2025

# JUDICIAL COMPENDIUM

**Hon'ble Mr. Justice Syed Mansoor Ali Shah,**
**Judge Supreme Court of Pakistan**

**JUSTICE (R) SYED MANSOOR ALI SHAH**

*The Trendsetter*

This compendium of judgments of Justice (R) Syed Mansoor Ali Shah brings together the work of a judge who has reshaped important parts of Pakistan's constitutional, public law, and institutional landscape. Elevated to the Lahore High Court in 2009, serving as its Chief Justice, and later as a Judge of the Supreme Court of Pakistan from 2018 till his retirement in 2025, his judicial career reflected a combination of doctrinal clarity, reformist energy, and a sustained concern for how the law impacts the daily lives of citizens.

Justice Shah's profile reflects a vast breadth of training and experience. Educated at Aitchison College, Lahore, he obtained law degrees from the University of Cambridge and the University of the Punjab, alongside a Master's in Economics. Before joining the bench, he practiced as a partner at *Afridi, Shah & Minallah*, developing a corporate and commercial practice while pursuing public interest litigation, particularly in environmental protection and sustainable development. He has been a teacher of law for nearly two decades at institutions including LUMS, Pakistan College of Law and Punjab Law College, and served on the steering committee that established the LUMS law school (now SAHSOL). He is also an accredited mediator from CEDR, London, an Honorary Bencher of Lincoln's Inn, a judicial member of the Global Judicial Institute on Environment (Brazil), a member of the Global Constitutionalism network at Yale University, and a member of the Rhodes Scholarship Committee for Pakistan - connections that situate his work within a wider global conversation on constitutionalism, rights, and environmental adjudication.

These biographical strands are mirrored in his jurisprudence. Justice Shah has consistently foregrounded constitutionalism, judicial independence, and the rule of law, with a particular emphasis on social justice and the protection of fundamental rights. His areas of special interest have included constitutional law, human rights, climate and water justice, environmental sustainability, disability rights, criminology, digital surveillance, privacy, and proportionality. Across these domains, he has treated the Constitution as a living document, attentive both to Islamic principles and to contemporary international and comparative standards and has used proportionality and structured rights analysis to test state action. His opinions display a recurring concern for those at the margins - persons with disabilities, vulnerable workers, victims of environmental harm, and communities affected by climate and water insecurity - insisting that equality, dignity, and access to justice are not abstract ideals but operative constitutional commands.

Equally distinctive is the way his jurisprudence is bound up with a broader project of institutional renewal. As Chief Justice of the Lahore High Court, he spearheaded the establishment of Alternate Dispute Resolution Centres in Punjab, created Criminal and Civil Model Courts, and introduced structured case management and court automation systems to tackle chronic backlog and pendency. He has repeatedly underscored the role of information technology, artificial intelligence, video-linking, and human resource development as engines of judicial governance, with a particular focus on empowering the district judiciary through training, performance-based evaluation, and safer, more enabling work environments, especially for women judges. His work in restructuring the Punjab Judicial Academy's curriculum, founding the Lahore High Court Research Centre, setting up e-courts at the Supreme Court, promoting the Supreme Court's judicial mobile application, and establishing the Supreme Court Research Centre reflects a jurisprudential vision in which rights, procedure, and institutional design are all mutually reinforcing.

This collection situates that jurisprudence within its broader arc: a body of work that is at once doctrinally rigorous and consciously transformative. The volume traces Justice Shah's contributions across constitutional structure and governance; fundamental rights and social

welfare; environmental, climate, and water justice; disability and equality law; criminal justice and due process; and the law of technology, surveillance, and privacy. Within each theme, the selected cases illuminate a recurring methodology – a holistic and purposeful reading of the Constitution, principled use of precedent, openness to comparative and international materials, and remedies crafted not only to vindicate rights but to improve institutions, procedure, and judicial accountability.

The purpose of this compendium is not hagiography. It is to provide the bench, the bar, students, and researchers with a structured way of engaging with a consequential judicial record that has already begun to influence how constitutional adjudication is imagined in Pakistan. By placing these judgments side by side, we hope to make visible the internal coherence of Justice Mansoor Ali Shah's approach: that courts must be guardians of rights and stewards of institutional reform; that access to justice, transparency, and efficiency are themselves constitutional values; and that Pakistani constitutionalism can participate in, and contribute to, global legal debates while remaining rooted in local history and social realities. In doing so, this volume aims to encourage sustained and critical engagement - agreement and disagreement alike - with his jurisprudence, and thereby to enrich the ongoing project of building a more just, accessible, and rights-respecting legal order.

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| 172. | 2023 SCMR 549 | Waqas Aslam and others v. Lahore Electric Supply Company Limited and others | Service Laws; Institutional autonomy | |
| 173. | 2023 SCMR 584 | Syed Hammad Nabi and others v. Inspector General Of Police Punjab, Lahore and others | Service Laws; Seniority | |
| 174. | 2023 SCMR 636 | Imran Ahmad Khan Niazi v. Main Muhammad Shahbaz Sharif | Constitutional Laws; Leave to appeal | |
| 175. | 2023 SCMR 711 | Muhammad Akhtar Ali v. Additional Sessions Judge, Kot Addu, District Muzaffargarh And Others | Criminal Laws; Superdari of vehicle | |
| 176. | 2023 SCMR 742 | Peerzada Waqar Alam v. National Accountability Bureau (NAB) through Chairman, Islamabad and others | Service Laws; Persons With Disabilities (PWDs) | |
| 177. | 2023 SCMR 761 | Divisional Superintendent, Pakistan Railways and another v. Umar Daraz | Service Laws; Rights of persons with different abilities regarding transfer and posting | |
| 178. | 2023 SCMR 774 | Province Of Punjab through Secretary Agriculture Department, Lahore v. Saleem Ijaz and others | Agricultural Pesticides Ordinance | |
| 179. | 2023 SCMR 803 | DIVISIONAL SUPERINTENDENT, POSTAL SERVICES, D.G. KHAN v. NADEEM RAZA and another | Service Laws; Removal from service | |
| 180. | 2023 SCMR 842 | Ijaz Akbar v. The Director General (EXT.) L&DD, Punjab, Lahore and others | Service Laws; Disciplinary Proceedings | |
| 181. | 2023 SCMR 877 | Director General, Intelligence Bureau v. Riaz-Ul-Wahab and others | Service Laws; Significance of Performance Evaluation Report (PER) and the obligations of Countersigning | |
| 182. | 2023 SCMR 887 | Mst. Ghazala v. The State and another | Criminal Law; Post arrest bail | |
| 183. | 2023 SCMR 960 | Zakir Mehmood v. Secretary, Ministry Of Defence (D.P), Pakistan Secretariat, Rawalpindi and others | Frivolous and vexatious cases; Imposition of costs | |
| 184. | 2023 SCMR 1055 | Snamprogetti Engineering B.V. through Special Attorney v. Commissioner Of Inland Revenue Zone-II, L.T.U, Islamabad and others | Tax Laws; International tax conventions, agreements or treaties | |
| 185. | 2023 SCMR 1087 | Dr. Sayyid A. S. Pirzada v. The Chief Secretary, | Service Laws; Appeal filed before the Service Tribunal after departmental | |

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| | | Services And Administration Department | authority fails to decide representation within 90 days | |
| 186. | 2023 SCMR 1103 | National Highway Authority through Chairman, Islamabad v. Messrs Sambu Construction Co. Ltd. Islamabad and others | Civil Laws; Arbitration award | |
| 187. | 2023 SCMR 1128 | Fakhar Nawaz v. Administrative Secretary/Senior Member Board Of Revenue, Peshawar and others | Supreme Court Rules; Change of Advocate on Record (AOR) | |
| 188. | 2023 SCMR 1166 | Allied Bank Limited v. The Commissioner Of Income Tax, Lahore and others | Tax Laws; Amendment of assessment | |
| 189. | 2023 SCMR 1174 | Mehtab Publication (PVT.) LTD. v. Pakistan Electronic Media Regulatory Authority (PEMRA) and others | Supreme Court Rules; Mode and manner of informing the Advocates regarding fixation of the cases by the Supreme Court stated. | |
| 190. | 2023 SCMR 1182 | Hilal Khattak v. The State and another | Criminal Laws; Post arrest bail | |
| 191. | 2023 SCMR 1292 | Salman Ashraf v. Additional District Judge, Lahore and others | Administrative Law;<br>Stay of criminal proceedings — Principles | |
| 192. | 2023 SCMR 1311 | Prof. Dr. Manzoor Hussain and others v. Zubaida Chaudhry and others | Federal Ombudsmen Institutional Reforms Act; Officer nominated by the President | |
| 193. | 2023 SCMR 1676 | The State v. Chaudhry Muhammad Usman | Criminal Law;<br>Summons to produce documents | |
| 194. | 2023 SCMR 1709 | The STATE through Deputy Director Law, Regional Directorate Anti-Narcotics Force, Punjab v. TASNIM JALAL GORAYA (DECEASED) through LRs. | Criminal Laws; Narcotics | |
| 195. | 2023 SCMR 1732 | Jawwad s. Khawaja and others v. Federation Of Pakistan and others | Trials of civilians under the Pakistan Army Act | |
| 196. | 2023 SCMR 1803 | The Commissioner Of Income Tax v. Messrs Inter Quest Informatics Services | Tax Laws; Exemption from income tax | |
| 197. | 2023 SCMR 1843 | Khalid Mehmood v. Chaklala Cantonment Board through C.E.O. and others | Supreme Court Rules;<br>Second review petition/curative review | |
| 198. | 2023 SCMR 1856 | Commissioner Inland Revenue v. Messrs RYK Mills | Tax Laws; Significance and purpose of a show cause notice stated. | |
| 199. | 2023 SCMR 1935 | Islamabad High Court Bar Association Islamabad through President Muhammad Shoaib Shaheen, Advocate Supreme Court, Islamabad and others v. ELECTION COMMISSION OF PAKISTAN through Chief Election Commissioner, Islamabad and others | Constitutional petitions and suo motu proceedings regarding holding of General Election | |
| 200. | 2023 SCMR 1955 | Sultan Ahmed v. Registrar, Balochistan High Court, Quetta and others— Respondents | Contempt Laws; Purpose and scope | |
| 201. | 2023 SCMR 1980 | Haji Tooti and another v. Federal Board Of Revenue, Islamabad and others | (a) Customs Laws; vires of option to pay fine in lieu of confiscated goods | |
| 202. | 2023 SCMR 1991 | Competition Commission Of Pakistan and others v. Dalda Foods Limited, Karachi | (a) Competition Act; Powers of the Commission in relation to a proceeding or enquiry- Power to call for information relating to undertaking | |
| 203. | PLD 2023 SC 22 | Amjad Hussain v. Nazir Ahmad and others | Supreme Court Rules; Review jurisdiction | |
| 204. | PLD 2023 SC 185 | Muhammad Iqbal (deceased) v. Ahmad Din (deceased) through L.Rs. and others | Supreme Court Rules; Change of Advocate-on-Record | |

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| 205. | PLD 2023 SC 207 | Federal Board of Revenue through Chairman v. Hub Power Company Ltd. and others | Civil Procedure; Exhaustion of remedy-Intra Court Appeal | |
| 206. | PLD 2023 SC 211 | Meera Shafi v. Ali Zafar | Civil Law; Use of modern technology in recording evidence | |
| 207. | PLD 2023 SC 252 | Abid Amin and others v. National Accountability Bureau and others | NAB Law; Restructuring and rescheduling of loans | |
| 208. | PLD 2023 SC 265 | F.I.A. through Director General v. Syed Hamid Ali Shah and others | Criminal Law;<br>Quashment of FIR | |
| 209. | PLD 2023 SC 298 | Qazi Naveed ul Islam v. District Judge, Gujrat and others | Judicial Process;<br>Frivolous litigation & Imposition of costs | |
| 210. | PLD 2023 SC 362 | Saadat Khan and others v. Shahid-ur-Rehman and others | Civil Law; Inheritance | |
| 211. | PLD 2023 SC 378 | Pakistan Electronic Media Regulatory Authority v. Pakistan Broadcasters Association and others | Civil Law; PEMRA Regulations | |
| 212. | PLD 2023 SC 431 | Pakistan Electronic Media Regulatory Authority v. ARY Communications (Pvt.) Ltd. and another | Civil Law; PEMRA Regulations | |
| 213. | PLD 2023 SC 461 | Muhammad Nawaz v. Additional District and Sessions Judge and others | Civil Law; Legality of DNA test for determination of parentage in civil cases | |
| 214. | PLD 2023 SC 482 | Pak Suzuki Motors Company Limited v. Faisal Jameel Butt and another | Consumer Law; Claims | |
| 215. | PLD 2023 SC 493 | Abid Shahid Zuberi, Advocate v. Federation of Pakistan and others | Constitutional Law ;Challenge to formation of Inquiry Commission | |
| 216. | PLD 2023 SC 516 | A. Rahim Foods (Pvt.) Limited and another v. K&N's Foods (Pvt.) Limited and others | Constitutional Law; Freedom of trade and business | |
| 217. | PLD 2023 SC 617 | Zafar Iqbal v. The State and others | Criminal Law; Post-arrest bail | |
| 218. | PLD 2023 SC 661 | Justice Qazi Faez Isa and others v. President of Pakistan and others | Supreme Court Rules; Review jurisdiction | |
| 219. | 2024 SCMR 527 | Vice-Chancellor Agriculture University, Peshawar and others v. Muhammad Shafiq and others | Service Laws; Regularization of contractual employees. | |
| 220. | 2024 SCMR 553 | Umar Aslam Khan v. Election Commission Of Pakistan and others | Elections Laws; Rejection of nomination papers of petitioner (candidate) | |
| 221. | 2024 SCMR 563 | Syed Asghar Ali Shah and another v. Kaleem Arshad and others | Constitutional Law;<br>Arts. 212(2) | |
| 222. | 2024 SCMR 640 | Taisei Corporation and another v. A.M. Construction Company (PVT.) LTD. and another | Civil Laws;<br>Arbitration, concept of minimal interference by courts in international commercial arbitration | |
| 223. | 2024 SCMR 700 | Commissioner Inland Revenue, Lahore v. Messrs Millat Tractors Limited, Lahore and others | Tax Laws;<br>Unexplained income or assets-Amendment of an assessment | |
| 224. | 2024 SCMR 741 | COMMISSIONER INLAND REVENUE, ZONE-IV, KARACHI v. Messrs A.P. MOLLER MAERSK and another | Tax Laws; Avoidance of double taxation | |
| 225. | 2024 SCMR 775 | Tahir Sadiq v. Faisal Ali and others | Election Laws; Right to vote for a candidate of one's choice | |
| 226. | 2024 SCMR 826 | Amir Sultan and 2 others v. Adjudicating Authority-III EOBI, Islamabad and others | Service Laws; Employees' Old-Age Benefits Act | |
| 227. | 2024 SCMR 853 | Commissioner Inland Revenue, Large Taxpayers | Supreme Court Rules; | |

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| | | Office, Islamabad v. Pakistan Oilfields LTD., Rawalpindi and others | Interference by the Supreme Court in interim order passed by the High Court | |
| 228. | 2024 SCMR 947 | Province Of Punjab through Secretary C&W, Lahore and others v. Messrs Haroon Construction Company, Government Contractor and others | Punjab Procurement Rules, 2014; Bidding documents | |
| 229. | 2024 SCMR 982 | National Bank Of Pakistan through President and another v. Muhammad Adeel and others | Law Reforms Ordinance; Main test to determine whether an ICA is available… | |
| 230. | 2024 SCMR 997 | Zulfiqar Ali Bhatti v. Election Commission Of Pakistan and others | Election Laws; Expressions election and conduct the election as used in Articles 218 & 225 of the Constitution | |
| 231. | 2024 SCMR 1037 | Commissioner, Rawalpindi/ Province Of The Punjab and others v. Naseer Ahmed and others | Civil Laws; When a statute is silent about limitation, a reasonable time limit is to be supplied by the Courts. | |
| 232. | 2024 SCMR 1071 | Muhammad Atif v. The State and another | Criminal Laws; Bail-Rule of consistency | |
| 233. | 2024 SCMR 1284 | Imran Ahmed Khan Niazi and another v. The State and another | Criminal Laws; Post arrest bail | |
| 234. | 2024 SCMR 1714 | Asma Haleem v. Abdul Haseeb Chaudhry and others | Civil Laws; partition Imposition of cost on frivolous litigation | |
| 235. | 2024 SCMR 1806 | Khalid alias Muhammad Khalid and others v. Collector Of Customs (Adjudication), Custom House, Lahore and others | Customs Laws; Power of Appellate Tribunal to execute orders passed by it | |
| 236. | 2024 SCMR 1831 | Superintendent Of Police, Headquarters, Lahore and others v. Ijaz Aslam and others | Service Laws; Institutional autonomy | |
| 237. | PLD 2024 SC 67 | Bashir Ahmad v. Additional District Judge, Hafizabad and others | Family Law; Maintenance | |
| 238. | PLD 2024 SC 102 | Imran Ahmad Khan Niazi v. Federation of Pakistan and another | Constitutional Law; Vires of statutes | |
| 239. | PLD 2024 SC 230 | Messrs Fun Infotainment (pvt.) limited/ neo t.v., lahore v. Pakistan Electronic Media Regulatory Authority through its Chairman, Islamabad and others | Election Laws; Delimitation of constituencies | |
| 240. | PLD 2024 SC 288 | Gohar Ali Khan v. Federation of Pakistan and others | Election Law; Role of Election Commission of Pakistan | |
| 241. | PLD 2024 SC 492 | Rohan Ahmad v. The State and others | Criminal Law; Post-arrest bail | |
| 242. | PLD 2024 SC 595 | Malik Arshad Hussain Awan v. United Bank Limited | Banking Law; Rights of persons of unsound mind | |
| 243. | PLD 2024 SC 610 | Taufiq Asif and others v. General (Retd.) Pervez Musharraf and others | Criminal Law; Trial of High treason | |
| 244. | PLD 2024 SC 642 | Sunni Ittehad Council, Faisalabad and others v. Election Commission of Pakistan and others | Election Law; Reserved seats for women and non-Muslims | |
| 245. | PLD 2024 SC 648 | Syeda Ayesha Subhani v. The State and others | Criminal Law; Post-arrest bail | |
| 246. | PLD 2024 SC 830 | Tanveer Cotton Mills (Pvt.) Ltd. and another v. Summit Bank Limited and others | Company Law; Winding up of company | |
| 247. | PLD 2024 SC 843 | Mehran v. Ubaid Ullah and others | Criminal Law; Rights of juveniles- Child justice approach | |
| 248. | PLD 2024 SC 862 | Muhammad Ashraf v. Chief Engineer (Administration), WAPDA and others | Supreme Court Rules; Review jurisdiction | |

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| 249. | PLD 2024 SC 873 | Mst. Samrana Nawaz and others v. MCB Bank Ltd. and others | Civil Law;<br>Execution of decree | |
| 250. | PLD 2024 SC 896 | Iftikhar Ahmed Chaudhry v. Saeed Ahmed Khan and others | Constitutional Law; Implementation of Supreme Court judgments | |
| 251. | PLD 2024 SC 978 | Public Interest Law Association of Pakistan and others v. Federation of Pakistan and others | Environmental Law;<br>Climate change | |
| 252. | PLD 2024 SC 1134 | Amer Ishaq and others v. Province of Khyber Pakhtunkhwa and others | Environmental Law;<br>Climate change | |
| 253. | PLD 2024 SC 1168 | Commissioner Inland Revenue and others v. Mekotex (Pvt.) Limited and others | Civil Law;<br>Retrospective legislative power | |
| 254. | 2025 SCMR 257 | Messrs Inter Quest Informatics Services v. The Commissioner Of Income Tax and others | Supreme Court Rules; Review petition before the Supreme Court | |
| 255. | 2025 SCMR 341 | Commissioner Inland Revenue, Zone-Iii Rto, Rawalpindi and others v. Messrs Sarwaq Traders, Rawalpindi and others | Interpretation of statutes;<br>Legislative intent can be drawn by consideration of the entire statute, its nature, its object and the consequences | |
| 256. | 2025 SCMR 517 | Kausar Rana Resources (Private) Limited and others v. Qatar Lubricants Company W.L.L. (QALCO) and others | Companies Laws; Pro-arbitration approach of Courts | |
| 257. | 2025 SCMR 538 | Federation Of Pakistan through Revenue Division and others v. Dewan Motors (PVT) LTD. and others | Customs Laws;<br>Jurisdiction of Regular Bench of Supreme Court | |
| 258. | 2025 SCMR 606 | Syed Ali Hussain and others v. Senior Member/Member (Revenue) Board Of Revenue Punjab, Lahore and others | Civil Laws; Land Acquisition | |
| 259. | 2025 SCMR 690 | Zafar Iqbal and another v. Syed Riaz Hussain Shah and others | Rent Laws;<br>Ejectment | |
| 260. | 2025 SCMR 708 | Muhammad Nasir Ismail v. Government Of Punjab through Secretary Law and Parliamentary Affairs Division, Lahore and others | Service Laws;<br>Disciplinary proceedings | |
| 261. | 2025 SCMR 1515 | Asad Hussain v. The Controller General Of Accounts Federal Co-Operative Building, Sector G-5/2, Islamabad and another | Service Laws;<br>Promotion | |
| 262. | 2025 SCMR 1076 | The Chief Commissioner Regional Tax Office, Bahawalpur and others v. Shaheen Yousaf | Service Laws;<br>Re-marriage of widow of deceased civil servant- Reinstatement in service | |
| 263. | 2025 SCMR 1221 | Aatika Hina Mushtaq v. Secretary Special Education Government Of The Punjab, Special Education Department Lahore and others | Service Laws;<br>Promotion | |
| 264. | 2025 SCMR 1357 | RAB NAWAZ v. SHEHZAD HASSAN and others | Criminal Laws;<br>Cancellation of Bail | |
| 265. | PLD 2025 SC 1 | Mughals Pakistan (Pvt.) Limited v. Employees Old Age Benefits Institution and others | Alternate Dispute Resolution | |
| 266. | PLD 2025 SC 67 | Speaker, Provincial Assembly of Khyber Pakhtunkhwa, Peshawar and | Election Law; Reserved seats for women and non-Muslims | |

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| | | others v. Shazia Tehmas Khan and others | | |
| 267. | PLD 2025 SC 247 | Malik Mahmood Ahmad Khan v. Malik Moazam Mahmood and others | Family Law;<br>Child justice approach | |
| 268. | PLD 2025 SC 274 | In the matter regarding non-fixation of case, CPLA 836-K of 2020, etc. | Contempt of Court | |
| 269. | PLD 2025 SC 280 | Crl. O.P. No. 1 of 2025 in CPLA 836-K of 2020, etc. | Supreme Court Rules;<br>Fixation of partly-heard cases | |
| 270. | PLD 2025 SC 319 | Adil Khan Bazai v. Election Commission of Pakistan and another | Election Law;<br>Declaration of defection | |
| 271. | PLD 2025 SC 354 | Muhammad Din v. Province of Punjab through Secretary, Population Welfare, Lahore and others | Employment Law<br>Harassment at workplace | |
| 272. | PLD 2025 SC 461 | Muhammad Sajid v. Mst. Shamsa Asghar and others | Family Law;<br>Gift between groom and bride | |
| 273. | PLD 2025 SC 529 | Zahida Parveen v. Government of Khyber Pakhtunkhwa and others | Service Law<br>Rights of married daughter of deceased civil servant to appointment | |
| 274. | PLD 2025 SC 560 | Shahbaz Latif v. DIG, Pakistan Railways Headquarters Office, Lahore and others | Service Law;<br>Appointment | |
| 275. | PLD 2025 SC 582 | Ishfaq Ahmed v. Mushtaq Ahmed and others | Rent Law;<br>Ejectment<br>Use of Artificial Intelligence in judicial decision-making | |
| 276. | PLD 2025 SC 720 | District Education Officer (Female), Charsadda and others v. Sonia Begum and others | Service Law;<br>Appointment, posting and transfer | |
| 277. | PLD 2025 SC 737 | Reference No. 1 of 2011 (Presidential Reference under Article 186) — In re Zulfiqar Ali Bhutto cases | Constitutional Law;<br>Presidential Reference under Article 186 — Review of Bhutto cases | |
| 278. | 2025 SCP 170 | Federal Public Service Commission through its Secretary, Islamabad v. Kashif Mustafa and others | Public bodies must avoid meritless litigation<br>Frivolous Litigation and cost | |
| 279. | 2025 SCP 187 | District & Sessions Judge (Authority), Jhang, etc. v. Ghulam Shabbir | Service Laws;<br>Principle of Proportionality | |
| 280. | 2025 SCP 192 | Dr. Muhammad Asif v. Dr Sana Sattar | Family Law;<br>Best interest of Child in custody matters | |
| 281. | 2025 SCP 198 | Muhammad Niaz Khan v. R.P.O. Sheikhupura Region at Lahore, etc. | Service Laws;<br>Principle of Proportionality | |
| 282. | 2025 SCP 203 | Frontier Holdings Limited through its Chief Executive, Islamabad and another v. Petroleum Exploration Pvt. Limited through its Chief Executive Officer, | Foreign Arbitral Award | |
| 283. | 2025 SCP 226 | Federal Public Service Commission, through its Chairman, Islamabad v. Dr. Shumaila Naeem and Others | Service Laws;<br>Domicile of married woman | |
| 284. | 2025 SCP 237 | Tahir Kazmi v. Inspector General of Police, Punjab, Lahore | Service Laws; Doctrine of Constructive Continuity | |
| 285. | 2025 SCP 285 | Abdul Salam v. Ms Bank Al-Habib Ltd, etc. | Banking Laws;<br>AI Based case management System | |
| 286. | 2025 SCP 308 | Ambreen Akram v. Asad Ullah Khan etc. | Family Laws;<br>Maintenance before Rukhsati | |
| 287. | 2025 SCP 353 | Shakeel Ahmed Khan v. The Managing Director/Chief Executive Office, Islamabad and another | Service Laws;<br>Pension | |

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| 288. | 2025 SCP 358 | Naeem Khan Niazi v. Federal of Pakistan through Secretary of Ministry of Interior Govt of Pakistan,Islamabad and another | Service Laws;<br>Seats to be filled from date of vacancy | |
| 289. | 2025 SCP 391 | Federation of Pakistan through Ministry of Defence, Rawalpindi and another v. Rooh ul Amin and anoher | Service Laws;<br>Supersession | |
| 290. | 2025 SCP 410 | Mst Farakh Naz v. The Secretary Elementary and Secondary Education Department Government Of Khyber Pakhtunkhwa Peshawar and another | Service Laws; Appointment of married daughter of deceased civil servant | |
| 291. | 2025 SCP 411 | Ghulam Murtaza v. District Police Officer Gujrat and others | Service Laws;<br>Sole allegation of nomination in criminal case | |
| 292. | 2025 SCP 414 | Hafiz Abdul Rauf v. PASSCO Lahore etc | Service Laws;<br>Inquiry before imposition of major penalty | |
| 293. | 2025 SCP 418 | The Secretary/Chairman Railways, Govt of Pakistan, Ministry of Railways Islamabad v. Tariq Mansoor etc | Service Laws<br>Institutional Autonomy | |
| 294. | 2025 SCP 427 | Allah Diwaya v. Secretary Education Quetta and another | Service Laws;<br>Status of absconder in criminal law do not bar civil remedy | |
| 295. | 2025 SCP 428 | Ain ud Din v. The Acting Sector Commander NHMP, Shahi Bag Kalat Quetta and others | Service Laws;<br>Right to cross Examination | |

**2018 S C M R 911**

**[Supreme Court of Pakistan]**

**Present: Asif Saeed Khan Khosa, Dost Muhammad Khan and Syed Mansoor Ali Shah, JJ**

**Mst. NAZIA ANWAR---Appellant**

**Versus**

**The STATE and others---Respondents**

Criminal Appeal No. 206 of 2016, decided on 13th February, 2018.

(Against the judgment dated 22.02.2016 passed by the Lahore High Court, Rawalpindi Bench, Rawalpindi in Criminal Appeal No.372 of 2011 and Murder Reference No. 69 of 2011)

**Per Asif Saeed Khan Khosa, J; Syed Mansoor Ali Shah, J agreeing; Dost Muhammad Khan, J dissenting.**

**(a) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Reappraisal of evidence---Accused-lady was alleged to have inflicted dagger injuries to the deceased and the complainant---Trial Court convicted the accused under S. 302(b), P.P.C. and sentenced her to death---High Court upheld the conviction and sentence recorded by the Trial Court; [Per Asif Saeed Khan Khosa, J (Majority view): Occurrence had taken place in broad daylight and inside the house of complainant---First Information Report in respect of the alleged occurrence had been lodged with reasonable promptitude wherein the accused was named as the sole perpetrator of the alleged murder---Complainant was a natural witness of the occurrence being an inmate of the house wherein the occurrence had taken place and the time of occurrence was such that the complainant was likely to be present in her house at that time---Complainant had absolutely no reason to falsely implicate the accused in the murder of the complainant's daughter who was also a friend of the accused---Record of the case showed, and it was so recorded in the FIR itself, that the accused had been apprehended at the spot inside the relevant house and was later on handed over to the local police---Blood-stained dagger had also been recovered from the place of occurrence---Medical evidence had provided full support to the ocular account furnished by the complainant---Prosecution had proved beyond reasonable doubt that accused was responsible for the murder of the deceased--- Appeal against conviction was dismissed accordingly]---[Per Dost Muhammad Khan, J (Minority view): First Information Report was lodged after more than two hours for which no plausible explanation was offered---Complainant waited for the arrival of the police and did not take any step to shift the dead body---Prosecution did not answer the question as to who informed the police about the crime and place of crime---Admittedly deceased and the accused were friends since long---No logic was offered as to for why the accused brought a four months' suckling baby with her when she allegedly had a clear intention to commit murder and the baby was placed within the reach of the complainant, putting his life at grave risk---Deceased was married but she frequently deserted her husband's house and stayed away with the mother (complainant) for no reason---Access of outsiders in the complainant's house raised the possibility of objectionable activities taking place in the complainant's house---Probability could not be ruled out that the husband of the deceased or some close blood relative after getting knowledge of such objectionable activities got annoyed and out of family honour acted so ruthlessly and caused multiple stab wounds to the deceased also slitting her throat, which under no circumstances could be the job of a young and fragile lady like the accused---Inescapable inference was that the accused was made a scapegoat to screen out the real culprit because of the highly objectionable family affairs of the complainant party---Furthermore the prosecution could not explain as to why the accused stayed for more than two hours in the crime house with blood-stained knife and her suckling baby after committing a heinous crime and fell into the hands of the police after its much delayed arrival---From the facts of the case it appeared that the accused was either arrested from her own house or being a fast and close friend of the deceased when she rushed to

the crime house with the suckling baby and was present there, then with deliberate intention or otherwise suspicion she was randomly implicated for the murder---Sentence of death awarded to the accused was set aside in circumstances and she was acquitted of the charge of murder].

**Per Asif Saeed Khan Khosa, J [Majority view]**

**(b) Penal Code (XLV of 1860)---**

----S. 302(b)--- Qatl-i-amd--- Reappraisal of evidence--- Sentence, reduction in---Death sentence reduced to imprisonment for life---Motive not proved---Motive set up by the prosecution had remained far from being established---According to the FIR as well as the statement of the complainant the motive was based upon borrowing of a sum by the accused from the deceased and on the issue of repayment of that loan a heated exchange had taken place between the accused and the deceased---Complainant was the only witness produced by the prosecution regarding the alleged motive but in her deposition made before the Trial Court the complainant had admitted that the accused and the deceased were on very good and friendly terms---No date or time of borrowing of the relevant amount by the accused from the deceased had been specified by the complainant---Furthermore complainant was not present when the money had been borrowed by the accused---No date, time or place of the altercation between the accused and the deceased over repayment of the borrowed amount had been specified by the complainant and admittedly the complainant was not present when the said altercation had taken place---Moreover it was not explained as to why the accused had brought her four months old child to the spot and put the child on the floor and then started inflicting dagger blows on the deceased---Real cause of occurrence remained shrouded in mystery and was completely suppressed by both the parties to the case---Such circumstances required caution in the matter of the accused's sentence of death---Sentence of death awarded to the accused was reduced to imprisonment for life---Appeal was disposed of accordingly.

**(c) Penal Code (XLV of 1860)---**

----S. 302(b)--- Qatl-i-amd--- Reappraisal of evidence--- Sentence, reduction in---Death sentence reduced to imprisonment for life---Motive not proved---Where the prosecution asserted a motive but failed to prove the same then such failure on part of the prosecution may react against sentence of death passed against a convict on the charge of murder.

Ahmad Nawaz v. The State 2011 SCMR 593; Iftikhar Mehmood and another v. Qaiser Iftikhar and others 2011 SCMR 1165; Muhammad Mumtaz v. The State and another 2012 SCMR 267; Muhammad Imran alias Asif v. The State 2013 SCMR 782; Sabir Hussain alias Sabri v. The State 2013 SCMR 1554; Zeeshan Afzal alias Shani and another v. The State and another 2013 SCMR 1602; Naveed alias Needu and others v. The State and others 2014 SCMR 1464; Muhammad Nadeem Waqas and another v. The State 2014 SCMR 1658; Muhammad Asif v. Muhammad Akhtar and others 2016 SCMR 2035 and Qaddan and others v. The State 2017 SCMR 148 ref.

**Per Dost Muhammad Khan, J**

**(d) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Acquittal---Scope---Benefit of doubt---Case of the prosecution open to multiple theories and possibilities---In such a situation benefit of doubt had to be extended to an accused to acquit him/her of capital charge, instead of reducing the sentence---Once doubts about the genuineness of the prosecution story lurked into the mind of a judge, the only permissible course would be to acquit the accused and not go for the alternative sentence of life imprisonment.

Ayub Masih v. The State PLD 2002 SC 1048; Muhammad Zaman v. The State and others 2014 SCMR 749 and Hashim Qasim v. The State 2017 SCMR 986 ref.

Raja Ikram Ameen Minhas, Advocate Supreme Court, Mrs. Rubina Mahmood Khan, Advocate Supreme Court, S.A. Mehmood Khan Saddozai, Advocate Supreme Court and Chaudhry Akhtar Ali, Advocate-on-Record for Appellant.

Muhammad Jaffar, Deputy Prosecutor-General, Punjab for the State.

Date of hearing: 13th February, 2018.

**JUDGMENT**

**ASIF SAEED KHAN KHOSA, J.---**Mst. Nazia Anwar appellant had allegedly caused multiple injuries to her friend namely Mst. Fahmeeda Bibi with the use of a dagger inside the house of the deceased as well as of her mother namely Mst. Sadiqa Bibi complainant in Line No. 2, Quaid-e-Azam Colony near Dhamial Camp, Rawalpindi in the area of Police Station Saddar Bairooni, District Rawalpindi at about 10.00 a.m. on 12.10.2010 in the backdrop of a motive according to which the appellant had borrowed a sum of Rs. 5,000/- from the deceased and a heated exchange had taken place between them over demand of repayment of that loan. With the said allegations the appellant was booked in case FIR No. 640 registered at the above mentioned Police Station at about mid-day on the same day and after a regular trial the appellant was convicted by the trial court for an offence under section 302(b), P.P.C. and was sentenced to death and to pay compensation which conviction and sentence of the appellant were subsequently upheld and confirmed by the High Court. Hence, the present appeal by leave of this Court granted on 21.04.2016.

2. Leave to appeal had been granted in this case in order to reappraise the evidence and with the assistance of the learned counsel for the parties we have undertaken that exercise.

3. The occurrence in this case had taken place in broad daylight and inside the house of Mst. Sadiqa Bibi complainant. An FIR in respect of the alleged occurrence had been lodged with reasonable promptitude wherein the present appellant was named as the sole perpetrator of the alleged murder. Mst. Sadiqa Bibi complainant (PW2) was a natural witness of the occurrence being an inmate of the house wherein the occurrence had taken place and the time of occurrence was such that the complainant was likely to be present in her house at that time. The complainant had absolutely no reason to falsely implicate the appellant in the murder of the complainant's daughter who was also a friend of the appellant. The record of the case shows, and it is so recorded in the FIR itself, that the appellant had been apprehended at the spot inside the relevant house and was later on handed over to the local police. A blood-stained dagger had also been recovered from the place of occurrence. The medical evidence had provided full support to the ocular account furnished by Mst. Sadiqa Bibi, complainant (PW2). Both the courts below had undertaken an exhaustive analysis of the evidence available on the record and had then concurred in their conclusion regarding guilt of the appellant having been established to the hilt and upon my independent evaluation of the evidence I have not been able to take a view of the matter different from that concurrently taken by the courts below. There can conceivably be many theories as to why the appellant was found inside the house of the complainant with a baby-boy aged about four months but all such theories lie within the realm of conjectures which have no place in the criminal law. There is also little room available for drawing an inference in that regard as some foundational facts necessary for drawing an inference are missing in that respect.

4. I have particularly attended to the sentence of death passed against the appellant and have noticed in that context that the motive set up by the prosecution had remained far from being established. According to the FIR as well as the statement of the complainant the motive was based upon borrowing of a sum of Rs. 5,000/- by the appellant from the deceased and on the issue of repayment of that loan a heated exchange had taken place between the appellant and the deceased. Mst. Sadiqa Bibi complainant (PW2) was the only witness produced by the prosecution regarding the alleged motive but in her deposition made before the trial court the complainant had admitted that the appellant and the deceased were on very good and friendly

terms, no date or time of borrowing of the relevant amount by the appellant from the deceased had been specified by the complainant, the complainant was not present when the money had been borrowed by the appellant from the deceased, no date, time or place of the altercation taking place between the appellant and the deceased over repayment of the borrowed amount had been specified by the complainant and admittedly the complainant was not present when the said altercation had taken place. In these circumstances it is quite obvious to me that the motive asserted by the prosecution had remained utterly unproved. The law is settled by now that if the prosecution asserts a motive but fails to prove the same then such failure on the part of the prosecution may react against a sentence of death passed against a convict on the charge of murder and a reference in this respect may be made to the cases of Ahmad Nawaz v. The State (2011 SCMR 593), Iftikhar Mehmood and another v. Qaiser Iftikhar and others (2011 SCMR 1165), Muhammad Mumtaz v. The State and another (2012 SCMR 267), Muhammad Imran alias Asif v. The State (2013 SCMR 782), Sabir Hussain alias Sabri v. The State (2013 SCMR 1554), Zeeshan Afzal alias Shani and another v. The State and another (2013 SCMR 1602), Naveed alias Needu and others v. The State and others (2014 SCMR 1464), Muhammad Nadeem Waqas and another v. The State (2014 SCMR 1658), Muhammad Asif v. Muhammad Akhtar and others (2016 SCMR 2035) and Qaddan and others v. The State (2017 SCMR 148). After going through the entire record of the case from cover to cover and after attending to different aspects of this case I have found that although it is proved beyond doubt that the appellant was responsible for the murder of the deceased yet the story of the prosecution has many inherent obscurities ingrained therein. It is intriguing as to why the appellant would bring her four months old baby-boy to the spot and put the baby-boy on the floor and then start belabouring the deceased with a dagger in order to kill her. I have, thus, entertained no manner of doubt that the real cause of occurrence was something different which had been completely suppressed by both the parties to the case and that real cause of occurrence had remained shrouded in mystery. Such circumstances of this case have put me to caution in the matter of the appellant's sentence and in the peculiar circumstances of the case I have decided to withhold the sentence of death passed against the appellant.

5. For what has been discussed above this appeal is dismissed to the extent of the appellant's conviction for the offence under section 302(b), P.P.C. but the same is partly allowed to the extent of her sentence of death which is reduced to imprisonment for life. The order passed by the trial court regarding payment of compensation by the appellant to the heirs of the deceased as well as the order regarding imprisonment in default of payment of compensation are, however, maintained. The benefit under section 382-B, Cr.P.C. shall be extended to the appellant.

Sd/-

Asif Saeed Khan Khosa, J.

I respectfully disagree with my learned brother Asif Saeed Khan Khosa, J. and have recorded my separate reasons.

Sd/-

Dost Muhammad Khan, J.

I agree with my learned brother Asif Saeed Khan Khosa, J.

Sd/-

Syed Mansoor Ali Shah, J

**JUDGMENT OF THE COURT**

By a majority of two against one (Dost Muhammad Khan, J. dissenting) this appeal is dismissed to the extent of the appellant's conviction for the offence under section 302(b), P.P.C. but the same is partly allowed to the extent of her sentence of death which is reduced to imprisonment for life. The order passed by the trial court regarding payment of compensation by the appellant to the heirs of the deceased as well

as the order regarding imprisonment in default of payment of compensation are, however, maintained. The benefit under section 382-B, Cr.P.C. shall be extended to the appellant. This appeal is disposed of in these terms.

Sd/-

Asif Saeed Khan Khosa, J

Sd/-

Dost Muhammad Khan, J.

Sd/-

Syed Mansoor Ali Shah, J.

**Dissenting Note in Crl. Appeal No.206 of 2016**

**DOST MUHAMMAD KHAN, J.---**After attending to the reasons given by my lord brother Judges, Mr. Justice Asif Saeed Khan Khosa (author Judge) and Mr. Justice Syed Mansoor Ali Shah, J., with utmost respect my view is entirely different and in favour of acquittal of the appellant. The reasons for my view are as follows:-

**Reasons for Dissent:**

1. The facts and evidence of the case is presenting extremely inextricable, highly complexed and much confounded theories about the tragedy.

2. Before us there are two mothers in the field and we have to judicially determine their respective roles during the tragedy and enacting the tragedy.

Before making reappraisal of evidence, I am constrained in citing below certain Quotes of Wisdom about mother-love for her child of any age:-

1. "To describe my mother would be to write about a hurricane in its perfect power. Or the climbing, falling colours of a rainbow."- Maya Angelou
2. "A mother turns lioness when her child is troubled."- Jennie Finch
3. "Mother bird protects until her chicks are grown and can fly free."- Unknown
4. A mother's arms the most secured and sound place for children."- Victor Hugo
5. "The strength of motherhood is greater than natural laws."- Barbara Kingsolver
6. "There is eternal influence and power in motherhood."-unknown
7. Mother's love is limitless, eternal, endless, untiring, unmatched and inexpungible." - unknown

The conduct of the complainant Mst. Sadiqa Bibi (PW-2) the mother of the deceased Mst. Fehmeeda Bibi and the convict appellant Mst. Nazia Anwar who is charged for the murder is also to be judged at the touchstone of Article 129 of the Qanun-e- Shahadat Order, 1984, which is reproduced below:

> **"129. Court may presume existence of certain facts.-**The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

3. Brief and relevant facts are that on 12.10.2010 at about 10:00 a.m. the appellant entered the crime house in residential colony "Makhan", brought her four months' suckling baby, put it on the ground close to the complainant, entered the room where the deceased was inflicted upon seven injuries of different dimensions and also slit her throat. The motive for the crime was that the deceased had given Rs.5000/- to the appellant as loan and when it was demanded back, the appellant reacted violently.

4. The most vital point in the case attracting the court's attention is the fact of FIR, having been lodged at the crime spot after more than two hours, no reason much less plausible has been given by the prosecution at any stage. The FIR lodged at the crime spot, in a murder case, would create reasonable suspicion that the crime was un-witnessed one, therefore, preliminary investigation are carried out and witnesses are set up.

It is the prosecution case itself that immediately after the occurrence many men reached the crime house and the dead body could be conveniently taken within no time to the police station but instead, the complainant waited for the arrival of the police not taking a single step to shift the dead body. Who informed the police about the crime and crime place, is another begging question, having no answer from the prosecution.

True that in each and every case if FIR is lodged at the crime spot, the entire case of the prosecution cannot be thrown away but there must be some plausible reasons in that regard and when the very reason is absent, many suspicions and doubts would arise and inference against the prosecution has to be drawn in this regard.

5. Adverting back to the story set up by the prosecution, the complainant who was the mother of the deceased acted like silent rather amused character during the tragic incident as according to her claim her daughter was killed in her presence, seven incised wounds were inflicted also slitting of her throat. She did not react motherly to prevent the appellant from causing so much number of injuries in her presence or to make loud-cries for help from the nearby houses.

On the other hand, the appellant brought four months' suckling baby with her when she was having a clear intention to commit murder and the baby was placed within the reach of the complainant, putting to grave risk the life of the baby. One fails to understand the logic and compelling reason for conducting herself in a manner expected only of insane or mentally deranged person. Secondly it is established on record that the deceased and the appellant were intimate friends since long on visiting terms. The motive has been disbelieved by the majority judgments and once the motive disappears then, what was the sudden impulse given to the appellant, blowing her sentiments of anger so high, which could not retake its seat, not a shred of evidence is present on record in that regard. The question thus, arises that without any cause of a grave nature, how the virtuous lady turned a villain ruthlessly slaughtering and stabbing the deceased, her best friend. When the very cause and reason for the violent act is absent then, the entire story becomes susceptible to many interpretations. It is the sacred obligation of the court to uncover the truth and husk out the lies and if this process also fails then the benefit of doubt has to be extended to the appellant as of right entitling her to clean acquittal because century old golden rules of benefit of doubt in the administration of criminal justice never approve lesser sentence rather to acquit the accused. If such course is not adopted this golden principle being old as hills are, would be reduced to naught.

6. Another aspect of the case is, discarding the testimony of Muhammad Zahid (PW-3) alien to the family and an outsider. He has claimed to be the frequent visitor to the complainant house without being needed. This fact speaks very loudly about the objectionable activities going inside the family. The complainant, a middle age lady of about 50 years with sound health is a widow as her husband died earlier. Her source of income has not been brought on record. Wherefrom family was meeting the needs of their daily life, would further re-enforce the view and the necessary inference would be that all was not going well in the crime house.

7. The deceased herself was married but she frequently deserted her husband's house and was staying away in the crime house with the mother (complainant) for no reason much less convincing one. The very access of outsiders including PW Muhammad Zahid due to frequent visits there would definitely disturb every prudent mind, much less a judicial one about the objectionable activities, going on in the family.

It has come in the evidence that the other daughter of the complainant namely Mst. Hafeeza Bibi had gone nearby to a local doctor for check up and treatment accompanied by her own daughter. Being mother, the complainant was supposed to accompany Mst. Hafeeza Bibi to the doctor when she was having no domestic work at home therefore, the deceased alone was left behind at home to look after it. Judged from this angle there is a probability that the husband of the deceased or some close blood relative of him after getting knowledge of such objectionable activities of the family including the deceased got annoyed irretrievably

and out of family honour acted so ruthlessly and mercilessly causing multiple stab wounds to the deceased also slitting her throat, which under no circumstances could be the job of a young lady, soft and fragile hand. The autopsy report would show that one thumb of the hand was completely cut including the hard bone of it. Such injury could only be caused with butcher chopper and not the dagger or kitchen knife, planted against the appellant in this case.

8. Another quite intriguing aspect of the case is that the role of the complainant (mother of the deceased) highlighted above is not in conformity with the natural reaction of a mother when her daughter was under a ruthless attack. The prosecution decided to make the court to believe that it was Muhammad Zahid (PW-3) and Muhammad Ameer (not produced), reached the crime house immediately after the occurrence and detained the appellant there with the crime knife and the baby.

9. My lord brothers themselves have kept out of consideration the presence of Muhammad Zahid (PW-3) and his testimony has been discarded being not present on the spot. There are strong reasons favouring that view as Muhammad Zahid was in a sensitive police wing (Special Branch) and on the fateful day he was on V.V.I.Ps duty. He could not convincingly explain as to how he left the place of duty entrusted to him with a highly sensitive job and once these two persons are kept aside then the detention of the appellant in the crime house with the crime knife and her suckling baby becomes absolutely unbelievable as the complainant did nothing but only wept for a moment. There was no earthly reason present that in the absence of any hurdle in her way why the appellant stayed for more than two hours in the crime house with blood stained knife, clothes and her suckling baby after committing such a heinous crime and fell into the hands of the police after its much delayed arrival there. The story so set up deserves to be rejected by the court with strong disapproval being false and tailored made.

10. The fallaciousness of the story does not end here because in the entire episode, during the course of investigation on the crime spot, there is no reference whatsoever as to what happened to the suckling baby of the appellant as no evidence has been brought on record. It is evident from the order sheet of the trial Court that on her first appearance, the appellant appeared with the same suckling baby in her lap duly observed and recorded in the order by the Trial Court but the prosecution had kept intriguing silence on this vital aspect of the case during the course of investigation on the fateful day. The inescapable inference thus would be that the appellant was made a scapegoat to screen out the real culprit because of the highly objectionable family affairs of the complainant party. It is noticeable fact that neither during the investigation nor during the trial proceedings the husband or any relative of the deceased, Mst. Fehmeeda, appeared on the scene or to prosecute the appellant in any manner. Distancing himself from the proceedings by the husband was a loud message to everyone and the necessary inference to be drawn is that either he himself was involved in the crime or his brother or father and why the deceased was killed in a very cruel manner as the murder had taken place inside the house of the complainant so she was required to blame someone else otherwise she herself would have been the suspect for the crime. Another strong reason is the dirty role of Muhammad Zahid (PW-3) who was not otherwise related within the prohibitory degree with the complainant or her daughters but used to visit and stay in the crime house frequently when he was neither feeding them nor it has come on record that his presence was required for genuine reason. His shady role diverting the course of investigation is palpable on record why the investigation commenced too late and the FIR was drawn at the crime spot and the story was manufactured with connivance of the police.

11. Here I am constrained to observe that the learned Judges of the High Court seized of the Murder Reference could not attend to these aspects and the incompleteness of the story besides being fallacious it did not perform its obligatory duty under the provision of section 375, Cr.P.C. and the matter was decided in vacuum and was left to suffer from suspicions/hypothesis. For confirmation of Murder Reference or otherwise it is the duty of the High Court to see as to whether the story set up is doubtful or not upto the

mark or it was left incomplete and some crucial aspects of it need further inquiry, it shall have to record evidence to clear all doubts and suspicions and fill up the left out vacuum for doing substantial justice.

12. My lord brothers have equally held that the case of the Prosecution has led to multiple theories and possibilities. The cardinal principle in the criminal justice system in a situation like this, is to extend benefit of doubt to an accused to acquit him/her of capital charge, instead of reducing the sentence. Once doubts about the genuineness of the story lurk into the minds of the Judges, the only permissible course is to acquit the accused and not go for the alternative sentence of life imprisonment. In this regard reference may be made to the following case laws:-

(i) Ayub Masih v. The State (PLD 2002 SC 1048)

(ii) Muhammad Zaman v. The State and others (2014 SCMR 749)

(iii) Hashim Qasim v. The State (2017 SCMR 986)

It is also well entrenched rule and principle of law that on the basis of probabilities, accused person may be extended benefit of doubt acquitting him/her of a capital charge however, such probabilities, high howsoever, could not be made basis for conviction of an accused person and that too on a capital charge.

13. The prosecution is under legal obligation to prove the guilt of an accused person beyond any shadow of doubt through evidence, coming from unimpeachable source which is not only convincing, reliable but also sufficient to satisfy the judicial mind about the guilt of an accused person. With utmost respect, in para 4 of the judgment, my lord brother Judges have acted on high probabilities and also for the reason that the complainant being inmate of the house therefore, her presence could not be lightly brushed aside. If at the fateful time her other daughter and grand daughter were away from the same home and being mother of her ailing daughter in all probabilities she was supposed to have accompanied her to the doctor, also could not be ruled out, why the FIR was delayed and made at the crime spot and it appears that the appellant was either arrested from her own house or being a fast and close friend when there was nobody in the house, after getting the news of her tragic murder she might have rushed to the crime house with the suckling baby and was present there till the arrival of the police and with deliberate intention or otherwise the suspicion fell on her and was at random implicated. The Investigating officer too has acted dishonestly and deprived the court of law by his action in collecting false evidence to reach at a fair and proper conclusion, doing substantial justice in the case.

14. For what has discussed above, I am of the considered view that once the case of the prosecution has been found susceptible to many interpretations and different theories are coming on record sufficient to disturb judicial mind about the guilt of the appellant then, after spending seven years in prison with a suckling baby and also from 20.9.2011 to 22.2.2016 (05 years) in death cell is serious injustice caused to her and on the basis of benefit of doubt she is entitled to clean acquittal. Therefore, this appeal is allowed. The impugned judgment of the High Court maintaining the sentence of death of the appellant with compensation amount is set aside and the appellant is acquitted of the charge/charges leveled against her. She be set free forthwith along with her baby from the jail by the jailor concerned if not required to be detained in any other case.

MWA/N-4/SC Order accordingly.

**2018 S C M R 1177**

**[Supreme Court of Pakistan]**

**Present: Mushir Alam and Syed Mansoor Ali Shah, JJ**

**ALLAH DITTA and others---Appellants**

**Versus**

**MEMBER (JUDICIAL), BOARD OF REVENUE and others---Respondents**

Civil Appeal No. 1257 of 2013, decided on 13th March, 2018.

(On appeal from judgment of Lahore High Court, Rawalpindi Bench, dated 03.10.2013, passed in W.P. No. 3386 of 2006)

**(a) Punjab Land Revenue Act (XVII of 1967)---**

----S. 135--- Application for partition--- Objections against---Non-speaking order---Respondent filed application for partition before the Tehsildar under S. 135 of the Punjab Land Revenue Act, 1967, which was allowed with the passing of a preliminary decree---Naqsha jeem was prepared and objections filed by the appellant to the said naqsha jeem were rejected by the Tehsildar---Appeal against the same before the DO(R) was dismissed, while revision filed before the EDO (R) was also dismissed---Finally the Member Board of Revenue remanded the matter to the DO(R)---Contention of appellant was that land sold by the respondent was not excluded while preparing naqsha jeem---Validity---Orders of the Tehsildar, the DO(R), as well as, the EDO(R) did not address the objections raised by the appellant regarding adjustment of the land sold by the respondents through a speaking order---Member Board of Revenue had rightly remanded the case to the Revenue Officer below to examine the record and pass a speaking order in such regard---Supreme Court remanded the matter to the Tehsildar concerned to consider the objections filed by the appellant against naqsha jeem and decide the same through a speaking order, clearly attending to the objection regarding land to be excluded from the share of the respondent, if any---Appeal was allowed accordingly.

**(b) Remand---**

----Scope---Order of remand was not a final order and simply sent the matter for re-examination for the second time---Remand order did not finally determine the claim or the rights of the parties---Forum to which the case was sent for fresh decision was free to re-examine the case and pass a fresh judgment---Against any such subsequent decision or judgment, alternate remedy was available to the parties.

**(c) Constitution of Pakistan---**

----Art. 199---Constitutional jurisdiction of the High Court---Scope---Remand order---Order of remand that was facially perverse or with

out jurisdiction or otherwise void could be interfered with under Constitutional jurisdiction like any other order.

Ghulam Rasool v. Khudai Dad PLD 1986 Quetta 130 ref.

**(d) Punjab Land Revenue Act (XVII of 1967)---**

----S. 164--- Constitution of Pakistan, Arts. 184(3) & 199---Constitutional jurisdiction of the High Court/Supreme Court---Scope---Remand order passed by Member, Board of Revenue---Constitutional Court must approach and examine a remand order passed by the Board of Revenue with care and circumspection, so as to sparingly interfere with it, unless, the remand order was facially perverse, without jurisdiction or otherwise void.

Ramzan v. Rehabilitation Commissioner (Legal) Sargodha PLD 1963 Lah. 461; Kaniz Fatima v. Board of Revenue PLD 1973 Lah. 495 and Ghulam Rasool v. Khudai Dad PLD 1986 Quetta 130 ref.

Muhammad Munir Paracha, Advocate Supreme Court for Appellants.

Ch. Afrasiab Khan, Advocate Supreme Court for Respondent No.2.

Date of hearing: 13th March, 2018.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**Leave to appeal was granted on 3-10-2013 to examine whether writ petition is maintainable against a remand order ?

2. Brief background of the case is that the respondent filed an application for partition before the Tehsildar under section 135 of the Land Revenue Act, 1967, which was allowed on 29.5.1999, with the passing of a preliminary decree. Thereafter, naqsha jeem was prepared and objections filed by the appellant to the said naqsha jeem were rejected by the Tehsildar on 25.5.2000. Appeal against the same before the D.O (R) was dismissed on 28.5.2003, while revision filed before the EDO (R) was also dismissed on 26.7.2004. However, finally in ROR filed before the Member Board of Revenue, the matter was remanded to the DO(R) vide order dated 31.10.2006. The said remand order was challenged before the High Court and vide impugned order dated 3-7- 2013, the remand order of the MBR was set aside and that of the EDO (R) was upheld.

3. In the above factual matrix, we have noticed that the objections raised by the appellant against naqsha jeem were not attended to through a speaking order. The crux of the objections was that the land sold by the respondents was not excluded while preparing naqsha jeem.

4. Learned counsel on behalf of respondent No.2 submits that the preliminary decree itself clearly mentions that the area sold by the respondents be adjusted while preparing the naqsha jeem. He while referring to the orders of the Revenue Authorities below submits that entire revenue record has been perused before deciding the matter and the required exclusion of land has taken place.

5. We have gone through the record of the case and also examined the orders passed by the Revenue Authorities. The orders of the Tehsildar, the DO(R), as well as, the EDO(R) do not address the objections raised by the appellant regarding adjustment of the land sold by the respondents. It is for this reason that the Member, Board of Revenue remanded the case to the DO(R) to examine the record and pass a speaking order in this regard. We are not satisfied with the orders passed by the Revenue Authorities from Tehsildar to EDO(R) and are in agreement with the decision of the Member, Board of Revenue.

6. Order of remand is not a final order and simply sends the matter for re-examination for the second time. It does not finally determine the claim or the rights of the parties. The forum to which the case is sent for fresh decision is free to re-examine the case and pass a fresh judgment. Against any such subsequent decision or judgment, alternate remedy is available to the parties. Further, Board of Revenue is the highest

court of appeal and revision in revenue cases and is a controlling authority in all matters connected with the administration of land, collection of land revenue, preparation of land record and other matters (See section 5 of the Board of Revenue Act, 1957). In this background the courts after having judicially examined the remand order passed by the Board of Revenue have expressed reluctance to interfere and for these reasons have maintained that order of remand would not be amenable to writ jurisdiction (see Ramzan v. Rehabilitation Commissioner (Legal) Sargodha (PLD 1963 Lahore 461), Kaniz Fatima v. Board of Revenue (PLD 1973 Lahore 495) and Ghulam Rasool v. Khudai Dad (PLD 1986 Quetta 130). This is not an absolute rule. An order of remand that is facially perverse or without jurisdiction or otherwise void can be interfered with, like any other order (see Ghulam Rasool (supra)). The constitutional power to judicially review an order of remand passed by the Board of Revenue is not in any manner curtailed or abridged by the precedents cited above. Infact, the principle that emerges from the wisdom of the precedents is that, for reasons narrated above, the constitutional court must approach and examine a remand order passed by the Board of Revenue with care and circumspection, so as to sparingly interfere with it, unless of course, the remand order is facially perverse, without jurisdiction or otherwise void. Amenability of writ jurisdiction against a remand order is in this context and subject to above conditions.

7. In the present facts and circumstances of the case, we agree with the order of remand passed by the Board of Revenue. We, therefore, set aside order dated 03.7.2013, passed by the High Court, and modify order dated 31.10.2006, passed by the Member, Board of Revenue to the extent that the case now stands remanded to the Tehsildar concerned to consider the objections filed by the appellant against naqsha jeem and decide the same through a speaking order, clearly attending to the objection regarding land to be excluded from the share of the respondent, if any.

8. This appeal is allowed and the case is remanded in the above terms.

MWA/A-7/SC Case remanded.

**2018 S C M R 1199**

**[Supreme Court of Pakistan]**

**Present: Mushir Alam and Syed Mansoor Ali Shah, JJ**

**MUHAMMAD IRFAN---Appellant**

**Versus**

**Mst. GUL AFROZ JAN (DECEASED) through LRs and others---Respondents**

Civil Appeal No. 1044 of 2015, decided on 12th March, 2018.

(On appeal from Judgment dated 10.06.2015 passed by the Peshawar High Court, Bannu Bench in C.R. No. 169-B of 2014)

**Specific Relief Act (I of 1877)---**

----Ss. 42 & 54---Suit for declaration and perpetual injunction---Common land/pathway---Proprietary rights through exclusive usage---Question as to whether a pathway or a galli, in an Abadi Deh was a common land for the use of the village community or whether, exclusive usage of the pathway or galli over the years by respondents (certain residents of Abadi Deh) granted them possessory and, as a result, proprietary rights over the said pathway; held, that subject pathway was described as an Abadi Dehor "inhabited site of a village" as per the Record of Rights---Said pathway according to the Khaka Tasweri was connected to other pathways or gallis in the village and ran along the mosque and other houses and ended as a cul de sac at the house of the respondents---In the absence of any proof of exclusive possession of the pathway by the respondents, mere usage of a common pathway by the respondents did not amount to possession---Pathways formed part of the commons and were to be used by everyone in the village, unless of course, the residents (or respondents in the present case) had through any means denied access of the pathway over the years to other residents of the village, thereby establishing exclusivity of possession---Khaka Tasweeri showed that the pathway was connected to other pathways in the village and was a communal pathway just like the other pathways in the village, therefore, the argument that the respondents enjoyed exclusive possession of the pathway was not supported by any tangible evidence---Furthermore a special attorney of respondent had made a statement before the court that the said pathway was built up by the relevant Municipal Authority, which also underlined the public character of the pathway and affirmed that it was part of the commons/shamilat---Suit filed by respondents was rightly dismissed by the lower Appellate Court---Appeal was allowed accordingly.

Zulfiqar Khalid Maluka, Advocate Supreme Court for Appellant.

Kh. Azhar Rasheed, Advocate Supreme Court for Respondents Nos.1 - 3.

Syed Rifaqat Hussain Shah, Advocate Supreme Court/Advocate-on-Record for Respondent No.4.

Date of hearing: 12th March, 2018.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**The question before us is whether a pathway or a galli, in an Abadi Deh is a common land for the use of the village community or whether, exclusive usage of the pathway or galli over the years by some residents of Abadi Deh grants them possessory and, as a result, proprietary rights over the said pathway?

2. This question arises out of a suit for declaration and perpetual injunction filed by the respondents against the appellants. The declaration and injunction sought is that the pathway or pukta galli (16 feet wide) (referred to by the respondents as Kocha Khaas) situated in Khasra No.5974, in Abadi Deh of Deh Teri,

Tehsil Banda Daud Shah, District Karak, has been used exclusively by the respondents, as a pathway leading to their house, for over two decades, therefore, they are in exclusive possession of the said pathway and, therefore, also maintain proprietary interest in the said pathway. As a consequence, the appellant, cannot open a gate onto the said pathway from their house, a property that abuts the said pathway. Respondents seek a declaration and an injunction to this effect.

3. The trial court decreed the suit in favour of the respondents on 21-2-2014 which was overturned in appeal by the Additional District Judge on 28-6-2014 and was then set aside by the Peshawar High Court through the impugned judgment dated 10-6-2015 holding that the respondents enjoy exclusive possession of the pathway.

4. Learned counsel for the appellant argued that the said pathway is public passage for common usage of the residents of the Abadi Deh, therefore, the appellant is entitled to use the same by opening a gate of his house into the said passage. He submits that there is no evidence on the record to establish that the said land is owned or is in possession of the respondents. He referred to the cross-examination of PW-2 (special attorney of the respondent/plaintiff) wherein he affirmed that the said passage was improved and built up by the local TMA.

5. Learned counsel for the respondent on the other hand submitted that the title in an Abadi Deh follows the possession and for the last 20 years, respondents have been using the said pathway and therefore the said passage belongs to the respondents and the appellant cannot be allowed access to the said pathway by opening the second gate of his house onto the said pathway. He placed reliance on Zarin Gul v. Malik Jan (1995 SCMR 92), Raees Khan v. Samar Ali Shah (1997 CLC 349) and Muhammad Sadiq v. Amir Muhammad (2006 SCMR 702) in support of his contention.

6. We have examined the record. The pathway falls in Khasra No.5974 of Mauza Teri, Tehsil Banda Daud Shah, District Karak, which is described as an Abadi Deh or "inhabited site of a village" as per the Record of Rights i.e., Register Haqdaran-e-Zameen 2007-2008 of Mauza of Deh Teri (see Ex.PW-1/1). The said pathway according to the Khaka Tasweri (see Ex.PW-1/2) is connected to other pathways or gallis in the village and runs along the mosque and other houses (including the house of the appellant) and ends as a cul de sac at the house of the respondents.

7. The principle that title in an Abadi Deh follows possession is well recognized, however, does this principle extend to common pathways in a village or Abadi Deh? Common land or Shamilat in an Abadi Deh includes pathways, lanes, streets, playgrounds, etc used for communal use of the residents of the village. "The whole of the abadi of every village is by presumption shamilat. That is not a proposition for which we need quote any authority, for it is well established. That part of the abadi which is in the exclusive possession of any co-sharer in the shamilat has to remain in his possession but any part not in exclusive possession of any co-sharer is subject to use by all. If at any time, a piece of land in the abadi has been left for use as a land it cannot be appropriated by any particular co-sharer."1

8. In the absence of any proof of exclusive possession of the pathway by the respondents, mere usage of a common pathway by the respondents does not amount to possession. Pathways form part of the commons and are to be used by everyone in the village, unless of course, the residents (or respondents in this case) had through any means denied access of the pathway over the years to other residents of the village, thereby establishing exclusivity of possession. Khaka Tasweeri shows that the pathway is connected to other pathways in the village and is a communal pathway just like the other pathways in the village. Therefore, the argument that the respondents enjoy exclusive possession of the pathway is not supported by any tangible evidence. It is also on the record as per statement of PW-2 (special attorney of respondent) that the

said pathway was built up by the TMA, which also underlines the public character of the pathway and affirms that it is part of the commons/shamilat. Case law relied upon by learned counsel for the respondents does not advance his cause.

9. Even otherwise, the opening of the second gate by the appellant into the pathway does not in any manner block or restrict the usage of the passage by the respondents. The passing reference to the right to privacy due to long usage is also incorrect as the said pathway merges into other thoroughfares in the village and maintains a communal and public character.

10. As a sequel of above discussion, we allow this appeal and set aside the judgment of the Peshawar High Court dated 10.06.2015 and uphold the judgment of the lower appellate court dated 28.06.2014.

11. Foregoing are the reasons for our short order dated 12.3.2018.

MWA/M-11/SC Appeal allowed.

**2018 S C M R 1372**

**[Supreme Court of Pakistan]**

**Present: Asif Saeed Khan Khosa, Manzoor Ahmad Malik and Syed Mansoor Ali Shah, JJ**

**IMRAN ALI---Petitioner**

**Versus**

**The STATE---Respondent**

Jail Petition No. 298 of 2018, decided on 12th June, 2018.

(Against the judgment dated 20.03.2018 passed by the Lahore High Court, Lahore in Criminal Appeal No. 167868/J of 2018 and Capital Sentence Reference No. 1/T of 2018)

**(a) Penal Code (XLV of 1860)---**

----Ss. 364-A, 376, 377, 302(b) & 201---Anti-Terrorism Act (XXVII of 1997), S. 7---Kidnapping or abducting a person under the age of fourteen, rape, sodomy, qatl-i-amd, causing disappearance of evidence of offence, act of terrorism---Voluntary and true confession of guilt---Accused allegedly kidnapped a minor girl, where after he subjected her to sodomy and rape, before murdering her---When the charge was framed by the Trial Court against the accused he had pleaded guilty as charged and on that occasion he recorded a detailed confessional statement wherein he had admitted almost every aspect of the case alleged against him---Despite pleading guilty to the charge and making of a confessional statement the Trial Court decided to proceed with recording of evidence and during the trial statements of as many as thirty two (32) prosecution witnesses were recorded and many other pieces of evidence were brought on the record---Accused, in his statement recorded under S. 342, Cr.P.C. had once again admitted almost all the vital pieces of evidence produced by the prosecution against him as correct and had once again admitted his guilt unreservedly---Counsel for the accused had only prayed for some lenience to be shown to the accused in the matter of his sentence and no argument had been advanced before the Trial Court challenging the merits of the prosecution's case---In his memorandum of appeal filed by the accused before the High Court once again only lenience in the matter of sentence had been prayed for by the accused without questioning his convictions recorded by the Trial Court---Only during arguments before the High Court the counsel for the accused had maintained that admission of guilt by the accused before the Trial Court was a result of coercion but during such arguments he had not provided any detail regarding coercion applied against the accused so as to extract a confession---Apart from the guilty plea and confession of accused the CCTV footages, photographs, DNA tests and the medical evidence brought on record proved that the confession made by the accused was not only voluntary but also true---Guilt of the accused had been proved to the hilt---Petition for leave to appeal was dismissed in circumstances and leave was refused.

**(b) Penal Code (XLV of 1860)---**

----Ss. 364-A, 376, 377, 302(b) & 201---Anti-Terrorism Act (XXVII of 1997), S. 7---Kidnapping or abducting a person under the age of fourteen, rape, sodomy, qatl-i-amd, causing disappearance of evidence of offence, act of terrorism---Death sentence, confirmation of---Accused allegedly kidnapped a minor girl, where after he subjected her to sodomy and rape, before murdering her---Accused was sentenced to death by the Trial Court, which sentence was upheld by the High Court---Crimes committed by the accused were absolutely horrendous and barbaric and the same had been committed with a minor and innocent girl aged about 7/8 years---Accused had not only deceitfully kidnapped the victim but also brutalized her by committing sodomy and rape with her and then ultimately killed her mercilessly---In his pleading guilty to the charge as well as in his statement recorded under S. 342, Cr.P.C. the accused had admitted committing similar offences with eight other minor victims and in such backdrop he did not deserve any sympathy in

the matter of death sentence awarded to him---Petition for leave to appeal was dismissed in circumstances and leave was refused.

Ms. Sarwat Nawaz, Advocate Supreme Court for Petitioner.

Complainant in person.

Mazhar Sher Awan, Additional Prosecutor-General, Punjab for the State.

Date of hearing: 12th June, 2018.

**JUDGMENT**

**ASIF SAEED KHAN KHOSA, J.---**For allegedly kidnapping, sodomizing, raping and murdering a minor girl namely Zainab Amin, aged about 7/8 years, the petitioner was booked in case FIR No. 8 registered at Police Station A-Division, Kasur on 04.01.2018 and after a regular trial he was convicted by the trial court for offences under sections 364-A, 376, 377, 302(b) and 201, P.P.C. and section 7(a) of the Anti-Terrorism Act, 1997 and for some of the above mentioned offences he was sentenced to death apart from some other sentences passed against him. The petitioner challenged his convictions and sentences through an appeal which was dismissed by the High Court and all his convictions and sentences recorded by the trial court were upheld and confirmed. Hence, the present petition before this Court.

2. We have heard the learned counsel for the petitioner and the learned Additional Prosecutor-General, Punjab appearing for the State and have gone through the record of the case with their assistance.

3. It has straightaway been noticed by us that when the charge was framed by the trial court against the petitioner he had pleaded guilty as charged and on that occasion he had got recorded a detailed confessional statement wherein he had admitted almost every aspect of this case alleged against him. Despite such pleading guilty to the charge and making of a confessional statement by the petitioner the trial court had decided to proceed with recording of evidence and during the trial statements of as many as 32 prosecution witnesses were recorded and many other pieces of evidence were brought on the record. In his statement recorded under section 342, Cr.P.C. the petitioner had once again admitted almost all the vital pieces of evidence produced by the prosecution against him as correct and had once again admitted his guilt unreservedly. We have observed that even in his arguments addressed before the trial court the learned counsel for the petitioner had only prayed for some lenience to be shown to the petitioner in the matter of his sentence and no argument had been advanced before the trial court challenging the merits of the prosecution's case against the petitioner. We have further observed that in his memorandum of appeal filed by the petitioner before the High Court once again only lenience in the matter of sentence had been prayed for by the petitioner without questioning his convictions recorded by the trial court. It was for the first time during the arguments before the High Court that the learned counsel for the petitioner had maintained that admission of guilt by the petitioner before the trial court was a result of coercion but during such arguments he had not provided any detail regarding coercion applied against the petitioner so as to extract a confession. In paragraph No. 4 of the memorandum of the present petition filed before this Court it has been maintained by the petitioner that the confession made by him was a result of duress and inducement but in paragraph No. 10 of this very petition the petitioner has, once again, admitted his involvement in the alleged offences in clear and categorical terms. Apart from pleading guilty to the charge and making a confession by the petitioner there were many pieces of evidence brought on the record by the prosecution which proved every word of the confession to be correct and in that regard we may refer to the CCTV footages, photographs, DNA tests and the medical evidence which had confirmed every aspect of the confession made by the petitioner. All such pieces of evidence have convinced us that the confession made by the petitioner was not only voluntary but also true. After proper assessment and evaluation of the evidence available on the

record both the courts below had concurred in their conclusion regarding guilt of the petitioner having been proved to the hilt and upon our own independent evaluation of the evidence available on the record we have found no occasion to take a view of the matter different from that concurrently taken by the courts below. We are also mindful of the provisions of section 412, Cr.P.C. according to which in a case where an accused person pleads guilty to the charge and he is convicted on the basis of such pleading guilty then he can file an appeal only to the extent or legality of the sentence passed against him and he cannot file an appeal challenging his conviction.

4. As regards the sentences passed by the trial court against the petitioner which sentences had subsequently been upheld and confirmed by the High Court we may observe that the crimes committed by the petitioner were absolutely horrendous and barbaric and the same had been committed with a minor and innocent girl aged about 7/8 years. The petitioner had not only deceitfully kidnapped her but had also brutalized her by committing sodomy and rape with her and had then ultimately killed her mercilessly. In his pleading guilty to the charge as well as in his statement recorded under section 342, Cr.P.C. the petitioner had admitted committing similar offences with eight other minor victims and in that backdrop the petitioner did not deserve any sympathy in the matter of his sentences. This petition is, therefore, dismissed and leave to appeal is refused.

MWA/I-8/SC Petition dismissed.

**2018 S C M R 1590**

**[Supreme Court of Pakistan]**

**Present: Asif Saeed Khan Khosa, Sardar Tariq Masood and Syed Mansoor Ali Shah, JJ**

**LAL KHAN and others---Appellants**

**Versus**

**QADEER AHMED and others---Respondents**

Criminal Appeals Nos. 449 and 450 of 2017, decided on 1st June, 2018.

(Against the judgment dated 02.02.2016 passed by the Lahore High Court, Rawalpindi Bench, Rawalpindi in Criminal Appeal No. 108 of 2011 and Capital Sentence Reference No. 2-T of 2011)

**(a) Penal Code (XLV of 1860)---**

----Ss. 302(b), 353, 186 & 34---Anti-Terrorism Act (XXVII of 1997), Ss. 7(a), 7(b) & 7(h)---Qatl-i-amd, assault or criminal force to deter public servant from discharge of his duty, obstructing public servant in discharge of public function, common intention, acts of terrorism---Appeal against acquittal---Reappraisal of evidence---Accused and his co-accused allegedly exchanged fire with a police party, as a result of which the co-accused and a police official lost their lives---According to the prosecution the initial firing at the police had been resorted to by the accused and co-accused and through such firing one member of the police force had been critically injured at the spot, then the question was as to why the police in firing back chose co-accused as the only target---Site plan clearly showed that if the police party wanted to target the accused as well then there was nothing to stop it from causing injuries to him---Such circumstances indicated a real possibility that it was only the co-accused who had fired at the police party and in response the police party had fired back at him and that accused had not fired at all and surrendered before the police without causing any harm to anybody---Four crime-empties secured from the place of occurrence did match with the pistol statedly recovered from the custody of the accused at the time of his surrender but it could not be lost sight of the fact that the said pistol had been recovered at the spot and it was not difficult for the police party to manufacture as many crime-empties from the said recovered pistol as it wanted so as to strengthen its case against the accused---Circumstances of the case clearly indicated that after surrender of accused some engineering had been resorted to by the prosecution so as to cook up a story qua the accused's role and to bolster the same through contrived circumstances---No occasion was found to interfere with the judgment of acquittal passed by the High Court in favour of the accused---Appeal against acquittal was dismissed accordingly.

**(b) Criminal trial---**

----'Conjectures' and 'inferences'--- Scope and distinction---"Conjecture" had no place in criminal law whereas an inference played an important role because the same was based upon a logical deduction from circumstances available on the record.

Malik Matee Ullah, Advocate Supreme Court for Appellants (in Cr. A. 449 of 2017).

Ahmed Raza Gillani, Additional Prosecutor-General, Punjab for Appellants (in Cr. A. 450 of 2017).

Haider Mehmood Mirza, Advocate Supreme Court for Respondents (in both cases).

Date of hearing: 1st June, 2018.

**JUDGMENT**

**ASIF SAEED KHAN KHOSA, J.---**Qadeer Ahmed respondent and his brother namely Ijaz were statedly present in their house at about 04.30 p.m. on 29.07.2009 in village Mian Rasheeda in the area of Police Station New Airport, Attock when a raiding police party entered their house and in the ensuing firing between the parties one member of the police party namely Muhammad Akram, S.I. and one from the

accused party namely Ijaz received bullet injuries leading to their death. In the said episode Qadeer Ahmed respondent had statedly surrendered before the police along with his pistol and upon such surrender the said respondent was arrested at the spot and his pistol was secured as the weapon of offence. With the said allegations the respondent and his deceased co-accused were booked in case FIR No. 74 registered at the above mentioned Police Station during the same evening and after a regular trial the respondent was convicted and sentenced by the trial court for offences under sections 302(b), 353 and 186, P.P.C. read with section 34, P.P.C. and sections 7(a), 7(b) and 7(h) of the Anti-Terrorism Act, 1997. For the offences of murder and terrorism the respondent was sentenced by the trial court to death. The respondent challenged his convictions and sentences before the High Court through an appeal which was allowed, his convictions and sentences recorded by the trial court were set aside and he was acquitted of the charge. Hence, the present appeals by leave of this Court granted on 11.01.2017.

2. Leave to appeal had been granted in this case in order to reappraise the evidence and with the assistance of the learned counsel for the parties we have undertaken that exercise.

3. There are certain facts which are not disputed in this case and they include the facts that the place of occurrence was the house of Qadeer Ahmed respondent and his deceased brother Ijaz, it was the police party which had gone to that house to conduct a raid and the said party surprised the respondent and his deceased co-accused who were otherwise peacefully present in their own house, upon seeing the police party it were the respondent and his deceased co-accused who had started firing at the police party which fires had hit Muhammad Akram, S.I. leading to his death and in retaliation of such firing at the police party the police had fired back at Ijaz co-accused who after receipt of firearm injuries at the hands of the police died at the spot. There was a serious infirmity in this story of the prosecution and that was that if, according to the prosecution itself, the initial firing at the police had been resorted to by Qadeer Ahmed respondent and his deceased co-accused namely Ijaz and if through such firing one member of the police force had been critically injured at the spot then what was expected was that the police party would fire back at both the present respondent and his deceased co-accused rather than choosing the said co-accused as the only target of the police response. The places of presence of the accused party and the police party at the spot shown in the site-plan of the place of occurrence clearly established that if the police party wanted to target Qadeer Ahmed respondent as well then there was nothing to stop it from causing injuries to him. This shows that the police party had not fired at Qadeer Ahmed respondent which is a clear indication of a real possibility that it was only the respondent's co-accused namely Ijaz who had fired at the police party and in response the police party had fired back at him and that Qadeer Ahmed respondent had not fired at the deceased at all and that is why he was not hurt by the police party. It may be true that four crime-empties secured from the place of occurrence had matched with the pistol statedly recovered from the custody of Qadeer Ahmed respondent at the time of his surrender before the police party at the spot but it cannot be lost sight of that the said pistol had been recovered at the spot and it was not difficult for the police party to manufacture as many crime-empties from the said recovered pistol as it wanted so as to strengthen its case against Qadeer Ahmed respondent. These factors available on the record of this case cannot be treated as conjectures because they are not purely speculative. We find that such circumstances lead to inferences which can be drawn on the basis of the facts available on the record. It is trite that a conjecture has no place in criminal law whereas an inference plays an important role because the same is based upon a logical deduction from circumstances available on the record. The circumstances becoming clear to us upon a proper appreciation of the evidence available on the record go a long way in convincing us that Qadeer Ahmed respondent had not fired at the police party at all and that is why he was not harmed by the police

party at the spot and also that he had surrendered before the police without causing any harm to anybody and after his surrender some engineering had been resorted to by the prosecution so as to cook up a story qua the respondent's role and to bolster the same through contrived circumstances.

4. For what has been discussed above we have found no occasion for interference with the impugned judgment of acquittal of Qadeer Ahmed respondent passed by the High Court. These appeals are, therefore, dismissed. The bail bond and surety of Qadeer Ahmed respondent, if any, shall stand discharged.

MWA/L-2/SC Appeals dismissed.

**2018 S C M R 2039**

**[Supreme Court of Pakistan]**

**Present: Asif Saeed Khan Khosa, Maqbool Baqar and Syed Mansoor Ali Shah, JJ**

**Criminal Appeals Nos. 523, 524 and 525 of 2017**

(On appeal from judgment of Balochistan High Court, Quetta dated 30.6.2016, passed in Crl. A. No. 114, 141 and 142/2016)

**and**

**Criminal Appeal No. 494 of 2017**

(On appeal from judgment of Balochistan High Court, Quetta dated 23.5.2016, passed in Crl.A No. 84/2015)

**and**

**Criminal Appeal No. 452 of 2017**

(On appeal from judgment of Balochistan High Court, Quetta dated 25.4.2016, passed in Crl. Jail Appeal No. 33/2015)

**and**

**Criminal Appeal No. 22 of 2018**

(On appeal from judgment of Balochistan High Court, Quetta dated 19.12.2016, passed in Crl. A. No. 269/2015)

**and**

**Criminal Appeal No. 51 of 2017**

(On appeal from judgment of Balochistan High Court, Quetta dated 19.12.2016, passed in Crl. A. No. 269/2015)

**and**

**Criminal Petition No. 94-Q of 2017**

(On appeal from judgment of Balochistan High Court, Quetta dated 13.11.2017, passed in Crl. A. (CNS) No. (T)58/2017)

**The STATE through Regional Director ANF---Appellant/Petitioner**

**Versus**

**IMAM BAKHSH and others---Respondents**

Criminal Appeals Nos. 523, 524, 525, 494, 452, 51 of 2017, 22 of 2018 and Criminal Petition No. 94-Q of 2017, decided on 3rd October, 2018.

**(a) Control of Narcotic Substances (Government Analysts) Rules, 2001---**

----Rr. 5 & 6---Control of Narcotic Substances Act (XXV of 1997), S. 9---Possession of narcotics---Report of Government Analyst---Safe custody and transmission of samples of the alleged drug from the spot of recovery till its receipt by the Narcotics Testing Laboratory---Chain of custody began with the recovery of the seized drug by the police and included the separation of the representative sample(s) of the seized drug and their dispatch to the Narcotics Testing Laboratory---Said chain of custody, was pivotal, as the entire construct of the Control of Narcotic Substances Act, 1997 and the Control of Narcotic Substances (Government Analysts) Rules, 2001 rested on the report of the Government analyst, which in turn rested on the process of sampling and its safe and secure custody and transmission to the laboratory---Representative samples of the alleged drug must be in safe custody and undergo safe transmission from the stage of recovery till it is received at the Narcotics Testing Laboratory---Prosecution must establish that the chain of custody was unbroken, unsuspicious, indubitable, safe and secure---Any break in the chain of

custody or lapse in the control of possession of the sample, would cast doubts on the safe custody and safe transmission of the sample(s) and would impair and vitiate the conclusiveness and reliability of the report of the Government Analyst, thus, rendering it incapable of sustaining conviction.

Amjad Ali v. State 2012 SCMR 577 and Ikramullah v. State 2015 SCMR 1002 ref.

**(b) Interpretation of statutes---**

----'Directory' and 'mandatory' provisions in a statute---Distinction---To distinguish where the directions of the legislature were imperative and where they were directory, the real question was whether a thing had been ordered by the legislature to be done and what was the consequence, if it was not done---Some rules were vital and went to the root of the matter, they could not be broken; others were only directory and a breach of them could be overlooked provided there was substantial compliance---Duty of the court was to try to unravel the real intention of the legislature---Such exercise entailed carefully attending to the scheme of the Act and then highlighting the provisions that actually embodied the real purpose and object of the Act---Provision in a statute was mandatory if the omission to follow it rendered the proceedings to which it related illegal and void, while a provision was directory if its observance was not necessary to the validity of the proceedings---Some parts of a statute, thus, may be mandatory whilst others may be directory---Furthermore certain portion of a provision, obligating something to be done, may be mandatory in nature whilst an other part of the same provision, may be directory, owing to the guiding legislative intent behind it---Even parts of a single provision or rule may be mandatory or directory---In another context, whether a statute or rule be termed mandatory or directory would depend upon larger public interest, nicely balanced with the precious right of the common man.

N.S. Bhindra's - Interpretation of Statutes - 12th edition. Lexis Nexis. P.435; Crawford, Statutory Construction, p.104; Maxwell, Interpretation of Statutes, 11th edition, pp 369; The Collector of Sales Tax, Gujranwala v. Super Asia Muhammad Din and Sons 2017 SCMR 1427 and Zia Haider Rizvi v. Deputy Commissioner of Wealth Tax 2011 SCMR 420 ref.

**(c) Control of Narcotic Substances (Government Analysts) Rules, 2001---**

----R. 3---Control of Narcotic Substances Act (XXV of 1997), S. 9---Possession of narcotic---Narcotic Testing Laboratories---Qualification of Government Analyst---Supreme Court directed that the Federal Government and the respective Provincial Governments shall ensure that the Government analysts in the Narcotics Testing Laboratories were qualified as per R. 3 of the Control of Narcotic Substances (Government Analysts) Rules, 2001('the Rules'); that the tests and their protocols were common across the country and as per International guidelines; that the officials of the National and Provincial Narcotics Testing Laboratories shall follow the Rules in the best manner possible so that efficient and meaningful chemical analysis could be achieved, and that in case of failure, disciplinary action shall be taken against the officials, in accordance with law.

**(d) Control of Narcotic Substances (Government Analysts) Rules, 2001---**

----Rr. 5 & 6---Control of Narcotic Substances Act (XXV of 1997), S. 9---Possession of narcotics---Report of Government Analyst---Rule 5 of the Control of Narcotic Substances (Government Analysts) Rules, 2001 was directory while R. 6 was mandatory to the extent that the full protocols ought to be mentioned in the report of the Government Analyst---Non-compliance of R. 6, in such context, would render the report of the Government Analyst inconclusive and unreliable.

Raja Inam Ameen Minhas, Special Prosecutor ANF, Ch. Aitsham-ul-Haq, Special Prosecutor ANF and Tariq, DD (Law), ANF for the State.

Syed Nayyab H. Gardezi, DAG on Court's Notice.

M. Shabbir Rajput, Advocate Supreme Court for Respondents (in Crl. As. 452 of 2017 and 51 of 2018).

Nemo for Respondents.

Date of hearing: 3rd October, 2018.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**Through this consolidated judgment we decide these appeals as they raise common questions of law.

**Criminal Appeals Nos. 523, 524 and 525 of 2017**

2. One Imam Bakhsh (hereinafter referred to as "Respondent No.1") was booked in FIR No. 04/2014, lodged at Police Station Anti-Narcotics Force, Turbat, Balochistan on 06.05.2014 under section 9(c) of the Control of Narcotic Substances Act, 1997 ("Act"). According to the crime report, Respondent No. 1 was driving a double cabin Vigo Pickup when it was stopped by the raiding party. On Respondent No. 1's pointing out, 10.500 kilograms of opium was recovered from the rear of the Pickup in a bag. Out of the recovered opium, 200 grams was separated as sample for analysis and the remaining opium was sealed and taken into possession. The double door Vigo Pickup vehicle was also taken into possession. After investigation and regular trial, the Special Judge (Control of Narcotic Substances), Quetta convicted Respondent No. 1 through judgment dated 30.3.2016 under section 9(c) of the Act and sentenced him to 14 years' imprisonment along with fine of Rs.60,000/- or in default of payment of fine to further undergo three months' simple imprisonment, with benefit of section 382-B, Cr.P.C.

3. In Criminal Appeal No. 523/2017 Respondent No. 1 challenged his conviction before the High Court. In Criminal Appeal No. 524/2017, the State sought enhancement of the sentence of Respondent No. 1 to capital punishment or at least imprisonment for life. In Criminal Appeal No. 525 /2017, the State prayed that the assets of Respondent No. 1 be frozen. The High Court through the impugned judgment acquitted Respondent No. 1 on the ground that the report of the Federal Government Analyst, Quetta, Balochistan, dated 13.05.2014 (Ex.P-3/E) did not conform to the requirement of section 36 of the Act, as well as, Rules 5 and 6 of the Control of Narcotic Substances (Government Analysts) Rules, 2001 ("Rules") and, in particular, protocols of the test applied were not mentioned in the Report. The High Court further held that even safe custody and safe transmission of the drug to the Federal Government Analyst were not established as the alleged recovery was effected on 30.03.2014, whereas the sample was received by the Government Analyst on 09.05.2014 and the intervening period and the mode of transmission were not explained.

**Criminal Appeal No. 494/2017**

4. One Fida Muhammad (hereinafter referred to as "Respondent No. 2") was booked in FIR No. 55/2014 dated 25.06.2014, Police Station Anti-Narcotics Force, Quetta, under section 9(c) of the Act. According to the crime report, upon raiding a house, a polythene bag was recovered from Respondent No. 2 containing different pieces of dried opium, weighing 45 kilograms. Samples were sent to chemical analyst in sealed parcels. After investigation and regular trial, Respondent No. 2 was convicted vide judgment dated 23.2.2015 by the Special Judge (Control of Narcotic Substances), Quetta under section 9(c) of the Act and was sentenced to rigorous imprisonment for life with fine of Rs. 200,000/- or in default thereof to further undergo one year simple imprisonment with benefit of section 382-B, Cr.P.C. On appeal against the judgment of the trial court, the High Court acquitted Respondent No. 2 on the ground that samples were not taken from all the pieces of opium recovered, as a result 1100 grams of opium taken as sample could not be considered as a representative sample and, thus, Respondent No. 2 could only have been convicted for 1100 grams of opium and placed reliance upon Ameer Zeb v. State (PLD 2012 SC 380) and Fareed

Ullah v. State (2013 SCMR 302). In addition to this the High Court also held that the Report of the Government Analyst was not in accordance with section 36 of the Act and Rules 5 and 6 of the Rules. According to the impugned judgment the report of the Government Analyst under the Rules prescribed in Form II stipulates signatures of two officers of the laboratory but the Report bears only one signature of the Federal Government Analyst. The Report is also silent regarding necessary protocols of the test applied.

**Criminal Appeal No. 452/2017**

5. One Muhammad Yousaf (hereinafter referred to as "Respondent No. 3") was booked in FIR No. 65/2014 dated 29.08.2014 registered at Police Station Anti-Narcotics Force, Quetta. According to the crime report 90 kilograms of charas garda was recovered from Respondent No.3, who was in the driving seat of a Corolla Car, which was intercepted by the Anti-Narcotics Force officials. Samples were taken from the recovered substance and were sent to the Government Analyst. After regular trial Respondent No. 3 was convicted by the Special Judge (Control of Narcotic Substances), Quetta under section 9(c) of the Act and was sentenced to suffer imprisonment for life and to pay fine of Rs.200,000/- or in default to further undergo simple imprisonment for one year, with benefit of section 382-B, Cr.P.C. Respondent No. 3 filed an appeal against the same before the High Court and vide impugned judgment dated 25.04.2016, he was acquitted of the charge on the ground that the Report of the Government Analyst was in violation of section 36 of the Act and Rules 5 and 6 of the Rules, inasmuch as, the report of the Federal Government Analyst bears only one signature of the Government Analyst whereas the Rules stipulate signatures of two officers, and the Report is also silent regarding the necessary protocols of the test applied, therefore, the Report was not considered to be conclusive proof regarding the status of the recovered substance and could not be relied upon for sustaining conviction.

**Criminal Appeal No. 22/2018 and Criminal Petition No. 94-Q of 2017**

6. One Mohsin (hereinafter referred to as "Respondent No. 4") was booked in FIR No. 2/2014 dated 12.02.2014, Police Station Anti-Narcotics Force, Turbat under section 9(c) of the Act. The Anti-Narcotics Force officials recovered 87 kilograms of heroin from Respondent No. 4 who was driving a Toyota Surf. The samples were separated from each sack of the recovered substance and sent to the chemical analyst. After investigation and regular trial Respondent No. 4 was convicted by the Special Judge, Quetta vide judgment dated 11.08.2015 under section 9(c) of the Act and was sentenced to imprisonment for life with fine of Rs. 200,000/- or in default thereof to further imprisonment of one year with benefit of section 382-B, Cr.P.C. Respondent No. 4 preferred an appeal before the High Court wherein he was acquitted of the charge on the ground that the Report of the chemical examiner was not in accordance with section 36 of the Act and Rules 5 and 6 of the Rules, inasmuch as, the Report of the Federal Government Analyst bears only one signature of the Government Analyst whereas the Rules stipulate signatures of two officers. The Report was also silent about the protocol of the test applied. It was also held that safe transmission of the alleged drug to the laboratory was not established as the police officer who had taken the contraband to the office of the chemical examiner was not produced in court. In the connected petition, i.e. Criminal Petition No.94-Q/2017 the State has prayed for forfeiture of the property of Respondent No. 4.

**Criminal Appeal No. 51/2018**

7. One Abdul Wahab (hereinafter referred to as "Respondent No.5") was booked in FIR No. 16/2015 dated 26.05.2015, registered at Police Station Anti-Narcotics Force, Quetta. According to the crime report, 9 kilograms of charas (garda) was recovered from Respondent No. 5 from his bag at Sada Bahar Coach Terminal and recovery was also made from his partner, i.e. one Noor-ud-Din. 200 grams were separated as a sample and sent in a sealed packet to the Chemical Analyst for examination, while the remaining

recovered substance was sealed. After investigation and trial, Respondent No. 5 was convicted by the Special Judge (Control of Narcotic Substances) Quetta under section 9(c) of the Act vide judgment dated 30.11.2015 and was sentenced to undergo rigorous imprisonment for 11 years and fine of Rs. 50,000/- or in default thereof to further undergo simple imprisonment for three months, with benefit of section 382-B, Cr.P.C. In appeal before the High Court, Respondent No. 5 was acquitted of the charge vide impugned judgment dated 30.12.2016 on the ground that the Report of the Government Analyst was in violation of section 36 of the Act, therefore, there was no conclusive proof that the recovered substance was charas (garda). Further, the Report also did not refer to any protocol of the test applied.

**Opinion of the Court**

8. We have heard the learned counsel for the parties and have gone through the record with their assistance. At the very outset, it is observed, that the controversy in these cases revolves around the consequence of non-compliance of Rules 5 and 6 of the Rules. In other words, whether the said Rules are mandatory or directory and whether non-compliance of these Rules invalidates the Report of the Government Analyst. Another overlapping ground in some cases has been the lack of safe custody and safe transmission of the recovered substance from recovery till its receipt by the Narcotics Testing Laboratory.

**Chain of Custody - Safe custody and safe transmission**

9. We have noted above that in Criminal Appeals Nos. 523 to 525/2017 and No. 22/2018, safe custody and safe transmission of the alleged drug from the spot of recovery till its receipt by the Narcotics Testing Laboratory are not satisfactorily established. The chain of custody begins with the recovery of the seized drug by the Police and includes the separation of the representative sample(s) of the seized drug and their dispatch to the Narcotics Testing Laboratory. This chain of custody, is pivotal, as the entire construct of the Act and the Rules rests on the Report of the Government Analyst, which in turn rests on the process of sampling and its safe and secure custody and transmission to the laboratory. The prosecution must establish that the chain of custody was unbroken, unsuspicious, indubitable, safe and secure. Any break in the chain of custody or lapse in the control of possession of the sample, will cast doubts on the safe custody and safe transmission of the sample(s) and will impair and vitiate the conclusiveness and reliability of the Report of the Government Analyst, thus, rendering it incapable of sustaining conviction. This Court has already held in Amjad Ali v. State (2012 SCMR 577) and Ikramullah v. State (2015 SCMR 1002) that where safe custody or safe transmission of the alleged drug is not established, the Report of the Government Analyst becomes doubtful and unreliable.

**Rules 5 and 6 of the Control of Narcotic Substances (Government Analysts) Rules, 2001 - whether mandatory or directory?**

10. The Control of Narcotic Substances (Government Analysts) Rules, 2001 operationalizes the purposes of the Act to the extent of test and analysis of the recovered substance. These Rules do not spell out any consequence for their non-compliance, therefore, it needs to be determined whether these Rules are mandatory or directory and whether non-compliance of these Rules invalidates the Report of the Government Analyst or not.

11. To distinguish where the directions of the legislature are imperative and where they are directory, the real question is whether a thing has been ordered by the legislature to be done and what is the consequence, if it is not done. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance. The duty of the court is to try to unravel the real intention of the legislature. This exercise entails carefully attending to the scheme of the Act and then highlighting the provisions that actually embody the real purpose and object of

the Act. A provision in a statute is mandatory if the omission to follow it renders the proceedings to which it relates illegal and void, while a provision is directory if its observance is not necessary to the validity of the proceedings. Thus, some parts of a statute may be mandatory whilst others may be directory. It can even be the case that a certain portion of a provision, obligating something to be done, is mandatory in nature whilst another part of the same provision, is directory, owing to the guiding legislative intent behind it. Even parts of a single provision or rule may be mandatory or directory. "In each case one must look to the subject matter and consider the importance of the provision disregarded and the relation of that provision to the general object intended to be secured." Crawford opined that "as a general rule, [those provisions that] relate to the essence of the thing to be performed or to matters of substance, are mandatory, and those which do not relate to the essence and whose compliance is merely of convenience rather than of substance, are directory." In another context, whether a statute or rule be termed mandatory or directory would depend upon larger public interest, nicely balanced with the precious right of the common man. According to Maxwell, "Where the prescription of statute relates to the performance of a public duty and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty without promoting the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed or in other words as directory only. The neglect of them may be penal indeed, but it does not affect the validity of the act done in disregard of them." Our Court has held while determining the status of a mandatory or directory provision that "perhaps the cleverest indicator is the object and purpose of the statute and the provision in question." And to see the "legislative intent as revealed by the examination of the whole Act."

12. In order to apply the above test, it is essential to understand the legislative intent of the Act and the scope of the Rules framed thereunder. The title of the Act and its objective is to control the production, processing and trafficking of narcotic drugs and psychotropic substances. The Act substantively provides for prohibition of cultivation of narcotic plants, prohibition of possession of narcotic drugs, etc. providing that "no one shall produce possess, offer for sale, sell, purchase, distribute, deliver, transport, dispatch any narcotic drug or psychotropic substance or controlled substance, prohibition of import and export of narcotic drugs and prohibition of trafficking or financing of narcotic drugs. Punishments for contravention are provided under section 9 which range from imprisonment, extending to two years and moving up to capital punishment of death or imprisonment for life depending on the quantity of the narcotic drug, psychotropic or controlled substance.

13. Sections 34 to 36 of the Act provide for Narcotics Testing Laboratories, the Test Reports of the Government Analyst and their evidentiary value. Section 36 mandates that the Government Analyst after carrying out tests and analysis of the sample of any narcotic drug or psychotropic or controlled substance shall deliver a Report as prescribed under the Rules. This Report under section 36(2) enjoys the benefit of being admissible as evidence of the facts stated therein without formal proof and such evidence, unless rebutted, is conclusive. Credible testing and analysis of the alleged drug is fundamental to actualizing the provisions of the Act as it determines the true nature of the recovered substance or the seized drug. Section 36(2) underlines the importance of such a test Report. Report of the Government Analyst, is therefore, pivotal in realizing the objective and purpose of the Act.

14. The Rules are framed under section 77 of the Act to carry out the purposes of the Act. Rule 5 provides a process for proper examination of the sample in the Narcotics Testing Laboratory. This rule reflects the best practice to be adopted while dealing with examination of the sample. Substantial compliance of this

Rule is sufficient as its non-compliance does not offend or upset the statutory regime of the Act. Non-compliance of Rule 5 will not cut so deep as to invalidate the Report of the Government Analyst.

15. Rule 6 on the other hand stands on a different statutory footing. It provides that the Report of the Government Analyst, after the test and analysis, is to furnish the result together with full protocols of the test applied. The accuracy of test and analysis and the correct application of the full protocols alone can determine if the recovered substance is a narcotic drug or a psychotropic or controlled substance. "Protocol" means an explicit, detailed plan of an experiment, procedure or test or a precise step-by-step description of a test, including the listing of all necessary reagents and all criteria and procedures for the evaluation of the test data. Rule 6 requires that full protocols of the test applied be part of the Report of the Government Analyst. Every test has its protocols, which are internationally recognized and a test without the observance of its protocols has no sanctity. "Full Protocols" include a description of each and every step employed by the Government Analyst through the course of conducting a test. Hence, the Report under Rule 6 must specify every test applied for the determination of the seized substances with the full protocols adopted to conduct such tests.

16. Non-compliance of Rule 6 can frustrate the purpose and object of the Act, i.e. control of production, processing and trafficking of narcotic drugs and psychotropic substances, as conviction cannot be sustained on a Report that is inconclusive or unreliable. The evidentiary assumption attached to a Report of the Government Analyst under section 36(2) of the Act underlines the statutory significance of the Report, therefore details of the test and analysis in the shape of the protocols applied for the test become fundamental and go to the root of the statutory scheme. Rule 6 is, therefore, in the public interest and safeguards the rights of the parties. Any Report (Form-II) failing to give details of the full protocols of the test applied will be inconclusive, unreliable, suspicious and untrustworthy and will not meet the evidentiary assumption attached to a Report of the Government Analyst under section 36(2). Resultantly, it will hopelessly fail to support conviction of the accused. This Court has already emphasized the importance of protocols in Ikramullah's case (supra).

17. Rule 6 also requires the issuance of quadruplicate copies of the Report and the requirement of two signatures on the Report of the Government Analyst in Form-II. Section 36 states that the Report shall be signed by the Government Analyst only, therefore the requirement of two signatures and the issuance of quadruplicate copies, are at best, a good practice, but are merely directory provisions, as their non-compliance does not offend the Act. At this stage it is important to point out that this Court, in a series of judgments, has considered the scope of Rule 4(2) of the Rules, which provides that the samples be dispatched to the Government Analyst not later than 72 hours of its seizure and has held it to be a directory provision. Reliance is placed on Muhammad Sarfraz v. State (2017 SCMR 1874), Gul Alam v. The State (2011 SCMR 624) and Tariq Mehmood v. The State (PLD 2009 SC 39). In Taimoor Khan v. State (2016 SCMR 621) this Court has additionally held that Rules 3, 4 and 6 are mandatory. Deeper examination of this judgment reveals that reference was only being made to Rule 4(1), whereas, Rule 4(2) was not discussed, separately. This understanding falls in line with the consistent view of this Court regarding Rule 4(2) as referred to above.

18. It is important to underline that even if a rule is directory, its substantial compliance as opposed to strict compliance is required. Non-compliance of such a rule might not invalidate the act but as it provides a legislative process based on public interest, transparency and good governance, its substantial compliance is necessary.

**Directions to the Federal and Provincial Governments**

19. Efficient, credible and proficient Narcotics Testing Laboratories are integral for successful execution of the Act and the Rules. The said laboratories have to be manned by competent analysts having prescribed qualifications. Rule 3 provides for the qualifications of a Government Analyst and it has already been held to be a mandatory provision by this Court. Further, the obligations of the Government Analysts under these Rules must be complied with for ensuring accurate and meaningful chemical analysis. In order to standardize the Narcotics Testing Laboratories across the country, the protocols and tests applied by these laboratories must meet common international standards, e.g. Guidelines issued by the United Nations Office on Drugs and Crime (UNODC) or Scientific Working Group for the Analysis of Seized Drugs (SWGDRUG) or the International Organization for Standardization (ISO) - 17025:2017. We, therefore, direct the Federal Government and the respective Provincial Governments to ensure that the Government Analysts in the Narcotics Testing Laboratories are qualified as per Rule 3, the tests and their protocols are common across the country are as per International guidelines. The officials of the National and Provincial Narcotics Testing Laboratories shall follow the Rules in the best manner possible so that efficient and meaningful chemical analysis can be achieved. In case of failure, disciplinary action be taken against the officials, in accordance with law.

20. We conclude that Rule 5 of the Rules is directory while Rule 6 is mandatory to the extent that the full protocols ought to be mentioned in the Report of the Government Analyst. Non-compliance of Rule 6, in this context, will render the Report of the Government Analyst inconclusive and unreliable. The representative samples of the alleged drug must be in safe custody and undergo safe transmission from the stage of recovery till it is received at the Narcotics Testing Laboratory.

21. In all the above appeals we have observed that there has been non-compliance of Rule 6 to the extent of absence of the full protocols of the tests applied. Additionally, in Criminal Appeals Nos. 523-525 of 2017 and No. 22 of 2018, safe custody and safe transmission of the seized drugs had also not been established.

22. For the above reasons, the main Appeals Nos. 523, 494, 452 of 2017 and Nos. 22 and 51 of 2018, against acquittal are dismissed. As a consequence, Criminal Appeal No. 524 of 2017 for enhancement of sentence and Criminal Appeal No. 525 of 2017 and Petition No. 94-Q/2017 for forfeiture of property, are also dismissed.

MWA/S-36/SC Appeals dismissed.

**P L D 2018 Supreme Court 698**

**Present: Sh. Azmat Saeed and Syed Mansoor Ali Shah, JJ**

**BILAL HUSSAIN SHAH and another---Appellants**

**Versus**

**DILAWAR SHAH---Respondent**

Civil Appeal No.404 of 2014, decided on 2nd May, 2018.

(On appeal from the judgment of Peshawar High Court, Abbottabad Bench dated 22-4-2013, passed in C.R. No.235 of 2008).

**(a) Qanun-e-Shahadat (10 of 1984)---**

----Art. 79, proviso---Gift deed---Proof of execution of document required by law to be attested---Proviso to the Art.79 of Qanun-e-Shahadat, 1984---Scope---Said proviso relaxed the requirement of calling the two attesting witnesses to prove the execution of the document, if the document was duly registered in accordance with the provisions of Registration Act, 1908 and its execution was not specifically denied---Party was relieved of the duty of calling the two witnesses but not from the duty of proving the execution of the registered document---Effect of the proviso to Art.79 was that the due execution and attestation of the gift deed would have to be proved, although it may be proved by calling a person other than an attesting witness---Such relaxation was pillared on an important assumption that the execution of the document was not denied---Denail of the execution of the document was not limited to the executant alone but was open to any party to the suit that was affected by the said document.

The Law of Evidence, Jethmalani and Chopra, 1st Edn. 2013, p.952; Mst. Saleema Bibi v. Mst. Ramzan Bibi 2007 YLR 910; Ghulam Bheek and others v. Mst.Salamat Bibi and others 2001 CLC 1078; AIR 1949 Nag. 149; AIR 1932 All 320; AIR 1959 Mysore 148 and AIR 1989 Kerala 163 ref.

**(b) Qanun-e-Shahadat (10 of 1984)---**

----Art. 79, proviso---Registered gift deed---Proof---Examination of attesting witness---Suit filed challenging legality of gift deed on basis of fraud and deceit---In case of death of the executant of the gift deed prior to the suit and in the face of the denial of its execution by the plaintiff, the requirement of two attesting witnesses could not be dispensed with.

Muhammad Iqbal Khan v. Mst. Farhat Nisa PLD 2017 Lah. 727; Abdul Hameed v. Shamasuddin PLD 2008 SC 140 and Abdul Ghafoor v. Mukhtar Ahmad Khan 2006 SCMR 1144 ref.

**(c) Gift---**

----Essential requirement---Proof---Three ingredients of a valid gift included declaration/offer by the donor; acceptance of gift by the donee; and, delivery of possession under the gift---Declaration of gift and delivery of possession had to be established through independent evidence.

Mst. Rasheeda Bibi v. Mukhtar Ahmad 2008 SCMR 1384 and Mst. Nagina Begum v. Mst. Tahzim Akhtar 2009 SCMR 623 ref.

Syed Hamid Ali Shah, Advocate Supreme Court for Appellants.

Muhammad Saeed Khan for Respondent.

Date of hearing: 2nd May, 2018.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**Leave was granted in this case vide order dated 13.03.2014 to examine whether the ratio of the judgment in the case of Manzoor Ahmed and 4 others v. Mehrban and 5 others (2002 SCMR 1391) relating to non-examination of attesting witnesses of a registered sale deed were applicable to the present case?

2. Brief facts giving rise to the above question are that the respondent (Dilawar Shah) filed a suit for declaration-cum-partition challenging the validity of Gift Deeds Nos. 1704 and 1705 dated 10.11.1996 allegedly executed in favour of appellant No. 1 (alleged donee) by one Syed Maqbool Shah (deceased) (alleged donor). Syed Maqbool Shah died in January, 2003 and was survived by his two brothers namely: Syed Lal Hussain Shah (father of appellant No.1) and Dilawar Shah, the respondent. Appellant No. 1 after the alleged Gift Deeds transferred the property in favour of his wife i.e., Appellant No.2, therefore, the respondent challenged both the transactions through the suit in question.

3. Learned counsel for the appellants argued that the Gift Deeds were registered documents, therefore, under proviso to Article 79 of the Qanun-e-Shandat Order, 1984 ("Order") there was no requirement for the examination of the two attesting witnesses, especially when the executant had not denied the execution of the documents. He further submitted that the possession was handed over to appellant No..1 who thereafter raised construction on the said properly by obtaining loan from the bank and also rented out the said property.

4. Learned counsel for the respondent on the other hand submitted that the said suit was filed in the year 2003 after the death of the donor i.e., Syed Maqbool Shah and that the execution of the Gift Deeds by the deceased has been specifically denied in the plaint. He further submitted that three ingredients of gift had to be independently proved and the appellants have failed to do so.

5. We have heard the parties at some length and have gone through the record of the case. Three questions that require examination are (1) whether two attesting witnesses were required to prove the execution of the registered Gift Deeds, in the present case? (2) whether, denial of execution of the document, under the proviso to Article 79 of the Order, has to be by the executant or can it be by any party to the suit, whose interest is affected by the document? and (3) whether the essential requirements of gift were independently established ?

6. Respondent (plaintiff) has specifically pleaded in the plaint that appellant No. 1 through his chicanery and deceit got the Gift Deeds registered and attested on behalf of Syed Maqbool Shah (alleged donor), hence the Deeds are illegal having no effect on the rights of the respondent. Article 79 of the Order provides as follows;

> **79. PROOF OF EXECUTION OF DOCUMENT REQUIRED BY LAW TO BE ATTESTED.--** If a document is required by law to be attested, it shall not be used as evidence until two attesting witnesses at least have been called for the purpose of proving its execution, if there be two attesting witnesses alive, and subject to the process of the Court and capable of giving evidence:
>
> Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied: (emphasis supplied)

This Article deals with proof of a document. that requires attestation under the law. The proviso to the Article relaxes the requirement of calling the two attesting witnesses to prove the execution of the document, if the document is duly registered in accordance with the provisions of Registration Act, 1908 and its execution is not specifically denied. In other words, the party is relieved of the duty of calling the two witnesses but not from the duty of proving the execution of the registered document. The effect of the proviso is that the due execution and attestation of the gift deed will have to be proved, although it may be proved by calling a person other than an attesting witness. This relaxation is pillared on an important

assumption that the execution of the document is not denied. Article 79 is document specific and deals with the proof of documents that require attestation under the law. Therefore, denial of execution is also document specific. The part "unless its execution by the person by whom it purports to have been executed is specifically denied" deals with the denial of the execution of the document and simply elaborates that the denial is to the effect that it has not been executed by the person who purports to have executed it. The words by the person by whom it purports to have been executed go with the word "execution" and not with the words 'specifically denied." What has to be specifically denied is the execution. In other words, the facts constituting denial must show that the purported executant of the document never executed it. The specific denial is by the opposite party, i.e., the party against whom the document is sought to be proved, irrespective of whether he is or is not the executant of the document. The words "specifically denied" evidently mean specifically denied by the party against whom the document is sought to be used and not by the executant alone. The denial, therefore, has to come from the party who is entitled to dispute or is interested in disputing its execution. Thus, the denial of the execution of the document is not limited to the executant alone but is open to any party to the suit that is affected by the said document. For a similar view in. our jurisdiction, see Mst. Saleema Bibi v. Mst. Ramzan Bibi (2007 YLR 910) and Ghulam Bheek and others v. Mst. Salamat Bibi and others (2001 CLC 1078).

7. In this case the plaint slates that the Gift Deeds have not been executed by Syed Maqbool Shah, as they have been fraudulently procured and executed on his behalf by appellant No. 1. Admittedly two attesting witnesses to the Gift Deeds were not produced. The argument of the learned counsel for the appellants that the proviso to Article 79 of the Order applies to the present case, because the Gift Deeds are registered documents and there is no specific denial to the execution of the document by the executant, does not hold ground for the above reasons. The execution of the document, therefore, required the evidence of two attesting witnesses.

8. Secondly, the executant in this case died in January, 2003 before the filing of the suit in February, 2003. In case of death of the executant prior to the suit and in the face of the denial of the execution by the respondent (plaintiff), the requirement of two attesting witnesses cannot be dispensed with. Reliance is placed on Muhammad Iqbal Khan v. Mst. Farhat Nisa (PLD 2017 Lahore 727), Abdul Hameed v. Shamasuddin (PLD 2008 SC 140) and Abdul Ghqfoor v. Mukhtar Ahmad Khan (2006 SCMR 1144).

9. Three ingredients of gift include: (i) declaration/offer by the donor (ii) acceptance of gift by the donee and (iii) delivery of possession under the gift. See Mst. Rasheeda Bibi v. Mukhtar Ahmad (2008 SCMR 1384) and Mst. Nagina Begum v. Mst. Tahzim Akhtar (2009 SCMR 623). The declaration of gift and delivery of possession has to be established through independent evidence. See Islam-ud-Din v. Mst. Noor Jahan (2016 SCMR 986), Mst. Shafqat Parveen v. Muhammad Iftikhar Amjad (2012 SCMR 1602) and the case of Mst. Nagina Begum (supra). In the instant case, the first ingredient of gift, i.e., Declaration of gift, evidenced by the two Gift Deeds, falls to the ground, as the said Gift Deeds were not proved due to the absence of the two attesting witnesses. The second ingredient, i.e., Delivery of possession, means that the donor must deliver and divest the property in favour of the donee and establish the same through independent evidence. It is an admitted position that the donor till his death in 2003 was in possession of the property along with appellant No. 1. There is no evidence on the record to establish that appellant No. 1 took possession of the property, to the total exclusion of the donor. The exclusivity of delivery or the factum of complete divestiture in favour of appellant No.1 is not established. This factual position has been, concurrently, upheld by the courts below.

10. For the above reasons, we find no illegality of approach or infirmity in the appreciation of evidence or in the application of the law by the courts below. This appeal is, therefore, dismissed.

MWA/B-2/S Appeal dismissed.

**P L D 2018 Supreme Court 703**

**Present: Asif Saeed Khan Khosa, Ijaz ul Ahsan and Syed Mansoor Ali Shah, JJ**

**SUO MOTU CASE Re: the issue as to whether compounding of an offence under section 345, Cr.P.C. amounts to acquittal of the accused person or not.**

Suo Motu Case No. 3 of 2017, decided on 27th June, 2018.

**(a) Criminal Procedure Code (V of 1898)---**

----Ss. 345(6) & 338-E(1), first proviso---Penal Code (XLV of 1860), Chapt. XVI, [Ss.299 to 338-H]---Waiver or compounding of offence---Compromise with legal heirs---Effect---As a result of a successful and complete compounding of a compoundable offence in a case of Ta'zir under S.345, Cr.P.C., with permission or leave of the relevant court where required, an accused person or convict was to be acquitted by the relevant court which acquittal shall erase, efface, obliterate and wash away his alleged or already adjudged guilt in the matter apart from leading to setting aside of his sentence or punishment, if any---Obliteration and removal of the offence and its erasing and effacing from the record as a result of compounding had the effect of absolving the accused person or convict of the act, acquittal from the charge and clearance from the actual guilt---Acquittal or the effects of it in criminal law were necessarily relevant to guilt of a person and criminal jurisprudence and law did not envisage or contemplate removal of punishment while impliedly maintaining a person's guilt---All the offences affecting human body including murder and causing of hurt falling in Chap. XVI of the Pakistan Penal Code, 1860 were capable of being waived or compounded.

Chairman Agricultural Development Bank of Pakistan and another v. Mumtaz Khan PLD 2010 SC 695; English Synonymes Explained In Alphabetical Order; with Copious Illustrations and Examples by George Crabb, A. M. (published by William Clowes and Sons, London, 6th Edition, 1837); English Synonymes Explained In Alphabetical Order; with Copious Illustrations by George Crabb, A. M. (published by LEIPSIC, a New Edition, 1839); Crabb's English Synonymes by George Crabb, A. M. (published by Grosse and Dunlap Publishers, New York, 1917) and Webster's New International Dictionary of the English Language by William Allan Neilson, Thomas A. Knott, Paul W. Carhart (published by G. & C. Merriam Company Publishers, 2nd Edition, 1957) ref.

**(b) Criminal Procedure Code (V of 1898)---**

----S. 345---Compounding of offence---Principles.

Following are the principles relating to compounding of offence;

(i) A compounding could take place during the trial or during the pendency of an appeal or a revision petition and it could take place even before the case had reached the trial court for trial.

(ii) A complete compounding fulfilling the requirements of sub-section (1) or (2) of section 345,Cr.P.C., as the case may be, could not be withdrawn or resiled from by any party at any later stage because it had already created the effect of an acquittal of the accused person.

(iii) Composition of a compoundable offence not requiring permission of the court deprived the court of its jurisdiction to try the case or ousted the jurisdiction of the court to try the offence and the court had no other option but to acquit the accused person.

(iv) Composition of a compoundable offence not requiring permission of the court and grant of permission or leave to compound by the relevant court in cases where such permission or leave was required resulted in immediate acquittal of the accused person.

(v) In a case where a court had already convicted a person of a compoundable offence and had held him guilty, no compounding of the offence by the victim or his heirs with the convict could take

effect or could be said to be successful or complete unless the relevant appellate or revisional court granted leave to compound or allowed the proposed composition---Matter of granting or refusing leave to compound and allowing or disallowing the same laid in the discretion of the relevant court and before taking a decision in that regard the court concerned had to apply its judicial mind to the facts and circumstances of the case in their totality and also to consider desirability or otherwise of granting permission in that respect---Court had to keep in mind the spirit of the law and the requisite permission or leave to compound may ordinarily not be withheld or refused unless the facts and circumstances of the case persuade the relevant court otherwise---Composition of a compoundable offence was a concession extended by the legislature and also by the religion of Islam to the victims and their heirs and the same may not lightly be taken away or whittled down by the courts.

Kumarasami Chetty v. Kuppusami Chetty and others AIR 1919 Madras 879(2); Ram Richpal v. Mata Din and another AIR 1925 Lahore 159; Jhangtoo Barai and another v. Emperor (AIR 1930 Allahabad 409; Dharichhan Singh and others v. Emperor AIR 1939 Patna 141; Mt.Rambai wife of Bahadursingh v. Mt. Chandra Kumari Devi AIR 1940 Nagpur 181; Godfrey Meeus v. Simon Dular AIR (37) 1950 Nagpur 91; Prithvi Bhagat and another v. Birju Sada AIR 1962 Patna 316 and Naseem Akhtar and another v. The State PLD 2010 SC 938 ref.

In attendance

Syed Nayyab Hussain Gardezi, Assistant Attorney-General for Pakistan.

Tariq Mehmood Jahangiri, Advocate-General, Islamabad.

Qasim Ali Chauhan, Additional Advocate-Gneral, Punjab.

Shehryar Qazi, Additional Advocate-General, Sindh.

Zahid Yousaf Qureshi, Additional Advocate-General, Khyber Pakhtunkhwa.

Ayaz Khan Swati, Additional Advocate-General, Balochistan.

Date of hearing: 27th June, 2018.

**JUDGMENT**

**ASIF SAEED KHAN KHOSA, J.---**One Waheed Ahmad had allegedly murdered a person named Tariq Hussain on 05.06.2007 in a village in the area of Police Station Mangla Cantonment, District Jhelum and for committing the said offence he was booked in case FIR No. 68 registered at the said Police Station on the same day for an offence under section 302 of the Pakistan Penal Code, 1860 (P.P.C.). After a regular trial the said Waheed Ahmad was convicted by a learned Additional Sessions Judge, Jhelum on 19.02.2009 for an offence under section 302(b), P.P.C. and was sentenced to death as Ta'zir and to pay a sum of Rs. 1,00,000/- to the heirs of the deceased by way of compensation under section 544-A of the Code of Criminal Procedure, 1898 (Cr.P.C.) or in default of payment thereof to undergo simple imprisonment for six months. The said Waheed Ahmad challenged his conviction and sentence before the Lahore High Court, Rawalpindi Bench, Rawalpindi through Criminal Appeal No. 75 of 2009 which was heard by a learned Division Bench of the said Court along with Murder Reference No. 20/RWP of 2009 seeking confirmation of the sentence of death and vide judgment dated 22.05.2012 the appeal was dismissed, the conviction and sentence were upheld and the sentence of death was confirmed. The said Waheed Ahmad then filed Criminal Petition for Leave to Appeal No. 216 of 2012 before this Court wherein leave to appeal was granted by this Court on 06.07.2012 in order to reappraise the evidence in the interest of safe administration of criminal justice. As a result of grant of leave to appeal Waheed Ahmad preferred Criminal Appeal No. 328 of 2012 before this Court and during the pendency of that appeal Criminal Miscellaneous Application No. 185 of 2017 was filed seeking acquittal of the convict-appellant on the basis of a compromise with the heirs of Tariq Hussain

deceased and the matter of compromise was referred by this Court to the learned District and Sessions Judge, Jhelum for verification. The report dated 27.02.2017 submitted by the learned District and Sessions Judge, Jhelum in that regard confirmed the fact that a genuine, voluntary and complete compromise between the parties had been effected, the heirs of Tariq Hussain deceased had forgiven the convict-appellant, had waived their right of Qisas and had not claimed any Diyat in that respect. After going through the said report a 3-member Bench of this Court comprising of our learned brothers Amir Hani Muslim, Qazi Faez Isa and Sardar Tariq Masood, JJ. unanimously accepted Criminal Miscellaneous Application No. 185 of 2017 on 21.03.2017 and allowed the compromise between the parties but their lordships differed on how the main appeal was to be disposed of upon acceptance of the compromise. Writing for the majority Sardar Tariq Masood, J. disposed of the appeal in the following terms and Amir Hani Muslim, J. agreed with his lordship:

> "In this view of the matter, Criminal Miscellaneous Application No. 185 of 2017 filed under Section 345, Cr.P.C. is accepted and the compromise arrived at between the parties is allowed. As according to subsection (6) of Section 345 of the Code of Criminal Procedure, 1898, the composition of an offence shall have the effect of an acquittal, hence Criminal Appeal No. 328 of 2012 is allowed, the sentence of Waheed Ahmad (appellant) recorded and upheld by the courts below is set aside and he is acquitted of the charges on the basis of the compromise. He shall be released from jail forthwith if not required to be detained in connection with any other case."

Qazi Faez Isa, J., however, wrote a separate note on that occasion and the said note read as follows:

> "Whilst I agree with my learned brother that the application under section 345(6) of the Code of Criminal Procedure ("the Code") be accepted, I most respectfully cannot bring myself to agree that the convict/appellant be "acquitted of the charges on the basis of the compromise". Subsection (6) of section 345 of the Code does not envisage an acquittal, as it provides:
>
> "(6) The composition of an offence under this section shall have the effect of an acquittal of the accused with whom the offence has been compounded."
>
> 2. The appellant was convicted by the Additional Sessions Judge, Jhelum, under section 302(b) of the Pakistan Penal Code ("P.P.C.") for the murder of Tariq Hussain, and was sentenced to death. The Trial Court sent the Murder Reference to the Lahore High Court for confirmation under section 374 of the Code whilst the appellant/convict preferred an appeal under section 410 of the Code. The High Court dismissed the appeal of the appellant, confirmed the Murder Reference and the sentence of death awarded to the appellant/convict. The appellant then preferred a criminal petition for leave to appeal before this Court, which granted leave, "to reappraise the evidence available on record in the interest of safe administration of criminal justice". However, during the pendency of this appeal a compromise was effected by the appellant/convict with the legal heirs of the deceased.
>
> 3. Section 345 of the Code enables compounding of offences and sets out the methodology thereof. It mentions the offences punishable under the P.P.C. which can be compounded either before or after an accused is convicted. The table contained in subsection (1) of section 345 specifies, "persons by whom offences may be compounded". But, subsection (5) of section 345 stipulates that once an accused has been convicted, "no composition for the offence shall be allowed without the leave of the Court before which the appeal is to be heard". Undoubtedly, the prescribed offences can be compounded, but the composition of such offences has to be in terms of subsection (6) of section 345 which stipulates that, "the composition shall have the effect of an acquittal".

4. In my opinion "the effect of an acquittal" is different from an acquittal. The guilt of an accused, that is ascertaining whether the accused has committed the offence for which he is charged, is determined by the Trial Court. Once the guilt of the accused has been determined the judgment is delivered by the Court. The judgment has two components, conviction, which means he is guilty, and the sentence, which is the punishment awarded to him. If the legal heirs of the deceased compound the offence it does not mean that the appellant/convict was not guilty of the murder for which he was convicted, which would be the case if, as a consequence of allowing the composition, he is "acquitted". Subsection (6) of section 345 also avoids creating such a fiction as it provides that the "composition of an offence shall have the effect of an acquittal", which means that the punishment (sentence) part of the judgment is brought to an end; neither this subsection states, nor it could, that the convict is "acquitted of the charges". The verdict of guilt (the conviction part of the judgment) that the Trial Court had recorded could only have been undone by the High Court, failing which by this Court; it cannot be undone by the legal heirs of the murdered person.

5. The law permits the legal heirs of a murdered person to compound the offence with the convict, with or without receiving badal-i-sulh/diyat (sections 310 and 323 P.P.C.). When the legal heirs compounded the offence they elected not to seek retribution or the enforcement of the sentence. The very premise of compounding the offence is the acknowledgment of guilt by the accused who is then forgiven by the legal heirs; the affidavits filed by the legal heirs clearly also state this.

6. Section 338-F of the P.P.C. stipulates that in the interpretation and application of Chapter XVI ("Offences Affecting the Human Body") "and in respect of matters ancillary or akin thereto, the Court shall be guided by the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah". The aforesaid interpretation of subsection (6) of section 345 is in conformity with a number of verses of the Holy Qur'an: surah Al-Baqarah (2) verses 178-9, surah Al-Maidah (5) verse 45, surah Al-Isra (17) verse 33 and surah Ash-Shura (42) verse 40. In these verses our Merciful Creator suggests that forgiveness and reconciliation is preferable to revenge or retaliation. A person can only be forgiven if he is guilty. The cited verses neither state nor imply that the finding of guilt is effaced.

7. Therefore, whilst I agree with the conclusion reached by my learned brother that the application for compounding the offences be accepted, I cannot agree that as a consequence the appellant/convict should be "acquitted of the charges" and thus completely exonerated. However, since section 345(6) of the Code has not been examined and interpreted in the aforesaid manner therefore the Hon'ble Chief Justice is requested to take notice of this matter under Article 184(3) of the Constitution as it is a question of public importance involving the enforcement of Fundamental Rights. The office is directed to place the matter before the Hon'ble Chief Justice of Pakistan for appropriate orders."

The matter was thereafter put up before the Hon'ble Chief Justice of Pakistan and his lordship was pleased to pass the following order:

"Let the issue raised in the order by my learned brother Justice Qazi Faez Isa be taken up under Art. 184(3) of the Constitution and the matter be fixed before the bench headed by my brother Justice Asif Saeed Khan Khosa."

It is in the above mentioned background that the matter has been fixed for hearing before the present Bench today.

2. We have heard the learned Assistant Attorney-General for Pakistan, the learned Advocate-General for the Islamabad Capital Territory, the learned Additional Advocate-General, Punjab, the learned Additional Advocate-General, Sindh, the learned Additional Advocate-General, Khyber Pakhtunkhwa and the learned Additional Advocate-General, Balochistan at some length. They have all submitted in complete unison that in Islamic jurisprudence and in the system of administration of criminal justice in vogue in this country a composition of a compoundable offence leads to and results in acquittal of the accused person or convict concerned. They have also submitted that any confusion created by the words "effect of an acquittal" used in section 345(6), Cr.P.C. now stands removed by the word "acquit" used in the subsequently introduced first proviso to section 338-E(1), P.P.C. and its interpretation by this Court in the case of Chairman Agricultural Development Bank of Pakistan and another v. Mumtaz Khan (PLD 2010 SC 695).

3. The issue before us is as to whether a successful and complete compounding of an offence leads to acquittal of the accused person or convict from the allegation or charge or it is only to have an effect of acquittal which may be something short of or other than acquittal. After hearing the learned Law Officers and going through the relevant legal provisions and the precedent cases available on the subject we have explored and attended to the issue at hand from diverse angles and in the following paragraphs we embark upon an effort to find an answer to this question and to resolve the controversy.

4. Section 345, Cr.P.C. deals with compounding of offences and it provides as follows:

> **345. Compounding offences**. (1) The offences punishable under the sections of the Pakistan Penal Code specified in the first two columns of the table next following may be compounded by the persons mentioned in the third column of that table:-
>
> | **Offence** | **Sections of Penal Code applicable** | **Persons by whom offence may be compounded** |
> |---|---|---|
> | ------- ------ - | ------- ------- | ------- ------- |
>
> (2) Subject to subsection (7), the offences punishable under the sections of the Pakistan Penal Code specified in the first two columns of the table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that table:-
>
> | **Offence** | **Sections of Penal Code applicable** | **Persons by whom offence may be compounded** |
> |---|---|---|
> | ------- ------ - | ------- ------- | ------- ------- |
>
> (2-A) Where an offence under Chapter XVI of the Pakistan Penal Code, 1860 (Act XLV of 1860), has been committed in the name or on the pretext of karo kari, siyah kari or similar other customs or practices, such offence may be waived or compounded subject to such conditions as the Court may deem fit to impose with the consent of the parties having regard to the facts and circumstances of the case.
>
> (3) Where any offence is compoundable under this section, the abetment of such offence or any attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner.
>
> (4) When the person who would otherwise be competent to compound an offence under this section is under the age of eighteen years or is an idiot or a lunatic, any person competent to contract on his behalf may with the permission of the Court compound such offence.

(5) When the accused has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court before which the appeal is to be heard.

(5-A) A High Court acting in the exercise of its power of revision under section 439 and a Court of Session so acting under section 439-A, may allow any person to compound any offence which he is competent to compound under this section.

(6) The composition of an offence under this section shall have the effect of an acquittal of the accused with whom the offence has been compounded.

(7) No offence shall be compounded except as provided by this section and section 311 of the Pakistan Penal Code, 1860 (Act XLV of 1860).

A plain reading of this section shows that compounding of a compoundable offence may be possible before the trial, during the trial or even during the pendency of an appeal or a revision petition and that in some cases compounding of an offence does not require permission of the court whereas in some other cases permission or leave of the relevant court is required for composition. However, the question before us is not as to how a compounding is to take place with or without permission or leave of a court but the controversy before us is about the consequence after a valid compounding has taken place and for resolving the said controversy it is important to appreciate what compounding of an offence actually means.

5. Before we dig deep into the controversy at hand it may be advantageous to mention that there are shorter answers available to the questions involved in this matter and they may be recorded straightaway. Chapter XVI of the Pakistan Penal Code, 1860 deals with offences affecting human body including murder and causing of hurt and all such offences are compoundable by virtue of the provisions of section 309, P.P.C. (Waiver-Afw), section 310, P.P.C. (Compounding-Sulh) and section 345, Cr.P.C. Section 338-E(1), P.P.C. and the first proviso to the same (falling in Chapter XVI of the Pakistan Penal Code, 1860) provide as follows:

**338-E. Waiver or compounding of offences**. (1) Subject to the provisions of this Chapter and section 345 of the Code of Criminal Procedure, 1898 (V of 1898), all offences under this Chapter may be waived or compounded and the provisions of sections 309 and 310 shall, mutatis mutandis, apply to the waiver or compounding of such offences:

Provided that, where an offence has been waived or compounded, the Court may, in its discretion having regard to the facts and circumstances of the case, acquit or award ta'zir to the offender according to the nature of the offence. -------

(bold letters have been supplied for emphasis)

These provisions show, and show quite clearly, that all the offences affecting human body including murder and causing of hurt falling in Chapter XVI of the Pakistan Penal Code, 1860 are capable of being waived or compounded and that in case of waiver or compounding of such offences the court concerned, after granting the discretionary permission or leave to compound where necessary, is to acquit the person accused or convicted if it is a case of Ta'zir but in a case of Qisas it has a discretion either to acquit or to pass a sentence of Ta'zir against the accused person or convict in view of the peculiar facts and circumstances of the case. It has already been clarified by this Court in the case of Zahid Rehman v. The State (PLD 2015 SC 77) that the discretion to punish by way of Ta'zir under section 311, P.P.C. and other similar provisions after waiver or compounding of the right of Qisas is relevant only to cases of Qisas and not to cases of Ta'zir. It is true that section 345(6), Cr.P.C. does not speak of "acquittal" as a consequence of compounding of an offence and it only speaks of the "effect of an acquittal" but it is now clear through the subsequently introduced section 338-E, P.P.C. that a compounding of a compoundable offence in a case of Ta'zir is to

lead to acquittal of the accused person or convict. When the law itself, as it stands today, speaks of acquittal as a consequence of compounding of an offence then any ambiguity in that regard created by the previous state of the law may not confound us anymore.

6. Another short answer to the core question involved in this matter is available in the judgment handed down by this Court in the case of Chairman Agricultural Development Bank of Pakistan and another v. Mumtaz Khan (PLD 2010 SC 695) involving the same issue which is under our consideration in the present matter. In that case the respondent was an employee of a Bank and on account of his involvement in and conviction for an offence of murder he was removed from service but later on he was acquitted on the basis of a compromise with the heirs of the deceased and a question arose as to whether a compromise or compounding could validly be treated as acquittal or not for the purposes of his reinstatement in service of the Bank. This Court had categorically held in that case that compounding of an offence through a court in a case of Ta'zir amounted to an acquittal and speaking for the Court on that occasion one of us (Asif Saeed Khan Khosa, J.) had observed as follows:

> "7. ------- After introduction of the Islamic provisions in the Pakistan Penal Code, 1860 it has now also become possible for an accused person to seek and obtain his acquittal in a case of murder either through waiver/Afw under section 309, P.P.C. or on the basis of compounding/Sulh under section 310, P.P.C. In the case of waiver/Afw an acquittal can be earned without any monetary payment to the heirs of the deceased but in the case of compounding/Sulh an acquittal may be obtained upon acceptance of Badal-i-Sulh by the heirs of the deceased from the accused person. In the present case the respondent had been acquitted of the charge of murder by the learned Sessions Judge, Lakki Marwat as a result of compounding of the offence and such compounding had come about on the basis of acceptance of Badal-i-Sulh by the heirs of the deceased from the respondent. -------

8. The provisions of the first proviso to subsection (1) of section 338-E, P.P.C. clearly contemplate acquittal of an accused person on the basis of compounding of an offence by invoking the provisions of section 310, P.P.C. and the effect of such compounding has also been clarified in most explicit terms by the provisions of subsection (6) of Section 345, Cr.P.C. in the following words:

> "The composition of an offence under this section shall have the effect of an acquittal of the accused with whom the offence has been compounded."
>
> 9. The legal provisions mentioned above leave no ambiguity or room for doubt that compounding of an offence of murder upon payment of Badal-i-Sulh -------and that such compounding of the offence leads to nothing but an acquittal of the accused person. It has already been clarified by this Court in the case of Dr. Muhammad Islam v. Government of N-W.F.P. through Secretary Food, Agricultural, Live Stock and Cooperative Department, Peshawar (1998 SCMR 1993) as follows:
>
> "We are inclined to uphold the above view inasmuch as all acquittals even if these are based on benefit of doubt are honourable for the reason that the prosecution has not succeeded to prove their cases against the accused on the strength of evidence of unimpeachable character. It may be noted that there are cases in which the judgments are recorded on the basis of compromise between the parties and the accused are acquitted in consequence thereof. What shall be the nature of such acquittals? All acquittals are certainly honourable. There can be no acquittals, which may be said to be dishonourable. The law has not drawn any distinction between these types of acquittals."
>
> The said precedent case also involved a question of reinstatement in service of an accused person implicated in a criminal case who had been acquitted by the criminal court and this Court had

declared that an acquittal had no shades and there was no concept of honourable or dishonourable acquittals. It had specifically been noted by this Court in that case that there could also be cases involving acquittals on the basis of compromise between the parties and after raising a query regarding the status of such acquittals this Court had hastened to add that "All acquittals are certainly honourable". -------

10. ------- Be that as it may, an ultimate acquittal in a criminal case exonerates the accused person completely for all future purposes vis- -vis the criminal charge against him as is evident from the concept of autrefois acquit embodied in section 403, Cr.P.C. and the protection guaranteed by Article 13(a) of the Constitution of the Islamic Republic of Pakistan, 1973 and, according to our humble understanding of the Islamic jurisprudence, Afw (waiver) or Sulh (compounding) in respect of an offence has the effect of purging the offender of the crime. In this backdrop we have found it difficult as well as imprudent to lay it down as a general rule that compounding of an offence invariably amounts to admission of guilt on the part of the accused person -------."

(underlining has been supplied for emphasis)

7. Delving deeper into the issue we note that the concept of compounding of an offence, also termed as composition of an offence, is an old concept recognized not only in the Islamic law and the Pakistan Penal Code, 1860 but also in the Anglo-Saxon jurisprudence. In his book An Introduction to the Philosophy of Law (revised edition 1954) Roscoe Pound had observed about the concept of composition of an offence as follows:

"The first theory of liability was in terms of a duty to buy off the vengeance of him to whom an injury had been done whether by oneself or by something in one's power. The idea is put strikingly in the Anglo-Saxon proverb, 'Buy spear from side or bear it', that is, buy off the feud or fight it out. --- As the social interest in peace and order - the general security in its lowest terms - comes to be secured more effectively by regulation and ultimate putting down of feud as a remedy, payment of composition becomes a duty rather than a privilege --- The next step is to measure the composition not in terms of the vengeance to be bought off in terms of the injury. A final step is to put it in terms of reparation."

In Black's Law Dictionary (Ninth Edition) the definition of 'composition' includes "A payment of money or chattels as satisfaction for an injury. In Anglo-Saxon and other early societies, a composition with the injured party was recognized as a way to deter acts of revenge by the injured party." In the same dictionary the definition of 'Compound' includes "To agree for consideration not to prosecute (a crime)". The meaning of the word 'Compound' in The Concise Oxford Dictionary of Current English (Ninth Edition) includes "settle (a debt, dispute, etc.) by concession or special agreement", "condone (a liability or offence) in exchange for money etc.", "forbear from prosecuting (a felony) from private motives" and "come to terms with a person, for forgoing a claim etc. for an offence". In Pakistan the Islamic concepts of Afw and Sulh (two different ways of compounding an offence which is made compoundable by the legislature) are an important part of our criminal law and in cases of murder and causing of hurt sections 309, 310 and 338-E, P.P.C. provide for Waiver-Afw (forgiveness without accepting any compensation) and Compounding-Sulh (compounding on accepting badal-i-sulh/compensation) and section 345, Cr.P.C. provides the mechanism for such compounding. According to Islamic jurisprudence Afw and Sulh are based upon forgiveness and reconciliation and in his lordship's separate note dated 21.03.2017 passed in this very matter our learned brother Qazi Faez Isa, J. had referred to the Verses of the Holy Qur'an [Surah Al-Baqarah (2) Verses 178-9, Surah Al-Maidah (5) Verse 45, Surah Al-Isra (17) Verse 33 and Surah Ash-Shura (42) Verse 40] wherein

our Merciful Creator has suggested that forgiveness and reconciliation is preferable to revenge or retaliation. Without burdening this judgment with copious references in that regard it may suffice to state for the present purposes that the Islamic scholars around the globe agree that Afw (forgiveness) means to hide an act, to obliterate, remove and pardon it and to erase and efface it from the record as if it had never been committed and, likewise, Sulh (reconciliation) means that the act or offence is forgiven and forgotten as if it had never happened. In his A Dictionary of Islam (The Unit Printing Press, Lahore, 1964) Thomas Patrick Hughes had recorded as follows:

> "AFU. Lit. "erasing, cancelling." The word is generally used in Muhammadan books for pardon and forgiveness. It occurs eight times in the Qur'an, e.g. Surah ii. 286, "Lord, make us not to carry what we have not strength for, but forgive us and pardon us and have mercy on us." Surah iv. 46, "Verily God pardons and forgives."
>
> `Al-'Afu is one of the ninety-nine special names of God. It means "one who erases or cancels;" "The Eraser (of sins)." See Qur'an, Surah iv. 51."

8. According to various dictionaries of English language, reference to which may not be necessary here, setting free from guilt, sin or penalty and forgiveness of an offence is also termed as absolution or absolving of the person concerned. As a consequence of Afw or Sulh resulting in obliteration and removal of the offence and its erasing and effacing from the record the accused person or convict stands absolved of what had been done by him or of what was attributed to him and such absolving effect of the act of compounding is recognized in the following treatises:

> English Synonymes Explained In Alphabetical Order; with Copious Illustrations and Examples by George Crabb, A. M. (published by William Clowes and Sons, London, 6th Edition, 1837):
>
> "To ABSOLVE, ACQUIT.
>
> ABSOLVE, in Latin absolvo, is compounded of ab from and solvo to loose, signifying to loose from that with which one is bound. ACQUIT, in French acquitter, is compounded of the intensive syllable ac or ad, and quit, quitter, in Latin quietus quite, signifying to make easy by the removal of a charge.
>
> These terms imply the setting free from guilt or its consequences. Absolving may sometimes be applied to offences against the laws of man, but more frequently to offences against God; acquitting applies solely to offences against man. The conscience is released by absolution; the body, goods, or reputation, are set free by an acquittal.
>
> Yet to be secret, makes not sin the less;
> 'Tis only hidden from the vulgar view,
> Maintains indeed the reverence due to princes,
> But not absolves the conscience from the crime. DRYDEN.
>
> The fault of Mr. Savage was rather negligence than ingratitude; but Sir Richard Steele must likewise be acquitted of severity; for who is there that can patiently bear contempt from one whom he has relieved and supported? JOHNSON.
>
> To ABSOLVE, ACQUIT, CLEAR.
>
> ABSOLVE in this case, as distinguished from the former article, (v. To absolve,) is extended to all matters affecting the conscience generally. ACQUIT (v. To absolve, acquit) and CLEAR in the sense of making clear or free from, are applied to everything which may call for blame, or the imputation of what is not right. A person may be absolved from his oath, acquitted or pronounced quit of every charge, and cleared from every imputation.

Compell'd by threats to take that bloody oath

And the act ill, I am absolv'd by both. WALKER.

Those who are truly learned will acquit me in this point, in which I have been so far from offending, that I have been scrupulous perhaps to a fault in quoting the authors of several passages which I might have made my own. ADDISON.

He set himself with very great zeal to clear the Romish church of idolatry. BURNET."

English Synonymes Explained In Alphabetical Order; with Copious Illustrations by George Crabb, A. M. (published by LEIPSIC, a New Edition, 1839):

"To ABSOLVE, ACQUIT, CLEAR.

ABSOLVE, in Latin absolvo, is compounded of ab from and solvo to loose, signifying to loose from that with which one is bound.

ACQUIT, in French acquitter, is compounded of the intensive syllable ac or ad, and quit, quitter, in Latin quietus quite, signifying to make easy by the removal of a charge.

These 2 words convey an important distinction between the act of the Creator and the creature.

To absolve is the free act of an omnipotent and merciful being towards sinners; to acquit is the act of an earthly tribunal towards supposed offenders.

By absolution, we are released from the bondage of sin and placed in a state of favour with God; by an acquittal we are released from the charge of guilt, and reinstated in the good estimation of our fellow creatures.

One is absolved from an oath, acquitted of a charge, and cleared from actual guilt.

Absolve is also sometimes used in the sense of setting free from a charge, as from an obligation in which sense it comes still nearer to the words acquit and clear; but it is thus used mostly in the grave style, and carries with it the idea of setting one altogether free from the consequences of a charge."

Crabb's English Synonymes by George Crabb, A. M. (published by Grosset & Dunlap Publishers, New York, 1917):

"ABSOLUTION. See FORGIVE.

ABSOLVE, ACQUIT. Absolve, in Latin absolvo, is compounded of ab, from, and solvere, to loose, signifying to loose from that with which one is bound. Acquit, in French acquitter, is compounded of the intensive syllable ac or ad, and quit, quitter, from Latin quietus, quite, signifying to make easy by the removal of a charge.

These terms imply the setting free from guilt or its consequences. Absolving may sometimes be applied to offences against the laws of man, but more frequently to offences against God; acquitting applies solely to offences against man. The conscience is released by absolution; the body, goods, or reputation are set free by an acquittal.

See also FORGIVE.

Absolve, Acquit, Clear. - Absolve in this case, as distinguished from the former article, is extended to all matters affecting the conscience generally. Acquit and clear, in the sense of making clear or free from, are applied to everything which may call for blame, or the imputation of what is not right. A person may be absolved from his oath, acquitted or pronounced quit of every charge, and cleared from every imputation."

Webster's New International Dictionary of the English Language by William Allan Neilson, Thomas A. Knott, Paul W. Carhart (published by G. & C. Merriam Company Publishers, 2nd Edition, 1957):

"Ab-solve'

1. To set free, or release, as from some obligation, debt, or responsibility, or from the consequences of guilt or from such ties as it would be guilt to violate; to pronounce free; as, to absolve a subject from his allegiance.

2. To acquit; to adjudge or pronounce not guilty.

Halifax was absolved by a majority of fourteen. Macaulay.

3. To free from a penalty; to pardon; remit (a sin); - said of the sin or guilt.

In his name I absolve your perjury. Gibbon.

4. To finish; accomplish.

The work begun, how soon absolved. Milton.

5. To resolve or explain, as a difficulty. Obs.

Syn. - Exonerate, discharge, forgive.

See EXCULPATE."

The material mentioned above shows that obliteration and removal of the offence and its erasing and effacing from the record as a result of compounding has the effect of absolving the accused person or convict of the act, acquittal from the charge and clearance from the actual guilt and the legislature in 1898, when section 345, Cr.P.C. was introduced, was aware of the fact that in English language as well as in legal literature the word 'absolve' was synonymous with the words 'acquit' and 'clear'. The legislature was cognizant of the legal position at that time that compounding of an offence ipso facto amounted to absolution which automatically had the effect of acquittal from the charge and clearance from guilt and, therefore, there was hardly any occasion for the legislature to provide in section 345, Cr.P.C. that upon a successful composition of an offence the accused person or convict would be acquitted by the court concerned. It was already understood quite well that compounding of an offence would have an automatic "effect of an acquittal" and that was exactly what was legislated through section 345(6), Cr.P.C. and no need was felt to expressly provide for an order of acquittal to be passed by a court on the basis of compounding.

9. A successful and complete composition of a compoundable offence having the "effect of an acquittal" in terms of section 345(6), Cr.P.C. came under discussion in the cases of Kumarasami Chetty v. Kuppusami Chetty and others (AIR 1919 Madras 879(2)), Ram Richpal v. Mata Din and another (AIR 1925 Lahore 159), Jhangtoo Barai and another v. Emperor (AIR 1930 Allahabad 409), Dharichhan Singh and others v. Emperor (AIR 1939 Patna 141), Mt. Rambai wife of Bahadursingh v. Mt. Chandra Kumari Devi (AIR 1940 Nagpur 181), Godfrey Meeus v. Simon Dular (AIR (37) 1950 Nagpur 91) and Prithvi Bhagat and another v. Birju Sada (AIR 1962 Patna 316) and the ratio decidendi of the said cases is summed up as follows:

(i) A compounding can take place during the trial or during the pendency of an appeal or a revision petition and it can take place even before the case has reached the trial court for trial.

(ii) A complete compounding fulfilling the requirements of sub-section (1) or (2) of section 345, Cr.P.C., as the case may be, cannot be withdrawn or resiled from by any party at any later stage because it has already created the effect of an acquittal of the accused person.

(iii) Composition of a compoundable offence not requiring permission of the court deprives the court of its jurisdiction to try the case or ousts the jurisdiction of the court to try the offence and the court has no other option but to acquit the accused person.

(iv) Composition of a compoundable offence not requiring permission of the court and grant of permission or leave to compound by the relevant court in cases where such permission or leave is required result in immediate acquittal of the accused person.

(v) In some of the above mentioned cases acquittal of the accused person was ordered on the basis of successful and complete composition rather than observing that the composition would only have the effect of an acquittal.

All the above mentioned precedent cases had been taken notice of by this Court in the case of Tariq Mehmood v. Naseer Ahmed and others (PLD 2016 SC 347) but the issue relating to compounding of an offence involved in that case was different from the one under discussion here.

10. In the context of the issue at hand it is of critical importance to notice that the heading of section 345, Cr.P.C. is 'Compounding of offences' and the said heading itself says it all that we are trying to find out. A compounding is in respect of the offence regarding which a person has been accused or convicted and it has no direct relevance to his guilt or punishment or even to his conviction or sentence and this is more so because a compounding can take place even before any finding of guilt or conviction is recorded. Through compounding the offence itself is compounded and resultantly the accused person or convict ipso facto stands absolved of the allegation levelled or the charge framed against him regarding commission of that offence and that is why there is no need for recording his acquittal in that connection because through the act of compounding the offence itself has disappeared or vanished. As already mentioned above, in English language the words "absolve", "acquit" and "clear" are synonymous words and can be used interchangeably in the context of criminal law and this was so acknowledged in the treatises referred to hereinbefore.

11. We find that the controversy over "acquittal" and "effect of an acquittal" in the context of section 345(6), Cr.P.C. and drawing a distinction in this regard between guilt and punishment may be quite unnecessary because for all practical purposes an acquittal or any other dispensation having the effect of an acquittal may not make any difference to the parties to the case or the system of administration of justice in the larger context. An acquittal of an accused person or convict from an allegation or charge of committing an offence entails that he cannot again be subjected to investigation in connection with the same allegation, he cannot be arrested, prosecuted or punished again for committing the same offence and the principle of autrefois acquit enshrined in Article 13(a) of the Constitution of Pakistan and also in section 403, Cr.P.C. becomes applicable to him. The acquittal of an accused person or convict also leads to his release from custody if he is in confinement and discharge of his bail bonds and sureties if he is on bail. Such consequences of an acquittal of an accused person or convict can also quite conveniently be called or termed as effects of his acquittal. In this backdrop the only rationale we can decipher as to why the legislature spoke of "effect of an acquittal" in the context of compounding of an offence and did not use the word "acquittal" in section 345(6), Cr.P.C. is that it could not employ or utilize the word acquittal in that context because an acquittal can be ordered in connection with an existing allegation or charge but where the allegation or the charge itself has disappeared, evaporated or vanished or it stands erased or effaced on account of composition of the offence itself there is hardly any occasion for recording an acquittal. In case of such a metamorphosis brought about by a composition of the offence the best that the legislature could do was to extend all the benefits and effects of an acquittal to the concerned person and this is exactly what had been done by it through the provisions of section 345(6), Cr.P.C.

12. The issue regarding compounding being relevant only to punishment and not to guilt of the accused person or convict may also be viewed from the angle of conviction and sentence and we note in that context that in the Code of Criminal Procedure, 1898 the legislature was quite conscious of the distinction between a conviction and a sentence or, in other words, between guilt and punishment. Section 412, Cr.P.C. speaks of conviction and sentence separately and provides for a situation where relief may be extended only in the matter of sentence and not in the matter of conviction. Sections 169 and 249, Cr.P.C. speak only of an accused person's release pending an investigation or trial when he is in custody without making any mention of his guilt. In the same statute the legislature, if it was so minded, could have provided in section 345, Cr.P.C. that as a result of compounding of an offence the person concerned would be released from custody or that he would not be liable to any punishment but his guilt in the matter would stand undisturbed but the legislature did not say that. In that section the legislature did not even provide for release of the accused person or convict from custody or his acquittal as a consequence of compounding and such silence of the legislature in those regards was a silence which said it all when it mentioned that all the effects of acquittal would automatically flow from the compounding. Such effects of acquittal could not be ordered to flow from the compounding unless the compounding itself amounted to, without saying so, nothing but acquittal by operation of the law. It may be appreciated in this context that an acquittal or the effects of it in criminal law are necessarily relevant to guilt of a person and criminal jurisprudence and law do not envisage or contemplate removal of punishment while impliedly maintaining a person's guilt. Such an approach may be debated in theological or sociological contexts and that too only in an academic sense but for importing the same into criminal jurisprudence and law one would have to rewrite the same which exercise we are neither ready nor equipped or qualified to undertake.

13. The stance sometimes taken in favour of keeping the relevant person's guilt intact while doing away with his punishment on the basis of compounding of an offence is premised upon considerations other than legal. According to this stance such a person should be kept away from public offices and civil services, etc. because he is an adjudged criminal who was once found guilty of an offence but he got away with his punishment because of compounding of the relevant offence. In his separate note recorded in the case of Mureed Sultan and others v. The State through P. G. Punjab and another (2018 SCMR 756) our learned brother Qazi Faez Isa, J. had raised similar concerns in this regard as had been voiced by his lordship in his lordship's separate note dated 21.03.2017 recorded in the present matter. In the said case of Mureed Sultan and others our learned brother had observed as under:

> "7. Some may question the significance of the entire discussion, and enquire, if a court has accepted the application under section 345 of the Code and the convict has been released from jail what difference would his acquittal make. There are grave consequences. A man who has committed murder but is "acquitted" merely because the legal heirs of the murdered person compound the offence, would enable the murderer, for instance, to honestly declare on a job application that he is not and has never been a convict; he could thus be eligible to apply for government employment, be employed as a teacher, be inducted into the Armed Forces, enter the judicial service or even be appointed as a judge of the superior courts. There is then the religious aspect to the discussion. The person who has committed the sin of murder if he professes his guilt or is convicted in this world, and serves out his sentence or is released as a consequence of the legal heirs forgiving him, may be spared the agony of punishment in the Hereafter."

While appreciating the intensity and sincerity of the sentiment expressed and also the gravity of the concerns voiced by our learned brother in respect of different ramifications of the issue not only in the context of

public life in this world but also regarding the Hereafter we have, with utmost respect, not been able to bring ourselves to agree with his lordship so as to interpret the existing law in the light of some hypothetical possibilities in this world and retribution or redemption in the Hereafter. It is not for us to consider as to how such a person would be dealt with by Almighty Allah in the next world or on the Day of Judgment as our job is only to interpret and apply the law of the land as it exists. Our short response to such stance is that it is based upon nothing but good intentions and pious wishes, it stems from mere possibilities conjured up by a noble and public-spirited mind, it involves public policy and it is for the legislature to amend the relevant laws, etc. to keep such a person out of the public life, if it so desires and decides. Without introducing appropriate amendments in the criminal law in vogue in the country there is little scope for canvasing such collateral or incidental punishments for a person and as long as the law of the land stands as it is all the fruits and effects of acquittal have to be extended to such person on the basis of a complete and lawful compounding of the offence with him. Be that as it may, this Court has already rejected a similar argument based upon this very stance in the above mentioned case of Chairman Agricultural Development Bank of Pakistan and another v. Mumtaz Khan (PLD 2010 SC 695) with the following observations:

> "9. ------- It has already been clarified by this Court in the case of Dr. Muhammad Islam v. Government of N-W.F.P. through Secretary Food, Agricultural, Live Stock and Cooperative Department, Peshawar (1998 SCMR 1993) as follows:
>
> "We are inclined to uphold the above view inasmuch as all acquittals even if these are based on benefit of doubt are honourable for the reason that the prosecution has not succeeded to prove their cases against the accused on the strength of evidence of unimpeachable character. It may be noted that there are cases in which the judgments are recorded on the basis of compromise between the parties and the accused are acquitted in consequence thereof. What shall be the nature of such acquittals? All acquittals are certainly honourable. There can be no acquittals, which may be said to be dishonourable. The law has not drawn any distinction between these types of acquittals."

The said precedent case also involved a question of reinstatement in service of an accused person implicated in a criminal case who had been acquitted by the criminal court and this Court had declared that an acquittal had no shades and there was no concept of honourable or dishonourable acquittals. It had specifically been noted by this Court in that case that there could also be cases involving acquittals on the basis of compromise between the parties and after raising a query regarding the status of such acquittals this Court had hastened to add that "All acquittals are certainly honourable". If that be the case then the respondent in the present case could not be stigmatized or penalized on account of his acquittal on the basis of a compromise. -------.

> 10. As regards the submission made by the learned counsel for the appellants based upon the issue of propriety of reinstating in service a person who, by virtue of compounding of an offence of murder, is a self-condemned murderer we may observe that we have pondered over the said issue from diverse angles and have not felt persuaded to agree with the learned counsel for the appellants. Experience shows that it is not always that a compromise is entered into by an accused person on the basis of admission of guilt by him and in many cases of false implication or spreading the net wide by the complainant party accused persons compound the offence only to get rid of the case and to save themselves from the hassle or trouble of getting themselves acquitted from courts of law after arduous, expensive and long legal battles. Even in the present case the respondent and his brother were accused of launching a joint assault upon the deceased upon the bidding and command of their father and before the learned trial court the respondent's brother had maintained in

unequivocal terms that he alone had murdered the deceased and the respondent and their father had falsely been implicated in this case. Be that as it may, an ultimate acquittal in a criminal case exonerates the accused person completely for all future purposes vis- -vis the criminal charge against him as is evident from the concept of autrefois acquit embodied in section 403, Cr.P.C. and the protection guaranteed by Article 13(a) of the Constitution of the Islamic Republic of Pakistan, 1973 and, according to our humble understanding of the Islamic jurisprudence, Afw (waiver) or Sulh (compounding) in respect of an offence has the effect of purging the offender of the crime. In this backdrop we have found it difficult as well as imprudent to lay it down as a general rule that compounding of an offence invariably amounts to admission of guilt on the part of the accused person or that an acquittal earned through such compounding may have ramifications qua all spheres of activity of the acquitted person's life, including his service or employment, beyond the criminal case against him. We may reiterate that in the case of Dr. Muhammad Islam (supra) this Court had categorically observed that "All acquittals are certainly honourable. There can be no acquittals, which may be said to be dishonourable. The law has not drawn any distinction between these types of acquittals". The sway of those observations made by this Court would surely also encompass an acquittal obtained on the basis of compounding of the offence. It is admitted at all hands that no allegation had been levelled against the respondent in the present case regarding any illegality, irregularity or impropriety committed by him in relation to his service and his acquittal in the case of murder had removed the only blemish cast upon him. His conviction in the case of murder was the only ground on which he had been removed from service and the said ground had subsequently disappeared through his acquittal, making him reemerge as a fit and proper person entitled to continue with his service."

(underlining has been supplied for emphasis)

14. Ordinarily an acquittal recorded by a trial court in a criminal case means that the charge framed against an accused person in respect of committing an offence has not been proved and he is, thus, judicially exonerated from the allegation. In our country in some special circumstances provided for in sections 249-A and 265-K, Cr.P.C. an acquittal can also be recorded by a trial court even before framing of a formal charge where the allegation levelled is found to be groundless or there is no probability of the accused person's conviction even if a trial is conducted. After an accused person is convicted and sentenced by a trial court he can be acquitted by a higher Court through an appeal or a revision petition and upon such acquittal his conviction and sentence are set aside. Compounding or composition of an offence is, however, a distinct dispensation of its own kind and it has to be understood in its own context without mixing or confusing it with concepts of conviction, sentence and acquittal. The references made above to Roscoe Pound's book, Black's Law Dictionary and Concise Oxford Dictionary show that composition of an offence serves a purpose different from that ordinarily served by the judicial process, i.e. retribution through law. Instead of retribution a composition brings about reconciliation between the parties, it buys off the vengeance of him to whom an injury had been done by buying spear from side rather than bearing it, through it vengeance of the victim is bought off through reparation, it achieves satisfaction for an injury rather than punishment for the injury and it deters acts of revenge by the injured party. Likewise, to compound means to agree not to prosecute a crime, to settle a dispute by concession or special agreement, to condone an offence in exchange for money or any other consideration, to forbear from prosecuting a crime and to come to terms with a person for forgoing a claim, etc. for an offence. We understand that the true meanings and objects of the special dispensation of compounding or composition of offences are to be appreciated and

recognized in this context rather than in the narrow context of conviction, sentence and acquittal and this is probably why section 345(6), Cr.P.C. speaks of a composition to have the effect of an acquittal and does not speak of setting aside of conviction and sentence and the resultant acquittal from the charge.

15. Any controversy over the issue that a person's guilt already determined judicially cannot be undone by the victim or his heirs on their own has appeared to us to be misconceived as the same overlooks the provisions of subsections (5) and (5-A) of section 345, Cr.P.C. according to which

> (5) When the accused has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court before which the appeal is to be heard.
>
> (5-A) A High Court acting in the exercise of its power of revision under section 439 and a Court of Session so acting under section 439-A, may allow any person to compound any offence which he is competent to compound under this section.
>
> (bold letters have been supplied for emphasis)

It is, thus, obvious that in a case where a court has already convicted a person of a compoundable offence and has held him guilty there no compounding of the offence by the victim or his heirs with the convict can take effect or can be said to be successful or complete unless the relevant appellate or revisional court grants leave to compound or allows the proposed composition. The law, therefore, clearly envisages not only involvement but also decision of the relevant court in finalization of the proposed composition of offence in such a case and it cannot be said that guilt of the convicted person is undone by the victim or his heirs on their own. It goes without saying that the matter of granting or refusing leave to compound and allowing or disallowing the same lies in the discretion of the relevant court and before taking a decision in that regard the court concerned has to apply its judicial mind to the facts and circumstances of the case in their totality and also to consider desirability or otherwise of granting permission in that respect. This aspect of the matter had been considered by this Court in the case of Naseem Akhtar and another v. The State (PLD 2010 SC 938) and it was observed as under:

> "5. In the above context, the relevant parts of the section 345(5) and (7), Cr.P.C. are reproduced as below.
>
> S.345(5)
>
> "When the accused has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court before which the appeal is to be heard."
>
> S.345(7)
>
> "No offence shall be compounded except as provided by this section".
>
> Before proceeding to analyze the noted provision, it may be pertinent to mention here that the expressions "an appeal is pending" and "the Court" appearing ibid (section 345(5) for all intents and purposes of the law shall also mean the leave petition pending before this Court. Be that as it may, because of the use of word `No', in both the subsections the command of law is in the negative form, thus, the composition of an offence is prohibited lacking (without) the leave of the Court. As per the Black's Law Dictionary (Fifth Edition 801), the noted expression is defined to mean "Permission obtained from a Court to take some action which, without such permission, would not be allowable." Thus, the object requiring leave from the Court as per the clear intention of the legislature is neither meaningless nor purposeless and it cannot be construed that while considering the compromise plea, even of a compromise which is lawfully entered, by free consent of the legal heirs, the Court, should act in a mechanical manner and allow the same as a matter of course or routine; should sit as a silent spectator or to conduct as a post office simpliciter and affix a judicial

stamp upon it. Rather it is the duty and the prerogative of the Court to determine the fitness of the case for the endorsement and sanction of the compromise and in appropriate cases, where the compromiser and offender is directly or indirectly beneficiary of the crime; the offence is committed or is caused thereof, for an obvious object of grabbing the property of the deceased by the compromiser, through his off spring, who may ultimately benefits himself (the offender) as well, the Court may refuse to give an effect to such a deal, especially coupled with the scenario when the offence is gruesome, brutal, cruel, appalling, odious, gross and repulsive which causes terror and sensation in the society."

(underlining has been supplied for emphasis)

There is no dearth of authority in our country where compounding of offences had been refused by the courts in view of some peculiar features of those cases which fact clearly demonstrates that the ultimate decision whether a compounding of an offence (in serious cases requiring permission or leave of the court as opposed to less serious cases involving petty offences not requiring permission of the court for the purpose) is allowed or not lies with the courts and not with the victims or their heirs. The issues highlighted by our learned brother Qazi Faez Isa, J. and mentioned above may be relevant to the concerned court at the time of granting or refusing permission or leave in respect of the proposed composition but after such permission or leave has been granted by the court and the proposed composition is successfully completed the accused person or convict is to be acquitted and such acquittal is to entail all the fruits and effects of a lawful acquittal. This Court has already declared, as referred to above, that an acquittal has no shades and there are no honourable or dishonourable acquittals.

16. It may be appreciated in this context that the law of the land permits compounding of some offences and through the act of compounding the victim or his heirs absolve the accused person or convict of the guilt and if such composition is allowed or permitted by the relevant court, where required, then because of a successful and complete composition the offence itself vanishes leaving no issue about guilt or otherwise alive. An offence is generally against the State and the society at large but the legislature has made some of the offences compoundable which is a recognition that wishes of the victims or their heirs have an important role in prosecution of such offences and adjudication regarding guilt and punishment therein, subject of course to permission or leave of the court for composition where required. In some of the precedent cases referred to above it had categorically been held that once a composition is complete in respect of a compoundable offence not requiring permission of the court the concerned court is divested of its jurisdiction to try the case or the offence. The references made to Black's Law Dictionary and Concise Oxford Dictionary also amply demonstrate that to compound means to agree not to prosecute a crime, to settle a dispute by concession or special agreement, to condone an offence in exchange for money or any other consideration, to forbear from prosecuting a crime and to come to terms with a person for forgoing a claim, etc. for an offence. The decision not to prosecute a person for a compoundable offence allegedly committed by him or the decision to absolve him of his guilt even where it has been judicially determined are decisions which have been given by the legislature in the hands of the victims or their heirs by making the offence compoundable and in cases where permission or leave of a court is required for composition of such offence this spirit of the law is to be kept in view and the requisite permission or leave may ordinarily not be withheld or refused unless the facts and circumstances of the case persuade the relevant court otherwise. Carrying the spirit of composition (forgiveness and reconciliation) forward we may add that grant of the requisite permission or leave by the court in such cases should be a rule and its withholding or refusal an exception. Composition of a compoundable offence is a concession extended by the legislature

and also by the religion of Islam to the victims and their heirs and the same may not lightly be taken away or whittled down by the courts.

17. As a result of the discussion made above we declare the legal position as follows:

(i) As provided by the provisions of section 338-E(1), P.P.C. and the first proviso to the same and as already declared by this Court in the case of Chairman Agricultural Development Bank of Pakistan and another v. Mumtaz Khan (PLD 2010 SC 695) as a result of a successful and complete compounding of a compoundable offence in a case of Ta'zir under section 345, Cr.P.C., with permission or leave of the relevant court where required, an accused person or convict is to be acquitted by the relevant court which acquittal shall erase, efface, obliterate and wash away his alleged or already adjudged guilt in the matter apart from leading to setting aside of his sentence or punishment, if any.

(ii) In the context of the provisions of section 345(6), Cr.P.C. the effect of an acquittal recorded by a court on the basis of a successful and complete compounding of a compoundable offence shall include all the benefits and fruits of a lawful acquittal.

MWA/S-27/S Order accordingly.

**P L D 2018 Supreme Court 813**

**Present: Asif Saeed Khan Khosa, Maqbool Baqar and Syed Mansoor Ali Shah, JJ**

**MUHAMMAD ABID---Appellant**

**Versus**

**THE STATE and another---Respondents**

Criminal Appeal No.92-L of 2017, decided on 10th September, 2018.

(On Appeal from judgment of Lahore High Court, Lahore dated 18-11-2014, passed in Criminal Appeal No. 1133/2011 (CSR No.23-T/20111).

**(a) Penal Code (XLV of 1860)---**

----S. 302---Qatl-i-amd---'Last seen evidence'---Meaning and principles---Theory of last seen together was one where two persons were 'seen together' alive and after an interval of time, one of them was found alive and the other dead---Where the period between the two was short, presumption could be drawn that the person alive was the author of the other's death---Time gap between the sighting and the occurrence should be such as to rule out possibility of somebody else committing the crime---Foundation of the "last seen together" theory was based on principles of probability and cause and connection and required cogent reasons that the deceased in normal and ordinary course was supposed to accompany the accused; proximity of the crime scene; small time gap between the sighting and crime; no possibility of third person interference; motive; and time of death of victim---Circumstance of the deceased being last seen in the company of the accused was not by itself sufficient to sustain the charge of murder, but there must be evidence to link the accused with the murder of his companion, such as incriminating facts as recovery, strong motive and the proximate time when they were last seen together and the time when the deceased was killed---Last seen evidence as circumstantial evidence must be incompatible with the innocence of the accused and should be accepted with great caution, and it must be scrutinized minutely so that no plausible conclusion should be drawn therefrom except guilt of the accused.

Rehmat v. State PLD 1977 SC 515; Muhammad Amjad v. State PLD 2003 SC 704; Deepak Chadha v.State 2012(1) JCC 540 and Fayyaz Ahmad v. State 2017 SCMR 2026 ref.

**(b) Penal Code (XLV of 1860)---**

----Ss. 302 & 365-A---Anti-Terrorism Act (XXVII of 1997), Ss. 7(a) & 7(e)--- Qatl-i-amd, kidnapping for ransom---Reappraisal of evidence---Benefit of doubt---'Last seen evidence'---According to the statement of witness who last saw the accused and victim together, the accused was last seen with the victim around 2:15 pm on 5-9-2010 while renting a motorcycle from his shop and then according to the same witness the accused returned the motorcycle at 3:30 pm the same day, but this time the victim was not with him---Said witness further stated that on the same day, the accused allegedly again rented the motorcycle at 5:00 pm to return it at 6:40 pm---Limited window from 2:15 pm to 3:30 pm on 5-9-2010 could be the probable time of crime in order to complete the continuous chain of events, but there was no evidence to establish the same---On the contrary, according to the FIR the call received by the complainant for ransom was at 7:15 pm on 5-9-2010 and as per statement of the complainant he received a similar call on 7-9- 2010---Both the calls implied that the victim was alive at the time---Facts and evidence on record did not draw up a chain of uninterrupted events connecting the accused with the alleged murder---Accused was, therefore, entitled to the benefit of doubt---Appeal was allowed, conviction and sentence of accused were set-aside and he was acquitted of the charge.

**(c) Penal Code (XLV of 1860)---**

----Ss. 302 & 365-A---Anti-Terrorism Act (XXVII of 1997), Ss. 7(a) & 7(e)--- Qatl-i-amd, kidnapping for ransom---Reappraisal of evidence---Benefit of doubt---Medical evidence---Post-mortem report---Stage of putrefaction---Exact time of death of victim was not fully certain---Dead body was recovered on 7-9-2010 and the Post Mortem Report conducted the same night described the external appearance of the dead body to be in advanced stage of putrefaction---Skin and soft tissues over the head, face and neck were completely decomposed---All viscera of skull, chest and abdomen were completely decomposed and soft tissues and muscles over the remaining body were in advanced stage of putrefaction---Advanced stage of putrefaction as described in the Post Mortem Report began five to ten days or more after death, therefore, the possibility of death of the victim prior to 5-9-2010, which was the date when the accused and victim were last seen together, could not be ruled out---Inquest Report was noticeably dated 7-8-2010, a month before the recovery of the dead body and nothing was on the record to show that the prosecution had moved the Trial Court or any Authority for the correction of the date---Said Report did not give any date or time of death---Accused was, therefore, entitled to the benefit of doubt---Appeal was allowed, conviction and sentence of accused were set-aside and he was acquitted of the charge.

Modi's Medical Jurisprudence and Toxicology ref.

**(d) Penal Code (XLV of 1860)---**

----Ss. 302 & 365-A---Anti-Terrorism Act (XXVII of 1997), Ss. 7(a) & 7(e)---Qatl-i-amd, kidnapping for ransom---Reappraisal of evidence---Benefit of doubt---Record of telephone calls---Crime report, as well as, the statement of the complainant referred to telephone calls received on two separate dates by an unknown person---No evidence on the record established that said calls were received by the complainant and were linked to the accused---Recovery memo of the mobile of the accused carried a SIM different from the number of the unknown caller mentioned in the FIR---In the absence of any such evidence, the alleged meeting of the complainant and the appellant for payment of ransom and the pointing out of the victim by the accused seemed improbable---Accused was, therefore, entitled to the benefit of doubt---Appeal was allowed, conviction and sentence of accused were set-aside and he was acquitted of the charge.

**(e) Penal Code (XLV of 1860)---**

----Ss. 302 & 365-A---Anti-Terrorism Act (XXVII of 1997), Ss. 7(a) & 7(e)---Qatl-i-amd, kidnapping for ransom---Reappraisal of evidence---Benefit of doubt---Recovery of ransom amount --- Bank notes of the ransom amount were not marked or signed by any Magistrate, hence its alleged recovery by the police becomes suspect---Accused was, therefore, entitled to the benefit of doubt---Appeal was allowed, conviction and sentence of accused were set-aside and he was acquitted of the charge.

Shahid Azeem, Advocate Supreme Court for Appellant.

Muhammad Jaffar, DPG, Punjab for the State.

Date of hearing: 10th September, 2018.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.--**This is a case of an un-witnessed murder, where one Muhammad Azhar alias Mithoo ("victim"), nine years of age, was done to death and his body, in advanced stage of putrefaction, was recovered by the Police on 07.9.2010.

2. The Crime Report (FIR No.400, Police Station B-Division, District Okara, registered on 05.9.2010 under sections 365-A and 302, P.P.C.) states that the deceased, son of the complainant, left the house around 2:30 pm on 5-9-2010 and did not return till evening. The complainant along with two others started searching for the victim but could not find him. The same evening, complainant received a call at 7:15 pm, on his mobile, from an unknown person saying that his son has been kidnapped and demanded ransom of

Rs.100,000/- against the return of his son. Subsequently, on 7-9-2010 the dead body of victim was recovered from the 'jawar' fields near Darbar Baba Jaddi Satti, Okara, whereupon the offence under section 302 was added.

3. The appellant after undergoing trial was convicted and sentenced to death under sections 365-A, 302(b), P.P.C. and 7(a),(e) Anti-Terrorism Act, 1997 by the trial court and the said conviction and sentence were upheld by the High Court through impugned judgment dated 18.11.2014.

4. Leave was granted in this case on 16.2.2017 to reappraise the evidence. With the assistance of learned counsel for the parties, we have examined the record of the case. Being an unseen occurrence, the case set out by the prosecution is based on circumstantial evidence in the form of last seen evidence, corroborated by the recovery of the ransom amount in the sum of Rs.100,000/- from the appellant and finally by the recovery of the body of the deceased.

5. Ocular account forming the last seen evidence is that the appellant was seen by PW-6 (Muhammed Naeem) at his shop with the victim at 2:15 pm on 05.9.2010 where he had come to rent a motorcycle and by PW-7 (Dildar Ahmed) at 2:20 pm on the same day when the appellant purchased petrol from his shop. The theory of last seen together is one where two persons are 'seen together' alive and after an interval of time, one of them is found alive and the other dead. If the period between the two is short, presumption can be drawn that the person alive is the author of the other's death. Time gap between the sighting and the occurrence should be such as to rule out possibility of somebody else committing the crime. The circumstance of the deceased being last seen in the company of the accused is not by itself sufficient to sustain the charge of murder. There must be evidence to link the accused with the murder of his companion, such as incriminating facts as recovery, strong motive and the proximate time when they were last seen together and the time when the deceased was killed. Last seen evidence as circumstantial evidence must be incompatible with the innocence of the accused and should be accepted with great caution. It must be scrutinized minutely so that no plausible conclusion should be drawn therefrom except guilt of the accused.

6. The foundation of the "last seen together" theory is based on principles of probability and cause and connection and requires 1. cogent reasons that the deceased in normal and ordinary course was supposed to accompany the accused. 2. proximity of the crime scene. 3. small time gap between the sighting and crime 4. no possibility of third person interference 5. motive. 6. time of death of victim. The circumstance of last seen together does not by itself necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime.

7. In the instant case we have observed that according to the statement of PW-6, the appellant is last seen with the victim around 2:15 pm on 5-9-2010 while renting a motorcycle from his shop and then according to the same witness the appellant returns the motorcycle at 3:30 pm the same day, this time the victim is not with him. On the same day, he again rents the motorcycle at 5:00 pm to return it at 6:40 pm. The limited window from 2:15 pm to 3:30 pm on 5-9-2010 could be the probable time of crime in order to complete the continuous chain of events, but there is no evidence to establish this. On the contrary, according to the FIR the call received by the complainant was at 7:15 pm on 5-9-2010 demanding ransom in return for the victim and as per statement of the complainant (PW-8) he received a similar call on 7-9-2010, both the calls imply that the victim was alive at the time.

8. The exact time of death is not fully certain. The dead body was recovered on 7-9-2010 and the Post Mortem Report conducted the same night described the external appearance of the dead body to be in "advanced stage of putrefaction. Skin and soft tissues over the head, face, neck completely decomposed (Only skeleton remains) .All viscera of skull, chest and abdomen completely autolysis (decomposed) soft

tissues, muscles over the remaining body are in advanced stage of putrefaction." This was also supported by the doctor in his statement as PW-1. According to Modi's Medical Jurisprudence and Toxicology. the process of putrefaction and its time frame is described as:

> In three to five days or more, the sutures of the skull, especially of children and young persons, are separated, the bones are loosened, and the liquefied brain runs out. The teeth become loose in their sockets and may fall off.
>
> The next stage of putrefaction is known as colliquative putrefaction, which begins from five to ten days or more after death. During this stage, the walls of the abdomen becomes softened, and burst open, protruding the stomach and intestine. The thorax, especially in children burst. The diaphragm is pushed upwards.
>
> If the putrefactive processes still go on, the tissues become soft, loose and are converted into a thick, semi-fluid, black mass. They ultimately separate from the bones, and fall off. The bones are consequently exposed, and the orbits are empty. The cartilages and ligaments are similarly softened, and ultimately the bones are destroyed, so that after some years no trace of body is left. The time taken up by these changes varies considerably with temperature and the medium in which the body lies.

(emphasis supplied)

The advanced stage of putrefaction as described in the Post Mortem Report begins five to ten days or more after death, therefore, the possibility of death of the victim prior to 5-9-2010 cannot be ruled out. The Inquest Report (Ex. PM) is noticeably dated 7-8-2010, a month before the recovery of the dead body. Column 3 of the said Report does not give any date or time of death. Nothing is on the record to show that the prosecution had moved the trial court or any authority for the correction of this date.

9. The Crime Report, as well as, the Statement of the complainant (PW-8) refers to telephone calls received on 5-9-2010 and 7-9-2010 by an unknown person. There is no evidence on the record to establish that these calls were received by the complainant and were linked to the appellant. The recovery memo of the mobile of the accused (Ex. PK) carries a SIM different from the number of the unknown caller mentioned in the FIR. In the absence of any such evidence, the alleged meeting of the complainant and the appellant for payment of ransom at Chak 49-2-L Dhayas and the pointing out of the victim by the accused seem improbable. It is, however, unimaginable that a person repeatedly demanding ransom has actually already murdered the victim. This also demolishes the motive of kidnapping for ransom. The bank notes of the ransom amount were not marked or signed by any Magistrate, hence its alleged recovery by the Police becomes suspect.

10. The above facts do not draw up a chain of uninterrupted events connecting the accused with the alleged murder. Last seen evidence and its constituents i.e., probability, cause and connection seem to be missing in this case. Appellant is, therefore, entitled to the benefit of doubt. We, therefore, allow this appeal and set aside the conviction and the sentence of the appellant. **He is acquitted of the charge in this case and ordered to be released forthwith**, if not required to be detained in any other case.

MWA/M-20/S Appeal allowed.

**P L D 2018 Supreme Court 845**

**[Supreme Judicial Council]**

**Present: Mian Saqib Nisar, Chairman, SJC, Asif Saeed Khan Khosa, Ejaz Afzal Khan, Muhammad Noor Meskanzai and Syed Mansoor Ali Shah, Members**

**ALI ANWAR GOPANG---Applicant**

**Versus**

**JUSTICE SHAUKAT AZIZ SIDDIQUI, JUDGE, ISLAMABAD HIGH COURT---Respondent**

Supreme Judicial Council No.242 of 2015, decided on 18th May, 2017.

(Reference under Article 209 of the Constitution).

**(a) Supreme Judicial Council Procedure of Inquiry, 2005---**

----Para. 13---Constitution of Pakistan, Arts. 4, 10A, 14, 25 & 209---Paragraph 13 of the Supreme Judicial Council Procedure of Inquiry, 2005, Vires of---Proceedings against a Judge of the High Court before the Supreme Judicial Council---Scope---Application seeking proceedings in open court---Plea of applicant/Judge of the High Court that holding in-camera proceedings in secret in terms of para. 13 of Supreme Judicial Council Procedure of Inquiry, 2005 was violative of the Fundamental Rights guaranteed to him under Arts. 4, 10A, 14 & 25 of the Constitution, therefore, para.13 should be declared to be ultra vires the Constitution---Validity---Supreme Judicial Council ("Council") was not a court---Proceedings before the Council did not determine the civil rights or criminal liabilities of a Judge against whom the proceedings were being conducted, therefore, the request for an open trial of the proceedings on the touchstone of Arts. 4, 10-A, 14 & 25 of the Constitution was not well founded---Furthermore, show cause notice was issued to the applicant along with the information and material against him; he had filed his reply thereto; the statement of allegations had been served upon him and the Attorney General had been required to conduct the reference---For the purposes of establishing the allegations contained in the complaint the affidavits of the witnesses who intended to depose in support of the complainant were to be filed through the Attorney General---Applicant was entitled to receive an advance copy of the affidavits, and the right to cross-examine the witnesses---All the documentary material brought on the record during the course of inquiry was also going to be delivered to the applicant, who would have the right to controvert such material---Applicant was also be entitled to produce oral and documentary material in support of his defence---Where the assistance of the Supreme Judicial Council was required, the same would be duly provided to the applicant---All said steps conformed to the utmost rules of fairness in proceedings, natural justice, transparency and due process of law---Paragraph 13 of the Supreme Judicial Council Procedure of Inquiry, 2005 was not ultra vires the Constitution, nor the proceedings conducted in the present manner would deny the applicant the right to defend himself in a robust and meaningful manner---Application was accordingly dismissed.

Zulfikar Ali Bhutto v. The State PLD 1979 SC 53; Mrs. Shahida Zahir Abbasi and 4 others v. President of Pakistan and others PLD 1996 SC 632; The President v. Justice Shaukat Ali PLD 1971 SC 585; Chief Justice of Pakistan Iftikhar Muhammad Chaudhary v. President of Pakistan through Secretary and others PLD 2010 SC 61 and George Meerabus v. The Attorney General of Belize [(2005) 2 AC 513 ref.

**(b) Supreme Judicial Council Procedure of Inquiry, 2005---**

----Para. 13---Constitution of Pakistan, Art. 209---Proceedings against a Judge of the High Court before the Supreme Judicial Council---In-camera proceedings---Proceedings before the Supreme Judicial Council not conducted in open court was in the larger interests of the judiciary, as the issues brought before the Supreme Judicial Council and the allegations levelled may ultimately turn out to be false, frivolous and vexatious.

The President v. Justice Shaukat Ali PLD 1971 SC 585 and Chief Justice of Pakistan Iftikhar Muhammad Chaudhary v. President of Pakistan through Secretary and others PLD 2010 SC 61 ref.

Hamid Khan, Senior Advocate Supreme Court (assisted by Honourable Murad Siddiqui and Ajmal Ghaffar Toor for Respondents.

Ashtar Ausaf Ali, Attorney General for Pakistan Moulvi Anwar-ul-Haq, Advocate Supreme Court (Assisted by Barrister Asad Rahim Khan and Salaar Khan Advocates (on Court's Notice).

Date of hearing: 18th May, 2017.

**ORDER**

**MIAN SAQ1B NISAR, CHAIRMAN.-**

**C.M.A.No.13/2017:**

The applicant is a Judge of the Islamabad High Court. Proceedings in terms of Ardcle 209 of the Constitution of the Islamic Republic of Pakistan, 1973 (the Constitution) are pending against him before the Supreme Judicial Council (SJC). He has moved an application that the proceedings be held in open Court. In this context he has challenged Paragraph 13 of the Supreme Judicial Council Procedure of Inquiry 2005 (the Procedure), which provides that proceedings be conducted in-camera. According to the applicant, despite the aforesaid paragraph, holding proceedings in secret is violative of the fundamental rights guaranteed to him by the Constitution. It is stated in the application and was argued by his counsel Mr. Hamid Khan, learned Sr. ASC, that any adverse recommendation made by the SJC against the applicant will form the basis of his removal from the constitutional office of a Judge, stigmatize the applicant (and his family) for the rest of his life, deprive him of his pensionary benefits and no right of appeal or review is available to him in case of an adverse report which will be final and conclusive for all intents and purposes. It was argued that Paragraph 13 notwithstanding, proceedings conducted in-camera against the applicant would be violative of the provisions of Articles 4, 10-A, 14 and 25 of the Constitution. Given the serious consequences of any adverse finding, the rule of proportionality weighs heavily in favour of open public proceedings. To conduct an open trial is not only a fundamental right of the applicant but a cardinal rule of administration of justice; thus as a matter of right and course the applicant is entitled to an open trial and holding of in-camera proceedings should be an exception. It was submitted that the applicant's case does not fall within any of the exceptions recognized by law for conducting in-camera proceedings, such as in matters pertaining to the rights of lunatics, minors, females or on account of public safety or the security of the country. It was also argued that justice must not only be done but must be seen to be done and this is only possible through an open trial. An open trial in the matter would provide comfort and confidence to the applicant that he had been judged by his peers in open proceedings so that in case there was no adverse finding against the applicant by the SJC, there would remain no doubt in the mind of the public that no case of misconduct was made out against the applicant and he would be able to conduct himself with full confidence. Conversely if there is no report and the proceedings are simply dropped, there would remain an element of doubt in the mind of the public. In support of his contentions, he relied upon on the judgments reported as Zulfikar Ali Bhutto v. The State (PLD 1979 SC 63) and Mrs. Shahida Zahir Abbasi and 4 others v. President of Pakistan and others (PLD 1996 SC 632). Learned counsel for the applicant at the very outset of his submissions, in the presence of his client, stated on his client's behalf and instructions that "I have full confidence in the Council if the proceedings are held in camera or in the open".

2. Heard. In Zulfiqar Ali Bhutto's case (supra), paragraph No.365 at page 179 provides as follows:-

> "365. It will thus be seen that it is an essential and salutary principle of administration of justice that it must not only be done but should also appear to be done. This necessarily carries with it the

> right to an open trial in the full gaze of the public, including the Press. This in turn leads to a healthy, fair and objective administration of justice calculated to promote public confidence in the Court and is conducive to dispel all misgivings about it. There can be no two opinions about it. But this rule, on all accounts, is not a rigid and inflexible one, and must not be pressed to its breaking point in defeating the very ends of justice. It admits of exceptions and cases may arise whereby following this rule for an open trial justice may itself be defeated. A Court of law exists for the administration of justice. The primary function and the ultimate goal before a Court is to do justice between the parties. However, as seen, above, there is no dearth of cases in which the very requirement of the administration of justice in itself demands that a trial may be held in private or in camera and an open public trial is likely to result in the stultification of justice. In this category are included cases within the parental jurisdiction of the Court for the safeguard of the interests of the ward or lunatics. But it is, nonetheless, not possible to prepare an exhaustive list of all such cases. In fact each case must be judged on its own facts in this respect. Indeed even the Legislature has also, in its wisdom, expressly provided for the holding of trials in camera under some of the statutes in force in this country."

Mrs. Shahida Zahir Abbasi's case (supra) at page 676 also refers to similar reasons for preferring an open trial "unless there are some very compelling reasons justifying the camera trial of the accused officer". As the case concerned a Court Martial, the eventual decision as to whether the trial ought to be conducted in-camera or open Court was left to the Court Martial itself. The rule which can be culled from the aforesaid judgments is that in cases pertaining to the determination of the civil rights or criminal liabilities of a person, ordinarily a case should be tried in open court, subject to the exceptions provided in these judgments or any other exception which may warrant in-camera proceedings in the specific facts and circumstances of the case or if specifically provided by law. Thus, irrespective of the consequences pointed out by Mr. Hamid Khan, the question is whether the proceedings before the SJC under Article 209 of the Constitution, are in the nature of determination of civil rights and/or criminal liabilities and whether this forum is a court. In this regard, the nature and the scope of the proceedings before the SJC has been succinctly expressed in The President v. Mr. Justice Shaukat Ali (PLD 1971 SC 585 at page 602) in the following words:-

> "Moreover, an inquiry into the conduct of a Judge is neither a criminal indictment nor even a quasi-criminal proceeding but it is, in our opinion, mainly an administrative proceeding conducted by a domestic forum to examine the professional fitness of a Judge. The subject-matter of these proceedings is neither civil rights and duties nor criminal liabilities. It is simply the conduct of a judge which is to be properly reviewed in the interest of the purity and honour of the judiciary. The forum consists of Judges of superior Courts who also belong to the same profession. To be tried by one's peers is a protection because they understand one's difficulties, problems and the situation in which one was. Doctors, architects, accountants and lawyers aim at having and have their domestic tribunals, that is to say, the tribunals which judge their conduct are manned by their own peers".

Mr. Justice Sheikh Shaukat Ali's case (supra) also provides an answer to the remarks made by Mr. Hamid Khan that the Procedure has no force of law because it has neither been framed under the Constitution nor any other law. In this context the judgment, at page 602, ibid provides:-

> "Learned counsel, in putting forward this extreme contention has unfortunately overlooked the fact that no procedure has been provided even for an inquiry into the conduct or capacity of a Judge, and thus the Supreme Judicial Council has been made the so+le judge of its own procedure. It can follow any procedure which is just and equitable."

In the judgment reported as Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan through Secretary and others (PLD 2010 SC 61) while examining the status and the nature of the proceedings before the SJC it was concluded that:--

> "96. The conclusion is thus inevitable that the Supreme Judicial Council is a forum created by the Constitution but the Constitution itself has refused to grant it the status of a court.
>
> 97. Although, having discovered the verdict of the Constitution itself about the status of the S.J.C., it may no longer be necessary to say anything more on the subject but it may be of some help to mention the further insight provided to us by the Constitution vis-a-vis the said issue. The proceedings which take place before the S.J.C. have been described, by Article 209 of the Constitution, as an inquiry and not a trial. It is too well known by now that an inquiry is only a fact-finding and not a right-determining exercise and further that the courts ordinarily hold trials and finally pronounce upon the rights of the parties if the proceedings were of a civil nature or declare the guilt or innocence of the accused persons if the proceedings were of a criminal or a quasi-criminal nature. The courts of law deliver judgments and pass orders which are final, enforceable and executable and do not submit reports. But according to clause (6) of the abovementioned Article 209, what is produced by the S.J.C. as a result of the proceedings taken by it is only a report which is to be submitted/sent to the President. Although the opinion of the SJC about the fitness of a Judge receives quietus but it has no power to make a final pronouncement which could PROPRIO VIGORE be binding on and create rights and obligations between the parties and consequently could not order removal of a Judge from office who is found unfit by it to hold the said office. In fact, as declared by this Court in the case of KHAN ASFAND YAR WALI (PLD 2001 SC 607) and in the case of MALIK ASAD (PLD 1998 SC 161), the findings of the S.J.C. and its report to the President were only "recommendatory in nature". It may be added that if the intention of the framers of the Constitution was to have the inquiry in question conducted by a court then it would be absurd to expect the Constitution to first create a Council and then to expect us to stretch all limits and confer the status of a court on the said Council for the said purpose when the same object could have been achieved by assigning the said task to an already existing court like it had been done through Article 169 of the 1956 Constitution which had cast this obligation on the Supreme Court itself with respect to the High Court Judges.
>
> 98. Having thus examined the relevant legal and constitutional provisions and also having surveyed the case law, I am of the opinion that the true status of the Supreme Judicial Council is the one suggested by Syed Sharif-ud-Din Pirzada, the learned Sr. ASC appearing for the President of Paldstan while placing reliance on MR. JUSTICE SHAUKAT ALI'S CASE (PLD 1971 SC 585 at 602) wherein the said status had been determined as under:-
>
> "Moreover, an inquiry into the conduct of a Judge is neither a criminal indictment nor even a quasi-criminal proceedings, but it is, in our opinion, mainly an ADMINISTRATIVE PROCEEDINGS conducted by a DOMESTIC FORUM to examine the professional fitness of a Judge. The subject-matter of these proceedings is neither civil rights and duties nor criminal liabilities. It is simply the conduct of a Judge which is to be properly reviewed in the interest of the purity and honour of the judiciary. The forum consists of judges of superior courts who also belong to the same profession. To be tried by one's peers is a protection because they understand one's difficulties, problems and the situation in which one was. DOCTORS, ARCHITECTS, ACCOUNTANTS AND LAWYERS

aim at having and have THEIR DOMESTIC TRIBUNALS, that is to say, the tribunals which judge their conduct are manned by their own peers." (Emphasis and underlining has been supplied)

99. Since nothing could be offered by Sahibzada Ahmed Raza Qasuri, ASC or even by Malik Muhammad Qayyum, ASC to come to any conclusion different from the one reached through MR. JUSTICE SHAUKAT ALI'S CASE, therefore, I agree with Syed Sharifud-Din Pirzada, Sr. ASC appearing for the President of Pakistan, with Mr. Makhdoom Ali Khan, the learned Attorney General for Pakistan and Mr. Aitizaz Ahsan, Sr. ASC for the petitioner and hold that while the Supreme Judicial Council may have some attributes and trappings of a court of law but it was neither intended by the Constitution to be a court nor, could any such status be conferred on it in view of the relevant constitutional provisions. It is, at best, a fact-finding domestic forum set up by the Constitution to look into the affairs of the Judges of the Superior Judiciary. 1 may, however, add that the said Council is entitled to the highest of respect because at least three of its members are the most senior Judges of the country. And before parting with this aspect of the matter, it may also be added that only because some holder of some public office or some forum stood blessed with the power to award punishment for contempt, was never by itself, sufficient to constitute such a person or a forum, as a court. Of the umpteen number of examples available in our corpus juris, I shall quote just one. The Federal Ombudsman (the Wafaqi Mohtisib) created under the Establishment of the Office of Wafaqi Mohtisib (Ombudsman) Order No.1 of 1983, has power to punish its contemnors vide Article 16 of the said Order but nobody has ever said that the Ombudsman was a court only because it could impose punishment for its contempt."

The ratio of the afore-quoted judgment(s) settles the issue about the scope and the nature of the proceedings conducted under Article 209 of the Constitution and the status of the SJC. Further, we came across a judgment of the Privy Council {George Meerabus v. The Attorney General of Belize [(2005) 2 AC 513]}, the brief facts of which are that a Judge of the Supreme Court of Belize was removed from office by the Governor-General on the advice of the Belize Advisory Council (BAC). He claimed that his rights under Sections 3(a), 6(1) and 6(8) of the Belize Constitution had been infringed and asked the Court to make a declaration to that effect and award damages. He raised two main pleas: firstly, regarding the bias of the BAC and secondly, that under the Constitution he was entitled to a public hearing of the matter which was denied to him by the BAC during the course of the inquiry conducted against him. Both these pleas were rejected by the Privy Council and the reason cited in the context of the latter plea is relevant for our purposes, that "The BAC is not part of the Judiciary. It is an independent body, uniquely constituted as part of the executive. The functions that are conferred on it are not judicial functions of the kind contemplated by section 6(8)". It was further held that though the Judge was entitled to a fair hearing but "Fairness does not always require such proceedings to be held in public...The question whether the proceedings are fair must be determined by looking at the proceedings as a whole."

3. In the light of the above we are of the view that the SJC is not a court; the proceedings before the SJC do not determine the civil rights or criminal liabilities of a Judge against whom the proceedings are being conducted. Therefore, the request for an open trial of the proceedings on the touchstone of Articles 4, 10-A, 14 and 25 of the Constitution is not well founded. We are also not persuaded to hold that after the inclusion of Article 10-A into the Constitution, the legal position has changed and that the SJC has attained the status of a court and that the proceedings before the SJC should be conducted like a civil or criminal trial. The contention that on account of in-camera proceedings any prejudice would be likely to be caused to the applicant is absolutely unfounded because firstly, full confidence in the SJC has been expressed by

the learned counsel for the applicant, as stated above. Besides, at the very beginning of the proceedings it was made clear to the applicant and. to Mr. Makhdoom Ali Khan, learned Sr. ASC representing him earlier, that the proceedings would be conducted in a fair and transparent manner and that the rules of natural justice would be duly observed. In this regard a show cause notice was issued to the applicant along with the information and material against him was also provided to him; he has filed his reply thereto; the statement of allegations has been served upon him and the learned Attorney General for Pakistan has been required to conduct the reference. For the purposes of establishing the allegations contained in the complaint the affidavits of the witnesses who intend to depose in support of the complainant will be filed through the learned Attorney General for Pakistan. The applicant will be entitled to receive an advance copy of the affidavits. He shall have the right to cross-examine the witnesses. All the documentary material brought on the record during the course of inquiry shall also be delivered to the applicant, who will have the right to controvert such material. He will also be entitled to produce oral and documentary material in support of his defence. If the assistance of the SJC is required, the same shall be duly provided to the applicant. All these steps conform to the utmost rules of fairness in proceedings, natural justice, transparency and due process of law. The only reason assigned in the application and propounded before us in support of the notion of an open trial was that only if the proceedings are made public will transparency and fairness be achieved: this, in our considered view is not well-founded. It is on account of the sanctity of the institution and the dignity of the applicant and other Judges whose matters are inquired into by the SJC that in-camera proceedings are expedient. It is in the larger interests of the judiciary that the proceedings are not conducted in open Court, as the issues brought before the SJC and the allegations levelled may ultimately be proved to be false, frivolous, vexatious. Thus, the holding of in-camera proceedings is absolutely in line with the principles laid down in the opinions of this Court in Mr. Justice Shaukat Ali (supra) and Chief Justice of Pakistan Iftikhar Muhammad Chaudhry (supra). Further, we do not find that Paragraph 13 supra is ultra vires the Constitution or that the proceedings conducted in the present manner would deny the applicant the right to defend himself in a robust and meaningful manner. Therefore we do not find any merit in this application which is accordingly dismissed.

MWA/A-20/S Application dismissed.

**2018 SCP 71**

**IN THE SUPREME COURT OF PAKISTAN**

**(Appellate Jurisdiction)**

**Present:**

**Mr. Justice Qazi Faez Isa**

**Mr. Justice Syed Mansoor Ali Shah**

Civil Appeal No.570-P of 2013.

*(on appeal from the judgment of Peshawar High Court, Peshawar dated 06.08.2013, passed in W.P No. 3750/2010.)*

Govt of KP thr. Secy Environment, Fisheries Deptt, etc

***Versus***

Roohullah and others

For the petitioners: Mian Arshad Jan, AAG

Respondent: N.R

Date of Hearing: 08.05.2018

JUDGMENT

**Syed Mansoor Ali Shah, J.-** The question before this Court is whether amendment brought about in Rule 7 of the North West Frontier Province Fisheries Rules, 1976 (**"the Rules"**) through sub-rule 1 (vii), is *ultra vires* the West Pakistan Fisheries Ordinance, 1961 (**"the Ordinance"**)?

2. The matter arises out of writ petition filed by the respondents before the Peshawar High Court, challenging the said amendment on the above score. The petition was allowed and the amendment was set aside through impugned judgment dated 06.08.2013.

3. Challenging the said judgment, learned AAG on behalf of the petitioners, argued that the Provincial Government is empowered under Section 26 of the Ordinance to make Rules for the

purpose of carrying into effect the provisions of the Ordinance. As the Ordinance relates to fisheries, the sale of "cooked or uncooked fish in commercial, market, shop, hotel," etc falls within the domain of the Ordinance, hence the impugned amendment is *intra vires* the Ordinance.

4. We have examined the question of law raised before us and have gone through the relevant law and the record of the case. The respondents are private individuals, who deal in the sale of cooked and uncooked fish at Ghantaghar Bazaar, Peshawar. However, in order to answer the question raised, we have to first examine the purpose, object and scope of the Ordinance.

5. In common parlance, "Fishery" means a place where fish are reared, or caught in numbers or the occupation or industry of catching or rearing fish[1]. In legal parlance, "fishery" means right or liberty of taking fish.[2] "Right of fishery," generally means the right of persons to fish in public waters, subject to federal and state restrictions and regulations, such as fishing seasons, licensing and catch limits.[3]

6. The Ordinance has been promulgated to regulate fisheries in the public waters in the Province. Under the Ordinance, right to catch fish in any public water can be leased out, subject to such conditions as may be prescribed. It further provides that no person shall use or employ for the capture of any species of fish specified in any water other than private water, or use any net or cage

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1 Concise Oxford English Dictionary. 12th Ed, p.536

2 Black's Law Dictionary, Ninth Edition, p. 712

3 ibid

or trap or other contrivance for taking fish or fixed engine[4] except during the period permitted, in respect of such species, through a license issued under the Ordinance (see section 9). Regulating the sector further, the Ordinance prohibits destruction of fish by explosives or destruction of fish by poisoning water and specifies the size of fish which shall not be killed, captured or possessed (see sections 4, 6, 7 and 8). The licenses issued under the Ordinance are subject to the payment of fee as prescribed under the Rules. The Government is also empowered to make Rules under Section 26, *inter alia,* to prescribe for fees to be charged for any license.

7. The Ordinance provides for regulation of the right of fisheries in "water" as opposed to "private water' which means water which is the exclusive property of any person…" Rules define the term "public water" in the following manner:-

> "2(e) Public water means water other than the private water and includes:
>
> (i) All natural bodies of water, such as rivers and their tributaries creeks, brooks, lakes, channels, canal or lagoons or dug, dredged or blasted canals;
>
> (ii) Any water impounded by the construction of any lake or dam or other impounding device across the channel of navigable stream;
>
> (iii) Flowing water within which fish are free to move across property limit and which are not by law or customs property of any person;"

From the above it is abundantly clear that the purpose and object of the Ordinance is to regulate fishery or the taking and catching of fish in public water. The Ordinance regulates public domain and deals with public rights and has no concern with private water or any other private activity relating to fish. For reference see: Naseer Muhammad

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[4] Defined in section 2(c) of the Ordinance to mean any net, cage, trap, or other contrivance for taking fish, fixed in the soil or made stationery in any other way.

v. Province of Sindh (**PLD 2008 Karachi 359**) and Jamaluddin v. Shahmurad (**PLD 1976 Karachi 174**).

8. The amendment brought about in Rule 7 (1) (vii) is as under:-

For the purpose of sale of fish cooked or uncooked in commercial, Market, shop, hotel, motel, tent, hut, Cart or open space etc.

Rs. 2000/-

Per year

The impugned amendment in the Rule deals with the sale of cooked or uncooked fish by private individuals, in commercial, market, shop, hotel, etc. The Ordinance does not deal with sale of cooked or uncooked fish, but simply restricts itself to fishery i.e., taking, catching or rearing of fish in the public domain. The impugned amendment falls outside the scope of the Ordinance and is, therefore, *ultra vires* the Ordinance and *like fish out of water*. The Government was not empowered to promulgate such a Rule under Section 26 of the Ordinance. For reference see: Khawaja Ahmad Hassan v. Government of Punjab (**2005 SCMR 186**).

9. We, therefore, agree with the reasoning of the High Court to this extent only and uphold the striking down of Rule 7(1)(vii) of the Rules for being *ultra vires* the Ordinance. Leave is, therefore, refused and this petition is dismissed.

Judge

**2019 S C M R 84**

**[Supreme Court of Pakistan]**

**Present: Qazi Faez Isa, Syed Mansoor Ali Shah and Yahya Afridi, JJ**

**TAJ WALI SHAH---Appellant**

**Versus**

**BAKHTI ZAMAN---Respondent**

Civil Appeal No. 71-P of 2015, decided on 22nd October, 2018.

(On Appeal from the judgment of the Peshawar High Court, Peshawar dated 19.02.2015 passed in Civil Revision No. 524-P of 2014)

**(a) Specific Relief Act (I of 1877)---**

----S. 8---Recovery of specific immovable property---Person entitled to seek remedy under S. 8 of Specific Relief Act, 1877---Scope---Such person would include an owner, lessor, lessee, mortgagee or mortgagee of immovable property, trustee or beneficiary of a trust.

Nair Service Society Ltd. v. K.C. Alexander and others AIR 1968 SC 1165 ref.

**(b) Constitution of Pakistan---**

----Arts. 4 & 10-A---Access to justice, right of---Scope---Vested right---Any right vested in a person to seek his remedy under the law should be liberally construed, as this would bolster his recognised fundamental right of access to justice.

**(c) Specific Relief Act (I of 1877)---**

----Ss. 8 & 42---Suit for recovery of specific immovable property---Relief---Scope---In a suit under S. 8 of the Specific Relief Act, 1877, the declaration of the entitlement was an inbuilt relief claimed by the plaintiff of such a case---In such circumstances, a prior declaration for the said entitlement under S. 42 of the Specific Relief, 1877 could not be made a condition precedent for filing a suit for possession under S. 8 of the Act.

Hazratullah and others v. Rahim Gul and others PLD 2014 SC 380 ref.

**(d) Specific Relief Act (I of 1877)---**

----Ss. 8 & 9---Recovery of specific immovable property---Undivided property--- Co-owners--- Co-owner of disputed property seeking possession from another co-owner, who was in peaceful possession of the disputed undivided property---Remedy in such circumstances was to seek possession through partition, and not by a suit under S. 8 of the Specific Relief Act, 1877.

**(e) Specific Relief Act (I of 1877)---**

----S. 8---Recovery of specific immovable property---Vested right---Scope---Person in possession of an immovable property acquired a vested right to possession, which could not be taken away unless the challenge was made thereto by a person who showed prior or better title through transfer or inheritance.

**(f) Khyber Pakhtunkhwa Land Revenue Act (XVII of 1967)---**

----Ss. 3 & 42---Abadi deh---Proprietary rights, transfer of---Transfer of proprietary rights in abadi deh were not recorded under S. 42 of the Khyber Pakhtunkhwa Land Revenue Act, 1967, as the said area had been, under S. 3 of the said Act, expressly excluded from the applicability thereof.

**(g) Specific Relief Act (I of 1877)---**

----S. 8--- Recovery of specific immovable property--- Undivided immovable property---Suit filed by one of the co-sharers for ejectment of a trespasser or person exercising possession over disputed property---Effect---Firstly, filing of such a suit could not be considered as evidence of the co-sharer's denial of the title of the other co-sharers; secondly, the suit brought by the co-sharer would be deemed to be for the benefit of the other co-sharers; and thirdly, when the co-sharer acquired possession in consequence of the proceedings, he would be in possession of the entire property, on behalf of all co-sharers and his said possession could not be deemed as adverse to the other co-sharers.

Bashir Ahmad and others v. Parshotam and others AIR 1929 Outh 337 and Kanchi Kamamma and others v. Yerramsetti Appanna AIR 1973 Andhra Pradesh 201 ref.

M. Faheem Wali, Advocate Supreme Court and M. Zahoor Qureshi, Advocate-on-Record for Appellant.

Muhammad Asif, Advocate Supreme Court and M. Ajmal Khan, Advocate-on-Record for Respondent.

Date of hearing: 27th September, 2018.

**JUDGMENT**

**YAHYA AFRIDI, J.---**Through the instant Civil Appeal, Taj Wali Shah, (appellant-plaintiff) has challenged the judgment dated 19.02.201.5 passed by the Peshawar High Court, Peshawar vide which Civil Revision (C.R. No.524-P of 2014) was accepted and the suit of present appellant was declared as not being maintainable.

2. Taj Wali Shah instituted a suit seeking possession by ejectment of Bakhti Zaman (defendant-respondent) from a house measuring 18 marlas situated in Khasra No.1493 Mousia Sher Garh (disputed house) on the basis of being owner vide sale deed No.207 dated 31.03.2010 (sale deed), default in payment of rent vide Karaya-Nama dated 23.06.1982 (rent deed), illegal alteration thereon, and for his personal use; recovery of outstanding rent; and permanent injunction.

3. Bakhti Zaman, in response to the averments made in the plaint, contested the same in his written statement, claiming that the disputed house was the legacy of his predecessor, which has been in their possession as owners for the last 80/90 years. In support of his claim, it was averred that the gas meter installed in the disputed house was under his uncle's name. He also contested the sale deed and further denied ever residing in the disputed house as a tenant.

4. The Trial Court reduced the contested pleadings of the parties into 11 issues, and allowed the parties to adduce their respective evidence. Finally, the Trial Court vide its judgment and decree dated 12.03.2013 decided the suit in favour of Taj Wali Shah in terms that:

> "The upshot of above discussion is that the plaintiff is the owner of the suit house. The defendant is a tenant under the plaintiff. The defendant is a defaulter in the payment of rent so he is liable to eviction and plaintiff is awarded decree as prayed for."

5. Being aggrieved, Bakhti Zaman impugned the decision of the Trial Court in appeal before the Appellate Court, which also met the same fate vide judgment and decree dated 17.05.2014 in the following terms:

> "Plaintiff/respondent has proved his case and the defendant/appellant has failed to prove his stance. Thus, findings of the trial court on all the issues except issues Nos.09 and 10 are based on proper appreciation of evidence. Findings on issues Nos.09 and 10 need trial modification in light of discussion made above. Therefore, judgment and decree of the trial court is upheld with modification to the extent of determination of the amount of rent. Appeal in hand is dismissed to extent of ejection and permanent injunction, being devoid of merit while it is partially allowed to extent of modification of findings regarding the amount of rent."

6. This led Bakhti Zaman to challenge the above decision in Civil Revision before the High Court, which was finally decided in his favour, essentially on the following premise:

> "Any suit under section 8 of the Specific Relief Act, 1877, could be filed by any person entitled to the possession of specific immovable property on the basis of his title and where the title is disputed one a suit under section 42, for declaration, under Specific Relief Act, 1877, is to be filed. Where a suit for possession, on the basis of a title which is disputed one, creating a cloud over his title, he must seek a declaration to his right, first."

And finally, after reviewing the evidence on the record, the High Court came to the conclusion that:

> "In view of the above, it can safely be held that both the courts below have ignored the fact by misreading and non-reading of evidence, that respondent/plaintiff is not the absolute owner of

the property in dispute and his titled is defected one, therefore, suit under section 8 of the Specific Relief Act, 1877, was not maintainable and in such like situation a suit for declaration under section 42 of the Act, ibid was competent, thus, both the impugned judgments of the lower courts are set aside and the suit of the respondent/plaintiff is dismissed being not maintainable in the given circumstances."

7. We have heard the learned counsel for the parties and with their valuable assistance have gone through the available record.

8. The entire controversy in the present case revolves around the scope and the true purport of section 8 of Specific Relief Act, 1877 (Act of 1877), which reads as follows:

"8. Recovery of specific immovable property.

A person entitled to the possession of the specific immovable property may recover it in the manner prescribed by the Code of Civil Procedure."

9. On careful reading of the aforementioned section, it is noted that the same provides for two essential elements in a suit for recovery of a specific, immovable property; firstly, it identifies the person, who may seek the remedy under this, section; and secondly, it specifies that said remedy is to be invoked and tried in accordance with the forum and procedure provided under the Civil Procedure Code, 1908.

10. The present case deals with the first part of section 8 supra, which relates to the right of a person entitled to possession under the law. This right to seek possession is anchored on the word entitled, and to understand the meaning thereof, we will have to examine the true intent of the legislature in inserting the said word in section, 8 supra. For this purpose, guidance may be sought from Narotam Singh Bindra's Interpretation of Statutes (Tenth Edition), wherein it is explained that:

"The primary and foremost task of a court in interpreting a statute is to ascertain the intention of the legislature, actual or imputed. The words of the statute are to be construed so as to ascertain the mind of the legislature from the natural and grammatical meaning of the words which it has used."

11. Now, the Oxford dictionary meaning of the word entitle is, "often be entitled to give (someone) a legal right or a just claim to receive or do something", while Black's Law Dictionary (Tenth Edition) defines the term to be ".... grant a legal right to or qualify for". It appears that the true intent of the legislature, as gathered from the ordinary meaning of the word entitled coupled with the natural spirit and the very reason of the provision, was to extend the scope of the right to seek possession to those persons who are eligible or qualified under the law to seek possession of an immovable property. This would thus include; an owner, lessor, lessee, mortgagee or mortgagee of immovable property, trustee or beneficiary of a trust.

12. Had the intention been to restrict the scope of the right to seek the possession to only owners, then the legislature would have expressly provided so, which it did not. In fact, any right vested in a person to seek his remedy under the law should be liberally construed, as this would bolster his recognised fundamental right of access to justice. In consonance with the same line of thought, the Indian Supreme Court in Nair Service Society Ltd. v. K.C. Alexander and others (AIR 1968 SC 1165) went on to extend the scope of section 8 supra to a possessor, by enunciating that:

"Section 8 of the Specific Relief Act does not limit the kinds of suit but only lays down that the, procedure laid down by the Code of Civil Procedure must be followed. This is very different from saying that a suit based on possession alone is incompetent after the expiry of 6 months. Under section 9 of the Code of Civil Procedure itself all suits of a civil nature are triable excepting suits of which their cognizance is either expressly or impliedly barred."

13. Let us now address the preliminary objection of the learned counsel for the respondent; that Taj Wali Shah could not seek possession under section 8 supra without praying for a declaration of his title over the disputed house. This issue has been aptly commented upon in a recent judgment of this Court

passed in the case of Hazratullah and others v. Rahim Gul and others (PLD 2014 SC 380), in terms that:

> "... it may be held that in a suit under section 8 of the Specific Relief Act, 1877, the declaration of the entitlement is an inbuilt relief claimed by the plaintiff of such a case. Once the plaintiff is found to be entitled to the possession, it means that he/she has been declared to be entitled, which includes the declaration of title of the plaintiff qua the property."

14. Interestingly, in the present case, the trial Court, in fact, framed two issues relating to the contesting claim of title over the disputed house to the effect:

> "..... 7 Whether the defendant is the owner of the disputed house?
>
> 8. Whether the plaintiff is the owner of the disputed house vide Iqrar-Nama dated 31.03.2010? "

15. In furtherance to the aforementioned two issues framed by the trial Court, and the evidence adduced by the parties in support of their respective claims to title over the disputed house, the trial Court passed a definite finding in favour of Taj Wali Shah. This finding transcended into an express declaration of title in the decree, when no specific prayer for title of the disputed house was sought by Taj Wali Shah in his plaint. This being so, it reaffirms the ratio of Hazratullah's case supra, that in a suit under section 8 of the Act of 1877, there is ordinarily an inbuilt prayer for the declaration of entitlement to possession, which is sought by the plaintiff. In view of the express declaration of title in the decree passed by the trial Court, the preliminary objection of the respondent and direction of the High Court, for Taj Wali Shah to first seek a declaration of title under section 42 of the Act of 1877 before filing a suit for possession under section 8 supra was not justified, and in the circumstances of the present case it would in fact be an exercise in legal futility.

16. A very crucial admitted position in the present case having serious legal consequences was that the disputed house was situated within the 'Abadi Deh' (village site), and this fact warranted the evidence relating to the transactions of proprietary rights therein to be viewed in the light of the special principles governing the said area. Firstly, the transfer of proprietary rights in favour of Taj Wali Shah vide the sale deed could not be recorded under section 42 of the West Pakistan Land Revenue Act, 1967, as the village site has been, under section 3 supra, expressly excluded from the applicability thereof. Secondly, Bakhti Zaman, despite being in possession of the disputed house, was unable to prove that he was a member of the proprietary body of the village site of Sher Gargh. In fact, his own uncle, Ali Mohammad (DW2) clearly admitted that Bakhti Zaman was from another village in Mauza Qasmi. This being so, Bakhti Zaman could only be put in peaceful possession of any piece of the land in the village site of Sher Gargh through a valid transfer or legacy, which he failed to prove. Thirdly, Salah-ud-Din and Siraj-ud-Din were proved to be members of the proprietary body of the village site of Sher Gargh, being sons of Amir-ud-Din, as reflected in the Pedigree Table (Exp PW4/1). It was also brought on record that Amir-ud-Din had expired and was survived by a widow, four sons including Siraj-ud- Din and Salah-ud-Din, and four daughters. Finally, had Bakht Zaman, even without proving his claimed legacy, established himself to be member of the proprietary body of the village site, he could then have claimed the status of a co-owner of the disputed property, and in such circumstances, the challenge made to his possession by Taj Wali Shah under section 8 of the Act of 1877 would not have been maintainable. The remedy then available to Taj Wali Shah would have been to seek possession of the disputed house through partition only and, not by a suit under section 8 of the Act of 1877.

17. The impugned decision of the High Court reveals that the above crucial principles relating to transfer of immovable property in Abadi Deh; particularly, the legal position of the transfer of proprietary interests of immovable property in Abadi Deh, the legal standing of a member of proprietary body of Abadi Deh vis-a-vis that of an outsider, and finally, the locus standi of a co-owner

seeking possession of the property under section 8 of the Act of 1877 were not taken into proper consideration, resulting in an error warranting legal correction.

18. Now to the contested claims of title over the disputed house. To appreciate the evidence produced by the parties, it would be essential to keep in view that Taj Wali Shah had instituted the suit for possession, as owner of the disputed house, which was in the possession of Bakhti Zaman. In such circumstances, the onus to prove the title of the disputed house rested upon Taj Wali Shah's shoulders under the mandate of Articles 117, 118, 119 and most importantly 126 of the Qanun-e-Shahadat Order, 1984 (Order of 1984).

19. This brings us to examine, whether Taj Wali Shah had discharged his onus in proving his said claim or otherwise. In civil cases, facts are to be proved on preponderance of evidence adduced by the parties. The enabling provisions of the Order of 1984 casting the onus of proof upon a party would only become relevant when ago evidence worth its while is produced by the plaintiff or when the Court is unable to decide the issue, as the evidence on the record is so evenly balanced.

20. On combing through the evidence on the record, it is noted that Taj Wali Shah was able to establish the link between Salah-ud-Din and his family and the disputed house through the testimony of two PESCO representatives, who were independent witnesses. It was proved that the electric supply meter in the disputed house was installed in the name of Siraj-ud-Din and that there was also a disconnection order thereof (Exp PW3/1). In addition, the rent deed (Ex PW6/l) was also produced in evidence without protest of Baktai Zaman. In contrast, apart from peaceful possession, Bakhti Zaman was unable to produce any reliable evidence that linked him to the disputed house; the claimed legacy and the gas, and electric meters of the disputed house under his uncle's name were not proved through any reliable evidence.

21. In view of the above, the preponderance of evidence surely tilted in favour of Taj Wali Shah, as he was able to discharge the onus to the extent that he had stepped into the shoes of the original owners. However, to what extent, it is noted that his status as a sole owner of the disputed house was not proved. It is noted that the sale deed, despite its admission in evidence without protest of Bakhti Zaman, was not executed by all the co-owners of the disputed house and, there was no valid power of attorney produced in evidence, vesting in Salah-ud-Din or Siraj-ud-Din the executants thereof, to transfer the same. Thus, the sale deed could not be considered a valid instrument, transferring to Taj Wali Shah, the proprietary rights of all the owners of the disputed house; the siblings and mother of Salah-ud-Din. However, the very fact that Salah-ud-Din appeared in the witness box (PW6), and testified to have sold the entire disputed house to Taj Wali Shah cannot be taken lightly. His testimony would legally suffice to transfer his share in the disputed house to Taj Wali Shah, thereby making Taj Wali Shah a co-sharer of the disputed house.

22. As far as the contention of the worthy counsel of the respondent regarding Bakhti Zaman's peaceful entry into the disputed house and his continuous possession thereof, it is noted that the same cannot be ignored. However, when the peaceful possession of Bakhti Zaman is placed in juxtaposition to rights of a co-owner, Taj Wali Shah, the latter would surely prevail. We have the well recognized legal maxims: possessio contra omnes valet praeter eur cui ius sit possessionis (he that hath possession hath right against all but him that hath the very right); adversus extraneous vitiose possessio prodesse solet (prior possession is a good title of ownership against all who cannot show a better), which has been very precisely described in Pollock and Wright on Possession, in terms that:

> "possession in law is a substantive right or interest which exists and has legal instance and advantages apart from the true owner's title".

23. The above legal position has been well recognized not only in the Common Law, but also in the law as it has developed in the sub continent. In fact, the Privy Council more than a century ago in Perry v. Clissold ([1907] AC 73) maintained the said stance, which has since then been reaffirmed by our courts. The view then expressed by the Privy Council was in terms that:

"It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably by ordinary rights of ownership has a perfectly good title against all the world but the rightful owner."

24. The above principle has now crystallised and, it is legally settled that the person in possession of an immovable property acquires a vested right to possession, which cannot be taken away unless the challenge is made thereto by a person who shows prior or better title through transfer or inheritance. One has to be mindful that this right is subject to legislation, as is witnessed in Abadi Deh in the Province of Punjab under Punjab Conferment of Proprietary Rights on Non-Proprietors in Abadi Deh Act, 1995. We have been informed that no such legislation has been introduced in Khyber Pakhtunkhwa rendering protection to possessory rights in Abadi Deh. Accordingly, the rights of Taj Wali Shah, as a co-owner would prevail over that of Bakhti Zaman, as a possessor.

25. Now that we have settled that the rights of a co-owner of an undivided property in Abadi Deh would prevail over the rights of a mere possessor thereof, let us now address the next crucial issue: whether a co-owner could seek possession of the entire property against a possessor under section 8 of the Act of 1877. This issue has been dealt in Bashir Ahmad and others v. Parshotam and others (AIR 1929 Oudh 337) wherein it has been held as follow:

"I must again point out a well settled rule of law, which has been laid down in numerous cases both by their Lordships of the Privy Council as well as by this court and the other High Court in India. The rule is that if a property belongs to several co-sharers and one co-sharer is in possession of the entire property, his possession cannot be deemed to be adverse to other co-sharers. He must be deemed to be in possession on behalf of other co-sharers and adverse possession cannot be founded on the basis of such exclusive possession, unless there has been an ouster of the other co-sharers. The ouster takes place when the title of the other co-sharers is denied...

...It is a settled rule of law that one co-sharer can maintain a suit for ejectment in respect of the entire property against a trespasser. The mere act that a co-sharer brings such a suit can, therefore, be no evidence that he denied the title of the other co-sharer. It is a question arising out his exclusive possession, but cannot be no evidence of a denial of the title of the other co-sharers. The suit brought by one co-sharer would in the eyes of law be considered for the benefit of the other co-sharers and the latter would be entitled to take advantage of such proceedings."

26. A similar matter later came up before Andhra Pradesh High Court in the case reported as Kanchi Kamamma and others v. Yerramsetti Appanna (AIR 1973 Andhra Pradesh 201), wherein it has been held as under:

"The mere fact that the alienation is not valid to the extent of half share does not take away this right of the purchaser. He can very well maintain the suit for recovery of possession of the entire property as against every person other than the true owner."

27. The views rendered in the above cases appear to be the correct pronouncement of the law on rights of a co-owner to seek possession of the undivided property: the right of a co-owner to seek possession of the entire undivided property; the possession of the co-owner would be considered to be on behalf of all the co-owners; the said suit of the co-sharer cannot be considered as evidence of his denial of the title of the other co-sharers; the suit brought by said co-sharer would be deemed to be for the benefit of the other co-sharers; and that the co-sharer's possession in consequence of the proceedings under section 8 of the Act of 1877 cannot be deemed as adverse to the other co-sharers.

28. In conclusion, it would be appropriate to recapitulate the important issues discussed and decided herein above. The same are that:

i. Section 8 of the Act of 1877 provides for any person who is 'entitled' to possession of immovable property to seek the same before the Civil Court of competent jurisdiction under section 9 of

the Code of Civil Procedure, 1908, (C.P.C.), unless the jurisdiction thereof is impliedly or expressly barred by law.

ii. By employing the word 'entitled' in section 8 of the Act of 1877, the legislature has expanded the scope for those who may seek possession of immovable property under the said section. This right is not only restricted to owners, but to all who are entitled to possession under the law.

iii. In a suit under section 8 of the Act of 1877, there is an inbuilt prayer for the declaration for entitlement to possession being sought by the plaintiff. In such circumstances, a prior declaration for the said entitlement under section 42 supra cannot be made a condition precedent for filing a suit for possession under section 8 of the Act of 1877.

iv. In a suit for possession, as owner of the disputed house, which was in the possession of defendant, the onus to prove the title of the disputed house rests upon the plaintiff under the mandate of Articles 117, 118, 119 and most importantly 126 of the Order of 1984.

v. When a co-owner of the disputed property seeks possession from another co-owner, who is in peaceful possession of the disputed undivided property, the remedy is to seek possession through partition, and not by a suit under section 8 of the Act of 1877.

vi. the person in possession of an immovable property acquires a vested right to possession, which cannot be taken away unless the challenge is made thereto by a person who shows prior or better title through transfer or inheritance.

vii. the transfer of proprietary rights in abadi deh are not recorded under section 42 of the West Pakistan Land Revenue Act, 1967, as the said area has been, under section 3 supra, expressly excluded from the applicability thereof.

viii. In an undivided immovable property one of the co-sharers can maintain a suit for ejectment of a possessor in respect of the entire property and in such a case the following may ensue:

firstly, the said suit of the co-sharer cannot be considered as evidence of his-denial of the title of the other co-sharers;

secondly, that the suit brought by said co-sharer would be deemed to be for the benefit of the other co-sharers; and

thirdly, when the said co-sharer acquires possession in consequence of the said proceedings, he would be in possession of the entire property, on behalf of all co-sharers and his said possession cannot be deemed as adverse to the other co-sharers.

29. Accordingly, for the reasons stated above, the impugned judgment of the High Court dated 19.02.201 5 is set aside, and the decree passed in favour of Taj Wali Shah passed by the Appellate Court is affirmed with the modification to the extent that the word "owner" be substituted with "entitled to possession as a co-owner of the disputed house".

30. The present appeal is allowed, in the above terms, with no orders as to costs.

MWA/T-4/SC Appeal allowed.

**2019 S C M R 118**

**[Supreme Court of Pakistan]**

**Present: Sh. Azmat Saeed, Faisal Arab and Syed Mansoor Ali Shah, JJ**

**Civil Appeal No. 700 of 2016**

**(On appeal from judgment of Lahore High Court, Lahore dated 10.12.2014, passed in W.P. No. 2596 of 2014)**

**and**

**Civil Petition No. 3832 of 2016**

**(On appeal from judgment of Lahore High Court, Lahore dated 29.11.2016, passed in W.P. No. 30770 of 2016)**

**Mian SHAUKAT ALI and another---Appellant/Petitioner**

**Versus**

**PUNJAB PUBLIC SERVICE COMMISSION and others---Respondents**

Civil Appeal No. 700 and Civil Petition No. 3832 of 2016, decided on 14th November, 2018.

**Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act (III of 2006)---**

----S. 8(1)---Competitive examination for post of Deputy Prosecutor General---Psychological assessment---Rounding off of marks to next whole number---Permissibility---Maxim expressio unis est exclusious alterius---Scope---Policy Decision No. 19.18 relating to Interviews by the Punjab Public Service Commission (PPSC) specifically provided that average scores of the members of the Interview Committee could be 'rounded off', while Policy Decision No. 19.16 relating to psychological assessment did not expressly provide such concession---Maxim expressio unis est exclusious alterius i.e., the express mention of one thing implies the exclusion of the other thing, was applicable to the present case---Mentioning of rounding off in case of average marks obtained in the interview and the absence of such a concession for the marks obtained in psychological assessment clearly showed that the Punjab Public Service Commission never intended to extend the benefit of rounding off to the marks obtained in psychological assessment---Clear exclusion of rounding off in the case of psychological assessment under the relevant Policy also stood on a logical plane, as a total of only 5 marks were allocated for the psychological assessment, and rounding off, either up or down by a value of 0.5 amounted to 10% change in the total marks---Such change was a sizable percentage and could unfairly bridge the well-earned distinction between competitive candidates and weaken the credibility of the result---Supreme Court observed that any number could be round up to the next whole number or round down to the same whole number, depending on the value being 0.5 or more or less, however, the rule of rounding off, being a rule of convenience, must be applied with caution, so as not to give an unfair advantage to a candidate who had scored low or to disadvantage a candidate who had scored high.

N.S. Bindra's - Interpretation of the Statutes, 10th Edition, p.770 ref.

Malik Muhammad Qayyum, Senior Advocate Supreme Court along with Ch. Akhtar Ali, Advocate-on-Record for Appellant (in C.A. 700 of 2016).

Razzaq A. Mirza, Additional A.-G. for Respondent No. 1 (in C.A. 700 of 2016).

Nemo for Respondent No. 2 (in C.A. 700 of 2016).

Mushtaq Ahmed Mohal, Advocate Supreme Court for Respondents Nos. 3 and 5 (in C.A. 700 of 2016).

Mushtaq Ahmed Mohal, Advocate Supreme Court for Petitioner (in C.P. 3832 of 2016).

Nemo for Respondents (in C.P. 3832 of 2016).

Date of hearing: 14th November, 2018.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.**---The question before the Court in the instant appeal and the connected C.P.L.A. No. 3832 of 2016 is, whether marks obtained in the psychological assessment by the candidate in the competitive examination for the post of Deputy Prosecutor General (BS-18) can be rounded off to the next whole number, as are the marks for the interview granted by the Interview Committee under the "Policy Decision"[1] framed by the Punjab Public Service Commission (PPSC)?

2. The facts are that the appellant applied for the post of Deputy Prosecutor General (BS-18) in pursuant to a public advertisement. He secured 103 marks out of 200 in written examination and 62.50 marks out of 100 in the interview, hence obtaining a total of 165.50 marks. The last candidate selected for the post obtained 166 marks, hence the appellant missed the merit and was not selected for the post.

3. The case of the appellant is that if his marks in the psychological assessment i.e., 2.5 out of 5 marks, were to be rounded off to the next whole number i.e., from 2.5 to 3, his total marks would become 166 and he would equal the marks of the last candidate appointed to the post. In case of a tie, he comes out successful under Policy Decision No. 20.11, which gives preference to inter-se seniority on the basis of age. Learned counsel argued that psychological assessment is part of the interview, therefore, the policy of rounding off, applied to the interview, should also apply to the marks awarded for psychological assessment. He further relied on the definition of "interview" under Regulation 3(O) of the Punjab Public Service Commission Regulations, 2000 ("Regulations") to submit that interview includes psychological assessment. He added that under Policy Decision No.19, there is an express provision for rounding off the marks granted in the interview, whereas the Policy is silent as regards the marks obtained in the psychological assessment, hence the rounding off facility be extended to the marks obtained in the psychological assessment.

4. Learned Law Officer on the other hand relied upon Policy Decision No.19 of the PPSC to submit that the concession of rounding off is only available to the marks obtained in the interview and as the psychological assessment is not a part of the interview under Policy Decision No.19.18, its marks cannot be rounded off.

5. The appellant challenged the failure on the part of PPSC to round off his marks in the psychological assessment before the Lahore High Court. The petition was dismissed vide impugned judgment dated 10.12.2014 on the ground that the Policy explicitly provided for rounding off for the average marks obtained in the interview but no such concession was available for the marks obtained in psychological assessment. The appellant preferred a petition, against the said judgment, before this Court. Leave was granted vide order dated 3.3.2016 to consider whether rounding off was possible for the marks obtained in psychological assessment.

6. We have heard the learned counsel for the parties and have examined the record. As per Policy Decision No.19.16 of the PPSC, psychological assessment is done after a candidate qualifies the written examination. Psychological assessment entails intelligence test, group discussion, psychological test and short essay, etc. The candidates who go through psychological assessment are then called for interview and marks of the psychological assessment are added to the academic qualification in the candidate's award sheet at the time of the interview. Psychological assessment is an assessment carried out prior to the interview but its marks, for the purposes of tabulation of the result are included in the 100 marks allocated for the interview.

7. As per Policy Decision No.19.18(a and b), a candidate is interviewed by the Interview Committee comprising two groups i.e., Members of PPSC and Advisors/Subject Specialist/Departmental Representative in the following manner;

> Policy 19.18
>
> a. Award of Interview Marks by Members of Punjab Public Service Commission. The Members of Commission award mark as separate group. Their average of marks awarded is also calculated separately. If average comes out to be in fraction, the value of 0.5 and above will he converted to the next whole number while fraction less than 0.5 will be ignored.

b. Award of Marks by Advisors/Subject Specialist/ Departmental Representatives. All other members of interview committee i.e. Advisors/Subject Specialists, Departmental Representative award marks as the second group. The average of the marks given by all of them is calculated separately. If average comes out to be in fraction, the value of 0.5 and above will be converted to the next whole number while fraction less than 0.5 will be ignored."

As per Policy Decision No.19.31 (h), the marks of the interview are tabulated as under:

Deputy Prosecutor General (BS-18)
Interview 100 Marks
(1) Psychological Assessment 05 Marks
(2) Viva Voce
a. Commission 70 Marks
b. Advisor(s)/Departmental
Representative 25 Marks

As shown above, the two groups award separate marks, each member of the two groups award marks out of 70 and 25 marks, respectively[2], thereafter, average of the total marks granted by the members of each group are calculated and in case the said average comes out to be in fraction, value of 0.5 and above is converted into next whole number, while fraction less than 0.5 is ignored. The Policy specifically provides for rounding off of the average score awarded by the Interview Committee in the above manner.

8. Policy Decision No. 19 deals with Interviews while Policy Decision No.19.18 specifically provides that average scores of the members of the two groups of the Interview Committee be rounded off (as mentioned above) while, Policy Decision No. 19.16 provides for psychological assessment and does 'not provide for any rounding off of the marks obtained in the said assessment. Therefore, the Policy expressly provides for rounding off of the average marks in the interview but does not extend such concession in the case of psychological assessment. The maxim expressio uni est exclusious alterius i.e., the express mention of one thing implies the exclusion of the other thing, comes in handy to understand the construction of the Policy, which is even otherwise clear. "On a principle of interpretation that what is left unexpressed, was in all probability not intended at all[3]." The express mention of rounding off in case of average marks obtained in the interview and the absence of such a concession for the marks obtained in psychological assessment clearly shows that the Punjab Public Service Commission never intended to extend the benefit rounding off to the marks obtained in psychological assessment, as is their stated position before us.

9. Regulation 3(o) while defining "interview" provides that "where it may be so required, also includes psychological assessment, credit of additional qualifications, distinctions and achievements." In this case, Policy Decision No. 19.16 does not include psychological assessment as part of the interview, except for calculating the total marks of the interview, therefore Regulation 3(o) is not applicable.

10. A number can be round up to the next whole number or round down to the same whole number, depending on the value being 0.5 or more or less. The general purpose of rounding up is sheer convenience and keeps the arithmetic simple and easy for the purposes of calculation. The clear exclusion of rounding off in the case of psychological assessment under the Policy also stands on a logical plane. With total 5 marks allocated for the psychological assessment, rounding off, either up or down by a value of 0.5 amounts to 10% change in the total marks. This is a sizable percentage and can unfairly bridge the well earned distinction between competitive candidates and weaken the credibility of the result. The impact of rounding off is almost negligible i.e., 0.5% if it is allowed where the total marks are 100. So while the rule of rounding off, is a rule of convenience, it must be applied with

caution, so as not to give an unfair advantage to a candidate who has scored low or to disadvantage a candidate who has scored high.

11. For what has been discussed above, we are not inclined to interfere in the impugned judgment of the Lahore High Court. Leave is, therefore, declined and this petition is dismissed.

12. Before parting, it is noted with concern that Mr. Mushtaq Mohal, learned ASC appearing on behalf of private respondents Nos. 3 to 5, in the instant case, opposed the case of the appellant and also represented the petitioner in the connected matter, thereby supporting the case of the appellant in the instant case, taking such somersaults is not becoming of an advocate and must be avoided.

MWA/S-41/SC Petition dismissed.

**2019 S C M R 274**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik and Syed Mansoor Ali Shah, JJ**

**ALTAF HUSSAIN---Appellant**

**Versus**

**The STATE---Respondent**

Criminal Appeal No. 62-L of 2018, decided on 27th November, 2018.

(On appeal from the judgment of the Lahore High Court, Lahore dated 27.05.2015 passed in Crl. Appeal No. 1543 of 2010, Crl. Revision No. 277 of 2013 and PSLA No. 7 of 2013)

**(a) Penal Code (XLV of 1860)---**

----S. 302(b)--- Qatl-i-amd--- Reappraisal of evidence--- Delay in reporting matter to police and lodging of FIR---Present case was registered under the orders of the Justice of the Peace on 19.03.2006 regarding an occurrence alleged to have taken place on 09.02.2006 and as such there was a delay of forty days in reporting the crime to the police without any plausible explanation---Complainant stated in his examination-in-chief that they reported the matter to the police repeatedly but the case was not registered, however, such assertion was not substantiated by any document---Deceased was medically examined in injured condition through police on 9.2.2006 i.e. the date of occurrence, therefore, the inordinate delay in setting the machinery of law in motion spoke volumes against the veracity of prosecution version---Doctor who had examined the deceased was not produced before the court---Motive behind the occurrence and alleged recovery of a dagger at the instance of the accused were not believed by the courts below for valid reasons---Besides the accused three other co-accused persons were also indicted in the case, who were acquitted by the Trial Court and appellate court and their acquittal had attained finality---Prosecution had failed to prove its case against the accused beyond reasonable doubt---Appeal was allowed and the accused was acquitted of the charge framed against him.

**(b) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Reappraisal of evidence---Presence of eye-witnesses at the scene of occurrence doubtful---Ocular account of the incident was furnished by the complainant and another eye-witness, however, perusal of statement made by deceased before his death did not disclose their presence at the scene of occurrence, therefore, it was highly unsafe to rely on the statements of both these witnesses to maintain conviction and sentence of the accused on a capital charge---Prosecution had failed to prove its case against the accused beyond reasonable doubt---Appeal was allowed and the accused was acquitted of the charge framed against him.

**(c) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Witnesses, reliance upon---Scope---When a set of witnesses was disbelieved to the extent of some accused the same could not be believed to the extent of remaining accused facing the same trial without there being any independent and strong corroboration.

Shahid Azeem, Advocate Supreme Court and Naveed Ahmad Khawaja, Advocate Supreme Court for Appellant.

Mazhar Sher Awan, Additional P.-G. for the State.

Mst. Murid Fatima mother of the deceased and wife of the Complainant in person.

Date of hearing: 27th November, 2018.

**JUDGMENT**

**MANZOOR AHMAD MALIK, J.---**Appellant Altaf Hussain and three of his co-accused Nisar Ahmad, Muhammad Aslam and Mst. Amiran were indicted by the learned Additional Sessions Judge, Shorkot, District Jhang to face trial in case FIR No. 137 of 2006 dated 19.03.2006 offence under sections 337-F(iv), 336 and 34, P.P.C. (later on added sections 302 and 324, P.P.C.) registered at Police

Station City Shorkot, District Jhang. On conclusion of trial, the learned trial court, vide its judgment dated 08.05.2010, convicted the appellant under section 302(b), P.P.C. and sentenced him to imprisonment for life. He was further ordered to pay Rs.2,00,000/- (rupees two lakh only) as compensation under section 544-A, Code of Criminal Procedure to the legal heirs of the deceased and in default of the payment of compensation he had to undergo simple imprisonment for six months. Benefit of section 382-B, Code of Criminal Procedure was extended to the appellant. Through the same judgment, the learned trial Court while extending the benefit of doubt, acquitted Nisar Ahmad, Muhammad Aslam and Mst. Amiran co-accused of the appellant. Aggrieved of his conviction/sentence, the appellant filed a criminal appeal before the learned High Court. The complainant also filed a criminal revision for enhancement of sentence of the appellant. Petition for Special Leave to Appeal was also filed against acquittal of Nisar Ahmad, Muhammad Aslam and Mst. Amiran. The learned High Court through the impugned judgment dismissed the criminal appeal of the appellant as well as the criminal revision and PSLA filed by the complainant. Thereafter, the appellant filed a criminal petition for leave to appeal, wherein leave to appeal was granted by this Court on 09.11.2018 to reappraise the entire evidence available on record for safe administration of criminal justice. Hence, the instant criminal appeal.

2. We have heard counsel for the appellant, learned Additional Prosecutor General for the State as well as mother of the deceased present in person and have also gone through the relevant record.

3. This case was registered under sections 337-F(iv), 336 and 34, P.P.C. at Police Station Shorkot City District Jhang under the orders of the learned Justice of the Peace Jhang on 19.03.2006 regarding an occurrence alleged to have taken place on 09.02.2006 and as such there is a delay of forty days in reporting the crime to the Police without any plausible explanation. While appearing before the learned trial court as PW.3 Saeed Ahmad complainant stated in his examination-in-chief that they reported the matter to the police repeatedly but the case was not registered, however, this assertion was not substantiated by any document. During the cross-examination he stated that he got (Exh.PA) drafted from an Araiz Navees (deed writer) on 18.03.2006 and the case was got registered on the following day. We have also observed that during the course of investigation statement of Sajjad Ahmad (deceased) then injured was recorded by the Police which has been brought on record as Exh.PH but even in the said statement there is no explanation whatsoever regarding the delay in reporting the matter to the Police. Moreover, it has been observed by us that Sajjad Ahmad (deceased) was medically examined in injured condition through police on 09.02.2006 at 1.45 p.m. i.e. the date of occurrence. Therefore, this inordinate delay in setting the machinery of law in motion speaks volumes against the veracity of prosecution version.

4. Ocular account in this case was furnished by Saeed Ahmad complainant "(PW.3) and Khan Muhammad (PW.4). However, perusal of the statement (Exh.PH) of Sajjad Ahmad (deceased) does not disclose the presence of these two witnesses and it was stated by him before the Police that after raising hue and cry, the male members were attracted to the scene, who beseeched the assailants and rescued him. Therefore, it is highly unsafe to rely on the statements of both these witnesses to maintain conviction and sentence of the appellant on a capital charge.

5. It is case of the prosecution that "Sajjad Ahmad injured remained admitted in the Allied Hospital Faisalabad and was medically examined there. His MLC was brought on record as Exh.PE/1 but the doctor who had examined Sajjad Ahmad was not produced before the court.

6. Motive behind the occurrence and alleged recovery of a dagger at the instance of the appellant were not believed by the learned courts below for valid reasons and upon our own independent appreciation of evidence we do not find any reason to differ with the well reasoned findings of the learned courts below qua motive and recovery of dagger.

7. There is another aspect of the case. As stated earlier besides the appellant three other persons were also indicted in this case three of whom namely Nisar Ahmad, Muhammad Aslam and Mst.

Amiran were acquitted by the learned trial court. PSLA No.67 of 2013 filed by the complainant against their acquittal was dismissed by the learned appellate court which was not assailed any further either by the complainant or the State and as such their acquittal attained finality. It is well settled by now that if a set of witnesses is disbelieved to the extent of some accused the same cannot be believed to the extent of remaining accused facing the same trial without there being any independent and strong corroboration. Upon scrutiny of the material available on record we have not been able to find any corroboration to maintain conviction and sentence of the appellant on a capital charge.

8. For what has been discussed above, we have no manner of doubt in our minds that the prosecution has failed to prove its case against the appellant beyond reasonable doubt. The instant criminal appeal is, therefore, allowed. The impugned judgments of the learned courts below to the extent of appellant Altaf Hussain are set aside. He is acquitted of the charge framed against him. He shall be released forthwith, if not required to be detained in any other criminal case.

MWA/A-2/SC Appeal allowed.

**2019 S C M R 599**

**[Supreme Court of Pakistan]**

**Present: Qazi Faez Isa, Sajjad Ali Shah and Syed Mansoor Ali Shah, JJ**

**Mst. Bibi SHAH BAN (DECEASED) through L.Rs. and others---Appellants**

**Versus**

**LAND ACQUISITION COLLECTOR, A.C., MARDAN and others---Respondents**

Civil Appeals Nos. 79-P and 143-P to 146-P of 2013, decided on 4th March, 2019.

(Against the judgment dated 01.04.2013 of the Peshawar High Court, Peshawar passed in R.F.As. Nos. 104-P, 114-P, 116-P and 117-P of 2004)

**(a) Land Acquisition Act (I of 1894)---**

----Ss. 6, 23 & 48-A---Constitution of Pakistan, Art. 24---Land acquired for expansion of a Government college---Delay of more than ten years between declaration and making of award--- Collector made his award and fixed the amount of compensation payable to the owners of the land at the rate of Rs. 1079.37 per marla and fixed an amount of Rs. 21,994 as compensation for the structures standing on the land---Fifteen per cent compulsory acquisition charges and eight per cent simple interest was also awarded from date of notification by the Commissioner for taking over the land---Collector noted that those from whom the land was acquired were left without access to their remaining lands and therefore carved out six approach roads/pathways to access their lands, but excluded the land falling under these approach roads/pathways for payment of compensation---Reference filed before the Judge Land Acquisition against the award was partly accepted and the Judge increased the price of the acquired land to Rs. 4,500 per marla, reduced the interest per annum to six per cent and maintained the fifteen per cent compulsory acquisition charges---High Court maintained the compensation that had been determined by the Judge Land Acquisition, however, it awarded the cost of litigation to the land owners---Held, that there had been an unjustifiable delay in making the Award---Declaration under S. 6 of the Land Acquisition Act, 1894 ('the Act') was made on 14th January, 1986 and the Award was made ten and a half years later on 4th August, 1996---Said Act envisaged an award to be made within a year---Article 24(2) of the Constitution mandated the payment of compensation for land compulsorily acquired---Depriving a person of property was an exception to the Fundamental Right to hold and enjoy property---Owner must be promptly compensated for the compulsorily acquired property---Designated authority (the Collector) had to determine the compensation payable to the land owners (appellants) within a year but failed to do so and instead took ten and a half years to make the Award---Judge Land Acquisition had noted that the acquired land was situated on the main road and also had commercial value as it was situated in the vicinity of a hospital, a college and the Office of the Forest Officer---Judge had also referred to documents, including the fard jamabandi for the year 1994-95 produced by Patwari Halqa and the mutations of lands in the area showing the price of land to be ten thousand rupees per marla at the relevant time, and a judgment wherein the compensation in respect of land acquired in the same area a few years previously was fixed at Rs. 6,000 (six thousand rupees) per marla---Despite noting such facts, which had remained un-rebutted, the Judge increased the compensation to only Rs. 4,500 per marla---High Court had also disregarded the evidence on record, though it had noted the price had increased and had expressed sympathy with the land owners---Land owners were also entitled to receive compensation for the land used in approach roads/pathways, since the value of such land had diminished because it could only be used as approach roads/pathways---As regards the structures standing on the land the owners had valued the same at Rs. 2,000,000 (two million rupees), however, in the Award these were valued at Rs. 21,994 only---Since the owners of the acquired area had not established that they had suffered damages on account of the delay in making the Award beyond the period of one year,

therefore, they were not entitled to receive additional compensation under S. 48-A of the Act---Supreme Court directed that compensation for the acquired land was to be paid at the rate of Rs. 10,000 per marla; that compensation for the reduction in the value of land utilized for the approach roads/pathways, was to be paid at the rate of Rs. 5,000 per marla; that compensation for the value of the construction on the land was to be Rs. 200,000; and the cost of litigation was to be awarded to the land owners---Appeal was disposed of accordingly.

**(b) Land Acquisition Act (I of 1894)---**

----S. 6---Land acquired for expansion of a Government college---College re-named after the then serving Provincial Governor---Supreme Court raised the question whether the College which was built on Government land and constructed out of public funds and for which land compulsorily acquired had been paid out of public funds could be named after a living person and one who held public office in the country---Supreme Court observed that since decision in respect of the matter of naming the College may affect the naming of public buildings, public parks, public roads and other public places not only in the province in question but also in other parts of the country therefore notices were to be issued to the Advocate Generals of all the provinces, the Federal Capital Territory and the Attorney General, all of whom were to file their respective written submissions within six weeks---Supreme Court directed office to fix the question raised for consideration of the Supreme Court as per the orders of the Chief Justice---Appeal was disposed of in circumstances.

Abdul Sattar Khan, Advocate Supreme Court and M. Zahoor Qureshi, Advocate-on-Record for Appellants (in C.A. No. 79-P of 2013).

Ex parte for Respondents Nos. 1 - 5 (in C.A. No. 79-P of 2013).

Mujahid Ali Khan, Additional Advocate-General, Khyber Pakhtunkhwa for Respondent No.6 (in C.A. No. 79-P of 2013).

Abdul Latif Yousafzai, Advocate-General, Khyber Pakhtunkhwa on Court's Notice (in C.A. No. 79-P of 2013).

Amjad Ali, Advocate Supreme Court and M. Ajmal Khan, Advocate-on-Record along with Faqir Jan, Admin Officer (in C.As. Nos.143-P to 146-P of 2013).

Ex parte for Respondents Nos. 1 - 7 (in C.As. Nos. 143-P to 146-P of 2013).

Nemo for Respondent No. 4 (in C.As. Nos. 143-P to 146-P of 2013).

Ex parte for Respondents Nos. 1 - 3, 5 - 10 (in C.As. Nos.143-P to 146-P of 2013).

Date of hearing: 13th December, 2018.

**JUDGMENT**

**Qazi Faez Isa, J.** The Government of N.W.F.P. (now Khyber Pakhtunkhwa) acting through the Secretary Education issued notification dated 1st August, 1983 by which the Government Comprehensive High School Mardan was renamed as the Public School Mardan and transferred to it all lands, buildings,

properties, assets and liabilities of the former. On 3rd November, 1985 the Secretary Education issued another notification changing the name of the school again and also upgrading it; the Public School Mardan was now named after the incumbent Governor of the Province and made into a college, the "Fazle Haq College Mardan" ("the College").

2. The Government then decided to expand the College. On 24th October, 1985 the Collector, Mardan, District Mardan ("the Collector") issued a notification under section 4 of the Land Acquisition Act, 1894 ("the Act") identifying fifty five kanals and seventeen marlas of private land lying adjacent to the College which could be used for the College and authorized a preliminary investigation of the land. On 14th January, 1986 the Commissioner Peshawar Division ("the Commissioner") issued a notification under section 17 of the Act taking over the possession of the land and stating that the provisions of sections 5 and 54 of the Act will not be applicable to the land. Nothing further happened for the next ten years. On 23rd January, 1996 the Commissioner issued a notification under section 6 of the Act declaring that the land was required for a public purpose and directed the Collector to make an order for its acquisition under section 7 of the Act.

3. On 4th August, 1996 the Collector made his award ("the Award") pursuant to section 11 of the Act and fixed the amount of compensation payable to the owners of the land at the rate of Rs.1079.37 paisas (one thousand and seventy nine rupees and thirty seven paisas) per marla and fixed an amount of Rs. 21,994 (twenty one thousand, nine hundred and ninety four rupees) as compensation for the structures standing on the land. Fifteen per cent compulsory acquisition charges and eight per cent simple interest was also awarded from 14th January, 1986. The Collector noted that those from whom the land was acquired were left without access to their remaining lands and therefore carved out six approach roads/pathways to access their lands, but excluded the land falling under these approach roads/pathways for payment of compensation. Compensation was ordered to be paid only in respect of the fifty-two kanals and fifteen marlas of land which had been acquired for the College ("the acquired land").

4. The owners (appellants in Civil Appeal No. 79-P/2013, "the private appellants") were dissatisfied with the amount of the compensation fixed by the Collector and filed a reference under section 18 of the Act against the Award. They alleged that the compensation fixed by the Collector was well below the market price of Rs. 25,000 (twenty five thousand rupees) per marla and the value of the construction on two kanals of the acquired land was Rs. 2,000,000 (two million rupees). They however conceded that the law envisaged six per cent interest per annum (instead of eight per cent interest as given in the Award). On 8th June, 2004 the reference was partly accepted by the learned Judge Land Acquisition who increased the price of the acquired land per marla to Rs. 4,500 (four thousand and five hundred rupees) per marla, reduced the interest per annum to six per cent and maintained the fifteen per cent compulsory acquisition charges; the compensation was payable from the date that the possession of the land was taken. Thereafter, both sides filed regular first appeals ("RFAs") in the Peshawar High Court, Peshawar against the judgment of the learned Judge Land Acquisition. In the RFAs the High Court maintained the compensation that had been determined by the learned Judge Land Acquisition, however, the learned Single Judge was pleased to award the cost of litigation to the private appellants. Both sides then appealed to this Court. The private appellants seek enhancement of compensation amount to Rs. 25,000 (twenty five thousand rupees) per marla and Rs.2,000,000 (two million rupees) for the said construction. The official appellants (who have filed Civil Appeals Nos. 143-P to 146-P/2013) state that compensation as determined by the Collector in the Award be reverted to.

5. The learned counsel for the private appellants (in Civil Appeal No. 79-P/2013) submitted as under:

(i) Evidence was produced to show the sale and purchase transactions at the rate of Rs. 10,000 (ten thousand rupees) per marla during the relevant period;

(ii) The acquired land is situated on a main road and has the potential of considerable increase in value;

(iii) The Award was made ten and a half years after the possession of the land was taken over and during this period the price of the land had gone up considerably;

(iv) The owners remained deprived of the use of their land till the Award was made;

(v) For similar land compensation was determined at six thousand rupees per marla by the Collector in the award dated 12th April, 1984 which was maintained by this Court on 17th December, 1992;

(vi) The owners were entitled to additional compensation mentioned in section 48-A of the Act (inserted by the N.W.F.P. Land Acquisition (Amendment) Act, V of 1987) but they were not granted it; and

(vi) The land falling under the approach roads/pathways should not have been excluded from the payment of compensation since it could only be used as approach roads/pathways.

The learned counsel relied upon the cases of Murad Khan v. Land Acquisition Collector (1999 SCMR 1647), Province of Punjab v. Jamil Ahmad Malik (2000 SCMR 870) and Province of Punjab v. Begum Aziza (2014 SCMR 75).

6. Mr. Mujahid Ali Khan, the learned Additional Advocate General ("AAG"), and Mr. Amjad Ali, the learned counsel for the College, opposed the appeal filed by the private appellants and supported the appeals filed by the College. They stated that compensation was determined by the Collector after he had personally visited the acquired land and the Award was made in accordance with the prevailing market price and the law. Therefore, the learned Judge Land Acquisition was not justified to increase the compensation amount. As regards the delay in making the Award, they stated that the additional six per cent interest per annum payable to the owners sufficiently compensates them, therefore, the delay in making the Award is inconsequential.

7. We have heard the learned counsel for the parties and with their able assistance examined the record. Section 23 of the Act stipulates the matters to be considered in determining compensation. In the Province of Khyber Pukhtunkhwa section 48-A of the Act has been added which states that the owner of land will also be entitled to damages suffered if the award is not made within a year of the declaration under section 6 of the Act. Section 48-A is reproduced hereunder:

"Compensation to be awarded when land not acquired within one year: (1) If within a period of one year from the date of publication of declaration under Section 6 in respect of any land, the Collector has not made an award under Section 11 in respect to such land, the owner of the land shall, unless he has been to a material extent responsible for the delay, be entitled to receive compensation for the damage suffered by him in consequence of the delay.

(2) The provisions of Part II of this Act shall apply, so far as may be possible, to the determination of the compensation payable under this section."

8. There has been an unjustifiable delay in making the Award. The declaration (under section 6 of the Act) was made on 14th January, 1986 and the Award was made ten and a half years later on 4th August, 1996. The Act envisages an award to be made within a year. Article 24 (1) of the Constitution of the Islamic Republic of Pakistan ("the Constitution") stipulates that, "No person shall be deprived of his property save in accordance with law." And, Article 24(2) of the Constitution mandates the payment of compensation for land compulsorily acquired. Depriving a person of property is an exception to the fundamental right to hold and enjoy property. The owner must be promptly compensated for the compulsorily acquired property. The designated authority (the Collector) had to determine the compensation payable to the private appellants within a year but failed to do so and instead took ten and a half years to make the Award. The learned High Court Judge had noted that the price of the land had increased on account of the depreciation - devaluation of the rupee and further that the owners could not utilize their land during the time it took to make the Award. However, he did not increase the compensation amount despite also having observed that, "the affectees are required to be compensated to some reasonable extent, deemed appropriate and justiciable in the circumstances of the case."

9. The learned Judge Land Acquisition, in deciding whether the owners were entitled to be compensated as sought by the owners (Issue No. 5), had noted that the acquired land was situated on the main road and also had commercial value as it was situated in the vicinity of Haroon Surgical Hospital, the Government Commerce College, Mardan and the Office of the Forest Officer, Mardan. He had also referred to evidence and the exhibited documents, including the fard jamabandi for the year 1994-95 produced by Patwari Halqa and the mutations of lands in the area showing the price of land to be ten thousand rupees per marla at the relevant time. He had also referred to the judgment wherein the compensation in respect of land acquired in the same area a few years previously was fixed at Rs. 6,000 (six thousand rupees) per marla. However, despite noting these facts, which had remained un-rebutted, he increased the compensation to only Rs. 4,500 per marla. The learned Judge of the High Court had also disregarded the evidence on record, though he had noted the price had increased and had expressed his sympathy with the private appellants.

10. To get a better understanding of the location of the acquired land and of the said approach roads/pathways we had directed the College, "to file photographs of the land that was acquired and the access to the remaining land of the persons from whom it was acquired." The photographs filed by the College confirm that the land falling under the approach roads/pathways cannot be used for any other purpose. When the use of such land is restricted in this manner then the value of such land stands diminished, but no compensation has been awarded for such land.

11. This Court in the case of Murad Khan v Land Acquisition Collector (1999 SCMR 1647) with regard to determining the compensation of land had considered the matters mentioned in section 23 of the Act and the scope of the expression market-value mentioned therein. Muhammad Bashir Jehangiri, J writing for a three-member Bench of this Court reviewed the case law comprehensively and derived the principles therefrom (paragraph 13, pages 1654-1657). This seminal judgment has been continuously followed by this Court, including in the cited cases of Province of Punjab v. Jamil Ahmad Malik (2000 SCMR 870) and Province of Punjab v Begum Aziza (2014 SCMR 75). Applying section 23 of the Act and the principles expounded in the case of Murad Khan the compensation payable to the private appellants needs to be revised.

12. The market-value of the acquired land at the relevant time as per the evidence on record was Rs. 10,000 (ten thousand rupees) per marla. The owners of the acquired land therefore had to be compensated at the rate of Rs. 10,000 (ten thousand rupees) per marla together with fifteen per cent compulsory acquisition

charges and six per cent interest per annum from the date of taking possession of the acquired land, that is from 14th January, 1986.

The private appellants will also be entitled to receive compensation for the land used in approach roads/pathways, measuring 2 kanals, 9 marlas and 7 sersais (as mentioned in the Award) since the value of such land had diminished because it could only be used as approach roads/pathways. However, evidence with regard to the reduction in the value of such land is not available. It has been decades since the land was acquired and the approach roads/pathways were created, therefore, it would not now be appropriate to remand the matter for the determination in the reduction in the value of such land. This land also constitutes a very small portion of the acquired land. Accordingly, we fix the compensation for the reduction in the value of the land used in the approach roads/pathways at Rs. 5,000 (five thousand rupees), which is half the compensation payable for the acquired land.

As regards the "abad houses on an area of 2 kanals of land" the owners had valued the same at Rs. 2,000,000 (two million rupees), however, in the Award these are valued at Rs. 21,994 (twenty one thousand, nine hundred and ninety four rupees). The Award doesn't mention the nature of such construction nor how its price was determined, instead the Collector relied on the value as determined by the Patwari. Taking into account the value of the land, the area on which the construction was raised and when it must have been raised (that is before the possession of the land was taken over) we think that it would be valued at Rs. 200,000 (two hundred thousand rupees) at the relevant time.

13. Since the owners of the acquired area had not established that they had suffered damages on account of the delay in making the Award beyond the period of one year, therefore, they are not entitled to receive additional compensation under section 48-A of the Act.

14. The compensation therefore payable by the College/Collector/ Government of Khyber Pakhtunkhwa to the owners of the land (the private appellants herein) is as under:

(a) Compensation for the acquired land at the rate of Rs.10,000 (ten thousand rupees) per marla;

(b) The reduction in the value of 2 kanal, 9 marlas and 7 sersais of land utilized for the approach roads/pathways, being at the rate of Rs. 5,000 (five thousand rupees) per marla;

(c) Compensation for the value of the construction to be Rs.200,000 (two hundred thousand rupees); and

(d) The cost of litigation granted by the High Court.

15. For the reasons mentioned above Civil Appeal No. 79-P of 2013 is partly allowed in the aforesaid terms and Civil Appeal Nos.143-P to 146-P of 2013 are dismissed. The order whereby judgment in these appeals was reserved had concluded as under:

" After the announcement of the judgment in these appeals the office is directed to send the files to the principal seat of this Court at Islamabad for determination of the question noted in the following paragraph.

2. The learned counsel for the College informed us that previously the College was known as the Government Comprehensive School and the land on which it stood was owned by the Government, however, subsequently the said School was converted into the College and was named after General Fazal Haq, the then Governor of the Province, when he was in office. The question arises whether the College

which was built on Government land and constructed out of public funds and for which land compulsorily acquired had been paid out of public funds can be named after a living person and one who held public office in Pakistan. The learned counsel for the College is directed to submit concise statement in this regard and attach therein all documents pertaining to the naming of the College. The learned Advocate General, Khyber Pakhtunkhwa seeks time to take instructions and to formulate his views on the noted question. Since our decision in respect of the matter of naming the College may affect the naming of public buildings, public parks, public roads and other public places not only in the province of the Khyber Pakhtunkhwa but also in other parts of Pakistan notices be issued to the Advocate Generals of all the four provinces, the Islamabad Capital Territory and the Attorney General for Pakistan, all of whom are directed to file their respective written submissions within six weeks, whereafter the matter be fixed in Court for hearing."

16. After the announcement of this judgment the office is directed to fix the aforenoted question for consideration of this Court as per the orders of the Hon'ble Chief Justice.

MWA/S-8/SC Order accordingly.

**2019 S C M R 610**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Yahya Afridi, JJ**

**MUHAMMAD AKRAM alias AKRAI---Appellant**

**Versus**

**The STATE---Respondent**

Criminal Appeal No. 160-L of 2013, decided on 7th March, 2019.

(On appeal against the judgment dated 08.03.2010 passed by the Lahore High Court, Lahore in Crl. As. Nos. 1139, 589 of 2004 and Murder Reference No. 484 of 2004)

**(a) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Reappraisal of evidence---Complainant party made no conscious or deliberate delay in reporting the matter to police---Complainant was the brother of the deceased and also an eye-witness---Presence of both the eye-witnesses at the place of occurrence was established beyond doubt---Both eye-witnesses while appearing before the Trial Court remained consistent on all the material aspects of the case, and they, in a straightforward manner held the accused responsible for the murder of deceased---Probable time between death and postmortem as noted by doctor coincided with the ocular account---Prosecution had been successful in proving its case against the accused beyond reasonable doubt---Conviction of accused recorded under S. 302(b), P.P.C. was maintained in circumstances.

**(b) Penal Code (XLV of 1860)---**

----S. 302(b)--- Qatl-i-amd--- Reappraisal of evidence---Eye-witness---Presence at scene of occurrence---Plausible explanation---One of the eye-witness was a friend of deceased---Said eye-witness was an independent witness and the resident of the vicinity---In his statement recorded before the Trial Court, he stated that he had friendship with deceased for the last about 18/20 years; that the distance between his house and the house of the deceased was about 250 meters and that he was residing in the vicinity for the last 20 years---Said eye-witness had given a plausible explanation for his presence at the spot at the relevant time--- Conviction of accused for murder was maintained in circumstances.

**(c) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Reappraisal of evidence---Identification of accused in low light---Where complainant and accused parties were closely related to each other, the identification of a close relative (accused) even in low light was not a big deal.

**(d) Penal Code (XLV of 1860)---**

----S. 302(b)--- Qatl-i-amd--- Reappraisal of evidence--- Sentence, reduction in---Death sentence reduced to imprisonment for life---Motive not proved---Specific motive was set out by the complainant in the FIR and in his statement recorded before the Trial Court by claiming that four days prior to the occurrence, accused along with his vagabond friends had come and stood in front of the house of the complainant, and the deceased had reprimanded the accused, whereupon an altercation took place between the two; that the accused had allegedly threatened the deceased of dire consequences and on account of such grudge, the accused committed the crime---In his cross-examination, the complainant admitted that he had never reported to police that accused along with his vagabond friends used to come and stand in front of their

house---Nothing was available on record to prove that the incidence of altercation between accused and deceased was ever reported to police---Complainant also did not disclose the names of vagabond friends of the accused who used to come and stand in front of the house of the complainant---Real cause of the occurrence had not been disclosed by either of the sides---In such circumstances, the motive set out by the prosecution remained far from being proved---Prosecution's failure to prove the motive set out by it certainly benefited the accused---Conviction of the accused under S. 302(b), P.P.C. was maintained but his sentence of death was converted into imprisonment for life.

Miss Najma Parveen, Advocate Supreme Court for Appellant.

Mazhar Sher Awan, Additional P.-G., Punjab for the State.

Umar Hayat Sandhu, Advocate Supreme Court for the Complainant.

Date of hearing: 7th March, 2019.

**JUDGMENT**

**MANZOOR AHMAD MALIK, J.**---The appellant-Muhammad Akram @ Akrai and his co-accused Imtiaz Ahmad faced trial in case FIR No.245 dated 11.05.2001, offence under sections 302, 324, 34, P.P.C., registered at Police Station Shahdara Town, Lahore. On conclusion of trial, the learned trial Court, vide its judgment dated 09.03.2004, convicted the appellant under section 302(b), P.P.C. and sentenced him to death for the murder of Muhammad Riaz. He was also directed to pay compensation of Rs. 1,00,000/- to the legal heirs of deceased, in terms of section 544-A, Code of Criminal Procedure, in default whereof to undergo six months' S.I. Aggrieved of his conviction and sentence, the appellant filed a criminal appeal before the learned Lahore High Court, Lahore. A Murder Reference was sent by the learned trial Court for confirmation of sentence of death of the appellant or otherwise. A criminal appeal was also filed by the complainant against the acquittal of co-accused Imtiaz Ahmad. Through the impugned judgment, the learned Appellate Court while maintaining the conviction and sentence of appellant dismissed his criminal appeal and answered the Murder Reference in the affirmative. The criminal appeal filed by the complainant against acquittal of co-accused was also dismissed by the learned High Court through the impugned judgment. Thereafter, the appellant filed a jail petition before this Court, whereas the complainant filed a criminal petition against the acquittal of co-accused Imtiaz Ali. This Court, vide order dated 26.03.2013, dismissed the criminal petition filed by the complainant and granted leave in the jail petition filed by the appellant. Hence, the instant criminal appeal.

2. Facts of the case have been summarized by the learned High Court in para.3 of its judgment, which read as under:-

"3. The prosecution story, in brief as narrated in the FIR Ex.P.A/1 by Fiaz Ali, complainant PW.1 is that on 10.05.2001 at 10.30 p.m. his brother Muhammad Riaz along with his friend Muhammad Shafique went outside the house towards "Band" for a walk. After a while the complainant along with Muhammad Ilyas (given up) also went towards "Band". In the meantime Muhammad Akram, appellant and his brother-in-law Imtiaz Ahmad co-accused armed with pistols came towards the "Band". Imtiaz Ahmad raised a lalkara that Riaz should not be let alive upon which Muhammad Akram fired a shot from his revolver hitting Muhammad Riaz on the back of his head who fell down. Thereafter, Muhammad Akram appellant fired at Riaz hitting him on his umbilicus, left thigh, left shin and left shoulder. It was further alleged that the complainant, Ilyas and Shafique stepped forward to save Muhammad Riaz but they were also fired at by

Imtiaz Ahmad and Muhammad Akram who were luckily saved. Thereafter Akram and Imtiaz fled from the spot while firing in the air. Muhammad Riaz was immediately taken to Mayo Hospital, Lahore where he was admitted but he could not survive. Hence, the FIR."

3. We have heard learned counsel for the appellant, learned counsel for the complainant and learned Additional Prosecutor General at length and have perused the available record with their assistance.

4. The occurrence in this case, as per prosecution, took place on 10.05.2001 at 10.30 p.m. The matter was reported to police by the complainant Fiaz Ali from Myo Hospital, Lahore at 12.30 hours (night), as a result whereof formal FIR was registered at 1.00 hours (night). The prosecution has produced Dr. Muhammad Aslam Awan (PW7) who provided medical aid to deceased Muhammad Riaz as the latter at that time was in injured condition in the emergency of Myo Hospital, Lahore. The doctor has stated before the trial court that injured (later on deceased) was brought to hospital by complainant Fiaz Ali, real brother of deceased. In these circumstances, it has been observed by us that there is no conscious or deliberate delay in reporting the matter to police.

5. The prosecution in order to prove its case against the appellant produced complainant Fiaz Ali (PW1) and Muhammad Shafique (PW2). The complainant Fiaz Ali (PW1) is the real brother of the deceased Muhammad Riaz, whereas Muhammad Shafique (PW2) is the friend of deceased. He is an independent witness and the resident of the vicinity. In his statement recorded before the trial court, he stated that he had friendship with deceased for the last about 18/20 years; that the distance between his house and the house of the deceased is about 250 meters and that he was residing in the vicinity for the last 20 years. He has given plausible explanation for his presence at the spot at the relevant time. As earlier discussed, the doctor (PW7) who medically examined Muhammad Riaz (deceased) in injured condition stated that the deceased Muhammad Riaz was brought to hospital by Fiaz Ali (PW1), the complainant of the case. In these circumstances, the presence of both the eye-witnesses at the place of occurrence is established beyond doubt. The complainant Fiaz Ali (PW1) and Muhammad Shafique (PW2) while appearing before the trial court remained consistent on all the material aspects of the case. They in a straightforward manner held the appellant responsible for the murder of Muhammad Riaz. The main argument of learned counsel for the appellant is that it was a night time occurrence and no source of light has been mentioned by the complainant in the FIR. It has been observed by us that in the site plan which was prepared on the instructions and pointation of the witnesses, the availability of 1000 watt rod and 200 watt bulb at points E and F respectively has been shown to be lit. Even otherwise, the parties are closely related to each other and identification of a close relative even in low light is not a big deal. Dr. Muhammad Aslam Awan (PW7) medically examined Muhammad Riaz in injured condition, whereas Dr. Muhammad Nazir (PW11) conducted post-mortem examination on the dead body of Muhammad Riaz and observed five entry wounds on the person of deceased. According to doctor (PW11), injuries Nos. 1, 3, 4, 5 and 6 were caused by firearm weapon. The probable time between death and postmortem as noted by doctor coincides with the ocular account. It has been observed by us that the learned appellate court has excluded recovery of revolver from the appellant and positive report of FSL from consideration due to the reason that the empties and the revolver were sent to the office of FSL on the same day after the arrest of appellant. Even if the recovery is excluded from consideration being legally inconsequential, it has been observed by us that the direct evidence in the form of ocular account furnished by complainant Fiaz Ali (PW1) and Muhammad Shafique (PW2) is confidence inspiring which has the support of medical evidence. In these circumstances, we have no hesitation to hold that the prosecution has been successful in proving its case against the appellant beyond reasonable doubt. Having concluded so, it has been observed by us that a specific motive was set out by the complainant in the FIR and in his statement recorded before the trial court inasmuch as four days prior to the occurrence, appellant along with his vagabond friends had come and stood in front of the house of the complainant.

Muhammad Riaz (deceased) had reprimanded the appellant, whereupon an altercation took place between the two. The appellant had threatened the deceased Muhammad Riaz of dire consequences and on account of this grudge, the appellant committed the crime. In his cross-examination, the complainant Fiaz Ali admitted that he had never reported to police that appellant along with his vagabond friends used to come and stand in front of their house. There is also nothing on record to prove that the incidence of altercation between appellant and deceased was ever reported to police. The complainant also did not disclose the names of vagabond friends of the appellant who used to come and stand in front of the house of the complainant. It appears that the real cause of the occurrence has not been disclosed by either of the sides. In these circumstances, we are of the view that the motive set out by the prosecution remained far from being proved. It is well settled that when prosecution alleges something against an accused person and then fails to prove the same, the premium of such failure must go to an accused person. In this case as well, prosecution's failure to prove the motive set out by it certainly benefits the appellant.

6. For what has been discussed above, the instant criminal appeal is partly allowed. The conviction of the appellant under section 302(b), P.P.C. is maintained but his sentence of death is converted into imprisonment for life. The amount of compensation and sentence in its default are maintained. Benefit of section 382-B, Code of Criminal Procedure is extended to the appellant. The impugned judgments of the learned Courts below are modified accordingly.

MWA/M-9/SC Order accordingly.

**2019 S C M R 631**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Yahya Afridi, JJ**

**MUHAMMAD ARIF---Appellant**

**Versus**

**The STATE---Respondent**

Criminal Appeal No. 177-L of 2013, decided on 7th March, 2019.

(On appeal against the judgment dated 12.03.2010 passed by the learned Lahore High Court, Lahore in Crl. A. No. 1530 of 2010 and Murder Reference No. 647 of 2004)

**(a) Penal Code (XLV of 1860)---**

----Ss. 302(b), 324 & 337-A(ii)---Qatl-i-amd, attempt to commit qatl-i-amd, shajjah-i-khafifah---Reappraisal of evidence---Accused and his co-accused persons were alleged to have murdered the deceased and caused injuries to certain other persons---Trial Court convicted and sentenced the accused to death---High Court maintained conviction of accused but reduced his sentence to imprisonment for life---Held, that vehicle of the complainant's side was assaulted allegedly by the accused and three others at about 05:30 a.m. and the crime was reported to the police at 05:45 a.m. i.e. within fifteen minutes---Such circumstance showed that crime was not reported to the police at the time mentioned in the FIR, which made the prosecution case doubtful in nature from its inception---Ocular account was furnished by two witnesses, who made material improvements to their statements while appearing before the Trial Court---Moreover one of the co-accused who was attributed a firearm injury on the person of injured witness was acquitted by the High Court---Ocular account was not fully supported by the medical evidence because in the FIR as well as before the Trial Court only one injury on the person of deceased was attributed to the accused, however, in the post mortem examination report two firearm injuries were observed---No explanation whatsoever was given as to how the second injury was inflicted on the person of deceased---Recovery of the weapons of offence along with live bullets allegedly effected at the instance of the accused was not of much help to the prosecution because report of the Forensic Science Laboratory was simply to the effect that the rifle was in working order---Prosecution claimed that the accused and his accomplices reached at the place of occurrence in a car, chased the car of the complainant's side and decamped from the place of occurrence in the same car---In the FIR, model, make or registration number of the car was not disclosed---In order to prove abscondance of the accused for a period of three months and ten days the prosecution produced a police official who stated during his cross-examination that the address given in the warrants of arrest did not specify street, house number and other conspicuous place, and that the report on the warrants of arrest did not contain name of any person from the neighborhood or any respectable person of the locality---No corroboration could be sought from such absconcion which, even otherwise, was only for a period of three months and ten days---Conviction and sentence recorded against the accused by the courts below were set aside and accused was acquitted of the charges framed against him---Appeal was allowed accordingly.

**(b) Penal Code (XLV of 1860)---**

----S. 302(b)--- Qatl-i-amd--- Reappraisal of evidence---Improvement made by witness in his previous statement---Effect---When a witness improved his statement dishonestly to strengthen the prosecution case, such portion of his statement was to be discarded---Testimony of such witness could not be safely relied upon to maintain conviction and sentence of an accused on a capital charge. [p. 636] C

Munir Ahmad Bhatti, Advocate Supreme Court and Ms. Tasnim Amin, Advocate-on-Record for Appellant.

Mazhar Sher Awan, Additional P.G. Punjab for the State.

Date of hearing: 7th March, 2019.

**JUDGMENT**

**MANZOOR AHMAD MALIK, J.---**Muhammad Arif (appellant) along with his co-accused namely Muhammad Javaid and Babar Irfan faced trial before a learned Additional Sessions Judge Faisalabad in case FIR No.336/2002 dated 01.08.2002 offence under sections 302, 324, 427 and 34, P.P.C. registered at Police Station Gulberg, Faisalabad. After regular trial, he was convicted under section 302(b), P.P.C. and sentenced to death. He was also directed to pay Rs.1,00,000/- (rupees one hundred thousand only) as compensation to the legal heirs of the deceased. He was also convicted under section 324, P.P.C. and sentenced to rigorous imprisonment for ten years with fine of Rs.50,000/-. In default of fine the appellant had to undergo simple imprisonment of six months. Co-accused of the appellant namely Muhammad Javaid was also convicted under section 302(b), P.P.C. and sentenced to imprisonment for life. He was also directed to pay Rs.1,00,000/- (rupees one hundred thousand only) as compensation to the legal heirs of the deceased. In default of payment of compensation amount he had to further undergo simple imprisonment for six months. He was also convicted under section 324, P.P.C. and sentenced ten years imprisonment with fine of Rs.50,000/-. In default of payment of fine he had to undergo simple imprisonment of six months. Muhammad Arif (appellant) and his co-accused Muhammad Javaid were also convicted under section 337-A(i), P.P.C. and sentenced to two years' R.I. and Daman of Rs.10,000/- (rupees ten thousand only) each. The substantive sentences were ordered to run concurrently and benefit of section 382-B, Code of Criminal Procedure was extended to both of them. Through the same judgment, Baber Arfan, co-accused of the appellant was acquitted of the charge. Aggrieved of their conviction and sentence Muhammad Arif (appellant) and his co-convict Muhammad Javaid filed Criminal Appeal No.1530 of 2004 whereas the learned trial court transmitted Murder Reference No.647 of 2004 for confirmation or otherwise of the sentence of death awarded to Muhammad Arif (appellant). Both these matters were taken up together by the learned appellate court. A learned Division Bench of the Lahore High Court through impugned judgment dated 12.03.2010 allowed the appeal to the extent of Muhammad Javaid and he was acquitted of the charges framed against him. To the extent of Muhammad Arif (appellant) the appeal was dismissed, however, his death sentenced was converted into imprisonment for life. It was observed by the learned appellate court that Muhammad Arif (appellant) shall pay the compensation on the same terms and conditions as ordained by the learned trial court. Feeling dissatisfied with the verdict of the learned appellate court Muhammad Arif preferred Jail Petition No.569/2010 wherein leave was granted vide order dated 21.02.2013 to consider whether the conclusions reached by the Lahore High Court, Lahore out to have resulted in the petitioner's acquittal or not. Hence this appeal with the leave of the Court. Before proceeding further in the matter, it is pertinent to note here that through the same order, Criminal Petition No.977-L of 2010 filed by Hamid Hussain complainant was dismissed and leave to appeal to that extent was refused.

2. Brief facts of the case as divulged from the complaint (Ex:PT) and (FIR Ex:PT/1) are that the complainant along with his father and brother were going towards his business on 01.08.2002 at about 05:30 a.m. early in the morning. When their car reached near the graveyard, Muhammad Arif (appellant) and Muhammad Javaid (co-accused of the appellant since acquitted by the learned appellate court) along with two other unknown persons armed with deadly weapons were available in another car without any registration number. When the car of complainant's side reached near the car of the appellant's side, Muhammad Arif (appellant) started firing with his rifle. One of the bullets hit the back side of neck of Javaid Hussain, father of the complainant. Then all the assailants made indiscriminate firing. It was further alleged in the FIR by

the complainant that Muhammad Javaid fired with his pump action which hit the brother of the complainant namely Aamer Javed on the left side of his head. The motive behind the occurrence as stated in the FIR was to the effect that father of Muhammad Arif (appellant) was murdered, and in that, father of the complainant was implicated but subsequently acquitted. Due to that grudge, Muhammad Arif (appellant) etc attempted to murder Javaid Hussain (deceased) about six years back. In that case Muhammad Arif (appellant) was a proclaimed offender whereas father of Muhammad Javaid had been convicted and sentenced to three years' rigorous imprisonment. Due to this grudge an assault was made upon the complainant's side.

3. We have heard learned counsel for the appellant, learned Additional Prosecutor General Punjab for the State and with their able assistance have also gone through the relevant record.

4. Car of the complainant's side was assaulted allegedly by Muhammad Arif and three others on 01.08.2002 at about 05:30 a.m. and the crime was reported to the Police at 05:45 a.m. i.e. within fifteen minutes. This over promptitude shown by the complainant as well as the Police was exposed by the defence. Dr Muhammad Akram (PW.11) stated during his examination in chief that he had examined Javaid Hussain (deceased) in injured condition at 05:50 a.m. He further stated that he had medically examined Aamar Javaid injured at 06:15 a.m. Zafar Iqbal 2656/HC (PW.16) who had formally recorded the FIR was cross-examined on this aspect of the case. After perusing entry No.25 in register No.2 he narrated that he had written therein that an application along with MLR No.23950 had been received on behalf of Hamid Hussain complainant. He further stated that the application was with medical certificate. He went on to state that FIR and rapt were simultaneously written down. He further clarified the situation by stating that, firstly, he had written rapat and then the FIR was lodged. This part of the cross-examination of Zafar Iqbal (PW.6) when juxtaposed with statement of Dr. Muhammad Akram (PW.11) clearly suggests that the crime was not reported to the Police at the time mentioned in the FIR, which makes the prosecution case doubtful in nature from its inception.

6. Ocular account was furnished by Hamad Hussain complainant (PW.9) and Aamar Javaid injured (PW.10). Both these witnesses while appearing before the learned trial court made material improvements. They were confronted with their statements recorded by the Police and the improvements were brought on record. Relevant extract from the cross-examination of the complainant is reproduced hereunder:-

"I did not record in my statement before the police that Akbar PW is my Mamoon and Arif, Javaid and Babar accused are relatives inter se. I stated before the police that I was travelling with my father in the car TOYOTA COROLLA FDU25. Confronted with Exh.PT only car has been mentioned sans any number or make. I had got recorded in my statement under section 154 of Cr.P.C. that I was driving the car, while my father was sitting in the front seat and my brother Aamar Javaid was sitting in the rear seat behind the deceased. Confronted with Exh.PT where not so recorded. I do not remember as to whether I have mentioned in statement about Alto car without bearing registration number. Confronted with Exh.PT the word Alto is not recorded. I have narrated in my statement Exh.PT that Javaid son of Bashir was armed with pump action .12 bore. Confronted with Exh.PT where armed with .12 bore is not mentioned. Volunteered that rifle was got recorded as a mistake, which was subsequently corrected in the same statement. It is incorrect that my volunteered statement is false. It is incorrect that just to make my statement true, I am deliberately converted the word rifle into .12 bore pump action. I did not mention in my statement Exh.PT that two unidentified people were armed with .222 bore rifle and .12 bore gun. I had got recorded that Arif opened the fire with 222 rifle which hit my father on the back side of neck. Confronted with Exh.PT the word "222"-is not mentioned. It is true that I have got recorded that Arif started firing with his rifle as soon as he saw our car. It is incorrect that I have improved my statement with mala fide intention

as tutored to me in order to bring it in line with medical evidence. I have mentioned that Javaid opened fire with his pump action gun. I did not mention in my complaint Exh.PT that we were medically(sic.) and medical certificates were issued. Confronted with Exh.PT only going to hospital is mentioned. I did not mention about pendency of any appeal of father of accused Javaid. I did not specifically mention that my father remained unconscious as a result of injuries sustained by firearm, made by the accused. I did not make any statement to the Police in respect of my statement in chief that on 8.8.2002 besides me PW Akbar and Aamar Javaid were present on the place of occurrence when Aurang Zaib Draftsman inspected the same and prepared scaled site plan. I did not make statement before the police that Magistrate had got recorded my statement on 23.11.2002. It is incorrect that I have deliberately improved my statement as tutored to me."

Following improvements were brought on record through cross-examination of Aamer Javaid injured PW.10:-

"My statement was recorded by the police. I did not state before the police that I was running a commission shop.

However, I have stated that when we reached graveyeard chowk, an Alto car without registration number was parked there. Confronted with Exh.DA, make of the car Alto is not mentioned. I had got recorded that Arif was armed with 222, Babar Irfan who was identified by me later on in the jail was armed with 222 and Javaid was armed with 12 bore pump action. Confronted with DA, the 222 and 12 bore are not recorded. I had also stated that Arif fired at my father, which hit him on the back side of his neck. Confronted with Exh.DA where

is recorded. I also stated that Javaid made a fire with his weapon which after pearcing through window pane hit on my left side of head and a pellet of the same is still available in my head. Confronted with Exh.DA not recorded in same dictation. I had also stated that one fire hit the door and upper part of the door (Gola of door). Confronted with Exh.DA word "Gola" is not recorded."

It is well established by now that when a witness improves his statement and moment it is observed that the said improvement was made dishonestly to strengthen the prosecution, such portion of his statement is to be discarded out of consideration. Having observed the improvements in the statements of both the witnesses of ocular account, we hold that it is not safe to rely on their testimony to maintain conviction and sentence of Muhammad Arif (appellant) on a capital charge. Moreover, Muhammad Javaid co-accused of the appellant who was attributed a firearm injury on the person of Aamer Javaid injured (PW.10) was acquitted by the learned appellate court. Criminal Petition filed by the complainant challenging his acquittal was dismissed, therefore, if testimony of Aamer Javaid was not believed to the extent of the injuries on his person, the same deserves to be discarded out of consideration to the extent of the role assigned to Muhammad Arif (appellant).

6. The ocular account is not fully supported by the medical because in the FIR as well as before the learned trial court only one injury on the person of Javaid Hussain (deceased) was attributed to Muhammad Arif (appellant). Even as per MLC of Javaid Hussain issued in his favour by Dr. Muhammad Akram (PW11), who medically examined him, there was only one entry wound on the person of deceased. During his cross-

examination, he (PW11) stated that he did not observe any other injury on the person of deceased. Dr. Iftikhar Ahmad (PW2) conducted postmortem examination on the dead body of deceased Javaid Hussain. He (PW2) stated in his cross-examination stated that there was only one injury in the MLC; that it was only the entry wound and that no exit wound was observed. However, in the post-mortem examination report two firearm injuries (injury No.1 4 cm x 2 cm and injury No.1 cm x 1/2 cm) were observed. There is no explanation whatsoever as to how the second injury was inflicted on the person of Javaid Hussain (deceased).

7. Recovery of the weapons of offence along with live bullets allegedly effected at the instance of the appellant is not of much help to the prosecution because report of the Forensic Science Laboratory (Exh.PHH) is simply to the effect that rifle 222 bore was in working order.

8. It is case of the prosecution that the appellant and his accomplices reached at the place of occurrence in a car, chased the car of the complainant's side and decamped from the place of occurrence in the same car. In the FIR, model, make or registration number of the car was not disclosed. It was claimed by prosecution witnesses that they had identified an Alto car in the warehouse of bank and the same was taken into possession but the said recovery was not effected upon the disclosure or pointation of the present appellant. Babar Irfan on whose disclosure the said car was taken into possession was acquitted by the learned trial court and his acquittal was not assailed any further either by the complainant or by the State, therefore, the said recovery cannot be used against the appellant.

9. The occurrence took place on 01.08.2002. Muhammad Akram S.I. arrested Muhammad Arif (appellant) whereas Muhammad Arif (appellant) was arrested by Abdul Rauf S.I. (PW.17) on 11.11.2002. In order to prove abscondance of the appellant for a period of three months and ten days the prosecution produced Muhammad Irshad 4106/C (PW.3) who stated during his cross-examination that the address given in the warrants of arrest did not specify street, house number and other conspicuous place. He further stated that the report on the warrants of arrest did not contain name of any person from the neghbourhood or any respectable person of the locality. He further stated that the report on the warrants of arrest and proclamation were bereft of any evidence. Therefore, no corroboration can be sought from such absconcion which, even otherwise, is only for a period of three months and ten days.

10. Having gone through the evidence produced by the prosecution, we have also gone through the impugned judgment of the learned Lahore High Court. Case of the present appellant has been discussed in paras 18 and 19, which read as under:-

"As far as the case of Muhammad Arif is concerned, admittedly the occurrence in this case had taken place at 5:30 a.m. on 1.8.2002. The time of occurrence is certainly of odd hours and presence of independent witness at the relevant time and place is out of question. The manner of occurrence in this case is highly criminal as far as the prosecution case is concerned. The prosecution has not brought quality evidence to persuade us to reach the conclusion that whatever the prosecution witnesses had stated is natural and inspire confidence. As per the contents of FIR 4 persons with sophisticated weapon resorted to indiscriminate firing at a place where there was no scope of interception or retaliation and nothing was recovered in the shape of crime empty from the place of occurrence. It is the prosecution case that the appellants also chased them when they accelerated their vehicle to escape from the place of occurrence but in such trial not a single empty was recovered. We are conscious of the fact that although the deceased and other persons present in the vehicle were at the mercy of the appellant but one pellet was recovered from the injury of prosecution witness, which was declared being superficial by the Doctor. The injury ascribed to the deceased though was caused by fire arm, but nothing in the shape of pellet or bullet was recovered from there except a Led

bullet, which was found lying in the car, was sent to the office of Forensic Science Laboratory, but of not avail to the prosecution. This version of the prosecution that the deceased sustained only one injury on the back of neck is contradicted by the Doctor, who conducted the post mortem examination (PW2), who gave his opinion that there are two injuries on the person of the deceased, for which the ocular account is silent. According to the contents of the FIR, appellant Arif was armed with rifle but recovery of rifle from the possession of Arif appellant is also not of much importance because no empty of rifle was recovered from the place of occurrence. Recovery of Led Bullet from the Car FDU 25 belonging to the complainant party do not advance prosecution case because the report of Forensic Science Laboratory does not coincide with the prosecution case. We also cannot loose sight of the fact that the fact that the deceased of this case Javaid Hassain sustained on 1.8.2002, while he succumbed to the injuries after 7 days of the occurrence i.e. on 7.8.2002 after the lapse of 7 days of the occurrence i.e. 7.8.2002 after the lapse of 7 days and according to the report of Doctor PW-11 the death in this case had occurred due to cardio respiratory arrest, which could not direct affect of the injury caused. If so, then the injury caused to the deceased by the appellant had not contributed towards his death, rather it could be due to slackness of the Doctor or so many other medical complications, which are not brought on the record. Previous enmity between the parties is admitted that there was cordial relations between the parties since many years, if so, the prosecution is silent on the immediate motive to commit the crime in hand.

19. What has been stated above, we cannot escape from the fact that the deceased had already 60 criminal cases to his credit, which shows his desperate character. In such like situation the judgment referred by the learned counsel for the appellant of the august Supreme Court report above, lends guidance to us, therefore, following the judgment reported above, we consider it a mitigating circumstance in favour of the appellant. Therefore, following the principle of abundant caution we do not find any independent corroboration qua the case of Arif appellant keeping in view the admitted enmity between the parties and non-mentioning of source of at the relevant time..."

11. As a sequel of the reappraisal of evidence in paras 4 to 9 and particularly the observations recorded by the learned appellate court in the impugned judgment there was no justification for the learned appellate court to award imprisonment for life and it was an open and shut case of acquittal. Therefore, the appeal in hand is allowed. Conviction and sentence recorded against the appellant by the learned courts below are set aside and appellant Muhammad Arif is acquitted of the charges framed against him. He is in jail and ordered to be released forthwith if not required to be detained any other case.

MWA/M-11/SC Appeal allowed.

**2019 S C M R 643**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Yahya Afridi, JJ**

**GOVERNMENT OF THE PUNJAB, EDUCATION DEPARTMENT through Secretary Higher Education, Punjab Civil Secretariat Lahore and others--Petitioners**

**Versus**

**MUHAMMAD IMRAN and others---Respondents**

Civil Petitions Nos. 1696-L to 1706-L of 2018 and Civil Petition No.3569-L of 2016, decided on 28th February, 2019.

(On appeal against the judgment/order dated 24.04.2016 of the Lahore High Court, Lahore passed in W.P. No. 39728 of 2016, W.P. No. 19283 of 2011, W.Ps. Nos. 1766, 3896, 4017, 4221, 5056, 8325, 1917, 15483, 28506 of 2017 and 178251 of 2018)

**(a) General Clauses Act (X of 1897)---**

----S. 21---Order---Power to amend, add to or rescind---Scope---Authority which could pass an order was entitled to vary, amend, add to or rescind the same under S. 21 of the General Clauses Act, 1897.

**(b) General Clauses Act (X of 1897)---**

----S. 21---Recalling of an order---Locus poenitentiae, principle of---Scope---Jurisdiction/power vested in an authority to recall an earlier older was based on the principle of locus poenitentiae---Exception to such principle was where in pursuance of the order passed by the authority, an aggrieved person took decisive steps, and changed his position---No one could retain the benefits of a withdrawn order, claiming the protection of having taken a decisive step, when the very order passed by the authority was illegal, void or without lawful authority---In such circumstances, it would not matter, even if decisive steps had been taken by the person in pursuance of the illegal order passed by the authority---However, the pecuniary benefit accrued and already received by a person in pursuance of an illegal order passed by the competent authority could not be recovered from him unless the benefiting order was obtained by the person through fraud, misrepresentation or concealment of material facts.

Pakistan through the Secretary, Ministry of Finance v. Muhammad Himayatullah Farukhi PLD 1969 SC 407; Engineer-in-Chief Branch v. Jalaluddin PLD 1992 SC 207; Shahid Masood Nadeem v. Dy. C.A.A.F., Lahore Cantt. 2003 PLC (C.S.) 1262; Shaukat Ali v. District Government through Nazim/Chairman Selection Committee and 4 others 2005 PLC (C.S.) 790 and Mst. Sajida Javed v. Director of Secondary Education, Lahore Division and others 2007 PLC (C.S.) 364 ref.

Imtiaz Ahmed Kaif, Additional A.-G., Punjab along with Ahmed Khan, S.O. Estt. Higher Education, Punjab for Petitioners.

Nemo for Respondents.

Date of hearing: 28th February, 2019.

**JUDGMENT**

**YAHYA AFRIDI, J.---**Education Department, Government of Punjab, Lahore ("the Petitioners") seeks leave of this Court challenging the judgment of the Lahore High Court, Lahore in the case titled: Hafeez Ahmed v. The Government of the Punjab and others (W.P. No.19283 of 2011) decided on 18.10.2016, which has been subsequently followed by the Lahore High Court in all the above-mentioned petitions vide common judgment dated 24.04.2018.

2. The essential facts leading to the present petitions have been aptly recapitulated by the High Court in its impugned judgment in Hafeez Ahmed's case (supra), in terms that:

"Unnecessary details apart, the facts, relevant for the disposal of the instant petition, are that petitioners Nos.1 to 95 were appointed as Lecturers in Education Department on contract basis in the year 2002 whereas petitioners Nos.96 to 145 joined the department as such in the year 2005. Later on Government of Punjab, through Notifications issued in the years, 2009 and 2010 regularized the services of the petitioners and they were held entitled for the protection of the pay drawn by them at the relevant time excluding the amount of social security benefit. After regularization of their services the petitioners started drawing their salary, however, later on, the District Accounts Officer on account of some clarification issued by the Accountant General Punjab started recovery of the amount already received by them on account of various Ad hoc Relief Allowance; hence this petition".

3. At the very outset of the proceeding, Mr. Imtiaz Ahmad Kaif, learned Additional Advocate General, Punjab was confronted as to whether the impugned allowance was paid to the Private-respondents by sanction of the competent authority, his response was in the negative, and he explained that the payment thereof to the private respondents lacked the requisite approval of the finance department under the applicable rules. He further explained that, the provincial government has constituted an Anomaly Committee to decide, whether the regularized civil servants were entitled to the impugned allowance or otherwise, and thus the private respondents had the alternate remedy to seek redressal of their said grievance. He was then confronted as to whether the private respondents had misrepresented, committed any fraud or concealment of facts in obtaining the impugned allowance, his response was in negative. He was further confronted, as to whether any proceedings were initiated against any government official responsible for allowing the inadmissible allowance to be paid to the private-respondents, his response was again in the negative.

4. In essence, the grievance of the private respondents in their writ petitions before the High Court was not the stoppage of payment of the impugned allowance, but the recovery thereof by the provincial government. This being so, the High Court was correct in holding that approaching the Anomaly Committee would not be of any avail to the private respondents, as far as the recovery of the already received impugned allowances.

5. The jurisdictional contours of an authority to recall its orders was considered in detail in Pakistan through the Secretary, Ministry of Finance v. Muhammad Himayatullah Farukhi (PLD 1969 SC 407), wherein an earlier order of the President of Pakistan made in favour of a government servant fixing his basic salary at a certain rate was withdrawn. This Court by a majority decision declared the withdrawal of the order to be without lawful authority in terms that:

"The authority that has the power to make an order has also the power to undo it. But this is subject to the exception that where the order has taken legal effect, and in pursuance, thereof certain rights have been created in favour of any individual, such an order cannot be withdrawn or rescinded to the detriment of those rights."

6. The ratio of the decision in the aforementioned case evolved with time. It was in Engineer-in-Chief Branch v. Jalaluddin (PLD 1992 SC 207) that this Court further refined the scope of the jurisdictional limits of the authority to withdraw its decisions, observing that:

"Locus poenitentiae is the power of receding till a decisive step is taken. But it is not a principle of law that orders once passed becomes irrevocable and it is past and closed transaction. If the order is illegal then perpetual rights cannot be gained on the basis of an illegal order... However, as the respondent had received the amount on the bona fide belief, the appellant is not entitled to recover the amount drawn by the respondent during the period when the latter remained in the field... We consider that as far as the recovery of the amount in question is concerned, the principle of locus poenitentiae would be applicable and the appellants are not entitled to recover the amount."

7. The principle laid down in the above-stated case was echoed in Shahid Masood Nadeem v. DY. C.A.A.F., Lahore Cantt. (2003 PLC (C.S.) 1262), wherein the Court reiterated that:

"It is settled proposition of law that no right can be claimed on the basis of an illegal order and such an order despite having taken effect, neither would change its status nor create any right enforceable in law and in the light of principle that the authority which possesses the power of passing an order is also empowered to vary, amend or rescind, the said order can be undone with no legal bar."

8. Following the above principle, this Court in the case of Shaukat Ali v. District Government through Nazim/Chairman Selection Committee and 4 others (2005 PLC (C.S.) 790) dilated upon the jurisdictional mandate of the authority to order the recovery the amount wrongly received by a government servant by observing that:

"It appears that the respondents did not send an officer/official to verify the documents of the petitioner from the concerned University and did not even use the modern technology of Computer E-Mail, U.M.S. This fact brings the case in the year that the petitioner had performed the duties of the respondents as a teacher on account of contributory negligence of the respondents... the action of the respondents is without lawful authority."

9. In a similar matter, regarding recovery of the received amount by a government servant, this Court in Mst. Sajida Javed v. Director of Secondary Education, Lahore Division and others (2007 PLC (C.S.) 364), after dilating upon the precedent cases, concluded that:

"This Court has consistently declared in a large number of cases that the payment made to a civil servant in the course of employment, due to inadvertence on the part of the employer, cannot be allowed to be recovered as arrears of salary wrongly paid. In our view, petitioner cannot be legally asked to refund the differential of salary drawn by her of the post against which she had been serving under a valid order. Reservation/allocation of vacancies for a particular District and utilization in another District has no nexus with the case of the petitioner."

10. Keeping in view the above deliberation, it is noted that there is a judicial consensus on the issues in hand in terms that;

I) The Authority which can pass order is entitled to vary, amend, add to or to rescind the same under section 21 of the General Clauses Act, 1897.

II) The jurisdiction to recall an earlier older is based on the principle of locus poenitentiae.

III) There is an exception to the principle of locus poenitentiae vesting power in an authority to recall its earlier order: if in pursuance of the order passed by the authority, an aggrieved person takes decisive steps, and changes his position.

IV) None can retain the benefits of a withdrawn order, claiming the protection of having taken a decisive step, when the very order passed by the authority is illegal, void or without lawful authority. In such circumstances, it would not matter, even if decisive steps have been taken by the person in pursuance of the illegal order passed by the authority. However, the pecuniary benefit accrued and already received by a person in pursuance of an illegal order passed by the competent authority cannot be recovered from him unless the benefiting order was obtained by the person through fraud, misrepresentation or concealment of material facts.

11. In the present case, it is an admitted position that the private respondents performed their duties during the interregnum period, and that the impugned allowances were not allowed or disbursed to them on their overt act of fraud, misrepresentation or even any concealment of fact. As the conditions precedent for recovery of an unauthorized payment is wanting in the present cases, the impugned recovery of allowances is thus not in accord with the law, and any amount so recovered from the private respondents warrants to be returned.

12. Accordingly, for the reasons stated hereinabove, the impugned decision of the High Court being in accord with the settled principle of safe administration of justice.

The instant petitions being bereft of merit are dismissed, and the leave so sought is refused.

MWA/G-4/SC Petitions dismissed.

**2019 S C M R 652**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Yahya Afridi, JJ**

**MUHAMMAD ASHRAF alias ACCHU---Appellant**

**Versus**

**The STATE---Respondent**

Criminal Appeal No. 176-L of 2013, decided on 7th March, 2019.

(On appeal from the judgment of the Lahore High Court, Lahore dated 06.04.2010 passed in Criminal Appeal No. 1924 of 2004 and M.R. No. 753 of 2004)

**(a) Penal Code (XLV of 1860)---**

----Ss. 302(b) & 34---Qatl-i-amd, common intention---Reappraisal of evidence---Accused and his co-accused were alleged to have murdered the deceased---Trial Court sentenced the accused to death---High Court reduced sentence of accused from death to imprisonment for life---Held, that occurrence in the present case, as per prosecution took place at 4.30 p.m.---Matter was reported to police on the same day at 5.45 p.m., as a result whereof formal FIR was registered at 6.45 p.m.---Apparent promptitude in reporting the matter to police and registration of FIR was hardly of any avail to the prosecution because the postmortem on the dead body of deceased was conducted after delay of more than 23 hours of reporting the matter to police---Complainant (father of deceased) claimed that during the time of occurrence he was posted as a police official in a city different to the one where the incident took place, but since he was on leave he was with his deceased son in the city where the incident took place---In his cross-examination, complainant claimed that he had produced proof of leave before the investigating officer, however, the investigating officer denied such assertion of complainant and stated before the Trial Court that the complainant never provided any documentary proof regarding his leave---Complainant further claimed that police reached first at the place of occurrence where murder of deceased took place, but the investigating officer stated that the police party reached another place of occurrence before visiting the place where deceased was murdered---Serious doubts were found on record regarding the presence of eyewitnesses at the place of occurrence at the relevant time and their claim of witnessing the occurrence---Direct evidence of complainant and another witness had been disbelieved up to the Supreme Court to the extent of co-accused, therefore, it was of paramount importance to see as to what independent corroboration was available on record to distinguish the case of accused from that of his acquitted co-accused---Scrutiny of evidence showed that no such corroboration was available on record---Empties secured from the spot and the weapon (pistol) allegedly recovered from the possession of accused at the time of his arrest were sent to the office of Forensic Science Laboratory on the same day i.e. on 21-03-2002 after the arrest of accused on 23-01-2002---In such circumstances, the report of Forensic Science Laboratory (FSL) could not be relied and was legally inconsequential---Conviction and sentence of accused was set aside and he was acquitted of the charge framed against him---Appeal was allowed accordingly.

**(b) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Reappraisal of evidence---Motive---Previous enmity---Motive was always a double-edged weapon---Previous enmity could be a reason for the accused to commit the alleged crime, but it could equally be a reason for the complainant side to falsely implicate the accused in the case for previous grouse.

**(c) Penal Code (XLV of 1860)---**

----S.302(b)---Qatl-i-amd---Reappraisal of evidence---Benefit of doubt---Benefit of slightest of doubt must go to accused.

**(d) Penal Code (XLV of 1860)---**

----S. 302(b)--- Qatl-i-amd--- Reappraisal of evidence---Concocted evidence provided by chance witnesses---Where the Court reached a conclusion that the eyewitnesses were chance witnesses; they had not witnessed the occurrence and the prosecution story was concocted by the prosecution witnesses, then the case of the accused merited plain acquittal.

Mian Muhammad Ilyas, Advocate Supreme Court for Appellant.

Mazhar Sher Awan, Additional P.-G. for the State.

Complainant in person.

Date of hearing: 7th March, 2019.

**JUDGMENT**

**MANZOOR AHMAD MALIK, J.---**Being dissatisfied with the investigation of case by local police in case FIR No. 548 dated 24.12.2001, offence under sections 302, 324, 337-F(iii), 148, 149, P.P.C. registered on his statement at Police Station Raiwind Saddar, District Kasur, the complainant Sultan Ahmad instituted a private complaint, wherein appellant Muhammad Ashraf @ Acchu and co-accused Saeed Ahmad were summoned to face trial. On conclusion of trial, the learned trial Court, vide its judgment dated 26.11.2004, convicted the appellant under section 302(b)/34, P.P.C. and sentenced him to death. Co-accused Saeed Ahmad was also convicted under section 302(b)/34, P.P.C. and awarded imprisonment for life. Both the convicts were directed to pay compensation of Rs.50,000/- each to the legal heirs of deceased, in terms of section 544-A, Code of Criminal Procedure, in default whereof to undergo SI for six months each. Benefit of section 382-B, Code of Criminal Procedure was extended to co-convict Saeed Ahmad. The trial Court through the same judgment acquitted the appellant and his co-convict Saeed Ahmad of the charges of committing intentional murder of Mst. Vakeelan Bibi and causing injuries to Musarrat Shaheen. Co-accused Labba, Naveed Ahmad and Amanat Ali were declared proclaimed offenders and perpetual warrant of their arrest were issued. It has come on record that co-accused of appellant Muhammad Ashraf son of Ishaq was murdered before trial.

2. Aggrieved of their convictions and sentences, the appellant and his co-convict Saeed Ahmad filed a joint criminal appeal before the Lahore High Court, Lahore. A murder reference was sent by the trial court for confirmation of sentence of death of appellant or otherwise. Through the impugned judgment, the learned appellate court, allowed the criminal appeal to the extent of co-convict Saeed Ahmad and by extending benefit of doubt acquitted him of the charge. The criminal appeal to the extent of appellant was dismissed with the modification that by maintaining his conviction under section 302(b), P.P.C., his sentence of death was converted into imprisonment for life. Murder reference was answered in the negative. Benefit of section 382-B, Code of Criminal Procedure was extended to the appellant. Thereafter, the appellant filed a criminal petition before this Court, whereas the complainant also filed a criminal petition against acquittal of co-accused Saeed Ahmad and for enhancement of sentence of the appellant. The said criminal petition was

dismissed by this Court vide order dated 20.02.2013. Through the same order, leave to appeal was granted by this Court in the criminal petition filed by the appellant. Hence, the instant criminal appeal.

3. We have heard learned counsel for the appellant, complainant present in person and learned Additional Prosecutor General at length and have perused the available record with their assistance.

4. The incident in this case as per the facts narrated by the complainant Sultan Ahmad in the FIR and in the private complaint has three episodes. In the first episode, it is the case the complainant Sultan Ahmad that he was employed in Punjab Police; that he was on leave; that he had gone to Raiwind to purchase household articles; that after purchase of said articles, when he returned to Adda Basti Bhail, he saw his son Liaqat Ali standing in front of a shop of Milk Shake; that at 4.30 p.m. appellant Muhammad Ashraf @ Achhu son of Muhammad Ali armed with pistol .30 bore, Saeed Ahmad, armed with pistol .30 bore and Muhammad Ashraf son of Ishaq (since dead) armed with pistol .30 bore came at the Adda; that a lalkara was raised by the appellant, whereupon he himself fired with his pistol 30 bore which fire hit Liaqat Ali on his forehead on the right side; that second fire was shot by Saeed Ahmad, which hit Liaqat Ali on his abdomen; that third fire was shot by Muhammad Ashraf son of Ishaq which hit Liaqat Ali on left side of his buttock. Liaqat Ali succumbed to injuries at the spot. The complainant further alleged that when Liaqat Ali had fallen on the ground, all the three accused persons made firing on him, which hit on different parts of his body. According to complainant, the occurrence was witnessed by Aman Ullah and Abdul Shakoor PWs as well. The second and third episodes of the incident as narrated by the complainant in the FIR and in the private complaint do not relate to the appellant and his co-accused as in those episodes they did not participate and they have already been acquitted by the trial court of the charges of committing intentional murder of Mst. Vakeelan Bibi and causing injuries to Musarrat Shaheen. The said acquittal was not challenged by the complainant or the State any further. Therefore, we are not discussing that part of the case lest it may prejudice the case of either side after arrest of absconding co-accused.

5. The occurrence in this case, as per prosecution, took place on 24.12.2001 at 4.30 p.m. The matter was reported to police on the same day at 5.45 p.m., as a result whereof formal FIR was registered at 6.45 p.m. The apparent promptitude in reporting the matter to police and registration of FIR is hardly of any avail to the prosecution because the postmortem on the dead body of Liaqat Ali was conducted on 25.12.2001 at 4.15 p.m. i.e. after delay of more than 23 hours of reporting the matter to police. Dr. Zulfiqar Ahmad (PW4) who conducted autopsy on the dead body of Liaqat Ali (deceased) categorically stated in his cross-examination that he had received dead body of Liaqat Ali few minutes prior to autopsy. He further stated that neither from the application for postmortem (Ex.PE) nor from other record it is indicated that any application was submitted for depositing the dead body in the mortuary of hospital on 24.12.2001. He asserted that in routine it is necessary that whenever dead body is required to be deposited in mortuary then application in this respect is essential. Muhammad Saleem, 728-C (PW5) is the policeman who escorted dead body of Liaqat Ali to the hospital. In his statement during trial, he stated that he escorted the dead body of Liaqat Ali from place of occurrence to DHQ Hospital, Kasur for postmortem examination on 24.12.2001. In his cross-examination, he stated that he had escorted the dead body of Liaqat Ali to the hospital after one hour of reaching at the place of occurrence. The investigating officer of the case Javed Raza, SI appeared before the trial court as PW14. According to him, after report of crime, he reached at the place where Liaqat Ali was murdered at about 7.00 p.m. and the dead body of Liaqat Ali was available there. He further stated that application (Ex.PE) for autopsy of Liaqat Ali was handed over to constable for its onward transmission to DSP on 25.12.2001. It has further been observed by us that it is the case of complainant Sultan Ahmad (PW9) that during the days of occurrence, he was posted in District Mianwali and that he had gone to Village Bhail on leave. In his cross-examination, he claimed that he had produced proof of leave before the investigating officer Javed Raza (PW14). In turn, Javed Raza, investigating officer

(PW14) denied this assertion of complainant and stated before the trial court that the complainant never provided any documentary proof regarding his leave. The complainant further claimed in his statement recorded during trial that he still had the proof of his leave with him but on record no such proof is available. It is the claim of the complainant Sultan Ahmad (PW9) that police reached at the place of occurrence where murder of Liaqat Ali took place firstly. But the investigating officer Javed Raza (PW14) stated that the police party including him reached at the place of occurrence where Mst. Vakeelan Bibi was murdered at first and they reached at the place where murder of Liaqat Ali had taken place at 7.00 p.m. The complainant Sultan Ahmad (PW9) stated before the trial court that during the days of occurrence, Aman Ullah PW (not produced) and Abdul Shakoor (PW11) were jobless. He volunteered that in those days they were working as labour in a factory. He further stated that Aman Ullah had his shop at Adda Basti Bhail and during the days of occurrence said shop was not being run by anybody as the same was being repaired. Abdul Shakoor (PW 11), however, stated in his examination in chief that he along with Aman Ullah was proceeding to their houses from their shops. In his cross-examination, he stated that he was not doing anything to earn his livelihood during the days of occurrence but was getting constructed his shops. In the same breath he stated that he was not the owner of shops but his brother Aman Ullah was the owner of shops. Abdul Shakoor (PW 11) admitted in his cross-examination that he had now shown to the investigating officer the shops being constructed by them. All these circumstances cast serious doubts regarding the presence of eye-witnesses at the place of occurrence at the relevant time and their claim of witnessing the occurrence.

6. Sequel to above discussion, it has been observed by us that it is the consistent stance of complainant Sultan Ahmad (PW9) in the FIR, in the private complaint and before the trial Court that the fire so shot by co-accused Saeed Ahmad hit Liaqat Ali on the front of his abdomen. Dr. Zulfiqar Ahmad (PW4), who conducted autopsy on the dead body of Liaqat Ali did not observe any entry wound on the abdomen of Liaqat Ali. The complainant Sultan Ahmad further alleged that after his son Liaqat Ali fell on the ground, the appellant, co-accused Saeed Ahmad and co-accused Muhammad Ashraf son of Ishaq (since dead) made firing at the deceased. Saeed Ahmad was acquitted by the learned appellate court. His acquittal was challenged before this Court but said petition of complainant was dismissed at leave granting stage. In these circumstances, when the direct evidence of Sultan Ahmad (PW9) and Abdul Shakoor (PW11) has been disbelieved up to this Court to the extent of co-accused Saeed Ahmad, it is of paramount importance to see as to what independent corroboration is available on record to distinguish the case of appellant from that of his acquitted co-accused. After scrutiny of evidence, it has been observed by us that no such corroboration is available on record because the empties secured from the spot and the .30 bore pistol allegedly recovered from the possession of appellant at the time of his arrest were sent to the office of FSL on the same day i.e. on 21.03.2002 after the arrest of appellant on 23.01.2002. In these circumstances, the report of FSL cannot be relied and is legally inconsequential.

7. The motive is always a double-edged weapon. The complainant Sultan Ahmad (PW9) has admitted murder enmity between the parties and has also given details of the same in his statement recorded before the trial court. No doubt, previous enmity can be a reason for the appellant to commit the alleged crime, but it can equally be a reason for the complainant side to falsely implicate the appellant in this case for previous grouse.

8. After evaluating the case from all possible angles, it has been observed by us that the learned appellate court, on reappraisal of evidence available on record, has given following observations while dealing with the case of co-accused Saeed Ahmad (since acquitted) and the appellant:-

"13..... In the first occurrence regarding murder of Liaqat Ali, deceased the witnesses are the complainant and Abdul Shakoor, his close relative. Sultan, complainant is the father of the deceased. The presence of

both these witnesses at the place of occurrence is advertently per chance. Sultan Ahmad, complainant has come at the shop from Raiwind, thereafter he saw the occurrence whereas Abdul Shakoor PW was coming from his job at home when he statedly saw the occurrence. Both of them were only per chance available at the site from where they saw the occurrence..... So it is clear that the injuries attributed to Muhammad Saeed, appellant are non-existent on the dead body of Liaqat Ali. It also indicates that the witnesses were not there and that's why later on after seeing the injuries they have got registered the FIR. There is a possibility that they have not seen the occurrence ....."

14..... This situation further creates doubt regarding the witnesses who had implicated the innocent persons by concocting the whole new story. The complainant is a police employee and was on duty and as per chance he was available at the time of occurrence at the place of occurrence. It appears that the occurrence has taken place in a different manner and he being the police official concocted and created different story just to implicate maximum persons and to conceal the murder of Mst. Vakeelan Bibi."

9. After recording such observations, the learned appellate court has gone on to render findings of guilt against the appellant. This approach of learned appellate court is totally misplaced. It is well settled that benefit of slightest doubt must go to an accused and in a case where the Court reaches a conclusion that eye-witnesses were chance witnesses; they had not witnessed the occurrence and the prosecution story is concocted by the PWs, then the case of the accused merits plain acquittal.

10. For what has been discussed above, the instant criminal appeal is allowed. The conviction and sentence of appellant Muhammad Ashraf @ Acchu are set aside. He is acquitted of the charge framed against him. He is on bail. His sureties are ordered to be discharged.

MWA/M-10/SC Appeal allowed.

**2019 S C M R 915**

**[Supreme Court of Pakistan]**

**Present: Faisal Arab and Syed Mansoor Ali Shah, JJ**

Civil Appeal No.805 of 2016

(On appeal from the judgment of Federal Service Tribunal, Islamabad dated 06.1.2016, passed in Appeal No.482(R)CS/2013)

and

Civil Appeals Nos.1438 and 1443 of 2016

(On appeal from the judgment of Federal Service Tribunal, Islamabad dated 18.2.2016, passed in Appeal No.1031(R)CS/2013)

and

Civil Appeals Nos.1439 and 1442 of 2016

(On appeal from the judgment of Federal Service Tribunal, Islamabad dated 16.2.2016, passed in Appeal No. 507(R)CS/2013)

and

Civil Appeals Nos.1440, 1444 and 1445 of 2016

(On appeal from the judgment of Federal Service Tribunal, Islamabad dated 11.2.2016, passed in Appeals Nos.2088, 1984 and 2088(R)CS/2012)

and

Civil Appeal No.1441 of 2016

(On appeal from the judgment of Federal Service Tribunal, Islamabad dated 19.2.2016, passed in Appeal No.3029(R)CS/2012)

and

C.M.As. Nos.2841 and 2842/2016 in C.As.1438 and 1439 of 2016

(stay applications)

and

Civil Petitions Nos.124 to 128, 269 to 271 of 2017

(On appeal from the judgment of Federal Service Tribunal, Islamabad dated 02.11.2016, passed in M.Ps No. 1920 in Appeal No.831(R)CS/2012 etc.)

and

Civil Petitions Nos.3446 and 3447 of 2016

(On appeal from the judgment of Federal Service Tribunal, Islamabad dated 20.1.2016, passed in Appeals Nos.1519 and 2118(R)CS/2015)

**FEDERATION OF PAKISTAN through Secretary Finance and others---Appellants**

**Versus**

**MUHAMMAD SHARIF and others---Respondents**

Civil Appeals Nos. 805, 1438, 1443, 1439, 1442, 1440, 1444, 1445, 1441, C.M.As. Nos. 2841, 2842 of 2016 in C.As. Nos. 1438, 1439 of 2016, Civil Petitions Nos. 124 to 128, 269 to 271 of 2017 and Civil Petitions Nos. 3446 and 3447 of 2016, decided on 16th April, 2019.

**Civil service---**

----Salary and pension, increase in---Increase of Rs.300/- per month in salary and 10% in pension, entitlement to---Prime Minister announced ad hoc relief for the government employees including an increase of Rs.300/- per month in their salaries w.e.f. 01-03-1997 and an increase in the pension by 10% (ten percent)---Such announcement was officialized through Office Memoranda, wherein it was clarified that benefit of an increase in pension was admissible to those Government servants who were

retired prior to 01-03-1997---Respondents (government employees), who admittedly retired after 01-03-1997, claimed that they were entitled to 10% increase in the pension after they had already availed the benefit of increase in monthly salary of Rs.300/- while they were in service---Held, that ad hoc relief was extended by the then Prime Minister by granting an increase of Rs.300/- in the salary of government employees and an increase of 10% in the pension of the employees who retired prior to the date 01-03-1997---Relevant Office Memoranda showed that two distinct reliefs were granted, one for the employees in service through increase in salary and the other for retired employees through increase in pension--- Retired employees were those who retired prior to 01-03-1997, as had been clarified in one of the Office Memoranda---Ad hoc relief of 10% increase in pension was only admissible to employees who stood retired prior to 01-03-1997---Respondents, thus, could not claim both the benefits; one of increase in the monthly salary by Rs.300/- while in service; and the other of increase in pension after retirement---Cutoff date of 01-03-1997 was critical and had relevance, as it split the employees into two broad categories of in service employees on the cutoff date and retired employees on the cutoff date for the purposes of the ad hoc relief---Extending 10% increase in pension to the employees who were in service on 01-03-1997 went against the scheme of the ad hoc relief as it created an imbalance between the two classes of employees by extending unjust advantage to one class of employees i.e., the in service employees on the cutoff date, who would walk away with two distinct ad hoc reliefs (i.e., increase in salary and increase in pension after retirement) when they had been promised only one.

Sohail Mehmood, DAG for Appellants (in C.As. Nos. 805, 1441 to 1445 of 2016 and C.Ps. Nos. 3446 and 3447 of 2016).

Hafiz S.A. Rehman Senior Advocate Supreme Court for Appellants (in C.As. Nos. 1438 to 1440 of 2016).

Syed Ishtiaq Haider, Advocate Supreme Court for Appellants (in C.Ps. 124 to 128 and 269 to 271 of 2017).

Ishtiaq Haider, Advocate Supreme Court along with Syed Rifaqat Hussain Shah, Advocate-on-Record for Respondent No.1 (in C.A. No. 805 of 2016).

Dates of hearing: 15th and 16th April 2019.

**JUDGMENT**

Civil Appeals Nos.805 and 1438 to 1445 of 2017 and Civil Petitions Nos.3446 and 3447 of 2016:

**SYED MANSOOR ALI SHAH, J.---**The Prime Minister in his speech to the nation on 23.2.1997 announced ad hoc relief for the government employees including an increase of Rs.300/- per month in their salaries w.e.f. 01.03.1997 and an increase in the pension by 10% (ten percent). This announcement was officialized through Office Memoranda Nos. F.1(17) Imp./97 and Nos.F.4(3)-Reg.6/97 dated 5.03.1997 and 11.3.1997 respectively, issued by the Finance Division (Regulations Wing), Government of Pakistan, while clarificatory Office Memorandum Nos. F.4(3)-Reg.6/97 dated 29.3.1997 issued by the Finance Division provided as follows:

> "2(ii). The benefit of an increase in pension is admissible to those Government servants who were retired prior to 1st March, 1997."

The respondents in these connected cases, who admittedly retired after 01.03.1997, claim that they are entitled to 10% increase in the pension after they have availed the benefit of increase in monthly salary of Rs.300/- under the above Office Memoranda, while they were in service. Their reliance is primarily on a series of orders passed by this Court in related matters arising out of the relief package announced by the Prime Minister. The matter was taken up by the Tribunal and benefit of 10% increase in pension was extended to the respondents on the ground that earlier orders of this Court have granted such relief, hence these appeals with leave of the Court.

2. We have heard the learned counsel for the parties. Ad hoc relief was extended by the then Prime Minister by granting an increase of Rs.300/- in the salary of government employees and an increase of

10% in the pension of the employees who retired prior to the said date i.e., 01.3.1997. The Office Memoranda show that two distinct reliefs were granted, one for the employees in service through increase in salary and the other for retired employees through increase in pension. Retired employees are those who retired prior to 01.03.1997, as has been clarified in Office Memorandum dated 29.03.1997. Therefore, the respondents cannot claim both the benefits; one of increase in the monthly salary by Rs.300/- while in service; and the other of increase in pension after retirement. The cutoff date of 01.03.1997 is critical and has relevance. It splits the employees into two broad categories of in service employees on the cutoff date and retired employees on the cutoff date for the purposes of the ad hoc relief Extending 10% increase in pension to the employees who were in service on 01.03.1997 goes against the scheme of the ad hoc relief as it creates an imbalance between the two classes of employees by extending unjust advantage to one class of employees i.e., the in service employees on the cutoff date, who would walk away with two distinct ad hoc reliefs (i.e., increase in salary and increase to pension after retirement when they have been promised only one.

3. We have also gone through the various orders referred to by the learned counsel for the respondents passed by this Court and upon examination we have noticed that through some of these orders leave was refused against the judgment of the Tribunal on various grounds, which does not form a binding precedent, while in other cases, the question raised before us has not been considered. Therefore, reference to earlier orders of this Court does not advance the case of the respondents.

4. For the above reasons, we set aside the impugned judgment passed by the Federal Service Tribunal, Islamabad and hold that ad hoc relief of 10% increase in pension is only admissible to employees who stood retired prior to 01.3.1997. The listed appeals are, therefore, allowed, whereas Civil Petitions Nos.3446 and 3447 of 2016 are converted into appeals and allowed.

Civil Petitions Nos.124 to 128, 269 to 271 of 2017

5. These petitions filed by the employees against an interim order of the Tribunal are disposed of in light of the above judgment.

MWA/F-3/SC Order accordingly.

**2019 S C M R 930**

**[Supreme Court of Pakistan]**

**Present: Asif Saeed Khan Khosa, C.J., Mushir Alam and Syed Mansoor Ali Shah, JJ**

**KHAIR-UL-BASHAR---Appellant**

**Versus**

**The STATE---Respondent**

Criminal Appeal No. 94 of 2019, decided on 8th April, 2019.

(On appeal from the judgment of Lahore High Court, Rawalpindi Bench, dated 11.9.2018, passed in Criminal Appeal No. 05 of 2017)

**(a) Control of Narcotic Substances (Government Analysts) Rules, 2001---**

----R.6---Control of Narcotic Substances Act (XXV of 1997), S. 36(1)---Narcotics---Government analyst report, preparation of---Mandatory requirements---Report of the Government Analyst, prepared in consequence of R. 6 of the Control of Narcotic Substances (Government Analysts) Rules, 2001, must provide for, firstly, tests and analysis of the alleged drug; secondly, the results of the test(s) carried out, and, thirdly the test protocols applied to carry out these tests---Said three elements formed the fundamental and the core elements of a valid Report prepared by a Government Analyst---Non-compliance of R. 6 and absence of any of the said mandatory elements/requirements frustrated the purpose and object of the Control of Narcotic Substances Act, 1997 ('the Act'), thereby diminishing the reliability and evidentiary value of the Report---Under S. 36 of the Act, the report of the Government Analyst, whilst being admissible in evidence without formal proof, was rebuttable and could be questioned by the accused, inter alia, on the ground of non-compliance of the information required under R. 6 of the Control of Narcotic Substances (Government Analysts) Rules, 2001---Judgment reported as State v. Imam Bakhsh (2018 SCMR 2039) purposively interpreted the Act and (rightly) found R. 6 to be a mandatory provision regarding information to be reflected in the Report of the Analysts.

State v. Imam Bakhsh 2018 SCMR 2039 affirmed.

2015 SCMR 1002 ref.

**(b) Control of Narcotic Substances (Government Analysts) Rules, 2001---**

----R.6---Control of Narcotic Substances Act (XXV of 1997), S. 36(1)---Narcotics--- Government analyst report--- Deficiencies--- Whether prosecution should be allowed re-testing of samples in case of a deficient report prepared by the Government analyst---Held, that re-testing of the drug, in case of a deficient report would amount to giving a premium to the prosecution for its mistakes and lapses---Any flaw in the case of the prosecution must only benefit the accused---Sending the alleged drugs for re-testing would be giving another chance to the prosecution to build its case, which was not the role or business of the court---Besides there was a likelihood that the chain of custody of the alleged drug was compromised with the passage of time.

**(c) Control of Narcotic Substances (Government Analysts) Rules, 2001---**

----R. 3---Control of Narcotic Substances Act (XXV of 1997), S. 35---Narcotics---Government analyst---Qualifications---Concept of testing under the Control of Narcotic Substances Act, 1997 ('the Act'), the establishment of the testing laboratories, tests and analysis and the report of the Government Analyst were premised on the assumption that the Government Analyst possessed the prescribed qualifications provided under S. 35 of the Act read with R. 3 of the Control of Narcotic Substances (Government Analysts) Rules, 2001 ('the Rules') which provided that the Government Analyst shall be a person who has a degree in Pharmacy or Pharmaceutical Chemistry or Medicine from a recognized University or of any other institution recognized by the Federal Government for such purpose and had not less than three years postgraduate experience in the test and analysis of drugs---Analysts who meet the said qualifications provided under the Act and the Rules must prepare these reports.

Ahsan Hameed Lilla, Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Appellant.

Muhammad Jaffar, DPG for the State.

Date of hearing: 8th April, 2019.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.**---The appellant was stopped by the Police while driving a Suzuki van and upon searching the van, the Police allegedly recovered 1500 grams of heroin wrapped in black shopping bag stacked under the driving seat. With this allegation the appellant was booked in FIR No.18 dated 15.01.2016 under section 9(c) of the Control of Narcotic Substances Act, 1997 ("Act") at Police Station Westridge, Rawalpindi. After regular trial, the appellant was convicted under section 9(c) of the Act vide judgment dated 07.12.2016 and sentenced to rigorous imprisonment for six years with a fine of Rs.30,000/-. The appeal filed by the appellant before the High Court was dismissed. Hence this appeal with the leave of the Court granted on 04.02.2019.

2. At the very outset we have noticed that the Report of the Punjab Forensic Agency dated 18.02.2016 is deficient in material particulars, i.e. while it mentions the names of the three tests performed, it does not provide results of these tests (except a consolidated result) and there is no mention of the test protocols applied in carrying out the said tests. In State v. Imam Bakhsh (2018 SCMR 2039) while discussing Rule 6 of the Control of Narcotic Substances (Government Analysts) Rules, 2001 ("Rules") this Court held that the information required under the said Rule is mandatory. Hence, the Report of the Government Analyst, prepared in consequence of Rule 6, must provide for (i) tests and analysis of the alleged drug (ii) the results of the test(s) carried out and (iii) the test protocols applied to carry out these tests. These three elements form the fundamental and the core elements of a valid Report prepared by a Government Analyst. Non-compliance of Rule 6 and absence of any of these mandatory elements/requirements frustrates the purpose and object of the Act thereby diminishing the reliability and evidentiary value of the Report. Rule 6, inter alia, requires that the Government Analysts must specify the test protocols applied and, therefore, the Report must signify (by name) the protocols applied to carry out the test(s)/analysis, which would certify that full protocols have been followed while conducting the tests/analysis. In case the veracity of the Report is challenged by the accused or is being examined by the Court, compliance of full protocols can be called for from the Government Analyst and verified.

3. Recent judgment of this Court in Minhaj Khan v. The State (2019 SCMR 326) handed down after Imam Bakhsh, was pointed out to us to highlight certain objections raised by the prosecution against Imam Bakhsh. These objections were recorded in Minhaj Khan, as argued by the APG in that case, but were not addressed as the case was decided on merits. These objections have been raised before us through reference. DPG, relying on the objections raised in Minhaj Khan pointed out that Imam Baksh is per incuriam on the ground that it goes against the clear provision of the statute as the requirement of protocols is not mentioned in sections 34, 35 and 36 of the Act or FORM II under the Rules, therefore, the same could not have been read into the Report of the Analyst as that would fall in the domain of the legislature; Rule 6 contradicts section 36(1) of the Act and, therefore, must yield to the Act; Protocols being a technical matter in respect whereof the courts do not have the requisite expertise and is not a matter of legal determination; Thousand of cases have been decided and convictions maintained even though protocols were not mentioned in the Report; Non-mentioning of the protocols does not prejudice the prosecution as they can always request for re-testing.

4. It appears that the import of Imam Bakhsh has not been fully understood. In Imam Bakhsh the question before this Court, other than the chain of custody of the drugs, was whether Rules 4, 5 and 6 of the Rules were mandatory or directory. This determination was important because these Rules dealt with the Report of the Government Analyst which is the pivotal evidence for awarding conviction under the Act. This Court in Imam Bakhsh, while discussing the nature of Rule 6 of the Rules held that

"some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance. The duty of the court is to try to unravel the real intention of the legislature. This exercise entails carefully attending to the scheme of the Act and then highlighting the provisions that actually embody the real purpose and object of the Act In each case one must look to the subject matter and consider the importance of the provision disregarded and the relation o that provision to the general object intended to be secured. Crawford opined that 'as a general rule, [those provisions that] related to the essence of the thing to be performed or matters of substance, are mandatory, and those which do not relate to the essence and whose compliance is merely of convenience rather than substance, are directory .perhaps the cleverest indicator is the object and purpose of the statute and the provision in question." After examining the entire scheme of the Act, it was held that "credible testing and analysis of the alleged drug is fundamental to actualizing the provisions of the Act as it determines the true nature of the recovered substance or the seized drug Report of the Government Analyst is, therefore, pivotal in realizing the objective and purpose of the Act." And "Report under Rule 6 must specify every test applied for the determination of the seized substances with the full protocols adopted to conduct such tests." Thus, holding that tests and analysis, results and test protocols to be a mandatory requirement under Rule 6 and the same must be reflected in the Report.

5. Section 36(1) of the Act also mandates that the Report must be in the prescribed form. This Court, in Ikramullah,[1] while discussing the scope of Rule 6 of the Rules held that " a complete mechanism is to be adopted by the Chemical Examiner upon receipt of samples and a report is then to be submitted by him referring to the necessary protocols and mentioning the tests applied and their results Section 36 of the Control of Narcotic Substances Act, 1997 requires a Government Analyst to whom a sample of recovered substance is sent for examination to deliver to the person submitting the sample a signed report in quadruplicate in "the prescribed form" and, thus if the report prepared by him is not prepared in the prescribed manner then it may not qualify to be called a report in the context of section 36 of the Control of Narcotic Substances Act, 1997 so as to be treated as a "conclusive" proof of recovery of narcotic substance from an accused person.[2]" A signed report in the prescribed form under section 36(1) of the Act does not refer to FORM-II, as argued by the DPG, but to the form, structure, design and content of the Report provided in the Rules. This is also so because the Act was promulgated[3] on 11.07.1997 while the Rules were framed and gazetted on 28.11.2001 under the title of Control of Narcotic Substances (Government Analysts) Rules, 2001, almost after four years. Therefore, FORM-II was not known to the legislature at the time of the promulgation of the Act, hence section 36(1) simply required that the structure and content (form) of the Report must be as provided in the Rules. FORM II, hereunder, is a manifestation of Rule 6 but does not have a stand alone existence.

FORM II (See rule 6) CERTIFICATION OF THE TEST OR ANALYSIS BY FEDERAL NARCOTIC TESTING LABORATORY GOVERNMENT ANALYST 1. Certified that the sample bearing on _____ purporting to be sample of _____ received on _____ with memorandum No._____ dated _____ from _____ has been test/analyzed and the result of each test/analysis is stated below: 2. That the condition of the seal on the packet on receipt was as follows; Satisfactory/Unsatisfactory/None. 3. In the opinion of the undersigned the sample is _____ as defined in the Section 2 of the CNS Act, 1997. 4. DETAILS OF THE RESULTS OF TESTS/ANALYSIS: Sample No._____ Gross Wt : _____ Net Wt:_____ FIR No. _____ Dated _____ Accused_____ Physical Ex amination _____ Conclusion _____ NOTE: In case of mixture the %age of each

| |
|---|
| Alkaloids, Opium derivatives, Opiates, Cannabis, Drugs of abuse and the synthetic compounds are as follows: The sample identified as _____ and contain % Signature of Government Analyst Federal Narcotics Testing Laboratory Signature of any other authorized officer of Laboratory |

The general head of DETAILS OF THE RESULTS OF TESTS/ANALYSIS provides only for Physical Examination and Conclusion, and does not mention of tests or their results. This would hardly be of any significance unless the Report provides the information required under Rule 6 in order to establish the culpability of the accused. Hence, for the Report to serve the purposes of the Act and the Rules, it must contain (i) the tests and analysis of the alleged drug (ii) the result of each test(s) carried out and (iii) the test protocols applied (the name(s) of protocols applied) to carry out these tests. It is important to underline that protocols are an intrinsic part of the tests and analysis. A test conducted without following the protocols does not pass for a test or meet the requirement of Rule 6.

6. Re-testing of the drug, as argued by the DPG, in case of a deficient report would amount to giving a premium to the prosecution for its mistakes and lapses. In any case any flaw in the case of the prosecution must only benefit the accused. Sending the alleged drugs for re-testing would be giving another chance to the prosecution to build its case, which is not the role or business of the court. Besides there is a likelihood that the chain of custody of the alleged drug is compromised with the passage of time. Regarding the objection that Imam Bakhsh may overturn hundreds of convictions, it is pointed out that the sole purpose of this Court is to dispense justice in accordance with law and it matters less if one or many convictions are overturned because of the correct interpretation and application of the law. Imam Bakhsh purposively interprets the Act and finds Rule 6 to be a mandatory provision regarding information to be reflected in the Report of the Analysts. Hence, the argument that Imam Bakhsh is per incuriam, is hopelessly misconceived and rejected. For completion of record it is pointed out that review filed[4] in Imam Bakhsh was also dismissed vide an earlier order dated 06.02.2019.

7. It is also important to underline that the Government Analysts while giving the details of tests/analysis, the results for each test and the test protocols applied in the Report, must remember that under section 36 of the Act, the report of the Government Analyst, whilst being admissible in evidence without formal proof, is rebuttable and can be questioned by the accused, inter alia, on the ground of non-compliance of the above information required under Rule 6. Further more, the admissibility of the Report in evidence under section 36(2) of the Act does not per se vouch for its evidentiary value. The court is free to examine the Report and to assess whether it meets the requirements of the Report under the Act and the Rules, even if the Report is not rebutted by the accused. The concept of testing under the Act, the establishment of the testing laboratories, tests and analysis and the report of the Government Analyst are premised on the assumption that the Government Analyst possesses the prescribed qualifications provided under section 35 of the Act read with Rule 3 of the Rules which provides that the Government Analyst shall be a person who has a degree in Pharmacy or Pharmaceutical Chemistry or Medicine from a recognized University or of any other institution recognized by the Federal Government for this purpose and has not less than three years postgraduate experience in the test and analysis of drugs. Analysts who meet the qualifications provided under the Act and the Rules must prepare these reports. This was echoed in Imam Bakhsh in the following words:

> Directions to the Federal and Provincial Governments
>
> 19. Efficient, credible and proficient Narcotics Testing Laboratories are integral for successful execution of the Act and the Rules. The said laboratories have to be manned by competent analysts having prescribed qualifications. Rule 3 provides for the qualifications of a Government Analyst and it has already been held to be a mandatory provision by this Court.[5] Further, the obligations of the Government Analysts under these Rules must be

complied with for ensuring accurate and meaningful chemical analysis. In order to standardize the Narcotics Testing Laboratories across the country, the protocols and tests applied by these laboratories must meet common international standards, e.g. Guidelines issued by the United Nations Office on Drugs and Crime (UNODC) or Scientific Working Group for the Analysis of Seized Drugs (SWGDRUG) or the International Organization for Standardization (ISO) - 17025:2017. We, therefore, direct the Federal Government and the respective Provincial Governments to ensure that the Government Analysts in the Narcotics Testing Laboratories are qualified as per Rule 3, the tests and their protocols are common across the country are as per International guidelines. The officials of the National and Provincial Narcotics Testing Laboratories shall follow the Rules in the best manner possible so that efficient and meaningful chemical analysis can be achieved. In case of failure, disciplinary action be taken against the officials, in accordance with law. (emphasis supplied)

8. The emphasis that the Report of the Government Analyst must carry the information required in Rule 6 is to ensure that convictions under the Act are based on reliable and credible reports. Courts can apply purposive interpretation of the statute to bridge the gap between the law and the safe administration of criminal justice system based on prudence, caution, circumspection and judiciousness. We cannot deny that the "the aim of interpretation in law is to realize the purpose of the law, the aim in interpreting a legal text is to realize the purpose the text serves. Law is, thus, a tool designed to realize a social goal. It is intended to ensure the social life of the community, on the one hand, and human rights, equality, and justice on the other.[6]" Professor Barak has argued that there is a subjective and an objective purpose of a statute. Subjective purpose reflects the actual intention of the legislature, in contrast to the intention of the legislature when applied to the times of the day. Mere focusing on the legislative intent alone fails to regard the statute as a living organism in a changing environment making it insensitive to the existence of the system in which the statute operates. "It is not capable of integrating the individual statute into the framework of the whole legal system. It makes it difficult to bridge the gap between law and society. Thus, it does not allow the meaning of the statute to be developed as the legal system develops. Rather, it freezes the meaning of the statute at the historical moment of its legislation, which may no longer be relevant to the meaning of the statute .If a judge relies too much on legislative intent, the statute ceases to fulfill its objective. As a result the judge becomes merely a historian and an archaeologist and cannot fulfill his role as a judge. Instead of looking forward, the judge looks backward. The judge becomes sterile and frozen, creating stagnation instead of progress . The objective purpose of the statute means the interests, values, objectives, policy, and functions that the law should realize The judge should not narrow interpretation to the exclusive search for subjective legislative intent. He must also consider the "intention" of the legal system for the statute is always wiser than the legislature. By doing so the judge gives the statute a dynamic meaning and thus bridges the gap between law and society.[7]"

9. Not so far back this Court required taking of separate samples from every packet of the substance recovered, proof of safe custody and safe transmission of the samples of the recovered substance and proof of conscious possession on the part of a passenger of a vehicle. Apart from that, safeguards were insisted upon in holding of a test identification parade and in recording of a confessional statement under section 164, Cr.P.C. In Ameer Zeb case[8] this Court held that for "safe administration of criminal justice some minimum standards of safety are to be laid down so as to strike a balance between the prosecution and the defence and to obviate the chances of miscarriage of justice Such minimum standards of safety are even otherwise necessary for safeguarding the Fundamental Rights of the citizens regarding life and liberty which cannot be left at the mercy of verbal assertions of police officers which assertions are not supported by independent evidence provided by a Chemical Examiner." Purposive interpretation of the Act and the Rules promotes the protection of constitutional and fundamental rights under Articles 4, 9 and 10A of the Constitution. Employing prudence, practice

and caution as interpretive tools to help actualize and operationalize the purpose of the statute, we realize its objective purpose and ensure safe administration of justice so that the convictions under the Act are based on Reports of the Government Analyst that are technically sound and credible.

10. In the present case examination of the report of the Government Analyst mentions the tests applied but does not provide their results except a concluding result, presumably of all the tests, which is not sufficient. The Report also does not signify the test protocols that were applied to carry out these tests. Hence, the mandatory requirement of law provided under Rule 6 has not been complied with and, thus, it is not safe to rely on the Report of the Government Analyst dated 18.02.2016. As a conclusion, it is reiterated, that the Report of the Government Analyst must mention (i) all the tests and analysis of the alleged drug (ii) the result of the each test(s) carried out along with the consolidated result and (iii) the name of all the protocols applied to carry out these tests.

11. For what has been discussed above, we extend the benefit of doubt to the appellant and set aside his conviction and sentence under the section 9(c) of the Act. He is ordered to be released from custody forthwith if not required in any other case. This appeal is allowed accordingly.

MWA/K-3/SC Appeal allowed.

**2019 S C M R 956**

**[Supreme Court of Pakistan]**

**Present: Asif Saeed Khan Khosa, C.J., Sajjad Ali Shah and Syed Mansoor Ali Shah, JJ**

**Mian SOHAIL AHMED and others---Appellants**

**Versus**

**The STATE and others---Respondents**

Criminal Appeals Nos. 306-L, 307-L and 308-L of 2012, decided on 24th April, 2019.

(Against the judgment dated 25.01.2012 passed by the Lahore High Court, Lahore in Criminal Appeal No. 383 of 2007 and Murder Reference No. 44 of 2007)

**(a) Penal Code (XLV of 1860)---**

----Ss. 302(b), 324, 392, 411 & 34---Qatl-i-amd, attempt to commit qatl-i-amd, robbery, dishonestly receiving stolen property, common intention---Reappraisal of evidence---Benefit of doubt---Belated post-mortem examination---Deceased and complainant were in their car, when the accused and the co-accused allegedly tried to rob them---During the incident the deceased was shot and murdered---Accused persons were sentenced to death, however on appeal the sentence of one of the accused was reduced to imprisonment for life---Held, that case of the prosecution rested on the ocular account of two eye-witnesses---Testimony of one of the said witnesses and his presence at the scene of the crime had been rightly disbelieved by the High Court---According to the doctor at the hospital the post-mortem examination took place 15 hours after the body of the deceased was brought to the hospital---Such delay in the post-mortem examination, when the occurrence was promptly reported and formal FIR was registered within 15 minutes gave rise to an inference that the incident was not reported as stated by the prosecution---Complainant, who claimed to be on the passenger seat, must have single-handedly moved the deceased, who was on the driving seat, to another seat in the car, and in the process soiled other seats and his clothes with blood; however, there was no evidence on the record to support such fact---Convictions and sentences of accused persons were set aside and they were acquitted of the charge by extending the benefit of doubt to them---Appeals were allowed accordingly.

**(b) Penal Code (XLV of 1860)---**

----Ss. 302(b), 324, 392, 411 & 34---Qatl-i-amd, attempt to commit qatl-i-amd, robbery, dishonestly receiving stolen property, common intention---Reappraisal of evidence---Benefit of doubt---Medical evidence---Nature of bullet wound---Site-plan showed one of the accused to be standing next to the driving seat of the car at a distance of 4 feet---Fire-shot from such short distance was likely to cause blackening but the medical evidence did not support this, raising suspicion that the events may have unfolded differently than as reported---Convictions and sentences of accused persons were set aside and they were acquitted of the charge by extending the benefit of doubt to them---Appeals were allowed accordingly.

**(c) Penal Code (XLV of 1860)---**

----Ss. 302(b), 324, 392, 411 & 34---Qatl-i-amd, attempt to commit qatl-i-amd, robbery, dishonestly receiving stolen property, common intention---Reappraisal of evidence---Benefit of doubt---Presence of deceased at the site of occurrence doubtful---Deceased and complainant were in a car outside a godown, where the accused persons allegedly tried to rob them and in the process shot and murdered the deceased---In the absence of any supporting evidence, the presence of the deceased at the site of occurrence was highly improbable considering that the deceased was a doctor, employed with the social security department of the Government, having no evident interest in the business of the complainant or any convincing evidence to show that the godown, where the incident took place, fell in the way to his residence---Convictions and sentences of accused persons were set aside and they were acquitted of the charge by extending the benefit of doubt---Appeals were allowed accordingly.

**(d) Penal Code (XLV of 1860)---**

----Ss. 302(b), 324, 392, 411 & 34---Qatl-i-amd, attempt to commit qatl-i-amd, robbery, dishonestly receiving stolen property, common intention---Reappraisal of evidence---Benefit of doubt---Recovery of weapon doubtful---Investigation Officer deposed that the recovery of pistol was effected from a house whose ownership he failed to ascertain---According to the investigating officer it was a double storied house and recovery was effected from the ground floor where other family members also resided--- Memorandum of recovery showed that the pistol was recovered from an open room lying under rough clothes, therefore, it would be unsafe to rely on such recovery for a conviction on a capital charge---Convictions and sentences of accused persons were set aside and they were acquitted of the charge by extending the benefit of doubt to them---Appeals were allowed accordingly.

**(e) Penal Code (XLV of 1860)---**

----Ss. 302(b), 324, 392, 411 & 34---Qanun-e-Shahadat (10 of 1984), Art. 22---Qatl-i-amd, attempt to commit qatl-i-amd, robbery, dishonestly receiving stolen property, common intention---Reappraisal of evidence---Benefit of doubt---Test identification parade, infirmities in---Description of suspects given in the FIR by complainant or witnesses---Test identification parade conducted by the Special Judicial Magistrate was fraught with several infirmities diminishing its probative and evidentiary value---Brief description of the two unknown persons (later on identified as the accused persons) in the First Information Report (FIR) mentioned their height, bodily size and colour of the skin---Test identification proceedings were silent regarding the description of the unknown accused given by the complainant in the report---Test identification could only commence, once suspects matching the description in the crime report or in the statements of the witnesses under S. 161, Cr.P.C. had been arrested---Matching the description in the FIR was the starting point towards identification of the unknown accused, therefore, it was uncertain as to how the accused persons in the present case were hurled and lined-up for the identification parade without the Magistrate first matching the description given by the complainant---Selection of the suspects, without any correlation with description of the accused in the FIR, raised doubts and made the identification proceedings unsafe and doubtful rendering the identification evidence inconsequential---Convictions and sentences of accused persons were set aside and they were acquitted of the charge by extending the benefit of doubt to them---Appeals were allowed accordingly.

State/Government of Sindh v. Sobharo 1993 SCMR 585; Muhammad Afzal alias Abdullah v. State 2009 SCMR 436; Sabir Ali alias Foji v. State 2011 SCMR 563 and Muhammad Abdul Hafeez v. State of A.P AIR 1983 SC 367 ref.

**(f) Penal Code (XLV of 1860)---**

----Ss. 302(b), 324, 392, 411 & 34---Qanun-e-Shahadat (10 of 1984), Art. 22---Qatl-i-amd, attempt to commit qatl-i-amd, robbery, dishonestly receiving stolen property, common intention---Reappraisal of evidence---Benefit of doubt---Joint identification parade---Suspects jointly seated in the line-up---Idea of identification parade or lineup was to stand or seat the suspect in a group of persons (dummies or fillers) that closely resembled the characteristics of the suspect, in order to test the recognition, memory, perception and observation of the witness and thus verify the testimony of the witness---Placing two or more suspects jointly in an identification parade (or joint parade), tarnished the homogeneity, sameness and identicalness of the members of the parade and defeated the very purpose of having a test identification parade---Joint parade passed for suggestive and indicative identification, compromising the reliability of the witness and opening doors to misidentification, rendering test identification unsafe and untrustworthy---Both the accused persons in the present case were jointly seated in the lineup during test identification parade---Convictions and sentences of accused persons were set aside and they were acquitted of the charge by extending the benefit of doubt to them---Appeals were allowed accordingly.

In the matter of Kanwar Anwaar Ali PLD 2019 SC 488 ref.

**(g) Penal Code (XLV of 1860)---**

----Ss. 302(b), 324, 392, 411 & 34---Qanun-e-Shahadat (10 of 1984), Art. 22---Qatl-i-amd, attempt to commit qatl-i-amd, robbery, dishonestly receiving stolen property, common intention---Reappraisal of evidence---Benefit of doubt---Test identification parade---Absence of role assigned to suspects by the witness or complainant in an identification parade---In the present case, no role was assigned to the suspects by the witnesses, especially when the First Information Report (FIR) clearly described two different roles to the accused persons; one that of an assailant, while the other of a driver of a motorcycle who drove the assailant away---Where a witness failed to give the description of the part played by the suspect in the crime, the credibility of the witness stood questioned as he failed to complete the picture of the crime scene, thus inviting caution and circumspection in assessing the evidentiary value of the identification evidence---Little reliance was placed on such identification evidence by the (Supreme) Court---Even in the subsequent identification by the complainant in court, which had little evidentiary value, the complainant failed to point an accusing finger at the accused persons to say who did what, therefore the parts played by the accused persons in the crime remained a mystery---Convictions and sentences of accused persons were set aside and they were acquitted of the charge by extending the benefit of doubt to them---Appeals were allowed accordingly.

In the matter of Kanwar Anwaar Ali PLD 2019 SC 488 ref.

**(h) Penal Code (XLV of 1860)---**

----Ss. 302(b), 324, 392, 411 & 34---Qanun-e-Shahadat (10 of 1984), Art. 22---Qatl-i-amd, attempt to commit qatl-i-amd, robbery, dishonestly receiving stolen property, common intention---Reappraisal of evidence--- Benefit of doubt--- Test identification parade---"Impermissible suggestiveness" by the police---Duty of police to guard identity of suspect till test identification proceedings---According to the complainant the accused persons were his employees at a godown, where the murder took place, and the Investigation Officer admitted in his cross-examination that he took the accused persons to the godown after they were arrested and the employees at the godown confirmed that both of them worked as employees at the godown of the complainant---Police was to guard the identity of the suspects from the witness till test identification parade took place---Visiting the godown of the complainant with the suspects unravelled the identity of the suspects, tarnishing the secrecy required, which was referred to as "impermissible suggestiveness" at the hands of the police---Probability of the witnesses knowing the identity of the accused persons prior to the identification parade could not be ruled out in such circumstances---Convictions and sentences of accused persons were set aside and they were acquitted of the charge by extending the benefit of doubt to them---Appeals were allowed accordingly.

**(i) Qanun-e-Shahadat (10 of 1984)---**

----Art. 22---Test identification parade---Capacity and ability of the eye-witness to identify the accused---"Estimator variables" negatively affecting the memory of a witness---Capacity and ability of the eye-witness should be assessed independently as a sequel or step two to the test identification proceedings---Such assessment also formed part of the identification evidence along with the test identification proceedings---After the test identification parade, the court must verify the credibility of the eye-witness by assessing the evidence on the basis of the factors or "estimator variables"---"Estimator variables" were factors related to the witness, like distance, lighting, or stress, over which the legal system had no control---Identification of an accused, therefore, became a two-step process; first, the suspects underwent a test identification parade and second, the credibility of the eye-witness was assessed by weighing the evidence in the light of the "estimator variables"---Non-exhaustive list of "estimator variables" provided.

Following is the non-exhaustive list of "estimator variables" that negatively affected the memory process of a witness:

i. Stress: Even under the best viewing conditions, high levels of stress could diminish an eye-witness' ability to recall and make an accurate identification. While moderate levels of stress

improved cognitive processing and might improve accuracy, an eyewitness under high stress was less likely to make a reliable identification of the perpetrator.

ii. Weapon focus: When a visible weapon was used during a crime, it could distract a witness and draw his or her attention away from the culprit. Weapon focus could thus impair a witness' ability to make a reliable identification and describe what the culprit looked like if the crime was of short duration.

iii. Duration: The amount of time an eyewitness had to observe an event may affect the reliability of an identification. There was no minimum time required to make an accurate identification, however, a brief or fleeting contact was less likely to produce an accurate identification than a more prolonged exposure.

iv. Distance and lighting: A person was easier to recognize when close by, and that clarity decreased with distance. Poor lighting made it harder to see well. Thus, greater distance between a witness and a perpetrator and poor lighting conditions could diminish the reliability of an identification.

v. Witness characteristics: Characteristics like a witness' age and level of intoxication could affect the reliability of an identification. Children between the ages of nine and thirteen who viewed target-absent lineups were more likely to make incorrect identifications than adults.

vi. Characteristics of perpetrator: Disguises and changes in facial features altered between the time of the event and the identification procedure affected the accuracy of an identification.

vii. Memory decay: Memories faded with time and memory decay was irreversible; memories never improved. As a result, delays between the commission of a crime and the time an identification was made could affect reliability.

PLD 1981 SC 142; Kenneth A. Deffenbacher et al., A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory, 28 Law & Hum. Behav. 687, 699 (2004). Charles A. Morgan et al., Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress, 27 Int'l J.L. & Psychiatry 265 (2004); Nancy M. Steblay, A Meta-Analytic Review of the Weapon Focus Effect, 16 Law & Hum. Behav. 413, 415-17 (1992). Anne Maass & Gunther Koehnken, Eyewitness Identification: Simulating the "Weapon Effect", 13 Law & Hum. Behav. 397, 401-02 (1989). The Handbook of Eyewitness Psychology: Memory for People, supra, at 339, 353-54; Colin G. Tredoux et al., Eyewitness Identification, in 1 Encyclopedia of Applied Psychology 875, 877 (Charles Spielberger ed., 2004). Elizabeth F. Loftus et al., Time Went by So Slowly: Overestimation of Event Duration by Males and Females, 1 Applied Cognitive Psychol. 3, 10 (1987); R.C.L. Lindsay et al., How Variations in Distance Affect Eyewitness Reports and Identification Accuracy, 32 Law & Hum. Behav. 526 (2008); Jennifer E. Dysart et al., The Intoxicated Witness: Effects of Alcohol on Identification Accuracy from Showups, 87 J. Applied Psychol. 170, 174 (2002). Joanna D. Pozzulo & R.C.L. Lindsay, Identification Accuracy of Children v. Adults: A Meta-Analysis, 22 Law & Hum. Behav. 549, 563, 565 (1998). Jennifer E. Dysart & R.C.L. Lindsay, Show-up Identifications: Suggestive Technique or Reliable Method? Vol.II, The Handbook of Eyewitness Psychology: Memory for People 137, 147 (2007). James C. Bartlett & Amina Memon, Eye-witness Memory in Young and Older Adults Vol.II The Handbook of Eye-witness Psychology: Memory for People, supra, at 309, 317-19; Brian L. Cutler et al., Improving the Reliability of Eyewitness Identification: Putting Context into Context, 72 J. Applied Psychol. 629, 635 (1987). K.E. Patterson & A.D. Baddeley, When Face Recognition Fails, 3 J. Experimental Psychol.: Hum. Learning & Memory 406, 410, 414 (1977); Kenneth A. Deffenbacher et al., Forgetting the Once-Seen Face: Estimating the Strength of an Eyewitness's Memory Representation, 14 J. Experimental Psychol: Applied 139, 142 (2008) and State v. Henderson, 208 N.J. 208 (2011), State v. Lawson, 291 P.3d 673, 695 (Or. 2012) ref.

**(j) Penal Code (XLV of 1860)---**

----Ss. 302(b), 324, 392, 411 & 34---Qanun-e-Shahadat (10 of 1984), Art. 22--- Qatl-i-amd, attempt to commit qatl-i-amd, robbery, dishonestly receiving stolen property, common intention---Reappraisal of evidence---Benefit of doubt---Test identification parade---"Estimator variables" negatively affecting the memory process of the identifying witness---Site-plan showed that the accused persons were at a distance of 15 to 30 feet from the complainant in the empty space of the godowns abutting a road with no light---Source of light in the empty area behind the godowns (place of occurrence) had not been secured as evidence during the investigation---Witness was fired at first and then the deceased was shot dead---Duration of the event had not been specified in the crime report---In such background, it could not be said with certainty that the visual recognition of the accused persons by the complainant on the fateful night was unhindered and unhampered especially when he was fired at first and allegedly saw the occurrence under stress of a threat---Based on such "estimator variables," possibility of misidentification could not be ruled out, thereby making it unsafe to place reliance on the identification evidence---Convictions and sentences of accused persons were set aside and they were acquitted of the charge by extending the benefit of doubt to them---Appeals were allowed accordingly.

Raja Tariq Nadeem, Advocate High Court with permission of the Court for Appellants (in Cr. A. 306-L of 2012).

Malik Abdul Haq, Advocate Supreme Court for Appellants (in Cr. As. 307-L and 308-L of 2012).

Raja Tariq Nadeem, Advocate High Court with permission of the Court for the Complainant (in Cr. As. 307-L and 308-L of 2012).

Ahmed Raza Gillani, Additional Prosecutor-General, Punjab for the State (in all cases).

Date of hearing: 20th February, 2019.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**Dr. Tofeeq Ahmed was robbed and shot dead in the driving seat of his car at 8:30 p.m. on the fateful night of 31st August, 2006. According to the story of the prosecution, the complainant (PW-8) along with his brother (the deceased) came out of their office-cum-godown, carrying cash in a shopping bag. As the deceased sat in the driving seat of his car while the complainant was still on his way to the car, they were taken by surprise by two unknown persons (later on identified as the appellants). One of them threatened the deceased to hand over the cash to him, as the complainant tried to resist, one of the appellants fired at him but missed and then ended up killing Dr. Tofeeq Ahmed, in the driving seat of his car. The assailant was driven away by his partner, who all this while remained watchfully seated on his motorcycle. In this background case FIR No. 935 was registered against two unknown persons, at Police Station North Cantonment, Lahore under sections 392 and 203, P.P.C. on 30.8.2006. In the investigation that ensued, the appellants were arrested and after verifying their identity in an identification parade, were sent up for trial. They were convicted and sentenced by the trial Court for multiple offences under sections 302(b), 392, 324 and 411 read with section 34, P.P.C. including death under section 302(b), P.P.C. along with compensation and imprisonment for various terms under sections 392, 324 and 411, P.P.C. while extending them the benefit of section 382-B, Cr.P.C. Upon appeal the convictions and sentences of the appellants were maintained to the extent that the sentence of death in the case of Abdur Rashid (appellant) was converted into imprisonment for life. Hence, these appeals with the leave of the Court granted on 6.12.2012.

2. Examining the record with the assistance of the learned counsel for the parties we observe that the case of the prosecution rests on the ocular account of two eye-witnesses namely Mian Suhail Ahmed (Complainant/PW-8) and Sheikh Khalid Saeed (PW-11). Testimony of PW-11 has been disbelieved and his presence at the scene of the crime held doubtful by the High Court, which has been found by us, on our own independent evaluation of the evidence to be convincing and correct. In this background, we observe that the complainant drove the deceased to the hospital in the same car in which he was shot and filed the complaint with the police at Combined Military Hospital ("CMH") at 8:45 p.m., the

same night, within 15 minutes of the occurrence. The name of the complainant does not find mention in the Inquest Report prepared at the hospital. There is no evidence on the record to support that the deceased was brought to CMH or death certificate was issued by the hospital as narrated in the ocular account of PWs 8 and 11. According to the Doctor (PW-10), who did the post-mortem examination, the dead-body of the deceased was brought to the mortuary at 11:15 a.m. on 01.9.2006 and the post-mortem examination took place at 12 noon after a delay of 15 hours. This delay in the post-mortem examination, when the occurrence was promptly reported at 8:45 p.m. and formal FIR was registered at 9.00 p.m. on 31.8.2006 gives rise to an inference that the incident was not reported as stated by the prosecution. The complainant must have single-handedly moved the injured deceased (see Ex-PA - memo of blood stained clothes of the deceased) to another seat in the car, having soiled other seats and his clothes with blood. However, there is no evidence on the record to support this. The story as narrated by the prosecution casts a ring of suspicion around its probability and credence.

3. Site-plan (Ex-PL) shows one of the appellants to be standing next to the driving seat of the car at a distance of 4 feet. A fire-shot from this distance is likely to cause blackening but the medical evidence (Post-mortem examination reports Ex-PM and Ex-PM/1 and the statement of PW-10) does not support this, once again raising a suspicion that the events may have unfolded differently than as reported. In the absence of any supporting evidence, the presence of the deceased at the site of occurrence is highly improbable considering that the deceased was a doctor, employed with the social security department of the Government having no evident interest in the business of the complainant or any convincing evidence to show that the godown fell in the way to his residence.

4. The Investigation Officer (PW-15) deposed that the recovery of pistol was effected from a house whose ownership he failed to ascertain. According to him it was a double storied house and recovery was effected from the ground floor where other family members also resided. The memorandum of recovery (Ex-PG) shows that the pistol was recovered from an open room lying under rough clothes. It would be unsafe to rely on this recovery for a conviction on a capital charge. The ocular account of the sole eye-witness (PW-8) does not inspire confidence in the absence of any corroboration from the identification evidence or the recovery.

5. The Test Identification Parade ("TIP") (Ex/PN) which was conducted by the Special Judicial Magistrate (PW-13) on 13.6.2006 is fraught with several infirmities diminishing its probative and evidentiary value. Brief description of the two unknown persons (later on identified as the appellants) in the first information report mentions their height, bodily size and colour of the skin. TIP proceedings are silent regarding the description of the unknown accused given by the complainant in the report. TIP can only commence, once suspects matching the description in the crime report or in the statements of the witnesses under section 161, Cr.P.C. have been arrested. Matching the description in the first information report is the starting point towards identification of the unknown accused. It is, therefore, uncertain how the appellants were hurled and lined-up for the identification parade without the Magistrate first matching the description given by the complainant. Selection of the suspects, without any correlation with description of the accused in the first information report, raises doubts and makes the identification proceedings unsafe and doubtful rendering the identification evidence inconsequential. This is just a shade apart from cases where there is no description of the accused in the FIR, the effect being the same, casting doubts on the credibility of the test identification parade. See State/Government of Sindh v. Sobharo (1993 SCMR 585), Muhammad Afzal alias Abdullah v. State (2009 SCMR 436), Sabir Ali alias Foji v. State (2011 SCMR 563) and Muhammad Abdul Hafeez v. State of A.P. (AIR 1983 SC 367).

6. Both the appellants were jointly seated in the lineup. The idea of identification parade or lineup is to stand or seat the suspect in a group of persons (dummies or fillers) that closely resemble the characteristics of the suspect, in order to test the recognition, memory, perception and observation of the witness and thus verify the testimony of the witness. Placing two or more suspects jointly in an

identification parade (or joint parade), tarnishes the homogeneity, sameness and identicalness of the members of the parade and defeats the very purpose of having a test identification parade. Joint parade passes for suggestive and indicative identification, compromising the reliability of the witness and opening doors to misidentification, rendering TIP unsafe and untrustworthy. See: In the matter of Kanwar Anwaar Ali (PLD 2019 SC 488) on joint identification parade.

7. No role was assigned to the suspects by the witnesses, especially when the first information report clearly describes two different roles to the appellants; one that of an assailant, while the other of a driver of a motorcycle who drove the assailant away. If a witness fails to give the description of the part played by the suspect in the crime, the credibility of the witness stands questioned as he fails to complete the picture of the crime scene, thus inviting caution and circumspection in assessing the evidentiary value of the identification evidence. This Court over the years has placed little reliance on such identification evidence. Even in the subsequent identification by the complainant in court, which has little evidentiary value, he failed to point an accusing finger at the appellants to say who did what, therefore the parts played by the appellants in the crime remain a mystery. See: In the matter of Kanwar Anwaar Ali (PLD 2019 SC 488) on the absence of a role assigned by the witness in an identification parade.

8. According to the complainant one of the appellants was his employee at the godown and the Investigation Officer (PW-15) admits in the cross-examination that he took the appellants to the godown after they were arrested and the employees at the godown confirmed that both of them worked as employees at the godown of the complainant. This is also indicated from the statements of the appellants under section 342, Cr.P.C. Police is to guard the identity of the suspects from the witness till TIP takes place. Visiting the godown of the complainant with the suspects unravels the identity of the suspects, tarnishing the secrecy required. This once again is suggestive and is also referred to as "impermissible suggestiveness[1]" at the hands of the police, therefore the probability of the witnesses knowing the identity of the appellants prior to the identification parade cannot be ruled out. Additionally, the identification of the appellants by PW-11, whose testimony and presence at the scene of the crime has been disbelieved further weakens the credibility of TIP and supports the view that the witnesses knew the identity of the suspects before TIP was held.

9. Identification evidence has so far been examined on the basis of the guidelines of test identification parade based on executive instructions and judicial pronouncements, which have been eloquently and elaborately discussed in Muhammed Yaqoob[2] and recently echoed In the matter of Kanwar Anwaar Ali.[3] These guidelines deal with the test identification parade and have also come to be known as "system variables," discussed later.

10. Other than the test identification parade, our courts have, now and then, independently examined the conditions under which the eye-witness saw the accused at the time of the crime, to assess whether the eye-witness had a good look at the accused so as to rely on his testimony. This assessment has been based on general principles of judiciousness and caution and is not necessarily based on scientific research. See Alim v. State (PLD 1967 SC 307) and Majeed alias Majeedi v. State (2019 SCMR 301). The evaluation of the witness on the basis of his ability to remember or recall the accused has not been mainstreamed in our criminal jurisprudence as an essential element while appreciating the identification evidence, i.e. identification proceedings and the rest of the evidence on the record especially the statement and location of the witness during the occurrence. Thus, the veracity of the testimony of the eye-witness is largely determined through the identification parade and not independent of the identification parade by examining the capacity and ability of the eye-witness to identify the accused.

11. In 1989, Lahore High Court in Muhammed Yaqoob[4] observed that "such-like identification proceedings are not the testimony of a witness but the testimony of the senses of the witness. It is essentially a test of his power of observation and perception, a test of his power to recognize strangers

and a test of his memory. These gifts of God may vary from man to man. A witness may be honest, independent and truthful but then his memory may be faulty. And then the tricks of memory and its conscious and unconscious activity could wrap the vision of a man. When mistakes are possible in the recognition of a man known from before, then the possibility of such mistakes in identifying strangers is definitely greater. And more so when the witnesses have been the offender for the first time during the occurrence and that also briefly and not with a calm but in an excited, confused and terrorized state of mind." Lahore High Court raised an important point regarding power of observation, perception, recognition and memory of an eye-witness identifying an accused. However, this approach remained restricted to the role played by the accused in the crime as per the requirement of the guidelines of the test identification parade discussed above. The capacity and ability of the eye-witness was not assessed independently as a sequel or step two to the test identification proceedings. In 1981 Doral Patel, J. in Lal Pasand's case[5] cautioned the courts to beware of the dangers inherent in the identification of strangers and quoting from the Criminal Law Revision Committee Report (1972) observed that mistakes in identifications were " by far the greatest cause of actual or possible wrong convictions ." This underlines the importance of assessing the ability and capacity of the eye-witness, separately, to identify the accused in the circumstances of the case. This assessment also forms part of the identification evidence along with the test identification proceedings.

12. As time passed, international scientific surveys revealed that eye-witness testimony has been the most popular topic in psychological research. By 1995 alone there were over 2000 publications in psychology concerned with eye-witness reliability.[6] The single most important observation from the research on eye-witness identification is that it is substantially less accurate than generally believed. Overall, data from real-life cases show that just under 45 percent of witnesses pick the suspect, about 35 percent decline to make a choice, and about 20 percent pick innocent fillers.[7] The over reliance on visual identification evidence has led to numerous mistaken identifications of innocent suspects and consequently wrongful convictions.[8] In approximately 75 % of DNA exonerations in the United States, mistaken identification was the principal cause of wrongful conviction.[9] Furthermore, in 80 to 90 per cent of all DNA exonerations at least one eye-witness made a mistaken identification.[10] A wrongful conviction results in two injustices. The first tragedy is to the innocent person. The second is to the victim of the offence and to society, because the real offender is not brought to justice.[11] Wrongful convictions undermine the credibility of the legal system. Whenever witnesses are mistaken, it is rarely because they lie or misrepresent facts, but mostly because they misidentify people.

13. In the late 1960s, the courts around the world[12], began to set the standard for reviewing eyewitness identification evidence.[13] Reliability and credibility of the witness was termed as the linchpin in determining the admissibility of identification testimony.[14] US Supreme Court in the case of Manson v Brathwaite[15], UK Court of Appeal (Criminal Division) in Regina v. Turnbull and Another,[16] New Jersey Supreme Court in State v Madison[17] and Oregon Supreme Court in State v. Classen[18] settled the following factors for assessing the reliability of the witness:

(1) the opportunity of the witness to view the suspect at the time of the crime;

(2) the witness's degree of attention;

(3) the accuracy of the witness's prior description of the suspect;

(4) the level of certainty demonstrated at the confrontation (seeing the accused in court); and

(5) the time between the crime and the confrontation (seeing the accused in court).

It is interesting to note that these factors were drawn from earlier judicial rulings and not from scientific research.[19] The scientific research refutes the notion that memory is like a video recording, and that a witness needs only to replay the tape to remember what happened. Human memory is far more complex. The memory is a constructive, dynamic, and selective process. The process of remembering consists of three stages: acquisition-"the perception of the original event"; retention-"the period of time that passes between the event and the eventual recollection of a particular piece of information"; and

retrieval-the "stage during which a person recalls stored information".[20] The process of memory retention and retrieval may be affected by a number of factors. The scientific literature divides those variables into two categories: system and estimator variables.[21] System variables are factors like lineup procedures which are within the control of the criminal justice system and in our jurisprudence are referred to as the Test Identification Parade. Whereas Estimator variables are factors related to the witness - like distance, lighting, or stress - over which the legal system has no control.[22] Our courts have marginally attended to this aspect of witness reliability before placing reliance on the identification evidence (see above). The scientific research[23] establishes that the following non-exhaustive list of "estimator variables" negatively affect the memory process:-

i. Stress: Even under the best viewing conditions, high levels of stress can diminish an eye-witness' ability to recall and make an accurate identification. It may be noted "while moderate levels of stress improve cognitive processing and might improve accuracy, an eye-witness under high stress is less likely to make a reliable identification of the perpetrator."[24]

ii. Weapon Focus: When a visible weapon is used during a crime, it can distract a witness and draw his or her attention away from the culprit. "Weapon focus" can thus impair a witness' ability to make a reliable identification and describe what the culprit looks like if the crime is of short duration.[25]

iii. Duration: The amount of time an eye-witness has to observe an event may affect the reliability of an identification. There is no minimum time required to make an accurate identification, however, a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure."[26]

iv. Distance and Lighting: A person is easier to recognize when close by, and that clarity decreases with distance. We also know that poor lighting makes it harder to see well. Thus, greater distance between a witness and a perpetrator and poor lighting conditions can diminish the reliability of an identification.[27]

v. Witness Characteristics: Characteristics like a witness' age and level of intoxication can affect the reliability of an identification. Children between the ages of nine and thirteen who view target-absent lineups are more likely to make incorrect identifications than adults.[28]

vi. Characteristics of Perpetrator: Disguises and changes in facial features altered between the time of the event and the identification procedure affects the accuracy of an identification.[29]

vii. Memory Decay: Memories fade with time and memory decay "is irreversible"; memories never improve. As a result, delays between the commission of a crime and the time an identification is made can affect reliability.[30]

The scientific research referred to above has not only appeared in the peer reviewed journals but also has been considered "credible" by various courts in different jurisdictions.[31] New Jersey Supreme Court in State v. Henderson[32] observed that "virtually all of the scientific evidence" that had emerged in recent decades "reveals that an array of variables can affect and dilute memory and lead to misidentifications." Also see State v. Lawson[33].

14. The laws of evidence maintain that in order for the court to take judicial notice of scientific facts they must be part of the general knowledge of men or must be agreed upon by reputable men in a particular field of science beyond reasonable dispute.[34] For judges to determine the degree of consensus on a particular scientific fact they may refer to any reputable and recognized reference sources.[35] The House of Lords in Regina (Quintavalle) v. Secretary of State for Health[36] held that the laws have to be construed in the light of contemporary scientific knowledge and in order to give effect to a plain parliamentary purpose, the statute may be held to cover a scientific development not known when the statute was passed. This Court can take judicial notice of the credible scientific development under Article 112, Qanun-e-Shahadat, 1984. The question is can we shut our eyes to credible scientific research and development, which has already been recognized and acknowledged by the courts in

various other jurisdictions. If scientific research can help and assist the court in understanding and appreciating evidence more fully and more meaningfully, the risk of miscarriage of justice stands minimized. Therefore, the courts don't shy away from scientific developments but instead reach out and embrace them. Reliance on scientific research and the factors evolved by science to assess the reliability and credibility of the eye-witness can improve the quality of identification evidence and as a consequence the quality of justice. Our jurisprudence had already travelled in this direction and now credible scientific research by providing us additional factors or "estimator variables" (which are not exhaustive) has provided additional factors to certify the credibility and reliability of the eye-witness and as a result the veracity and probative value of the identification evidence.

15. After the test identification parade, the court must verify the credibility of the eye-witness by assessing the evidence on the basis of the factors or estimator variables discussed above. Identification of an accused, therefore, becomes a two-step process. First, the suspects undergo a test identification parade and second, the credibility of the eye-witness is assessed by weighing the evidence in the light of the estimator variables.

16. Applying the "estimator variables" to the instant case we see that the site-plan shows that the appellants were at a distance of 15 to 30 feet from the complainant in the empty space of the godowns abutting a road with no light. The source of light in the empty area behind the godowns has not been secured as evidence during the investigation. The witness was fired at first and then the deceased was shot dead, we notice that factors like weapon focus and distance and lighting are visible in this case. The duration of the event has not been specified in the crime report. In this background, it cannot be said with certainty that the visual recognition of the appellants by the complainant on the fateful night was unhindered and unhampered especially when he was fired at first and allegedly saw the occurrence under stress of a threat. Based on the above "estimator variables," possibility of misidentification cannot be ruled out, thereby making it unsafe to place reliance on the identification evidence.

17. For the above reasons, appellants stand acquitted of the charge by extending them benefit of the doubt. These are the reasons for our short order dated 20.2.2019 which is reproduced hereunder for convenience and completion of record:

> "For reasons to be recorded later Criminal Appeals Nos. 307-L of 2012 and 308-L of 2012 are allowed, the convictions and sentences of Abdul Rashid and Rashid Aziz Rana appellants are set aside and they are acquitted of the charge by extending the benefit of doubt to them. They shall be released from the jail forthwith if not required to be detained in connection with any other case. Criminal Appeal No. 306-L of 2012 seeking enhancement of the sentence of Abdul Rashid respondent is dismissed."

MWA/S-15/SC Appeals allowed.

**2019 SCM R 980**

**[Supreme Court of Pakistan]**

**Present: Faisal Arab and Syed Mansoor Ali Shah, JJ**

**SECRETARY REVENUE DIVISION/CHAIRMAN, FBR and another---Petitioners**

**Versus**

**MUHAMMAD ARSHAD HILALI---Respondent**

Civil Petition No. 396 of 2017 and C.M.A. No. 1012 of 2017, decided on 26th April, 2019.

(Against the judgment dated 01.12.2016 of the Federal Service Tribunal, Islamabad in Appeal No. 72(P)CS/2015)

**Civil service---**

----Seniority---Civil servant transferred to another department after making a request for mutual transfer with another civil servant---Whether seniority of such civil servant was to be reckoned from date of his absorption in the new department or date of his initial appointment in his original department---Respondent was appointed as Preventive Officer (BS-11) in Customs House, whereas civil servant 'S' was working as Inspector (BS-11) in Collectorate of Customs and Central Excise---Both being in the Customs department holding posts in equal grade made a request for mutual transfer, which was accepted and the respondent was permanently absorbed as Inspector Customs, while "S" was absorbed as Preventive Officer---Held, that paragraph 6 of instructions contained in Serial No. 30, Chapter III, Part II of Estacode (1989 edition) clearly provided that where a person was transferred to another office in a situation where it was open to him to accept or refuse such transfer, his seniority was to be reckoned from the date of his transfer to the new office---Only exception to such rule was contained in paragraph 6(i)(b), which stated that where a person was compulsorily transferred to another office then he was allowed to count his service in the previous office towards his seniority in his new office---In the present case, the respondent sought his transfer to his new office on his own volition on the basis of mutual consent with another officer of the same grade; he was not compulsorily transferred at the instance of the department, hence the recognized practice contained in paragraph 6(i)(a) of Serial No. 30, Chapter III, Part II of Estacode (1989 edition) clearly disentitled him to count his previous service towards seniority in the new office---Petition for leave to appeal was converted into appeal and allowed and impugned judgment of the Service Tribunal was set aside.

Imran Fazal, Advocate Supreme Court for Petitioners.

Jehanzeb Raheem, Advocate Supreme Court for Respondent.

Date of hearing: 26th April, 2019.

**JUDGMENT**

**FAISAL ARAB, J.---**The respondent was appointed as Preventive Officer (BS-11) on 19.07.1988 and was posted in Customs House, Karachi. One Sultan Naeem Akhtar was working as Inspector (BS-11) in Collectorate of Customs and Central Excise, Peshawar. They being in the Customs department holding posts in equal grade made a request for mutual transfer, which was accepted in 1991 and the respondent was permanently absorbed as Inspector Customs in Peshawar, while Sultan Naeem Akhtar was absorbed as Preventive Officer and posted in Karachi.

2. In 2011 when FBR circulated the seniority list of the Inspectors of Customs department who were appointed upto the year 1990, the respondent found his name missing. He made representation claiming that as he was appointed as Preventive Officer in the year 1988 he be given seniority in the list of Inspectors from the date when he was initially appointed in 1988 and not from the date of his transfer in 1991. When the FBR issued the final seniority list of Inspectors in 2014, respondent was not given seniority from the date of his initial appointment i.e. from 1988 but from the date of his absorption as Inspector in 1991. He again made a departmental representation seeking his seniority to be reckoned from the date of his initial appointment i.e. 19.07.1988 which was not responded. He then preferred appeal in the Service Tribunal and succeeded in his endeavor by securing declaration that his seniority

in the array of Inspectors be reckoned from the date when he was initially appointed in 1988. In granting such declaration, the reason which prevailed with the Service Tribunal was that when the seniority of four Valuation Officers, who were later absorbed in service as Appraisers was reckoned from the date of their initial appointment as Valuation Officer (the posts of Appraisers and Valuation Officers being of the same grade), on the same analogy the respondent could not be discriminated and ought to have been given the same treatment. Against such decision, the Customs department has preferred this petition seeking leave to appeal.

3. Learned counsel for the petitioner argued that the respondent who was working as Preventive Officer in Karachi since 1988 was transferred to Peshawar in 1991 and absorbed on the post of Inspectors on the basis of mutual transfer with one Sultan Naeem Akhtar and not compulsorily transferred at the instance of the department, therefore, the respondent cannot claim seniority in the list of Inspectors from the date of his initial appointment and is entitled to claim seniority only from the date when he was transferred to Peshawar as Inspector.

4. Learned counsel for the respondent, on the other hand, argued that it is a clear case of discrimination as in the case of transfer of four officers of equal grade to another post i.e. from Valuation Officers to Appraisers, their seniority was reckoned from the date of their initial appointment and not from the date of transfer to the new post. When we called upon the counsel for the respondent that keeping aside the plea of discrimination for a moment on what principle of service law respondent claims that his seniority be reckoned from the date when he was initially appointed and not from the date of his transfer, learned counsel referred to paragraph 6 of instructions contained in Serial No. 30, Chapter III Part II of Estacode (1989 edition), which reads as follows:-

"6. Seniority on transfer from one office to another.---(i) The instructions in the foregoing paragraphs regulate the position of a deputationist in his parent office. As regards his seniority in the office to which he is transferred, it should be determined in the following manner:-

(a) When it is open to the person concerned to accept or refuse an offer of appointment in another office, he should count his seniority in the new office from the date of his transfer to that office.

(b) When a person is compulsorily transferred to another office as a result of conscription, or along with the post and his work, he should be allowed to count his previous continuous service in the grade towards seniority in that grade in the new office."

5. The import of paragraph 6(i)(a) above appears to be quite contrary to what respondent's counsel intend to advance before us. It clearly provides that where a person is transferred to another office in a situation where it was open to him to accept or refuse such transfer, his seniority was to be reckoned from the date of his transfer to the new office. The only exception to this rule is contained in paragraph 6(i)(b). It states that where a person is compulsorily transferred to another office then he is allowed to count his service in the previous office towards his seniority in his new office. In the case of transfer of four other officers of the department, example of which has been quoted as precedent in the present case, their seniority may have been reckoned from the date of their initial appointment but nothing was brought on the record as to the circumstances in which such transfers had taken place. In the present case, one thing is clear that the respondent sought his transfer to his new office on his own volition on the basis of mutual consent with another officer of the same grade. He was not compulsorily transferred at the instance of the department, hence the recognized practice contained in paragraph 6(i)(a) of Serial No. 30, Chapter III Part II of Estacode (1989 edition) clearly disentitles him to count his previous service towards seniority in the new office. When on a principle of law one upon his transfer is not entitled to seek seniority from the date of his initial appointment then if someone else has been granted seniority in violation of such principle, which too is not clear, the same cannot be made a ground to raise the plea of discrimination.

6. In the circumstances, we are of the view that the Service Tribunal committed error when it accepted the plea of discrimination and granted seniority to the respondent from the date of his initial

appointment in violation of the principle laid down in paragraph 6 of Serial No. 30 of Estacode for the simple reason that he could only be allowed to count his previous service towards seniority had he been compulsorily transferred at the instance of the department and not at his own. This petition is, therefore, converted into appeal and allowed and the impugned judgment is set aside.

C.M.A. No. 1012/2017

7. As the main petition has been converted into appeal and allowed, this C.M.A. for stay has become infructuous and is disposed of accordingly.

MWA/S-16/SC Appeal accepted.

**2019 S C M R 1029**

**[Supreme Court of Pakistan]**

**Present: Asif Saeed Khan Khosa, C.J.,**

**Syed Mansoor Ali Shah and Munib Akhtar, JJ**

**LAHORE HIGH COURT BAR ASSOCIATION and others---Petitioners**

**Versus**

**GENERAL (RETD.) PERVEZ MUSHARRAF and others---Respondents**

Civil Review Petition No. 513 of 2014 in Constitutional Petition No. 14 of 2013, decided on 1st April, 2019.

**Criminal Law Amendment (Special Court) Act (XVII of 1976)---**

----S. 9---Constitution of Pakistan, Art. 10A---Criminal Procedure Code (V of 1898), S. 342---Trial for high treason---Constitution of Special Court---Accused delaying conclusion of trial by remaining a fugitive and absenting himself from court---Complaint against the accused was filed on 12-12-2013 before the Special Court, the charge was framed on 31-3-2014 and the prosecution evidence was closed on 18-9-2014 and since then the matter was dragging on due to absence of the accused---Significance, gravity and solemnity of the proceedings before the Special Court could not be undermined by delaying the trial due to non-appearance of the accused---Section 9 of the Criminal Law Amendment (Special Court) Act, 1976 ('the Act') envisaged that once the trial had begun, the trial shall not be adjourned by reason of absence of any accused person due to illness, or if the absence of the accused or his counsel had been brought about by the accused person himself, or if the behavior of the accused person prior to such absence had been, in the opinion of the Special Court, such as to impede the course of justice---Section 9, Criminal Law Amendment (Special Court) Act, 1976, mandated that the Special Court shall proceed with the trial after taking necessary steps to appoint an advocate to defend any such accused person---Section 9 was, therefore, an extension of the procedure for trial provided under S. 6 of the said Act and supported the purpose of the special law---Within the scope of the Act, if the accused voluntarily choose not to exercise his right to appear and to be present at trial, it did not infringe the fairness of the trial nor did it violate the right to fair trial under Art. 10A of the Constitution---To stop further proceedings of the trial, in such a situation, would amount to putting a premium on the fault of the absconder---Besides the control over the proceedings of the trial could not be allowed to vest in the accused---Accused, in the present case, was not merely absenting himself from attending the Special Court, he had also been declared a proclaimed offender---Being a fugitive from the law, the accused had lost the right to have an advocate appointed to defend him unless and until the accused surrendered before the court---In the context of the Act, if the accused voluntarily choose not to appear or join the proceedings, he lost his right to an explanation in terms of S. 342, Cr.P.C.---Supreme Court directed that the Special Court shall proceed with the trial on the next date of hearing; that in case the accused surrendered and appeared before the Court he would be entitled to record his statement under S. 342, Cr.P.C. and lead any other defence under the law, however, in case the accused failed to appear on the next date of hearing, being a proclaimed offender, the Special Court was empowered to proceed against the accused even in his absence under S. 9 of the Act---Case adjourned.

Abdul Hameed Dogar v. Federal Government through Secretary, Ministry of Interior and 2 others PLD 2016 SC 454; Ikramullah v. State 2015 SCMR 1002; Dr. Mobashir Hassan v. Federation of Pakistan PLD 2010 SC 265 and Hayat Bakhsh v. The State PLD 1981 SC 265 ref.

Hamid Khan, Senior Advocate Supreme Court, Taufiq Asif, Advocate Supreme Court and Sh. Ahsan-ud-Din, Advocate Supreme Court for Petitioners.

Sajid Ilyas Bhatti, Additional Attorney-General for Pakistan for the State.

Nasir-ud-Din, Special Prosecutor and Rao Abdul Jabbar Khan, Registrar, Special Court on Court's Call.

Salman Safdar, Advocate Supreme Court for Respondents.

Date of hearing: 1st April, 2019.

**ORDER**

**SYED MANSOOR ALI SHAH, J.--**On 07.3.2019, learned counsel for the petitioner informed this Court that trial of General (Retd.) Pervez Musharraf (accused/respondent No.1) before the Special Court, constituted under the Criminal Law (Special Court) Act, 1976 ("Act"), for the charge of high treason, stands stalled on account of absence of the accused from Pakistan. Report from the Registrar of Special Court was called for, to furnish reasons for the delay in the trial. More importantly, parties were put to notice to appear before the Court so as to determine as to how the Special Court may proceed further if the respondent deliberately and persistently fails to appear before it. Report of the Registrar, Special Court dated 20.3.2019, submitted before this Court, reveals that the complaint was filed against the accused on 12.12.2013, while formal charge was framed on 31.3.2014. The prosecution evidence stood recorded on 18.09.2014 and the accused was declared as a proclaimed offender on 12.7.2016. Since then the trial is at the stage of recording of statement of the accused under section 342, Cr.P.C. We took up the matter on 25.3.2019 and before determining the course of action regarding persistent absence of the accused from appearing before the Special Court, we thought it best to leave it to the Special Court to first decide on the future course of action. On 28.3.2019, learned counsel for the accused made a statement before the Special Court that the accused will appear before the Special Court for his examination under section 342, Cr.P.C. on 13.5.2019, but the Special Court directed the accused to appear on 02.5.2019 and the trial has been adjourned to the said date.

2. Learned counsel for the petitioner submitted that keeping in view the history of the case and the conduct of the accused, it is not likely that he will appear before the Special Court on the next date of hearing. They submitted that under section 9 of the Act, the Special Court can proceed against the accused if he fails to appear before the Court and prayed that directions be given to the Special Court to proceed and conclude the trial in the absence of the accused.

3. Learned counsel for the accused on the other hand referred to section 6 of the Act to submit that powers and procedure of the Special Court require presence of the accused, while section 9 deals with adjournments and cannot be interpreted to derail the procedure provided under section 6 of the Act. Order dated 19.07.2016 of the Special Court was also referred to where the Special Court was of the view that presence of the accused was required to proceed further in the matter.

4. We have heard the learned counsel of the parties at some length. This Court on 24.2.2016, in Abdul Hameed Dogar v. Federal Government through Secretary, Ministry of Interior and 2 others (PLD 2016 SC 454) directed the Special Court to proceed with the trial of the accused with all convenient dispatch and without any unnecessary delay. Looking at the progress of the trial, we note with concern that complaint against the accused was filed on 12.12.2013 before the Special Court, the charge was framed on 31.3.2014 and the prosecution evidence was closed on 18.9.2014 and since then the matter is dragging on due to absence of the accused. The report of the Registrar, Special Court cuts a sorry picture of the long delay in the trial. There cannot be a more grave an offence than high treason and more solemn a proceedings than the trial for high treason case before a Special Court. High treason is a constitutional offence. Article 6 provides that if a person abrogates or subverts or suspends or holds in abeyance, or attempts or conspires to abrogate or subvert or suspend or hold in abeyance, the Constitution by use of force or show of force or by any other unconstitutional means, is guilty of high treason. Constitution is the fundamental law of the land which people of Pakistan through their representatives in the National Assembly have adopted, enacted and have given to themselves. Obedience to the Constitution under Article 5 of the Constitution is the inviolable obligation of every citizen where ever he may be. The significance, gravity and solemnity of the proceedings before the

Special Court cannot be undermined by delaying the trial due to non-appearance of the accused. The parliamentary debate on the bill of this Act suggested that "the accused are charged with serious offences involving security and sovereignty of the State, therefore, it is in their interest that the cases, if they are proved innocent, if their innocence is proved should be decided as speedily and as quickly as possible[1]? Section 9 of the Act prevents this and ensures that the trial must proceed without any adjournment. Section 9 of the Act provides as under:-

> "9. Restriction of adjournments. No trial before the Special Court shall be adjourned for any purpose unless the Special Court is of opinion that the adjournment is necessary in the interests of justice and, in particular, no trial shall be adjourned by reason of the absence of any accused person due to illness, or if the absence of the accused or his counsel has been brought about by the accused person himself, or if the behavior of the accused person prior to such absence has been, in the opinion of the Special Court, such as to impede the course of justice but, in any such case, the Special Court shall proceed with the trial after taking necessary steps to appoint an advocate to defend any such accused person."

The above section envisages that once the trial has begun, the trial shall not be adjourned by reason of absence of any accused person due to illness, or if the absence of the accused or his counsel has been brought about by the accused person himself, or if the behavior of the accused person prior to such absence has been, in the opinion of the Special Court, such as to impede the course of justice. Section 9 mandates that the Special Court shall proceed with the trial after taking necessary steps to appoint an advocate to defend any such accused person. Section 9 is, therefore, an extension of the procedure for trial provided under section 6 of the Act and supports the purpose of the special law. Within the scope of this Act, if the accused voluntarily chooses not to exercise his right to appear and to be present at trial, it does not infringe the fairness of the trial nor does it violate the right to fair trial under Article 10A of the Constitution. To stop further proceedings of the trial, in this situation, would amount to putting a premium on the fault of the absconder. Besides the control over the proceedings of the trial cannot be allowed to vest in the accused.

5. In the present circumstances of the case, the accused is not merely absenting himself from attending the Special Court, he has also been declared a proclaimed offender on 12.7.2016. Being a fugitive from the law, the accused loses his right to audience [see Ikramullah v. State (2015 SCMR 1002); Dr. Mobashir Hassan v. Federation of Pakistan (PLD 2010 SC 265); Hayat Bakhsh v. The State (PLD 1981 SC 265)] as a consequence the accused has lost the right to have an advocate appointed to defend him unless and until the accused surrenders before the court.

6. We conclude that while section 342, Cr.P.C. enables the accused to explain any circumstances appearing against him in the evidence, however, in the context of this Act, if he voluntarily chooses not to appear or join the proceedings, he loses his right to such an explanation. Similarly, the accused being a proclaimed offender loses his right to audience and forfeits his right to put up a defence.

7. For the above reasons, the Special Court shall proceed with the trial on the next date of hearing. In case the accused surrenders and appears before the Court he would be entitled to record his statement under section 342, Cr.P.C. and lead any other defence under the law. However, in case the accused fails to appear on the next date of hearing, being a proclaimed offender, the Special Court is empowered to proceed against the accused even in his absence under section 9 of the Act.

8. Adjourned to a date to be fixed later on.

MWA/L-3/SC Order accordingly.

**2019 S C M R 1099**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik,Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed, JJ**

**DIRECTOR GENERAL EXCISE AND TAXATION LAHORE and others---Petitioners**

**Versus**

**MARKET COMMITTEE, MULTAN and another---Respondents**

Civil Petitions Nos. 1926-L and 1927-L of 2015, decided on 15th May, 2019.

(On appeal from the judgment of Lahore High Court, Multan Bench dated 02.6.2015, passed in W.Ps. Nos. 4627/2002 and 8421/2002)

**Punjab Urban Immovable Property Tax Act (V of 1958)---**

----S. 4(b) [as it stood before amendment by the Punjab Finance Ordinance, XXXVII of 2002]---Market committee---Exemption from tax---Market committee was exempt from the chargeability of tax prior to the amendment in S. 4(b) of Punjab Urban Immovable Property Tax Act, 1958 ('the Act') brought through the Punjab Finance Ordinance, 2002 ('the Ordinance')---After the said amendment the term "local authority" had been deleted and exemption was only available to "Provincial Government" or to a "local government" as defined under the Local Government Ordinance, 2001---Market committee did not fall into either of the two, therefore, it was liable to pay tax under the Act after the amendment in S. 4(b) of the Act brought about through the Ordinance on 25-6-2002.

Province of Punjab v. Market Committee 2011 SCMR 1856 ref.

Rana Shamsad Khan, Additional A.-G. for Petitioners.

Syed Shahid Hussain Shah, Advocate Supreme Court and Izhar Saleem, Secy., Market Committee for Respondents (in C.P. 1926-L of 2015).

Nemo for Respondents (in C.P. 1927-L of 2015).

Date of hearing: 8th May, 2019.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**Through this consolidated judgment, the titled cases are decided as they raise common question of law and facts.

2. Respondents (Market Committees) challenged the demand of tax raised by the petitioners (Department) under the Punjab Urban Immovable Property Tax Act, 1958 ("Act") for a period, before and after, the year 2002. Respondents have argued that as a "Market Committee" they stand exempt from tax under section 4(b)(ii) of the Act and placed reliance on Province of Punjab v. Market Committee (2011 SCMR 1856). While the case of the Petitioners is limited to the period after the amendment brought about in section 4 of the Act through Punjab Finance Ordinance, 2002 ("Ordinance") when the said exemption was no more available.

3. We have heard the learned counsel for the parties and have examined the law. Section 4 before the amendment in 2002 stood as follows:

"4. Exemptions.-The tax shall not be leviable in respect of the following properties, namely:-

(a) …

(b) buildings and lands other than those leased in perpetuity;

(i) vesting in Government of West Pakistan and not administered by a local authority.

(ii) owned or administered by a local authority when used exclusively for public purposes and not used or intended to be used for purposes of profit,"

Market committees enjoy exemption from tax under the above unamended section 4(b)(ii) of the Act as has already been settled by this Court vide judgment dated 21.7.2011 in the case of Province of Punjab v. Market Committee (2011 SCMR 1856), wherein it was held that the Market Committee falls within the definition of "Local Authority," and is, therefore, exempt from tax under section 4(b)(ii) of the Act. The impugned judgment correctly follows that judgment of this Court cited above to hold that the market

committee is exempt from the chargeability of tax prior to the amendment brought through the Ordinance. The impugned judgment, however, does not discuss the liability of tax after the said amendment.

3(sic.) The Ordinance amended section 4(b) of the Act and replaced it in the following manner:

"4. Exemptions.-The tax shall not be leviable in respect of the following properties, namely:-

(a) …

(b) buildings cafe/lands other than those leased in perpetuity, owned and administered by the Government of the Punjab or a local government as defined in section 2 clause (xvi) of the Punjab Local Government Ordinance, 2002 (XIII of 2001)." (emphasis supplied)

After the amendment the term "local authority" has been deleted and exemption is only available to Government of the Punjab or to a local government as defined under the Local Government Ordinance, 2001. Market committee does not fall into either of the two. Therefore, respondents are liable to pay tax under the Act after the amendment in section 4(b) of the Act brought about through the Ordinance on 25.6.2002.

4. Faced with this situation, learned counsel for the respondents submits that the petitioners should have filed an intra court appeal before the High Court under section 3 of the Law Reforms Ordinance, 1972 instead of approaching this Court directly. This argument has little force in the light of section 10 of the Act, which provides for an appeal before the authority, especially when the name of the respondents is wrongly included in the valuation list, prepared for the purposes of collection of tax.

5. For the above reasons we hold that the respondents are liable to pay tax under the Act after the amendment in section 4(b) of the Act w.e.f 25.06.2002, therefore, both these petitions are converted into appeals and partially allowed.

MWA/D-3/SC Order accordingly.

**2019 S C M R 1362**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed, JJ**

**MUHAMMAD BILAL---Appellant**

**Versus**

**The STATE and others---Respondents**

Criminal Appeal No. 104-L of 2017, decided on 15th May, 2019.

(On appeal from the judgment dated 12.01.2015 passed by the Lahore High Court, Lahore in Criminal Appeal No. 1119 of 2012 and Capital Sentence Reference No. 30-T of 2012)

**(a) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Reappraisal of evidence---Murder in a court premises---Deceased was alleged to have killed the accused's brother---During the trial of deceased, at one of the court hearings he was shot and killed by the accused while being escorted from court---Admitted facts were that there was previous bad blood between the parties in the aftermaths of murder of accused's brother at deceased's hands and that case was fixed before the Court on the fateful day are common grounds---Presence of eye-witnesses at the spot, including police officials and a co-accused of the case against the deceased, could not be doubted---All said witnesses were in unison on all the details of the occurrence, salient as well as collateral---Accused's arrest at the crime scene shortly after the occurrence with a .30 caliber pistol subsequently found wedded with two out of three casings secured from the spot went a long way to exclude hypothesis of his innocence---Cautious analysis of evidence on record irresistibly lead to the conclusion of accused's guilt---Conviction of accused under S. 302(b), P.P.C. and award of death sentence consequent thereupon was upheld---Appeal was dismissed in circumstances.

**(b) Penal Code (XLV of 1860)---**

----S. 302(b)---Anti-Terrorism Act (XXVII of 1997), S. 7(a)---Qatl-i-amd, act of terrorism---Reappraisal of evidence---Murder in a court premises---Question as to whether conviction and sentence under S. 7(a) of Anti-Terrorism Act, 1997 was justified---Deceased was alleged to have killed the accused's brother---During the trial of deceased, at one of the court hearings he was shot and killed by the accused while being escorted from court---Held, that conduct of the accused was certainly far from being benign; he choose a venue most guarded by law to settle his score, nonetheless, he was undoubtedly actuated to quench a personal vendetta---Every act of violence triggered fear and panic with collateral impact on the surroundings; but this by itself would not bring even the most violent act to fall within the mischief of "terrorism" as contemplated by the Anti-Terrorism Act, 1997---Accused's conviction and sentence under S. 7(a) of the Anti-Terrorism Act, 1997, was set aside, however his conviction under S. 302(b), P.P.C and award of death sentence consequent thereupon was upheld---Appeal was dismissed accordingly.

Amjad Ali and others v. The State PLD 2017 SC 661 and Farooq Ahmed v. State and another PLJ 2017 SC 408 ref.

Rai Bashir Ahmad, Advocate Supreme Court for Appellant.

Muhammad Irfan Malik, Advocate Supreme Court for Respondent No.2.

Mazhar Sher Awan, Additional Prosecutor-General, Punjab for the State.

Date of hearing: 15th May, 2019.

**JUDGMENT**

**QAZI MUHAMMAD AMIN AHMED, J.---**Adnan Aslam, deceased was being tried for committing qatl-i-amd of one Mehtab; on fateful day i.e. 11.03.2011 at about 09:30 a.m. he alongside

co-accused appeared before a learned Additional Sessions Judge at Gujranwala; after hearing he was being escorted back when Muhammad Bilal, appellant, brother of Mehtab deceased, armed with .30 caliber pistol, confronted him to avenge the earlier incident; he targeted three fire shots on different parts of his body as a result whereof, he succumbed to the injuries at the spot. Present in the precincts, Mukhatar Ahmad, S.I. PW-13, with assistance of his colleagues subdued the appellant at the spot. Incident was reported on the complaint of the deceased's father Muhammad Aslam, PW-9 wherein he arrayed, besides the appellant, Manzoor Ahmad and Shahzad Ahmad, alongside two unknown companions as accused for the crime; they were indicted before an Anti-Terrorism Court at Gujranwala; learned trial Judge while extending benefit of the doubt to Manzoor Ahmad and Shahzad Ahmad, co-accused, convicted the appellant under clause (b) of section 302 of the Pakistan Penal Code, 1860 read with clause (a) of section 7 of the Anti-Terrorism Act, 1997 and sentenced him to death on both counts along with compensation and fine in the sum of Rs.100,000/- respectively vide judgment dated 12.06.2012; his appeal met with no better fate; a learned Division Bench of the Lahore High Court affirmed the Capital Sentence Reference vide impugned judgment dated 12.01.2015 vires whereof are being disputed through leave of the Court.

2. Previous bad blood in the aftermaths of murder of appellant's brother at deceased's hands and fixation of case before the Court on the fateful day are common grounds. However, according to the defence the deceased was shot while attempting to flee by a police contingent. In this backdrop, prosecution has primarily relied upon the statements of Ghanafar Khalid, PW-8, Muhammad Aslam, PW-9, Muhammad Zaman, PW-10 and Mukhtar Ahmad, SI, PW-13; of them Ghanafar Khalid, PW-8, escorted the deceased in custody after court hearing. Muhammad Aslam, PW was a co-accused required to appear in the same case; Mukhtar Ahmad, SI, was also present in the premises. Presence of these witnesses cannot be doubted at the spot; they are in a comfortable unison on all the details of the occurrence, salient as well as collateral. Embarrassingly lengthy cross-examination remained inconsequential throughout. Defence's edifice is structured upon bald suggestions alone, denied by the witnesses with vehemence. Appellant's arrest at the crime scene shortly after the occurrence with a .30 caliber pistol subsequently found wedded with two out of three casings secured form the spot goes a long way to exclude hypothesis of his innocence. Acquittal of co-accused, tried for being in the community of intention, out of abundant caution, does not adversely impact upon prosecution's case. Responsibility for the crime, unambiguously, revolves around the appellant alone. A most stringent and cautious analysis irresistibly leads to the conclusion of appellant's guilt; he has been rightly returned a guilty verdict, however in so far as his conviction under clause (a) of section 7 of the Act ibid is concerned, it is found by us as inconsistent with the law declared by this Court in the cases of Amjad Ali and others v. The State (PLD 2017 SC 661) and Farooq Ahmed v. State and another (PLJ 2017 SC 408). Clause (iii) of Section 4 of the Third Schedule to the Act ibid provides an Anti-Terrorism Court as a forum for trial of offences involving, inter alia, "firing or use of explosives by any device, including bomb blast in the Court premises". Therefore the learned Special Judge was well within remit of law to try the appellant, however his conviction under section 7(a) of the Act ibid has to be essentially consequent upon a nexus between his act and situations provided in section 6 thereof. Aftermaths of appellant's conduct were certainly far from being benign; he choose a venue most guarded by law to settle the score, nonetheless, he was undoubtedly actuated to quench a personal vendetta. Every act of violence triggers fear and panic with collateral impact on the surroundings; this by itself would not bring even a most violent act to fall within the mischief of terrorism as contemplated by law. Therefore, appellant's conviction and sentence under section 7(a) of the Act ibid is set aside, however his conviction under clause (b) of section 302 of the Code ibid and sentence consequent thereupon is upheld. With the above modification, Criminal Appeal 104-L/2017 is dismissed.

MWA/M-27/SC Order accordingly.

**2019 S C M R 1391**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed, JJ**

**TARIQ ALI SHAH and another---Appellants**

**Versus**

**The STATE and others---Respondents**

Criminal Appeals Nos. 298 and 299-L of 2017, decided on 24th June, 2019.

(Against the judgment dated 26.11.2014 passed by the Lahore High Court, Lahore in Criminal Appeals Nos. 1985 and 2098 of 2011 and C.S.R. No. 45-T/2011)

**Penal Code (XLV of 1860)---**

----S. 302(b)---Anti-Terrorism Act (XXVII of 1997), S. 7---Qatl-i-amd, acts of terrorism---Reappraisal of evidence---Accused was alleged to have murdered one of his rivals within the precincts of office of Superintendent of Police---Arch rivalry with string of criminal cases between the two sides was admitted---Arrest of accused from the office of Superintendent of Police did not find mention in the crime report---Prosecution's claim that a police official arrested the accused from first floor of the office had to be taken with a pinch of salt; according to his narrative, he first went to the hospital to draw up preliminary proceedings, a time intensive exercise, and thereafter upon his return apprehended the accused at the spot with a weapon---Question was as to why in a heavily guarded premises no one else attempted to arrest the accused---Acquittal of one of the co-accused by the High Court was yet another blow to the prosecution case; she was a lady constable, indicted for being privy to the crime and providing logistical support to the accused---Acquittal of said co-accused shook the very foundation of the prosecution case---Hypothesis of consultations and deliberations could not be ruled out due to the belated autopsy conducted a day after the incident---Injuries on the deceased mentioned in the autopsy report were incompatible/inconsistent with the weapon seized from the accused at the time of his arrest---Such fact cast away the hypothesis of accused's arrest soon after the occurrence alongside the weapon of offence---Witnesses did not appear to have come forward with the whole truth and given the past enmity between both sides, patent discrepancies could not be viewed as trivial, particularly after prosecution's failure qua three of the co-accused albeit with somewhat different roles---Accused was acquitted from the charge in circumstances.

Abid Saqi, Advocate Supreme Court for Appellants (in Criminal Appeal No. 298-L of 2017).

Naveed Ahmed Kh., Advocate Supreme Court for Appellants (in Criminal Appeal No. 299-L of 2017).

Ch. Muhammad Mustafa, DPG for the State.

Naveed Ahmed, Kh., Advocate Supreme Court for Respondent No.2 (in Criminal Appeal No. 298-L of 2017).

Date of hearing: 24th June, 2019.

**JUDGMENT**

**QAZI MUHAMMAD AMIN AHMED, J.---**Through leave of the Court, impugned herein is High Court's judgment dated 26.11.2014 whereby conviction of Ahad Shah, appellant, returned by the trial Court was upheld with modification of death penalty into imprisonment for life; he was indicted alongside Shahbaz Ali, Adal Shah, Sattar Shah and Mst. Kousar alias pathano for committing qatl-i-amd of Saqib Shah within the precincts of office of Superintendent of Police, Laylpur Town, Faisalabad at 3.45 p.m. on 2.5.2011. On the fateful day, investigation in a criminal case brought both the factions face-to-face at the venue; from amongst the array of accused, Adal Shah and Sattar Shah, blamed for abetment, were acquitted by the trial Court whereas Mst. Kousar alias Pathano has been let off by the High Court; Shahbaz Ali, co-accused slipped away before announcement of the judgment.

In the backdrop of a longstanding enmity, on the fateful day, the appellant, armed with a .30 caliber pistol, targeted the deceased with multiple fire shots; apprehended at the spot alongside the weapon, wedded with six casings secured from the spot, he was tried by an Anti-Terrorism Court, to receive a guilty verdict.

2. Arch rivalry with string of criminal cases between the two sides is a common ground; appellant's arrest with the weapon shortly after the occurrence statedly from the precincts of office of Superintendent of Police are circumstances, at first sight, pointed inexorably towards his culpability, however, on a closer scrutiny of prosecution's case, a number of factors san plausible explanations; his arrest from the office of Superintendent of Police does not find mention in the crime report; prosecution's claim that Nazakat Ali, SI, PW-9 arrested the appellant from first floor of the office has to be taken with a pinch of salt; according to his narrative, he first went to Allied Hospital, Faisalabad to draw up preliminary proceedings, a process essentially time intensive, and thereafter upon his return apprehended the appellant at the spot with weapon. It is mind boggling as to why in the heavily guarded premises no one else attempted to arrest the appellant; mute response in a heightened situation is somewhat intriguing; genesis of the script is inherently suspect. Acquittal of Mst. Kousar alias Pathano by the High Court is yet another devastating blow to the prosecution; she is a lady constable, indicted for being privy to the crime; it is alleged that clad in a sheet, she took aside the appellant shortly before the incident; logistical support is suggested though with reticence; her acquittal tremors down the very foundation of the case. No less intriguing is belated autopsy conducted the following day i.e. 3.5.2011 at 9.40 a.m. The deceased was shifted dead in the mortuary on 2.5.2011 where complaint was recorded at 4.20 p.m.; Allied Hospital, Faisalabad is a tertiary hospital; holding in abeyance of postmortem examination for such a long period is mind boggling to say the least; it reasonably spaces the hypothesis of consultations and deliberations. Findings recorded by the medial officer further add to the prosecution's predicament; use of a .30 caliber pistol is unequivocally alleged as the only weapon employed by the appellant, however, according to the autopsy report, the medical officer noted "A complex of 22 firearms wounds of entries of different shape and sizes (2 mm x 2 mm to 1 cm x 1 cm) in an area of 23 cm x 7 cm on lower chest and abdomen. Left part". The High Court itself viewed the above injury with suspicion for being incompatible/inconsistent with the weapon, seized with appellant's arrest. It casts away the hypothesis of appellant's arrest soon after the occurrence alongside the weapon of offence. Witnesses do not appear to have come forward with the whole truth and given the formidable past hounding both sides, patent discrepancies cannot be viewed as trivial, particularly after prosecution's failure qua three of the co-accused albeit with somewhat different roles. It would be unsafe to maintain the conviction. Criminal Appeal No. 299-L/2017 is allowed; impugned judgment is set aside; the appellant is acquitted from the charge and shall be released forthwith, if not required in any other case. As a natural corollary, Criminal Appeal No.298-L/2017 is dismissed.

MWA/T-5/SC Order accordingly.

**2019 S C M R 1394**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed, JJ**

**TARIQ SHAH and others---Appellants**

**Versus**

**The STATE and others---Respondents**

Criminal Appeal No. 185-L of 2017, decided on 24th June, 2019.

(Against the judgment dated 17.2.2015 passed by the Lahore High Court, Lahore in Criminal Appeal No. 72 of 2012 and CSR No. 4-T of 2012)

**Penal Code (XLV of 1860)---**

----Ss. 302(b) & 324---Qatl-i-amd, attempt to commit qatl-i-amd---Reappraisal of evidence---Benefit of doubt---Investigative conclusions reinforced the hypothesis of a wider net and once such a possibility was reasonably contemplated, participation of each nominee would inherently be fraught with suspicion---Seizure of two types of empties during spot inspection unmistakably suggested number of assailants much less than mentioned in the crime report---Acquitted co-accused persons were inexorably placed in an identical position with the present accused persons---Witnesses were found unworthy of reliance, and there was nothing to improve upon their credence---Once rejected, evidence of prosecution's witnesses could not be pressed into service to sustain the charge---Prosecution's case failed on investigative and forensic sides, therefore, it would be unsafe to maintain the convictions without potential risk of error---By extending benefit of doubt, appeal was allowed, and the accused persons were acquitted from the charge.

Munir Ahmad Bhatti, Advocate Supreme Court and Mrs. Tasnim Amin, Advocate-on-Record for Appellants.

Ch. Muhammad Mustafa, DPG for the State.

Naveed Ahmad Kh., Advocate Supreme Court for Respondent No.2.

Date of hearing: 24th June, 2019.

**JUDGMENT**

**QAZI MUHAMMAD AMIN AHMED, J.---**Through leave of the Court, impugned herein is High Court's judgment dated 17.2.2015 whereby appellants' convictions recorded by the trial Court have been affirmed, albeit with alternation of death penalties into imprisonment for life.

2. Appellants, namely, Tariq Shah, Makhdoom Hussain and Fayyaz Shah have been arrayed as accused alongside Saqib Shah, Husnain Shah, Abbas Shah, Aoun Shah, Ali Hassan, and Ali Hussain on the complaint of Syed Ahad Haider Shah for committing qatl-e-amd of Ghulam Abbas Lak, Sammar Ali Shah and Qamar Ali Shah besides murderous assault upon Muhammad Naveed, Muhammad Ashiq, Muhammad Adil and Shahzad, PWs at 8.45 a.m. on 12.10.2009 within the remit of Police Station Civil Lines, Faisalabad. According to the prosecution, on the fateful day, arrived at the scene in two vehicles, armed with Kalashnikovs, they confronted the deceased and the injured in front of Anti-Terrorism Court, Faisalabad; Saqib Shah accused is assigned a burst to Ghulam Abbas Lak deceased; Makhdoom Shah fired upon Sammar Ali Shah and Ghulam Abbas Lak whereas Husnain Shah and Tariq Shah targeted Qamar Ali Shah and Sammar Ali Shah deceased; Tariq Shah joined the co-accused while hitting Sammar Ali Shah; Abbass Shah once again targeted Ghulam Abbas Lak while Ali Hussain Shah shot Sammar Ali Shah; fire shots by Ali Hassan hit Qamar Ali Shah; Fayyaz Hussain Shah resorted to indiscriminate firing on Muhammad Naveed whereas Aoun Shah targeted Ashiq and Muhammad Adil. A police constable on duty, namely, Muhammad Shahzad, was also caught in the line of fire; motive for the crime is previous enmity.

During spot inspection, the Investigating Officer secured nine casings ejected from two types of weapons i.e. Kalashnikov and .222 caliber gun besides a .30 caliber pistol with six live bullets.

3. Before appellants' indictment, through separate trial, Saqib Shah, Husnain Raza, Ali Hassan and Ali Hussain, were acquitted from the charge. It is a common ground that Abbas Ali Shah and Aoun Shah, accused tried subsequently, were also issued a clean chit. Acquittal of the identically placed co-accused notwithstanding and despite exoneration, the appellants, however were convicted by the learned trial Court with ultimate penalty, altered into imprisonment for life vires whereof are being assailed before us.

4. An internecine feud is long raging between the two sides facing each other in and outside the courts and in this backdrop, appellants' culpability, warrants a cautious judicial scrutiny. Huge loss of lives and receipt of multiple injuries by the witnesses are confirmed by those who miraculously endured the assault; their presence at the crime scene cannot be doubted, nonetheless, whether they are telling the whole truth is an issue altogether different; while the assailants certainly desired to eliminate old adversaries, the former may not have qualms to utilize the incident to see that some heads roll. Seen from this angle, participation of a large number of accused, each armed with automatic weapon, to take the victims by surprise is really intriguing; with formidable lethality of the weapons used in first strike, every single of them could conveniently engage the intended targets; wholesale participation is an uncalled for imprudence, certainly avoidable; investigative conclusions and earlier adjudications reinforce the hypothesis of a wider net and once such a possibility is reasonably contemplated, participation of each nominee would inherently be fraught with suspicion. Seizure of two types of empties during spot inspection unmistakably suggests number of assailants much less than mentioned in the crime report. There is yet another predicament facing the prosecution in the totality of circumstances; those acquitted from the charge are inexorably placed in an identical position with the present appellants. The witnesses were found unworthy of reliance; there is nothing to improve upon their credence; injuries suffered by them are not passports into the realm of truth; once rejected, evidence of prosecution's witnesses cannot be pressed into service to sustain the charge, similar on all fours. Prosecution is also failing on investigative and forensic sides. It would be unsafe to maintain the convictions without potential risk of error, therefore, by extending benefit of doubt, Criminal Appeal is allowed; impugned judgment is set aside; the appellants are acquitted from the charge and shall be released forthwith, if not required in any other case.

MWA/T-6/SC Appeal allowed.

**2019 S C M R 1412**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed, JJ**

**SAFDAR BALOCH alias ALI and another---Appellants**

**Versus**

**The STATE and others---Respondents**

Criminal Appeals Nos. 67-L and 68-L of 2017, decided on 9th May, 2018.

(On appeal from the judgment dated 28.11.2013 passed by the Lahore High Court, Lahore in Criminal Appeals Nos. 148 and 202 of 2010 and CSR No. 3-T of 2010)

**(a) Penal Code (XLV of 1860)---**

----Ss.365-A, 324 & 34---Anti-Terrorism Act (XXVII of 1997), S.7(e)---Kidnapping for ransom, attempt to commit qatl-i-amd, common intention, act of terrorism---Reappraisal of evidence---Statement of the child-abductee, statedly of 7/8 years of age at the relevant time, certainly required a very cautious scrutiny; he was reticent on important details of the episode, relating to the present accused persons---Being of an impressionable age, and having experienced a kidnapping, the abductee's susceptibility to tuition could not be ruled out--- Argument that crime report was recorded after arrest of co-accused and the accused persons were named therein on the basis of information other than purportedly laid by the complainant was not entirely beside the mark---While the occurrence could not possibly be denied, nonetheless, nomination of the accused persons on complainant's knowledge was a circumstance fraught with doubts---Complainant claimed to have seen the accused persons in a marriage ceremony few days prior to the kidnapping---Crowded ceremony would provide little space/opportunity to the complainant to remember the faces and names of the participants and thus once the source of information about accused persons' participation in the crime was found suspect it would be unsafe to rely upon the testimony of a vulnerable witness/abductee alone, particularly when the accused persons were not arrested alongside the co-accused---Prosecution's case against the accused persons could not be viewed as beyond reasonable doubt and thus their conviction could not be maintained without potential risk of error---Appeals were allowed and accused persons were acquitted of the charge of murder.

**(b) Criminal trial---**

----Conviction---Grounds---Criminal liability was to be essentially settled on evidentiary certainty and not on moral satisfaction or factualities incompatible with evidence based upon truth.

Naseer-ud-Din Khan Nayyar, Advocate Supreme Court for Appellants (in Criminal Appeal No. 67-L of 2017).

Miss Najma Parveen, Advocate Supreme Court for Appellants (in Criminal Appeal No. 68-L of 2017).

Mazhar Sher Awan, Additional Prosecutor-General for the State.

Date of hearing: 9th May, 2019.

**JUDGMENT**

**QAZI MUHAMMAD AMIN AHMED, J.---**Criminal Appeal No.67-L/2017 by Safdar Baloch alias Ali and Criminal Appeal No.68-L/2017 by Aziz Khan, through leave of the Court, arisen out of incident dated 15.12.2005 are bound by a common thread; these are being decided through this single judgment.

2. Prosecution case is structured upon statement of Iftikhar Khan, PW-1; on the eventful day at about 7.30 a.m. he was about to leave home to drop his son namely Shahrayar Khan at the school when the appellants along with Nazir Ahmed, co-accused, differently armed, confronted him. Safdar Baloch alias Ali and Nazir Ahmad shot him with .12 caliber guns on his left leg; as he felled on the ground Aziz Khan, appellant took Shahryar, aged 7/8, and whisked away in a car while demanding a sum of

Rs.500,000/- as ransom. The complainant was rushed to Jinnah Hospital, Lahore; examined at 8.35 a.m., he was noted with two entry wounds on left leg with corresponding exits. Incident was reported to the police at 11:40 a.m. In hot pursuit of the culprits, Sardar Ali, ASI, intercepted car bearing No.LZV-9611 on a police picket; the person on wheel decamped from the scene by scaling over an adjoining wall, while Nazir Ahmad co-accused was subdued alongside the child. The appellants stayed away from law; they were arrested on 8.7.2008 and 18.3.2009 respectively; Nazir Ahmad, co-accused had already faced trial with failures of his appeals throughout. It is in this backdrop that the appellants were convicted under section 365-A of Pakistan Penal Code, 1860, section 7(e) of Anti-Terrorism Act, 1997 and section 324 read with section 34 of the Code ibid; they are sentenced to death alongside collateral sentences for murderous assault. Their appeals met with no better fate with capital sentence reference, returned in affirmative.

3. First glance cannot escape preponderance of prosecution's evidence; Iftikhar Khan, PW undoubtedly endured the assault; he was medially examined, noted to have injuries extensive in nature and consistent with the weapons allegedly used in the crime. First Information Report was recorded with a remarkable promptitude with accused prominently named therein; vehicle mentioned in the crime report was intercepted same day at police picket alongside Nazir Ahmed, co-accused with the child; later appeared as a witness to point out his finger upon the appellants. However, certain intriguing aspects of the case warrant an independent and careful scrutiny of evidence. The fate of the present appellants is not linked with the outcome of trial of Nazir Ahmad, co-accused, for a variety of reasons. The foremost question is as to how the complainant nominated the accused merely after having their momentary glimpses in a marriage ceremony few days before the occurrence. They were not with the child when the vehicle was intercepted, nor can it be held with certainty that the one who took to heels was one of them and this leaves Nazir Ahmad, co-accused alone in the field. Statement of the child, statedly of 7/8 years of age at the relevant time, certainly requires a very cautious scrutiny; he is reticent on important details of the episode, relating to the present appellants; being of an impressionable age, having experienced the nightmare his susceptibility to tuition cannot be ruled out. Argument that crime report was recorded after arrest of Nazir Ahmed, co-accused and the appellants were named therein on the basis of information other than purportedly laid by the complainant is not entirely beside the mark. While the occurrence cannot possibly be denied, nonetheless, nomination of the appellants on complainant's knowledge is a circumstance fraught with doubts. A crowded ceremony would provide little space/opportunity to the complainant to remember the faces and names of the participants and thus once the source of information about appellants' participation in the crime is found suspect it would be unsafe to rely upon the testimony of a vulnerable witness alone, particularly when the appellants were not arrested alongside the co-accused. Criminal liability is to be essentially settled on evidentiary certainty and not on moral satisfaction or factualities incompatible with evidence based upon truth. Prosecution's case against the appellants cannot be viewed as beyond reasonable doubt and thus conviction cannot be maintained without potential risk of error. Resultantly, criminal appeals are allowed, impugned judgment is set aside. The appellants shall be released forthwith, if not required in any other case.

MWA/S-27/SC Appeals allowed.

**2019 S C M R 1415**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed, JJ**

**ALAMGIR---Appellant**

**Versus**

**GUL ZAMAN and others---Respondents**

Criminal Appeal No. 6-P of 2010, decided on 29th April, 2019.

(Against the judgment dated 14.5.2009 passed by Peshawar High Court, Peshawar in Cr. Revision No. 158 of 2002)

**Penal Code (XLV of 1860)---**

----Ss. 302(b) & 302(c)--- Qatl-i-amd--- Reappraisal of evidence---Conviction under S. 302(b), P.P.C. converted into S. 302(c), P.P.C.---Sudden fight with no previous enmity---According to the prosecution's own case the occurrence took place in a sudden encounter with no previous bad blood---Weapons used in the occurrence were not generally weapons of choice selected to mount an assault---Accused side also suffered injuries, which were conspicuously omitted in the crime report---Circumstances of the case spelled out an occurrence that no one anticipated, and once it started it aggravated, resulting into injuries to both parties, with a heavier toll on the complainant's side---In circumstances liability of accused persons more aptly fell within the mischief of S. 302(c), P.P.C., as rightly decided by the High Court---Appeal was dismissed accordingly.

Ali Muhammad v. Ali Muhammad and another PLD 1996 SC 274 ref.

Astaghfirullah, Advocate Supreme Court for Appellant.

Nemo for Respondent No.1.

Barrister Qasim Wadud, Additional Advocate-General, Khyber Pakhtunkhwa for the State.

Date of hearing: 29th April, 2019.

**ORDER**

**QAZI MUHAMMAD AMIN AHMED, J.---**Through leave of the Court, impugned herein is judgment dated 14.5.2009, whereby a learned division bench of the Peshawar High Court altered respondents' conviction from clause (b) of section 302 of the Pakistan Penal Code, 1860 into clause (c) thereof. The issue has arisen out of incident dated 10.8.2006 within the remit of Police Station Lund Khwar, District Mardan reported by Alamgir, appellant herein; he arrayed the respondents as well as one Umar Din in the crime report for committing qatl-i-amd of his father Gul Mehmood, who surprised them while cutting branches of keekar tree and excavating stones from his area. The appellant endured the assault, however his father succumbed to the injuries. While Umar Rehman co-accused stayed away from law, indicted by a learned Additional Sessions Judge, the respondents were returned a guilty verdict on multiple counts; for qatl-i-amd of Gul Mehmood deceased they were convicted under clause (b) of the Section ibid and sentenced to imprisonment for life along with direction to collectively pay diyat to the tune of Rs.3,65,921/-, to be apportioned amongst the legal heirs. In appeal the learned High Court set aside diyat amount and instead directed payment of compensation in the sum of Rs.50,000/- each; respondents' conviction was altered from clause (b) into clause (c) of the Section ibid.

2. Learned counsel for the appellant has primarily assailed modification in conviction and sentences consequent thereupon on the ground that there was no occasion for the learned High Court, to modify conviction and sentences, rightly settled by the learned trial Court. It is further argued that the respondents with available weapons took the life of an innocent person 'massom-ud-dum', without provocation and thus were liable to be visited with the penalty commensurate with the crime believed to have been committed at their hands by both the Courts below. The learned Law Officer has defended the impugned judgment.

3. It is prosecution's own case that occurrence took place in a sudden encounter with no previous bad blood; weapons used in the occurrence though formidable in circumstances were nonetheless not choice selection to mount an assault. Accused side also suffered injuries, conspicuously omitted in the crime report. Spot inspection sans presence of tree branches or excavated stones. Scenario spells out a situation that no one anticipated; once started it aggravated, resulting into injuries to the both, with a heavier toll on the complainant's side. In circumstances respondents' liability more aptly falls within the mischief of clause (c) of Section ibid. The view taken by the learned High Court is in consonance with the law declared in the case titled Ali Muhammad v. Ali Muhammad and another (PLD 1996 SC 274), reaffirmed in the case titled v. The State (sic.). It is by now well settled that situations earlier covered by erstwhile provisions of section 304 of the Code ibid are not catered by clause (c) of aforesaid section of law. Impugned view being well within the remit of law calls for no interference. Appeal is dismissed.

MWA/A-13/SC Appeal dismissed.

**2019 S C M R 1417**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed, JJ**

**BASHIR AHMAD and another---Appellants**

**Versus**

**The STATE and others---Respondents**

Criminal Appeal No. 97-L of 2016 and Criminal Petition No. 465-L of 2014, decided on 7th May, 2019.

(On appeal from the judgment dated 27.03.2014 passed by the Lahore High Court, Multan Bench in M.R. No. 46 of 2009, Crl. A. No.305 of 2008, Crl. Rev. No.95 of 2009 and Crl. P.S.L.A. No.20 of 2009)

**Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Reappraisal of evidence---Complainant party had implicated in the present case two brothers, son of one of the brothers, and two other persons belonging from the same clan---Entire household had been implicated giving the impression that it was a case of a casting a wider net---Admittedly deceased and complainant were carrying weapons during the occurrence giving credence to the argument that complainant party was also the aggressor---Suppression of injuries sustained by the accused side was another intriguing circumstance---While the complainant was well within the remit of law to pursue his case through a private complaint, nonetheless, non-examination of investigating officer alongside some other witnesses exposed the accused to agrievous prejudice---Prosecution case was not free from doubt and thus it would be unsafe to maintain the conviction of the accused---Appeal was allowed and accused was acquitted of the charge of murder.

Malik Muhammad Saleem, Advocate Supreme Court for Appellants.

Malik Muhammad Munsif Awan, Advocate Supreme Court for Petitioners.

Mazhar Sher Awan, Additional Prosecutor-General for the State.

Date of hearing: 7th May, 2019.

**JUDGMENT**

**QAZI MUHAMMAD AMIN AHMED, J.---**Criminal Appeal by Bashir Ahmad, convict and Criminal Petition for leave to appeal by Mst. Kaneez Fatima, sister of Talib Hussain deceased, arisen out of incident dated 29.5.2003, with a common thread are being decided through this singe judgment.

2. Prosecution case is structured upon statement of Ghulam Hussain, PW-2. According to him, on the fateful day his daughter Mst. Kaneez Mai was on her way to fetch grocery items when Naseer Bakhsh accused held her by hair, while his brother Ahmed dealt her club blow; upon receipt of information, the complainant with a pistol rushed to the spot; Naseer Bakhsh hit him with the club; the pistol felled, picked by Naseer Bakhsh accused. In the meantime, Talib Hussain deceased with.12 caliber gun is attracted to the spot. Rehmat Ali accused engaged the deceased with a hatchet blow on his right ear, later fell on the ground when Naseer Bakhsh, Ahmed Khan, Rehmat Ali, Bashir Ahmad and Muhammad Zaman caused injuries; the deceased succumbed to the injuries at the spot. Manhandling of Mst. Kaneez Mai, PW by Naseer Bakhsh is cited as motive for the crime.

Dissatisfied with police investigation, the complainant preferred to prosecute the accused through a private complaint; he blamed that crime report was not faithfully recorded by the investigating officer, otherwise biased in favour of the accused. Indictment resulted into conviction vide judgment dated 18.12.2008. For homicide, the appellant was sentenced to death besides being held in the community of intention qua the injuries suffered by the witnesses. Naseer Bakhsh, Muhammad Zaman and Ahmed Khan were convicted and sentenced for injuries to the witnesses. Appeal filed by the convict met with no better fate. A learned division bench of the Lahore High Court at Multan vide impugned judgment dated 27.3.2014 upheld the convictions albeit with alteration of death penalty into

imprisonment for life; sentences awarded to the co-accused were reduced to already undergone by them. Petition for Special Leave to Appeal by the complainant was dismissed vide the same judgment; they are in contest once again before us.

3. Well orchestrated narrative by the witnesses that includes the injured, notwithstanding, we have noticed inherent shortcomings casting their shadow on the prosecution case. Naseer Bakhsh and Bashir Ahmad are real brothers, Ahmed Khan accused is former's son. Muhammad Zaman and Rehmat Ali also hail from the same clan; the entire household is in the array and in this backdrop argument that it is a case of wider net is not entirely beside the mark. Similarly, a pistol and shotgun, admittedly with the deceased and the complainant, lend credence to hypothesis of aggression; renunciation of crime report by the complainant goes a long way to tremor the very basis of his case. Suppression of injuries of an opponent is yet another intriguing circumstance. While the complainant was well within the remit of law to pursue his case through a private complaint, nonetheless, non-examination of investigating officer alongside some other witnesses cannot be countenanced without exposing the accused to a grievous prejudice. Prosecution case is not free from doubt and thus it would be unsafe to maintain the conviction. Resultantly, Criminal Appeal is allowed, the impugned judgment is set aside. The appellant shall be at set at liberty forthwith, if not required in any other case. As a natural corollary criminal petition for leave to appeal is dismissed. These are the reasons of our short order of even date which is reproduced as under:-

> "For reasons to be recorded later, the instant criminal appeal is allowed. The conviction and sentence of the appellant Bashir Ahmad is set aside. He is acquitted of the charge framed against him. The appellant is present in person as he is on bail after suspension of his sentence by the learned High Court. Therefore, his sureties are ordered to be discharged. Criminal Petition No.465-L of 2014 filed for enhancement of sentence of respondents Nos.2 - 5 is dismissed."

MWA/B-3/SC Order accordingly.

**2019 S C M R 1448**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed, JJ**

**SHEWAIZ RASOOL alias SHABI---Appellant**

**Versus**

**The STATE and others---Respondents**

Criminal Appeal No. 135-L of 2017, decided on 14th May, 2019.

(On appeal from the judgment dated 11.02.2015 passed by the Lahore High Court, Lahore in Criminal Appeal No. 1130-J of 2010 and Capital Sentence Reference No. 39-T of 2010)

**Penal Code (XLV of 1860)---**

----S. 302(b)--- Qatl-i-amd--- Reappraisal of evidence--- Rule of consistency---Accused and acquitted co-accused assigned similar roles during occurrence---Role assigned to the accused of firing at the deceased was similar to that of the two acquitted co-accused---In the absence of any specific motive no distinction could possibly be drawn so as to distinguish, even obliquely accused's case from his co-accused---One of the co-accused was acquitted by the Supreme Court for a variety of reasons; these included issue of identity of assailants during the night of occurrence; improbability of witnesses' detour preceding assault and arrival at the scene exactly at the time when firing commenced; human incapacity to capture minor details in an extreme crisis situation involving no less than eight persons and lack of motive etc.---All said reasons were squarely applicable to the case of accused as well---Appeal was allowed and accused was acquitted of the charge.

Ms. Khalida Parveen, Advocate Supreme Court and Mian Ghulam Hussain, Advocate-on-Record for Appellant.

Respondent No.2 in person.

Mazhar Sher Awan, Additional Prosecutor-General, Punjab for the State.

Date of hearing: 14th May, 2010.

**JUDGMENT**

**QAZI MUHAMMAD AMIN AHMED, J.---**Muhammad Akbar and his three sons, namely Qasim Ali, Mubashir Hussain and Nazeer Hussain were done to death at 9.30 p.m. on 20.6.2004 within the remit of Police Station Kunjha, District Gujrat. Incident was reported by Amjad Ali, PW who escaped assailant's wrath as according to him he alongside his mother and maternal uncles arrived at the scene just when the family was being given blood bath. It is prosecution's case that the complainant and his mother had visited Muhammad Anwar and Muhammad Akbar, later's real brothers to settle certain family differences and it was after reconciliation that the witnesses returned home together.

Shewaiz Rasool, the present appellant, alongside Shahid Afzaal and Muhammad Rafi co-accused, armed with automatic weapons, were blamed to have targeted the deceased with multiple shots. Khawar Ali, Qamar-uz-Zaman, Muhammad Luqman, Muhammad Boota and Asad Ullah, differently armed were also alleged to have resorted to firing. The witnesses viewed the occurrence in electric bulb light; motive is conspicuously absent in the crime report.

2. The appellant stayed away from law, while remainder were tried by an Anti-Terrorism Court. Convicted on multiple counts, Shahid Afzaal and Muhammad Rafi were sentenced to death, whereas Khawar Ali, Muhammad Boota, Qamar-uz-Zaman, Asad Ullah and Muhammad Luqman, to imprisonment for life. In the wake of remand for re-writing of the judgment, the case came up before the learned High Court when vide judgment dated 18.11.2008 it maintained convictions and sentences of Shahid Afzaal and Muhammad Rafi while acquitting the remainder from the charge; appeal filed by them was allowed by this Court. It was a posthumous success for Shahid Afzaal, died during the pendency of his appeal. The appellant has been subsequently tried in the above backdrop; he was convicted on multiple counts and sentenced to death by the learned trial Court vide judgment dated

22.4.2010, affirmed by the learned High Court vide impugned judgment dated 11.2.2015 vires whereof are being challenged through leave of the Court.

3. The appellant is identically placed, on all fours, with Muhammad Rafi and Shahid Afzaal, co-accused; they had been assigned joint firing on the deceased; in the absence of any specific motive no distinction can be possibly drawn so as to distinguish, even obliquely appellant's case from his co-accused. Though not assigned any harm to the deceased or the witnesses, acquittal of Khawar Ali, Muhammad Boota, Qamar-uz-Zaman, Asad Ullah and Muhammad Luqman stated to be in the company and community of intention with the appellant and acquitted co-accused, firing side by side, does cast a dark shadow upon prosecution's case. This Court for a variety of reasons, each valid, acquitted Muhammad Rafi, co-accused from the charge; these include issue of identity of assailants during the fateful night; improbability of witnesses' detour preceding assault and arrival exactly at a point of time when firing commenced; human incapacity to capture minor details in an extreme crises situation involving no less than eight persons and lack of motive etc.; these are squarely applicable to the case of present appellant as well and thus we have not been able either to draw any distinction or take a different view. Sauce for the goose is sauce for the gander. Resultantly, Criminal Appeal No.135-L/2017 is allowed, impugned judgment is set aside. The appellant shall be set at liberty, if not required in any other case.

MWA/S-28/SC Appeal allowed.

**2019 S C M R 1451**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed, JJ**

**WAJAHAT---Appellant**

**Versus**

**GUL DARAZ and another---Respondents**

Criminal Appeal No. 13-P of 2015, decided on 30th April, 2019.

(On appeal from the judgment dated 13.02.2013 passed by the Peshawar High Court, Mingora Bench in Criminal Appeal No. 97 of 2010)

**(a) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Reappraisal of evidence---Accused was alleged to have murdered his wife in the matrimonial home---Trial Court convicted the accused under S. 302(b), P.P.C. and sentenced him to imprisonment for life, which sentence was affirmed by the High Court---Held, that the complainant, who was the deceased's father, had not himself witnessed the occurrence---Crime report was structured upon the complainant's strong belief that no one else other than the accused could be the possible assassin---Conviction of accused was based upon hearsay queries, most important being the one furnished by the complainant's second daughter, who was married in the same household---Said witness appeared in the witness box and pleaded ignorance about the culprit responsible for her sister's death, and merely deposed about the crime without reference to the assailant---Absconsion of accused and his belated plea of suicide even if rejected outrightly by themselves would not absolve the prosecution to drive home the charge on its own strength---Appeal was allowed and accused was acquitted of the charge of murder.

**(b) Penal Code (XLV of 1860)---**

----S. 302(b)---Qanun-e-Shahadat (10 of 1984), Art. 121---Qatl-i-amd of wife in matrimonial house---Reappraisal of evidence---Adverse presumption---Scope---Accused's reticence to satisfactorily explain as to what befell upon his wife in their matrimonial home, though somewhat intriguing, could not be equated to qualify as evidentiary certainty, essentially required in order to saddle him with corporal consequences---Failure to provide satisfactory explanation would not give rise to an adverse presumption within the contemplation of Art. 121 of the Qanun-e-Shahadat, 1984 and thus it would be grievously unsafe to maintain the conviction of murder against the accused---Appeal was allowed and accused was acquitted of the charge of murder.

Ansar Nawaz Mirza, Advocate Supreme Court for Appellant.

Abdul Munir Khan, Advocate Supreme Court for Respondent No.1.

Mujahid Ali Khan, Additional Advocate-General, Khyber Pakhtunkhwa for the State.

Date of hearing: 30th April, 2019.

**ORDER**

**QAZI MUHAMMAD AMIN AHMED, J.---**Touheed Begum met homicidal death in her home; Wajahat, appellant herein, was blamed for the crime by Gul Daraz, PW, no other than his father-in-law; domestic differences were cited as motive for the crime. The learned trial Court returned guilty verdict to the appellant; he was convicted under clause (b) of Section 302 of Pakistan Penal Code and sentenced to imprisonment for life along side direction for payment of diyat to the tune of rupees six lacs to the legal heirs with benefit of section 382-B of the Code of Criminal Procedure, 1898 vide impugned judgment dated 28.1.2010 affirmed by the learned Peshawar High Court vide judgment dated 13.2.2013, albeit with conversion of diyat into compensation.

2. Learned counsel for the appellant contends that judgments of the Courts below are erroneously premised on misconception of law inasmuch as in the absence of positive proof, the appellant could not have been convicted on the basis of presumptions or his failure to satisfactorily explain

circumstances leading towards his wife's death. Similarly, appellant's absence from law cannot be equated with his guilt, complained the learned counsel, positions vehemently contested by the learned Law Officer.

3. The complainant, though seemingly with no axe to grind, nonetheless has not himself witnessed the occurrence; crime report, is structured upon his strong belief that no one else other than the appellant could be the possible assassin, a conviction based upon hearsay queries, most important being one furnished by his second daughter Nazakat PW married in the same household; she appeared as PW-5 and in the witness box pleaded ignorance about the culprit, responsible for her sister's death. She merely deposed about crime without reference to the assailant. Her evidence is not of much benefit to the prosecution leaving in the field suspicion alone to sustain the charge. Appellant's belated plea of the suicide even if rejected outrightly by itself would not absolve the prosecution to drive home the charge, on its own strength and same goes for appellant's absconsion; people avoid to face process of law or their adversaries for a variety of reasons, not necessarily inclusive of their guilt; Appellant's reticence to satisfactorily explain as to what befell upon his better half under the same roof, though somewhat intriguing, however cannot be equated to qualify as evidentiary certainty, essentially required in order to saddle him with formidable corporal consequences; his failure would not give rise to an adverse presumption within the contemplation of Article 121 of the Qanun-e-Shahadat Order, 1984 and thus it would be grievously unsafe to maintain the conviction, without potential risk of error as well as diametrical departure from adversarial nature of criminal trial. The appeal is allowed, the impugned judgment is set aside and the appellant shall be set at liberty forthwith, if not required in any other case.

MWA/W-2/SC Appeal allowed.

**2019 S C M R 1646**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah andQazi Muhammad Amin Ahmed, JJ**

**Qari MUHAMMAD ISHAQ GHAZI---Appellant**

**Versus**

**The STATE---Respondent**

Criminal Appeal No. 310-L of 2017, decided on 27th June, 2019.

(Against the judgment dated 26.10.2016 passed by the Lahore High Court, Lahore in Criminal Appeal No. 608 of 2015)

**(a) Anti-Terrorism Act (XXVII of 1997)---**

----S. 9---Possession of pamphlets containing content inciting violence against a particular sect---Reappraisal of evidence---Contents of the pamphlets were repugnant and abhorrent, capable of causing most grievous offence---Said pamphlets contravened all limits of decency, an obligation sanctimoniously upheld by every faith---Anti-Terrorism Court had rightly convicted the accused under S. 9 of the Anti-Terrorism Act, 1997 and sentenced him to 5 years' rigorous imprisonment with fine of Rs.100,000---Appeal was dismissed accordingly.

**(b) Anti-Terrorism Act (XXVII of 1997)---**

----S. 9---Possession of pamphlets containing content inciting violence against a particular sect---Whether mere possession of such pamphlets was sufficient to attract provisions of S. 9 of the Anti-Terrorism Act, 1997---Held, that S. 9 of the said Act, unambiguously, suggested that possession of the inflammatory material by itself was an offence even before it was distributed---Legislature intended to nip the evil in the bud given the inflammatory potential of the crime---Anti-Terrorism Court had rightly convicted the accused under S. 9 of the Anti-Terrorism Act, 1997 for mere possession of the inflammatory pamphlets---Appeal was dismissed accordingly.

**(c) Anti-Terrorism Act (XXVII of 1997)---**

----S. 9---Possession of pamphlets containing content inciting violence against a particular sect---Reappraisal of evidence---Non-association of private witnesses---Police witnesses, credibility of---Police officials, being functionaries of the State, were no less credible witnesses to drive home the charge---Police officials were as good witnesses as any other and their evidence was subject to the same standard of proof and principles of scrutiny as applicable to any other category of witnesses---In the absence of any animus, infirmity or flaw in their depositions, their statements could be relied upon without demur---Officials who testified in the witness-box had seemingly no axe to grind against the accused, and were in comfortable unison with one another---Appeal against conviction was dismissed with the observation that people in the society generally preferred to recuse behind safety instead of coming forward in aid of justice.

Rai Bashir Ahmad, Advocate Supreme Court for Appellant.

Ch. Muhammad Mustafa, DPG for the State.

Date of hearing: 27th June, 2019.

**JUDGMENT**

**QAZI MUHAMMAD AMIN AHMED, J.**---Surprised on 21.1.2015 by a contingent of Police Station A-Division Okara, Qari Muhammad Ishaq Ghazi, appellant herein, was found in possession of pamphlets, fraught with incendiary contents, calculated to incite hatred towards a particular sect; indicted before an Anti-Terrorism Court at Lahore, he was convicted under section 9 of the Anti-Terrorism Act, 1997 and sentenced to 5-years' RI with fine of Rs.100,000/-, to be recovered as arrears of land revenue with benefit of section 382-B of the Code of Criminal Procedure, 1898 vide judgment dated 24-3-2015; his appeal in the High Court met with no better fate on 26-10-2016 vires whereof are being impugned through leave of the Court. The appeal came up before the Court after appellant's release in the wake of completion of sentence, however, the learned counsel has opted to argue the case at full length with a view to vindicate his position.

2. A multipronged tirade includes submissions, both on factual as well as legal aspects of the case; it ranges from denial, non-association of public witnesses as well as prosecution's failure to establish distribution of impugned material in the public, a sine qua non, according to the learned counsel to attract the mischief of section 9 ibid.

3. Contents of the impugned pamphlets are repugnant and abhorrent to say the least; too nauseatic to be reproduced; capable of causing most grievous offence; these contravene all the limits of decency, an obligation sanctimoniously upheld by every faith. The argument that mere possession of the impugned material by itself would not attract the mischief of the section ibid, without actual distribution, is naively beside the mark. A plain reading of section 9, unambiguously, suggests that possession of the inflammatory material by itself is an offence even before it is distributed; the legislature intended to nip the evil in the bud and rightly so given the inflammatory potential of the crime. Arrested red-handed, objection over non-association of public witnesses to confirm the possession does not hold water either. Police officials, being functionaries of the State, are no less credible witnesses to drive home the charge in a milieu of pervasive apathy towards civic responsibilities; people prefer to recuse behind safety instead of coming forward in aid of justice. The officials who testified in the witness-box had seemingly no axe to grind, otherwise, found by us in a comfortable unison with one another. Police officials are as good witnesses as any other and their evidence is subject to same standard of proof and principles of scrutiny as applicable to any other category of witnesses; in the absence of any animus, infirmity or flaw in their depositions, their statements can be relied without demur. View taken by the Courts below, well within the remit of law, calls for no interference. Criminal Appeal fails. Dismissed.

MWA/M-40/SC Appeal dismissed.

**P L D 2019 Supreme Court 183**

**Present: Mian Saqib Nisar, C.J., Qazi Faez Isa and Syed Mansoor Ali Shah, JJ**

**HUMAN RIGHTS CASE No.14959-K of 2018: In the matter:**

Human Rights Case No. 14959 of 2018, decided on 1st January, 2019.

(In the matter regarding disposal of infectious wastes in the Province of Khayber Pakhtunkhwa)

Per Syed Mansoor Ali Shah, J; agreeing with Qazi Faez Isa, J.

**Supreme Court Rules, 1980---**

----0. XI---Constitution of Pakistan, Art. 184(3)---Human rights case Constitution/re-constitution of Bench---Administrative powers of the Chief Justice---Scope---Order XI of Supreme Court Rules, 1980 provided for administrative powers of the Chief Justice to constitute benches---Once a bench was constituted, cause list was issued and the bench was assembled for hearing cases, the matter regarding constitution of the bench went outside the pale of administrative powers of the Chief Justice and rested on the judicial side, with the bench---Any member of the bench may, however, recuse to hear a case for personal reasons or may not be available to sit on the bench due to prior commitments or due to illness---Bench may also be reconstituted if it was against the Rules and required a three-member bench instead of two; in such eventualities the bench passed an order to place the matter before the Chief Justice to nominate a new bench---In the absence of a recusal by a member of the Bench, any amount of disagreement amongst the members of the Bench, on an issue before them, could not form a valid ground for reconstitution of the Bench (by the Chief Justice)---Any reconstitution of the Bench on such ground would impinge on the constitutional value of independence of judiciary---Reconstitution of a bench while hearing a case, in the absence of any recusal from any member on the bench or due to any other aforementioned reason, would amount to stifling the independent view of the judge---Any effort to muffle disagreement or to silence dissent or to dampen an alternative viewpoint of a member on the bench, would shake the foundations of a free and impartial justice system, thereby eroding the public confidence on which the entire edifice of judicature stood---Reconstitution of the Bench by the Chief Justice, in the present case, was unwarranted and unprecedented and undermined the integrity of the system, therefore, the same was held to be void and non-est.

Ahron Barak, The Judge in a Democracy, Princeton University Press, p.109-110 ref.

In attendance:

Abdul Latif Yousafzai, A.G. Khyber Pakhtunkhwa.

Azam Khan, Chief Secretary, Khyber Pakhtunkhwa.

Abid Majeed, Secretary Health, Khyber Pakhtunkhwa.

Date of hearing: 9th May, 2018.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**I have seen the order passed by my learned brother Qazi Faez Isa, J. in the instant case dated 09.05.2018 (the "Order"). This Order was passed when the three-member bench, of which he was a member, was abruptly reconstituted, ousting him as member of the bench. The relevant extracts from the Order of my learned brother are as under:

> "3. Article 184(3) of the Constitution grants to the Supreme Court the power to make an order of the nature mentioned in Article 199 of the Constitution if "the Supreme Court... considers that a question of public importance with reference to the enforcement of any of Fundamental Rights conferred by Chapter I Part-II is involved". Once the Supreme Court is satisfied that these two conditions (public importance and Fundamental Rights) are involved then the question of enforcement of the relevant Fundamental Rights arises. Needless to state the powers that the Constitution has granted to the Supreme Court cannot be assumed by the said Director. The approval of the Hon'ble Chief Justice is also not a substitute for an order of the Supreme Court.

4. The Director had written similar notes, also dated April 12, 2018, in the cases at serial numbers 3, 4 and 5 of the List (HRC Nos.14960-K of 2018, 14962-K of 2018 and 14964-K of 2018 respectively). The files of these cases and of those listed at serial numbers 6, 7 and 8 of the List (HRC Nos.16549- K/2018, 18200-K/2018 and 18879-K/2018) also did not indicate that the Supreme Court had satisfied itself that the abovementioned two conditions had been met.
5. However, before Article 184(3) could be read the Hon'ble Chief Justice intervened and said that he will be reconstituting the Bench and suddenly rose up. The Bench was then presumably reconstituted, I say presumably because no order was sent to me to this effect. However, a two member Bench did assemble later, from which I was excluded. This for me is a matter of grave concern. In my humble opinion it is
unwarranted and unprecedented to reconstitute a Bench, in
such a manner, whilst hearing a case. To do so undermines the integrity of the system, and may have serious repercussions.
6. Before exercising its original jurisdiction the Supreme Court must satisfy itself that the jurisdiction it is assuming accords with the Constitution. However, even before any opinion could be expressed thereon the matter was cut short as mentioned above.
7. I am constrained to write this as not doing so would weigh heavily on my conscience and I would be abdicating my responsibility as a judge."

2. Since then I waited for the senior member of the Bench (the Hon'ble Chief Justice) to pass an appropriate order in the case and also respond to the Order passed by my learned brother Qazi Faez Isa, J in order to explain the reconstitution of the bench that day. However, no such order has been passed till date and the case has been incorrectly reflected in the "Bench Disposal Statement" of the said date as an "adjourned case." The Hon'ble Chief Justice is retiring on 17th January, 2019, therefore, I feel constitutionally obligated, as a member of the bench, to express my views regarding the Order of my learned brother and to pass my order in this case for 19.05.2018, when it came up for hearing before the bench.

3. As a matter of background, a special three member bench, was constituted to hear the under-mentioned cases on 09.5.2018 at 3:00 pm as per Supplementary Cause List No.6-P of 2018, dated 8th May, 2018 at the Peshawar Registry of the Supreme Court of Pakistan, including the instant case. This Bench was to assemble after the conclusion of work by the regular two member bench already working at Peshawar comprising Qazi Faez Isa, J. and myself.

| | Case No. |
|---|---|
| 1. | Const. P.74/2013 and HRC No.25684-K/2017 |
| 2. | H.R.C.14959-K/2018 |
| 3. | H.R.C.14960-K/2018 |
| 4. | H.R.C.14962-K/2018 |
| 5. | H.R.C.14964-K/2018 |
| 6. | H.R.C.16549-K/2018 |
| 7. | H.R.C.18200-K/2018 |
| 8. | H.R.C.18879-K/2018 |

4. The special three member bench heard the first case i.e., Constitution Petition No.74/2013 titled Professor Muhammed Ibrahim Khan and others v. ERRA through its Chairman and others and connected HRC No.25684-K/2017 Application by Sheraz Mehmood Qureshi and passed a verbal order constituting a Commission.[1] When the titled case (second case on the Cause List) came up for hearing, my learned brother Qazi Faez Isa J., member of the bench, inquired from the counsel as to how the case was initiated by the Human Rights Cell, under Article 184(3) of the Constitution (The Order passed by my brother, relevant extracts reproduced above, is self-explanatory). At this juncture I felt a

certain unease amongst the other two members of the bench over the issue of Article 184(3) and in order to avoid any further escalation, I proposed to the Hon'ble Chief Justice to take a brief recess so that the members of the Bench can discuss this matter in chambers to avoid embarrassment in open court. However, the Chief Justice, instead, announced in open court that the Bench stands reconstituted and that the new two-member bench will re-assemble soon.

5. The Bench was reconstituted and the new two-member bench, comprising the Hon'ble Chief Justice and myself, assembled and resumed the hearing of the instant case, which was being heard earlier by the three-member bench. We also heard the other cases from the same Cause List. However, after court, I had a chance to read the Order of my learned brother (reproduced above). This necessitated the examination of the legal scope of reconstitution of benches under the Supreme Court Rules, 1980 ("Rules"). Upon examining the legal position, I declined to sign the orders of the newly re-constituted two-member bench unless the Order of my learned brother was responded to.[2] Here are my reasons:

6. Under Order XI of the Supreme Court Rules, 1980 ("Rules") the Chief Justice has the prerogative to constitute benches. The Order is reproduced for ready reference:

**ORDER XI**

**CONSTITUTION OF BENCHES**

Save as otherwise provided by law or by these Rules every cause, appeal or matter shall be heard and disposed of by a Bench consisting of not less than three Judges to be nominated by the Chief Justice:

Provided that

(i) all petitions for leave to,

(ii) appeals from appellate and revisional judgments, and orders made by a Single Judge in the High Court, and

(iii) appeals from judgments/orders of the Service Tribunals or Administrative Courts, and appeals involving grant of bail/cancellation of bail, may be heard and disposed of by a bench of two Judges,

but the Chief Justice may, in a fit case, refer any cause or appeal as aforesaid to a larger Bench.

Provided further that if the Judges hearing a petition or an appeal are equally divided in opinion, the petition or appeal, as the case may be, shall, in the discretion of the Chief Justice, be placed for hearing and disposal either before another Judge

or before a larger Bench to be nominated by the Chief Justice.

The above Rule provides for administrative powers of the Chief Justice to constitute benches. However, once the bench is constituted, cause list is issued and the bench starts hearing the cases, the matter regarding constitution of the bench goes outside the pale of administrative powers of the Chief Justice and rest on the judicial side, with the bench. Any member of the bench may, however, recuse to hear a case for personal reasons or may not be available to sit on the bench due to prior commitments or due to illness. The bench may also be reconstituted if it is against the Rules and requires a three-member bench instead of two. In such eventualities the bench passes an order to place the matter before the Chief Justice to nominate a new bench. Therefore, once a bench has been constituted, cause list issued and the bench is assembled for hearing cases, the Chief Justice cannot reconstitute the bench, except in the manner discussed above.

7. In the absence of a recusal by a member of the Bench, any amount of disagreement amongst the members of the Bench, on an issue before them, cannot form a valid ground for reconstitution of the Bench. Any reconstitution of the Bench on this ground would impinge on the constitutional value of independence of judiciary. The construct of judicial system is pillared on the assumption that every

judge besides being fair and impartial is fiercely independent and is free to uphold his judicial view. This judicial freedom is foundational to the concept of Rule of Law. Reconstitution of a bench while hearing a case, in the absence of any recusal from any member on the bench or due to any other reason described above, would amount to stifling the independent view of the judge. Any effort to muffle disagreement or to silence dissent or to dampen an alternative viewpoint of a member on the bench, would shake the foundations of a free and impartial justice system, thereby eroding the public confidence on which the entire edifice of judicature stands. Public confidence is the most precious asset that this branch of the State has. It is also one of the most precious assets of the nation.

8. Professor Ahraon Barack points out that a judge ought to be aware of his power and the limits thereof. Naturally, the judge knows the law and the power it grants to the judge, but he must also learn the limits imposed on him as a judge. Second, a judge must recognize his mistakes. Like all mortals, judges err. A judge must admit this. According to the well-known statement of Justice Jackson, 'We are not final because we are infallible, but we are infallible only because we are final.' In one opinion, citing Justice Jackson's statement, it was added, 'I think that the learned judge erred. The finality of our decision is based on our ability to admit our mistakes, and our willingness to do so in appropriate cases.' McLachlim Beverly in 'The Charter of Rights and Freedom: A Judicial Perspective' notes, 'I hope that if we admit our mistake, we will strengthen public confidence in the judiciary.' Third, in our writing and our thinking, judges must display modesty and an absence of arrogance. Statements such as those of Chief Justice Hughes that 'we are under the Constitution, but the Constitution is what the judges say it is' are not merely incorrect but also perniciously arrogant.[3] I must admit that my sitting on the reconstituted two-member bench was a mistake and having realized that after examining the legal position, I did not sign the orders passed by the reconstituted two-member bench and as a junior member of the Bench, awaited for the Hon'ble Chief Justice to pass an appropriate order in response to the Order of my learned brother Qazi Faez Isa, J.

9. In my opinion, a bench, once it is constituted and is seized of a matter on the judicial side, cannot be reconstituted by the Chief Justice in exercise of his administrative powers, unless a member(s) of the bench recuses or for reasons discussed above. Therefore, the reconstitution of the two-member bench and the proceedings before the said bench on 9th May, 2018 in all the cases fixed before it are void and non-est. I agree with my learned brother Qazi Faez Isa, J. that the reconstitution of the Bench by the Hon'ble Chief Justice in the present case is unwarranted and unprecedented and undermines the integrity of the system.

10. This order may be read into other cases fixed before the three member bench on that day i.e. from serial Nos.2 to 8 of the cause list (reproduced in paragraph 3 above), and which were again fixed before the reconstituted two-member bench. All those cases are to be put up for rehearing before an appropriate bench to be constituted by the Hon'ble Chief Justice and record of the court must reflect the correct status of these cases.

For the above reasons, I concur with my learned brother Qazi Faez Isa, J.

MWA/R-2/S Order accordingly.

**PLD 2019 Supreme Court 189**

**Present: Qazi Faez Isa, Sajjad Ali Shah and Syed Mansoor Ali Shah, JJ**

**SABIR IQBAL---Petitioner**

**Versus**

**CANTONMENT BOARD, PESHAWAR through Executive Officer and others---Respondents**

Civil Petition No.330-P of 2013, decided on 4th January, 2019.

(On appeal from the judgment of Peshawar High Court, Peshawar dated 15-5-2013, passed in W.P. No.2211-P of 2012).

**(a) Pakistan Cantonment Servants Rules, 1954---**

----R. 50---Removal from service---Legal infirmities in disciplinary proceedings---Order of removal without jurisdiction---Petitioner was serving as a Telephone Operator (BPS-02) in the Cantonment Board---Department initiated disciplinary proceedings against the petitioner for absenting himself from work---Inquiry officer recommended that 1/4th amount from the monthly salary of the petitioner be deducted as fine and he be also given last/final chance and in case he did not improve his behavior in future he be punished strictly---Authorized officer, however, removed the petitioner from service---Held, that under R.50 of the Pakistan Cantonment Servants Rules, 1954, the Authority of the petitioner was the President, Cantonment Board and the Authorized Officer was the Cantonment Executive Officer (legal position as it stood prior to the amendments made in R.50 through SRO 205(1)/2012 dated 20th February, 2012)---Procedure of inquiry under the said Rule was that if a major penalty was to be imposed the Authorized Officer was required to forward the case to the Authority along with charge and statement of allegations---In the present case, the impugned order of removal from service had been passed by the Authorized

Officer and had not been forwarded to the Authority---Additionally, the inquiry officer had recommended deduction of salary (1/4th amount from monthly salary) as a fine for absence from duty on and giving the petitioner last chance to improve himself---Authorized Officer, if disagreeing with the inquiry officer, should have issued fresh notice to the petitioner and given reasons for his disagreement and justification for visiting the petitioner with a graver penalty---With said legal infirmities in the disciplinary proceedings, the order of removal of the petitioner was totally without jurisdiction---Order of removal of the petitioner from service and the impugned order passed by the High Court, upholding the removal of the petitioner from service was set aside and the petitioner was reinstated into service without back benefits, as he had categorically stated in court that he did not wish to seek back benefits---Petition for leave to appeal was converted into appeal and allowed accordingly.

Habibullah Bhutto v. Collector of Customs 2011 SCMR 1504 ref.

**(b) Constitution of Pakistan---**

----Arts. 184(3) & 199---Civil Service---Disciplinary proceedings---Executive discretion of authority---Judicial review --- Proportionality, suitability and necessity, tests of---Scope---Court could examine and judicially review the executive discretion exercised by the authorized officer on the ground of proportionality---Alongside reasonableness, proportionality was a central standard directing the action of the executive branch---Disproportionate act that infringed upon a human right was an illegal act---Court, which guarded the legality of the acts of the executive branch, performed judicial review over these acts and examined whether they fulfilled the tests of proportionality---Proportionality was a standard that examined the relationship between the objective the executive branch wished to achieve, which had the potential of infringing upon a human right, and the means it had chosen in order to achieve that infringing objective---Fiduciary duty, from which the administrative duty of fairness and administrative reasonableness were derived, demanded administrative proportionality as well---Courts would quash exercises of discretionary powers in which there was not a reasonable relationship between the objective which was sought to be achieved and the means used to that end, or where punishments imposed by administrative bodies or inferior courts were wholly out of proportion to the

relevant misconduct---Administrative measure must not be more drastic than necessary---Standards of proportionality and unreasonableness were inextricably intertwined---Unreasonableness contained two elements of proportionality when it required the weight of relevant considerations to be fairly balanced and when it forbade unduly oppressive decisions---Under the first element, proportionality was a test requiring the decision maker to maintain a fair balance, and under this category the courts evaluated whether manifestly disproportionate weight had been attached to one or other considerations relevant to the decision---Second element was that the courts considered whether there had been a disproportionate interference with the claimants rights or interests---More sophisticated version of proportionality provided for a structured test, where under the courts asked first whether the measure, which was being challenged, was suitable to attaining the identified ends (the test of suitability)---Suitability here included the notion of "rational connection" between the means and ends---Next step asked whether the measure was necessary and whether a less restrictive or onerous method could have been adopted (the test of necessity - requiring minimum impairment of the rights or interest in question).

A. Barak, The Judge in a Democracy, Princeton, p.225 and Halsbury's Laws of England, Vol 1(1), 4th Edition, Para 78 ref.

**(c) Civil service ---**

----Removal from service---Absence from duty for a day---Executive discretion---Proportionality, suitability and necessity, tests of---Scope---Petitioner was serving as a Telephone Operator (BPS-02) in the Cantonment Board---Department initiated disciplinary proceedings against the petitioner for absenting himself from work---Inquiry officer recommended that 1/4th amount from the monthly salary of the petitioner be deducted as fine and he be also given last/final chance and in case he did not improve his behavior in future he be punished strictly---Authorized officer, however, removed the petitioner from service---Held, applying the test of proportionality to the executive discretion exercised in the present case, the order of the authorized officer, failed to maintain fair balance by removing a person from service because he absented himself from duty for a day---Executive discretion also failed the structured test of proportionality including the test of suitability and test of necessity requiring minimum impairment of the right of the petitioner---Order of removal of the petitioner was set aside and the petitioner was reinstated into service without back benefits, as he had categorically stated in court that he did not wish to seek back benefits---Petition for leave to appeal was converted into appeal and allowed accordingly.

Ghulam Nabi, Advocate Supreme Court and M. Ajmal Khan, Advocate-on-Record alongwith petitioner in person for Petitioner.

Ihsan Ullah, Advocate Supreme Court and Haji M. Zahir Shah Advocate-on-Record for Respondent No.1.

Syed Hamid Ali Shah, Advocate Supreme Court and M. Zahoor Qureshi, Advocate Supreme Court for Respondent No.2.

Date of hearing: 11th December, 2018.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**The petitioner was appointed as Mali (gardener) in BPS-01 vide office order dated 30.04.2009 in the Cantonment Board, Peshawar. Thereafter, he was absorbed against the permanent post of Telephone Operator in BPS-02 vide office order dated 23.08.2010. During his service as a Telephone Operator, the petitioner absented himself from duty on 07.02.2011. The department initiated disciplinary proceedings against the petitioner and appointed an inquiry officer, who recommended in his report dated 10.05.2011 that 1/4th amount from the monthly salary of the petitioner be deducted as fine and he be also given last/final chance and in case he does not improve his behavior in future he be punished strictly. However, the authorized officer removed the petitioner from service vide office order dated 21.05.2011. Thereafter, the petitioner preferred

departmental appeal before the Director, Military Lands and Cantonment, Peshawar which was dismissed vide order dated 24.05.2012, as being barred by time. The petitioner challenged the same through writ petition before the Peshawar High Court which was dismissed vide impugned order dated 15.05.2013.

2. Learned counsel for the petitioner submits that petitioner was removed from service just because he absented himself from service for one day i.e., on 07.02.2011. He further submits that if the authorized officer was to disagree with the findings of the inquiry officer, he should have given reasons and granted fresh opportunity of hearing to the petitioner. In this regard he referred to Rule 7(a) of the Government Servants (Efficiency and Discipline) Rules, 1973 and placed reliance on the case of Habibullah Bhutto v. Collector of Customs (2011 SCMR 1504).

3. Learned counsel representing the respondents submitted that the petitioner had been absenting himself in the past and considering his record the penalty of removal is commensurate. He further submitted that petitioner has been removed from service in terms of the Pakistan Cantonment Servants Rules, 1954 ("Cantonment Rules")

4. We have heard the learned counsel for the parties and have examined the record. The petitioner, during his service as Telephone Operator, earlier absented himself from duty on 21.11.2010. As a result he was fined a sum of Rs.2000/-. He then absented himself on 07.02.2011, which resulted in his removal from service, which is the subject matter of this petition. Under Rule 50 of the Cantonment Rules, the Authority of the petitioner is the President, Cantonment Board and the Authorized Officer is the Cantonment Executive Officer[1]. The procedure of inquiry under the said Rule is that if a major penalty is to be imposed the Authorized Officer is required to forward the case to the Authority along with charge and statement of allegations. In the instant case, the impugned order has been passed by the authorized officer and has not been forwarded to the Authority. Additionally, the inquiry officer had recommended deduction of salary (1/4th amount from his monthly salary) as a fine for absence from duty on 07.02.2011 and giving him last chance to improve himself. The Authorized Officer, if disagreeing with the inquiry officer, should have issued fresh notice to the petitioner and given reasons for his disagreement and justification for visiting the petitioner with a graver penalty. Reliance is placed on Habibullah Bhutto v. Collector of Customs (2011 SCMR 1504). Learned counsel appearing for the respondent Cantonment Board candidly conceded to both these omissions. With these legal infirmities in the disciplinary proceedings, the order of removal of the petitioner was totally without jurisdiction, therefore, the question of the departmental appeal being barred by time pales into insignificance. It is also noticed that earlier absence of the petitioner from duty, while working as a Mali, weighed with the High Court in upholding his removal order. The petitioner had absented himself from work on 25.01.2010, 08.05.2010 and 10.05.2010. According to the record, the petitioner has already been penalized for absenting himself on the said dates and more importantly inspite of this background, he on the basis of his "satisfactory performance," was absorbed against a permanent higher post i.e., Telephone Operator in BPS-02, on 23.08.2010.

5. There is yet another dimension of the case. The court can examine and judicially review the executive discretion exercised by the authorized officer on the ground of proportionality. Alongside reasonableness, proportionality is now a central standard directing the action of the executive branch. The point of departure is that a disproportionate act that infringes upon a human right is an illegal act. The court, which guards the legality of the acts of the executive branch, performs judicial review over these acts and examines whether they fulfill the tests of proportionality. Proportionality is a standard that examines the relationship between the objective the executive branch wishes to achieve, which has the potential of infringing upon a human right, and the means it has chosen in order to achieve that infringing objective. The fiduciary duty, from which the administrative duty of fairness and administrative reasonableness are derived, demands administrative proportionality as well.[2] "The courts will quash exercises of discretionary powers in which there is not a reasonable relationship

between the objective which is sought to be achieved and the means used to that end, or where punishments imposed by administrative bodies or inferior courts are wholly out of proportion to the relevant misconduct[3]. An administrative measure must not be more drastic than necessary or to sum up in a phrase - not taking a sledgehammer to crack a nut[4]. According to De Smith's Judicial Review[5], the standards of proportionality and unreasonableness are inextricably intertwined. Unreasonableness contains two elements of proportionality when it requires the weight of relevant considerations to be fairly balanced and when it forbids unduly oppressive decisions. Under the first element, proportionality is a test requiring the decision- maker to maintain a fair balance. Under this category the courts evaluate whether manifestly disproportionate weight has been attached to one or other considerations relevant to the decision. The second element is that the courts consider whether there has been a disproportionate interference with the claimants rights or interests. A more sophisticated version of proportionality provides for a structured test. Here the courts ask first whether the measure, which is being challenged, is suitable to attaining the identified ends (the test of suitability). Suitability here includes the notion of "rational connection" between the means and ends. The next step asks whether the measure is necessary and whether a less restrictive or onerous method could have been adopted (the test of necessity - requiring minimum impairment of the rights or interest in question).

6. Applying the test of proportionality to the executive discretion exercised in the instant case, the order of the authorized officer, other than the legal infirmities discussed above, fails to maintain fair balance by removing a person from service because he absented himself from duty for a day. The executive discretion also fails the structured test of proportionality including the test of suitability and test of necessary requiring minimum impairment of the right of the petitioner.

7. For the above reasons, this petition is converted into an appeal and allowed. The order of removal of the petitioner from service and the impugned order passed by the High Court, upholding the removal of the petitioner from service is set aside and the petitioner reinstated into service without back benefits, as the petitioner has categorically stated in court that he does not wish to seek back benefits.

8. These are the reasons for short order dated 11-12-2018, which is reproduced hereunder:-

"The learned counsel for the petitioner does not claim back benefits and only seeks his reinstatement in service.

2. We have heard the learned counsel. For reasons to be recorded later, this petition is converted into an appeal and is allowed by reinstating the petitioner to the same position that was held by him when he was removed from service, however, he shall not be entitled to back benefits."

MWA/S-1/S Petition allowed.

**P L D 2019 Supreme Court 461**

**Present: Asif Saeed Khan Khosa, C.J., Mushir Alam, Maqbool Baqar, Manzoor Ahmad Malik, Sardar Tariq Masood, Mazhar Alam Khan Miankhel and Syed Mansoor Ali Shah, JJ**

**MUHAMMAD YOUSAF---Appellant**

**Versus**

**THE STATE and others---Respondents**

Criminal Appeal No.137-L of 2010, decided on 20th February, 2019.

(Against the judgment dated 6-10-2010 passed by the Lahore High Court, Multan Bench, Multan in Criminal Appeal No.534 of 2005 and Murder Reference No.547 of 2005).

Per Asif Saeed Khan Khosa, CJ: Mushir Alam, Maqbool Baqar, Manzoor Ahmad Malik, Sardar Tariq Masood and Mazhar Alam Miankhel, JJ, agreeing; Syed Mansoor Ali Shah, J also agreeing but with his own reasons.

**(a) Penal Code (XLV of 1860)---**

----Ss. 299(m), 302(b), 305(a), 307, 309(2), 310 & 313---Qatl-i-amd---Waiver and compounding in cases of 'Qisas'---'Wali'---Right of Qisas devolving onto heirs of wali---Principles---In cases of Qisas the right of qisas vested in each wali (section 313, P.P.C.); a wali may waive his right of Qisas (section 309, P.P.C.); and a wali may compound his right of Qisas (section 310, P.P.C.)---Heirs of the victim were his wali, according to his personal law (section 305(a), P.P.C.) --- Person entitled to claim Qisas was wali [section 299(m), P.P.C.] and upon death of a wali his right of Qisas devolved on the heirs of the wali (section 307, P.P.C.)---Even an heir of an heir of a victim had a (devolved) right of Qisas and he himself became a wali and in that devolved capacity of a wali he too could waive or compound the offence of qatl-i-amd in a case of Qisas---According to S. 309(2), P.P.C. and the proviso to the same if a wali (having the original or a devolved right of Qisas) did not waive his right of Qisas but the other wali waived their right of Qisas then the non-waiving wali was entitled to his share of Diyat.

**(b) Penal Code (XLV of 1860)---**

----S. 304---Qatl-i-amd---Proof of qatl-i-amd liable to Qisas---Case of Ta'azir and 'Qisas"---Distinction---Criminal case became a cases of Qisas when, after the case had reached the Trial Court, either a confession was made by the accused person before the Trial Court during the trial or Tazkiya-tul-shahood (scrutiny of the witnesses before trial of the accused person) was undertaken by the Trial Court and unless either of the said two things happened before the Trial Court every criminal case was to be treated as a case of Ta'zir at every stage of the case including the stage of investigation.

**(c) Criminal Procedure Code (V of 1898)---**

----S. 345(2)---Penal Code (XLV of 1860), S. 302(b)---Qatl-i-amd---'Ta'azir'---Compounding of offence --- Inheriting the right to compound offence---Scope---In a case of Ta'zir an offence of qatl-i-amd under S.302, P.P.C. may be compounded by the "heirs of the victim" and when an heir of a victim was only a person who inherited directly from the victim then what was clearly meant by S.345(2), Cr.P.C. was that only a person who could directly inherit from the victim was the person who could compound the offence of qatl-i-amd of the victim and none else.

**(d) Criminal Procedure Code (V of 1898)---**

----S. 345(2)---Penal Code (XLV of 1860), Ss. 302(b), 305(a), 307, 309, 310 & 313---Qatl-i-amd---'Ta'azir' and 'Qisas'---'Wali'---Compounding of offence---Scope---Inheriting the right to compound offence---Scope---Different principles applied to cases of Qisas and Ta'zir in the matter of compounding of an offence---Concept of wali relevant to a case of Qisas was not relevant to a case of Ta'zir which belonged to a different regime of criminal law and was governed by separate and distinct principles---In cases of Qisas the term wali meant the entire body or group of persons who were entitled to claim Qisas for a qatl-i-amd and such persons included those who were heirs of the victim entitled to inherit from him as well as those on whom the right of Qisas devolved upon death of an heir of the

victim, even if such heirs of the heir of the victim did not themselves inherit from the victim directly---In cases of Ta'zir the law had conferred the capacity to compound only upon the heirs of the victim and had not provided for devolving of the capacity to compound upon an heir of an heir of the victim as had been provided in cases of Qisas---Difference between devolving of a right of Qisas and devolving of the status of an heir also had to be kept in mind---Section 307, P.P.C. recognized that the right of Qisas devolved on an heir of an heir of the victim and because of devolving of the right of Qisas on him an heir of an heir of the victim also became a wali of the victim and in that devolved capacity of wali such heir of an heir of the victim could also waive or compound the relevant offence---Section 307, P.P.C. however, did not provide or recognize that through such devolving of the right of Qisas on him an heir of an heir of the victim also became or was recognized as an heir of the victim---Such distinction between devolving of the right of Qisas and devolving of a right to inherit from the victim had to be clearly understood because the first was relevant to the concept of Qisas whereas the second was relevant to the concept of Ta'zir---In Qisas the tie of blood with the victim was the governing consideration even if a wali in his devolved capacity was not in a position to directly inherit from the victim whereas in Ta'zir the sole consideration for the capacity to compound was the capacity to inherit directly from the victim. Ahmad Nawaz @ Gogi v. The State PLD 2007 Lah. 121 and Abdul Rashid alias Teddi v. The State 2013 SCMR 1281 not to be treated as good precedents.

Sh. Muhammad Aslam and another v. Shaukat Ali @ Shauka and others 1997 SCMR 1307 and Zahid Rehman v. The State PLD 2015 SC 77 ref.

Ahmad Nawaz @ Gogi v. The State PLD 2007 Lah. 121 and Abdul Rashid alias Teddi v. The State 2013 SCMR 1281 not to be treated as good precedents.

**(e) Criminal Procedure Code (V of 1898)---**

----S. 345(2)---Penal Code (XLV of 1860), Ss. 302(b), 309 & 310---Qatl-i-amd---'Ta'azir' and 'Qisas'---Partial compromise---Such a compromise was acceptable in a case of Qisas but the same was not acceptable in a case of Ta'zir.

Sh. Muhammad Aslam and another v. Shaukat Ali @ Shauka and others 1997 SCMR 1307 ref.

**(f) Penal Code (XLV of 1860)---**

----Ss. 302, 324 & 34---Criminal Procedure Code (V of 1898), S.345(2)---Qatl-i-amd, attempt to commit qatl-i-amd, common intention---'Ta'azir'---Compounding of offence---Inheriting the right to compound offence---Scope---Accused and co-accused were alleged to have murdered the deceased-victim---Accused was sentenced to death by the Trial Court whereas the co-accused was sentenced to imprisonment for life---During pendency of appeal before the High Court, the accused and co-accused filed an application before the Court seeking their acquittal on the basis of a compromise with the legal heirs of the victim, which included the victim's father, widow and son---Widow and son of victim confirmed entering into the compromise, however the victim's father denied factum of any such compromise---During pendency of such application before the High Court the victim's father died, leaving behind four sons---Said sons, who were also brothers of the victim, claimed that after their father's death, the right to compound the offence had devolved upon them, and since they were not agreeable to the compromise, the accused and co-accused should not be acquitted on the basis of a compromise with the victim's surviving heirs i.e. widow and son of victim---[Per Asif Saeed Khan Khosa, CJ (Majority view): Present case was one of Ta'zir, therefore, the offence of murder of victim could be compounded only by his heirs---Concept of devolving of the right of Qisas upon an heir of an heir/wali of the victim relevant to a case of Qisas was not applicable to cases of Ta'zir---In the absence of any devolving of the capacity to compound in a case of Ta'zir the capacity to compound possessed by an heir of the victim at the time of murder of the victim stood exhausted upon the subsequent death of that heir---Being the father and an heir of the victim, the father had a capacity to compound the relevant offence but he had not compounded the offence during his own lifetime and upon his death his capacity to compound stood exhausted and the same was not heritable as father's

heirs were not heirs of the victim because they did not, and could not, inherit from him---After father's death his heirs could not be treated as heirs of the victim and the only heirs of victim left in the field at such stage were those surviving heirs of victim who could inherit directly from him and they could compound the offence throughout their lifetime irrespective of timing of the father's death---High Court was, therefore, correct in holding that the victim's brothers, who were heirs of a subsequently dying heir of the victim, were not relevant to the matter of compounding of the offence]---[Per Syed Mansoor Ali Shah, J, agreeing with his own reasons (Minority view): Applying the principles of the Islamic Law of inheritance to the present case, in the presence of the victim's son and widow, his brothers stood excluded from the line of succession---Available heirs at the time of compromise were the son and the widow of the victim---Brothers of victim were excluded not because they were the heirs of the heirs of the victim but because they were not the heirs of the victim under the Islamic Law of inheritance---Even if the present case was one of Qisas, under Islamic Law of inheritance, the brothers of the victim would have stood ousted in the presence of the son of the victim and could not pass as wali of the victim even though they were the heirs of the deceased father---Any embargo on the exercise of the right to compound under S.345(2), Cr.P.C. by the subsequent heirs of the victim might not be in consonance with Islamic Law of Inheritance---Appeal was dismissed in circumstances.

**(g) Criminal Procedure Code (V of 1898)---**

----S. 345(2)---Penal Code (XLV of 1860), S.302(b)---Qatl-i-amd---'Ta'azir'---Compounding of offence---Timing---In cases of Ta'zir S.345(2), Cr.P.C. did not specify any time when compounding of an offence may take place---Provisions of S.345(2), Cr.P.C. did not place any embargo upon compounding of the relevant offence by the surviving heirs of a victim at a time when one or more of the heirs of the victim had already died.

Per Syed Mansoor Ali Shah, J: agreeing with Asif Saeed Khan Khosa, CJ, but with his own reasons [Minority view]

**(h) Criminal Procedure Code (V of 1898)---**

----S. 345(2)---Penal Code (XLV of 1860), Ss. 302(b), 305(a), 307, 309, 310 & 313---Qatl-i-amd---'Ta'azir' and 'Qisas'---'Wali'---Compounding of offence---'Heirs of the victim' or 'walis of the victim', determination of---Qisas and Ta'zir were two separate regimes, having their own sets of rules, however, when it came to the question of determining the heirs of the victim or walis of the victim, for the purposes of compoundability of the offence of qatl-i-amd, the two regimes converged and both took guidance from the Islamic Law of inheritance to resolve such question---Islamic Law of inheritance was the only law that provided for determination of heirs in the country. [Minority view]

**(i) Criminal Procedure Code (V of 1898)---**

----S. 345(2)---Penal Code (XLV of 1860), S. 302(b)---Qatl-i-amd---'Ta'azir'---Compounding of offence---Inheritable right---Heirs of the victim, determination of---Under the regime of Ta'zir, the heirs of the victim could compound the offence of qatl-i-amd under S.345(2), Cr.P.C. with the permission of the Court---Right vested in the "heirs of the victim" made the right of compoundability under Ta'zir inheritable---Such right was also an actionable claim, hence inheritable---Section 345(2) Cr.P.C. had no time limit and could be invoked by the accused party at any stage after the offense was committed and before the sentence was executed---Purpose of said provision was understandably to encourage settlements between warring parties in order to protect family life and ensure a peaceful community---Heirs of the deceased victim could exercise such right---First heirs of the victim were those who survived him immediately at the time of his death---Heirship of the victim continued in time and at any given time, when the heirs who survived at the time of death of the deceased were no more, there would still be heirs of the victim under the Islamic law of inheritance in the shape of sharers, residuaries or distant kindred---Heirship was based on blood and marriage and continued as the families evolved---Available heirship was to be determined afresh when the right to compound was to be

exercised irrespective of the time of death of the victim---Available heirs of the victim and not heirs of the heirs were to be determined during such exercise. [Minority view].

**(j) Penal Code (XLV of 1860)---**

----Ss. 299(m), 302(b), 305(a) & 307(c)---Qatl-i-amd---Waiver and compounding in cases of 'Qisas'---'Wali'---Right of Qisas devolving onto heirs of wali---Principles---Wali by definition was an heir of the victim---Right to Qisas was akin to an actionable claim and was, therefore, inheritable under the Islamic Law of inheritance---Right of Qisas held by the wali of the victim devolved on to the next wali of the victim, who was of course an heir of the victim and not necessarily an heir of the heir or heir of the wali---Section 307, P.P.C. did not provide a scheme of inheritance that helped identify the next wali of the victim. [Minority view]

Muhammad Akram Qureshi, Advocate Supreme Court for Appellant.

Rana Abdul Majeed, Additional Prosecutor-General Punjab for the State.

Rashid Mehmood Sindhu, Advocate Supreme Court, Syed Rafaqat Hussain Shah, Advocate-on-Record with Respondents Nos. 2 and 3 in person.

Date of hearing: 25th October, 2018.

**JUDGMENT**

**ASIF SAEED KHAN KHOSA, C J.--**One Muhammad Aslam was murdered and another namely Ijaz Ahmad was injured in an occurrence taking place on 02.02.2005 in Chak No. 93/WB in the area of Police Station Thingi, District Vehari and in that regard respondents Nos.2 and 3, brothers inter se, were booked in case FIR No.19 registered at the said Police Station on the same day at the instance of the present appellant/complainant. After a regular trial respondents Nos.2 and 3 were convicted by the learned Additional Sessions Judge, Vehari on 19.07.2005 for the offences under sections 302(b) and 324 of the Pakistan Penal Code, 1860 (P.P.C.) read with section 34, P.P.C. For the offence under section 302(b), P.P.C. read with section 34, P.P.C. respondent No. 2 was sentenced to death and respondent No. 3 was sentenced to imprisonment for life whereas for the offence under section 324, P.P.C. read with section 34, P.P.C. both the said respondents were sentenced to rigorous imprisonment for 10 years each. The said respondents were also ordered to pay a sum of Rs. 1,00,000/- each to the heirs of Muhammad Aslam deceased by way of compensation under section 544-A of the Code of Criminal Procedure, 1898 (Cr.P.C.), to pay a sum of Rs.1,75,000/- jointly to the injured victim namely Ijaz Ahmad by way of Arsh being half of the amount of Diyat and to pay a sum of Rs. 50,000/- jointly to the said Ijaz Ahmad by way of Daman. It was ordered that in case of default in payment of the said amounts respondents Nos.2 and 3 would undergo rigorous imprisonment for a period of 6 months each. The benefit under section 382-B, Cr.P.C. was extended to the said respondents.

2. Respondents Nos.2 and 3 jointly challenged their convictions and sentences before the Lahore High Court, Multan Bench, Multan through Criminal Appeal No.534 of 2005 which was to be heard by a learned Division Bench of the said Court along with Murder Reference No. 547 of 2005 seeking confirmation of the sentence of death passed by the trial court against respondent No.2. During the pendency of that appeal Criminal Miscellaneous No.102 of 2009 was filed before the High Court seeking acquittal of respondents Nos.2 and 3 from the charge under section 302(b), P.P.C. read with section 34, P.P.C. on the basis of a compromise between the said respondents and the heirs of Muhammad Aslam deceased which matter was referred by the High Court to the learned District and Sessions Judge, Vehari for its verification. The report dated 25.02.2009 submitted in that regard by the learned District and Sessions Judge, Vehari showed that Muhammad Aslam deceased was survived by his father namely Waryam, his widow namely Mst. Razia Bibi and his son namely Muhammad Akmal out of whom the father of the deceased had denied entering into any compromise with respondents Nos.2 and 3 whereas the widow and the son of the deceased had confirmed that they had entered into a compromise with respondents Nos.2 and 3, they had forgiven the said respondents in the name of Almighty Allah and they had no objection to acquittal of the said respondents from the charge of

murder on the basis of the compromise. During the pendency of Criminal Miscellaneous No. 102 of 2009 Waryam, the father of Muhammad Aslam deceased, died and thereafter Criminal Miscellaneous No. 431-M of 2010 was filed before the High Court seeking acquittal of respondents Nos.2 and 3 from the charge of murder because all the surviving heirs of Muhammad Aslam deceased were agreeable to a compromise with the said respondents. The matter of compromise was again referred by the High Court to the learned District and Sessions Judge, Vehari for its verification. The report dated 12.05.2010 submitted by the learned District and Sessions Judge, Vehari in that regard confirmed that the surviving heirs of Muhammad Aslam deceased, i.e. his widow and son had acknowledged their compromise with respondents Nos.2 and 3, they had forgiven the said respondents in the name of Almighty Allah and they had no objection to the respondents' acquittal from the charge of murder on the basis of the compromise. The learned District and Sessions Judge, Vehari had, however, pointed out in that report that on an earlier occasion the father of Muhammad Aslam deceased, an heir of the said deceased, had denied entering into any compromise with respondents Nos.2 and 3 and after his subsequent death his four sons namely Muhammad Yousaf, Muhammad Ashraf, Atta Ullah and Noor Ahmad, brothers of Muhammad Aslam deceased, were not agreeable to a compromise with respondents Nos.2 and 3. The learned District and Sessions Judge, Vehari was of the opinion that the said sons of Waryam and brothers of Muhammad Aslam deceased were not heirs of Muhammad Aslam deceased and, thus, their refusal to enter into a compromise with respondents Nos.2 and 3 was irrelevant to the compromise voluntarily entered into by the surviving heirs of the deceased with respondents Nos.2 and 3. According to the learned District and Sessions Judge, Vehari the acclaimed compromise between the surviving heirs of Muhammad Aslam deceased and respondents Nos.2 and 3 was voluntary and complete. After perusal of the said report and after finding the compromise between the surviving heirs of Muhammad Aslam deceased and respondents Nos.2 and 3 to be voluntary and complete a learned Division Bench of the Lahore High Court, Multan Bench, Multan accepted the compromise vide judgment dated 06.10.2010, partially allowed Criminal Appeal No. 534 of 2005 filed by respondents Nos.2 and 3, acquitted the said respondents of the charge under section 302(b), P.P.C. read with section 34, P.P.C. on the basis of the compromise and dismissed the said appeal to the extent of the convictions and sentences of the said respondents for the offence under section 324, P.P.C. read with section 34, P.P.C. while answering the Murder Reference in the negative.

3. Aggrieved of the judgment passed by the Lahore High Court, Multan Bench, Multan on 06.10.2010 the appellant/complainant filed Criminal Petition for Leave to Appeal No. 1091-L of 2010 before this Court and on 24.12.2010 the said petition was allowed by this Court and leave to appeal was granted in the following terms:

> "Inter alia contends that the learned High Court has allowed compromise of the offence of murder on the application of two legal heirs namely Razia Bibi (wife of the deceased) and Muhammad Akmal (son of the deceased) notwithstanding the fact that the father of the deceased namely Waryam who was alive at the time of murder of Sajid [actually Muhammad Aslam] but died when the application for compounding the offence was made, his heirs were 'walis' and the offence could not have been compounded without their concurrence.
>
> 2. Having heard learned counsel for the petitioner at some length, leave is granted inter alia to consider whether the heir of an heir of the victim could be a 'wali' of the said victim and whether the law laid down by this Court [actually the Lahore High Court, Lahore] in Ahmed Nawaz v. State (PLD 2007 Lahore 121) would be attracted to the facts of the case in hand?"

On 05.06.2018 it was noticed by this Court that the view of the relevant law taken by the Lahore High Court, Lahore in the case of Ahmad Nawaz alias Gogi v. The State (PLD 2007 Lahore 121) was based upon the definition of 'wali' contained in section 305(a), P.P.C. whereas a different view of the same law subsequently taken by a 5-member Bench of this Court in the case of Abdul Rashid alias Teddi v. The State and others (2013 SCMR 1281) did not even refer to the definition of 'wali' contained in

section 305(a), P.P.C. In this background it was felt by this Court on that date of hearing that the issue involved in the present case required a fresh look so as to render an authoritative pronouncement on the subject and, thus, the office of this Court was directed to bring the matter to the notice of the then Hon'ble Chief Justice who was requested to consider advisability or otherwise of constitution of a Larger Bench of at least seven Hon'ble Judges of this Court in order to resolve the controversy noted above. It is in this backdrop that the present Larger Bench is now seized of the matter.

4. We have heard the learned counsel for the parties at some length and have gone through the record of this case with their assistance besides perusing the precedent cases referred to by them. It has been argued by the learned counsel for the appellant that in the case of Abdul Rashid alias Teddi v. The State and others (2013 SCMR 1281) this Court has already declared that the right to compound an offence is a heritable right and upon the death of a wali of the victim his right devolves upon that wali's heirs and, thus, in the present case upon the death of the appellant's father his capacity of being a wali of Muhammad Aslam deceased had devolved upon the appellant and his brothers and, therefore, compounding of the offence by the surviving heirs of Muhammad Aslam deceased with respondents Nos.2 and 3 could not materialize unless the appellant and his brothers had joined the compounding. He has also argued that the case in hand was a case of Ta'zir and by virtue of the law declared by this Court in the case of Sh. Muhammad Aslam and another v. Shaukat Ali @ Shauka and others (1997 SCMR 1307) compounding of the offence of murder in the present case could not succeed unless all the heirs of Muhammad Aslam deceased, including the appellant and his brothers possessing the devolved status of wali upon the death of their father, had consented to the compromise. While referring to the case of Zahid Rehman v. The State (PLD 2015 SC 77) the learned counsel for the appellant has maintained that the concept of compounding of an offence of murder is common to cases of Qisas as well as of Ta'zir and, therefore, the principles applicable to cases of Qisas in the matter of compounding of an offence ought to be read into cases of Ta'zir as well. He has, thus, prayed that the impugned judgment passed by the High Court may be set aside and the High Court may be required to decide the issue of compounding of the offence of Muhammad Aslam's murder afresh in accordance with the law. The learned Additional Prosecutor-General, Punjab appearing for the State has also submitted that the right to claim Qisas is a heritable right in Islamic law and the same stands recognized in the provisions of section 307, P.P.C. and, therefore, the offence of murder of Muhammad Aslam in the present case could not have been compounded by some of the heirs of the victim in the absence of the appellant and his brothers on whom the right to claim Qisas had devolved on account of death of their father after the murder of Muhammad Aslam. The leaned Additional Prosecutor-General has also prayed for setting aside of the impugned judgment passed by the High Court and for remand of the matter to the High Court for a decision of the matter of compounding afresh. As against that the learned counsel for respondents Nos.2 and 3 has contended that the principles applicable to compounding of an offence in cases of Qisas cannot be made applicable to cases of Ta'zir which cases are governed in the matter by the provisions of section 345, Cr.P.C. and in terms of section 345(2), Cr.P.C. the appellant and his brothers were not heirs of the victim and, therefore, they had no recognized role to play in the matter of compounding of the offence of Muhammad Aslam's murder. He has, thus, prayed for upholding of the impugned judgment of the High Court and dismissal of the present appeal.

5. After hearing the learned counsel for the parties, perusing the record of the case with their assistance and going through the precedent cases referred to before us we have found it appropriate to refer to the relevant statutory provisions first and then to discuss the precedent cases on the subject. The Pakistan Penal Code, 1860 (P.P.C.) provides for and recognizes two distinct and separate regimes in the criminal justice system of the country and they pertain to cases of Qisas and cases of Ta'zir depending primarily upon the standard of evidence required and produced in a criminal case. The distinction between the separate regimes of Qisas and Ta'zir cases was clearly elucidated by this Court in many cases including the cases of Sh. Muhammad Aslam and another v Shaukat Ali @ Shauka and

others (1997 SCMR 1307) and Zahid Rehman v. The State (PLD 2015 SC 77). It may be advantageous to begin the discussion with the relevant statutory provisions governing waiver (Afw) and compounding (Sulh) in cases of Qisas pertaining to the offence of qatl-i-amd (intentional murder) under section 302, P.P.C.. Section 309(1), P.P.C. provides that in a case of qatl-i-amd an adult sane wali may waive his right of Qisas without any compensation, section 310(1), P.P.C. provides that in a case of qatl-i-amd an adult sane wali may compound his right of Qisas on accepting badal-i-sulh (compensation) and according to section 313(1), P.P.C. the right of Qisas vests in the sole wali if there is only one and in each one of them if there are more than one. Section 305, P.P.C. provides as follows:

"305. Wali.-- In case of qatl, the wali shall be-

(a) the heirs of the victim, according to his personal law but shall not include the accused or the convict in case of qatl-i-amd if committed in the name or on the pretext of honour; and

(b) the Government, if there is no heir."

Section 299(m), P.P.C. defines wali in the following terms:

" "wali" means a person entitled to claim qisas (other than the person who has murdered the victim)."

Section 307(1)(c), P.P.C. provides as follows:

"307. Cases in which qisas for qatl-i-amd shall not be enforced. (1) Qisas for qatl-i-amd shall not be enforced in the following cases, namely:

(a) ----------

(b) ----------

(c) when the right of qisas devolves on the offender as a result of the death of the wali of the victim, or on the person who has no right of qisas against the offender.

(2) ----------

Illustrations

(i) A kills Z the maternal uncle of his son B. Z has no other wali except D the wife of A. D has the right of qisas from A. But if D dies, the right of qisas shall devolve on her son B who is also the son of the offender A. B cannot claim qisas against her father. Therefore, the qisas cannot be enforced.

(ii) D kills Z, the brother of her husband A. Z has no heir except A. Heir A can claim qisas from his wife B. But if A dies, the right of qisas shall devolve on his son D who is also son of B, the qisas cannot be enforced against B."

According to this section the right of Qisas vesting in a wali devolves on his heirs as a result of death of the wali.

6. From the statutory provisions referred to and quoted above it emerges that in cases of Qisas the right of Qisas vests in each wali (section 313, P.P.C.), a wali may waive his right of Qisas (section 309, P.P.C.), a wali may compound his right of Qisas (section 310, P.P.C.), the heirs of the victim are his wali, according to his personal law (section 305(a), P.P.C.), a person entitled to claim Qisas is wali (section 299(m), P.P.C.) and upon death of a wali his right of Qisas devolves on the heirs of the wali (section 307, P.P.C.). It, thus, becomes evident that even an heir of an heir of a victim has a (devolved) right of Qisas and he himself becomes a wali and in that devolved capacity of a wali he too can waive or compound the offence of qatl-i-amd in a case of Qisas. According to section 309(2), P.P.C. and the proviso to the same if a wali (having the original or a devolved right of Qisas) does not waive his right of Qisas but the other wali waive their right of Qisas then the non-waiving wali is entitled to his share of Diyat. Therefore, had the case in hand been a case of Qisas then the appellant and his other brothers (who were not the heirs of Muhammad Aslam deceased but the right of Qisas possessed by the victim's father had devolved upon them upon the father's subsequent death and they had not waived their devolved right of Qisas against respondents Nos. 2 and 3) would have been entitled to their share of Diyat whereas the waiver would have been effective to the extent of all the other wali of the victim who had waived their right of Qisas against respondents Nos.2 and 3.

7. It is not disputed that the case in hand is a case of Ta'zir and not of Qisas because the proof required for a case of Qisas in terms of section 304, P.P.C. was not adduced in this case before the trial court. It may be clarified here that a criminal case becomes a case of Qisas when, after the case has reached the trial court, either a confession is made by the accused person before the trial court during the trial or Tazkiya-tul-shahood (scrutiny of the witnesses before trial of the accused person) is undertaken by the trial court and unless either of the said two things happen before the trial court every criminal case is to be treated as a case of Ta'zir at every stage of the case including the stage of investigation. Compounding of offences in cases of Ta'zir is governed by section 345, Cr.P.C. and according to section 345(2), Cr.P.C. (as the said legal provision stood in the year 2005 when the offences in the present case had been committed) the offence of qatl-i-amd under section 302, P.P.C. could be compounded with the permission of the relevant court "By the heirs of the victim other than the accused or the convict if the offence has been committed by him in the name or on the pretext of karo kari, siyah kari or similar other customs or practices". The said legal provision was amended on 21.10.2016 and it presently reads as "By the heirs of the victim subject to the provisions of section 311, P.P.C.." According to the law in this country succession opens at the time of death of a person and upon his death his assets automatically stand devolved upon those who are entitled to inherit from him in specified shares in terms of his personal law and such inheriting persons are called the heirs of the deceased. There is, thus, no confusion in our law that an heir is a person who is entitled to inherit from the deceased at the time of his death. In view of this settled and recognized principle when the law of the land provides that in a case of Ta'zir an offence of qatl-i-amd under section 302, P.P.C. may be compounded by the "heirs of the victim" and when an heir of a victim is only a person who inherits directly from the victim then what is clearly meant by section 345(2), Cr.P.C. is that only a person who can directly inherit from the victim is the person who can compound the offence of qatl-i-amd of the victim and none else.

8. We note that the concept of wali relevant to a case of Qisas is not relevant to a case of Ta'zir which belongs to a different regime of criminal law and is governed by separate and distinct principles. It has to be understood very clearly that in cases of Qisas the term wali means the entire body or group of persons who are entitled to claim Qisas for a qatl-i-amd and such persons include those who are heirs of the victim entitled to inherit from him as well as those on whom the right of Qisas devolves upon death of an heir of the victim even if such heirs of the heir of the victim do not themselves inherit from the victim directly. In cases of Ta'zir the law has conferred the capacity to compound only upon the heirs of the victim and has not provided for devolving of the capacity to compound upon an heir of an heir of the victim as has been provided in cases of Qisas, as discussed above. It has been canvassed before us that for the purposes of harmonious construction the said principle applicable to cases of Qisas may be read into cases of Ta'zir as well but we have not felt persuaded to venture into such an exercise of judicial legislation through the means of interpretation, particularly when this Court has already recognized and declared in some earlier cases that different principles apply to cases of Qisas and Ta'zir in the matter of compounding of an offence and such principles cannot be confused or mixed and, hence, an attempt to harmonize the two concepts or principles may amount to unwholesome judicial engineering offensive to the concepts themselves. In the case of Sh. Muhammad Aslam and another v. Shaukat Ali @ Shauka and others (1997 SCMR 1307) the distinction between the principles applicable to cases of Qisas under sections 309 and 310, P.P.C. and to cases of Ta'zir under section 345, Cr.P.C. had clearly been recognized and acknowledged by this Court. The said case was a case of Ta'zir wherein a partial compromise had been arrived at between the convict and some of the heirs of the victim. This Court had elaborately discussed the issue from diverse angles and had then concluded that a partial compromise was acceptable in a case of Qisas but the same was not acceptable in a case of Ta'zir. In many subsequent cases and particularly in the case of Zahid Rehman v. The State (PLD 2015 SC 77) this Court had reiterated and categorically declared again that the principles regarding

compounding of an offence applicable to a case of Qisas are not relevant or applicable to a case of Ta'zir. In that case it was observed by this Court as under:

> "This Court has already declared that section 309, P.P.C. pertaining to waiver (Afw) and section 310, P.P.C. pertaining to compounding (Sulh) in cases of murder are relevant only to cases of Qisas and not to cases of Ta'zir and a reference in this respect may be made to the cases of Sh. Muhammad Aslam and another v. Shaukat Ali alias Shauka and others (1997 SCMR 1307), Niaz Ahmad v. The State (PLD 2003 SC 635) and Abdul Jabbar v. The State and others (2007 SCMR 1496). In the said cases it had also been clarified by this Court that in cases of Ta'zir the matter of compromise between the parties is governed and regulated by the provisions of section 345(2), Cr.P.C. read with section 338-E, P.P.C. In the same cases it had further been explained and clarified by this Court that a partial compromise may be acceptable in cases of Qisas but a partial compromise is not acceptable in cases of Ta'zir. The cases of Manzoor Hussain and 4 others v. The State (1994 SCMR 1327), Muhammad Saleem v. The State (PLD 2003 SC 512), Muhammad Arshad alias Pappu v. Additional Sessions Judge, Lahore and 3 others (PLD 2003 SC 547), Niaz Ahmad v. The State (PLD 2003 SC 635), Riaz Ahmad v. The State (2003 SCMR 1067), Bashir Ahmed v. The State and another (2004 SCMR 236) and Khan Muhammad v. The State (2005 SCMR 599) also throw sufficient light on such aspects relating to the matter of compromise. It may be true that compounding of an offence falling in Chapter XVI of the Pakistan Penal Code is permissible under some conditions both in cases of Qisas as well as Ta'zir but at the same time it is equally true that such compounding is regulated by separate and distinct provisions and that such limited common ground between the two does not obliterate the clear distinction otherwise existing between the two separate legal regimes."

As if this were not enough, section 338-E(1), P.P.C. clinches the issue by providing as follows:

> "338-E. Waiver or compounding of offences. (1) Subject to the provisions of this Chapter and section 345 of the Code of Criminal Procedure, 1898 (V of 1898), all offences under this Chapter may be waived or compounded and the provisions of sections 309 and 310 shall, mutatis mutandis, apply to the waiver or compounding of such offences: ----------."

This section makes it abundantly clear that the principles of waiver and compounding contained in sections 309 and 310, P.P.C. and applicable to cases of Qisas are neither applicable to nor do they control the principles contained in section 345, Cr.P.C. pertaining to compounding of offences in cases of Ta'zir. In view of such clear statutory clarification and in view of the above mentioned repeated judicial enunciation there is hardly any scope left for any harmonious construction of the two distinct and separate concepts by us.

9. For the purpose of clarity of understanding we may explain why Qisas and Ta'zir are said to belong to separate legal regimes. To start with, the two concepts have different origins as the concept of Qisas has its origin in divine Islamic law and jurisprudence pertaining to offences in respect of human life and body whereas the origin of the concept of Ta'zir is secular and in our context it is derived mainly from Anglo-Saxon traditions. In the regime of Qisas the offence is committed against the victim whereas in the regime of Ta'zir the offence is committed against the State and the society as a whole. Application of Qisas or Ta'zir to a criminal case requires different standards of proof and entails different punishments. In cases of Qisas the right of Qisas as well as the right to waive or compound the offence vest in the victim or his wali whereas in cases of Ta'zir the serious offences committed in respect of human life or body were originally not compoundable in our law but subsequently only a limited concession was made in that regard by the State by amending the law and providing for compounding of most of such offences by the victim or his heirs. Even while making such concession and providing for composition of such offences no right to compound was conferred on the victim or his heirs and any composition proposed by the parties was made subject to permission or leave of the relevant court which may refuse to grant the requisite permission or leave in the peculiar

circumstances of a given case. Partial compromise is permissible in a case of Qisas but is not allowed in a case of Ta'zir. Devolving of a right of Qisas, waiver or compounding on the heir of a dead wali of the victim is recognized in cases of Qisas but is not permitted or recognized in cases of Ta'zir. Claiming Qisas is a right in Islamic dispensation whereas compounding in a case of Ta'zir is a concession subject to permission or leave of the relevant court in serious offences. A right in law ordinarily devolves upon an heir but a concession extended to a particular person is not to devolve on another unless the law expressly provides for the same. We entertain no manner of doubt that while expressly providing for some principles applicable to compounding of offences in cases of Qisas and while omitting to expressly provide for the said principles vis- -vis cases of Ta'zir the legislature was conscious of the difference between the two concepts and their requirements. The silence of the legislature in this regard speaks, and speaks quite loudly, and we as a Court of law cannot ignore it or override it by transposing the principles applicable to one regime of law to the other. We cannot shut our eyes to the clear provisions of section 345(7), Cr.P.C. according to which in a case of Ta'zir "No offence shall be compounded except as provided by this section."

10. In the present case of Ta'zir the offence of murder of Muhammad Aslam could be compounded only by the heirs of the said victim and all the surviving heirs of that victim had voluntarily compounded the said offence with respondents Nos.2 and 3. The High Court was, therefore, quite correct in holding that the appellant and his brothers, who were heirs of a subsequently dying heir of the victim, were not relevant to the matter of compounding of the offence.

11. The argument that in his lifetime Waryam, the father and one of the heirs of Muhammad Aslam deceased, had refused to join the compromise between the remaining heirs of the deceased and respondents Nos. 2 and 3 and, therefore, after the death of Waryam any compromise between the remaining heirs of Muhammad Aslam deceased and the said respondents could not be complete without the heirs of Waryam joining the same had failed to impress the High Court and we have also not felt persuaded to accept the same. As already observed above, the concept of devolving of the right of Qisas upon an heir of an heir/wali of the victim relevant to a case of Qisas is not applicable to cases of Ta'zir. In the absence of any devolving of the capacity to compound in a case of Ta'zir the capacity to compound possessed by an heir of the victim at the time of murder of the victim stands exhausted upon the subsequent death of that heir. Being the father and an heir of Muhammad Aslam deceased Waryam had a capacity to compound the relevant offence but he had not compounded the offence during his own lifetime and upon Waryam's death his capacity to compound stood exhausted and the same was not heritable as Waryam's heirs were not heirs of Muhammad Aslam deceased because they did not, and could not, inherit from him. After Waryam's death his heirs could not be treated as heirs of Muhammad Aslam deceased and the only heirs of Muhammad Aslam deceased left in the field at such stage were those surviving heirs of Muhammad Aslam deceased who could inherit directly from him and they could compound the offence throughout their lifetime irrespective of timing of Waryam's death. In cases of Ta'zir section 345(2), Cr.P.C. does not specify any time when compounding of an offence may take place and the provisions of section 345(2), Cr.P.C. do not place any embargo upon compounding of the relevant offence by the surviving heirs of a victim at a time when one or more of the heirs of the victim has/have already died. Placing an embargo upon the surviving heirs of a victim in such a situation may amount to committing violence upon the provisions of section 345(2), Cr.P.C. which we are not ready to commit.

12. Another thing to be clearly understood in the present context is that there is a difference between devolving of a right of Qisas and devolving of the status of an heir. Section 307, P.P.C. recognizes that the right of Qisas devolves on an heir of an heir of the victim and because of devolving of the right of Qisas on him an heir of an heir of the victim also becomes a wali of the victim and in that devolved capacity of wali such heir of an heir of the victim can also waive or compound the relevant offence. Section 307, P.P.C., however, does not provide or recognize that through such devolving of the right

of Qisas on him an heir of an heir of the victim also becomes or is recognized as an heir of the victim. Such distinction between devolving of the right of Qisas and devolving of a right to inherit from the victim has to be clearly understood because the first is relevant to the concept of Qisas whereas the second is relevant to the concept of Ta'zir. It has already been observed by us above that in cases of Qisas the term wali means the entire body or group of persons who are entitled to claim Qisas for a qatl-i-amd and such persons include those who are heirs of the victim entitled to inherit from him as well as those on whom the right of Qisas devolves upon death of an heir of the victim even if such heirs of the heir of the victim do not themselves inherit from the victim directly. In Qisas the tie of blood with the victim is the governing consideration even if a wali in his devolved capacity is not in a position to directly inherit from the victim whereas in Ta'zir the sole consideration for the capacity to compound is the capacity to inherit directly from the victim. The present case offers a classical example of such a distinction because by virtue of section 307, P.P.C. the appellant and his brothers might have become wali of Muhammad Aslam deceased on account of possessing a devolved right of Qisas (relevant to a case of Qisas) but they are not the heirs of Muhammad Aslam deceased for the purposes of compounding of the offence under section 345(2), Cr.P.C. in this case of Ta'zir.

13. In the interim order passed in this case on 05.06.2018 it was noticed by this Court that the view regarding the issue at hand taken by the Lahore High Court, Lahore in the case of Ahmad Nawaz @ Gogi v. The State (PLD 2007 Lahore 121) was in conflict with the view of this Court on the subject taken in the later case of Abdul Rashid alias Teddi v. The State and others (2013 SCMR 1281) but we note that in none of the said cases the all-important distinction between cases of Qisas and those of Ta'zir had come under discussion and the Courts were not properly assisted in those cases in this particular regard. In the case of Ahmad Nawaz @ Gogi (supra) the Lahore High Court, Lahore had observed on the issue as follows:

"At the very outset, we may here reproduce section 305, P.P.C.--

"305. WALI.---In case of a qatl, the wali shall be

(a) the heirs of the victim, according to his personal law but shall not include the accused or the convict in case of Qatl-e-Amd if committed in the name or on the pretext of honour; and

(b) the Government, if there is no heir."

A bare perusal of the above quoted section clearly states that in case of a qatl, the wali shall be the heirs of the victim, according to his personal law and the said provisions do not contemplate that the heirs of an heir of the victim shall also be wali of the victim. An heir of a person is understood to be a person who is entitled to inherit the property of the deceased at the time of his death. In the case in hand the inheritance of the victim automatically opened upon his death and at that time, the only heirs of the victim were his father and mother and thus the property of the deceased automatically devolved upon the said heirs of the victim. After devolving of the property of the victim upon the said heirs the inheritance of the victim had been exhausted and there was nothing left for anybody else to inherit from the victim. Keeping in view the spirit of the provisions of section 305(a) P.P.C. the heirs of a victim are surely different from the heirs of a wali of the victim. In the present case, the consanguine sisters were to inherit from the father of the victim namely Maqbool Ahmad and not from Mohsin Raza victim himself and thus they were the heirs of Maqbool Ahmad not of the victim namely Mohsin Raza. It is not disputed that the said consanguine sisters had not and could not inherit the property of Mohsin Raza as they were not his heirs at the time of his murder. What the consanguine sisters are claiming before us is a right to effect or refuse a compromise with the appellant which right they claim to have inherited from Mohsin Raza's father namely Maqbool Ahmad and they are not claiming any right to inherit the property of Mohsin Raza directly. According to the spirit and rationale of the provisions of section 305(a), P.P.C. a wali of the victim is the person who is entitled to inherit the property of the victim and the interpretation of the said provisions

cannot be stretched to include in the definition of wali a person who claims to have inherited the right of compromise possessed by the Wali. No legal provision has been produced nor any reference to the Islamic Jurisprudence has been made before us to support such a stretched interpretation of the provisions of section 305(a), P.P.C. Apart from that the spirit of the Qisas and Diyat laws is to quench the thirst of revenge of the immediate heirs of the victim and thus the right to enter into a compromise or otherwise cannot be extended to any other remote relative of the deceased who may not inherit the property from the deceased at the time of his murder but may at some subsequent stage become entitled to inherit some property from some heir of the deceased upon the death of such heir."

In the later case of Abdul Rashid alias Teddi (supra) this Court had extensively quoted from a judgment passed by the Lahore High Court, Lahore in the case of Muhammad Jabbar v. The State and 10 others (2000 PCr.LJ 1688) and had then concluded as under:

"14. To put it in other words, Islam is a religion of peace and harmony. It has for the first time in the history of mankind introduced and encouraged the concept of afw, darguzar/condoning and compounding of offences, even those relating to heinous crimes. Particularly, the one which relate to disputes between two or more private parties and carry an element of revenge, thus, harming the peace and tranquility in the society at large. For this purpose, through the dictates of various verses from the Holy Qur'an and Sunna of our Holy Prophet Hazrat Muhammad (Peace be upon him), a workable and practicable scheme for compounding of offences has been outlined under the Islamic criminal law. The purpose behind it is to provide a respectable and fair mode, based on the principles of equality of all human beings, to reach some settlement/compromise in the larger interest of the civil society and to bury the hatchet of revenge once for all, so as to save other generations from facing the consequence of enmity amongst different segments of society, aimed for satisfaction of endless personal vendetta. On this account too, such provisions of law relating to compounding of criminal offences are to be interpreted and applied liberally for the benefit of society and the humanity at large, but at the same time as per injunctions of Islam.

15. Thus, after a careful reading of the provisions of section 345, Cr.P.C., other relevant guiding principles of Islamic jurisprudence in this regard and the cases cited at the Bar, we are of the opinion that not only the surviving legal heirs of the victim have legal authority to waive right of qisas and compound the offence with the appellant/convict upon payment of compensation of diyat or without payment in lieu of pleasure of God, but such right is equally inheritable by the successors of any legal heir of the victim, who during his life time had either not entered into compromise with the appellant/convict or refused to enter into such compromise, as despite his earlier refusal he was competent to change his mind and to subsequently enter into such compromise with the appellant/convict, while the principle of estoppel was not attracted in such situation to debar his successor from exercising such right independently at their own free will."

It is obvious that in the said case, due to lack of proper assistance, the Islamic concept of Qisas and the principles applicable thereto in the matter of compounding of an offence were expressly referred to and were simply presumed to be applicable to the secular concept of Ta'zir and compounding of an offence under that concept. Apart from that while holding that "not only the surviving legal heirs of the victim have legal authority to waive right of qisas and compound the offence with the appellant/convict ---------- but such right is equally inheritable by the successors of any legal heir of the victim" no statutory provision or any source of Islamic jurisprudence had been referred to or relied upon by this Court. Both the above-mentioned cases were cases of Ta'zir but on account of lack of proper assistance they were decided on the basis of principles applicable to cases of Qisas. We are,

therefore, constrained to observe that the said cases may not to be approved or treated as good precedents on the subject.

14. In India the Islamic regime of Qisas in criminal cases is not recognized and originally the matter of compounding of an offence was governed in India by statutory provisions identical to the original provisions of section 345, Cr.P.C. in Pakistan recognizing no role of an heir of a person in the matter of compromise if the person competent to compound an offence is dead. In Pakistan section 345(2), Cr.P.C. now provides that an offence of qatl-i-amd under section 302, P.P.C. may be compounded by "the heirs of the victim" and does not provide for devolving of such capacity to compound on an heir of an heir of the victim but in India the legislature had introduced section 320(4)(b) of the Code of Criminal Procedure, 1973 which reads as follows:

> "When the person who would otherwise be competent to compound an offence under this section is dead, the legal representative, as defined in the Code of Civil Procedure, 1908, of such person may, with the consent of the Court, compound such offence."

Introduction of this legal provision in India is by itself a legislative acknowledgment that the capacity to compound an offence is not automatically devolved upon an heir of a person possessing the capacity to compound unless the law expressly provides for the same. The omission in this respect in the original law was supplied in India by the legislature and we in this country would not like to embark upon judicial legislation by supplying the relevant omission in our law through the means of interpretation. Let this responsibility rest where it lies and we would not like to encroach upon the domain of the legislature in this regard. We, therefore, refer this aspect of the matter to the Secretary, Ministry of Law and Justice, Government of Pakistan, Islamabad so that the Federal Government may consider getting the relevant law amended by the Majlis-e-Shoora (Parliament) appropriately, if so advised.

15. As a result of the discussion made above we have not been able to take any legitimate exception to the impugned judgment passed by the Lahore High Court, Multan Bench, Multan. The case in hand was not a case of Qisas but was of Ta'zir. Under the Islamic law of inheritance the brothers of Muhammad Aslam deceased in this case did not inherit from the deceased directly and even when the father of Muhammad Aslam deceased, an heir of the said deceased, subsequently died the brothers of Muhammad Aslam deceased, including the present appellant, did not become Muhammad Aslam deceased's heirs because they stood excluded by a surviving son of Muhammad Aslam deceased who was closer to the deceased in degree in the matter of inheritance. In this case of Ta'zir only the heirs of the deceased could compound the offence of murder and the appellant and his brothers, all brothers of Muhammad Aslam deceased, did not and could not inherit from Muhammad Aslam deceased either directly or through their father and, thus, they never qualified as "heirs of the victim" for the purposes of section 345(2), Cr.P.C. This appeal is, therefore, dismissed.

16. The office is directed to send a copy of this judgment to the Secretary, Ministry of Law and Justice, Government of Pakistan, Islamabad for his information and for appropriate action, if deemed warranted.

(Sd)
Asif Saeed Khan Khosa, C.J.
(Sd)
Mushir Alam, J
(Sd)
Maqbool Baqar, J
(Sd)
Manzoor Ahmad Malik, J
(Sd)
Sardar Tariq Masood, J
(Sd)

Mazhar Alam Khan Miankhel, J

I concur with the conclusion but for different reasons, which have been set out in my separate note.

(Sd)

Syed Mansoor Ali Shah, J

**SYED MANSOOR ALI SHAH, J.---**I have gone through the judgment authored by the Hon'ble Chief Justice (hereinafter referred to as the "Judgment"). I concur with the conclusion of the Judgment that the instant appeal merits dismissal. I, however, espouse views different from those expressed in the Judgment, regarding the meaning and determination of the heirs of the victim or the wali of the victim in the context of compoundability of the offence of qatl-i-amd (interchangeably also referred to as compromise between the parties) under the two regimes of Qisas[1] and Ta'zir[2].

2. The precise legal question before the Court is the scope and extent of the term "heirs of the victim" used in section 345 Cr.P.C. in order to determine who on behalf of the deceased victim is entitled to compound the offence of qatl-i-amd punishable as ta'zir under section 302, P.P.C. Additionally, whether the scheme of compoundability is different in case of Qisas where "wali of the victim" is to be determined?

3. In my view, Islamic Law of Inheritance goes to the root of the case and is central to the concept of compounding of the offence of qatl-i-amd under Qisas and Ta'zir, which in turn rests on the meaning of heirs and walis of the victim. It is essential to emphasize that the only law that can determine the heir(s) of a deceased (victim) for Muslims in Pakistan is their personal law i.e., the Islamic Law of Inheritance (similarly for non-Muslims its their personal law). According to Professor Coulson, Islamic Law of Inheritance "is a solid technical achievement, and Muslim scholarship takes a justifiable pride in the mathematical precision with which the rights of the various heirs, in any given situation, can be calculated Nowhere is the fundamental Islamic ideology of law as the manifestation of the divine will more clearly demonstrated than in the laws of the inheritance .From a sociological standpoint, the laws of inheritance reflect the structure of family ties and the accepted social values and responsibilities within the Islamic community[3]." Under Islamic Law of Inheritance, rights of inheritance rest upon two principal grounds of marriage and blood relationship with the deceased and there are three kinds of heirs: Sharers, Residuaries and Distant Kindred. Sharers are those who are entitled to a prescribed share of inheritance. Residuaries are those who take no prescribed shares but succeed to the residue after the claims of the sharers are satisfied. Distant Kindred are all those relations who are neither sharers nor residuaries. After ascertaining which of the heirs or descendants of the deceased (victim) are entitled to succeed, the next step is to distribute the estate among them.[4] It is true that the inheritance opens on the death of the victim and the heirs are identified according to the Islamic Law of Inheritance and the estate of the victim automatically devolves upon the said heirs. While the estate of the deceased devolves on the heirs, the concept of inheritance and heirship does not end. Devolution is neither one time nor does it freeze in time at the time of the death of the victim. As families grow and evolve, moving from generations to generations, the heirs also grow, replacing the earlier heirs yet maintaining their descent and lineage from the ancestors. The heirship or right to inheritance moves downwards, as well as, upwards, hence the term "descendants" and "ascendants." The concept of "how low-so-ever" or "how-high-so-ever" under the Islamic Law of Inheritance marks the downward and upward flowing concept of succession and inheritance, resembling a running chain of blood ties and marriage. As a matter of illustration, if in the instant case it is discovered after say thirty years from the death of the victim that the State has decided to confer certain property on the victim for his meritorious services or some property has been discovered that belongs to the victim, and the surviving heirs at the time of death of the victim being dead by now, who then will inherit the property of the victim? or will the property escheat and revert to the State because the first line of heirs is dead ? Under the Islamic Law of Inheritance, heirship is a living and an evolving concept and therefore the property will vest in the heirs of the victim as they stand today and the meticulous Islamic Law of Inheritance can identify the

heirs of the victim even after three decades. Therefore, at any given time, the heirs or descendants or ascendants of the victim can be identified with mathematical precision under the Islamic Law of Inheritance. Restricting the term "heirs of the victim" to only the surviving heirs of the victim at the time of the death of the victim, is an interpretation that might not sit well with the Islamic Law of Inheritance and public policy. The concept of genealogical tree (shajrah nasab) in our Land Revenue law is an example of this successional calculation. At this juncture I cannot lose sight of section 338-F of the P.P.C. which provides that while interpreting the provisions of Chapter XVI (of offences affecting the human body) the court shall be guided by the injunctions of Islam as laid down in the Holy Quran and Sunnah. One of the best showcases of these injunctions is the Islamic Law of Inheritance, itself.

4. Applying the principles of the Islamic Law of Inheritance, as discussed above, to the instant case on merits, I see that in the presence of the son and the widow, the brothers of the victim or sons of the deceased father Waryam stand excluded from the line of succession. Hence the available heirs at the time of compromise are the son and the widow of the victim. The High Court confirmed the view taken in Report of the District and Sessions Judge, Vehari dated 12.05.2010. The relevant extract of the Report is as follows:

> "5. From the statements of Razia Bibi (widow) and Muhammed Akmal (son) legal heirs of the deceased , it is evident that compromise between the parties is genuine as they have no objection if the said convicts are acquitted. The legal heirs of the deceased Waryam who was father of Muhammed Aslam deceased are not now the legal heirs of Muhammed Aslam deceased of this case." (emphasis supplied)

The Appellants were excluded not because they were the heirs of the heirs of the victim but because they were not the heirs of the victim under the Islamic Law of Inheritance. The application for compromise was rightly allowed leading to the acquittal of respondents Nos.2 and 3. The impugned judgment of the High Court upholding this view is, therefore, correct and the present appeal merits dismissal.

5. It is now settled that Qisas and Ta'zir are two separate regimes, having their own sets of rules as laid down in Muhammad Aslam v. Shaukat Ali (1997 SCMR 1307) and Zahid Rehman v. State (PLD 2015 SC 77). However, when it comes to the question of determining the heirs of the victim or walis of the victim, for the purposes of compoundability of the offence of qatl-i-amd, the two regimes converge and both take guidance from the Islamic Law of Inheritance to resolve this question. This is because the Islamic Law of Inheritance is the only law that provides for determination of heirs in the country. Even otherwise, Pakistan Penal Code, 1860 or the Criminal Procedure Code, 1898 do not provide a separate mode and manner of determining heirs of the victim and, thus, cannot possibly be considered as a parallel system of inheritance and succession. Reference to the terms "heirs of the victim" and "wali of the victim" under these Codes assumes outsourcing the answer to the Islamic Law of Inheritance, as these Codes have no mechanism to resolve these questions. Therefore, both the regimes of Qisas and Ta'zir rely on the principles of Islamic Law of Inheritance uniformly to determine the heirs of the victim or the wali of the victim for the purposes of compoundability in the cases of qatl-i-amd.

6. Under the regime of Ta'zir, the heirs of the victim can compound the offence of qatl-i-amd under Section 345(2), Cr.P.C. with the permission of the Court. The right vested in the "heirs of the victim" makes the right of compoundability under Ta'zir inheritable. In another sense this right is also an actionable claim,[5] hence inheritable. Section 345(2) Cr.P.C. has no time limit and can be invoked by the accused party at any stage after the offense is committed and before the sentence is executed. The purpose of this provision is understandably to encourage settlements between warring parties in order to protect family life and ensure a peaceful community. The heirs of the deceased victim can exercise this right. The first heirs of the victim are those who survive him immediately at the time of his death,

but as explained above, the heirship of the victim continues in time and at any given time, when the heirs who survived at the time of death of the deceased are no more, there will still be heirs of the victim under the Islamic law of inheritance in the shape of sharers, residuaries or distant kindred. The heirship is based on blood and marriage and continues as the families evolve. So the available heirship is to be determined afresh when the right to compound is to be exercised irrespective of the time of death of the victim. It is emphasized that the available heirs of the victim and not heirs of the heirs are to be determined. In the instant case, the appellants are the heirs of the heir but are not the heirs of the victim under the Islamic law of inheritance, as they stand excluded by the son. A five member bench of this Court has upheld this view in Abdul Rashid v. State (2013 SCMR 1281), even though the distinction between the two regimes of Qisas and Ta'zir was somewhat blurred in the said opinion.

7. Qisas means punishment by causing similar hurt to same part of the body of the convict as he has caused to the victim or by causing death if he has committed qatl-i-amd in exercise of the right of the victim or a wali[6]. Under section 299 (m) P.P.C., wali means a person entitled to claim qisas. Under section 305(a) P.P.C., wali in case of qatl means the heirs of the victim, according to his personal law. Section 306(c) provides that qati-i-amd shall not be liable to qisas when any wali of the victim is a direct descendant, how low-so-ever, of the offender. Section 307(c) provides a situation when qisas for qatl-i-amd cannot be enforced i.e., "when" the right of qisas devolves on an offender as a result of the death of the wali of the victim. Section 307(c) P.P.C. is actually about an offender not having a right of qisas and proceeds on an implied assumption that the right of qisas is inheritable. Section 307(c) is, therefore, not a specific provision mandating devolution of the right of qisas. In my view there is no requirement to state the obvious. Wali by definition is an heir of the victim[7]. Right to qisas is also akin to an actionable claim and is, therefore, inheritable under the Islamic Law of Inheritance[8]. The right of qisas held by the wali of the victim devolves on to the next wali of the victim, who is of course an heir of the victim and not necessarily an heir of the heir or heir of the wali. As discussed above, section 307, P.P.C. does not provide a scheme of inheritance that helps to identify the next wali of the victim. Therefore, it is difficult to accept the view propounded in the Judgment that had the instant case been under qisas, the appellants would pass for walis (para 6 of the Judgment), being the heirs of the deceased wali (Waryam). The distinction between heirs of the victim i.e., wali under section 299(m) P.P.C. and heirs of wali (Waryam), needs to be kept in mind. Under Islamic Law of Inheritance, the appellants (brothers of the victim) stand ousted in the presence of the son and cannot pass as wali of the victim even though they are the heirs of Waryam. So even if the instant case was under qisas, only walis would have been the son and the widow or else the principles of Islamic Law of Inheritance would stand violated.

8. Another dimension is sociological and rests on public policy. Why should an interpretation be encouraged that restricts the choice or option of the subsequent heirs of the victim to settle a feud and move towards a more harmonious and peaceful life. Why deprive the heirs of this right? This interpretation supports the protection of the family as envisaged in the Principles of Policy under Article 35 of the Constitution. Any embargo on the exercise of the right to compound under section 345(2) Cr.P.C. by the subsequent heirs of the victim might not be in consonance with the Islamic Law of Inheritance.

9. Section 320 of the Indian Code of Criminal Procedure, 1973 does not provide for compounding of an offence in case of murder (qatl-i-amd). Further, in case the person who can compound the offences given under the said section dies a natural death, his or her legal representative, with the consent of the court, may compound the offence. Legal representative supports the purposive interpretation employed in this note, recognizing a more contemporary status of the heir of the victim, who is there at the point of time of compounding and is not frozen in history at the time of the death of the victim.

10. The Judgment has referred the matter to the Federal Government to consider the possibility of amending the law by the Parliament. I am sure these reasons will also assist the Federal Government in bringing about more clarity in the proposed amendment. I, therefore, concur with the said direction.

11. As a conclusion, these are my reasons for concurring with the Judgment to the extent of the dismissal of the instant appeal and the direction to the Federal Government as discussed above.

(Sd.)

Syed Mansoor Ali Shah, J

MWA/M-8/S Appeal dismissed.

**P L D 2019 Supreme Court 488**

**Present: Asif Saeed Khan Khosa, C.J., and Syed Mansoor Ali Shah, J**

**KANWAR ANWAAR ALI, Special Judicial Magistrate: In the matter of**

Criminal Miscellaneous Application No.183 of 2019 in Criminal Appeal No.259 of 2018, decided on 22nd February, 2019..

Notice in compliance with the order dated 12-2-2019 passed in Criminal Appeal No.259 of 2018 to Mr. Kanwar Anwaar Ali, Special Judicial Magistrate on account of dereliction of duty and lack of sufficient legal knowledge.

**(a) Qanun-e-Shahadat (10 of 1984)---**

----Art. 22---Test identification parade---Evidentiary value and object of test identification parade in criminal cases stated.

Following is the evidentiary value and object of a test identification parade:

(i) Test identification parade and correct pointing out of an accused person by an eye-witness therein was not a substantive piece of evidence. Evidence offered through identification proceedings was not a substantive piece of evidence but was only corroborative of the evidence given by the witnesses at the trial. It had no independent value of its own and could not as a rule, form a sufficient basis for conviction though the same may add some weight to the other evidence available on record.

Muhammad Yaqoob and another v. The State 1989 PCr.LJ 2227; Muhammad Bashir v. The State PLD 1958 SC (Pak) 1 and Muhammad Afzal and another v. The State 1982 SCMR 129 ref.

(ii) Identification parade was necessary only where the offender was a complete stranger to the witnesses. Whole object of the identification proceedings was to find out whether the suspect was or was not the real offender. [p. 498] B

Ismail and another v. The State 1974 SCMR 175; Satya Narain v. The State AIR 1953 All. 385 and Kind v. Christle 1914 AC 545 ref.

(iv) Failure to hold a test identification parade was not always fatal to the prosecution's case. [p. 503] Y

Muhammad Akram Rahi and others v. The State and others 2011 SCMR 877 and Ghazanfar Ali alias Pappu and another v. The State 2012 SCMR 215 ref.

**(b) Qanun-e-Shahadat (10 of 1984)---**

----Art. 22---Test identification parade---Guidelines, requirements and safeguards necessary for holding a test identification parade in connection with criminal cases stated.

Following are the guidelines, requirements and safeguards necessary for holding a test identification parade:

(i) Vital factor determinative of the worth and value of test identification proceedings was the effectiveness of the precautions taken, before and during the course of such proceedings which were designed to eliminate the possibility of unjustified convictions.

(ii) Test identification proceedings were not the testimony of a witness but the testimony of the senses of the witness. It was essentially a test of his power of observation and perception, a test of his power to recognize strangers and a test of his memory. Such gifts of God may vary from man to man. A witness may be honest, independent and truthful but then his memory may be faulty. Tricks of memory and its conscious and unconscious activity could also wrap the vision of a man. When mistakes were possible in the recognition of a man known from before, then the possibility of such mistakes in identifying strangers was definitely greater. And more so when the witnesses had seen the offender for the first time during the occurrence and that also briefly and not with a calm but in an excited, confused and terrorised state of mind.

Lal Pasand's case PLD 1981 SC 142 ref.

(iii) Memories faded and visions got blurred with passage of time. Thus, an identification test, where an unexplained and unreasonably long period had intervened between the occurrence and the

identification proceedings, should be viewed with suspicion. Therefore, an identification parade, to inspire confidence, must be held at the earliest possible opportunity after the occurrence.

(iv) Test identification, where the possibility of the witness having seen the accused persons after their arrest could not be ruled out, was worth nothing at all. It was, therefore, imperative to eliminate all such possibilities. It should be ensured that, after their arrest, the suspects were put to identification tests as early as possible. Such suspects should preferably, not be remanded to police custody in the first instance and should be kept in judicial custody till the identification proceedings were held. This was to avoid the possibility of overzealous investigating officers showing the suspects to the witnesses while they were in police custody. Even when these accused persons were, of necessity, to be taken to Courts for remand etc. they must be warned to cover their faces if they so choose so that no witness could see them.

(v) Identification of an accused person by eye-witnesses before the trial court during a trial was generally considered to be quite unsafe because before such identification during the trial the eye-witnesses got many opportunities to see the accused persons appearing before the court in connection with their remand, distribution of copies of statement of prosecution witnesses, framing of the charge and recording of statements of other prosecution witnesses.

Asghar Ali alias Sabah and others v. The State and others 1992 SCMR 2088; Muhammad Afzal alias Abdullah and another v. The State and others 2009 SCMR 436; Nazir Ahmad v. Muhammad Iqbal 2011 SCMR 527; Shafqat Mehmood and others v. The State 2011 SCMR 537; Ghulam Shabbir Ahmed and another v. The State 2011 SCMR 683 and Azhar Mehmood and others v. The State 2017 SCMR 135 ref.

(vi) Identification parades should never be held at police stations.

(vii) Magistrate, supervising the identification proceedings, must verify the period, if any, for which the accused persons had remained in police custody after their arrest and before the test identification and must incorporate such fact in his report about the proceedings.

(viii) In order to guard against the possibility of a witness identifying an accused person by chance, the number of persons (dummies) to be intermingled with the accused persons should be as much as possible. But then there was also the need to ensure that the number of such persons was not increased to an extent which could have the effect of confusing the identifying witness. Superior Courts had, through their wisdom and long experience, prescribed that ordinarily the ratio between the accused persons and the dummies should be 1 to 9 or 10. Such ratio must be followed unless there were some special justifiable circumstances warranting a deviation from it.

(ix) If there were more accused persons than one who had to be subjected to test identification, then the rule of prudence laid down by the superior Courts was that separate identification parades should ordinarily be held in respect of each accused person. Identification of many accused persons in one line in one go during a test identification parade was improper. Every accused person was to be put to a separate test identification parade.

Lal Pasand v. The State PLD 1981 SC 142; Imran Ashraf and 7 others v. The State 2001 SCMR 424; Ziaullah alias Jajj v. The State 2008 SCMR 1210; Bacha Zeb v. The State 2010 SCMR 1189; Shafqat Mehmood and others v. The State 2011 SCMR 537; Gulfam and another v. The State 2017 SCMR 1189; Hakeem and others v. The State 2017 SCMR 1546 and Kamal Din alias Kamala v. The State 2018 SCMR 577 ref.

(x) It must be ensured that before a witness had participated in the identification proceedings, he was stationed at a place from where he could not observe the proceedings and that after his participation he was lodged at a place from where it was not possible for him to communicate with those who had yet to take their turn. It also had to be ensured that no one who was witnessing the proceedings, such as the members of the jail staff etc., was able to communicate with the identifying witnesses.

(xi) During a test identification parade the witness had to specify the role allegedly played by an accused person in commission of the offence. [pp. 502, 503] T & W

Ismail and another v. The State 1974 SCMR 175; Khadim Hussain v. The State 1985 SCMR 721; Ghulam Rasul and 3 others v. The State 1988 SCMR 557; Asghar Ali alias Sabah and others v. The State and others 1992 SCMR 2088; State/Government of Sindh through Advocate-General, Sindh, Karachi v. Sobharo 1993 SCMR 585; Mehmood Ahmad and 3 others v. The State and another 1995 SCMR 127; Siraj-ul-Haq and another v. The State 2008 SCMR 302; Ghulam Qadir and 2 others v. The State 2008 SCMR 1221; Muhammad Afzal alias Abdullah and another v. State and others 2009 SCMR 436; Shafqat Mehmood and others v. The State 2011 SCMR 537; Sabir Ali alias Fauji v. The State 2011 SCMR 563; Muhammad Fayyaz v. The State 2012 SCMR 522; Azhar Mehmood and others v. The State 2017 SCMR 135; Hakeem and others v. The State 2017 SCMR 1546 and Kamal Din alias Kamala v. The State 2018 SCMR 577 ref.

(xii) Magistrate conducting the proceedings must take an intelligent interest in the proceedings and not be just a silent spectator of the same bearing in mind at all times that the life and liberty of someone depended only upon his vigilance and caution.

(xiii) Magistrate was obliged to prepare a list of all the persons (dummies) who formed part of the line-up at the parade along with their parentage, occupation and addresses.

(xiv) Magistrate must faithfully record all the objections and statements, if any, made either by the accused persons or by the identifying witnesses before, during or after the proceedings.

(xv) Where a witness correctly identified an accused person, the Magistrate must ask the witness about the connection in which the witness had identified that person i.e. as a friend, as a foe or as a culprit of an offence etc. and then incorporate such statement in his report.

(xvi) Where a witness identified a person wrongly, the Magistrate must so record in his report and should also state the number of persons wrongly picked by the witness.

(xvii) Magistrate was required to record in his report all the precautions taken by him for a fair conduct of the proceedings.

(xviii) Magistrate had to give a certificate at the end of his report in the form prescribed by C.H.II.C. of Vol. III of Lahore High Court Rules and Orders. [p. 501] R

(xix) Said measures listed should, however, not be taken as exhaustive of the steps which were required to be taken before, during and after the identification proceedings. All said requirements were no doubt mandatory but at the same time they were only illustrative of the precautions which the Courts of law demanded before some respect could be shown to the evidence offered through the test identification proceedings.

In attendance:

Kanwar Anwaar Ali, Special Judicial Magistrate (in person).

Ahmed Raza Gillani, Additional Prosecutor-General, Punjab.

Date of hearing: 22nd February, 2019.

**ORDER**

**ASIF SAEED KHAN KHOSA, C J.---**While disposing of Criminal Appeal No. 259 of 2018 (Asfand Yar Khan v The State, etc.) this Court had passed the following judgment on 12.02.2019:

"Asfand Yar Khan appellant and some others had allegedly abducted one Adil Butt on 01.09.2009 for the purpose of extracting ransom and had later on done him to death and for commission of the said offences they were booked in case FIR No.370 registered at Police Station Model Town, Lahore on 02.09.2009 for an offence under section 365-A, P.P.C.. After a regular trial the appellant's co-accused were acquitted of the charge by the trial court whereas the appellant was convicted and sentenced for offences under section 302(b), P.P.C. read with section 34, P.P.C., section 347, P.P.C. read with section 34, P.P.C. and section 7(a) of the Anti-Terrorism Act, 1997. The appellant was, however, acquitted of the charge as far as the offences under

sections 365-A and 201, P.P.C. were concerned. For the offences of murder and terrorism the appellant was sentenced by the trial court to death on each such count. The appellant challenged his convictions and sentences before the High Court through an appeal which was partly allowed, the convictions and sentences of the appellant for the offences under section 347, P.P.C. and section 7(a) of the Anti-Terrorism Act, 1997 were set aside, his conviction for the offence under section 302(b), P.P.C. was upheld and his sentence of death for the offence of murder was reduced by the High Court to imprisonment for life. Hence, the present appeal by leave of this Court granted on 12.04.2018.

2. Leave to appeal had been granted in this case in order to reappraise the evidence and with the assistance of the learned counsel for the parties we have undertaken that exercise.

3. The case in hand is a case of an alleged abduction for ransom and murder and admittedly the case hinges upon some pieces of circumstantial evidence. It is not denied that nobody had seen the appellant forcibly or deceitfully abducting Adil Butt deceased, no demand of ransom was attributed to the appellant or any connection of the appellant with such demand was established, no ransom was paid to the appellant or to anybody else for release of Adil Butt and the murder of Adil Butt had not been seen by anybody. The prosecution had produced Tabassum Saeed (PW6) and Mian Muhammad Yasin (PW7) so as to establish that they had seen the appellant and his co-accused in the company of Adil Butt deceased late in the evening on 01.09.2009 but we have found that the said piece of evidence produced by the above mentioned witnesses suffered from lack of proximity between death and last-seen. The said witnesses had claimed to have seen the deceased in the company of the appellant and his co-accused on 01.09.2009 but the medical evidence brought on the record showed that Adil Butt had died some time between 02.09.2009 and 05.09.2009 and, thus, the all-important consideration of proximity was not available in this case so as to make the last-seen evidence worth any serious consideration. Apart from that the above mentioned witnesses were chance witnesses and the stated reason for their availability at the relevant spot at the relevant time had not been established through any independent evidence. The next piece of circumstantial evidence relied upon by the prosecution was the statement of Sanaullah (PW 15) who had allegedly seen the appellant and another throwing a sack in a canal on 07.09.2009 but the medical evidence did not support that stance of PW 15 inasmuch as according to the medical evidence Adil Butt deceased lost his life latest by 05.09.2009 and, thus, throwing away of a sack by an appellant and another in a canal on 07.09.2009 could not positively establish that it were the appellant and another who had done the deceased to death themselves and all that it could show was that some effort was made by the appellant and another to make the deadbody disappear. Such action attributed to the appellant and another attracted an offence under section 201, P.P.C. but admittedly the appellant had been acquitted of the said charge framed against him. The prosecution had claimed that the deadbody of the deceased had been recovered from a canal and admittedly such recovery of the deadbody had not been brought about at the instance of the appellant. It was maintained by the prosecution that two days prior to recovery of the deadbody the appellant had pointed out the place where he had thrown the deadbody in a canal. Such pointing out of the place of throwing of the deadbody attributed to the appellant could not qualify as evidence or confession because during such pointing out no recovery of any incriminating article had taken place. The last-seen evidence provided by Tabassum Saeed (PW6) and Mian Muhammad Yasin (PW7) and the Waj-takkar evidence provided by Sana Ullah (PW 15) showed that at the relevant time the said witnesses had not identified the persons who were seen last in the company of the deceased and even the persons throwing a sack in a canal had not been identified by the Waj-takkar witness. These pieces of evidence could have some relevance to this case against the appellant if the appellant had been lawfully or properly

identified during a test identification parade. In the case in hand the test identification parade conducted for identification of the appellant and his co-accused by the relevant prosecution witnesses suffered from a serious legal defect inasmuch as in one and the same parade three accused persons including the appellant had statedly been identified by three separate prosecution witnesses. Such identification of three accused persons in one go amounted to a joint identification and an identification parade which is joint has consistently been disapproved by this Court through many a judgment and a reference in this respect may be made to the cases of Kamal Din alias Kamala v. The State (2018 SCMR 577), Gulfam and another v. The State (2017 SCMR 1189), Hakeem and others v. The State (2017 SCMR 1546), Shafqat Mehmood and others v. The State (2011 SCMR 537), Bacha Zeb v The State (2010 SCMR 1189), Ziaullah alias Jajj v. The State (2008 SCMR 1210), Imran Ashraf and 7 others v. The State (2001 SCMR 424) and Lal Pasand v. The State (PLD 1981 SC 142). It is unfortunate that the Magistrate conducting the test identification parade in this case was completely oblivious of such judgments holding the field. The only piece of evidence remaining in the field was in the shape of some recoveries affected in this case which included a Danda a rope, a wallet, a copy of the Computerized National Identity Card, some cheques, visiting card, receipts and a copy of the Matriculation Result Card of the deceased which had statedly been recovered from the house of the appellant during the investigation. Some reservations have already been expressed by the High Court in the impugned judgment passed by it regarding veracity of the alleged recoveries and upon our own independent evaluation we have found such recoveries to be nothing but fabricated. It was unthinkable that the culprits who had taken every precaution to conceal their crimes would keep such articles at their home so as to furnish evidence of their crimes later on.

4. For what has been discussed above a conclusion is inescapable and irresistible that the prosecution had failed to prove its case against the appellant beyond reasonable doubt. This appeal is, therefore, allowed, the conviction and sentence of the appellant are set aside and he is acquitted of the charge by extending the benefit of doubt to him. He shall be released from the jail forthwith if not required to be detained in connection with any other case.

5. Before parting with this judgment we may observe that competence and capability of Mr. Kanwar Anwaar Ali, Special Judicial Magistrate appearing before the trial court as PW8 have been found by us to be quite doubtful and deficient inasmuch as while conducting a test identification parade on 19.09.2009 in connection with this criminal case in Central Jail, Kot Lakhpat, Lahore he had paid no heed or regard whatsoever to the law declared by this Court in the precedent cases holding the field wherein it had clearly been laid down that a test identification parade qua many accused persons cannot be conducted in one go. Through his disregard of the law declared by this Court he had made a very important piece of evidence reduced in worth or eliminated as an admissible piece of evidence and the prosecution had to suffer on that score irretrievably. Let Mr. Kanwar Anwaar Ali appear before this Court on 22.02.2019 in person so as to show as to why appropriate proceedings may not be initiated against him on account of dereliction of duty and lack of sufficient legal knowledge and also to show as to why some adverse recommendations may not be made to the concerned authorities regarding his suitability to hold a judicial or executive office. The Registrar of the Lahore High Court, Lahore is directed to trace the said Mr. Kanwar Anwaar Ali and to make sure that he appears before the Court in person on the appointed date."

2. In compliance with the direction issued by this Court on 12.02.2019 Mr. Kanwar Anwaar Ali, the then Special Judicial Magistrate appearing before the trial court as PW8 has appeared before this Court in person along with his written statement which reads as follows:

"I most humbly submit that I was inducted as a Provincial Management Service (PMS) Officer (BS-17) on 15.05.2006 and my academic qualification at the time of induction was simple graduation (B.A). I received training at Management and Professional Development Department (MPDD), Government of the Punjab in a 32 weeks course on Administration and Development from 15.05.2006 to 23.12.2006. Except for few orientation lectures on C.P.C., P.P.C., Cr.P.C. and Constitutional Law, no extensive legal education or training was being imparted by the MPDD after abolition of Executive Magistracy and main focus was and still is on planning and Development, Public Administration, Public Policy, Management and Revenue.

2. It is further submitted that after 03-years of government

service while I was working as Tehsil Municipal Officer, Okara, I was transferred by S&GAD on 18.08.2009, after concurrence of Hon'ble Lahore High Court, Lahore and posted as Special Judicial Magistrate, at Model Town Courts, Lahore against one of the vacant posts where erstwhile Executive Magistrates of PCS cadre would serve and decide petty offences pertaining to local and special laws. I was not a law graduate yet I served there as Special Judicial Magistrate in District Judiciary w.e.f. 01.09.2009 to 11.10.2012. in absence of any institutional setup and formal legal training arrangement or practical demonstrations pertaining to assignments like test identification parades, raids, inquests and exhumations, the only opportunity available to me was day to day on job learning or study of case laws of Superior Courts and commentaries. For a non-law-graduate like me, there was no institutional arrangement for capacity building and throughout I had to be self taught.

3. I beg to state that it was the 10th day of my duty as Special

Judicial Magistrate when I conducted my maiden test identification parade in the subject case. I had given bare reading of instructions on the subject contained in volume-III of High Court Rules and Orders and Police Rules 1934. During the conduct of my ever first identification Parade, I used commonsensical learning that I had gathered from reading of bare instructions, pattern and guidance of my colleagues in judiciary. In my humble understanding, a joint identification parade meant a parade in which more than one accused had been made to stand in a single row with many other dummies for identification by a witness, therefore I took care not to mix more than one accused person with 09 almost identical dummies in a separate row. Each row was separately presented before a witness for identification. The witness was told that he would be presented three rows; one after the other and in each row of 10 inmates, one person could be a suspect. A row would appear on site, the witness could identify or otherwise, the identified person would be separated and then the left over row of the dummies would depart. The second important learning was identification of accused with description of role in front of the identified suspects.

4. It is my most humble submission that I have conducted said identification proceedings in good faith as a judicial officer to the best of my ability and knowledge without any mala fide intention. It is my humble understanding that the crux of the statements made by witnesses while describing respective roles of accused person in the occurrence could hardly substantiate the offence under sections 365-A or 302, P.P.C. It was responsibility of the prosecution to collect corroborating circumstantial evidence for proving charges against the accused person. I most humbly submit that my role as a judicial officer was restricted only to the extent of recording witnesses and their description of respective roles of the accused persons in the occurrence.

Prayer:

It is most humbly prayed that I am a career civil servant and father of three school going kids and a sole bread-winner of a large family consisting of elderly parents and un-married sisters. In

good faith, I tried to perform my duty where-ever I was posted by the Government. I place myself at the mercy of the Hon'ble Court and invoke its compassion of taking a lenient view and humbly request that I may not be punished in any manner which may jeopardize my career as a civil servant and future lives of my innocent kids and dependents."

The explanation put forward by Mr. Kanwar Anwaar Ali who is presently posted as Deputy Secretary (P&D Department) Government of the Punjab, Lahore and the peculiar circumstances mentioned therein have been found by us to be plausible and, thus, no occasion has been found by us for proceeding against him in any manner or for passing any adverse remark against his conduct. The notice issued to him is, therefore, discharged.

3. Before parting with this order we would like to point out that the matter of taking of different steps in holding of a proper test identification parade in connection with a criminal case has developed over many decades and the requirements of such a parade as well as the safeguards to be ensured during such a parade so as to make it a meaningful exercise and providing material in a criminal case to be considered in a trial have elaborately been detailed in the landmark judgment passed by a learned Division Bench of the Lahore High Court, Lahore in the case of Muhammd Yaqoob and another v. The State (1989 PCr.LJ 2227) and in the said judgment Mr. Justice Khalil-ur-Rehman Ramday (as his lordship then was a Judge of the Lahore High Court, Lahore) had observed as follows:

"16. But before we undertake a deeper analysis of the evidentiary value of the test identification proceedings held in the present case, it would be of advantage to first appreciate the object and the value of such an evidence as also to recapitulate the standards required to be met before such like identification parades could be credited with reliance.

17. The evidence offered through identification proceedings is not a substantive piece of evidence but is only corroborative of the evidence given by the witnesses at the trial Muhammad Bashir v. The State PLD 1958 SC (Pak.) 1. It has no independent value of its own Muhammad Afzal and another v. The State 1982 SCMR 129 and cannot as a rule, form a sufficient basis for conviction though the same may add some weight to the other evidence available on record Sudhindranath v. The State AIR 1952 Cal. 423.

18. The identification parades (as they are normally called) are necessary only where the offender was a complete stranger to the witnesses Ismail and another v. The State 1974 SCMR 175. And the whole object of the identification proceedings is to find out whether the suspect was or was not the real offender Satya Narain v. The State AIR 1953 All. 385 and Kind v. Christle 1914 AC 545.

19. Such-like identification proceedings are not the testimony of a witness but the testimony of the senses of the witness. It is essentially a test of his power of observation and perception, a test of his power to recognize strangers and a test of his memory. These gifts of God may vary from man to man. A witness may be honest, independent and truthful but then his memory may be faulty. And then the tricks of memory and its conscious and unconscious activity could also wrap the vision of a man. When mistakes are possible in the recognition of a man known from before, then the possibility of such mistakes in identifying strangers is definitely greater. And more so when the witnesses have seen the offender for the first time during the occurrence and that also briefly and not with a calm but in an excited, confused and terrorised state of mind.

20. It was primarily for these reasons that Dorab Patel, J. (as his Lordship then was) cautioned the Courts to beware of the dangers inherent in the identification of strangers and quoting from the Criminal Law Revision Committee Report (1972), observed in Lal Pasand's case PLD 1981 SC 142 that mistaken identifications were:-

" ..by far the greatest cause of actual or possible wrong convictions...."

A similar note of caution was given by Monir in his Evidence Act Pak. Edition, Vol. 1 where the advice is that:-

" .... the evidence as to identification ought in each case, to be subjected to a close and careful scrutiny."

21. What then are the standards required to be satisfied by such an evidence before the same could be accepted by a Court of law?

22. The answer is that the vital factor determinative of the worth and value of identification proceedings is the effectiveness of the precautions taken, before and during the course of such proceedings which are designed to eliminate the possibility of unjustified convictions.

23. Although there is no law, which prescribes any such precautions yet the necessary guidelines are available in the form of executive instructions and judicial pronouncements. Some of them are summarised as under:-

(a) Memories fade and visions get blurred with passage of time. Thus, an identification test, where an unexplained and unreasonably long period has intervened between the occurrence and the identification proceedings, should be viewed with suspicion. Therefore, an identification parade, to inspire confidence, must be held at the earliest possible opportunity after the occurrence;

(b) a test identification, where the possibility of the witness having seen the accused persons after their arrest cannot be ruled out, is worth nothing at all. It is, therefore, imperative to eliminate all such possibilities. It should be ensured that, after their arrest, the suspects are put to identification tests as early as possible. Such suspects should preferably, not be remanded to police custody in the first instance and should be kept in judicial custody till the identification proceedings are held. This is to avoid the possibility of overzealous I.Os. showing the suspects to the witnesses while they are in police custody. Even when these accused persons are, of necessity, to be taken to Courts for remand etc. they must be warned to cover their faces if they so choose so that no witness could see them;

(c) identification parades should never be held at police stations;

(d) the Magistrate, supervising the identification proceedings, must verify the period, if any, for which the accused persons have remained in police custody after their arrest and before the test identification and must incorporate this fact in his report about the proceedings;

(e) in order to guard against the possibility of a witness identifying an accused person by chance, the number of persons (dummies) to be intermingled with the accused persons should be as much as possible. But then there is also the need to ensure that the number of such persons is not increased to an extent which could have the effect of confusing the identifying witness. The superior Courts have, through their wisdom and long experience, prescribed that ordinarily the ratio between the accused persons and the dummies should be 1 to 9 or 10. This ratio must be followed unless there are some special justifiable circumstances warranting a deviation from it;

(f) if there are more accused persons than one who have to be subjected to test identification, then the rule of prudence laid down by the superior Courts is that separate identification parades should ordinarily be held in respect of each accused person;

(g) it must be ensured that before a witness has participated in the identification proceedings, he is stationed at a place from where he cannot observe the proceedings and that after his participation he is lodged at a place from where it is not possible for him to communicate with those who have yet to take their turn. It also has to be ensured that no one who is witnessing the proceedings, such as the members of the jail staff etc., is able to communicate with the identifying witnesses;

(h) the Magistrate conducting the proceedings must take an intelligent interest in the proceedings and not be just a silent spectator of the same bearing in mind at all times that the life and liberty of some one depends only upon his vigilance and caution;

(i) the Magistrate is obliged to prepare a list of all the persons (dummies) who form part of the line-up at the parade along with their parentage, occupation and addresses;

(j) the Magistrate must faithfully record all the objections and statements, if any, made either by the accused persons or by the identifying witnesses before, during or after the proceedings;

(k) where a witness correctly identifies an accused person, the Magistrate must ask the witness about the connection in which the witness has identified that person i.e. as a friend, as a foe or as a culprit of an offence etc. and then incorporate this statement in his report;

(l) and where a witness identifies a person wrongly, the Magistrate must so record in his report and should also state the number of persons wrongly picked by the witness;

(m) the Magistrate is required to record in his report all the precautions taken by him for a fair conduct of the proceedings and

(n) the Magistrate has to give a certificate at the end of his report in the form prescribed by CH.II.C. of Vol. III of Lahore High Court Rules and Orders.

24. The measures above listed should, however, not be taken as exhaustive of the steps which are required to be taken before, during and after the identification proceedings. All these requirements are no doubt mandatory but at the same time they are only illustrative of the precautions which the Courts of law demand before some respect can be shown to the evidence offered through the test identification proceedings.

25. In enunciating the above principles governing the proceedings in question and in enumerating the above measures and requirements, we have sought guidance from the following:-

(i) Rules and Orders of the Lahore High Court, Chapter 11-C of Vol.III; (ii) Punjab Government Circular Letter No.6091-J-36/ 39829 (H-Judl.) dated 19-12-1936; (iii) Punjab Government Circular Letter No. 6546-J-43/83844 (H-Judl.), dated 17.12.1943; (iv) Punjab Government Circular Letter No.Judl.I-(13)/61, dated 26-7-1961, (v) Monir's Evidence Act (Pak. Edition) Vol. I, (vi) Lal Pasand v. The State PLD 1981 SC 142, (vii) Muhammad Afzal v. The State 1982 SCMR 129, (viii) Ismail v. The State 1974 SCMR 175, (ix) Khadim Hussain v. The State 1985 SCMR 721, (x) Muhammad Bashir Alam v. The State PLD 1958 SC (Pak.) 1, (xi) Gul Baig v. The State PLD 1964 Kar. 275, (xii) Musharrif Hussain v. The State PLD 1970 Dacca 686, (xiii) Sadu v. The State 1972 PCr.LJ 10, (xiv) Qabil Shah v. The State PLD 1960 Kar. 697, (xv) Wahid Bakhsh v. The State 1969 PCr.LJ 137, (xvi) Karim v. The State PLD 1961 Kar. 728, (xvii) Kameshwar Singh v. The State AIR 1972 SC 102 (xviii) Parbhu v. Emp. AIR 1943 Lah. 946, (xix) Emp. v. Debi Charan AIR 1942 All. 339, (xx) Sataya Naryan v. The State AIR 1953 All. 385, (xxi) Gajadher v. Emp. AIR 1932 Oudh. 99 and (xxii) Ramzan v. Emp. AIR 1929 Sindh 149."

We have failed to find a more elaborate illustration of the requirements and the safeguards necessary for holding a test identification parade than found in the above mentioned portion of the judgment passed in the said precedent case. We wholeheartedly approve the said requirements and safeguards which are to be meticulously followed and observed in all the test identification parades held in connection with criminal cases.

4. It may also be observed that during a test identification parade the requirement regarding specifying by a witness the role of an individual accused person in commission of an offence had also been identified and emphasized by this Court in the cases of Ismail and another v. The State (1974 SCMR 175), Khadim Hussain v. The State (1985 SCMR 721), Ghulam Rasul and 3 others v. The State (1988 SCMR 557), Asghar Ali alias Sabah and others v. The State and others (1992 SCMR 2088), State/Government of Sindh through Advocate-General, Sindh, Karachi v. Sobharo (1993 SCMR 585), Mehmood Ahmad and 3 others v. The State and another (1995 SCMR 127), Siraj-ul-Haq and another v. The State (2008 SCMR 302), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Muhammad Afzal alias Abdullah and another v. State and others (2009 SCMR 436), Shafqat Mehmood

and others v. The State (2011 SCMR 537), Sabir Ali alias Fauji v. The State (2011 SCMR 563), Muhammad Fayyaz v. The State (2012 SCMR 522), Azhar Mehmood and others v. The State (2017 SCMR 135), Hakeem and others v. The State (2017 SCMR 1546) and Kamal Din alias Kamala v. The State (2018 SCMR 577).

5. Identification of many accused persons in one line in one go during a test identification parade has also repeatedly been held by this Court to be improper and it has been clarified by this Court on a number of occasions that every accused person is to be put to a separate test identification parade and a reference in this respect may be made to the cases of Lal Pasand v. The State (PLD 1981 SC 142), Imran Ashraf and 7 others v. The State (2001 SCMR 424), Ziaullah alias Jajj v. The State (2008 SCMR 1210), Bacha Zeb v. The State (2010 SCMR 1189), Shafqat Mehmood and others v. The State (2011 SCMR 537), Gulfam and another v. The State (2017 SCMR 1189), Hakeem and others v. The State (2017 SCMR 1546) and Kamal Din alias Kamala v. The State (2018 SCMR 577).

6. Identification of an accused person by eye-witnesses before the trial court during a trial is generally considered to be quite unsafe because before such identification before the trial court during the trial the eye-witnesses get many opportunities to see the accused persons appearing before the court in connection with their remand, distribution of copies of statement of prosecution witnesses recorded under section 161, Cr.P.C., framing of the charge and recording of statements of other prosecution witnesses. Even in such identification before the trial court during the trial it is imperative that a witness must point towards a particular accused person present before the trial court and must also specify the role allegedly played by him in the incident in issue. The unsafe nature of identification of an accused person before the trial court during the trial has already been commented upon by this Court in the cases of Asghar Ali alias Sabah and others v. The State and others (1992 SCMR 2088), Muhammad Afzal alias Abdullah and another v. The State and others (2009 SCMR 436), Nazir Ahmad v. Muhammad Iqbal (2011 SCMR 527), Shafqat Mehmood and others v. The State (2011 SCMR 537), Ghulam Shabbir Ahmed and another v. The State (2011 SCMR 683) and Azhar Mehmood and others v. The State (2017 SCMR 135).

7. It may also be mentioned here that a test identification parade and correct pointing out of an accused person by an eye-witness therein is not a substantive piece of evidence and failure to hold a test identification parade is not always fatal to the prosecution's case and a reference in this respect may be made to the cases of Muhammad Akram Rahi and others v. The State and others (2011 SCMR 877) and Ghazanfar Ali alias Pappu and another v. The State (2012 SCMR 215).

8. The above mentioned precedent cases and the best practices mentioned therein have been consolidated by us in the present order so that any confusion regarding the legal position in respect of a test identification parade may be removed and all concerned may stand instructed and guided in that regard in future. A serious exception may henceforth be taken to any non-compliance or disregard of the requirements and safeguards mentioned above.

9. The office of this Court is directed to send a copy of this order to the Registrars of all the High Courts in the country with a direction to send a copy of the same to every Judge and Magistrate within the jurisdiction of each High Court handling criminal cases at all levels for their information and guidance.

MWA/K-2/S Order accordingly.

**P L D 2019 Supreme Court 504**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Yahya Afridi, JJ**

**BASHIR AHMED through Legal Representative and others---Appellants**

**Versus**

**MUHAMMAD HUSSAIN and others---Respondents**

Civil Appeal No.42-L of 2010, decided on 28th February, 2019.

(On appeal against the order dated 23.5.2005 of the Lahore High Court, Lahore passed in C.M.No.1/2002 in W.P. No.136-R/82.)

**Civil Procedure Code (V of 1908)---**

----S. 12(2)---Limitation Act (IX of 1908), S. 18 & First Sched. Art.181---Application under S.12(2), C.P.C, filing of---Limitation---Fraud---In terms of Art.181 of First Sched. to the Limitation Act, 1908, the period of limitation to file an application under S. 12(2), C.P.C. would be three years, and the crucial starting point for the period of limitation would be when the right to apply accrued to the aggrieved applicant, which in case of an application under S.12(2), C.P.C. would be the date when the impugned decision based on fraud and concealment was passed---In case the aggrieved person had, by means of fraud, been kept from the knowledge of decision of the Court, he may then seek the extension of the commencing point of the period of limitation of three years from the date of the decision under Art.181, to the date of knowledge of the said decision under S.18 of the Limitation Act, 1908---Ground of fraud or concealment had to be specifically pleaded with clear particulars and should not be a vague assertion.

Faizum alias Toor v. Nander Khan 2006 SCMR 1931; Mian Muhammad and others v. Pir Bakbsh and others 2005 SCMR 1505; Fida Hussain v. Ghulam Sarwar 2002 SCMR 1554; Mst. Amtul Kabir and others v. Safia Khatoon and others 1991 SCMR 1022; Muhammad Iqbal and another v. Muhammad Alamgir and others 1990 SCMR 1377; Ghulam Shabbir v. Mst. Nur Begum and others PLD 1977 SC 75; Izzat Bakhsh v. Nazir Ahmad and 13 others PLD 1976 SC 508; Faizum alias Toor v. Nander Khan and others 2006 SCMR 1931; Akbar Ali Khan and others v. Mukamil Shah and others 2005 SCMR 431 and Haji Muhammad Saleem v. Khuda Bakhsh PLD 2003 SC 315 ref.

Asif (grandson of Bashir Ahmad) in person.

Nemo for Respondents.

Date of hearing: 28th February, 2019.

**JUDGMENT**

**YAHYA AFRIDI, J.**---This Court had granted leave to appeal in the petition moved by Bashir Ahmad (deceased) through his legal heirs, the present appellant, against the order of the learned Division Bench of the Lahore High Court, Lahore dated 23.05.2005 passed in Writ Petition No.136-R/82 in terms that:

> "Inter alia contends that the learned Division Bench of the Lahore High Court did not appreciate that the, petitioner was not a party in Writ Petition No.136/1982; that the said petition was allowed by the judgment dated 7.10.1982 and the same has adversely affected petitioner's right qua the land subject matter of this petition without hearing him.
>
> 2. Having heard the learned counsel for the petitioner at some length leave is granted to consider, inter alia, whether the learned High Court could have dismissed his application under section 12(2) notwithstanding the fact that the land subject matter of this petition was in petitioner's possession an allottee and he was not even impleaded as a party."

2. In essence, the issue in hand is whether the application under Section 12(2) of the Code of Civil Procedure, 1908 ("the C.P.C.") filed by the present appellant on 07.08.2002, challenging the decision of the learned High Court dated 17.10.1982 passed in Writ Petition No.136-R/82, was time-barred under The Limitatlon Act, 1908 ("the Act") or otherwise.

3. Before we consider the merits of the present appeal, it would be appropriate to note that the essential purpose of the Act is to prescribe the period of limitation for an aggrieved party to enforce his existing right. The said period for different nature of suits, appeals and applications have separately been prescribed in the various Articles contained in the First Schedule of the Act ("the schedule"). The legislature has, in Section 3 of the Act, also provided for peculiar circumstances in which the period of limitation prescribed in the various Articles of the Schedule can be extended or altered. The said provision reads:

"3. Dismissal of suit, etc., instituted etc., after period of limitation. Subject to the provisions contained in sections 4 to 25 (inclusive), every suit instituted, appeal preferred and application made after the period of limitation prescribed therefor by the First Schedale shall be dismissed, although limitation has not been set up as a defence."

(emphasis added)

4. One of the instances for extension of the period of limitation envisaged in the above provision is under Section 18, wherein an aggrieved person who has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded, or where any document necessary to establish such right has been fraudulently concealed from him. Faced with the above disposition, the time limited for instituting a suit or making an application by the aggrieved person is to commence from the time when the fraud first became known to him or, in the case of the concealed document, when he first had the means of producing it or compelling its production. Section 18 of the Act reads as under:

Section 18

"Effect of fraud. Where any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded, or where any document necessary to establish such right has been fraudulently concealed from him, the time limited for instituting a suit or making an application--

(a) against the person guilty of the fraud or accessory thereto, or

(b) against any person claiming through him otherwise than in good faith and for a valuable consideration,

shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or, in the case of the concealed document; when he first had the means of producing it or compelling its production."

5. A careful review of the above referred provisions reveals that Section 3 prescribes for the period of limitation for the institution of suits and the filing of appeals or applications, while Section 18 provides for the commencement of the period of limitation for only suits and applications to the exclusion of appeals. Therefore, Section 18 of the Act becomes an umbrella provision for all the Articles of the Schedule when a right in a suit or application is pleaded, inter alia, on the grounds of fraud or concealment.

6. Prior to insertion of Section 12(2) of the C.P.C. vide Ordinance No. 10 of 1980, any person aggrieved of the validity of a decree on the plea of fraud, misrepresentation or concealment of fact could institute a fresh suit challenging the same. In such circumstances, the period of limitation for filing a suit was to be determined in view of Article 95 of the Act read with Section 18 (supra). Article 95 of the Act reads:

Article 95

| Description of suit | Period of limitation | Time from which period begins to run |
|---|---|---|

| | | |
|---|---|---|
| To set aside a decree obtained by fraud, or for other relief on the ground of fraud. | [Three years] | When the fraud becomes known to the party wronged. |

7. With the insertion of Section 12(2) in the C.P.C., any person aggrieved of a judgment passed on fraud, misrepresentation or concealment of facts was barred to institute a fresh suit and was mandated to file an application agitating his grievance before the same court which passed the said decision. In the changed scenario, the limitation for filing the application would not be governed in terms of the provisions provided under Article 95 of the Act, as the same relates to suits and not an application, which was to be filed by an aggrieved party under Section 12(2) of the C.P.C.

8. There is no period of limitation prescribed in the Act for filing an application under Section 12(2) of the C.P.C. And Article 95, being a provision for filing a suit, would not be applicable for an application being filed under Section 12(2) of the C.P.C. Therefore, residuary Article 181 of the Act would come into play to govern the period of limitation.

9. Let us now review Article 181 of the Act, which reads:--

| Description of application | Period of limitation | Time from which period begins to run |
|---|---|---|
| 181. Application for which no period of limitation is provided elsewhere in this schedule or by section 48 of the Code of Civil Procedure, 1908 | Three years | When the ritght to apply accrues |

A careful reading of the above provision clearly reveals that the period of limitation to file an a oplication under Section 12(2) of the C.P.C. would be three years, and the crucial starting point for the period of limitation would be when the right to apply accrues to the aggrieved applicant, which in case of an application under Section 12(2) of the C.P.C. would be the date when the impugned decision based on fraud and concealment was passed. In case the aggrieved person has, by means of fraud, been kept from the knowledge of decision of the Court, he may then seek the extension of the commencing point of the period of limitation of three years from the date of the decision under Article 181 of the Act, to the date of knowledge of the said decision under section 18 (supra). Reference may be made to the case of Faizum alias Toor v. Nander Khan (2006 SCMR 1931), Mian Muhammad and others v. Pir Bakhsh and others (2005 SCMR 1505), Fida Hussain v. Ghulam Sarwar (2002 SCMR 1554), Mst. Amtul Kabir and others v. Safia Khatoon and others (1991 SCMR 1022) and Muhammad Iqbal and another v. Muhammad Alamgir and others (1990 SCMR 1377).

10. In the instant case, the right to apply accrued to the appellant when the writ petition of the private respondent was accepted by the High Court on 17.10.1982. The appellant, on the other hand, challenged the said decision under Section 12(2) of the C.P.C. after almost two decades, on 07.08.2002. Hence, the said petition, on the face of this essential fact, was time-barred within the contemplation of Article 181 of the Act. Since the appellant, in his petition, had pleaded fraud by the private respondents for not impleading him in their petition, and thereafter, concealing from him the knowledge of the decision of the High Court, his case would deserve consideration for the commencement of the period of limitation prescribed under Section 18 of the Act. In the present case, no specific date of knowledge has been stated in the application filed by the appellant under Section 12(2) of the C.P.C. However, in paragraph 11 of the said application, a vague reference to the date of knowledge as to the decision of the High Court has been made, i.e. when the partition proceedings were initiated by the private respondents. This vague assertion on such a crucial fact would not be of any legal avail to the appellant,

as a mere bold assertion of fraud or concealment would not legally suffice to establish the appellant's said claim. Moreover, it is by now a settled principle that when a person raises the ground of fraud or concealment to allege his claim or defend his stance, the same has to be specifically pleaded with clear particulars. Some of the leading cases decided by this court are Ghulam Shabbir v. Mst. Nur Begum and others (PLD 1977 SC 75), Izzat Bakhsh v. Nazir Ahmad and 13 others (PLD 1976 SC 508), Faizum alias Toor v. Nander Khan and others (2006 SCMR 1931), Akbar Ali Khan and others v. Mukamil Shah and others (2005 SCMR 431) and Haji Muhammad Saleem v. Khuda Bakhsh (PLD 2003 SC 315).

11. Therefore, after having viewed the matter from every angle, we find that the application of the appellant under Section 12(2) of the C.P.C., having been filed after a lapse of twenty years, and that too, without mentioning of any specific date of knowledge, was correctly rejected by the learned High Court in its impugned decision.

12. Accordingly, for the reasons stated hereinabove, the impugned decision passed by the learned High Court is in accord with the settled principles of civil administration of justice, and thus, warrants no interference by this Court. The instant appeal being bereft of merit is dismissed.

MWA/B-2/S Appeal dismissed.

**P L D 2019 Supreme Court 563**

**Present: Manzoor Ahmad Malik, Sardar Tariq Masood and Syed Mansoor Ali Shah, JJ**

**SECRETARY REVENUE DIVISION, ISLAMABAD---Appellant**

**Versus**

**IFTIKHAR AHMED TABASSAM and others---Respondents**

Civil Appeal No.227-L of 2010, decided on 21st March, 2019.

**(a) Accommodation Allocation Rules, 2002---**

----Rr. 15(2) & 25(4)(b)---Unauthorized retention of Government accommodation after retirement---Payment of standard rent with penal charges---Respondent (retired civil servant) contended that he was not liable to pay rent in terms of R.25(4)(b) of the Accommodation Allocation Rules, 2002 (`the Rules') due to a stay order granted by the Service Tribunal during pendency of his appeal---Held, that as per Rr.15(2) & 25(4)(b) of the Rules, respondent could have retained official accommodation after his retirement only for a period of six months and thereafter he was liable to pay standard rent for the remaining period---Stay order granted by the Service Tribunal was insignificant as appeal was not decided on merits and was finally withdrawn by respondent, resulting in the withdrawal of the stay order, as if it never existed---After the withdrawal of the appeal respondent had no justification not to pay the penal rent in accordance with the Rules---Department was entitled to recover standard rent with penal charges from the respondent as per R.25(4)(b) of the Rules---Appeal was allowed accordingly.

**(b) Constitution of Pakistan---**

----Art. 212(3)---Appeal to Supreme Court---Substantial question of law of "public importance"---Meaning---To constitute "public importance," the matter must go substantially beyond the facts of the case; it was not sufficient that a question of law arose in the case, but whether the question of law transcended the facts of the individual case and was substantial enough to have a significant bearing on the public interest---In the context of service laws a substantial question of law of public importance was a question that may arise out of a case but then surpassed the parties, to the case, and had an overarching effect on the public or a community or a class of civil servants---To determine what might constitute a substantial question of law of public importance under Art.212(3) of the Constitution, a good test was to determine whether any decision by the Supreme Court in the matter would have a bearing on the public or on the rights of a community or segment of civil servants and would not be restricted to the parties to the case---Any question of law that involved interpretation of the law, rules, instructions, notifications or governmental policy; that had not been finally settled by the Supreme Court or was not free from difficulty or ambiguity or called for discussion of alternative views; that highlighted a state of uncertainty in the law, arising from a contradictory precedent, or, that pointed out blatant abuse of due process, may pass for a substantial question of law of public importance.

Manzoor Elahi v. Federation of Pakistan PLD 1975 SC 66; Suo Motu Case No.13 of 2007 PLD 2009 SC 217; Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416; Sohail Butt v. Deputy Inspector General of Police 2011 SCMR 698; Watan Party v. Federation of Pakistan PLD 2012 SC 292 and Suo Motu Action Regarding Islamabad-Rawalpinid Sit-in/Dharna case PLD 2019 SC 318 ref.

**(c) Accommodation Allocation Rules, 2002---**

----R. 25(4)(b)---Constitution of Pakistan, Art. 212(3)---Substantial question of law of "public importance"---Scope---Unauthorized retention of Government accommodation after retirement---Payment of standard rent with penal charges---In the present case, the question was whether a civil servant could unauthorizedly retain official accommodation beyond a period of six months without paying penal rent---Hence, the case required interpretation of the Accommodation Allocation Rules, 2002 ('the Rules'), which constituted a substantial question of law of public importance because the decision by the Supreme Court would affect all those civil servants who were subject to the Rules---Appeal was allowed in circumstances.

Izharul Haque, Advocate Supreme Court for Appellant.

Hafiz Tariq Nasim, Advocate Supreme Court for Respondent No.1.

Date of hearing: 21st March, 2019.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J**.---The question before us is whether respondent No.1 is liable to pay standard rent (with penal charges as opposed to normal rent, for unauthorized retention of Govempaent accommodation i.e., House No.C-1, Customs Officers Colony, Gulberg-III, Lahore, for a period of more than six months of his retirement in terms of Accommodation Allocation Rules, 2002 ("Rules").

2. Brief background to this case is that respondent No.1 filed Miscellaneous Petition No.569/2006 in Appeal No.952(L)CS of 2004 before the Federal Service Tribunal ("Tribunal") on 10.07.2006 before his retirement on 09.10.2006 praying that he be allowed to retain the official accommodation after his retirement. He submitted that as his pension, GP Fund and other dues had not been paid, he was not in a position to rent a new house and, therefore, requested to retain the official accommodation in question for a period of six months. Interim relief was granted to respondent No.1 on 10.07.2006 but the main appeal came up for hearing on 06.01.2010 i.e., after three and a half years, when the appeal was withdrawn by respondent No.1 while the Tribunal observed in the said order that as respondent No.1 has retained official accommodation on the basis of a stay order he was not liable to pay any penal rent and was only liable to pay normal rent under the Rules.

3. Subsequently, respondent No.3 vide letter dated 24.01.2010 demanded respondent No.1 to pay accrued standard rent in the sum of Rs.626,551/- as per rule 25(4)(b) of the Rules. Respondent No.1, according to the said letter, was entitled to retain the official accommodation under rule 15(2) only for a period of six months, after his retirement, on payment of normal rent and thereafter was liable to pay standard rent (with penal charges) such penal rent as is provided under rule 25(4)(b) of the Rules, as the house had been retained beyond the said period without any authorization and in this case for over 3 years.

4. Respondent No.1 once again approached the Tribunal against demand raised through letter 24.01.2010 by making an application in an appeal which stood already withdrawn on 06.01.2010, complaining that inspite of earlier direction of the Tribunal he has been charged rent under rule 25(4)(b) of the Rules. The Tribunal while disposing of the application of respondent No.1 vide impugned order dated 27.03.2010 reiterated that the occupation of the official accommodation by respondent No.1 was due to the judicial order passed by the Tribunal and, therefore, respondent No.1 was not liable to pay the said amount. Hence this appeal with leave of the Court granted on 22.06.2010.

5. Learned counsel for the appellant Department submits that there is a clear abuse of power and process in the present case. The appeal filed by respondent No.1 had been withdrawn on 06.01.2010 and, therefore, the question whether respondent No.1 was liable to pay standard rent (with penal charges) over and above the normal rent remained undetermined. The stay order was contingent on the final determination of the question in the appeal but as the appeal stood withdrawn so was the stay order. The appeal having been withdrawn by respondent No.1, his application could not have been entertained and no direction could have been issued vide impugned order dated 27.03.2010 to the Department. Learned counsel on behalf of respondent No.1 has no convincing argument and keeps hiding behind the stay order granted by the Tribunal. He also submitted that the instant petition is not maintainable in terms of Article 212(3) of the Constitution as it does not raise any substantial question of law of public importance.

6. We have heard the learned counsel for the parties and have gone through the record of the case. As per Rules 15(2) and 25(4)(b) of the Rules, respondent No.1 could have retained official accommodation after his retirement only for a period of six months and thereafter he was liable to pay standard rent for the remaining period. The stay order granted by the Tribunal is insignificant in the

instant case as appeal was not decided on merits and was finally withdrawn by respondent No.1, resulting in the withdrawal of the stay order, as if it never existed. After the withdrawal of the appeal respondent No.1 had no justification not to pay the penal rent in accordance with the Rules. The entertainment of application filed by respondent No.1 by the Tribunal in an appeal which was no more pending before the Tribunal in itself amounts to abuse of the process. The legal position under the Rules is absolutely clear and there is no factual dispute regarding retention of official accommodation by respondent No.1.

7. As regards submission of learned counsel for respondent No.1 that no substantial question of law of public importance is raised in this case, it is necessary to examine the scope of Article 212(3) of the Constitution which is reproduced hereunder for reference:-

> "212(3). An appeal to the Supreme Court from a judgment, decree, order or sentence of an Administrative Court or Tribunal shall lie only if the Supreme Court, being satisfied that the case involves a substantial question of law of public importance, grants leave to appeal."

8. Jurisdiction of this Court can be invoked only if the Court is satisfied that the case involves a substantial question of law of public importance. In order to fully understand the import of this Article, a good starting point is the parliamentary debate on Article 212(3) of the Constitution before the promulgation of the Constitution of the Islamic Republic of Pakistan, 1973.

> "Mr. Abdul Hafeez Pirzada: ...I would like to submit that we are establishing the supremacy of the Supreme Court over the Special Tribunals and Administrative Courts which are being set up; but in order to prevent flooding petitions before the Supreme Court on trivial matters and no questions of fact or on matters concluded by administrative tribunal on questions of fact and appraisal of evidence. We have provided these safeguards so that the Supreme Court shall not be flooded with petitions from judgments of administrative courts and thus destroy the object of creating Administrative Courts ....So while recognizing the principle that safety valve should be provided inasmuch as if there are any errors of law committed by Administrative Courts remedy should be available if special leave is granted by the Supreme Court. We also want to prevent frivolous and vexatious petitions from going to the Supreme Court and thus impeding the task of Supreme Court in adjudicating upon its normal cases, usual exercise of its normal jurisdiction. Therefore, what has been said is this that from the judgment, decree etc. of an Administrative Court an appeal may lie to the Supreme Court, only if the Supreme Court grants special leave, after being satisfied that there is a substantive question of law of general public importance involved in the petition. This will be a sufficient safeguard to the Government servants and also this will be recognition of the principle of the supremacy of the Supreme Court as far as judicature is concerned[1]."

9. The purpose of this limited jurisdiction assessed from the parliamentary debate was to restrict the jurisdiction of the Court in order to avoid flooding of Supreme Court with matters which do not raise any substantial question of public importance and recognizing that Tribunal is the final forum for the determination of facts. Under Order XXIV of the Supreme Court Rules, 1980 a petition for leave to appeal from the judgment, decree or order of an Administrative Court or Service Tribunal shall specify succinctly in separate paragraphs, the substantial questions of law of public importance upon which leave is sought. What then is a question of public importance? In the case of Manzoor Elahi v. Federation of Pakistan (PLD 1975 SC 66), this Court held that "the term 'public' is invariably employed in contradistinction to the terms private or individual, and connotes, as an adjective, something pertaining to, or belonging to, the people, relating to a nation, state, or community. In other words, it refers to something which is to be shared or participated in or enjoy by the public-at-large, and is not limited or restricted to any particular class of the community." The judgment goes ahead to explain that "whatever else it may mean must include a purpose, that is an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally

concerned." In Suo Motu case No.13 of 2007 (PLD 2009 SC 217) this Court held that "public importance of a case is determined... on question affecting the legal rights and liberties of the people at large, even though the individual who may have brought the matter before the Court is of no significance". In Benazir Bhutto v. Federation of Pakistan (PLD 1988 SC 416), it was held that public importance should be viewed with reference to the freedom and liberties granted under the Constitution, their protection and invasion of these rights in a manner, which raises a serious question regarding their enforcement, irrespective of the fact whether such infraction of right, freedom or liberty is alleged by an individual or a group of individuals. In Sohail Butt v. Deputy Inspector General of Police (2011 SCMR 698) it was held that "public importance must include a purpose or aim in which general interest of the community as opposed to the particular interest of the individuals is directly and vitally concerned." In Watan Party v. Federation of Pakistan (PLD 2012 SC 292), this Court held that "it is settled that public importance must include a purpose or aim in which the general interest of the community as opposed to the particular interest of the individuals is directly and vitally concerned". Finally in Suo Motu Action regarding Islamabad - Rawalpindi Sit-in/Dharna case PLD 2019 SC 318 this Court held that public importance must involve the rights of the public.

10. To constitute "public importance," the matter must go substantially beyond the facts of the case. It is not sufficient that a question of law arises in the case, but whether the question of law transcends the facts of the individual case and is substantial enough to have a significant bearing on the public interest.

11. In the context of service laws a substantial question of law of public importance is a question that may arise out of a case but then surpasses the parties, to the case, and has an overarching effect on the public or a community or a class of civil servants. To determine what might constitute a substantial question of law of public importance under Article 212(3), a good test is to determine whether any decision by this Court in the matter will have a bearing on the public or on the rights of a community or segment of civil servants and will not be restricted to the parties to the case. The remedy under Article 212(3) is, therefore, not an appeal in the ordinary sense of the word but is a unique constitutional jurisdiction that is to be exercised if the question of law raised before the Court impinges on the rights of the public or a segment of public or a community of civil servants. Thus many questions of law (i) that involves interpretation of the law, rules, instructions, notifications or governmental policy; (ii) that has not been finally settled by the Supreme Court or is not free from difficulty or ambiguity or calls for discussion of alternative views[2] (iv) that highlights a state of uncertainty in the law, arising from a contradictory precedent or (v) that points out blatant abuse of due process, may pass for a substantial question of law of public importance. On the other hand a mere factual inter-party dispute, devoid of the nature of questions of law, mentioned above, will not attract the jurisdiction of this Court under Article 212(3) of the Constitution.

12. The framers of our Constitution by giving exclusivity to the constitutional jurisdiction under Article 212(3) also underlined that the Tribunal is the final forum of fact and the law (other than a substantial question of law of public importance, as discussed above). As a matter of background it is useful to remember that a civil servant has a remedial structure of in-house appeal or representation before the concerned authority and then the facility of appea1 before the Service Tribunal. This adjudicatory or dispute resolution process reaches finality at the Tribunal unless the aggrieved party can invoke the constitutional jurisdiction under Article 212(3) by raising substantial question of public importance.

13. In this case the question is whether a civil servant can unautiorizedly retain official accommodation beyond a period of six months without paying penal rent. Hence, the case requires interpretation of the Rules. This constitutes a substantial question of law of public importance because the decision by this Court would affect all those civil servants who are subject to the Accommodation

Allocation Rules, 2002. This case also highlights abuse of process and jurisdiction of the Tribunal, which is also a question of public importance and attracts the jurisdiction of this Court.

14. For the above reasons this appeal is allowed and impugned order dated 27.03.2010 passed by the Tribunal is set aside. Appellant Department is entitled to recover Standard Rent as per letter dated 24.01.2010 from respondent No. 1.

MWA/S-12/S Appeal allowed.

**P L D 2019 Supreme Court 577**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed, JJ**

**SHAUKAT ALI---Appellant**

**Versus**

**The STATE and others---Respondents**

Criminal Appeal No.133-L of 2017, decided on 16th May, 2019.

(On appeal from the judgment dated 9-2-2015 passed by the Lahore High Court, Lahore in Criminal Appeal No.381 of 2012 and CSR No.7-T of 2012).

**(a) Penal Code (XLV of 1860)---**

----Ss. 302(b), 365-A & 201---Anti-Terrorism Act (XXVII of 1997), S.7(e)---Qatl-i-amd, kidnapping or abduction for extorting property, valuable security etc., causing disappearance of evidence of offence, acts of terrorism---Reappraisal of evidence---Confessional statement before Judicial Magistrate, retraction from---Reliance upon such retracted confessional statement for conviction---Prosecution's reliance was primarily upon accused's confessional statement before a Judicial Magistrate---Accused when indicted claimed trial and retracted from his confessional statement, nonetheless, on a careful examination, his confessional statement was free from all taints---Such statement was seemingly voluntary without duress or inducement,and inculpatory in nature---Confessional statement reflected a complete and truthful narration of event leading to deceased's death---Magistrate had taken due care to administer necessary warnings to the accused and recorded each detail thereof in his own hand---Confessional statement did not appear to have been fabricated to advance prosecution's case and thus could be squarely relied upon without any reflection on safe administration of criminal justice---Retraction notwithstanding, the confessional statementwas in synchronization with the events leading towards deceased's death and recovery of dead body on accused's disclosure---Circumstances excluded every hypothesis of innocence of accused and thus the Courts below had rightly relied upon the retracted confessional statement---Conviction of accused was maintained in circumstances---Appeal was dismissed.

**(b) Criminal trial---**

----Conviction---Confessional statement before Magistrate, retraction from---Retracted confession could form basis for conviction if found voluntary and truthful.

**(c) Penal Code (XLV of 1860)---**

----Ss. 302(b), 365-A & 201---Anti-Terrorism Act (XXVII of 1997), S.7(e)---Qatl-i-amd, kidnapping or abduction for extorting property, valuable security etc., causing disappearance of evidence of offence, acts of terrorism---Reappraisal of evidence---Sentence, reduction in---Death sentence reduced to imprisonment for life---Predominant purpose behind the crime was to extract ransom and it was in that process that the deceased lost his life due to suffocation and use of excessive tranquilizers to subdue him---Viewed from such angle alteration of death penalty into imprisonment for life on each count would be appropriate---Consequently, penalty of death awarded to accused on three counts was altered into imprisonment for life on each count---Appeal was dismissed accordingly.

Mian Subah Sadiq Klasson, Advocate Supreme Court for Appellant.

Mazhar Sher Awan, Additional Prosecutor General Punjab for the State.

Date of hearing: 16th May, 2019.

**JUDGMENT**

**QAZI MUHAMMAD AMIN AHMED, J.---**Through leave of the Court, impugned herein is judgment dated 9.2.2015 of a learned division bench of Lahore High Court whereby appellant's conviction and sentence returned by a learned Anti Terrorism Court vide judgment dated 23.2.2012 is maintained.

2. Naveed alias Guddu, hereinafter referred to as the deceased, left home after receipt of a phone call at 7.30 p.m. on 22.8.2011. Upon failure to return, his disappearance was reported by his brother, Muhammad Rafique, PW-7. On 25.8.2011, the family received a phone call, demanding ransom of Rs.500,000/- in pursuance whereto the witnesses went to the designated place where they saw the appellant who decamped from the scene. The incident was reported to the police in consequence whereof the appellant was arrested on 26.8.2011 and upon his disclosure dead body of the abductee was retrieved, wrapped in a jute bag. It is in this backdrop that the appellant alongside Shahzad, co-accused were indicted before the Court; third accused Nadeem Hussain is still away from law. The learned Trial Judge while acquitting Shahzad co-accused from the charge convicted the appellant under Sections 201, 302(b), 365-A of Pakistan Penal Code, 1860 read with Section 7(e) of Anti Terrorism Act, 1997; he was sentenced to death on three counts along with five years' R.I. under Section 302 of the Code ibid with fine of Rs.5,000/- or to undergo four months' S.I. in lieu thereof.

3. Muhammad Rafique, PW-7, Muhammad Shehbaz, PW-9 and Fida Muhammad, PW-10 are prominent amongst the witnesses to drive home the charge. They have furnished details preceding as well as subsequent to deceased's disappearance. The investigating officer also collected cell phone data to establish conversations between the captor and the family. However, prosecution's reliance is primarily upon appellant's confessional statement dated 16.9.2011 before a judicial magistrate. It constitutes the mainstay.

4. Though the appellant when indicted claimed trial and retracted from his confessional statement during his examination under Section 342 of the Code of Criminal Procedure, 1898, nonetheless, on a careful examination we have found his confessional statement free from all taints. Seemingly voluntary without duress or inducement; inculpatory in nature the confessional statement reflects a complete and truthful narration of event leading to deceased's death. The learned Magistrate has taken due care to administer necessary warnings to the appellant and recorded each detail thereof in his own hand. It does not appear to have been fabricated to advance prosecution's case and thus can be squarely relied upon without any reflection on safe administration of criminal justice. It is by now well settled that a retracted confession can form basis for conviction if found voluntary and truthful. Retraction notwithstanding when examined in the totality of circumstances, the disclosure is synchronized with the events leading towards deceased's death and recovery of dead body on appellant's disclosure. These circumstances exclude every hypothesis of his innocence and thus the Courts below have rightly relied upon the confessional statement, there being no space to entertain any hypothesis of innocence. Guilty verdict calls for no interference; the appeal fails. However, in so far as question of quantum of sentence

to be exacted from the appellant is concerned it requires reconsideration; in the totality of circumstances, it is unmistakably found that predominant purpose behind the crime was to extract ransom and it was in that process that the deceased lost his life due to suffocation and tranquilizer, excessively administered to subdue him; taken from this angle, alteration of death penalty into imprisonment for life on each count would be a conscionable wage in circumstances. Consequently, penalty of death is altered into imprisonment for life on each count with amounts of fine and compensation kept intact; sentences shall run concurrently with benefit of Section 382-B of the Code ibid. With the above modification, Criminal Appeal 133- L/2017 is dismissed.

MWA/S-29/S Appeal dismissed

**P L D 2019 Supreme Court 580**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed, JJ**

**MUHAMMAD YAQOOB---Appellant**

**Versus**

**The STATE---Respondent**

Criminal Appeal No.154-L of 2017, decided on 30th May, 2019.

(On appeal from the judgment dated 10-2-2015 passed by the Lahore High Court, Lahore in Criminal Appeal No.463 of 2010 and CSR No26-T/2010).

**(a) Penal Code (XLV of 1860)---**

----S. 302---Anti-Terrorism Act (XXVII of 1997), S. 7(a)---Murderous assault in court premises---Reappraisal of evidence---Conviction under Anti-Terrorism Act, 1997---Scope---Accused was present in court to record his statement as a witness when the murderous assault took place and accused allegedly fired at the complainant side---Anti-Terrorism Court sentenced the accused to death on two counts---Held, that admittedly there was enmity raging between both parties---Accused was arrested on the spot in the court room and he had not denied his presence during the episode albeit with the story of uncalled for provocation offered by the deceased persons---Three casings secured by the investigating officer though in commensurate with the number of alleged fire shots,nonetheless, were opined to have been fired from the weapon carried by the accused---Totality of circumstances pointed to the accused's guilt, and he had rightly been convicted on the charge of homicide, however his conviction under the Anti-Terrorism Act, 1997 was not in consonance with the law declared by the Supreme Court in the cases reported as Amjad Ali and others v. The State (PLD 2017 SC 661) and Farooq Ahmad v. The State and another (PLJ 2017 SC 408) and was, therefore, set aside---Appeal was dismissed with the said modification.

Amjad Ali and others v. The State PLD 2017 SC 661 and Farooq Ahmad v. The State and another PLJ 2017 SC 408 ref.

**(b) Penal Code (XLV of 1860)---**

----S. 302---Murderous assault in court premises---Re-appraisal of evidence---Sentence, reduction in---Death sentence altered to imprisonment for life---Accused was present in court to record his statement as a witness when the murderous assault took place and accused allegedly fired at the complainant side---Trial Court sentenced the accused to death on two counts---Held, that the accused himself sustained injuries during the occurrence receipt whereof was denied by the prosecution witnesses---Such circumstance clouded moments immediately preceding the occurrence into mystery, particularly when in the given background, the accused was appearing only as a witness and had no exclusive motive, targeted upon the deceased persons---Alteration of death penalty awarded to accused into imprisonment for life would not be unconscionable in circumstances---Consequently, penalty of death awarded to accused on both counts was altered into imprisonment for life, with both sentences to run concurrently---Appeal was dismissed with the said modification.

Saqib Akram Gondal, Advocate Supreme Court for Appellant.

Ch. M. Mustafa, Deputy Prosecutor General for the State.

Date of hearing: 30th May, 2019.

**JUDGMENT**

**QAZI MUHAMMAD AMIN AHMED, J.---**Gohar Zaman, Muhammad Afzal, Muhammad Ashraf, Babar, Zulfiqar Ali, Shiraz Ahmed, Asad Abbas, Muhammad Suleman, Muhammad Bashir, Arshad Bhatti, Haji Mushtaq and Muhammad Amjad, accused in a case of homicide, appeared before a learned Additional Sessions Judge within the precincts of District Courts, Gujrawnwala on 11-7-2009; posted for recording of evidence, the case was, however, adjourned for 17-7-2009 and it was soon thereafter, inside the court-room, the appellant alongside Muhammad Mushtaq, Haji Muhammad

Siddique, Qaisar Munir with two unknown persons, differently armed, emerged at the scene; they resorted to firing; the appellant, cited as a witness in the said case, with a .30 caliber pistol, fired upon Gohar Zaman and Arshad Bhatti followed by Muhammad Siddique who targeted Muhammad Ashraf, PW-14 while Muhammad Mushtaq and Qaisar Munir fired upon Muhammad Bashir, given up PW, and Muhammad Afzal, PW-12, respectively; they were joined by the unknown assailants; according to the crime report, lodged by Zeeshan Ilyas, PW-13, one Gogi was also shot during the occurrence. The assailants took to the heels except the appellant, apprehended at the spot and handed over to the police with two .30 caliber pistols, one found forensically wedded with three casings, secured during spot inspection. As the investigation progressed, Qaiser Munir and Haji Muhammad Siddique were let off; Muhammad Mushtaq, co-accused is still away from law. Prosecution is clueless about the unknown accused till date. The appellant alone was indicted before an Anti Terrorism Court; he was returned a guilty verdict with penalty of death on two counts, upheld by a learned Division Bench of Lahore High Court vide impugned judgment dated 10.02.2015 vires whereof are being assailed through leave of the Court.

2. Prosecution case, predominantly, is founded on common grounds; these include, enmity long raging between the two factions, hearing of the case, appearance of the deceased and the appellant being amongst the witnesses, on the fateful day, at the venue, a court-room as well as appellant's arrest therefrom. Though with some reticence, nonetheless, the appellant has not denied his presence during the episode albeit with the story of a most uncalled for provocation offered by the deceased. Three casings secured by the Investigating Officer though incommensurate with the number of alleged fire shots, nonetheless, were opined to have been fired from the weapon carried by the appellant. Totality of circumstances does not space any hypothesis other than appellant's guilt; he has rightly been convicted on the charge of homicide, however, quantum of sentence, notwithstanding the venue, warrants reconsideration. It is prosecution's own case that the appellant attended the Court to record his statement as a witness; the case was adjourned without recording of evidence and it is subsequent thereto that as many as six accused started firing upon the deceased and the PWs; two from amongst them have since been exonerated, never tried even through private complaint; Muhammad Mushtaq along with two unknown accomplices is still away from law; appellant's acquittal from the charge of attempted homicide has not been challenged. Appellant himself sustained injuries receipt whereof is denied by the prosecution witnesses. These circumstances cloud moments immediately preceding the occurrence into mystery, particularly when in the given background, the appellant had no exclusive motive, targeted upon the deceased. In this backdrop, as a cumulative impact, alteration of death penalty into imprisonment for life would not be unconscionable in circumstances. Consequently, penalty of death on both counts is altered into imprisonment for life; sentences shall run concurrently with benefit of Section 382-B of the Code of Criminal Procedure, 1898. Though the aftermaths far from being benign, nonetheless, having no nexus with the situations and effects thereof, contemplated by Section 6 of the Anti Terrorism Act, 1997, appellant's conviction under section 7(a) thereof is not inconsonance with the law declared by this Court in the cases reported as Amjad Ali and others v. The State (PLD 2017 SC 661) and Farooq Ahmad v. The State and another (PLJ 2017 SC 408) and is, therefore, set aside. With the above modification, Criminal Appeal is dismissed.

MWA/M-34/S Appeal dismissed.

**P L D 2019 Supreme Court 592**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed, JJ**

**MUHAMMAD PERVAIZ---Appellant**

**Versus**

**THE STATE and other---Respondents**

Criminal Appeal No.37-L of 2016, decided on 6th May, 2019.

(On appeal from the judgment dated 7-10-2013 passed by the Lahore High Court, Lahore in Criminal Appeal No.1511 of 2009).

**(a) Penal Code (XLV of 1860)---**

----S. 302(b)---Qanun-e-Shahadat (10 of 1984), Art. 121---Reappraisal of evidence---Husband accused of murdering his wife in the matrimonial house---Failure on part of husband to satisfactorily explain cause of death---Adverse presumption---Scope---Silence or implausible explanation by the accused husband could not be equated with failure within the contemplation of Art. 121 of Qanun-e- Shahadat, 1984---Prosecution was not absolved from driving home the charge by itself on the strength of positive proof---Grievously unsafe to convict suspects on presumptions or upon failure to establish their innocence---Accused was acquitted of the charge of murder in circumstances.

**(b) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Reappraisal of evidence---Accused was alleged to have murdered his wife in the matrimonial home---Trial Court convicted the accused under S.302(b), P.P.C and sentenced him to death, which sentence was reduced to imprisonment for life by the High Court---Held, that once the deceased's brother and his accomplice, both purported eye-witnesses, had visited the deceased to take her back, apparently there was no occasion for them to change their plans, and in case they were allegedly present in the next room, there was no compulsion for the accused-husband to kill his wife at the risk of retaliation or prosecution---Prosecution script was far from being plausible and it was so viewed by the High Court itself when it observed that presence of purported eye-witnesses may be suspicious at the time of occurrence---By extending the benefit of doubt to the accused, appeal was allowed and he was acquitted of the charge of murder.

**(c) Criminal trial---**

----Conviction---Proof---Suspicions could not substitute legal proof nor a suspect could be condemned on the basis of moral satisfaction in the absence of evidentiary certainty.

**(d) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Reappraisal of evidence---Accused and co-accused assigned similar role of strangling the deceased---Same set of evidence forming basis of acquittal of the co-accused but conviction of accused---Held, that the evidence of prosecution qua the co-accused was rejected by the courts below and he was acquitted---Role assigned to the acquitted co-accused was inexorably intertwined with the accused's alleged participation in the crime, thus it would be unsafe to maintain the conviction of accused in such circumstances---Appeal was allowed and accused was acquitted of the charge of murder.

Nawab Ali Mayo, Advocate Supreme Court for Appellant.

Mehmud ul Islam, Advocate-on-Record (with caveat) for Respondent.

Nemo for the Complainant.

Mazhar Sher Awan, Additional Prosecutor General for the State.

Date of hearing: 6th May, 2019.

**JUDGMENT**

**QAZI MUHAMMAD AMIN AHMED, J.---**Muhammad Pervaiz, appellant is in receipt of a guilty verdict; he was indicted for committing qatl-e-amd of Kausar Bibi, no other than his better half; it is

affirmed by the learned High Court vide impugned judgment dated 7.10.2013 vires whereof are being challenged through leave of the Court.

2. Prosecution case is structured on the statement of deceased's brother, Muhammad Arshad, PW; according to him, the marriage was on the rocks as the bride failed to bring dowry to the expectation of her in laws. Upon a message by the deceased, Muhammad Arshad, PW along with Mehmood, PW visited the former to take her back, however, upon threats by the appellant they preferred to stay overnight when in midst thereof they were attracted by the hue and cry to see the deceased being strangulated by the appellant with the assistance of Khalid co-accused; they attempted to rescue the deceased without success. Upon indictment, the accused claimed trial to confront prosecution evidence; they blamed dacoits to have murdered the deceased during the fateful night. While acquitting the co-accused, the learned trial Judge convicted the appellant under clause (b) of Section 302 of Pakistan Penal Code, 1860 and sentenced him to death with a direction to pay Rs.100,000/- as compensation or to undergo six month S.I. in the event of default, a view affirmed by the learned High Court albeit with alteration of death penalty into imprisonment for life with benefit of Section 382-B of the Code of Criminal Procedure.

3. Learned counsel for the appellant contends that the appellant could not have been convicted merely upon his failure to satisfactorily explain as to what befell upon his life during the fateful night. He adds that presence of witnesses is extremely doubtful and even otherwise cannot sustain the charge after they had been disbelieved qua identically placed co-accused; the bottom line is that it would be unsafe to maintain conviction. Contrarily, the learned Law Officer vehemently defends appellant's conviction on the ground that plea advanced by him being preposterous was rightly rejected which in retrospect established his presence at the spot, thus there was no space to entertain any hypothesis of his innocence.

4. Homicidal death is not in dispute; appellant's plea that

dacoits intruded the household and strangulate the deceased has not found favour with the Courts below. The appellant has also not denied his presence, however these factors by themselves cannot hypothesize presumption of appellant's guilt in the absence of positive proof. Silence or implausible explanation cannot equate with failure within the contemplation of Article 121 of Qanun-e-Shahadat Order, 1984, thus does not absolve the prosecution to drive home the charge by itself on the strength of positive proof. It would be grievously unsafe to convict suspects on presumptions or upon failure to establish their innocence. Possibilities are infinite and do not necessarily include the guilt alone.

A criminal case is to be essentially decided on the basis of evidence adduced by the prosecution. Once the witnesses had visited the deceased to take her back, apparently there was no occasion for them to hold in abeyance the purpose of their detour and in case they were present and in the next room, there was no compulsion for the appellant to do away with the deceased at the risk of retaliation or a certain prosecution. The script is far from being plausible and it is so viewed by the learned High Court itself in the following words "Presence of PWs may be suspicious at the time of occurrence . . . . ". It is astonishing that despite above observation, the High Court preferred to maintain the conviction. Suspicions are after all suspicions and cannot substitute the legal proof nor a suspect can be condemned on the basis of moral satisfaction in the absence of evidentiary certainty. Yet another circumstance to cast away the conviction is rejection of prosecution evidence qua Khalid co-accused. Role assigned to the acquitted co-accused is inexorably intertwined with appellant's alleged participation in the crime and thus even strongest corroboration, otherwise hopelessly lacking cannot rescue the charge. It would be unsafe to maintain the conviction, therefore by extending the benefit of doubt, Criminal Appeal No.37-L/2016 is allowed, impugned judgment is set aside. The appellant shall be released forthwith, if not required in any other case.

MWA/M-23/S Appeal allowed.

**P L D 2019 Supreme Court 595**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed, JJ**

**MUHAMMAD AZHAR HUSSAIN and anohter---Appellants**

**Versus**

**THE STATE and another---Respondents**

Criminal Appeal No.11-P/2017 and Jail Petition No.726 of 2017, decided on 2nd May, 2019.

(On appeal from the judgment dated 19-4-2016 passed by the Peshawar High Court, Mingora Bench (Dar-ul-Qaza) Swat in Cr.As. 178 and 216-M of 2014 with M.R. 9-M and 10-M of 2014).

**(a) Penal Code (XLV of 1860)---**

----S.302(b)---Qatl-i-amd---Reappraisal of evidence---Benefit of doubt---Accused and co-accused were convicted under S. 302(b), P.P.C and sentenced to death for killing a minor---Doubtful confessional statements---Fate of the prosecution's case was hinged upon confessional statements made by the accused and co-accused before a Magistrate---Both of them arrived before the Magistrate on the same day, one after another and gave confessions in a comfortable unison, in tune with the prosecution case, which reasonably excluded hypothesis of a voluntary disclosure, free from the taints of inducement or persuasion---Such confessional statements seemed to be more of anegotiated settlement rather than a volitional representation, and there was remarkable similarity in both the statements, in terms of sequential order as well as the pattern, and surprisingly both such statements were very exhaustive---Testimony of one of the main prosecution witnesses who last saw the minor with the accused was in conflict with the confessional statements---Evidence of said witness could not be accepted without excluding confessional statements from consideration and vice versa---In both the confessional statements, the accused and co-accused stated to have thrown weapon of offence, a churri in the river, however according to recovery memo, it was recovered with blood stains from inside bushes a day before confessional statements were recorded---Both the accused and co-accused were entitled to the benefit of doubt in such circumstances and were acquitted accordingly.

**(b) Criminal Procedure Code (V of 1898)---**

----S. 364---Confessional statement of accused, recording of---Procedure---Practice of using a printed form to administer warnings to the accused before recording his statement---Confession may entail formidable consequences for an accused facing indictment and thus it was incumbent upon the Magistrate to ensure that the maker consciously comprehended the consequences of his choice---Magistrate himself, face to face, was to faithfully communicate to the accused all the relevant warnings,as contemplated by S.364 of the Code of Criminal Procedure,1898, which was a surer way to establish that the confession was free from all taints---Supreme Court observed that it did not approve the practice of a printed form to administer warnings to the accused and obtaining his signatures on the same.

Khalid Mehmood, Advocate Supreme Court and Zahoor Qureshi, Advocate-on-Record for Appellant.

Petitioner through Jail.

Mujahid Ali Khan, Additional Advocate General, Khyber Pakhtunkhwa for the State.

Date of hearing: 2nd May, 2019.

**ORDER**

**QAZI MUHAMMAD AMIN AHMED, J.---**Muhammad Azhar Hussain, appellant in Criminal Appeal No. 11 -P of 2017, was tried along-side Al-Haj-ud-Din, petitioner in J.P. No.726 of 2017 for committing qatl-i-amd of Fida-ur-Rehman; they were convicted under clause (b) of Section 302 of Pakistan Penal Code, 1860 and sentenced to death with direction to pay compensation in the sum of Rs.100,000/-each or to undergo six months' S.I. in the event of default vide judgment dated 28.6.2014 upheld by the learned Peshawar High Court vide impugned judgment dated 19.4.2016; bound by a common thread these are being decided through this single judgment.

2. Fida-ur-Rehman, deceased, aged 4/5, went missing; he was spotted lying dead in a maize field. According to autopsy report dated 24.8.2012, his neck was found slit with sharp edge weapon; medical officer observed certain marks of resistance as well as a rounded small piece of glass in his hand. As the investigation progressed, the accused named above were hauled up by the police; they were produced before a Judicial Magistrate on 5.9.2012 when they, one by one, confessed the guilt; their confessional statements are prosecution's mainstay. It is alleged that both the accused were jointly carrying on with one Mst. Khadija and on the fateful day they went to visit her while she was alone; as they were busy in foreplay, the deceased surprised them; he threatened disclosure, however the accused persuaded him for silence in lieu of Rs. 20/-. Later in the day they again came across the child, followed him and finally intercepted near a maize field; they subdued the child, constricted his neck with the string and afterward slit it with a knife. During the trial, Saleema Bibi alias Naseem Bibi, mother of Muhammad Azhar Hussain, appellant appeared as PW-22; according to her statement, she saw Al-Haj-ud-Din while taking a small child in his lap heading towards the maize field; accused inquired from the lady about her son who according to her was about to set out to a different location. Amongst the array of witnesses, the prosecution has primarily relied upon the confessional statements to drive on the charge.

3. Learned counsel for the convicts contends that enormity of the crime notwithstanding, reliance on the confessional statements by the courts below was fraught with multiple errors, heavily impinging upon the principle of safe administration of criminal justice; according to him, the statements were inherently flawed; these were contradicted by prosecution's own witness, Saleema Bibi, PW-22, a dichotomy that escaped notice of the courts below. The learned Law Officer has vehemently defended the impugned judgments by highlighting the gruesome nature of the crime. According to him, there was no earthly reason either for the devastated family or the police to swap the real offenders; every hypothesis of their innocence stood excluded, concluded the learned Law Officer.

4. The fate of the prosecution's case is hinged upon confessional statements, made by the convicts before a Magistrate and it is on the basis of their disclosures that they have been handed down the ultimate corporal penalty, irreversible in nature and thus warrants a most careful scrutiny. Though examined separately, nonetheless their arrival before the Magistrate on the same day, one after another on 5.9.2012 is quite intriguing; two individuals in an extreme crisis situation, conducting themselves in a comfortable unison, both being in tune with the prosecution, reasonably excludes hypothesis of a voluntary disclosure, free from the taints of inducement or persuasion; it appears to be more a negotiated settlement rather than a volitional representation; there is a remarkable similarity in both the statements, in terms of sequential order as well as the pattern these were reduced into writing, otherwise surprisingly exhaustive. A person making his breast clean is not expected to be that expressive. The statements contain prosecution's encyclopedia with all the relevant details required to prosecute the case; it does not appear to be an exercise by a repentant to bring himself at peace with his conscious. Another predicament for the prosecution is conflict between testimony of Saleema Bibi, PW-22 with the confessions. Going by the later, both the convicts remained together right from intercepting the child to finally dumping him in the field whereas according to the former she saw Al-Haj-ud-Din alone while taking the child in his lap towards the field. This is also not in line with the disclosure that the accused first constricted his neck with the string before they jointly threw him in the field. These positions are irreconcilable; evidence of Saleema Bibi, PW-22 cannot be accepted without excluding confessional statements from consideration and vice versa. Similarly, in both the statements, the accused stated to have thrown weapon of offence, a churri in the river, however according to memo, exhibit PW-6/ 11, dated 4.9.2012 it was recovered with blood stains from inside the bushes a day before confessional statements were recorded; if Al-Haj-ud-Din had led to the recovery of weapon he had no occasion to omit this important investigative step in his exhaustive narrative and in case it is presumed as factually incorrect, would tremor the very basis of the

confessions. We have also not felt comfortable with the printed form, purportedly used to administer warnings to the accused before recording of their statements. A confession may entail formidable consequences for an accused facing indictment and thus it is incumbent upon the Magistrate to ensure that the maker consciously comprehends the consequences of his choice and thus it is most important that the Magistrate himself, face to face, faithfully communicates to the accused all the relevant warnings, as contemplated by Section 364 of the Code of Criminal Procedure, 1898, a surer way to establish that the confession is free from all taints, thus we would not approve convenience procuring accused's signature on a printed format. On an overall analysis of the prosecution case, confessional statements cannot be relied upon without potential risk of error. In the absence of evidentiary certainty, it would be unsafe to maintain the convictions on moral satisfaction that certainly cannot equate with legal proof. The convicts are entitled to the benefit of doubt. Criminal Appeal No. 11-P of 2017 is allowed and as a natural corollary Jail Petition No.726 of 2017 is converted into appeal and allowed. Impugned judgments are set aside. They shall be set at liberty forthwith, if not required in any other case.

MWA/M-20/S Appeal accepted.

**P L D 2019 Supreme Court 669**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ai Shah and Qazi Muhammad Amin Ahmed, JJ**

**MUHAMMAD NAEEM and another---Appellants**

**Versus**

**The STATE and others---Respondents**

Criminal Appeals Nos.81-L and 82-L of 2017, decided on 10th May, 2019.

(On appeal from the judgment of Lahore High Court, Lahore dated 27-1-2016, passed in Crl.A.No.551 of 2009).

**(a) Control of Narcotic Substances Act (XXV of 1997)---**

----Ss. 2, 3 & 9(c)---Possession of narcotic---Liquid mixture---Percentage of narcotic, determination of---Requirement of calculating the percentage of narcotic drug in a liquid preparation or mixture was mandatory as per S. 3 of the Control of Narcotic Substances Act, 1997 read with the definitional test under S. 2 of the Act.

Muhammad Imran v. State 2011 SCMR 1954 and Taimoor Khan v. State 2016 SCMR 621 ref.

**(b) Control of Narcotic Substances Act (XXV of 1997)---**

----Ss. 3 & 9(c)---Possession of narcotic---Intoxicating liquid---Report of Chemical Examiner failing to mention the percentage of "morphine" found in the intoxicating substance---Effect---Such fatal omission made the report of the Chemical Examiner inconclusive, leaving it uncertain whether the substance passed for a narcotic drug, and the same was unreliable to support conviction under the Act.

**(c) Administration of justice---**

----Court being a neutral arbiter had to dispassionately appreciate, appraise, examine and weigh the evidence placed before it, rather than by ignoring the evidence and embarking on a probing journey guided by emotions, sentiments and sense of self-styled justice pegged on the lofty notion of societal reform.

**(d) Constitution of Pakistan---**

----Art. 10-A---Right to fair trial---Scope---Court could not allow one of the parties to fill lacunas in their evidence or extend a second chance to a party to improve their case or the quality of the evidence tendered by them---Any such step would tarnish the objectivity and impartiality of the court which was its hallmark---Such favoured intervention, no matter how well-meaning, struck at the very foundations of fair trial, which was recognized as a Fundamental Right under Art. 10-A of the Constitution.

**(e) Control of Narcotic Substances Act (XXV of 1997)---**

----Ss. 3 & 9(c)---Constitution of Pakistan, Arts. 4 & 10-A---Criminal Procedure Code (V of 1898), S. 423(1)(a)---Possession of narcotic---Intoxicating liquid---Report of Chemical Examiner failed to mention the percentage of "morphine" found in the intoxicating substance---Trial Court acquitted the accused on the basis of such inconclusive Report---On appeal High Court gave directions for obtaining fresh samples of the alleged intoxicating substance and preparing a fresh report of the Chemical Examiner---Legality---Such direction of the High Court amounted to granting the prosecution a premium on its failure to put up a proper case in the first instance---Such judicial intervention was opposed to the adversary principle and offensive to the fundamental right of fair trial and due process guaranteed under the Constitution---High Court has travelled beyond its lawful powers under S.423(1)(a), Cr.P.C. and had in fact directed to conduct re-investigation or further investigation of the case, which was not permissible under the law---Even otherwise, calling for fresh examination of the intoxicating substance at the appellate stage after many years may frustrate the settled laws as to safe custody and safe transmission of the recovered substance making the report of the Chemical Examiner suspect and unreliable---Impugned judgment of High Court whereby the case was remanded to the

Trial Court for retrial was set-aside and acquittal recorded by the Trial Court was restored---Appeals were allowed accordingly.

Dildar v. The State PLD 2001 SC 384; Painda Gul v. State 1987 SCMR 886; State v. Amjad Ali PLD 2007 SC 85; Mazhar Naeem Qureshi v. State 1999 SCMR 828; Amjad Ali v. State 2012 SCMR 577; Ikramullah v. State 2015 SCMR 1002 and State v. Imam Bakhsh 2018 SCMR 2039 ref.

Chaudhry Muhammad Din Ansari, Advocate Supreme Court for Appellants (in Crl.A.81-L of 2017).

Nemo. For Appellants (in Crl.A.82-L of 2017).

Irfan Malik, Special Prosecutor, ANF for the State (in both cases).

Date of hearing: 10th May, 2019.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.--**A raid, on the basis of secret information; led to the alleged recovery of intoxicating injections. Intoxicating liquid and "Phenvil injections (collectively referred to as "intoxicating substance") from the appellants. In this background they were booked in FIR No.2/2008 under sections 9(c) and 15 of the Control of Narcotic Substances Act, 1997 ("Act"). After regular trial the appellants were acquitted of the charge. The ground that prevailed with the trial court was that the Reports of the Chemical Examiner failed to assess the percentage of morphine in the intoxicating substance in order to pass as a "narcotic drug," in violation of section 3 of the Act,hence the Reports were inconclusive and unreliable and could not sustain conviction. Additionally, the trial court also held that "Phenvil or pheniramine maleate did not fall under the definition of "psychotropic substance" under section 2(za) of the Act. Upon appeal before the High Court the judgment of the trial court was set aside and the case was remanded with the direction that fresh samples and fresh report of the Chemical Examiner be taken and a "fresh judgment" be passed in the case. Hence, these appeals with leave of the Court granted on 14.02.2017 to consider whether the High Court could assume the role of a prosecutor and fill the lacunas left by the parties during the trial.

2. We have heard the learned counsel for the parties and have examined the record of the case with their able assistance. "Narcotic drug[1]" means "coca leaf, cannabis, heroin, opium, poppy straw and all manufactured drugs" while "manufactured drug"[2] includes:-

(i) All coca derivatives, medicinal hemp, opium derivatives, cannabis in any form and any mixture of stalks and flowering or fruiting tops of the Indian hemp plant (cannabis sativa L.), Acetic Anhydride; and

(ii) any other narcotic substance which the Federal Government may, by notification in the official Gazette made in pursuance of recommendations of any International Convention or otherwise, declare to be a manufactured drug.

"Opium[3]" means:-

(i) Poppy straw, that is to say, all parts of the poppy plant (Papaver somniferum or any other species of Papaver) after mowing, other than the seeds;

(ii) The spontaneously coagulated juice of capsules of poppy which has not been submitted to any manipulations other than those necessary for packing and transport; and

(iii) Any mixture, with or without natural materials, of any of the above forms of opium, but does not include any preparation containing not more than 0.2 per cent of morphine; (emphasis added)

"opium derivatives[4] " includes:-

(i) Medicinal opium, that is, opium which has undergone the process necessary to adapt it for medicinal use;

(ii) Prepared opium, that is, any product of opium obtained by any series of operations designed to transform opium into an extract suitable for smoking, and the dross or other residue remaining after opium is smoked;

(iii) Morphine, that is, the principal alkaloid of opium having the chemical formula C21H23NO5 and its salts;

(iv) Diacetylmorphine,that is, the semi-synthetic substance, also known as diamorphine or heroin having the chemical formula C21H23NO5 and its salts; and

(v) All preparations containing more than 0.2 per cent of morphine, or containing any diacetylmorphine.

3. Any mixture or preparation (liquid in this case) with any form of opium or opium derivative shall not pass for "opium" or "opium derivative" and finally as a "narcotic drug," if the quantity of morphine in the mixture or preparation is less than 0.2 percent. Morphine is the principal alkaloid of opium having the chemical formula C21H19NO3 and its salts[5] or an alkaloid extracted from opium to relieve moderate to severe pain,[6] used in medicine as an analgesic and sedative, although repeated use causes addiction.[7] Similarly, under sections 2(g) and 2(h) a percentage of cocaine is required in the mixture and preparations to constitute "coca derivative" or "coca leaf." The method of calculating percentages in the absence of any rules is given in proviso to section 3 of the Act which provides that one percent (1%) of a substance means a preparation in which one milliliter of the substance is contained in every one hundred milliliter of the preparation and so in proportion for any greater or less percentage. For a liquid preparation or liquid mixture to pass for opium or opium derivative, the liquid preparation or liquid mixture must have morphine in excess of 0.2 percent. Thus, the requirement of calculating the percentage of narcotic drug in a liquid preparation or mixture is mandatory as per section" 3 of the Act read with the definitional test under section 2 of the Act. See: Muhammad Imran v. State (2011 SCMR 1954) and Taimoor Khan v. State (2016 SCMR 621).

4. The three Reports of the Chemical Examiner, all dated 15.02.2008 (Ex-PK, Ex-PL, Ex-PN) show the following results:

| |
|---|
| "Morphine detected in all samples" (Ex-PK) "Morphine detected in all above samples" (Ex-PL) "(i)-(iii) Morphine detected in all unlabeled glass ampules and unlabeled plastic bottle. (ii) Pheniramine Maleate is detected in the above bottle labeled with phenvil (Ex-PN) |

The Reports of the Chemical Examiner hopelessly fail to mention the percentage of morphine found in the intoxicating substance, leaving it uncertain whether it passes for a narcotic drug. This fatal omission makes the Reports of the Chemical Examiner inconclusive and unreliable to support conviction under the Act.

5. An important dimension of this case is the role of a criminal court, in an adversarial system of justice.[8] "The adversarial system is a two-sided structure under which criminal trial courts operate that pits the prosecution against the defence. Justice is done when the most effective and rightful adversary is able to convince the judge or jury that his or her perspective on the case is the correct one."[9] The fundamental construct of our criminal courts is modeled on an adversarial system of justice which decides on the strength of the evidence of the parties. However, in exceptional cases our criminal courts also exercise inquisitorial powers under certain provisions[10] of Criminal Procedure Code, 1898 (Cr.P.C) to secure the ends of justice,[11] however, these provisions are not attracted in the facts of the present case. The court being a neutral arbiter has to dispassionately appreciate, appraise, examine and weigh the evidence placed before: it, rather than by ignoring the evidence and embarking on a probing journey guided by emotions, sentiments arid sense of self-styled justice pegged on the lofty notion of societal reform. In an adversarial system the role of the judge is that of a neutral umpire, unruffled by emotions, a judge is to ensure fair trial between the prosecution and the defence on the basis of the evidence before it. The judge should not enter the arena so as to appear that he is taking sides. The court cannot allow one of the parties to fill lacunas in their evidence or extend a second chance to a party to improve their case or the quality of the evidence tendered by them. Any such step would

tarnish the objectivity and impartiality of the court which is its hallmark. Such favoured intervention, no matter how well-meaning strikes at the very foundations of fair trial, which is now recognized as a fundamental right under Article 10-A of our Constitution.

6. In the present case the direction of the High Court for obtaining fresh samples of the alleged intoxicating substance and preparing a fresh report of the Chemical Examiner amounts to granting the prosecution a premium on its failure to put up a proper case in the first instance. Such judicial intervention is opposed to the adversary principle and offensive to the fundamental right of fair tria1[12] and due process[13] guaranteed under the Constitution. see Dildar v. State[14]; Painda Gul v. State[15] and State v. Amjad Ali.[16] The High Court has travelled beyond its lawful powers under section 423(1)(a) Cr.P.C. and has infact directed to conduct re-investigation or further investigation of the case, which is not permissible under the law.[17] Even otherwise, calling for fresh examination of the intoxicating substance at the appellate stage after all these years may frustrate the settled law[18] as to safe custody and safe transmission of the recovered substance making the report of the chemical examiner suspect and unreliable.

7. For the foregoing reasons, we allow these appeals and set aside the impugned judgment whereby the case was remanded to the trial court for retrial and restore the acquittal recorded by the trial court. These are the reasons for our the short order dated 10.05.2019, which is reproduced hereunder for convenience and completion of record:

> "For detailed reasons to follow, the instant criminal appeals are allowed. The impugned judgment of the learned High Court dated 27.01.2016 is set aside. Consequently the judgment by the learned trial Court dated 21.03.2009 is restored.

MWA/M-36/S Appeals allowed.

**P L D 2019 Supreme Court 719**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed, JJ**

**Miss NUSRAT YASMIN---Appellant**

**Versus**

**REGISTRAR, PESHAWAR HIGH COURT, PESHAWAR and others---Respondents**

Criminal Appeal No.3-P of 2017, decided on 2nd May, 2019.

(On appeal from the judgment of the Peshawar High Court, Peshawar, dated 26-6-2014 passed in Crl.A.No.633-P of 2012).

**Khyber Pakhtunkhwa Government Servants (Efficiency and Discipline) Rules, 2011--**

----Rr. 3(b) & 4(1)(a)(i)---High Court (Lahore) Rules and Orders, Vol.IV, Chapt. 1. Part-A, R. 4---Constitution of Pakistan, Arts. 202 & 203---Judicial strictures recorded against a judge of district/subordinate judiciary by the High Court---Propriety---Mechanism for warning or proceeding against a judge of the subordinate judiciary for grave incompetence or misconduct---Character of judicial determination by the High Court did not allow the court to go beyond and assess, evaluate and appraise the competence, diligence, conduct, integrity or temperament of a judge of the District Judiciary, other than judicial bias or malice if it was borne out from the record of the case and was essential for the determination of the lis---Constitutional domain of the High Court included exercising supervisory control over the District judiciary through administrative disciplinary mechanisms---High Court was not to pass strictures in a judgment against a judge of the District Judiciary or summon a judge in judicial proceedings, relating to his or her judgment, for public reprimand in open court---Course open to the High Court was on the administrative side and the judge(s) of the High Court hearing the case, could apprise the Chief Justice of the Court through a confidential administrative note highlighting the grave illegalities, irregularities and improprieties noticed, leaving it to the Chief Justice or the Administrative Committee of the High Court, as the case may be, to take an appropriate disciplinary action against the judge of the District judiciary Error, if any, in the legal reasoning, application of law or appraisal of evidence by the courts below, was rectified by the High Court, in accordance with the law, which may include the ground of bias or malice. Stricture recorded in a judgment, on the other hand, was a severe and a sharp criticism or a censorious remark and was akin to a piece of censure and passed for a critical remark regarding the conduct, integrity, diligence, behaviour, temperament, and competence of a judge. Stricture became accessible and remained in the public domain (as part of the judgment) for posterity. Subsequent exoneration of the judge in departmental disciplinary proceedings could not undo the damage
already done, as the stricture continued to exist in the judgment and the mind of the public. Strictures did not restrain the judge from continuing as a judge but at the same time, shattered his confidence and weakened his performance. Judicial stricture was not something reformative and was a stigma thrust upon a judge with no formal legal recourse to undo it.

AIR 1994 SC 1031; Chambers 21st Century Dictionary P.1396 and New Webster's Dictionary of the English Language. Deluxe Encyclopedic Edition p.969; The Concise Oxford Dictionary-New Edn. p.1140; V.K Jain v. High Court of Delhi through Registrar General and others [(2008)17 SCC 538], Awani Kumar Upadhyay v. The Hon'ble High Court of Judicature at Allahabad and others AIR 2013 SC 2189 and Amar Pal Singh v. State of U.P. and another AIR 2012 SC 1995 and PLD 1996 SC 229 ref.

Supreme Court observed that it was desirable that the High Court, while performing its judicial function, avoided passing strictures regarding the ability, competence, integrity, and behaviour of the judge whose

judgment was under scrutiny before it. Judge of the High Court, even if unhappy over the quality of the judgment under challenge, must not let go of judicial precaution and propriety and restraint from making a personal remark. Articulation, scholarship and legal reasoning of the judgment of the High Court, couched in moderation, temperance, and sobriety, would automatically highlight the error and mistake of the lower Court. High Court was not to assume the role of a critic of the personal attributes and abilities of the judge. Instead the High Court, maintaining its judicial majesty, was to focus only on the legal reasoning of the judgment under challenge. Passing strictures and publically rebuking, condemning and reproaching a judge did not sit well with the judicial character of the High Court. Similarly it was also inappropriate to summon a judge of the District Judiciary to court for a public reprimand, during the hearing of the case against his judgment, in open Court. Character of judicial determination by the High Court did not allow the court to go beyond and assess, evaluate and appraise the competence, diligence, conduct, integrity or temperament of a judge of the District Judiciary, other than judicial bias or malice if it was borne out from the record of the case and was essential for the determination of the lis. Equally, it was necessary for a judge of the District Judiciary to refer or distinguish the judgments of the superiori courts with care, caution and respect.

PLD 1996 SC 176 ref.

While it was not in the majesty, character, and dignity of the High Court or the justice system to pass judicial strictures and summon judges of the District Judiciary in open court, it was eminently within the constitutional domain of the High Court and indeed desirable that the High Court, where appropriate, exercised supervisory control over the District Judiciary through administrative disciplinary mechanisms. Power to supervise and control the District Judiciary was to be exercised by the High Court (Chief Justice and Judges of the Court) under Articles 202 and 203 of the Constitution while exercising its administrative/authority.

William G. Ross, Civility among Judges: Charting the Bounds of Proper Criticism by Judges of Other Judges, 51 F.L.A. L. R.E.V. 957, 974 (1999) ref.

Structure of service laws relating to the District Judiciary empowered the competent authority (the Chief Justice or the Administrative Committee of the High Court) to take disciplinary action against the judge. High Court had ways of expressing disapproval of judgments of the lower courts. In case inadvertent errors or irregularities of the lower courts were noticed by the High Court they could be brought to the notice of the judge concerned through a memorandum or a note addressed to the said judge by the High Court on the administrative side but not through the judgment, in exercise of its judicial function. Such notes or memorandums did not form part of the judgment but were separate administrative communiqu s delivered to the judge confidentially and also did not form part of the service dossier of the judge. However, in cases where Judge(s) of the High Court, espoused an opinion that the judge of the District Judiciary had exhibited grave incompetence or had misconducted himself in discharge of judicial duty and needed to be warned or proceeded against, the appropriate process was to inform the competent authority on the administrative side though a confidential note addressed to the Chief Justice of the Court, along with copies of the relevant judgment(s), and then leaving it to the discretion of the competent authority to take appropriate disciplinary action against the judge concerned. Such discreet and confidential process was consistent with the deliberative character of the judicial system.

Appellant in person.

Barrister Qasim Wadud, Addl. A.G. Khyber Pakhtunkhwa, Hasan Raza, Senior Civil Judge and Khalid Rehman, Advocate Supreme Court for Respondents.

Date of hearing: 2nd May, 2019.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.**---The appellant before us is a judge, currently working as Additional District and Sessions Judge, Peshawar. She is aggrieved of the strictures recorded against her by the High Court in its judgment dated 26.06.2014 passed in Crl.A.No.633-P of 2012. She prays that these strictures, being uncalled for, harsh and impermissible in law, be expunged from the judgment of the High Court. Leave was granted by this Court to consider this question on 26.09.2017.

2. We have heard the appellant and the counsel for the respondents at some length. Brief background in which the strictures were recorded against the appellant in the judgment is that case FIR No. 97 dated 19.08.2003 was registered against M/s. Murad Gul, Hazir Bahadur and Khan Bahadur under sections 302/324 read with section 34 P.P.C. in Police Station, Nizampuir, District Nowshera for the murder of one Ghulam Haider. Initially, accused Murad Ali was arrested, who alone was tried and convicted by the trial court. On appeal his conviction was set aside and he was acquitted by the High Court. Later, the remaining two accused were also arrested and were tried separately. The trial court, presided by the appellant, convicted them and on appeal, through the judgment in question, the High Court acquitted them of the charge on the ground that similar evidence was disbelieved against the co-accused (Murad Ali) who had already been acquitted. In this case, the trial court presided by the appellant held that the evidence was disbelieved against the co-accused due to certain infirmities qua him (Murad Ali), but regarding the two accused before her, the evidence was firm and confidence-inspiring; hence, the appellant convicted and sentenced them to imprisonment for life, despite earlier acquittal of their co-accused by the High Court. This background resulted in the following observations and remarks by the High Court against the appellant, recorded in the judgment dated 26.06.2014:

"15. We have gone through the impugned judgment of the Trial Court, but did not find any reference from which it may impliedly be inferred that the Trial Court has probably applied the principle of sifting the grain from the chaff. There is no reference to any particular piece of evidence to differentiate the role of the appellants from that of acquitted co-accused. Rather, the learned Trial Judge, namely, Miss Nusrat Yasmin, despite having knowledge of acquittal of co-accused Murad Ali by this Court on the same set of evidence and knowing about finality of findings of this Court, while making unnecessary discussion on section 34, P.P.C. like alien to the law and having no knowledge about the actual essence and application of section 34, P.P.C., labored hard for convicting the appellants by passing contemptuous observations (sic) language against the High Court. The Trial Judge has failed to distinguish the role of the present appellants from that of acquitted co-accused or to point out any new evidence against them. If she while discussing section 34 P.P.C., has held the appellants vicariously liable for single injury on the person of the deceased, then at the same time, not only the appellants are charged for said single injury, but also the acquitted co-accused because general role of firing has been attributed to the appellants and acquitted accused, without attributing that single injury to any one of them. So in such circumstances, what about the acquitted co-accused? The learned Trial Court has not discussed that aspect of the case. Trial Judge while violating the mandate of law and ignoring the sphere of judicial ethic and her duties, has acted like a higher Court, treating this Court as a subordinate Court by passing disgracing language. The relevant part of her observations made in the judgment is re-produced below:--

'As far as the acquittal of co-accused is concerned, it may be added here that he has been acquitted on certain minor discrepancies occurring in the statements of the PWs examined during the said trial and it

cannot be accepted as a universal principle that once an evidence was not accepted qua one accused, it can never be accepted against another accused, against whom the case has been proved to the hilt. It is also worth mentioning here that in the trial of acquitted co-accused, line of cross-examination over the statement of complainant was quite different and it was certain minor lapses in the cross-examination of the complainant which persuaded the Hon'ble High Court to acquit the said co-accused, however, in the instant trial no such lapses can be seen in the statements of the PWs including the complainant and eye-witness, who have furnished very straight forward and trustworthy account of the occurrence and have fully established the prosecution case against the accused facing trial.'

Underlines are for emphasis.

16. We have scrutinized the testimony of complainant and PW Noor Shah Gul in the earlier part of our judgment, from perusal of which, one can better understand their credibility and truthfulness. The learned Trial Judge, has traversed all the limits of judicial ethics by passing such contemptuous observations against the Higher Court, which on one hand, shows her meager knowledge about the law, while on the other hand, her disrespect towards the higher Judiciary, and such exercise on the part of a Judicial Officer, amounts to professional misconduct, which being highly deplorable cannot be countenanced.

17. Additional Registrar (Judicial) of this Court is directed to send copy of the judgment to the Registrar, for proceedings the Judicial Officer under the Government Servants (Efficiency and Disciplinary) Rules, 1973, for misconduct and showing disregard towards the Higher Judiciary, with intimation to this court. Additional Registrar (Judicial) shall circulate copy of the judgment in subordinate Judiciary of the Province for guidance."

3. The question before us is, whether it is befitting and appropriate for the High Court to record judicial stricture (i.e., a stricture recorded in a judgment) against a judge of the District Judiciary relating to his or her ability, conduct, integrity, diligence, behaviour, temperament and competence, while examining his or her judgment? Or can only address these concerns through administrative disciplinary proceedings by invoking its supervisory jurisdiction under the Constitution, the Rules and Orders of the High Court and the law?

4. High Court, under our Constitution, enjoys both judicial and administrative powers and functions. Judicial powers are drawn from the jurisdiction enjoyed by the High Court under the Constitution or the law. Article 175 of the Constitution declares that "no court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law." The High Court enjoys original, appellate and revisional jurisdiction under various provisions of law and the Constitution and while exercising these jurisdictions, the High Court enjoys the power to modify, set aside or uphold the judgment of the courts below. As a matter of routine, the High Court comes across orders of the lower court, which are not justified either in law or in fact, and modifies them or sets them aside. The concept of appeal and revision to a higher forum presumes that a judge inspite of discharging his or her duties to the best of his abilities and capacity may still error make a mistake. "A judge who has not committed an error is yet to be born."[1] The High Court while adjudicating a lis is free to examine all aspects of the case that are necessary and integral for the determination of the case and this includes, in a particular case, bias or malice on the part of the judge of the District Judiciary, if the record of the case supports it. This, at best, will result in setting aside the impugned judgment on the ground of bias or mala fide. The High Court, while exercising constitutional, appellate or revisional jurisdiction under various laws is to judicially examine and review the orders and judgments of the courts below on questions of law and facts. What is under examination on the judicial side is the legal reasoning behind the order or the judgment. Error, if any, in the legal reasoning, application of

law or appraisal of evidence by the courts below, is rectified by the High Court, in accordance with the law, which may include the ground of bias or malice. Stricture recorded in a judgment, on the other hand, is "a severe" and a "sharp criticism or a censorious remark[2]" and is akin to a "piece of censure[3]" and passes for a "critical remark"[4] regarding the conduct, integrity, diligence, behaviour, temperament, and competence of a judge. Stricture becomes accessible and remains in the public domain (as part of the judgment) for posterity. Subsequent exoneration of the judge in departmental disciplinary proceedings cannot undo the damage already done, as the stricture continues to exist in the judgment and the mind of the public. Strictures do not restrain the judge from continuing as a judge but at the same time, shatter his confidence and weaken his performance. There is nothing reformative about a judicial stricture and is a stigma thrust upon a judge with no formal legal recourse to undo it. Public disgrace suffered at the hands of the judicial strictures remains in the public memory, as if, etched in stone.[5] Fazal Karim J., a distinguished judge of this Court, in Muhammad Mansha v. The State[6], observed:

"2. The subordinate Courts or the inferior Courts as they are sometimes called are an integral part of the judicial system of our country. The description "inferior Courts", or "inferior tribunal" is a categorising and not a derogatory description. Such Courts or tribunals "are not inferior in the doing of justice; nor in the judges who man them, nor in the advocates who plead in them" (Lord Denning in 'Attorney-General v. B.B.C. (1981) A.C. 303, 313). The rule of law depends upon public confidence and public acceptance of the judicial system; therefore, anything which tends to undermine that confidence in the judicial system must be strongly discountenanced. It is for these reasons that we feel that the observations in the order of the learned Judge in the High Court that there were some extraneous considerations which weighed with the learned Additional Sessions Judge for granting bail to Mansha and the direction in para. 9 of the judgment that "Mr. Ghulam Mustafa Shahzad, Additional Sessions Judge, Sheikhupura to appear in person before this Court on 14-11-1995" should not have been made. The sweeping condemning observation that the learned Additional Sessions Judge was moved, in making the impugned order, by "extraneous considerations" and the direction referred to above, must necessarily shake the public confidence' at least the confidence in that officer of the people of the district where he is for the time being serving; it is the more serious because the officer had had no opportunity of explaining his position before the observation was made."

Therefore, it is desirable that the High Court, while performing its judicial function, avoids passing strictures regarding the ability, competence, integrity, and behaviour of the judge whose judgment is under scrutiny before it. A judge of the High Court, even if unhappy over the quality of the judgment under challenge, must not let go of judicial precaution and propriety and restraint from making a personal remark. The articulation, scholarship and legal reasoning of the judgment of the High Court, couched in moderation, temperance, and sobriety, will automatically highlight the error and mistake of the lower Court. The High Court is not to assume the role of a critic of the personal attributes and abilities of the judge. Instead the High Court, maintaining its judicial majesty, is to focus only on the legal reasoning of the judgment under challenge. Passing strictures and publically rebuking, condemning and reproaching a judge does not sit well with the judicial character of the High Court. It is equally inappropriate to summon a judge of the District Judiciary to court for a public reprimand, during the hearing of the case against his judgment, in open Court. The character of judicial determination by the High Court does not allow the court to go beyond and assess, evaluate and appraise the competence, diligence, conduct, integrity or temperament of a judge of the District Judiciary, other than judicial bias or malice if it is borne out from the record of the case and is essential for the determination of the lis. Needless to mention, that it equally necessary for a judge of the District Judiciary to refer or distinguish the judgments of the superiors courts with care, caution and respect. The "judicial powers" enjoyed by the High Court are only to examine the legality of the order or

judgment/decree passed by the judge of the District Judiciary. The observations of this Court made in Abdul Khaliq v. Khan Bahadur[7] may advantageously be referred in this regard. This Court observed:

"3. The complainant filed a revision application before the Bench of Lahore High Court at Rawalpindi and the learned Judge in Chamber vide order dated 20-11-1995 impugned before us in this petition has cancelled the bail. Perusal of the impugned order shows that the learned Judge of the High Court in Chamber had called the Magistrate and asked from him as to why had [he] granted bail in that case. This amounts to reprimand and we do not approve such action by the Judges of the superior Courts. If judicial order is found not to have been passed in accordance with law, it can be set aside by the upper forum which is competent to do so. Even the learned Judge in the High Court could have set aside the order according to law, if he came to such conclusion, without calling the Magistrate with a view to reprimand him." (emphasis supplied)

5. While it is not in the majesty, character, and dignity of the High Court or the justice system to pass judicial strictures and summon judges of the District Judiciary in open court, it is eminently within the constitutional domain of the High Court and indeed desirable that the High Court, where appropriate, exercises supervisory control over the District Judiciary through administrative disciplinary mechanisms.[8] The power to supervise and control the District Judiciary is to be exercised by the High Court (Chief Justice and Judges of the Court) under Articles 202 and 203 of the Constitution while exercising its administrative authority. This constitutional responsibility vests in the High Court and not in a judge of a High Court exercising judicial power. The power to supervise and control is actualized through High Court Rules and Orders and service laws that govern the judges of the District Judiciary. The structure of service law[9] relating to the District Judiciary empowers the competent authority (the Chief Justice or the Administrative Committee of the High Court) to take disciplinary action against the judge.

6. High Court has ways of expressing disapproval of judgments of the lower courts. In case inadvertent errors or irregularities of the lower courts are noticed by the High Court they can be brought to the notice of the judge concerned through a memorandum or a note addressed to the said judge by the High Court on the administrative side but not through the judgment, in exercise of its judicial function. It is important to refer to Rule 4 of Part-A, Chapter-1 of the Rules and Orders of the Lahore High Court[10.] (Volume IV) which provides as under:

"4. Appellate Courts should point out to lower Courts errors and irregularities.-It is very desirable that Appellate Courts should apart from disposing of appeals judicially, bring to the notice of subordinate Courts errors or irregularities in procedure which may be observed in the course of hearing appeals. Unnecessary adjournments; undue delay in disposing of cases; omission to hear cases on the days fixed; too harsh a use of the summary procedure allowed by law in cases in which defaults in attendance, or in producing evidence or the like, occur; failure to examine thoroughly the parties and to arrive at an intelligent appreciation of the points in dispute, and similar matters should always be brought to the notice of officers concerned in a note or memorandum separate from the judgment."
(emphasis supplied)

The above Rule shows that in cases of inadvertent lapses, errors or mistakes committed by the judges of the District Judiciary, which are condonable, the judges of the High Court may point them out to the judge of the District Judiciary through an administrative note or memorandum, maintaining a correctional approach. This also passes for a piece of elderly advice, guidance and counselling of the judge of the District Judiciary by the High Court. The note or memorandum do not form part of the judgment but are separate administrative communiqu s delivered to the judge confidentially and also do not form part of the service dossier of the judge.

7. However, in cases where Judge(s) of the High Court, espouses an opinion that the judge of the District Judiciary has exhibited grave incompetence or has misconducted himself in discharge of judicial duty and needs to be warned or proceeded against, the appropriate process is to inform the competent authority on the administrative side through a confidential note addressed to the Chief Justice of the Court, along with copies of the relevant judgment(s), and then leaving it to the discretion of the competent authority to take appropriate disciplinary action against the judge concerned. This discreet and confidential process is consistent with the deliberative character of the judicial system.

8. We, therefore, hold that High Court should not pass strictures in a judgment against a judge of the District Judiciary or summon a judge in judicial proceedings, relating to his or her judgment, for public reprimand in open court. The course open to the High Court is on the administrative side and the judge(s) of the High Court hearing the case, can apprise the Chief Justice of the Court through a confidential administrative note highlighting the grave illegalities, irregularities and improprieties noticed, leaving it to the Chief Justice or the Administrative Committee of the High Court, as the case may be, to take an appropriate disciplinary action against the judge of the District Judiciary.

9. For the above reasons, we expunge the strictures recorded against the appellant in the impugned judgment dated 26.06.2014 passed by the Peshawar High Court in Crl.A.No.633-P of 2012. They shall not form part of the service record of the appellant or in any manner influence the competent authority against the appellant judge in her service matters. This appeal is allowed in these terms.

10. The Assistant Registrar of the Peshawar Branch Registry of this Court shall ensure that a copy of this judgment is dispatched to the Registrars of all High Courts, who shall circulate it among all Judges of the respective High Court, for their information.

11. It is clarified that this judgment is restricted to judicial strictures passed by High Court against a judge of the District Judiciary while performing his or her judicial function.

MWA/N-12/S Appeal allowed.

**P L D 2019 Supreme Court 730**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Yahya Afridi, JJ**

**SIKANDAR HAYAT KHAN JOGAZAI and others---Petitioners**

**Versus**

**MUHAMMAD HASHIM and others---Respondents**

Civil Petitions Nos.522-L. 523-L and 588-L of 2013, decided on 16th September, 2019.

(On appeal from the judgment of Lahore High Court, Lahore dated 29-1-2013, passed in I.C.As. Nos.268/2010 and 51/2012).

**(a) Islamic law---**

----'Waqf'---Meaning and concept of waqf in Islam stated.

H. Wehr, A Dictionary of Modern Written Arabic, 1091-1094; Gregory C. Kozlowski, Muslim Endowments and Society in British India-Cambridge Sourt Asian Studies, 1985; Peter C. Hennigan. The Birth of Legal Institution-The formation of the Waqf in the Third Centrury, Brill, 2004; Webster's Revised Unabridged Dictionary (1913) by G. & C. Merriam Co.; D.F. Mullah Principles of Muhammadan Law, para, 173; A Digest of Muhammadan Law, pp.557-558 (Neil B.E. Bailllie) 2nd Edn. and The Hedaya, pp.231, 234 (Charles Hamilton) 2nd Edn. ref.

**(b) Islamic law---**

----'Waqf'---Origins of the concept of waqf in Islam provided.

Al-Quran, Surah Al-Baqarah (2:215, 261, 265, 271, 280; Aal-e-Imran (3: 92, 134), Al-Hadid (57:18) and Al-Lail (92:18-21); Vidya Varuthi v. Blusami AIR 1922 PC 123 and Sahih Muslim, Vol. III, Kitab al-Wassiya, Hadith-4005 (Translated by Abdul Hamid Siddiqi, 1973) ref.

**(c) Islamic law---**

----'Waqf'---Role of waqf in the development of Islamic civilization stated.

Peter C. Hennigan. The Birth of a Legal Institution-The formation of the Waqf in the Third Century, Brill, 2004; Gregory C. Kozlowski, Muslim Endowments and Society in British India-Cambridge South Asian Studies, 1985 and Baqutayan, et al. Waqf Between the Past and Present.Mediterranean Journal of Social Sciences, 9. 149. (2018) ref.

**(d) Punjab Waqf Properties Ordinance (IV of 1979) ---**

----Ss. 3(1), 15 & 17,---Punjab Waqf Properties (Administration) Rules, 2002, Rr. 4, 5 & 7---Waqf property---Chief Administrator Auqaf---Preparation of scheme---Control, management, development and maintenance of waqf properties by the Chief Administrator Auqaf --- Scope and mechanism---Administration and development of waqf property by the Chief Administrator Auqaf under the Punjab Waqf Properties Ordinance, 1979 ('the Ordinance') was through the mode and mechanism of schemes, with the singular object of advancing and maximizing the wishes of the wakif or the religious, pious and charitable purposes recognized by Islam---Scheme under S.15 of the Ordinance was, therefore, a strategic plan, a road map, a financial feasibility or a business plan for the administration and development of the waqf property, driven and directed by the objectives settled by the wakif or as given under the law---While

the word "administration" in S.15, signified the overall control, management and maintenance of the waqf properties, the expression "development" enjoined upon the Chief Administrator Auqaf to expand, evolve and enlarge the scope of charitable work of the waqf with changing times---Scheme to be settled by the Chief Administrator Auqaf must not only carry a plan of action or a programme for the administration of the waqf properties but also the stratagem and vision for its development, evolution and future growth---Chief Administrator Auqaf must consider, at all time, the best use of the waqf property was to achieve its noble objectives, keeping in view the needs of the time and that of an evolving society---Chief Administrator Auqaf in settling a scheme must not lose sight of such central objective of the scheme and must always remain cognizant of the historical significance of waqf and how it contributed to the building of Islamic civilization; through which many mosques, schools, and educational centres were built alongwith libraries, scientific research centres and other fields in different walks of life, which gave way to the training of many scientists, researchers, inventors, and intellectuals---To draw up a scheme, therefore, required the Chief Administrator Auqaf to have sufficient expertise in management, administration, finance, accounts, marketing, planning, development, policy and in running of public charities---Chief Administrator should also be supported by informed and expert recommendations of the qualified managers and administrators appointed under the Ordinance---Waqf property could either be put to use to serve a religious, pious or charitable cause directly i.e., by running and managing a shrine or a khanqah or by establishing a school, college, university, hospital, research and training centres, etc for the general public utility and welfare of the society, either free or at subsidized rates; or indirectly, by leasing it out for purposes closer to the objectives of the waqf---Only as an exception and in the absence of any viable option to lease the property out for purposes closer to the objectives of the waqf, could the waqf property be leased out for commercial purposes---Scheme prepared by Chief Administrator must weigh, evaluate and discuss alternatives when leasing out waqf property and preference should always be given to lease out waqf property for purposes that were more akin or close to the wishes of the wakif or the objectives given under the law, including charitable purposes---Both the direct or indirect use of waqf property must be justified, with reasons, to be laid out in the scheme that was to be settled and sanctioned by the Chief Administrator Auqaf.

**(e) Punjab Waqf Properties Ordinance (IV of 1979)---**

----Ss. 15(2) & 17---Punjab Waqf Properties (Administration) Rules, 2002, R. 7---Waqf property---Part of waqf property leased out for commercial purposes by the Chief Administrator Auqaf without preparation of a scheme---Legality---Chief Administrator Auqaf granted lease of subject waqf property to the petitioner for setting up a petrol pump, on a monthly rent of Rs. 4,000/- per month for a period of 30 years---Descendants of the original dedicator (waqif) challenged the said grant on the ground that the lease offended the object of the waqf and was violative of the provisions of the Punjab Waqf Properties Ordinance, 1979 ('the Ordinance') and the Rules framed thereunder---High Court set aside the grant of lease for setting up a petrol pump holding that the trust property could not lawfully be given to the petitioner for establishment of a petrol pump, the grant of lease for 30 years was illegal and the land in question being a playground attached to a school could not be put to a different use---Held, that only as an exception and in the absence of any viable option to lease the property out for purposes closer to the objectives of the waqf, could the waqf property be leased out for commercial purposes---In the present case, the proposal for grant of lease of subject waqf property for setting up of a petrol pump did not form part of a scheme, that was to be prepared by the Chief Administrator Auqaf for administration of the waqf property---In fact no scheme had been submitted with the Court---Summary put up for the lease of waqf property (as in the present case) to set-up a petrol pump in isolation of the other factors and considerations, without an overall plan or a road map, did not constitute a scheme, envisaged under the Ordinance---Several questions and points needed to be explained in the scheme such as why was the waqf property required to be put on lease; why for a petrol pump and not for any other purpose more akin to the objectives of the waqf; why for a meagre rental of Rs

4,000/- per month and that too for a period of 30 years; why allegedly in a playground abutting a school; whether other alternatives were discussed and weighed by the Chief Administrator Auqaf; whether the waqf was in a deficit or loss, and how was the rental money to be utilized for the advancement of the objectives of the waqf---In the absence of a well thought out scheme, sanction for lease of any waqf property could not be permitted---Grant of lease of waqf property for the setting up of a petrol pump to the petitioner without there being settlement of a proper scheme, and in the absence of any plausible reasons for extending the lease beyond the statutory period given under R.7 of Punjab Waqf Properties (Administration) Rules, 2002 ('the Rules), was offensive to the provisions of the Ordinance and Rules, and hence illegal---Supreme Court directed that the Chief Administrator Auqaf, may lease out waqf property, in future, but after settlement and sanction of the scheme, in the manner provided under the Ordinance and the Rules---Petitions for leave to appeal were dismissed.

**(f) Punjab Waqf Properties Ordinance (IV of 1979) ---**

----S. 15---Punjab Waqf Properties (Administration) Rules, 2002, Rr.4, 5 & 7---Waqf property---Chief Administrator Auqaf---Preparation of scheme---Judicial review---Scope---Scheme settled for the administration and development of waqf properties was a manifestation of the discretion exercised by the Chief Administrator Auqaf, in the best interest of the waqf under the law and was, therefore, always open to judicial review by the courts.

Mehboob Azhar Sheikh, Advocate Supreme Court for Petitioners (in C.Ps.Nos. 522-L and 523-L of 2013).

M. Anwar Bhaur, Advocate Supreme Court for Petitioners (in C.P.No.588-L of 2013).

M. Usman Arif, Advocate Supreme Court/DAG for Respondents Nos. 5 to 8 (in C.Ps. Nos.522-L and 523-L of 2013).

Sharjeel Adnan Sheikh, Advocate Supreme Court for Respondents Nos. 1-4 (in all cases).

Rana Shamshad Khan, Addl. A.G. for Government of Punjab.

Date of hearing: 7th March, 2019.

**ORDER**

**SYED MANSOOR ALI SHAH, J.**---Waqf or religious endowment for the Shrine and Khanqah of Hazrat Makhdoom Abdul Rasheed Haqqani was created in the year 1908[1] over land ("waqf property") situated in tehsil and district Multan. In the year 1950, a school was also established on a portion of the said waqf property and subsequently, in 1960, the Chief Administrator Auqaf took over the said waqf property under the erstwhile Punjab Waqf Properties Ordinance, 1959 vide notification dated 23.05.1960. An amended schedule of the said waqf property was issued on 24.07.1973 under the Punjab Waqf Properties Ordinance, 1979 ("Ordinance") showing the total area of land constituting waqf property as 202 acres and 4 marlas.

2. The question before us is the legality of the grant of lease of waqf property (4 kanals) by the Chief Administrator Auqaf to the petitioner for setting up a petrol pump, on a monthly rent of Rs. 4,000/- per month for a period of 30 years. The descendants of the original dedicator (waqif) challenged the said grant through a constitutional petition, on the ground that the lease offends the object of the waqf and is violative of the provisions of the Ordinance and the Rules framed thereunder. The High Court set aside the grant of

lease for setting up a petrol pump vide judgment dated 10.02.2010 holding that the trust property could not lawfully be given to the petitioner for establishment of a petrol pump, the grant of lease for 30 years is illegal and the land in question being a playground attached to a school cannot be put to a different use. The Division Bench of the High Court upheld the judgment in appeal vide impugned Order dated 29.01.2013. Hence, the instant petitions.

3. Learned counsel for the petitioners vehemently argued that the department enjoys the power under the Ordinance and the Punjab Waqf Properties (Administration) Rules, 2002 ("Rules") to lease out a portion of waqf property for setting up a petrol pump and the department has fully complied with the Rules for doing so and prayed that the judgment of the Courts below be set aside.

4. On the other hand, learned counsel for the respondents have argued that lease of the waqf property for setting up a petrol pump offends the provisions of the Ordinance and the Rules. Besides, it is also against public interest as a petrol pump is being proposed to be set up in a playground which is adjacent to a school. He supported the judgments of the Courts below.

5. We have heard the learned counsel for the parties at some length and have gone through the record and the law on the subject. The legal questions involved in the case are whether a part of waqf property can be leased out for commercial purposes? And if so, what is the mode, manner and procedure available to the Chief Administrator Auqaf for sanctioning such a lease under the Ordinance and the Rules? In order to meaningfully answer the above legal questions, we need to first consider the concept of waqf in Islam; its historical importance; its purpose and utility today and the scope of administration and development of waqf properties by the Chief Administrator Auqaf under the Ordinance.

Waqf: meaning and concept

6. Waqf and its plural form, auqaf, are derived from the Arabic root verb, waqafa, which means "to stop" or "to hold."[2] When the word is employed in a legal sense with regard to a piece of land or a building, it signifies that henceforth that "property" is "stopped." In theory, it can never again change hands by inheritance, sale or seizure. An individual creating a waqf, known in Arabic as the "waqif," divests him or herself of the formal rights to possession, but retains the power to appoint a custodian i.e., a "mutawali" (literally "one who is trusted"), who manages the property dedicated[3]. Waqf is an inalienable trust[4] and is the granting or dedication of property in trust for a pious purpose.[5] D.F. Mullah, in his compilation of principles of Muhammadan Law, has defined "waqf" to mean the permanent dedication by a person professing the Mussalman [Muslim] faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable.[6]" "Waqf signifies the extinction of the proprietor's ownership in the thing dedicated and the detention of the thing in the implied ownership of God, in such a manner that its profits may revert to or be applied for the benefit of mankind.[7]" "Waqf Property" is defined in section 2(e) of the Ordinance in the following manner:-

"Waqf Property means property of any kind permanently dedicated by a person professing Islam for any purpose recognized by Islam as religious pious, or charitable....

Origins of Waqf in Islam

7. Although the word "waqf" is not specifically mentioned in the Holy Quran, yet there are many verses[8] which inspire Muslims to donate and give charity, to obtain piety, righteousness and fore mostly, the closeness and love of the Allah Almighty. A hadith quoted by Hazrat Abu Hurairah (Allah be pleased

with him) is usually referred by the Islamic scholars as the basis of the institution of "waqf" in Islam. He reported Allah's Messenger, Mohammad (may peace be upon him) as saying: "when a man dies, all his acts come to an end, but three; recurring charity, or knowledge (by which people) benefit, or a pious son who prays for him (for the deceased)[9]." Waqf is the best form of a continuous charity as the dedicated property earns for the dedicators continuous good deeds even after his death. It is this understanding that motivates the Muslims to promote this religious social-welfare institution. Syed Ameer Ali, a great judge and jurist of the sub-continent (Indo-Pak) speaking for the Judicial Committee of the Privy Council in the case of Vidya Varuthi v. Blusami (AIR 1922 PC 123) observed:

"13. But the Mahommedan law relating to trusts differs fundamentally from the English law. It owes its origin to a rule laid down by the Prophet of Islam; and means "the tying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings." When once it is declared that a particular property is wakf, or any such expression is used as implies wakf, or the tenor of the document shows, ... that a dedication to pious or charitable purposes is meant, the right of the wakif is extinguished and the ownership is transferred to the Almighty " (emphasis underlined)

8. Hazrat Ibn-e-Umar (may Allah be pleased with him) reported: "Umar acquired a land at Khaibar. He came to Allah's Apostle (may peace be upon him) and sought his advice in regard to it. He said: Allah's Messenger, I have acquired land in Khaibar. I have never acquired property more valuable for me than this, so what do you command me to do with it? Thereupon he (Allah's Messenger) said: If you like, you may keep the corpus intact and give its produce as Sadaqa. So, Umar gave it as Sadaqa declaring that property must not be sold or inherited or given away as gift. And Umar devoted it to the poor, to the nearest kin, and to the emancipation of slaves, and in the way of Allah and guests .. "[10]. Thus, these two traditions of the Holy Prophet (peace be upon him) are commonly considered providing the express basis for the emergence of waqf in Islam.

Role of Waqf in the development of Islamic Civilization

9. It is not an exaggeration to claim that the waqf created in perpetuity has provided foundation for much of what is considered "Islamic civilization.[11]" Waqf fulfilled a crucial gap between the resources available with an emerging State and the need of a growing community in the early days of Islam, and in the later years became a main source for various public services. The Waqf contributed to the building of Islamic civilisation; through which many mosques, schools, and educational centres were built along with libraries, scientific research centres and other fields in different walks of life. Throughout the history of the Islamic world, such settlements provided for many of the spiritual and temporal wants of Muslims.[12] Waqf played an important role in establishing a flourishing civilization. It created a comprehensive scientific and cultural renaissance. These funds were the main resource for schools, scientific centres and libraries, which gave way to the training of many scientists, researchers, inventors, and intellectuals. Therefore, Waqf is described as the most important institution which provided the foundation for Islamic civilization as it was interwoven with the entire religious life and the social economy of Muslims. It covered almost all the needs of life during the early period of Islamic civilization; encompassing health, education, basic infrastructures, business and commercial activities, job creation, food provision for the hungry and livestock, shelter provision for the poor and needy, and supporting the agricultural and industrial sectors without any cost to the government[13]. Waqf is in fact a comprehensive mechanism of public finance that is capable of bringing upon economic progress as well as social development.

10. With this religious and historical perspective of waqf in Islam, we now proceed to examine the legal framework regarding the administration and management of the waqf properties under the Ordinance and the Rules.

Scheme of law under the Ordinance and the Rules

11. The preambular purpose of the Ordinance is to provide for the proper management and administration of waqf properties in the Province of the Punjab. Waqf property is defined[14] to mean any kind of property permanently dedicated by a person professing Islam for any purpose recognized by Islam as religious, pious or charitable. Property used for the relief of the poor and the orphans, education, workshop, medical relief, maintenance of shrines or for any other object of charitable, religious or pious nature or of general public utility is deemed to be charitable purposes under the Ordinance.[15] The income from boxes placed at shrines and offerings, subscriptions or articles presented at the shrine and property permanently dedicated for the purposes of mosque, shrine, takia, khankah, dargah is deemed to be waqf property. All the waqf properties in the Province vest in the Chief Administrator of Auqaf for the Province appointed by the Government including all the rights, assets, debts, liabilities and obligations relating thereto.[16] Chief Administrator Auqaf is a corporation sole and enjoys perpetual succession and can sue or be sued in its corporate name[17]. Chief Administrator Auqaf enjoys the power to take over and assume the administration, control, management and maintenance of the waqf property.[18]

12. Under section 15 of the Ordinance, the Chief Administrator Auqaf, is to settle schemes for the administration and development of a waqf property and through the settlement of schemes the Chief Administrator is to give effect to such wishes of the waqif, as can be ascertained, and to which effect can be reasonably given. Under the Punjab Waqf Properties (Administration) Rules, 2002, ("Rules 2002") the Chief Administrator Auqaf, after taking control of the waqf property appoints a Manager to administer, control, manage and maintain the waqf property on behalf of the Chief Administrator. The Manager is to prepare scheme for the waqf property to be settled by the Chief Administrator. The scheme must honour the wishes of the wakif, as can be ascertained and in the absence of any evidence, the waqf property shall be used for the purpose for which it has been used or for any purpose recognized by Islam as religious, pious or charitable.

13. Under section 17, there are two broad purposes for utilization of the waqf property; (i) the purpose for which it (waqf property) was dedicated or has been used; and (ii) for any (other) purpose recognized by Islam as religious, pious or charitable, as the Chief Administrator may deem fit. The Chief Administrator Auqaf is to maintain a complete record of all the properties under his control and management and keep accounts of income and expenditure of such properties including expenditure on the Chief Administrator and his establishment. All moneys are credited to a fund, called Auqaf Fund, which is under the control of and operated upon by the Chief Administrator subject to general supervision of the Government. The accounts maintained by the Chief Administrator are to be audited at the end of each financial year and the Audit Report with the comments of the Chief Administrator is to be laid before the Government[19]. The Punjab Waqf Properties (Accounts) Rules, 1982 provide that the Auqaf Fund shall be audited once a year by the Local Fund Audit Department of the Government.

14. Sections 9 and 19 of the Ordinance recognise that the waqf property can be put out on lease as section 9 provides for termination of lease and resumption of tenancy in cases of breach of the agreement and section 19 deals with recovery of rent or lease money as arrears of land revenue in case of default. While Rule 7 of the Rules 2002 framed under section 26(2)(c) specifically deals with terms and conditions on which waqf property may be leased out. However, any lease of waqf property shall be a part of the scheme

approved by the Chief Administrator Auqaf and the "directions" given in Rule 7 are to be read as part of the scheme. The period of lease shall be for one year and not more than three years but can be extended for another two years with the approval of Chief Administrator Auqaf. Lease can also be granted for a longer period if Chief Administrator Auqaf is of the opinion that it is in the best interest of the waqf property.

Opinion

15. One of the core statutory obligations[20] of the Chief Administrator Auqaf is to settle a Scheme for the administration and development of the waqf property. In settling a scheme the Chief Administrator Auqaf is to honour the wishes of the waqif, as can be ascertained and to which effect can be given reasonably.[21] Otherwise, the Scheme is to advance purposes recognized by Islam as religious, pious or charitable.[22] Relief of poor and the orphans, education, workshop, medical relief, maintenance of shrines or the advancement of any other object of charitable, religious or pious nature or of general public utility are deemed to be charitable purposes under the Ordinance.[23] Under the Rules 2002, the Chief Administrator Auqaf after taking over and assuming the administration of a waqf property appoints a Manager to administer, control, manage and maintain the waqf property. It is the Manager who prepares a scheme for the administration and development of the waqf property under his charge. The scheme is then submitted to the Chief Administrator Auqaf, who may settle or refuse to settle or return the scheme for reconsideration or may call for the further details or information about the scheme or direct any further examination of the scheme as he may consider[24].

16. The administration and development of waqf property by the Chief Administrator Auqaf under the Ordnance is, therefore, through the mode and mechanism of schemes, with the singular object of advancing and maximizing the wishes of the wakif or the religious, pious and charitable purposes recognized by Islam. A scheme under section 15 of the Ordinance is, therefore, a strategic plan, a road map, a financial feasibility or a business plan for the administration and development of the waqf property, driven and directed by the objectives settled by the wakif or as given under the law. While the word "administration" in section 15, signifies the overall control, management and maintenance of the waqf properties, the expression "development[25]" is of much more significance and enjoins upon the Chief Administrator Auqaf to expand, evolve and enlarge the scope of charitable work of the waqf with changing times. The scheme to be settled by the Chief Administrator Auqaf must not only carry a plan of action or a programme for the administration of the waqf properties but also the stratagem and vision for its development, evolution and future growth. The Chief Administrator Auqaf must consider, at all time, the best use of the waqf property is to achieve its noble objectives, keeping in view the needs of the time and that of an evolving society.

17. The scheme, like any strategic or development plan has to consider, evaluate and weigh the exiting status of the waqf properties, the revenue generated, the expenditure incurred and most importantly, the central theme of the scheme: the actual advancement of the wishes of the waqif or the promotion of religious, pious and charitable work or work of public utility for the care and welfare of the society. The Chief Administrator Auqaf in settling a scheme must not lose sight of this central objective of the scheme and must always remain cognizant of the historical significance of waqf and how it contributed to the building of Islamic civilization; through which many mosques, schools, and educational centres were built along with libraries, scientific research centres and other fields in different walks of life, which gave way to the training of many scientists, researchers, inventors, and intellectuals. The scheme is fundamentally for advancement of such causes and must justify, at all times, that the waqf property is being used to promote and expand the objectives mentioned above, improving and growing with time. The settling of scheme, therefore, goes to the root of effective administration and development of waqf property and is the central function of the Chief Administrator Auqaf under the Ordinance. To draw up a scheme, therefore, requires

the Chief Administrator Auqaf to have sufficient expertise in management, administration, finance, accounts, marketing, planning, development, policy and in running of public charities. He should also be supported by informed and expert recommendations of the qualified managers and administrators appointed under the Ordinance.

18. Maximization of charitable work requires a strong and a growing revenue base, which can be generated through use or letting out of the immovable waqf property or by investments of moneys collected from the waqf property (moveable waqf property). Therefore, waqf property can either be put to use to serve a religious, pious or charitable cause directly i.e., by running and managing a shrine or a khanqah or by establishing a school, college, university, hospital, research and training centres, etc for the general public utility and welfare of the society, either free or at subsidized rates; or indirectly, by leasing it out for purposes closer to the objectives of the waqf. Only as an exception and in the absence of any viable option to lease the property out for purposes closer to the objectives of the waqf, can the waqf property be leased out for commercial purposes. It is underlined that the Scheme must weigh, evaluate and discuss alternatives when leasing out waqf property and preference should always be given to lease out waqf property for purposes that are more akin or close to the wishes of the wakif or the objectives given under the law, including charitable purposes. Both the direct or indirect use of waqf property must be justified, in the manner discussed above, with reasons, to be laid out in the scheme that is to be settled and sanctioned by the Chief Administrator Auqaf.[26] A deliberative and a well-reasoned scheme shows structured exercise of discretion by the Chief Administrator Auqaf, who is burdened with the sole authority under the law, to settle the scheme for the administration and development of the waqf property.

19. In the present case, the proposal for grant of lease of 4 kanals of waqf property for setting up of a petrol pump does not form part of a scheme as discussed above. In fact no scheme has been submitted with the Court. A summary put up for the lease of waqf property (as in the present case) to set-up a petrol pump in isolation of the other factors and considerations, without an overall plan or a road map, as discussed above, does not constitute a scheme, envisaged under the Ordinance. Questions like: why is the waqf property required to be put on lease? why for a petrol pump and not for any other purpose more akin to the objectives of the waqf? why for a meagre rental of Rs.4,000/- per month? and why for a period of 30 years? why allegedly in a playground abutting a school? And whether other alternatives were discussed and weighed by the Chief Administrator Auqaf? is the waqf in a deficit or loss? How is the rental money to be utilized for the advancement of the objectives of the waqf? These questions and points need to be explained and answered in the scheme, which, in fact, showcases the lawful exercise of discretion by the Chief Administrator Auqaf under the Ordinance. According to the information supplied to this Court, total revenue earned by the waqf property is Rs.3,958,934/- (R) from lease of agricultural land, rent of shops, income from cash boxes, rent of colleges and contract of mela ground; while the expenditure of the waqf is Rs.1,671,792/- (E). Thus, revenue exceeds the expenditure by Rs.2,287,142/- (R-E). Therefore, the leasing out of a portion of waqf property for the establishment of petrol pump (commercial purpose) needs justification and requires explanation. We hold that in the absence of a well thought out scheme, sanction for lease of any waqf property cannot be permitted.

20. Sections 9 and 19 of the Ordinance read with Rule 7 of the Rules, 2002 recognize that the waqf property can be put out on lease to generate income for the waqf. Under Rule 7 of the Rules 2002, lease is granted for a year and shall not exceed three years. However, it is extendable for another two years subject to the approval of the Chief Administrator Auqaf. Finally the lease can be extended even for a longer period if the Chief Administrator Auqaf is of the opinion that it is in the best interest of the waqf property. Any departure for the statutory period of lease provided in Rule 7 must be explained and recorded in the scheme with reasons and must show, how the extension in time, best serves the interest of the waqf property.

21. The scheme settled for the administration and development
of waqf properties is a manifestation of the discretion exercised by the Chief Administrator Auqaf, in the best interest of the waqf under the law and is, therefore, always open to judicial review by the courts.

22. For the above reasons, the grant of lease of waqf property for the setting up of a petrol pump to the petitioner without there being settlement of a proper scheme, as discussed above, and in the absence of any plausible reasons for extending the lease beyond the statutory period given under Rule 7 of Rules 2002, is offensive to the provisions of the Ordinance and Rules 2002, and hence illegal. We uphold the decision of the High Court, but for reasons of our own, discussed above. Leave is, therefore, declined and these petitions are dismissed. Chief Administrator Auqaf, may lease out waqf property, in future, but after settlement and sanction of the scheme, in the manner provided under the Ordinance and Rules 2002, as explained in this judgment.

23. The Deputy Registrar of the Lahore Branch Registry of this Court shall ensure that a copy of this judgment is dispatched to all the Chief Administrators Auqaf, in the country, for their information and compliance.

**P L D 2019 Supreme Court 749**

**Present: Asif Saeed Khan Khosa, C.J., Mushir Alam, Manzoor Ahmad Malik, Sardar Tariq Masood, Ijaz ul Ahsan, Mazhar Alam Khan Miankhel and Syed Manzoor Ali Shah, JJ**

**Civil Appeal No.1772 of 2008 and Civil Miscellaneous Application No.1990 of 2015**

**MOINUDDIN and others---Appellants**

**Versus**

**The STATE and others---Respondents**

(Against the judgment dated 14-7-2008 passed by the High Court of Sindh, Karachi in Constitution Petition No.D-1372 of 2008).

**Civil Petition No.1708 of 2011**

**ABDUL REHMAN---Petitioner**

**Versus**

**The STATE and others---Respondents**

(Against the judgment dated 9-6-2011 passed by the Lahroe High Court, Lahore in Writ Petition No.6915 of 2011).

Civil Appeal No.253 of 2015

**MUHAMMAD QAISER alias BILLA---Appellant**

**Versus**

**The LEARNED DISTRICT AND SESSIONS JUDGE/JUDGE ATC NO.1, FAISALABAD and others---Respondents**

(Against the judgment dated 16-3-2015 passed by the Lahore High Court, Lahore in Writ Petition No.21957 of 2012).

Criminal Petition No.988 of 2015

**WARYAM and others---Petitioners**

**Versus**

**The STATE---Respondent**

(Against the judgment dated 29-1-2015 passed by the High Court of Sindh at Sukkur in Criminal Revision Application No.40-D of 2014).

Criminal Appeal No.391 of 2015

**ZAFAR HUSSAIN and otheres---Appellants**

**Versus**

**The STATE and others---Respondents**

(Against the judgment dated 13-8-2015 passed by the Lahore High Court, Multan Bench, Multan in Criminal Revision No.267 of 2015).

Criminal Appeal No.19 of 2018

**KALAY KHAN---Appellant**

**Versus**

**The STATE---Respondent**

(Against the judgment dated 27-1-2015 passed by the Lahore High Court Lahore in Criminal Appeal No.98-J of 2014, Criminal Appeal No.324 of 2014, Criminal Appeal No.337 of 2014 and Capital Sentence Referene No.11-T of 2014).

Civil Appeal No.1772 of 2008 and Civil Miscellaneous Application No.1990 of 2015; Civil Petition No.1708 of 2011; Civil Appeal No.253 of 2015; Civil Petition No.988 of 2015; Criminal Appeal No.391 of 2015 and Criminal Appeal No.19 of 2018, decided on 11th October, 2019.

**Supreme Court Rules, 1980---**

----O. XXVI, R. 9---Constitution of Pakistan Art. 188---Review jurisdiction of the Supreme Court---Second/subsequent review petition before the Supreme Court---Maintainability---No scope for

maintainability of a second or subsequent review petition before the Supreme Court after the first review petition had been decided.

Khalid Iqbal and 2 others v. Mirza Khan and others PLD 2015 SC 50; Syed Shabbar Raza Rizvi and others v. Federation of Pakistan, Ministry of Law and Justice Division through Secretary, Islamabad and others 2018 SCMR 514 and Akhtar Umar Hayat Lalayka and others v. Mushtaq Ahmed Sukhaira and others 2018 SCMR 1218 ref.

**(b) Constitution of Pakistan---**

----Arts. 184(3), 187(1) & 188---Review jurisdiction of the Supreme Court---Scope---After exhausting the review jurisdiction of the Supreme Court a party to a case could not invoke Art. 184(3) or Art.187(1) of the Constitution for reopening the same case.

Khalid Iqbal and 2 others v. Mirza Khan and others PLD 2015 SC 50; Syed Shabbar Raza Rizvi and others v. Federation of Pakistan, Ministry of Law and Justice Division through Secretary, Islamabad and others 2018 SCMR 514 and Akhtar Umar Hayat Lalayka and others v. Mushtaq Ahmed Sukhaira and others 2018 SCMR 1218 ref.

**(c) Constitution of Pakistan---**

----Arts. 184(3), 185, 187(1) & 188---Interpretation of law in a judgment by the Supreme Court---Question whether an interpretation of law in any earlier order or judgment of the Supreme Court needed to be revisited or not---Such question was to be decided by the Supreme Court upon its own initiative and no party to a case or any other interested person could approach the Supreme Court for revisiting its earlier orders or judgments.

**(d) Criminal Procedure Code (V of 1898)---**

----S. 345---Anti-Terrorism Act (XXVII of 1997), S. 7---Act of terrorism---Non-compoundable offence committed simultaneously with some other coordinate compoundable offence in the same case---Question as to whether a non-compoundable offence, such as terrorism, could be treated as a compoundable offence for the purpose of recording an acquittal in respect of that offence if a coordinate compoundable offence committed in the same case had been compounded by the relevant parties---Held, that a non-compoundable offence of terrorism was an offence distinct and independent from any other coordinate offence also committed in the same case---Offence which the law declared to be non-compoundable remained non-compoundable even if in a coordinate compoundable offence a compounding took place between the relevant parties and, therefore, despite any compounding of the coordinate compoundable offence an acquittal could not be recorded in the non-compoundable offence on that sole basis.

Muhammad Amin v. The State 2002 SCMR 1017; Muhammad Ali and others v. The State and others PLD 2004 Lah. 554; Muhammad Rawab v. The State 2004 SCMR 1170; Muhammad Akhtar alias Hussain v. The State PLD 2007 SC 447 and Kareem Nawaz Khan v. The State through PGP and another 2016 SCMR 291 ref.

**(e) Criminal Procedure Code (V of 1898)---**

----S. 345---Non-compoundable offence committed simultaneously with some other coordinate compoundable offence in the same case---Question as to whether a sentence passed in a non-compoundable offence could be reduced on the ground that a coordinate compoundable offence committed in the same case had been compounded by the relevant parties---Held, that in an appropriate case, keeping in view the peculiar circumstances of the case, compounding of a coordinate compoundable offence may be considered by a court towards reduction of the sentence, within the permissible limits, passed for commission of a non-compoundable offence---Consideration of such factor vis- -vis reduction of the sentence passed for commission of the non-compoundable offence laid within the discretion of the court and could not be treated as automatic or as a matter of course.

**(f) Criminal Procedure Code (V of 1898)---**

----S. 345---Non-compoundable offence committed simultaneously with some other coordinate compoundable offence in the same case---Sentence passed in non-compoundable offence reduced on the ground that the coordinate compoundable offence committed had been compounded by the parties---Stage at which a court or forum could reduce the sentence passed in respect of the non-compoundable offence, if deemed warranted in the circumstances of the case explained.

In case of compounding of a coordinate compoundable offence, reduction of a sentence passed or to be passed for commission of a non-compoundable offence in the same case may be considered by the following courts at the following stages of the case:

(i) by the trial court at the time of passing the sentence at the end of the trial; or

(ii) if compounding of the coordinate compoundable offence took place at the appellate or revisional stage before a High Court or before the Supreme Court at the stage of petition for leave to appeal or appeal or review petition then a prayer for reduction of the sentence passed for commission of the non-compoundable offence may be made on that ground before the Court seized of the pending matter; or

(iii) if the Supreme Court had already passed a final order or judgment in a petition for leave to appeal or an appeal and no review petition had been filed so far then reduction of the sentence passed for the non-compoundable offence may be sought on the ground of compounding of the coordinate compoundable offence through filing of a review petition before the Supreme Court; or

(iv) if the remedy of filing of a review petition before the Supreme Court had already been exhausted then, there being no scope for filing of a second or subsequent review petition before the Supreme Court and a party to a case or anyone else interested in the matter being in no position to seek revisiting of an earlier order or judgment of the Supreme Court, the only remedy left for seeking reduction of the sentence passed for commission of a non-compoundable offence on the ground of compounding of a coordinate compoundable offence was to file a mercy petition before the President who may, in his discretion, consider such aspect in the light of the judgments passed by the Supreme Court on the subject from time to time; or

(v) if the remedy of a mercy petition before the President had already been exhausted before compounding of the coordinate compoundable offence had taken place then after acceptance of the compromise by the competent court in respect of the coordinate compoundable offence the Superintendent of the relevant jail shall, upon an initiative of the convicted prisoner, forward a fresh mercy petition to the President on behalf of that convicted prisoner seeking fresh consideration of the matter by him in respect of the sentence passed against the convicted prisoner for commission of the non-compoundable offence in the light of compounding of the coordinate compoundable offence committed by him. When seized of such a fresh mercy petition the President may, in his discretion, consider the matter of the convicted prisoner's sentence passed for commission of the non-compoundable offence afresh in the light of the judgments passed by the Supreme Court on the subject from time to time.

In attendance:

Shahid Azeem, Advocate Supreme Court, Javed Iqbal Raja, Advocate Supreme Court, Burhan Moazam Malik, Advocate Supreme Court, Mian Pervaiz Hussain, Advocate Supreme Court, Syed Tayyab Mehmood Jaffari, Advocate Supreme Court, Muhammad Ishtiaq Ahmed Raja, Advocate Supreme Court Raja Abdul Ghafoor, Advocate-on-Record, Malik Ghulam Mustafa Kandwal, Advocate Supreme Court, Kamran Murtaza, Advocate Supreme Court, Abid Hussain Saqi, Advocate Supreme Court, Muhammad Sadiq Baloch, Advocate Supreme Court, Ch. Munir Sadiq, Advocate Supreme Court, Zulfiqar Khalid Maluka, Advocate Supreme Court and Khadim H. Sandhu, Advocate Supreme Court

On Court's Notice:

Sajid Ilyas Bhatti, Deputy Attorney-General of Pakistan, Tariq Mehmood Jehangiri, Advocate-General, Islamabad, Ahmed Awais, Advocate-General, Punjab, Ch. Faisal Farid, Additional Advocate-General, Punjab, Ahmed Raza Gillani, Additional Prosecutor-General, Punjab. Barrister Shabbir Hussain Shah, Additional Advocate-General, Sindh, Salim Akhtar, Additional Prosecutor-General, Sindh, Zahid Yousaf Qureshi, Additional Advocate-General, Khyber Pakhtunkhwa, Syed Baqar Shah, State Counsel, Balochistan and Ayaz Khan Swati, Additional Advocate-General, Balochistan.

Date of hearing: 2nd April, 2019.

**JUDGMENT**

**ASIF SAEED KHAN KHOSA, C J.---**The offence of 'terrorism' defined in section 6 and punishable under section 7 of the Anti-Terrorism Act, 1997 is not a compoundable offence but in many cases the offence of terrorism is committed simultaneously with commission of some other offence and such other coordinate offence may sometimes be a compoundable offence. The effect of compounding of such coordinate compoundable offence upon the non-compoundable offence of terrorism or some other non-compoundable offence is a question which has been referred to the present Larger Bench for resolution. The circumstances in which this question has arisen in the present cases are briefly narrated as follows:

Civil Appeal No. 1772/2008.

(Moinuddin and another v. The State and others)

The appellants were convicted and sentenced to death under section 302(a), P.P.C. read with section 7 of the Anti-Terrorism Act, 1997 besides having been convicted and sentenced for some other offences. The appellants' appeal was dismissed by the High Court and their appeal before this Court was also dismissed. The appellants then filed a Criminal Suo Motu Review Petition before this Court which too was dismissed and their Mercy Petition was subsequently dismissed by the President of Pakistan. Later on the parties entered into a compromise but the same was disallowed by the trial court and the appellants' Constitution Petition against the said order was dismissed by the High Court which order was challenged before this Court and the matter was referred to the present Larger Bench to determine whether a compromise in respect of the offence of murder can be treated as a mitigating circumstance for reducing the sentence of death under section 7 of the Anti-Terrorism Act, 1997 to imprisonment for life at such a stage or not. Through an order passed on 22.04.2015 in Civil Miscellaneous Application No. 1990 of 2015 this Court had suspended execution of the appellants' sentences of death during the pendency of their main appeal.

Civil Petition No. 1708 of 2011

(Abdul Rehman v. The State and another)

The petitioner was tried by the Anti-Terrorism Court, Sargodha and was convicted and sentenced to death under section 302(b), P.P.C. as well as under section 7 of the Anti-Terrorism Act, 1997 besides having been convicted and sentenced for some other offences. The petitioner's appeal was dismissed by the High Court and his appeal before this Court also met the same fate. Thereafter the petitioner filed Criminal Review Petition 65 of 2010 before this Court which was also dismissed vide order dated 11.11.2010. The petitioner then filed an application before the Anti-Terrorism Court, Sargodha seeking permission to compound the offences against him. The said application was rejected by the said court vide order dated 18.02.2011 which order was upheld by the High Court on 16.08.2011 and the petitioner has challenged the said order before this Court through this petition.

Civil Appeal No.253 of 2015.

(Muhammad Qaiser @ Billa v. The learned District and Session Judge/Judge ATC No. 1, Faisalabad and others)

The appellant was tried by the Anti-Terrorism Court, Faisalabad and was convicted and sentenced to death for the offence under section 302(b), P.P.C. as well as for the offence under section 7 of the Anti-Terrorism Act, 1997 besides having been convicted and sentenced for some other offences. The

appellant's appeals were dismissed by the High Court and also by this Court and his convictions and sentences were upheld. The appellant then filed a Criminal Suo Motu Review Petition before this Court which was dismissed and his Mercy Petition was also rejected by the President of Pakistan. In a subsequent round the appellant's application for compromise was dismissed by the trial court and the High Court refused to interfere in the same. Leave to appeal was granted by this Court to examine the effect of a compromise in the compoundable offences on the sentence passed under section 7 of the Anti-Terrorism Act, 1997 which offence is non-compoundable.

Criminal Petition No. 988 of 2015.

(Waryam and another v. The State)

The petitioners were tried by the Anti-Terrorism Court, Sukkur and were convicted and sentenced to imprisonment for life for the offence under section 302(b), P.P.C. and also for the offence under section 7 of the Anti-Terrorism Act, 1997 besides having been convicted and sentenced for some other offences. The petitioners' appeal was dismissed by the High Court and their Jail Petition filed before this Court was also dismissed. Subsequently the parties entered into a compromise but the trial court refused to give effect to it and later on a revision petition filed by the petitioners in that regard was dismissed by the High Court which order was assailed by the petitioners before this Court through a Criminal Suo Motu Review Petition which is being treated as the instant petition.

Criminal Appeal No.391 of 2015

(Zafar Hussain and another v. The State and others)

The appellants were convicted by the trial court for the offence under section 396, P.P.C. and were sentenced to death and they were also convicted for the offence under section 302(c), P.P.C. and were sentenced to rigorous imprisonment for 10 years and later on their convictions and sentences had been upheld and maintained by the High Court as well as this Court. The appellants then filed Criminal Review Petition 106 of 2015 before this Court which was also dismissed vide order dated 08.09.2015. Subsequently the parties entered into a compromise but the trial court refused to give effect to it and a revision petition filed by the appellants in that regard before the High Court was also dismissed. Leave to appeal was granted by this Court to consider whether the sentences of death awarded to the appellants for the offence under section 396, P.P.C., which is a non-compoundable offence, could be converted into imprisonment for life in view of the compromise affected between the parties in the coordinate compoundable offence.

Criminal Appeal No. 19 of 2018

(Kalay Khan v. The State)

The appellant was convicted by the trial court for the offences under section 302(b), P.P.C. and section 7(a) of the Anti-Terrorism Act, 1997 and was sentenced to death for both the said offences besides having been convicted and sentenced for the offences under section 324, PPC, section 148, P.P.C. and section 7(c) of the Anti-Terrorism Act, 1997. During pendency of the appellant's appeal before the High Court the complainant party entered into a compromise with the appellant leading to his acquittal from the charge under section 302(b), P.P.C. and conversion of his sentence of death under section 7(a) of the Anti-Terrorism Act, 1997 to imprisonment for life. Leave to appeal was granted by this Court to examine the effect of a compromise in connection with a compoundable offence on the conviction and sentence recorded for an offence under the Anti-Terrorism Act, 1997 which offence is non-compoundable.

2. We have heard the learned counsel for the parties and the learned law officers at some length and with their assistance we have attended to the factual and legal issues involved in these cases as well as the precedent cases available on the subject.

3. We find that three questions emerging from the facts of the present cases need to be answered and they are as follows:

(i) Can a non-compoundable offence be treated as a compoundable offence for the purpose of recording an acquittal in respect of that offence if a coordinate compoundable offence committed in the same case has been compounded by the relevant parties?

(ii) Can the sentence passed in a non-compoundable offence be reduced on the ground that a coordinate compoundable offence committed in the same case has been compounded by the relevant parties?

(iii) If the answer to question No. (ii) is in the affirmative then at what stage and by which court or forum reduction in the sentence passed in respect of a non-compoundable offence be ordered, if deemed warranted in the circumstances of the case?

4. A careful perusal of different precedent cases decided by this Court shows that the answers to all these questions are already available in such cases but they are in a scattered form and the same need to be consolidated so that the above mentioned questions may be answered with clarity and any confusion in that regard may be removed. The relevant extracts from such precedent cases are reproduced here for facility of reference:

Muhammad Rawab v. The State

(2004 SCMR 1170)

"3. Heard Dr. Babar Awan, learned Advocate Supreme Court on behalf of appellant and learned Advocate-Generals for the State. The pivotal question which needs determination would be as to whether parties can be allowed to compound the offences which are not compoundable by virtue of the provisions as contemplated in section 345, Cr.P.C. specially in view of the specific bar as mentioned in subsection (7) of section 345, Cr.P.C. There is no denying the fact that section 365-A, P.P.C. read with section 7(e) of the Anti-Terrorism Act, 1997 is not compoundable. The provisions as contained in section 345(7), Cr.P.C. have been couched in such a plain and simple language that there is hardly any scope for any interpretation except that a non-compoundable offence cannot be made compoundable by this Court for the simple reason that no amendment, deletion, insertion or addition could be made by this Court and it could only be done by the Legislature as this aspect of the matter falls in its exclusive domain of jurisdiction. The provisions as contained in section 345, Cr.P.C. cannot be stretched too far by including the non-compoundable offence therein under the garb of humanitarian grounds or any other extraneous consideration. The offences committed by the appellant are not of grave and alarming nature but the same are against the society as a whole and cannot be permitted to compound by any individual on any score whatsoever. It may be noted that tabulation of the offences as made under section 345, Cr.P.C. being unambiguous remove all doubts, uncertainty and must be taken as complete and comprehensive guide for compounding the offences. The judicial consensus seems to be that "The Legislature has laid down in this section the test for determining the classes of offences which concern individuals only as distinguished from those which have reference to the interests of the State and Courts of law cannot go beyond that test and substitute for it one of their own. It is against public policy to compound a non-compoundable offence, keeping in view the state of facts existing on the date of application to compound. No offences shall be compounded except where the provisions of section 345, Cr.P.C. are satisfied as to all matters mentioned in the section". (Emphasis provided).

4. The above judicial consensus is based on the following authorities:--

Dalsukhram Hargovandas v. Charles DeBretton 28 Bom. 326; Meenakshi Sundarammal v. Subramaniam Ayyar AIR 1955 Mad. 369; Akshoy Singh v. Rameshawar Bagdi AIR 1917 Cal. 705; Mt. Rani v. Mt. Jaiwanti AIR 1925 Nag. 395; Crown v. Muhammad Hussain PLD 1950 Lah. 86; Gurunarayan Das and others's case AIR 1948 Pat. 58; Agha Nazarali Sultan Muhammad v. Emperor AIR 1941 Sindh 186; Emperor v. Jarnally and others AIR 1925 Lah. 464; Ghulam Rasool v. State 1999 MLD 3085; Muhammad Asif v. State 1991 MLD 1026;

Noor Muhammad alias Noora v. State 1992 SCMR 2079; Muhammad Nazir alias Jeera v. State PLD 2001 Lah. 212; Muhammad Anwar v. State 1986 MLD 1111; Nawab-ul-Hassan v. State 2003 SCMR 658 and Yousaf Ali v. State 2002 SCMR 1885."

Ghulam Farid alias Farida v. The State

(PLD 2006 SC 53)

"5. The offence of dacoity is not compoundable either under pure Islamic Law or under the statutory law of Pakistan, therefore, the contention of the learned counsel that notwithstanding the circumstances under which the murder had taken place, Qatl with no distinction is compoundable in Islam and the bar of statutory law would not be applicable, has no substance. There is concept of right of Afw and Badal-e-Suleh in a case of Qatl-i-Amd, punishable under section 302(a), P.P.C., as Qisas and this right can also be exercised with permission of Court in a case in which punishment of death is awarded as Tazir under section 302(b) but the concept of Afw and Badl-e-Suleh under the existing law has not been made applicable to a case under section 396, P.P.C., in which death is awarded for murder taken place during the course of committing dacoity and thus the Court cannot competently give effect to a compromise in a non-compoundable offence against the policy of law. The petitioner in the present case was awarded sentence of death under section 396, P.P.C. for murder as Tazir which had taken place during the course of committing dacoity and the offence under section 396, P.P.C., being not compoundable, the provision of sections 309 and 310, P.P.C., read with 338(E), P.P.C., could not be made applicable to give effect to a compromise in a non-compoundable offence under the law. In the matter of interpretation and application of provision of Chapter XVI, P.P.C., in respect of the offences mentioned therein or the matters ancillary or akin thereto Court can seek guidance from Holy Quran and Sunnah as provided in section 338(F), P.P.C., but the Court cannot bring a non-compoundable offence within the purview of section 345, Cr.P.C., by virtue of section 338-F, P.P.C., for the purpose of compounding it on the basis of compromise. This is settled law that Courts can interpret the provisions of law but cannot change or substitute such provisions and also cannot go beyond the wisdom of law. The contention of the learned counsel that the compromise between the parties at least could be treated a mitigating circumstance for the purpose of lesser punishment, has also no substance. This Court while upholding the judgment of the High Court by virtue of which conviction and sentence awarded to the petitioner by the trial Court was maintained, has already dismissed the petition for leave to appeal. The present petition has arisen out of the proceedings in a miscellaneous application moved by the petitioner for his acquittal on the basis of his compromise with the legal heirs of the deceased, therefore, in these proceedings, it was not possible for the High Court to re-open the case on merits in exercise of its powers under section 561-A, Cr.P.C., and similarly this Court is not supposed to undertake such an exercise under Article 187 of the Constitution of Islamic Republic of Pakistan and consider the question relating to the quantum of sentence on the basis of compromise between the parties in such a heinous offence which is considered a crime against the Society."

M. Ashraf Bhatti and others v. M. Aasam Butt and others

(PLD 2006 SC 182)

"7. In view of the facts that parties have compromised the matter and compensation has already been received by the complainants therefore, permission is accorded to compound the offence under section 345(2), Cr.P.C. Now we would advert to examine whether in the cases like one in hand where brutal murder of two young boys has been committed when they were confined in judicial lock-up, in a shocking manner which has outraged the public conscience, the convicts are liable for punishment on the principle of Fasad-fil-Arz. The facts of the case and material available on record reveal that petitioners/convicts have committed crime in a brutal

manner of the deceased who were confined in lock-up. Therefore, considering them sitting ducks, they took the law in their hands, without caring that police stations or Court premises are considered such places where law protects the life of citizens. Therefore, in exercise of jurisdiction under section 311, P.P.C. the sentence of death of the two convicts namely Naheeb Butt alias Bhutto and Moazzam Butt is reduced from death to life imprisonment under section 302, P.P.C. and under section 7(b) of A.T.A. on both the counts. Similarly sentences awarded to Muhammad Aasam and Shahbaz alias Dodi for imprisonment of life under section 302(b), P.P.C. is reduced to 14 years and sentence awarded to them for life imprisonment under section 7(b) of A.T.A. is kept intact on both the counts with benefit of section 382-B of Cr.P.C., which has already been extended to them by the Lahore High Court. Remaining sentences awarded to them are kept intact. All the sentences shall run concurrently."

Muhammad Akhtar alias Hussain v. The State

(PLD 2007 SC 447)

"2. The petitioner after having been unsuccessful in his attempts to secure his acquittal in the case initiated making efforts to effect a compromise with the complainant party and in this respect he submitted an application before the trial Court for his acquittal on the basis of the compromise. His this application was dismissed by the trial Court against which a writ petition was filed before the High Court. The case was remanded back by the High Court to the Anti-Terrorism Court (the trial Court) with the direction to give findings with regard to the compromise between the parties. This time the trial Court while allowing the compromise to the extent of charge under section 302(b), P.P.C., acquitted the petitioner from the said charge whereas his application to the extent of conviction and sentence on the charge under section 7 of the ATA, 1997 was dismissed. The petitioner again approached the High Court through a Constitution Petition questioning the legality of the order on the ground that the conviction and sentence of the petitioner under section 7 of the ATA, 1997 is the outcome of the main charge under section 302(b), P.P.C. and since the petitioner has already been acquitted from the said charge he is also entitled to be acquitted from the charge under section 7 of the ATA, 1997. However, his this plea was not accepted by the High Court and his writ petition was dismissed and now the present petition.

3. The learned counsel for the petitioner has vehemently contended, as submitted before the High Court, that after the acquittal of the petitioner under section 302, P.P.C. he was entitled to the acquittal under section 7 of the ATA, 1997 which is the offshoot of the main offence under section 302, P.P.C.

4. We have attended to his this contention. Whatever the nature or status of an offence but for the purposes of the compromise it will be seen as to whether the offence/the section of law for which the compromise is requested is compoundable under the law or not. The offences which are compoundable have been mentioned in section 345(1), Cr.P.C. Since the offence is under section 7 of the ATA, 1997 for which a death penalty has been prescribed does not find its mention in the aforesaid section in the category of the offences which are compoundable, and both the Courts below have rightly disallowed the compromise. In this respect reliance can be placed on the case of Muhammad Rawab v. The State 2004 SCMR 1170. The relevant extract from the judgment in which leave was granted in order to examine, inter alia, the following:--

"2. ------ The question whether the Court can permit the parties to compound the offences which are not mentioned in section 345, Cr.P.C. specially when there is a bar under section 345(7) of Cr.P.C. for entertaining a compromise in the offences not mentioned in section 345, Cr.P.C."

The Court while dismissing the appeal held:--

"3. ----- The pivotal question which needs determination would be as to whether parties can be allowed to compound the offences which are not compoundable by virtue of the provisions as

contemplated in section 345, Cr.P.C. specially in view of the specific bar as mentioned in subsection (7) of section 345, Cr.P.C. There is no denying the fact that section 365-A, P.P.C. read with section 7(e) of the Anti-Terrorism Act, 1997 is not compoundable. The provisions as contained in section 345(7), Cr.P.C. have been couched in such a plain and simple language that there is hardly any scope for any interpretation except that a non-compoundable offence cannot be made compoundable by this Court for the simple reason that no amendment, deletion, insertion or addition could be made by this Court and it could only be done by the Legislature as this aspect of the matter falls in its exclusive domain of jurisdiction. The provisions as contained in section 345, Cr.P.C. cannot be stretched too far by including the non-compoundable offence therein under the garb of humanitarian grounds or any other extraneous consideration. The offences committed by the appellant are not of grave and alarming nature but the same are against the society as a whole and cannot be permitted to compound by any individual on any score whatsoever. It may be noted that tabulation of the offences as made under section 345, Cr.P.C. being unambiguous remove all doubts, uncertainty and must be taken as complete and comprehensive guide for compounding the offences. The judicial consensus seems to be that "The Legislature has laid down in this section the test for determining the classes of offences which concern individuals only as distinguished from those which have reference to the interests of the State and Courts of law cannot go beyond that test and substitute for it one of their own. It is against public policy to compound a non-compoundable offence, keeping in view the state of facts existing on the date of application to compound. No offences shall be compounded except where the provisions of section 345, Cr.P.C. are satisfied as to all matters mentioned in the section."

The aforesaid judgment was followed by this Court in another case, Ghulam Farid alias Farida v. The State PLD 2006 SC 53.

5. We have also considered the question of reduction of sentence in view of the compromise arrived at between the parties. Since the matter before us is not in the regular proceeding arising out of the conviction and sentences passed by the trial Court and his appeal before the High Court and then a petition before this Court but after the decision having been rendered by this Court dismissing the petition of the petitioner against the order of his conviction and sentence and while dismissing the petition by this Court, his conviction and sentences under section 302/34, P.P.C. and section 7 of the ATA, 1997 were kept intact. So once the findings have been given on merits by this Court, then it would not be appropriate to enter the merits of the case again to consider the reduction of sentence in an offence which is not compoundable. In this respect the relevant portion of paras. 4 and 5 of the judgment passed in the case of Ghulam Farid (supra) are reproduced hereinbelow:--

"4. There is no cavil to the proposition that the Courts at all levels without any legal impediment, while deciding the criminal cases on merits, in the regular proceedings, can consider the compromise of an offender with the victim or his legal heirs, as a mitigating circumstance for the purpose of question of sentence in a non-compoundable offence but after final disposal of a criminal matter, Courts cannot assume jurisdiction to re-open the case on merits in collateral proceedings arising out of miscellaneous application. The petitioner after losing the case on merits, before the trial Court, the High Court and also before this Court in regular proceedings moved an application to the Court of first instance for his acquittal on the basis of his compromise with the legal heirs of the deceased wherein he also made an alternate prayer of reduction in sentence ----

5. ---- This is settled law that Courts can interpret the provisions of law but cannot change or substitute such provisions and also cannot go beyond the wisdom of law. The contention of the learned counsel that the compromise between the parties at least could be treated a mitigating circumstance for the purpose of lesser punishment, has also no substance. This Court while

upholding the judgment of the High Court by virtue of which conviction and sentence awarded to the petitioner by the trial Court was, maintained, has already dismissed the petition for leave to appeal. The present petition has arisen out of the proceedings in a miscellaneous application moved by the petitioner for his acquittal on the basis of his compromise with the legal heirs of the deceased, therefore, in these proceedings, it was not possible for the High Court to re-open the case on merits in exercise of its powers under section 561-A, Cr.P.C., and similarly this Court is not supposed to undertake such an exercise under Article 187 of the Constitution of Islamic Republic of Pakistan and consider the question relating to the quantum of sentence on the basis of compromise between the parties in such a heinous offence which is considered a crime against the Society."

6. The findings of the Courts below by not granting permission to compound the offence under section 7 of the ATA, 1997 are in accordance with law and particularly in view of the bar as contained in subsection (7) of section 345, Cr.P.C. We find no illegality in the orders impugned herein and which does not deserve any interference. Resultantly we see no force in this petition, leave is declined and the petition dismissed."

Muhammad Nawaz v. The State

(PLD 2014 SC 383)

"8. It is to be noted that the act of terrorism, though is interlinked with the principal offence i.e. 302(b), P.P.C., falls under a different provision of law i.e. section 6(2)(n) of ATA. Deceased Muhammad Mumtaz was on official duty at the time of the occurrence as it is evident from the statements of P.Ws. that he was in uniform and was causing arrest of nominated accused along with raiding police party but to terrorize the police the accused opened fire, which caused his (Muhammad Mumtaz) death and also created obstruction in the discharge of their duty. Sentence under section 302(b) attracts the provision of section 353, P.P.C., which he has already undergone. Thus, the offence under section 6(2)(n) of ATA also stands established against the petitioner, which provides the meaning of terrorism and any such action that falls within the meaning of said section, involving serious violence against a member of the police force, armed forces, civil armed forces, or a public servant. This offence stood established, in view of the facts and circumstances narrated hereinabove, particularly, accepting the conviction/ sentence under section 302(b), P.P.C. as he has entered into compromise with the deceased, however as far as the second count of death sentence under section 7 ATA is concerned, it has got its own implications and is not compoundable under section 345 subsections (5) and (7) of Cr.P.C. This Court examined this very proposition in the case of Muhammad Rawab v. State (2005 SCMR 1170), reliance on which has also been placed by the Sessions Judge when the compromise under section 302(b), P.P.C. and 7 of ATA was submitted. Learned Special Judge gave effect the compromise only to the extent of 302(b), P.P.C., whereas compromise under section 7 ATA was not allowed to be compounded in view of the law referred to hereinabove.

9. However, this fact can also not be over sighted that in respect of murder of Muhammad Mumtaz, Constable, the petitioner was also sentenced to death and now the parties have compounded the offence under section 302(b), P.P.C. and according to the record compensation has also been paid. Therefore, question for quantum of sentence under section 7 of ATA can be examined in view of the judgment in the case of M. Ashraf Bhatti v. M. Aasam Butt (PLD 2006 SC 182) wherein after the compromise between the parties sentence of death was altered to life imprisonment.

10. It is to be noted that both the sentences i.e. death and life imprisonment are legal sentences, therefore, under the circumstances either of them can be awarded to him. Thus in view of the peculiar circumstances noted hereinabove, sentence of death under section 7 ATA, 1997 is

converted into life imprisonment without extending benefit of section 382-B, Cr.P.C. as the same was not allowed by the trial Court, first appellate Court as well as by this Court in the judgment under review.

11. Accordingly, compromise between the parties is accepted to the extent of conviction under section 302(b), P.P.C. and the petitioner is acquitted of the charge. However, the death sentence under section 7 of ATA is converted into life imprisonment and the review petition is disposed of."

Shahid Zafar and 3 others v. The State

(PLD 2014 SC 809)

"9. Insofar as the compounding of the offences is concerned by the appellants reached through compromise with the legal heirs of the deceased, it would be seen that Section 7 (a) of the Anti Terrorism Act, 1997 is not compoundable and hence the learned High Court correctly dismissed such compromise applications. Even otherwise we are of the opinion that the cruel and gruesome murder of the deceased who had been begging for his life from the appellants certainly amounted to Fasad-Fil-Arz within the meaning of Section 311, P.P.C. and hence there could not be any question of acceptance of compromise between the parties. However having said as much we are also aware that in the case of Muhammad Nawaz (Supra) this Court had converted the sentence of death to that of life imprisonment under Section 7(a) of the Anti Terrorism Act 1997 where the legal heirs had compounded the matter with the accused as in the present case. Consequently we would partly allow Criminal Appeal No.8-K of 2014 by directing that the sentence of death imposed upon the appellant Shahid Zafar be reduced to life imprisonment."

Kareem Nawaz Khan v. The State

(2019 SCMR 1741)

"3. Karim Nawaz Khan petitioner had allegedly murdered his sister, a brother and a sister-in-law by firing at them with the use of a Kalashnikov in an incident taking place at about 12.00 Noon on 03.06.2007 inside the house of Muhammad Khan complainant in village Whandi Shiapur in the area of Police Station Moch, District Mianwali in the backdrop of a motive based upon a dispute between the parties over some ancestral property. With these allegations the petitioner was booked in case FIR No 101 registered at the above mentioned Police Station soon after the incident and after a regular trial the petitioner was convicted on 3 counts of an offence under section 302(b), P.P.C. and was sentenced to death on each count and to pay compensation and Diyat to their heirs of the deceased. The petitioner was also convicted by the trial court for an offence under section 7(a) of the Anti-Terrorism Act, 1997 and even on that count of the charge he was sentenced to death and to pay fine. The petitioner was additionally convicted by the trial court for an offence under section 21-L of the Anti-Terrorism Act, 1997 and for the said offence he was sentenced to rigorous imprisonment for five years and to pay fine. The petitioner challenged his convictions and sentences before the High Court through an appeal which was dismissed and all his convictions and sentences recorded by the trial court were upheld and confirmed by the High Court. Thereafter the petitioner approached this Court through Criminal Petition No.1245-L of 2010 but the said petition was also dismissed by this Court on 05.06.2012 and leave to appeal was refused to him. Hence, the present review petition before this Court.

4. On 05.06.2012 this Court had dismissed Criminal Petition No. 1245-L of 2010 after attending to the merits of the petitioner's case and it had been held by this Court that the courts below were justified in convicting and sentencing the petitioner and in upholding and confirming his sentences. Through the present review petition it has been brought to this Court's notice that after passage of the said order by this Court upholding and maintaining the petitioner's

convictions, and sentences the heirs of all the three deceased had entered into a compromise with the petitioner which compromise was presented before the trial court, i.e. the Anti-Terrorism Court, Sargodha and vide judgment dated 19.02.2014 the learned Judge, Anti-Terrorism Court, Sargodha was pleased to accept the said compromise on all the three counts of the charge under section 302(b), P.P.C. whereas the said compromise was rejected to the extent of the petitioner's convictions and sentences for the offences under sections 7(a) and 21-L of the Anti-Terrorism Act, 1997. We have gone through the said order passed by the trial court on 19.02.2014 and have noticed that the trial court had felt satisfied regarding genuineness and completion of the acclaimed compromise between the parties. Through the present review petition the learned counsel for the petitioner has urged that in view of the compromise affected between the parties vis- -vis the offences under section 302(b), P.P.C. the sentence of the petitioner for the offence under section 7(a) of the Anti-Terrorism Act, 1997 may be reduced from death to imprisonment for life. In support of this submission the learned counsel for the petitioner has referred to the cases of Muhammad Nawaz v. State (PLD 2014 SC 383), Shahid Zafar and 3 others v. The State (PLD 2014 SC 809) and M. Ashraf Bhatti and others v. M. Aasam Butt and others (PLD 2006 SC 182). The learned Additional Prosecutor-General, Punjab appearing for the State has submitted that in above mentioned precedent cases this Court had indeed utilized a compromise between the parties for reduction of a convict's sentence of death to imprisonment for life on a charge under section 7(a) of the Anti-Terrorism Act, 1997 and, thus, the matter of reduction of the petitioner's sentence on such score in the present case lies within the discretion of the Court.

5. After hearing the learned counsel for the parties and going through the record we have noticed that the appellant was very closely related to all the three murdered persons in this case, i.e., he was a brother of two of the deceased and a brother-in-law of the third deceased and the incident in issue had taken place because of a dispute between the parties over some ancestral property. According to the prosecution itself there was no enmity between the parties and the present incident had taken place half an hour of an earlier incident wherein the petitioner and the deceased and some others had quarreled with each other while discussing the matter of ancestral property. It could, thus, be said that in the absence of any on-going enmity between the parties the present occurrence had taken place because of some very recent provocation offered to the petitioner by the complainant party while discussing the issue regarding ancestral property. It may, therefore, be a case not of grave and sudden provocation but a case which was based upon some provocation recently offered to the petitioner although the same was not sudden. In a case of such a situation this Court has held that the least that a Court can do in such a case is to reduce the sentence of death to imprisonment for life and a reference in this respect may be made to the case of Ghulam Abbas v. Mazhar Abbas and another (PLD 1991 SC 1059). There is an additional factor available in this case for reduction of the petitioner's sentence of death to imprisonment for life and that is that a valid compromise had been arrived at between the parties which has already been allowed by the trial court vis- -vis three counts of the charge under section 302(b), P.P.C. In the cases of Muhammad Nawaz v. The State (PLD 2014 SC 383), Shahid Zafar and 3 others v. The State (PLD 2014 SC 809) and M.Ashraf Bhatti and others v. M. Aasam Butt and others (PLD 2006 SC 182) this Court has already considered a valid and accepted compromise in the coordinate offence to be a valid ground for reduction of a sentence of death into imprisonment for life on the charge of terrorism or of a non-compoundable offence.

6. For what has been discussed above this review petition is allowed, the order under review dated 05.06.2012 passed by this Court in Criminal Petition No. 1245-L of 2010 is recalled, the said petition is converted into an appeal and the same is partly allowed with the result that the

sentence of death passed against the petitioner/ appellant for the offence under section 7(a) of the Anti-Terrorism Act, 1997 is converted into a sentence of imprisonment for life. The order passed by the trial court regarding payment of fine on that charge is maintained but it is ordered that in default of payment of fine he shall undergo simple imprisonment for six months. On account of a valid compromise having been arrived at between the heirs of the three deceased and the present appellant, which compromise had already been allowed by the trial court, his convictions and sentences on three counts of the charge under section 302(b), P.P.C. are set aside and he is acquitted of the said counts of the charge. The appellant has already served out his sentence of imprisonment for the offence under section 21-L of the Anti-Terrorism Act, 1997 which shall be deemed to have run concurrently with his other sentence of imprisonment. The appellant shall be allowed the benefit under section 382-B, Cr.P.C. as far as his reduced sentence under section 7(a) of the Anti-Terrorism Act, 1997 is concerned. This review petition and the appellant's petition converted into an appeal are disposed of in the terms noted above."

5. The situation is altogether different in cases where the convictions and sentences of convicts have already attained finality after decision of their review petitions by this Court. Order XXVI, Rule 9 of the Supreme Court Rules, 1980 provides as follows:

"After the final disposal of the first application for review no subsequent application for review shall lie to the Court and consequently shall not be entertained by the Registry."

There is, thus, no scope for maintainability of a second or subsequent review petition before this Court after the first review petition has been decided. It is sometimes argued that in such a situation, particularly in a case of extreme hardship, this Court may attend to the matter in exercise of its jurisdictions under Articles 184(3) or 187 of the Constitution or may resort to revisiting the earlier order or judgment in order to safeguard the interests of justice but such arguments have consistently been rejected by this Court in the past. In many previous cases this Court has consistently held that after exhausting the review jurisdiction of this Court a party to a case cannot invoke Articles 184(3) or 187(1) of the Constitution for reopening the same case. It has also been held by this Court that the question whether an interpretation of law in any earlier order or judgment of this Court needs to be revisited or not is a question to be decided by this Court upon its own initiative and no party to a case or any other interested person can approach this Court for revisiting its earlier orders or judgments. The following precedent cases may be referred to in this respect:

Khalid Iqbal and 2 others v. Mirza Khan and others

(PLD 2015 SC 50)

"12. The question of maintainability of the 2nd Criminal Review Petition on the ground that this Court has to do complete justice by invoking Article 187(1) of the Constitution is also misconceived. The provisions of Article 187(1) cannot be attracted in the present case, as this Court has already recorded findings against the petitioner by the Judgment dated 28-2-2001, against which review was also dismissed and there was no 'lis' pending before this Court warranting exercise of its jurisdiction under Article 187(1) of the Constitution, besides Rule 9 of the Order XXVI of the Supreme Court Rules, bars 2nd Review Petition. There is a distinction between right of a party to approach the Court and jurisdiction of the Court to do complete justice on its own. Once this Court has finally determined the right of the petitioner in the judgment dated 28-2-2001, holding him guilty, the petitioner through 2nd Review Petition, cannot reagitate it. If such a Review Petition is allowed to be entertained, it will land in a situation where findings of this Court against a party will never attain finality.

13. This, however, does not mean that the jurisdiction of this Court is barred by any restriction placed by the Constitution; there is no Article in the Constitution which imposes any restriction or bar on this Court to revisit its earlier decision or even to depart from them, nor the doctrine of stare decisis will come in its way so long as revisiting of the judgment is warranted, in view

of the significant impact on the fundamental rights of citizens or in the interest of public good. This issue was fully comprehended and answered in the case titled Regarding pensionary benefits of the Judges of Superior Courts from the Date of their respective retirements, irrespective of their length of service as such Judges (PLD 2013 SC 829 at page 993). The relevant portions are reproduced herein below:--

"3. My learned brother has exhaustively dealt with the question of maintainability, which is a threshold proposition of the matter, and in this behalf extensive reference to the case-law has also been made. I therefore have no intention to add any superfluity to that, however, my approach to the proposition is quite simple, plain and facile, in that, the Supreme Court of Pakistan is the apex Court of the country. It is the final, the utmost and the ultimate Court, inter alia, in relation to, (a) resolving disputes inter se the parties before it, (b) securing and enforcing the fundamental rights of the citizen/person, when those (rights) are in issue before the Court, in any of its jurisdiction, either original or appellate or suo motu, (c) the interpretation and the enunciation of the law of the land, (d) examining and adjudging the legislative Acts and the executive order/actions of the State, in the exercise of its power of judicial review, (e) the exercise of original jurisdiction as per the mandate of Article 184 of the Constitution, (f) the advisory jurisdiction within the parameter of Article 186 of the Constitution, (g) the review of its decision (judgments) (see Article 188) (h) a special jurisdiction conferred upon this Court by any law. And above all the power to do complete justice (see Article 187). In terms of Article 189 of the Constitution, 'Any decision of the Supreme Court shall, to the extent that it decides question of law or is based upon or enunciates a principle of law, (emphasis supplied) be binding on all other courts in Pakistan". Moreover, according to Article 190 "All executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court".

4. The aforestated legal position explains and highlights the true magnitude and the supremacy of this Court in regard to the dispensation of justice in the country and the enunciation and the declaration of the law by it. As the law laid down by the (apex) Court, and the order(s) passed by it, being the paramount and ultimate in nature, has to be imperatively and mandatorily followed, obeyed and adhered to by all the concerned. Reading Articles 189 and 190 conjointly, and while keeping in view the scheme of the Constitution, the very purpose, the pivotal position and the status of this Court (prescribed above), it is expedient that correct law should be pronounced by the apex Court. And pursuant to the above object and due to the venerated position of this Court, the Court is cumbered with, inviolable responsibility, and a sacred duty, to interpret, declare and enunciate the law correctly, so that it should be followed, obeyed and adhered to purposively and in letter and spirit, by all the other organs of the State (including all other Courts in Pakistan) strictly in consonance with the true aim of the aforementioned Articles. It may be pertinent to mention here, that any invalid enunciation of law, shall contravene and impugn the very character, and attribute(s) of this Court and such bad/wrong law shall cause drastic adverse effects on the socioeconomic, political, geographical, ethnic, cultural aspects and dynamics of the nation, the society, the people at large and the State in presentee or in futurio. In the above context, reference can also be made to Article 4 of the Constitution which enshrines (inter alia) an inalienable right of every citizen to be dealt with in accordance with the law, obviously this shall mean the law that is, correctly laid down by this Court. As it is a cardinal principle of justice, that the law should be worn by the Judge in his sleeves and justice should be imparted according to the law, notwithstanding whether the parties in a lis before the Court are misdirected and misplaced in that regard. Therefore, if any law which has been invalidly pronounced and declared by this Court, which in particular is based upon ignorance of any provisions of the Constitution, and/or is founded on gross and grave misinterpretation thereof; the provisions of the relevant law have been ignored, misread

and misapplied; the law already enunciated and settled by this Court on a specific subject, has not been taken into account, all this, inter alia, shall constitute a given judgment(s) as per incuriam; and inconsistent/conflicting decision of this Court shall also fall in that category. Such decision undoubtedly shall have grave consequences and repercussions, on the State, the persons/ citizens, the society and the public at large as stated above. Therefore, if a judgment or a decision of this Court which is found to be per incuriam (note: what is a judgment per incuriam has been dealt with by my brother), it shall be the duty of this Court to correct such wrong verdict and to set the law right. And the Court should not shun from such a duty (emphasis supplied). For the support of my above view, I may rely upon the law laid down in the dicta Lt. Col. Nawabzada Muhammad Amir Khan v. The Controller of Estate Duty, Government of Pakistan, Karachi and others (PLD 1962 SC 335 at page 340):--

'Where, however, there is found to be something directed by the judgment of which review is sought which is in conflict with the Constitution or with a law of Pakistan, there it would be the duty of the Court, unhesitatingly to amend the error. It is a duty which is enjoined upon every Judge of the Court by the solemn oath which he takes when he enters upon his duties, viz., to "preserve, protect and defend the Constitution and laws of Pakistan" But the violation of a written law must be clear."

M. S. Ahlawat v. State of Haryana and another (AIR 2000 SC 1680):--

'15. To perpetuate an error is no virtue but to correct it is a compulsion of judicial conscience."

Bengal Immunity Co. Ltd., v. State of Bihar and others (AIR 1955 SC 661):--

'19. Reference is made to the doctrine of finality of judicial decisions and it is pressed upon us that we should not reverse our previous decision except in cases where a material provision of law has been overlooked or where the decision has proceeded upon the mistaken assumption of the continuance of a repealed or expired statute and that we should not differ from a previous decision merely because a contrary view appears to us to be preferable.

It is needless for us to say that we should not lightly dissent from a previous pronouncement of this court. Our power of review, which undoubtedly exists, must be exercised with due care and caution and only for advancing the public well being in the light of the surrounding circumstances of each case brought to our notice but we do not consider it right to confine our power within rightly fixed limits as suggested before us.

If on a re-examination of the question we come to the conclusion, as indeed we have, that the previous majority decision was plainly erroneous then it will be our duty to say so and not to perpetuate our mistake even when one learned Judge who was party to the previous decision considers it incorrect on further reflection (emphasis supplied by me).

In Superintendent and Remembrancer of Legal Affairs, West Bengal v. Corporation of Calcutta (AIR 1967 SC 997) it is held:-

"If the aforesaid rule of construction accepted by this Court is inconsistent with the legal philosophy of our Constitution, it is our duty to correct ourselves and lay down the right rule (emphasis supplied by me). In constitutional matters which affect the evolution of our policy, we must more readily do so than in other branches of law, as perpetuation of a mistake will be harmful to public interests. While continuity and consistency are conducive to the smooth evolution of the rule of law, hesitancy to set right deviations will retard its growth. In this case, as we are satisfied that the said rule of construction is inconsistent without republican polity and, if accepted, bristles with anomalies, we have no hesitation to reconsider our earlier decision."

The question, however, shall be as to how this duty should be discharged and the object of correcting the wrong law, and setting it (the law) right should be achieved. One of the obvious ways of doing so is, when a party to the lis seeks review of the wrong judgment in terms of Article 188 of the Constitution. But what, if that remedy is not availed for any reason, or even if availed

by the concerned, is discarded by the Court (again by committing an another wrong). Whether thereafter, such a wrong decision on the point of law, cannot be remedied and interfered with, revisited or set aside at all or in other words, even if a judgment which is patently per incuriam, infinitely should be left outstanding, allowing it to become the liability of this Court and our legal/judicial system, for all future times. And the (this) Court and the system should be fettered by it, and held as a captive thereto, leaving it intact to pervade and permeate serious prejudice in perpetuity to the persons/ citizens of the country and even the State, compelling them, to be dealt with by a wrong/invalid law, despite it having come to the notice of the Court, through any means whatsoever, that such decision suffers from patent and gross vice, and it is vividly a judgment per incuriam by all references. The answer is "No". In my candid view the approach to leave such a decision to stay intact shall be ludicrous and shall lead to drastic effects as indicated above. Rather in such a situation this Court, having special position in our judicature (judicial system as highlighted above) shall have the inherent, intrinsic and inbred power (jurisdiction) vested in it, (a) to declare a judgment per incuriam; (b) decline to follow the same as a valid precedent, (c) and/or to set it aside. For the exercise of jurisdiction in that regard and for the discharge of the duty as mentioned earlier, it is absolutely irrelevant and immaterial vide (via) which source it (decision) has come to the notice of the Court. The Court once attaining the knowledge of such a blemished and flawed decision has the sole privilege, to examine the same and to decide about its fate, whether it is per incuriam or otherwise. In this context, it may be mentioned, for example, if while hearing some case, it is brought to the attention of the Court by the member(s) of the Bar; or during the hearing of any matter, the Court itself finds an earlier judgment to be per incuriam; or if a Judge (Judge of this Court) in the course of his study or research, comes across any judgment which in his view is per incuriam or if any information through the Registrar of the Court is passed on to the honourable Chief Justice of the Court or to any other Judge (of this Court), by any member of the Bar, or the member of the civil society (any organization/ group of the society) that a judgment is per incuriam (note: without the informant having any right or locus standi of hearing or the audience, until the matter is set out for hearing in the Court and the Court deems it proper to hear him), the Court in exercise of its inherent suo motu power and the duty mentioned above (emphasis supplied) shall have the due authority and the empowerment to examine such a judgment, in order to ascertain and adjudge if the law laid down therein is incorrect or otherwise. And if the judgment is found to be per incuriam, it shall be dealt with accordingly. In such a situation (as earlier stated) it shall not be of much significance, as to who has brought the vice of the judgment to the notice of the Court or through which channel it has reached there. Rather, the pivotal aspect, the object, the concern and the anxiety of this Court should be to examine the judgment and if it is per incuriam to set the law right with considerable urgency."

On perusal of the paragraphs referred to hereinabove, we can safely reach a conclusion that this Court has absolute powers to re-visit, to review and or to set aside its earlier judgments/orders by invoking its Suo Motu Jurisdiction under Articles 184(3), 187 or 188 of the Constitution. The Powers of this Court to exercise its inherent jurisdiction under the above referred Articles of the Constitution are not dependant upon an application of a party.

14. The learned counsel has contended that the petitioner has the fundamental rights, under Articles 9 and 25 of the Constitution to seek protection of his liberty as a citizen of this country. We are not persuaded by this contention of the learned Advocate Supreme Court of the petitioner. The protection of the term "liberty" used in this Article would not cover the petitioner, who was convicted by this Court, and had exhausted all the legal remedies available in law, against his conviction and sentence. The findings of this Court against the petitioner had attained

finality, which could not be undone on the basis of the judgment in the case of Dilawar Hussain (supra) which came, later in time, and had distinct facts. Therefore, the contention of the learned Advocate Supreme Court that Article 9 of the Constitution protects the life and liberty of the petitioner is without force. As far as the discrimination under Article 25 of the Constitution is concerned, the petitioner has not been discriminated against at all. This Court has decided his case on the basis of the material produced at trial. The petitioner could not plead discrimination of lesser sentence by relying on the case of Dilawar Hussain (supra), as every case needs to be decided on its own merits and the decision of one case will not regulate the quantum of sentence in the other case, nor it could attract the term 'discrimination' as used in Article 25 of the Constitution.

15. For the aforesaid reasons, we hold that 2nd Criminal Review Petition of the petitioner is not competent and the judgment dated 28-2-2001, in Criminal Appeal No. 23/1997, and the order dated 6-3-2008 in Criminal Review Petition No. 12/2001, passed by this Court having attained finality, cannot be impugned once the petitioner has exhausted all his legal remedies. Mere delay on the part of executive to execute the sentence of the petitioner would not give him a right to approach this Court and have his decision reversed on the aforestated grounds."

Syed Shabbar Raza Rizvi and others v. Federation of Pakistan, Ministry of Law and Justice Division through Secretary, Islamabad and others (2018 SCMR 514)

"There is another aspect of the matter which is of considerable importance i.e. the maintainability of these petitions. In this context, it is held that the petitioners had the remedy of challenging the judgment, if they were aggrieved of the same, by filing review petitions, which they did attempted so to do but could not succeed. They were a party in Khurshid Anwar Bhinder's case (supra) and their respective submissions were rejected and the review applications were accordingly dismissed as being not maintainable; besides observing that the judgment impugned, being in the supreme national interest, there hardly appeared any justification for review. Further, the petitioners contested the contempt notices in Justices (R) Iftikhar Hussain Chaudhry's case (supra) and then Intra Court Appeals in Justice Hasnat Ahmed Khan's case (supra) but without any measure of success. All the points raised in the said cases/judgments have been re-agitated through the present petitions. In such a situation, the petitions under Article 184(3) are absolutely incompetent and not maintainable. Where a person has/had the opportunity of filing a review or appeal against a judgment, and either files a review/appeal and fails, or does not avail that opportunity, or fails to become a party in any pending review/appeal filed by another person against the same judgment, then he has no right to re-agitate the matter through a petition under Article 184(3) ibid. Article 184(3) ibid is a constitutional provision which is meant for the purposes of enforcement of fundamental rights, where there is a question of public importance involved. It cannot be exercised as a parallel review jurisdiction by the court, especially when the remedy of review has already been availed or declined. Yes, a judgment of this Court can be considered to be per incuriam but it is for the Judges to revisit any such judgment, if and when pointed out by any person during the course of hearing of any other case. Such a finding would be premised on the Court finding the same judgment to be against any provision of the Constitution or the law, or the principle(s) already settled by a larger Bench of the Court. It is not the right of a person, who would have no locus standi under Article 184(3) of the Constitution, to file such a petition, particularly in the situation where the review jurisdiction has been invoked and the same (review) has been dismissed; thus, such judgment (under review) can never be challenged by virtue of filing independent proceedings under Article 184(3) of the Constitution. This would be an abuse of the process of law and is absolutely impermissible. Resultantly, we do not find any merit in these petitions which are accordingly dismissed."

Akhter Umar Hayat Lalayka and others v. Mushtaq Ahmed Sukhaira and others (2018 SCMR 1218)

"Second review is barred by law and no party can now approach this Court for a second review, however, this Court has absolute power to re-visit its earlier judgments/orders by invoking its Suo Motu Jurisdiction under Articles 184(3), 187 or 188 of the Constitution. This Power is not dependant upon an application of any party and it was so held in the case of Khalid Iqbal v. Mirza Khan (PLD 2015 SC 50), in the following words:-

"12. The question of maintainability of the 2nd Criminal Review Petition on the ground that this Court has to do complete justice by invoking Article 187(1) of the Constitution is also misconceived. The provisions of Article 187(1) cannot be attracted in the present case, as this Court has already recorded findings against the petitioner by the Judgment dated 28-2-2001, against which review was also dismissed and there was no 'lis'pending before this Court warranting exercise of its jurisdiction under Article 187(1) of the Constitution, besides Rule 9 of the Order XXVI of the Supreme Court Rules, bars 2nd Review Petition. There is a distinction between right of a party to approach the Court and jurisdiction of the Court to do complete justice on its own. Once this Court has finally determined the right of the petitioner in the judgment dated 28.2.2001, holding him guilty, the petitioner through 2nd Review Petition, cannot re-agitate it. If such a Review Petition is allowed to be entertained, it will land in a situation where findings of this Court against a party will never attain finality.

13. This, however, does not mean that the jurisdiction of this Court is barred by any restriction placed by the Constitution; there is no Article in the Constitution which imposes any restriction or bar on this Court to revisit its earlier decision or even to depart from them, nor the doctrine of stare decisis will come in its way so long as revisiting of the judgment is warranted, in view of the significant impact on the fundamental rights of citizens or in the interest of public good. ... ...

On perusal of the paragraphs referred to hereinabove, we can safely reach a conclusion that this Court has absolute powers to re-visit, to review and or to set aside its earlier judgments/orders by invoking its Suo Motu Jurisdiction under Articles 184(3), 187 or 188 of the Constitution. The Powers of this Court to exercise its inherent jurisdiction under the above referred Articles of the Constitution are not dependant upon an application of a party."

The same view has been reiterated in a recent judgment dated 5.1.2018 passed in the case of Syed Shabbar Raza Rizvi v. Federation of Pakistan (2018 SCMR 514)."

6. In view of the legal position already declared by this Court in the above mentioned precedent cases the questions posed above are answered as follows:

(i) Can a non-compoundable offence be treated as a compoundable offence for the purpose of recording an acquittal in respect of that offence if a coordinate compoundable offence committed in the same case has been compounded by the relevant parties?

It has already been clarified in many a case that the non-compoundable offence of terrorism is an offence distinct and independent from any other coordinate offence also committed in the same case including the offences under sections 302, 365-A, 396 and 460, P.P.C., etc. and a reference in this respect may be made to the cases of Muhammad Amin v. The State (2002 SCMR 1017), Muhammad Ali and others v. The State and others (PLD 2004 Lahore 554), Muhammad Rawab v. The State (2004 SCMR 1170), Muhammad Akhtar alias Hussain v. The State (PLD 2007 SC 447) and Kareem Nawaz Khan v. The State through PGP and another (2016 SCMR 291). It is hereby held that an offence which the law declares to be non-compoundable remains non-compoundable even if in a coordinate compoundable offence a compounding takes place between the relevant parties and, therefore, despite any compounding of the coordinate compoundable offence an acquittal cannot be recorded in the non-compoundable offence on that sole basis.

(ii) Can the sentence passed in a non-compoundable offence be reduced on the ground that a coordinate compoundable offence committed in the same case has been compounded by the relevant parties?

It is declared that in an appropriate case, keeping in view the peculiar circumstances of the case, compounding of a coordinate compoundable offence may be considered by a court towards reduction of the sentence, within the permissible limits, passed for commission of a non-compoundable offence. It is further declared that consideration of this factor vis- -vis reduction of the sentence passed for commission of the non-compoundable offence lies within the discretion of the court and cannot be treated as automatic or as a matter of course.

(iii) If the answer to question No. (ii) is in the affirmative then at what stage and by which court or forum reduction in the sentence passed in respect of a non-compoundable offence be ordered, if deemed warranted in the circumstances of the case?

It is clarified that in case of compounding of a coordinate compoundable offence reduction of a sentence passed or to be passed for commission of a non-compoundable offence may be considered on that ground by the following courts at the following stages of the case:

(i) by the trial court at the time of passing the sentence at the end of the trial; or

(ii) if compounding of the coordinate compoundable offence takes place at the appellate or revisional stage before a High Court or before this Court at the stage of petition for leave to appeal or appeal or review petition then a prayer for reduction of the sentence passed for commission of the non-compoundable offence may be made on that ground before the Court seized of the pending matter; or

(iii) if this Court has already passed a final order or judgment in a petition for leave to appeal or an appeal and no review petition has been filed so far then reduction of the sentence passed for the non-compoundable offence may be sought on the ground of compounding of the coordinate compoundable offence through filing of a review petition before this Court; or

(iv) if the remedy of filing of a review petition before this Court has already been exhausted then, there being no scope for filing of a second or subsequent review petition before this Court and a party to a case or anyone else interested in the matter being in no position to seek revisiting of an earlier order or judgment of this Court, the only remedy left for seeking reduction of the sentence passed for commission of a non-compoundable offence on the ground of compounding of a coordinate compoundable offence is to file a Mercy Petition before the worthy President of Pakistan who may, in his discretion, consider this aspect in the light of the judgments passed by this Court on the subject from time to time; or

(v) if the remedy of a Mercy Petition before the President has already been exhausted before compounding of the coordinate compoundable offence has taken place then after acceptance of the compromise by the competent court in respect of the coordinate compoundable offence the Superintendent of the relevant Jail shall, upon an initiative of the convicted prisoner, forward a fresh Mercy Petition to the President on behalf of that convicted prisoner seeking fresh consideration of the matter by him in respect of the sentence passed against the convicted prisoner for commission of the non-compoundable offence in the light of compounding of the coordinate compoundable offence committed by him. When seized of such a fresh Mercy Petition the President may, in his discretion, consider the matter of the convicted prisoner's sentence passed for commission of the non-compoundable offence afresh in the light of the judgments passed by this Court on the subject from time to time.

7. The office is directed to fix the captioned appeals and petitions for hearing before appropriate Benches of this Court for their decision in terms of the legal position declared through the present judgment.

MWA/M-51/S Order accordingly.

**2020 S C M R 124**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Yahya Afridi, JJ**

**SAJJAD ALI---Petitioner**

**Versus**

**VICE-CHANCELLOR through Registrar University of Malakand at Chakdara, Dir Lower and others---Respondents**

Civil Petition No. 3107 of 2018, decided on 24th October, 2019.

(On appeal against the judgment of Peshawar High Court, Mingora Bench dated 28.05.2018, passed in Writ Petition No. 290-M of 2013)

**Disabled Persons (Employment and Rehabilitation) Ordinance (XL of 1981)---**

----Ss. 10 & 12 [as amended by the Khyber Pakhtunkhwa Disabled Persons (Employment and Rehabilitation) (Amendment) Act, 2012---Establishments to employ disabled persons--- Disability quota, calculation of---Provisions of S. 10 of the Disabled Persons (Employment and Rehabilitation) Ordinance, 1981 ('the Ordinance') mandated that not less than two percent of the total number of persons employed by an establishment at any time shall be disabled persons---Under S. 10 of the Ordinance the quota for disabled persons in an establishment was calculated on the basis of the total number of persons employed by the establishment and not on the basis of the number of posts advertised at a given time---To give effect to S. 10, S.12 of the Ordinance must also be given full effect---Under S. 12, a disabled person desirous of getting employed had to ensure that his name was registered with the Employment Exchange of the area---Additionally, the Provincial Council was to assess the nature of functional disability of the person and also as to his aptitude and the nature of work he was fit to do and if the Provincial Council was of the view that the disabled person was fit to work it shall inform the Employment Exchange, indicating the nature of work for which he may be employed---Total quota of 2% calculated on the basis of the fixed number of the employees in an establishment was then given effect through the information collected by the Employment Exchange with the assistance of the Provincial Council---Calculating the quota under S. 10 would not lead to much result if the exercise under S. 12 had not been undertaken, especially regarding the nature of work a disabled person was fit to perform.

Nasir Mahmood, Advocate Supreme Court and M.S. Khattak, Advocate-on-Record for Petitioner.

Rehman Ullah, Advocate Supreme Court along with Rauf Khattak, A.D (SWD) KPK for Respondent No.1.

Date of hearing: 24th October, 2019.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**Brief facts of the case are that the petitioner applied for the post of Lecturer in the subject of Pharmacy (BS-18) against the disability quota but his request was turned down on the ground that only one post of Lecturer in the subject of Pharmacy was advertised and the two percent quota prescribed under the law for the disabled persons could not be worked out against the advertised post.

2. We have examined sections 10 and 12 of the Disabled Persons (Employment and Rehabilitation) Ordinance, 1981 ("Ordinance"), as amended by the Khyber Pakhtunkhwa Disabled Persons (Employment and Rehabilitation) (Amendment) Act, 2012, which state as under:-

Section 10:

"Establishments to employ disabled persons.---(1) Not less than two percent of the total number of persons employed by an establishment at any time shall be disabled persons whose names have been registered with the Employment Exchange of the area in which such establishment is located and against whose names in the register maintained under section 12 an endorsement exists to the effect that they are fit to work.

(2) The disabled persons employed against any post in pursuance of subsection (1) shall be entitled to the terms and conditions which are not less favourable than those of the other persons employed by the establishment against similar posts.

(3) When calculating the percentage of the posts in an establishment for the purposes of employment of disabled persons, the fraction of 2 and above shall count as a whole number."

Section 12

"Registration of disabled persons.---1. Any disabled persons desirous of being employed or otherwise rehabilitated may have his name registered in the register maintained by an Employment Exchange in such form and in such manner as may be prescribed by the Federal Government; and the Employment Exchange shall refer all names so registered to the Provincial Council.

2. The Provincial Council shall, if it thinks necessary, cause each disabled person registered under subsection (1) to be assessed as to the nature of his functional disability and also as to his aptitude and the nature of work he is fit to do by a medical officer authorised by it in his behalf or by such assessing board consisting of not less than one medical officer as it may appoint, and the medical officer or, as the case may be, the assessing board shall submit its report to the Provincial Council in such form as may be prescribed by the Provincial Government.

3. If the disabled person is considered by the Provincial Council fit to work, it shall so inform the Employment Exchange, indicating the nature of work for which he may be employed or the trade or vocation in which he may be trained, and an endorsement to that effect shall be made against his name in the register.

4. If the disabled person is not considered by the Provincial Council fit to work, the Provincial Council shall inform the Employment Exchange accordingly for an endorsement to that effect being made against his name in the register, and the Provincial Council shall take such measures for his rehabilitation as it thinks fit.

5. If a person is declared by the Provincial Council not to be a disabled person, his name shall be struck off the register"

The above provisions mandate that not less than two percent of the total number of persons employed by an establishment at any time shall be disabled persons. While "Establishment" under the Ordinance includes a University (see sections 2(f) and (h) of the Ordinance). Therefore, under section 10 the quota for disabled persons in an establishment is calculated on the basis of the total number of persons employed by the establishment and not on the basis of the number of posts advertised at a given time. To give effect to section 10, section 12 must also to be given full effect. Under section 12, a disabled person desirous of getting employed has to ensure that his name is registered with the Employment Exchange of the area. Additionally, the Provincial Council is to assess the nature of functional disability of the person and also as to his aptitude and the nature of work he is fit to do and if the Provincial Council is of the view that the disabled person is fit to work it shall inform the Employment Exchange, indicating the nature of work for which he may be employed. The total quota of 2% calculated on the basis of the fixed number of the employees in an establishment is then given effect through the information collected by the Employment Exchange with the assistance of the Provincial Council. Calculating the quota under section 10 will not lead to much result if the exercise under section 12 has not been undertaken, especially regarding the nature of work a disabled person is fit to perform.

3. Respondent University, in light of the above provision and Khyber Pakhtunkhwa Disabled Persons (Employment and Rehabilitation) Rules, 1981, has worked out the total number of persons employed at the University to be 966 persons. Learned counsel for the University along with departmental representative submits that according to the total strength of the employees of the University, two percent quota for the disabled persons comes out to be 19 seats and the University is

willing to allocate the said quota for disabled persons. Learned counsel representing the University submitted that University is in the process of formulating a policy for the allocation of this quota for disabled persons and as soon as it is done the case of the petitioner will be considered in the light of the said policy.

4. We leave it to the University to evolve a policy for disabled persons and for the allocation of the 19 posts for disabled persons in the University. While formulating the policy, the University will ensure that although disabled persons will have a separate quota under the Ordinance, however, merit will not be compromised and same threshold qualification, standard and eligibility shall be maintained as in the case of regular appointment. It is in this context that the assessment of the Provincial Council regarding the nature of work a disabled person is fit to perform, becomes relevant and crucial.

5. Let such policy be formulated within a period of three months from today. Once the policy is formulated, the case of the petitioner will be duly considered afresh by the respondent University and the findings of impugned judgment dated 28.05.2018 will not come in its way.

6. This petition is disposed of in the above terms.

MWA/S-40/L Order accordingly.

**2020 S C M R 206**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Yahya Afridi, JJ**

**PAKISTAN ELECTRONIC MEDIA REGULATORY AUTHORITY (PEMRA) through Secretary---Petitioner**

**Versus**

**TRADE SERVE INTERNATIONAL (PVT.) LTD. LAHORE and others---Respondents**

Civil Petitions Nos. 2459 to 2465 of 2017, decided on 1st October, 2019.

(On the appeal against the judgment of the Lahore High Court, Lahore dated 12.05.2017 passed in Writ Petitions Nos. 2446, 4366, 4367, 4368, 4369, 4370 and 4371 of 2013)

**Pakistan Electronic Media Regulatory Authority Ordinance (XIII of 2002)---**

----S. 24(5)---Pakistan Electronic Media Regulatory Authority Rules, 2009, R. 12(c)---Pakistan Electronic Media Regulatory Authority (Radio Broadcast Station Operations) Regulations, 2012, Reglns. 2(f), 2(h), 2(qq) & 9(2)---License for operating FM radio---Renewal license fee---Quantum---Prevailing applicable license fee---Where bidding had been carried out in granting licenses, the renewal fee for the same shall be the "prevailing applicable license fee" for the respective area and category of license sought to be renewed conjoined with the rate of inflation calculated as prescribed by the State Bank of Pakistan---Renewal license fee would be the last bidding price determined by the bidding carried out and approved by Pakistan Electronic Media Regulatory Authority (PEMRA) for the category and area of F.M. radio for which renewal of license was being sought plus the rate of inflation calculated as prescribed by the State Bank of Pakistan---Where after the grant of license by PEMRA to licensee, there had been no bidding for the category and area of F.M. radio for which license was sought to be renewed, then the renewal license fee for the next term, would be the bidding price approved by PEMRA in favour of the licensee plus the rate of inflation calculated as prescribed by the State Bank of Pakistan.

Salman Akram Raja, Advocate Supreme Court, Syed Rifaqat Hussain Shah, Advocate-on-Record, Ali Zeeshan Haider, Head Legal PEMRA, Mohsin Hameed Dogar, DGM (Legal) and Wakeel Khan, D.G., Licenses B.M. for Petitioners (in all cases).

Qutb-ud-Din Saim Hashmi, Advocate Supreme Court and Muhammad Ali Raza, Advocate Supreme Court for Respondents Nos. 1 and 2 (in C.Ps. Nos. 2459 and 2462 of 2017).

Rasheed A. Rizvi, Advocate Supreme Court and Muhammad Kassim Mirjat, Advocate-on-Record for Respondent No. 1 (in C.Ps. Nos. 2460 and 2461 of 2017).

Qutb-ud-Din Saim Hashmi, Advocate Supreme Court for Respondent No. 2 (in C.Ps. Nos. 2460 and 2461 of 2017).

Date of hearing: 1st October, 2019.

**JUDGMENT**

**YAHYA AFRIDI, J.---**Through this single judgment, we shall dispose of the instant seven petitions for leave to appeal impugning common judgment dated 12.05.2017 rendered by the Lahore High Court in Writ Petitions Nos. 2446, 4366, 4367, 4368, 4369, 4370 and 4371.

2. The precise issue to be addressed in all seven petitions relates to the renewal license fee payable by a licensee seeking to renew the license for operating FM radio under Pakistan Electronic Media Regulation Authority Ordinance, 2002 ("Ordinance").

3. The stance of Pakistan Electronic Media Regulation Authority ("PEMRA") is that the renewal license fee should be the last approved bidding price for FM radio of the area for which renewal is sought, with the annual inflationary rate set by the State Bank of Pakistan. While the seven licensee-respondents contend that the same to be the original bidding price, they had rendered and was approved by PEMRA with the additional annual inflationary rate set by the State Bank of Pakistan. The latter

view contented by the seven licensee-respondents prevailed before the Lahore High Court, as recorded in the impugned judgment dated 12.05.2017. Hence, the instant petitions.

4. It would be appropriate to first understand; the subject matter of dispute between the parties, and the regulatory role of PEMRA envisaged under the applicable law.

Subject Matter

5. The subject matter of the dispute between the parties in the present petitions relates, generally to, information and communication technology ("ICT"), and in particular, radio frequency spectrum utilized for FM radios. ICT, including radio frequency spectrum, is regulated globally by International Telecommunication Union ("ITU"), a specialized agency of the United Nations mandated to maintain, standardize and allocate the rational use of telecommunication and radio frequency spectrum[1]. ITU has divided the globe into three geographical regions for allocation of ICT and including radio frequency spectrums, Pakistan is a signatory of ITU and falls in Region 3 on its allocation map. FM radio in Pakistan allocated the range of 87- 108 Mhz[2].

6. In recent years, ICT has witnessed tremendous growth, and in particular, in the wireless applications, GPS, cellular phones, WiFi, satellite TV, and public safety communications, e-health, e-commerce, and intelligent transportation systems. This fast growth in wireless related applications has created an unprecedented demand for the limited radio frequency spectrum allocated for its application by ITU. Resultantly, radio frequency spectrum has become a invited resource, and the market forces have made the same very valuable, leading to what has been referred to as spectrum scarcity[3].

7. The United States Supreme Court way back in 1943, acknowledged the marketability of the radio frequency spectrum and voiced its concern for the State to control and manage it[4]. Thereafter, many have cautioned that without such central administration, endemic interference between radio stations would produce chaos, and what has been dubbed as "a cacophony of competing voices."[5] Gordon A. Gow and Richard K. Smith[6] after analysing the Coase Theorem[7] and The Ofcom Spectrum Framework Review (2004)[8] concluded that: spectrum is subject to a condition of limited supply, which must be assigned in an efficient and equitable manner; and market forces can best ensure efficiency and equity for access to the available limited spectrum. This view has repeatedly resounded and urged the need for the limited spectrum of radio frequency to be under fair and equitable State regulation.

Regulatory Regime

8. To regulate and manage the telecommunication and radio frequency spectrum allocated by ITU to Pakistan, there are two essential enactments. Firstly, Pakistan Telecommunication (Reorganization) Act, 1996 ("Act of 1996"), which has created Pakistan Telecommunication Authority ("PTA")[9], a regulatory body, with its essential purpose to establish, operate, maintain and grant licenses for telecommunication systems and services in Pakistan[10]. Secondly, the Ordinance of 2002, which has also created a regulatory body, PEMRA[11], to regulate the establishment and operation of all broadcast media and distribution services in Pakistan.[12] However, the actual allocations of the frequencies for telecommunication and broadcast services within the allocated bands, under the Act of 1996 and Ordinance of 2002, are carried out by the Frequency Allocation Board (FAB) created under section 12 of Act of 1996.[13]

Renewal of License

9. The legal regime regulating issuance and renewal of licenses of F.M. radio is generally dealt with under the Ordinance of 2002. However, for the resolution of the dispute in hand; we would restrict our attention to the renewal license fee for FM radio. In this regard, it is noted that a licensee desirous of renewal of a license of F.M. radio may six months before the expiry of the sanctioned term of the license, apply for the same to PEMRA under section 24(5) of the Ordinance, which mandates:

> (5) The Authority may renew a license on such terms and conditions as may be prescribed and in case of refusal to renew a license reasons shall be recorded in writing.
>
> (emphasis provided)

10. The above provision clearly provides, inter alia, for PEMRA to renew a license on such terms and conditions, as may be "prescribed". While the term "prescribed" has been defined in section 2(s) of Ordinance of 2002 to be an instrument framed by rules or regulations made by PEMRA.

What is interesting to note that Ordinance of 2002, leaves the matter of determination of the renewal license fee to delegated legislation. We, however, note a reference to the renewal license fee in Rule 12 of The Pakistan Electronic Media Regulatory Authority Rules, 2009 ("Rules of 2009"), which stipulates, inter alia, that:

Renewal of license on expiry of the license term;

.....

(c) payment of the prescribed fee prevalent at the time of renewal and payment of outstanding dues, if any;

(emphasis provided)

12. In this regard, our attention was drawn to Regulation 9(2) of the Radio Broadcast Station Operation Regulations, 2012 ("Regulations of 2012"), framed by PEMRA, and duly notified in terms of subsection (3) of section 4 read with section 2(s) of the Ordinance of 2002, which provides:

License renewal fee shall be prevailing applicable license fee for the respective area and category of license plus rate of inflation calculated as prescribed by the State Bank of Pakistan: Provided that if bidding has not been held for such license, the renewal fee shall be determined by the Authority.

(emphasis provided)

13. The terms "renewal fee" and "renewal of licence" have been defined under clauses (h) and (qq) of Regulation 2 of the Regulation of 2012, respectively, which read:

clauses (h)

"renewal fee" means fee payable for renewal of a licence on expiry of the term of the licence."

clauses (qq)

"renewal of licence" means grant/revalidation of a licence for a similar or another term after expiry of the original term."

14. Similarly, the term "applicable license fee" provided in Regulation 9(2), has been defined in clause (f) of Regulation 2 of the Regulation of 2009 in terms that:

"payment of renewal fee as applicable at the time of renewal."

15. The "applicable license fee" as defined above, in the context of the present cases, where bidding had been carried out leads one to the fee which is determined through bidding by PEMRA. However, the above definition of the said fee, is rather vague, as it does not cater to situations, where more than one bidding has been carried out by PEMRA for a particular category and area where F.M. radio license renewal is being sought. To render clarity and completeness to the provision, the word "prevailing" has correctly been employed before the words "applicable license fee". By doing so, it has clarified that in cases, where there have been bidding carried out by PEMRA in the grant of licenses, then it would be the then-current approved bidding fee that would apply to the renewal of the license. Hence, the conjunctive reading of the above stated provisions would reveal that, in cases where bidding has been carried out in granting licenses, the renewal fee for the same shall be the "prevailing applicable license fee" for the respective area and category of license sought to be renewed conjoined with the rate of inflation calculated as prescribed by the State Bank of Pakistan. Simply put, the renewal license fee would be the last bidding price determined by the bidding carried out and approved by PEMRA for the category and area of F.M. radio for which renewal of license is being sought plus the rate of inflation calculated as prescribed by the State Bank of Pakistan.

16. Undoubtedly, the intention of the legislature was to vest PEMRA with the authority to decide the criteria for determining the renewal fee for carrying out and regulating F.M. radio. However,

PEMRA opted to leave it for the market forces to determine the renewal license fee, and by doing so, surely left it for the principles of transparency, fairness and equity to prevail.

17. Now, when we review the impugned judgment, it is noted that a serious error crept in on account of restricting its consideration only to the "applicable license fee" as provided under Rule 2(f) of the Regulations of 2012, and the non-reading of the most crucial word "prevailing" as provided under Regulation 9(2) supra.

18. We have also noted that the impugned judgment has

misread the term "base price" by referring to Table-II, Schedule B of the Rules of 2009, and applied the same to the renewal license fee, when the same clearly applies to the initial bidding process leading to the first license, which is issued for a particular category of license in a particular area[14]. In fact, for the renewal license fee, the impugned judgment did not consider the "base price", as expressly defined and dealt with under by regulation 2(k) of the Regulation of 2012, in terms: -

> "base price" means the minimum fee determined by the Authority from time to time to conduct bidding for a particular category of the license.

19. Similarly, the impugned judgment has erred by mis-reading the term "annual renewal fee" provided in Table-II, Schedule B of the Rules of 2009, and applied the same to the renewal license fee for the next term sought by the licensee-respondents. Whereas, the "annual renewal fee", stated in the said Table, applied to the annual renewal fee within the sanctioned term, and not the next term, which was the subject matter of the dispute between the parties.

20. Accordingly, in view of the above discourse, we hold that:

I. The renewal license fee for the next term sought by the licensee-respondents, would be the last bidding price determined by the bidding carried out and approved by PEMRA for the category and area of F.M. radio for which license is sought to be renewed plus the rate of inflation calculated as prescribed by the State Bank of Pakistan.

II. And in cases, where after the grant of license by PEMRA to licensee-respondents, there has been no bidding for the category and area of F.M. radio for which license is sought to be renewed, then the renewal license fee for the next term, would be the bidding price approved by PEMRA in favour of the licensee-respondent plus the rate of inflation calculated as prescribed by the State Bank of Pakistan.

21. For the reasons stated hereinabove, impugned judgment dated 12.05.2017 is set aside and these seven petitions are converted into appeals and allowed in terms of the above findings.

MWA/P-14/SC Petitions allowed.

**2020 S C M R 265**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Yahya Afridi, JJ**

**SARHAD DEVELOPMENT AUTHORITY N.W.F.P. (NOW KPK) through COO/CEO (Officio) and others---Appellants**

**Versus**

**NAWAB ALI KHAN and others---Respondents**

Civil Appeals Nos. 2186 to 2199, 59-P, 60-P, 61-P and 27-P of 2017 and Civil Misc. Applications Nos. 9482 to 9495 of 2019, decided on 7th November, 2019.

(On appeal against the judgment dated 06.11.2017 of the Peshawar High Court Peshawar passed in R.F.As. Nos. 200-P, 216-P, 12-P, 208-P, 209-P, 210-P, 211-P, 215-P, 212-P, 214-P, 201-P, 213-P, 204-P of 2016 and 198-P of 2016)

**(a) Land Acquisition Act (I of 1894) [as amended by the North-West Frontier Province (Amendment of Laws) Ordinance (XVII of 2001)]---**

----Ss. 5-A & 6---Constitution of Pakistan, Art. 24---Acquisition of land--- Compensation mechanism--- Right to property--- Scope---Legislature in its wisdom had provided in the Land Acquisition Act, 1894, an inbuilt mechanism for redressal of grievances of persons interested in the land being compulsorily acquired---Formal declaration of the Provincial Government to acquire a particular land only took place after the objections of interested persons, if any, were addressed by the competent authority---Such protection afforded to the private landowners under the Act bolstered their fundamental right enshrined under Art. 24 of the Constitution.

Sub. (Retd.) Muhammad Ashraf v. District Collector Jhelum and others PLD 2002 SC 706 ref.

**(b) Land Acquisition Act (I of 1894) [as amended by the Khyber Pakhtunkhwa (Amendment of Laws) Ordinance (XVII of 2001)]---**

----Ss. 4(1) & 23---Constitution of Pakistan, Art. 24---Acquisition of land---Matters to be considered in determining compensation---Market value of land on the date of taking possession---Unlike Khyber Pakhtunkhwa, in the other three provinces, S. 23(1) of the Land Acquisition Act, 1894, had not been amended, and the "market value" of the land, as originally enacted, was determinable on basis of the value prevailing on the date of gazette publication of the notification under S. 4(1) of the Act---Since the year 2001, when the Khyber Pakhtunkhwa (Amendment of Laws) Ordinance, 2001 introduced amendments in the Land Acquisition Act, 1894, it was only in Khyber Pakhtunkhwa that, the determining criteria for deciding the "market value" of the property proposed to be acquired within the contemplation of S. 23(1) had been the prevalent value of land on the date of taking possession of the said property, and not the date when the notification under S. 4(1) was published in the official gazette. **(c) Land Acquisition Act (I of 1894) [as amended by the Khyber Pakhtunkhwa (Amendment of Laws) Ordinance (XVII of 2001)]---**

----S. 23---Acquisition of land---Matters to be considered in determining compensation---Sale transactions of similar properties---Potential value of property---Precedents reflected a consistent trend to also consider for the purposes of determining the "market value" of property to be acquired, its "potential value" or essentially, the future use to which the said property could be put to---In doing so, there was judicial consensus in considering sale transactions of similar nature of immovable property in the adjoining khasras or even mauzas taking place even after the date of publication of the notification under S. 4(1) of the Land Acquisition Act, 1894, for adjudging the "market value", and in doing so to finally fix the amount of compensation to be awarded to the landowners for the property acquired---Not only in Khyber Pahktunkhwa, but even in other three provinces, where S. 23(1) of the Act had not been amended, firstly, the value of similar land in the adjoining khasras and mauzas to the acquired land was taken into consideration for determining the amount of compensation to be awarded to owners of the acquired property; secondly, the escalation of price of land during the acquisition

period till its culmination in issuance of the award could be taken into consideration; thirdly, for assessing the "potential value" of the acquired land, the most critical factor, which was to be kept in mind was the future utility of the proposed acquired land, keeping in view the availability of facilities for its said utilization; and finally, there could be no mathematical formula set for the determination of the compensation due to the landowners for the compulsory acquisition of their property--- Various factors depending on the circumstances of each case would cumulatively form the basis for determining the "market value" of the acquired land within the contemplation of S. 23(1) of the Act.

Mst. Iqbal Begum's case PLD 2010 SC 719; Begum Aziza's case 2014 SCMR 75 and Mst. Surraya Mehmood Jan's case 2015 SCMR 28 ref.

**(d) Constitution of Pakistan---**

----Art. 185---Land Acquisition Act (I of 1894) [as amended by the Khyber Pakhtunkhwa (Amendment of Laws) Ordinance (XVII of 2001)], S. 23---Appellate jurisdiction of the Supreme Court---Scope---Acquisition of land---Disputed questions of fact/grounds not raised by Acquiring Authority in forums below---Supreme Court in its appellate jurisdiction would generally not determine any question of fact, that had not been pleaded or raised by the parties at any stage before the Referee Court or the High Court and was for the first time raised in appeal before the Supreme Court.

Ali Khan's case 1968 SCMR 565; Adeeba Musharraf's case 1995 SCMR 2354 and Malik Ghulam Hussain's case PLD 1971 SC 573 ref.

Shazib Masud, Advocate Supreme Court, Dil Muhammad Khan Alizai, Advocate Supreme Court and Zair Nawaz, Mnager, SDA for Appellants (in C.As. 2186 to 2199 of 2017).

Haji Muhammad Zahir Shah, Advocate-on-Record/Advocate Supreme Court for Appellants (in C.As. 59-P to 61-P of 2017 and 27-P of 2017).

Dil Muhammad Khan Alizai, Advocate Supreme Court for Applicants (in C.M.As. 9482 to 9495 of 2019).

Shazib Masud, Advocate Supreme Court and Ch. Akhtar Ali, Advocate-on-Record for Respondent SDA (in C.As. 59-P to 61-P of 2017 and 27-P of 2017).

Respondent No. 1 in person (in C.As. 2193 to 2198 of 2017).

Zahid Hussain, Tehsildar Nowshera on behalf of Respondent No. 2 (in all cases).

Barrister Qasim Wadood, Additional A.-G., Khyber Pakhtunkhwa on behalf of Land Acquisition, Khyber Pakhtunkhwa (in C.As. 59-P - 61-P of 2017 and C.A. 27-P of 2017).

Nemo for other Respondents (in all cases).

Date of hearing: 7th November, 2019.

**JUDGMENT**

**YAHYA AFRIDI, J.---**Through these direct appeals, Sarhad Development Authority, Khyber Pakhtunkhwa ("the Acquiring Authority") has challenged the judgment of the Peshawar High Court, Peshawar dated 06.11.2017 passed in R.F.As. Nos. 200-P, 216-P, 12-P, 208-P, 209-P, 210-P, 211-P, 215-P, 212-P, 214-P, 201-P, 213-P, 204-P/2016 and 198-P/2016.

2. The Acquiring Authority, to expand the Nowshera Industrial Estate, Risalpur ("Project"), situated in Mauza Mera Kander District Nowshera, moved for the acquisition of land under the enabling provisions of Land Acquisition Act, 1894 ("Act"). In furtherance thereof, notification dated 25.05.2004 under section 4 ibid proposed to acquire 1205 kanals and 17 marlas, which was further enhanced to 1476 kanals and 18 marlas ("Acquired Property") vide notification dated 04.11.2004 ("Notification"). The acquisition proceedings, which followed thereafter, culminated in Award Nos. 495-502/DOR/ACQ dated 16.05.2007 ("Award"), inter alia, in the terms that:

"Cost of the land as determined by the field Revenue as under:

(i) Cost of the Land measuring 1476 Kanal 18 Marla Rs.4,11,55,590/-

(ii) 15% compulsory acquisition charges.

Rs. 61, 73 ,338/50

Total Rs.4,73,28,928/50

Under the circumstances explained above, I hereby pass an award for Rs. 4,73,28,928/50 in respect of the above land. The land owners shall be entitled for their share as entered in the Register Haqdaran-e -Zamin in the ownership column and in case of Shamilat Deh, according to HASB-E- RASAD KEWAT of Muza Mera Kander, Tehsil and District Nowshera.

All the Government taxes will be paid by the acquiring Department at the time of attestation of mutation."

3. The landowners being dissatisfied with the above Award moved references to the Referee Court under the enabling provisions of the Act for enhancement of the compensation of Acquired Property. The Referee Court vide judgment dated 28-10- 2009, after considering the evidence of the parties and report of the local commissioner ("Commission Report"), adjudged the compensation for the Acquired Property to be Rs.5,000/- per marla along with 15% compensation charges and 6% simple interest from the date of taking possession of the property till the actual payment. This decision of the Referee Court was challenged by the Acquiring Authority and the private landowners ("both parties") before the Peshawar High Court, and the same was set aside vide its common judgment dated 23.12.2010, wherein it was held that:

"The contentions of the learned counsel for both the parties appear to be correct as the report of the Commissioner is not supported by any cogent and convincing oral as well as documentary evidence. Even the evidence of the owners is not of a nature as could be considered of unquestionable worth for determining the market value of the property. We, thus, allow these appeals, set aside the impugned judgments and sent back the cases to the learned Referee Judge for decision afresh after issuing a fresh Commission at the expense of the respondents. In the circumstances of the case, the appellants as well as the respondents shall be at liberty to adduce additional evidence in support of their claim."

4 After remand, the compensation of the Acquired Property was again considered by the Referee Court, and relying upon the findings of another Commission Report adjudged the same to be Rs.22,000/- per marla. Both parties being dissatisfied with the said determination of the compensation impugned the same before the Peshawar High Court, which vide judgment dated 30-10-2014, set aside the decision of the Referee Court, in terms that: -

"The order of this Court has not been complied with properly and report of Local Commission relied upon is lacking the evidence in support of opinion framed by the learned Local Commissioner on points Nos. 1 to 4 as mentioned in the report Ex.CW.1/1 and has not based his opinion upon cogent and convincing evidence including averages rather opted to take the mutation in isolation along with un-registered documents which are not safe to be relied upon, rather the cogent oral and documentary evidence has to be considered for the purpose of assessment of market value/compensation. As such the report commission which was without any substance was wrongly relied upon by the trial Court thus the findings of Referee Court are not sustainable.

8. In view of what has been observed above, we allow all the appeals, set aside the judgment and decree dated 15.12.2011, by remanding the case to the trial Court with the direction to appoint a fresh Local Commission for submitting report with clarity about prevailing rate at the time of possession and notification strictly in accordance with parameters given in section 23 of the Land Acquisition Act, 1894. The learned Referee Court shall decide the matter afresh in the light of available evidence along with report commission and after hearing the parties within a period of two months positively."

5. Again after the second remand, yet another commission was constituted, and the report so submitted recommended the value of the Acquired Property to be Rs.20,000/- per marla, which was accepted by the Referee Court, and so the compensation of the Acquired Property was determined to

be Rs.20,000/- per marla. Yet again, the decision of the Referee Court was challenged by both parties before the Peshawar High Court, and it decided the matter vide the impugned judgment dated 06.11.2017, whereby the Court held that:-

"12. For what has been discussed and deriving wisdom from the judgments of the Hon'ble Supreme Court (supra), the appeals of the landowners are allowed. The impugned judgments of the learned Referee Court are modified in the manner that the market price of per marla acquired land is fixed Rs.23,684/-. The appeals of the Acquiring Department (SDA), being meritless are hereby dismissed."

6. Both parties being aggrieved of the above impugned-decision, moved the appellate jurisdiction of this Court, while others claiming to be landowners of the Acquired Property have moved applications to be impleaded as parties in the instant appeals.

7. After carefully considering the valuable submissions of the learned counsel for the Acquiring Authority, two crucial issues require resolution in the instant connected appeals: firstly, whether sale transactions subsequent to the issuance of the notification under section 4 of the Act could be considered in determining the amount of compensation to be awarded to landowners for the Acquired Property; and secondly, whether this Court in its present jurisdiction, could for the first time determine disputed question of facts, in particular, whether the sale transactions relied by the Courts below were from a different mauza, and that the third commission report based its valuations on sale transactions relied by the previous commissions, which had been rejected by the High Court in its earlier decisions.

Object envisaged under the Act

8. Before we consider the above issues, it would be appropriate to first appreciate that the Act[1], aims to provide the procedure for compulsory acquisition of privately owned land needed for public purposes and for companies, and to this end, the mode and manner of determination of the amount of compensation to be awarded to the rightful owners of the Acquired Property. The legislature in its wisdom has provided in the Act, an inbuilt mechanism for redressal of grievances of persons interested in the land being compulsorily acquired. Firstly, we note that the formal declaration of the Provincial Government to acquire a particular land[2] only takes place after the objections of interested persons, if any, are addressed by the competent authority[3]. This protection afforded to the private landowners under the Act surely bolsters their fundamental right enshrined under Article 24 of the Constitution, as has been earlier dilated upon by this Court[4]. Secondly, any person aggrieved of the measurement of the Acquired Property, the amount of or to whom the compensation is payable, or the apportionment of the compensation amongst the persons interested, may in writing seek the Collector to refer the same for determination by the Referee Courts[5].

Sale transactions to be considered in determining the Compensation

9. To address the first contention raised by the learned counsel for the appellants, we note that section 23 of the Act provides for the essential criteria to be considered for determining the amount of compensation to be awarded to the landowners for compulsorily acquiring their property. The relevant provision of the said section, applicable to the present cases, as it reads before NWFP Ordinance No.XVII of 2001 ("Ordinance"), provided that:

"23. Matters to be considered in determining compensation.-

(1) In determining the amount of compensation to be awarded for land acquired under this Act, the court shall take into consideration. Firstly, the market-value of the land on the date of publication of the notification under section 4, subsection (1).

(emphasis provided)

10. The Ordinance introduced various amendments in the Act, and the one relevant to the present matter, was in section 23(1) ("Amendment"), which since then remains to read:

"23. Matters to be considered in determining compensation.--

(1) In determining the amount of compensation to be awarded for land acquired under this Act, the court shall take into consideration. Firstly, the market-value of the land on the date of taking possession of the land.

(emphasis provided)

11. What is interesting to note is that, unlike Khyber Pakhtunkhwa, in the other three provinces, section 23(1) of the Act has not been amended, and the "market value" of the land, as originally enacted, is determinable on basis of the value prevailing on the date of gazette publication of the notification under section 4(1) ibid. Thus, it is crucial to note that since 2001, when the Amendment was introduced in the Act, it is only in Khyber Pakhtunkhwa that, the determining criteria for deciding the "market value" of the property proposed to be acquired within the contemplation of section 23(1) has been the prevalent value of land on the date of taking possession of the said property, and not the date when the notification under section 4(i) ibid was published in the official gazette. As far as transfer of possession of the Acquired Property is concerned, we note that section 16 of the Act, expressly mandates that the possession thereof is to be taken by the Acquiring Authority, after the announcement of the award, unless there are circumstances, as provided in section 17 ibid, warranting taking the said possession of the Acquired Property at an early stage, which was admittedly not the case in the present appeals. In fact, in the present cases, the actual date of transfer of possession of the Acquired Property to the Acquiring Authority has not been brought on record, and thus, the High Court was legally correct in its cautious approach: to consider the "market value" recorded in sale mutations of similar properties dated after the publication of the Notification; and to discard sale mutations taking place subsequent to the date of the Award.

12. To sum up the first contention of the learned counsel for the appellants, we note that, the Amendment in the Act, peculiar to acquisitions of property in Khyber Pakhtunkhwa, escaped his attention. Resultantly, his said contention being bereft of legal merit is dispelled.

13. Before parting with the issue in hand, it is pertinent to note that, precedents reflect a consistent trend to also consider for the purposes of determining the "market value" of property to be acquired, its "potential value" or essentially, the future use to which the said property can be put to. And in doing so, there is judicial consensus in considering sale transactions of similar nature of immovable property in the adjoining khasras or even mauzas taking place even after the date of publication of the Notification under section 4(1) of the Act for adjudging the "market value", and in doing so to finally fix the amount of compensation to be awarded to the landowners for the property acquired.

14. This Court in Mst. Iqbal Begum's case (PLD 2010 Supreme Court 719) after tracing its earlier decisions on the issue in hand, declared that:

"The principles laid down for determination of compensation reflect anxiety of law-giver to compensate those deprived of property adequately enough so as to be given gold for gold and not copper for gold." Various factors have to be taken into consideration i.e. the size and shape of the land, the locality and its situation, the tenure of property, the user, its potential value, and the rise or depression in the value of the land in the locality and even in its near vicinity. In our view real, proper and potential value, keeping in view all the relevant factors have been determined and it is unexceptionable.

15. Later, this Court in Begum Aziza's case (2014 SCMR 75), further clarified and expanded the scope of considering sale transactions, as to its time and location, for determining the amount of compensation to be paid for the acquired land in terms that:

"The market value is normally taken up as one existing on the date of notification under section 4(1) of the Land Acquisition Act under the principle of willing buyer and willing seller while the potential value was the value to which similar lands could be put to any use in future. Thus in determining the quantum of compensation the exercise may not be restricted to the time of the aforesaid notification but its future value may be taken into account .....

> While determining the value of the land acquired by the Government and the price which a willing purchaser would give to the willing seller, only the past sales should not be taken into account but the value of the land with all its potentialities may also be determined by examining (if necessary as Court witness) local property dealers or other persons who are likely to know the price that the property in question is likely to fetch in the open market..... The value of the land of the adjoining area which was simultaneously acquired and for which different formula of compensation has been adopted, should be taken into consideration..... The notification under section 4 of the Act was published on 27.04.1981; two corrigenda were issued on 6.10.1982; notification under section 5 was published on 20.7.1983; the declaration under section 6 was published on 1.2.1984 and the award was announced on 28.03.1985. Thus it took four years for appellants to complete the acquisition proceedings. The prices may have escalated during this period and this escalation has to be kept in view while assessing the potential value of the land. This is in line with the law laid down by this Court in Province of Sindh v. Ramzan (PLD 2004 SC 512), Abdul Majeed and others v. Muhammad Subhan and others (1999 SCMR 1245 at 1255) and Pakistan Burma Shell Limited v. Province of N.-W.F.P. and others (1993 SCMR 1700)."

16. More recently, this Court in Mst. Surraya Mehmood Jan's case (2015 SCMR 28), has confirmed its earlier views in terms that:

> "While undertaking this exercise, contemporaneous transactions of the same, adjoining or adjacent as well as the land in the same vicinity or locality; in dissenting precedents, may be taken into account. An award of compensation of a similar, adjacent, adjoining land or in respect of the land acquired in the same vicinity or locality cannot be ignored. The classification of the land in the Revenue Record cannot be the sole criteria for determining its value and its potential i.e. the use of which the said land can be put, must also be a factor. In this behalf, the use of the land in its vicinity needs to be examined."

17. Thus, in view of the above, it would be safe to state that not only in Khyber Pahktunkhwa, but even in other three provinces, where section 23(1) of the Act has not been amended, it is noted that: firstly, the value of similar land in the adjoining khasras and mauzas to the acquired land was taken into consideration for determining the amount of compensation to be awarded to owners of the acquired property; and secondly, the escalation of price of land during the acquisition period till its culmination in issuance of the award could be taken into consideration; and thirdly, for assessing the "potential value" of the acquired land, the most critical factor, which is to be kept in mind is the future utility of the proposed acquired land, keeping in view the availability of facilities for its said utilization; and finally, there can be no mathematical formula set for the determination of the compensation due to the landowners for the compulsory acquisition of their property. And thus, various factors depending on the circumstances of each case would cumulatively form the basis for determining the "market value" of the acquired land within the contemplation of section 23(1) of the Act.

Jurisdiction to determine disputed questions of fact not agitated earlier

18. Now coming to the next contention of the learned counsel for the Acquiring Authority. It has been urged that the Courts below had considered sale mutations of property having no nexus to the location of the Acquired Property and that the same had already been rejected by the earlier decisions of the High Court. In this regard, when the learned counsel for the Acquiring Authority was confronted to point out whether these grounds were taken by the Acquiring Authority in its objections to the last Commission Report or as a ground of appeal before the High Court leading to the impugned decision, he was unable to positively do so. It is by now settled[7] that this Court in its appellate jurisdiction, would generally not determine any question of fact, that has not been pleaded or raised by the parties at any stage before the learned Referee Court or the High Court and is for the first time raised in appeal before this Court. Hence, we are not inclined to enter into the disputed questions of fact raised for the

first time before this Court. Accordingly, the second contention of the learned counsel for the Acquiring Authority is also devoid of legal merit, and so declined.

19. For the reasons stated hereinabove, we are of the view that the impugned decision rendered by the High Court is in accord with the settled principles of the law and has also correctly appreciated the evidence on the record, and thus, warrants no interference by this Court. These appeals being devoid of merit are dismissed.

C.M.As. NOS.9482 TO 9495 OF 2019:

Learned counsel for the applicants does not press these civil Miscellaneous Applications and wishes to withdraw the same in order to pursue the remedy before the proper forum. Accordingly, the same are dismissed as withdrawn.

MWA/S-46/SC Order accordingly.

**2020 S C M R 305**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed, JJ**

**MUHAMMAD ILYAS and another---Appellants**

**Versus**

**AMEER ALI and another---Respondents**

Criminal Appeals Nos. 142-L and 143-L of 2015, decided on 6th May, 2019.

(On appeal from the judgment of the Lahore High Court, Lahore dated 6.11.2013 passed in Criminal A. No. 600 of 2011, Criminal A. No. 735 of 2011, Criminal Revision No. 725 of 2011 and M.R. No. 203 of 2011)

**(a) Penal Code (XLV of 1860)---**

----S. 302(b)--- Qatl-i-amd--- Reappraisal of evidence---Motive not proved---Vague motive was set out in the FIR and the eye-witnesses, while appearing before the Trial Court made material improvements and introduced rather a different motive---In the FIR it was alleged that occurrence had taken place because of a quarrel between deceased and accused and co-accused persons a year prior to the occurrence, however, while appearing before the Trial Court, the witnesses of ocular account stated that the accused side had been pressurizing the complainant side to enter into a compromise and on refusal of the complainant side, the occurrence had taken place---In such circumstances, the motive set out by the prosecution remained far from being proved---Case of prosecution against the accused for the murder of deceased was not proved beyond reasonable doubt---Appeal was allowed and accused was acquitted of the charge of murder.

**(b) Penal Code (XLV of 1860)---**

----Ss. 302(b) & 149---Qatl-i-amd, unlawful assembly---Reappraisal of evidence---Rule of consistency---Case against accused similar to that of co-accused not charged for murder---Case of the prosecution, against the accused and his co-accused to the extent of murder of deceased was on the same pedestal---One firearm injury was attributed to the accused on the chest of deceased, whereas two firearm injuries were attributed to co-accused on the chest and neck of deceased---As per doctor all the three injuries contributed towards the death of deceased, however the Trial Court found that every accused person was responsible for his own act and for injury on the person of deceased, therefore, the co-accused in question was not convicted for murder under S. 302(b), P.P.C.---Since the prosecution failed to bring on record any strong and independent corroboration to distinguish the case of accused from that of said co-accused, therefore, in the circumstances of the case, it could safely be held that case of prosecution against the accused for the murder of deceased was not proved beyond reasonable doubt---Furthermore no injury on the person of any injured prosecution witness was attributed to the accused, thus, the accused stood absolved from the vicarious liability under S. 149, P.P.C. to the extent of injuries on the persons of injured prosecution witnesses---Appeal was allowed and accused was acquitted of all charges.

Muhammad Taqi Khan, Advocate Supreme Court and Ms. Tasneem Amin, Advocate-on-Record for Appellants (in Criminal A. 142-L of 2015).

Rashid Javed Lodhi, Advocate Supreme Court for Appellants (in Criminal A. No. 143-L of 2015).

M. Anwar Bhaur, Advocate Supreme Court for Respondents Nos. 1-4 (in Criminal A. No. 142-L of 2015).

Mazhar Sher Awan, Additional P.-G. for the State.

Date of hearing: 6th May, 2019.

**ORDER**

**MANZOOR AHMAD MALIK, J.---**Criminal Appeal No. 143-J of 2015: After a regular trial, the appellant Ameer Ali was convicted by the trial court under section 302(b), P.P.C. and sentenced to

death for committing Qatl-i-amd of Ijaz Ahmad. Along with him Ghulam Hussain, Abbas and Shehbaz were also convicted and sentenced under different penal provisions; detail whereof is given in Para 1 of the impugned judgment, whereas nine others who were also indicted along with appellant and his co-convicts were acquitted and the trial court after giving them benefit of doubt. The appellant and his co-convicts filed criminal appeals before the learned Lahore High Court, Lahore. A murder reference was also sent for confirmation of sentence of death of appellant. The complainant filed a criminal appeal and criminal revision against acquittal of co-accused and for enhancement of sentences of co-convicts. Through the impugned judgment, the learned appellate court answered the murder reference in the negative, dismissed the appeal of the appellant and converted his sentence of death into imprisonment for life. The appeal of co-convicts Ghulam Hussain, Abbas and Shehbaz was also dismissed through the impugned judgment. The criminal revision and the criminal appeal filed by the complainant met the same fate. Thereafter, the appellant filed a jail petition, wherein leave was granted by this Court on 02.12.2015 and on the strength of leave granted to appellant, leave was also granted in the criminal petition filed by the complainant for enhancement of sentences of appellant and co-convicts Ghuiam Hussain, Abbas and Shahbaz. Hence, the instant appeals.

2. The machinery of law was set into motion through FIR (Exh.PE/1) drafted on the statement (Exh.PE) of Muhammad Ilyas complainant. It is case of the prosecution in the FIR that the complainant along with five others 'including the deceased and injured prosecution witnesses was proceeding to participate in a festival (maila) and in the way they were assaulted by Ameer Ali (appellant) and eleven others. Firearm injury on the person of Ijaz Ahmad (deceased) was attributed to Ameer Ali (appellant). Similarly a fireshot on the person of the said deceased was also attributed to Shahbaz. Thereafter murderous assault and specific injuries were attributed to Ghulam Hussain, Shahzad, Abbas and Ibrar. Motive behind the occurrence, as alleged in the FIR was that one year prior to the occurrence there was a quarrel between Ijaz (deceased) and Ameer Ali and others and due to that grudge the assault was launched.

3. We have heard learned counsel for the parties at length and have perused the available record with their assistance.

4. It is the case of the prosecution that during the occurrence, the fire so shot by appellant Ameer Ali with his repeater .12 bore hit Ijaz Ahmed on his chest, whereas the second fire shot by Shahbaz, co-convict with his 12 bore double barrel gun hit Ijaz Ahmed on his neck and chest. During the postmortem examination of Ijaz Ahmed (deceased), Dr. Muhammad Javaid (PW1) observed three firearm wounds on his person: Injury No. 1 is a firearm wound on left of his chest, front and below nipple Injury No. 2 is a firearm wound on the left side of chest above left nipple; and injury No.3 is a firearm wound on base of left side of neck. According to doctor, all the three injuries were sufficient to cause death in ordinary course of nature. Perusal of charge sheet reveals that co-accused Shahbaz along with appellant and other acquitted co-accused were charged by the trial court under sections 148, 302 read with sections 149, 324 read with sections 149, 449 and 324, P.P.C.. However, the learned trial court after appraisal of evidence concluded that every accused was responsible for the act done by him individually and as such said court did not convict co-accused Shahbaz under section 302(b), P.P.C. for the murder of Ijaz Ahmed notwithstanding the fact that in the FIR and in the statement of eye-witnesses recorded before the trial court, he was attributed two firearm injuries on the person of Ijaz Ahmed (deceased) and as per doctor, all the three firearm injuries contributed towards death of Ijaz Ahmed (deceased). Before the learned High Court, the complainant Muhammad Ilyas filed a criminal appeal against the acquittal of co-accused of the appellant and a criminal revision for enhancement of sentence of fine of appellant Amir Ali and for enhancement of sentences of co-convicts Ghulam Hussain, Shahbaz and Abbas to death as they committed the crime in furtherance of their common intention and common object. The criminal appeal and criminal revision filed by the complainant (appellant in connected appeal) was dismissed by the learned High Court. It is relevant to mention here

that the complainant did not file any separate appeal against the acquittal of Shahbaz for the murder of Ijaz Ahmed (deceased), who was attributed specific injuries on the person of Ijaz Ahmed (deceased) not only in the FIR but in the statements of eye-witnesses. Before this Court as well, the complainant has not specifically challenged the acquittal of co-accused Shahbaz for the murder of Ijaz Ahmed (deceased). In these circumstances, it is to be seen what independent corroboration is available on record which could distinguish the case of the appellant from that of his co-accused/co-convict Shahbaz.

5. During course of investigation, a gun (P7) was recovered from the appellant along with live cartridges but the report of the FSL is confined only to its working order. Similarly a gun (P.8) was recovered from co-convict/co-accused Shahbaz with cartridges but the report of FSL qua that gun is also confined to its working order. The learned trial court has already disbelieved this piece of evidence.

6. The motive behind the occurrence was not believed by the learned appellate court. On our own independent scrutiny, it has been observed by us that a vague motive was set out in the FIR and the eye-witnesses, while appearing before the trial Court made material improvements and introduced rather a different motive. In the FIR it was alleged that occurrence had taken place because of a quarrel between Ijaz Ahmad (deceased) and appellant etc a year prior to the occurrence. However, while appearing before the trial court, the witnesses of ocular account stated that the appellant's side had been pressurizing the complainant side to enter into a compromise and on refusal of the complainant side, the occurrence had taken place. In these circumstances, the motive set out by the prosecution remained far from being proved.

7. It is relevant to mention here that no injury on the person of any injured PWs is attributed to the appellant. The learned trial court has concluded that every accused in this case is responsible for his own act and for injury on the person of deceased or injured PWs. Thus, the appellant stands absolved from the vicarious liability under section 149, P.P.C. to the extent of injuries on the persons of injured PWs Liaqat Ali (PW11) and Shahzad (PW12).

8. It is crystal clear that the case of the prosecution, against the appellant and his co-accused/co-convict Shahbaz to the extent of murder of Ijaz Ahmed (deceased) was on the same pedestal. At the cost of reiteration, it has been observed by us that significantly one injury was attributed to the appellant on the chest of Ijaz Ahmed, whereas two injuries were attributed to Shahbaz on the chest and neck of deceased and as per doctor all the three injuries contributed towards the death of Ijaz Ahmed. Since the prosecution failed to bring on record any strong and independent corroboration to distinguish the case of appellant from that of his co-accused Shahbaz, therefore, in the circumstances of the case, it can safely be held that case of prosecution against the appellant for the murder of Ijaz Ahmed (deceased) is not proved beyond reasonable doubt.

9. For what has been discussed above, the instant criminal appeal is allowed. The conviction and sentence of appellant Ameer Ali are set aside. He is acquitted of the charge framed against him. He shall be released forthwith, if not required to be detained in any other criminal case.

Criminal Appeal No. 142-L of 2015.

10. Since we have acquitted Respondent No. 1 Ameer Ali in the preceding paragraphs, therefore, the instant appeal to his extent has lost its relevance, which is dismissed accordingly.

11. So far as prayer of appellant for enhancement of sentences of Respondents Nos. 2 to 4 is concerned, it has been observed by us that the reasons assigned by the learned High Court for dismissing the criminal revision filed by the appellant are neither arbitrary nor fanciful or capricious, warranting interference by this Court. Therefore, the instant criminal appeal to the extent of Respondents Nos. 2 to 4 being without merit is also dismissed.

MWA/M-66/SC Appeal allowed.

**2020 S C M R 454**

**[Supreme Court of Pakistan]**

**Present: Mushir Alam, Mazhar Alam Khan Minakhel and Syed Mansoor Ali Shah, JJ**

**TASNEEM JALAL---Appellant**

**Versus**

**DEPUTY DIRECTOR ANF and others---Respondents**

Criminal Appeal No. 01-L of 2015, decided on 15th January, 2020.

(On appeal from the judgment of Lahore High Court, Lahore dated 31.07.2002, passed in Criminal Misc. 1192-M of 1995)

**Control of Narcotic Substances Ordinance (VI of 1995) [since repealed]---**

----S. 37--- Constitution of Pakistan, Art. 12--- Possessing and distributing narcotics---Conviction by a foreign court---Forfeiture of property in Pakistan under S. 37 of the Control of Narcotic Substances Ordinance, 1995 ("Ordinance") for an offence that was committed prior to the promulgation of said Ordinance---Protection against retrospective punishment---Scope---Said Ordinance was promulgated on 29-11-1995 whereas the offence took place in September, 1992 and the convict was convicted and sentenced by a foreign court on 26-09-1993---At the time of the offence (i.e. the year 1992), the punishment of forfeiture of properties of the convict in Pakistan was not available under the law as the Ordinance was promulgated in the year 1995---Fundamental Right under Art.12 protected a person against punishment for an offence (act or omission) that was not punishable at the time of the offence---Clearly, the punishment of forfeiture of the properties of the convict in Pakistan against a conviction of a foreign court did not exist at the time of the offence or the conviction, therefore, S. 37 of the Ordinance was not applicable to an offence committed by the convict before its promulgation---Appeal was allowed accordingly.

Khan Asfandyar Wali v. Federation of Pakistan PLD 2001 SC 607; Abdul Rehman v. State 1978 SCMR 292 and Maqbool Ahmad v. State 2007 SCMR 116 ref.

Waqar Hassan Mir, Advocate Supreme Court and Ahmed Awais, Advocate Supreme Court for Appellant.

Kamran Murtaza, Senior Advocate Supreme Court for Applicant.

Zafar Iqbal Chohan, Special Prosecutor ANF, Ch. Inam Amin Minhas, Special Prosecutor ANF, Muhammad Nazir, DD ANF and Ch. Ehtisham, Special Prosecutor ANF for Respondents.

Date of hearing: 15th January, 2020.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**The legal question that concerns us is the application of the punishment of forfeiture of property under section 37 of the Control of Narcotic Substances Ordinance, 1995 ("Ordinance") to an offence that was committed prior to the introduction of such punishment in law.

2. The facts of the case are simple and admitted. The predecessor-in-interest of the appellant namely; Tasneem Jalal was convicted for the offences of possessing, aiding and abetting with the intent to distribute Heroin vide judgment dated 26.09.1993, passed by the United States District Court in the District of New Jersey, USA for a term of 108 months under the relevant law.

3. Subsequently, in Pakistan, the Federal Government through their authorized representative moved an application under section 37 of the Ordinance before the Lahore High Court, Lahore on 28.09.1995, praying for forfeiture of the properties acquired by the predecessor-in-interest of the appellant in Pakistan. List of the said properties was attached with the application. Leave was granted vide order dated 26.01.2015 to consider whether section 37 of the Ordinance is applicable to the present case?

4. We have heard the learned counsel for the parties and examined the record of the case with their able assistance. The Ordinance was promulgated on 29.11.1995 having, inter alia, repealed the

Dangerous Drugs Act, 1930 ("DDA"). Section 37 of the Ordinance provides that where a citizen of Pakistan is convicted by a foreign court for an offence which is also an offence punishable under the Ordinance, the Court (i.e., High Court) may on an application by the Director-General or any other authorized officer of the Federal Government order that the assets acquired in Pakistan of such a citizen are forfeited. Section 37 is reproduced hereunder for reference:-

"37. Forfeiture of assets of person convicted abroad.---(1) Notwithstanding anything contained in any other law for the time being in force, where a citizen of Pakistan is convicted by a foreign Court for an offence which is also an offence punishable under this Ordinance, the Court may, on an application made by the Director-General or any other officer authorized by the Federal Government, order that the assets acquired in Pakistan by such citizen shall be forfeited to the Federal Government:

Provided that the judgment or order of conviction---

(a) is passed by the foreign Court of competent jurisdiction;

(b) has been pronounced on the merits of the case;

(c) has not been obtained by fraud;

(d) has not been made in contravention of any law in force in Pakistan;

(e) has assumed finality through appeal, revision or review and is not sub judice before any appellate forum:

Provided further no order under this section shall be made without providing an opportunity of being heard to such citizen:

Provided also that, notwithstanding anything contained in clauses (a) to (e) of the first proviso, during the pendency of the application the Court may, by an order, freeze all or any of the assets or restrain such citizen, his associate and relative from alienating such assets by lease, sale, gift, transfer or in any other manner.

Explanation.---For the purpose of this section, the expression 'Court' means the High Court of the Province where the assets or any portion thereof are located."

5. The said Ordinance was promulgated on 29.11.1995 whereas the offence took place in September, 1992 and the predecessor-in-interest of the appellant was convicted and sentenced on 26.09.1993 in the USA. Therefore, at the time of the offence (1992), the punishment of forfeiture of properties of the appellant in Pakistan was not available under the law as the Ordinance was promulgated in the year 1995. Article 12 of the Constitution is very clear on the subject and provides as follows:-

"12. Protection against retrospective punishment

(1) No law shall authorize the punishment of a person:-

(a) for an act or omission that was not punishable by law at the time of the act or omission; or

(b) for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed.

(2) Nothing in clause (1) or in Article 270 shall apply to any law making acts of abrogation or subversion of a Constitution in force in Pakistan at any time since the twenty-third day of March, one thousand nine hundred and fifty-six, an offence."

Fundamental right under Article 12 protects a person against punishment for an offence (act or omission) that was not punishable at the time of the offence. Clearly, the punishment of forfeiture of the properties of the accused in Pakistan against a conviction of a foreign court did not exist at the time of the offence or the conviction. Therefore, section 37 of the Ordinance is not applicable to an offence committed by the predecessor-in-interest of the appellant before its promulgation. See Khan Asfandyar Wali v. Federation of Pakistan (PLD 2001 Supreme Court 607), Abdul Rehman v. State (1978 SCMR 292) and Maqbool Ahmad v. State (2007 SCMR 116).

6. The erstwhile DDA, which was in force prior to the Ordinance and at the time of the offence, did not provide for any such punishment. Reference to section 35-C of the DDA by the prosecution is grossly misplaced. Section 35-C reproduced hereunder does not give effect to conviction of a foreign court in Pakistan, hence the sentence referred to in section 35-C cannot be read to give effect to a sentence awarded by a foreign court as has been clearly done in section 37 of the Ordinance. Section 35-C, for convenience, is reproduced hereunder:-

> "35-C. Court to order forfeiture of assets: When any person found guilty of an offence punishable under Chapter III is sentenced to imprisonment for a term of two years or more, the Court shall also order that his assets shall stand forfeited to the Federal Government and impose on him a sentence of fine which shall not be less than twice the value of the assets."

7. In this view of the matter, this appeal is allowed and the impugned judgment dated 31.07.2002 is set aside and the forfeited properties of the predecessor-in-interest of the appellant shall stand released, unless encumbered or attached in some other proceedings.

8. Criminal Misc. Application No.221-L of 2018: This is an application filed by an intervener who has statedly acquired interest in the properties in question. In the light of the above judgment, this application has become infructuous, and the applicant is free to pursue his remedy available to him under the law. Disposed of.

9. Criminal Misc. Application No.189-L of 2019: This is a reply filed by respondent No.1. The said reply has been entertained and considered. Application allowed.

MWA/T-1/SC Order accordingly.

**2020 S C M R 463**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik, Sardar Tariq Masood and Syed Mansoor Ali Shah, JJ**

**STATE LIFE INSURANCE CORPORATION OF PAKISTAN and another---Petitioners**

**Versus**

**MUZAFAR ALI---Respondent**

Civil Petition No. 1631-L of 2018, decided on 20th March, 2019.

(On appeal from the judgment of Lahore High Court, Lahore dated 14.5.2018 passed in R.F.A. No. 605 of 2014)

**Insurance Ordinance (XXXIX of 2000)---**

----S. 115---Qanun-e-Shahadat (10 of 1984), Art. 133---Accidental Death and Indemnity Benefit Policy ('AIB Policy')---Injury and permanent disability---Proof---Statement made by policy holder during examination-in-chief regarding his accident and permanent disability not cross-examined---Effect---Statement of policy holder stood admitted.

Evidence available on the record established that respondent-policy holder was suffering from traumatic paraplegia and was permanently disabled for life. This could be inferred from his statement, when he appeared before the (Insurance) Tribunal. Respondent was not, cross-examined on the material fact that he had met with an accident and was disabled and now confined to wheelchair for life. In absence of any cross-examination on this material fact, the statement made by respondent in his examination- in-chief stood admitted.

Further, State Life Insurance Corporation ('the Corporation') itself carried out a test in the year 2008, declaring respondent to be disabled for life. More importantly, relying on the evidence filed along with the claim of respondent, the Corporation allowed sickness benefit to the respondent. So, while relying on the same evidence, the respondent had been allowed sickness benefit, whereas for the purpose of granting annuity to him under the Accidental Death and Indemnity Benefit Policy ('AIB Policy'), the same evidence had been rejected. Courts below had rightly held that respondent was entitled to annuity under the AIB Policy.

Ibrar Ahmed, Advocate Supreme Court and Imtiaz A. Shaukat, Advocate-on-Record for Petitioners.

Liaqat Ali Butt, Advocate Supreme Court for Respondent.

Date of hearing: 19th March, 2019.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J,**---The respondent held a life insurance policy ("Policy") in the sum of Rs.500,000/-, issued by the State Life Insurance Corporation (petitioner), dated 01.2.2004, and along with said policy, the respondent through a supplementary contract also held the Accidental Death and Indemnity Benefit Policy ("AIB Policy") for an additional premium. Admittedly, during the currency of the said policies, respondent met with a road accident in United Kingdom on 13.1.2006 and subsequently filed a claim under the AIB Policy.

2. Learned counsel for the petitioner has argued that the claim of the respondent was not maintainable as it was not filed within the time stipulated in the Policy. He also argued that there is no evidence on the record to establish that respondent had suffered permanent disability and that in the facts of the case, liquidated damages could not have been imposed on the petitioners. During the course of arguments, he submitted that on the basis of the claim submitted by the respondent, he was granted sickness benefit in the sum of Rs.130,000/- under the said policy.

3. Learned counsel for respondent on the other hand supported the judgments of the Tribunal and the High Court and submitted that it has been established that respondent suffered from permanent disability and was entitled to the annuity under the AIB policy.

4. We have heard the learned counsel for the parties at some

length and perused the record. The question regarding late filing of the claim was not framed as an issue between the parties before the Tribunal and, therefore, we are not inclined to go into that question. As far as the factum of respondent having met with an accident in United Kingdom resulting in permanent disability is concerned, while we agree with the learned counsel for the petitioners that reliance cannot be placed on Mark-A and Mark-B produced by respondent along with his claim, there is still other evidence available on the record which establishes that respondent is suffering from trauamatic paraplegia and is permanently disabled for life. This can be inferred from the statement of respondent, who appeared before the Tribunal as AW-1. Respondent was not cross-examined on the material fact that he had met with an accident and was disabled and now confined to wheelchair for life. In absence of any cross-examination on this material fact, the statement made by respondent in his examination- in-chief stands admitted. Further, petitioner Corporation itself carried out a test in the year 2008, declaring respondent to be disabled for life. More importantly, relying on the evidence filed along with the claim of respondent, petitioner Corporation allowed sickness benefit in the sum of Rs.130,000/- to respondent. So, while relying on the same evidence, the petitioners have been allowed sickness benefit, whereas for the purpose of granting annuity to the respondents under the AIB policy, the same evidence has been rejected.

5. As far as liquidated damages are concerned, section 118 of the Insurance Ordinance, 2000 provides that in case of late settlement of claims, the insurer is bound to make payment of liquidated damages as provided under section 118(2). It is, therefore, a statutory requirement and is attracted in the present case.

6. For the above reasons and in the peculiar facts and circumstances of this case, we are not inclined to interfere in the concurrent judgments of the Courts below. Leave is, therefore, refused and this petition is dismissed.

MWA/S-4/SC Petition dismissed.

**2020 S C M R 477**

**[Supreme Court of Pakistan]**

**Present: Asif Saeed Khan Khosa, C.J., Ijaz ul Ahsan and Syed Mansoor Ali Shah, JJ**

**GHULAM NABI---Appellant**

**Versus**

**IKRAM alias KAMA and others---Respondents**

Criminal Appeal No. 175-L of 2011, decided on 16th August, 2019.

(Against the judgment dated 19.05.2009 passed by the Lahore High Court, Lahore in Criminal Appeals Nos. 1097 and 1094 of 2004, Criminal Revision No. 709 of 2004 and Capital Sentence Reference No. 305 of 2004)

**Penal Code (XLV of 1860)---**

----Ss. 302, 148 & 149---Qatl-i-amd, rioting armed with deadly weapons, unlawful assembly---Appeal against acquittal---Reappraisal of evidence---Prosecution had completely suppressed the fact that the deceased had also resorted to firing at the place of occurrence---Motive set up by the prosecution regarding damaging of a drain of waste water by the accused party at the spot had remained far from being established and the site-plan of the place of occurrence did not show any drain having been damaged---High Court had rightly concluded that some material facts had been suppressed by the complainant party and it was not clear how and why the occurrence had taken place---In such circumstances, the High Court had decided to extend the benefit of doubt to the accused persons and acquitted them of the charge---Furthermore, the acquittal of accused persons had come about 10 years ago and the present criminal case had originated about 19 years ago---Appeal against acquittal was dismissed in circumstances.

Malik Amjad Pervaiz, Advocate Supreme Court for Appellant.

Naveed A. Khawaja Advocate Supreme Court for Respondents Nos. 1 - 5 and Respondent No. 3 in person

Mazhar Sher Awan, Additional Prosecutor-General Punjab for the State.

Date of hearing: 16th August, 2019.

**JUDGMENT**

**ASIF SAEED KHAN KHOSA, C.J.---**Respondents Nos. 1 to 5 had been convicted by the trial court on two counts of an offence under section 302, P.P.C. read with sections 148 and 149, P.P.C. and were variously sentenced but on appeal their convictions and sentences recorded by the trial court were set aside and they were acquitted of the charge by the High Court. Hence, the present appeal by leave of this Court granted on 13.12.2011.

2. Leave to appeal had been granted in this case in order to reappraise the evidence and with the assistance of the learned counsel for the parties we have undertaken that exercise.

3. The record of the case shows that five crime-empties had been recovered from the place where the dead bodies of Manzoor and Noor Hussain were present at the spot and it had completely been suppressed by the prosecution that the deceased had also resorted to firing at the place of occurrence. The motive set up by the prosecution regarding damaging of a drain of waste water by the accused party at the spot had remained far from being established and the site-plan of the place of occurrence did not show any drain having been damaged. After an elaborate reappraisal of the evidence available on the record the High Court had concluded that some material facts had been suppressed by the complainant party and it was not clear how and why the occurrence had taken place. In these circumstances the High Court had decided to extend the benefit of doubt to respondents Nos. 1 to 5 and had acquitted them of the charge. The respondents' acquittal had come about in the year 2009, i.e. about 10 years ago and the criminal case in hand had originated about 19 years ago. The reasons recorded by the High Court for recording acquittal of respondents Nos. 1 to 5 have been found by us to be cogent and valid. No jurisdictional infirmity, illegality of approach, irregularity of procedure or

perversity of reasoning on the part of High Court has been highlighted before us so as to warrant interference in the impugned judgment of acquittal passed by the High Court. This appeal is, therefore, dismissed. The bail bonds and sureties of respondents Nos. 1 to 5, if any, shall stand discharged.

MWA/G-2/SC Appeal dismissed.

**2020 S C M R 505**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed, JJ**

**Mst. YASMEEN---Appellant**

**Versus**

**JAVED and another---Respondents**

Criminal Appeal No. 8-P of 2014, decided on 30th April, 2019.

(On appeal from the judgment of the Peshawar High Court, Peshawar dated 28.07.2009 passed in Criminal Appeal No. 106 of 2008 and M.R. No. 4 of 2008)

**(a) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Appeal against acquittal---Reappraisal of evidence---Inquest report---In the relevant column of inquest report "brief history of crime", nothing was mentioned regarding facts of the case despite the claim of prosecution that matter was reported to police within three hours of the occurrence---Such circumstance alone cast serious doubts about the veracity of prosecution case against the accused and the claim of the eye-witnesses to have witnessed the occurrence---Appeal against acquittal was dismissed.

**(b) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Appeal against acquittal---Reappraisal of evidence---Night occurrence---No source of light---Admittedly occurrence took place at night at 10.00 p.m---In the FIR complainant mentioned that at the time of occurrence there was no electricity due to loadshedding---No source of light had been mentioned in the site plan either---Appeal against acquittal was dismissed.

**(c) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Appeal against acquittal---Reappraisal of evidence---Recovery and motive---During the course of investigation, nothing was recovered from the accused and he was not even connected with the motive part of the prosecution story---In a separate trial, two co-accused persons who along with the accused were equally charged by the complainant with the allegation of firing at the deceased were acquitted by Trial Court and no appeal against their acquittal was filed by the complainant---Appeal against acquittal was dismissed.

Syed Abdul Fayaz, Advocate Supreme Court for Appellant.

Iltaf Samad, Advocate Supreme Court for Respondent No.1.

Barrister Qasim Wadud, Additional A.-G., Khyber Pakhtunkhwa for the State.

Date of hearing: 30th April, 2019.

**ORDER**

**MANZOOR AHMAD MALIK, J.**---Respondent Javed, after a regular trial, was convicted by the trial court under section 302(b), P.P.C. and sentenced to death, with direction to pay compensation of Rs.100,000/- to the legal heirs of deceased. He challenged his conviction and sentence before the Peshawar High Court, Peshawar by filing a criminal appeal, whereas a murder reference was sent by the trial court for confirmation of sentence of death or otherwise. Through the impugned judgment, the learned High Court allowed the criminal appeal of respondent, set aside his conviction and sentence, answered the murder reference in the negative and acquitted the respondent of the charge framed against him. Against the said judgment, the appellant filed a criminal petition, wherein leave was granted by this Court on 18.09.2014. Hence, the instant criminal appeal.

2. We have heard learned counsel for the parties at length and have perused the available record with their assistance.

3. It has been observed by us that the learned appellate court, after proper reappraisal of evidence available on record, has rendered findings of acquittal in favour of respondent. In addition to the said findings, it has been observed by us that the occurrence in this case, as per prosecution, took place on

19.02.2005 at 10.00 p.m. The matter was reported to police in the intervening night of 19/20.02.2005 at 1.00 a.m (night). The postmortem examination on the dead body of Mst. Naheeda (deceased) was conducted by Dr. Faiqa Elahi (PW7) on 20.02.2005 at 8.50 a.m. Even if delay in conducting the postmortem examination on the dead body of deceased, in the circumstances of the case, is ignored, the fact remains that in the relevant column of inquest report "brief history of crime", nothing is mentioned regarding facts of the case despite the claim of prosecution that matter was reported to police within three hours of the occurrence i.e. in the intervening night of 19/20.02.2005 at 1.00 a.m (night). This circumstance alone casts serious doubts about the veracity of prosecution case against the respondent and the claim of the eye-witnesses Mst. Yasmeen (PW5) and Mst. Kabalo (PW6) to have witnessed the occurrence.

4. The occurrence in this case, as per prosecution, had taken place in the month of February at 10.00 p.m. In the FIR, the complainant Mst. Yasmeen (PW5) has herself mentioned that at the time of occurrence there was no electricity at the place of occurrence due to loadshedding. No source of light has been mentioned in the site plan either.

5. During the course of investigation, nothing was recovered from the respondent. He is not even connected with the motive part of the prosecution story. It has been admitted by the learned counsel for the appellant that in a separate trial, co-accused of the respondent namely Muhammad Jan, Bakhtiar and Akbar Ali, who along with the respondent were equally charged by the complainant with the allegation of firing at the deceased were acquitted by the trial court and no appeal against their acquittal was filed by the complainant-appellant.

6. For the foregoing this appeal having no merit is dismissed.

MWA/Y-1/SC Appeal dismissed.

**2020 S C M R 843**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ**

**HAMID ASHRAF (LATE) through L.Rs. and others---Petitioners**

**Versus**

**COMMISSIONER INLAND REVENUE, LAHORE---Respondent**

Civil Petitions Nos. 283-L to 286-L of 2018, decided on 5th March, 2020.

(On appeal from the order of Lahore High Court, Lahore dated 21.11.2017 passed in Income Tax References Nos. 304 to 307 of 2014)

**Income Tax Ordinance (XLIX of 2001)---**

----Ss. 120, 171 (Explanation) & 171(2)(c)---Tax refund---Due date---Additional payment or compensation for delayed refund---For the purposes of compensation, tax refund became due from the date of the refund order and not from the date of deemed assessment under S. 120 of the Income Tax Ordinance, 2001.

Explanation to section 171 of the Income Tax Ordinance, 2001 ('the Ordinance') provided that for the purposes of compensation, tax refund becomes due from the date of the refund order and not from the date of deemed assessment under section 120. In other words, the mechanism of refund under the Ordinance, worked on the basis of a refund order passed on an application for refund filed by tax payer and duly scrutinized by the Commissioner and was not payable simply on the basis of the deemed assessment under section 120. The scheme of refund provided under the statute overrode the deeming provision of section 120. Deemed assessment under section 120 was, therefore, not a substitute for a refund order. It appeared, as if the return of tax or refund by the Exchequer to a taxpayer required scrutiny by the Commissioner and could not be deemed to be an amount outstanding in favour of the taxpayer. The taxpayer was free to apply for refund under section 170, immediately after the filing of the tax return or the deemed assessment. Section 170 provided a fast-tracked mechanism for refund as it specified time for the passing of a refund order and the remedy of appeal in case of failure to pass any such order. Other than this fast-track refund mechanism there was no scheme of automatic refund on the basis of the deemed assessment as was made amply clear by the Explanation to section 171 of the Ordinance.

Explanation to section 171 of the Ordinance enjoyed retrospective effect because its purpose was "removal of doubt" besides supplying necessary statutory "clarification." However, the retrospective operation of the Explanation shall not affect past and closed transactions where the benefit of refund and compensation had already been extended to the taxpayer on the basis of deemed assessment under section 120.

In the present case, the applications for refund filed by the petitioner-taxpayer under section 170 were taken up by Assistant Commissioner Inland Revenue in the year 2010 and initially rejected. After remand of the matter by Commissioner Inland Revenue (CIR) (Appeals), the Deputy Commissioner Inland Revenue (DCIT) passed refund order on 22-03-2013. The matter remained under litigation between the department and the taxpayer, and refund order was passed on 23-03-2013, rather than 15-02-2011, when the CIR (Appeals) simply remanded the matter to the DCIT to decide the same afresh. Therefore, the date of refund order passed by DCIT i.e., 22-03-2013 would be the date when the refund became due as per section 171(2)(c) [instead of section 171(2)(a)] of the Ordinance.

Shahbaz Butt, Advocate Supreme Court along with Iqbal Hashmi, Advocate Supreme Court for Petitioners (in all cases).

Mian Yousaf Umer, Advocate Supreme Court along with Imtiaz A. Shaukhat, Advocate-on-Record for Respondent (in all cases).

Date of hearing: 5th March, 2020.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.**---The question before us is to determine the date when tax refund becomes due to the petitioner (taxpayer) under the Income Tax Ordinance, 2001 (the "Ordinance") for the purposes of Additional Payment or compensation for delayed refund.

2. Brief facts are that the petitioner filed tax returns along with refund applications for Tax Years 2004 to 2008. The refund applications were taken up under section 170 and rejected by the Assistant Commissioner Inland Revenue, Regional Tax Office, Lahore on 23.09.2010. On appeal filed by the petitioner before the Commissioner Inland Revenue (Appeals) [CIR (Appeals)], Lahore the case was remanded to Taxation Officer on 15.02.2011 for a fresh decision. The Deputy Commissioner Inland Revenue (DCIT) decided the matter on 22.03.2013 granting refund to the petitioner, as well as, additional payment (compensation) for delayed refund w.e.f 15.02.2011 i.e., the date when CIR (Appeals) decided the appeals and remanded the matters to the DCIT. Petitioner, aggrieved of the date of the refund due, preferred appeals before CIR (Appeals) which were dismissed on the question of jurisdiction; holding that no appeal lay against an order under section 171 of the Ordinance. The petitioner filed an appeal before the Appellate Tribunal Inland Revenue (ATIR) which was allowed vide order dated 12.09.2014, granting Additional Payment (compensation) to the petitioner for delayed refunds from the date of the deemed assessment under section 120 of the Ordinance when the petitioner had filed the annual income tax returns for the relevant tax years. The tax department assailed the order before the High Court by filing appeals which were allowed vide impugned order dated 21.11.2017 holding the date of the refund due in terms of section 171(2)(a) to be w.e.f 22.03.2013 - the date when DCIT passed the refund order in favour of the petitioner.

3. We have heard the learned counsel for the parties. The petitioner defended the order of the Tribunal while the respondent department supported the view of the High Court in the impugned judgment. We have examined the relevant provisions of the Ordinance, in particular, sections 120, 170, 171 and the Explanation inserted in section 171(2) vide Finance Act, 2013, dated 01.07.2013. These provisions have been reproduced in the Schedule to this judgment for ready reference.

4. Under the scheme of the Ordinance (Chapter X, Part VI) a taxpayer, who has paid tax in excess of the amount which is properly chargeable under the Ordinance, may apply to the Commissioner for the refund of the excess under section 170. The application for refund has to be in the prescribed form and verified in the prescribed manner and is to be made within three years of the later of the (i) assessment order (under section 120) issued by the Commissioner to the taxpayer for the tax year to which the refund application relates or (ii) the date on which the tax was paid. The Commissioner if satisfied that the tax has been overpaid by the taxpayer may do the following in a sequential manner: (i) apply the excess in reduction of any tax due from the taxpayer under the Ordinance. (ii) apply the balance, if any, to pay any outstanding liability of the taxpayer to pay other taxes and (iii) refund the remainder, if any to the taxpayer. The Commissioner is to decide the refund application within 60 days of the receipt of the application and decide the same after granting a hearing to the taxpayer. Any one aggrieved of the refund order or the failure of the Commissioner to decide the application within the specified time can file an appeal as provided in the Ordinance. Once the refund order has been passed which may entail cash refund or adjustment against pending liability as envisaged under section 170(3). Thereafter, if the refund is delayed and not paid to the taxpayer within three months of the date on which it becomes due, the taxpayer gets entitled to compensation at the rate of KIBOR plus 0.5 percent per annum of the amount of refund computed for the period commencing at the end of the three month period and ending on the date on which it is paid. Subsection (2) of section 171 refers to dates which are treated to be the dates when the refund becomes due. Sections 170 and 171, therefore, provide a complete mechanism for claiming tax refund by a taxpayer. Such an application undergoes proper scrutiny and only upon satisfaction of the Commissioner is the refund order issued.

5. The impression that deemed assessment under section 120, when the annual tax return filed under section 114 shows a refund payable to the taxpayer, passes for a refund order, stands dispelled by the Explanation to section 171 inserted through Finance Act, 2013, which states as under:

> Explanation.-- For the removal of doubt, it is clarified that where a refund order is made on an application under subsection (1) of section 170, for the purpose of compensation, the refund becomes due from the date refund order is made and not from the date the assessment of income treated to have been made by the Commissioner under section 120."

For removal of any doubt and as a clarification, the Explanation provides that for the purposes of compensation, tax refund becomes due from the date of the refund order and not from the date of deemed assessment under section 120. In other words, the mechanism of refund under the Ordinance, works on the basis of a refund order passed on an application for refund filed by tax payer and duly scrutinized by the Commissioner and is not payable simply on the basis of the deemed assessment under section 120. The scheme of refund provided under the statute overrides the deeming provision of section 120. Deemed assessment under section 120 is, therefore, not a substitute for a refund order. It appears, as if the return of tax or refund by the Exchequer to a taxpayer requires scrutiny by the Commissioner and cannot be deemed to be an amount outstanding in favour of the taxpayer. The taxpayer is free to apply for refund under section 170, immediately after the filing of the tax return or the deemed assessment. Section 170 provides a fast tracked mechanism for refund as it specifies time for the passing of a refund order and the remedy of appeal in case of failure to pass any such order. Other than this fast-track refund mechanism there is no scheme of automatic refund on the basis of the deemed assessment as is made amply clear by the Explanation. The Explanation enjoys retrospective effect because its purpose is "removal of doubt" besides supplying necessary statutory "clarification." However, the retrospective operation of the Explanation shall not affect past and closed transactions where the benefit of refund and compensation has already been extended to the taxpayer on the basis of deemed assessment under section 120.

6. The instant case pertains to pre-2013, it has been argued by the petitioner that the tax refund became due from the date of the deemed assessment under section 120 of the Ordinance. This argument is not available to the petitioner. Firstly, the case of the petitioner is not a past and closed transaction and secondly, the petitioner had moved a refund application under section 170 of the Ordinance which was processed and finally refund order was passed on 22.03.2013.

7. In the present case, the applications for refund filed by the petitioner under section 170 were taken up by Assistant Commissioner Inland Revenue in the year 2010 and initially rejected. After remand of the matter by CIR (Appeals), DCIT passed refund order on 22.03.2013. The matter remained under litigation between the department and the taxpayer, and refund order was passed on 23.03.2013, rather than 15.02.2011, when the CIR (Appeals) simply remanded the matter to the DCIT to decide the same afresh. Therefore, the date of refund order passed by DCIT i.e., 22.03.2013 will be the date when the refund becomes due as per section 171(2)(c) [instead of section 171(2)(a)] as correctly noted by the High Court.

8. For the above reasons, these petitions fail and are, therefore, dismissed.

SCHEDULE

"120. Assessments.-(1) Where a taxpayer has furnished a complete return of income (other than a revised return under subsection (6) of section 114) for a tax year ending on or after the 1st day of July, 2002,-

> (a) the Commissioner shall be taken to have made an assessment of taxable income for that tax year, and the tax due thereon, equal to those respective amounts specified in the return; and
>
> (b) the return shall be taken for all purposes of this Ordinance to be an assessment order issued to the taxpayer by the Commissioner on the day the return was furnished.

(1A) Notwithstanding the provisions of subsection (1), the Commissioner may [conduct audit of the income tax affairs of a person] under section 177 and all the provisions of that section shall apply accordingly.]

(2) A return of income shall be taken to be complete if it is in accordance with the provisions of subsection (2) of section 114.

(3) Where the return of income furnished is not complete, the Commissioner shall issue a notice to the taxpayer informing him of the deficiencies (other than incorrect amount of tax payable on taxable income, as specified in the return, or short payment of tax payable) and directing him to provide such information, particulars, statement or documents by such date specified in the notice.

(4) Where a taxpayer fails to fully comply, by the due date, with the requirements of the notice under subsection (3), the return furnished shall be treated as an invalid return as if it had not been furnished.

(5) Where, in response to a notice under subsection (3), the taxpayer has, by the due date, fully complied with the requirements of the notice, the return furnished shall be treated to be complete on the day it was furnished and the provisions of subsection (1) shall apply accordingly.

(6) No notice under subsection (3) shall be issued after the [expiry of one hundred and eighty days from the end of the financial year in which return was furnished], and the provisions of subsection (1) shall apply accordingly.

170. Refunds.- (1) A taxpayer who has paid tax in excess of the amount which the taxpayer is properly chargeable under this Ordinance may apply to the Commissioner for a refund of the excess.

(1A) Where any advance or loan, to which sub-clause (e) of clause (19) of section 2 applies, is repaid by a taxpayer, he shall be entitled to a refund of the tax, if any, paid by him as a result of such advance or loan having been treated as dividend under the aforesaid provision.

(2) An application for a refund under subsection (1) shall be -

(a) made in the prescribed form;

(b) verified in the prescribed manner; and

(c) made within [three] years of the later of -

(i) the date on which the Commissioner has issued the assessment order to the taxpayer for the tax year to which the refund application relates; or

(ii) the date on which the tax was paid.

(3) Where the Commissioner is satisfied that tax has been overpaid, the Commissioner shall -

(a) apply the excess in reduction of any other tax due from the taxpayer under this Ordinance;

(b) apply the balance of the excess, if any, in reduction of any outstanding liability of the taxpayer to pay other taxes; and

(c) refund the remainder, if any, to the taxpayer.

(4) The Commissioner shall, within [sixty] days of receipt of a refund application under subsection (1), serve on the person applying for the refund an order in writing of the decision [after providing the taxpayer an opportunity of being heard].

(5) A person aggrieved by-

(a) an order passed under subsection (4); or

(b) the failure of the Commissioner to pass an order under subsection (4) within the time specified in that subsection, may prefer an appeal under Part III of this Chapter.

171. Additional payment for delayed refunds.- (1) Where a refund due to a taxpayer is not paid within three months of the date on which it becomes due, the Commissioner shall pay to the taxpayer a further amount by way of compensation at the rate of [KIBOR plus 0.5 per cent] per annum of the amount of the refund computed for the period commencing at the end of the three month period and ending on the date on which it was paid.

(2) For the purposes of this section, a refund shall be treated as having become due --

(a) in the case of a refund required to be made in consequence of an order on an appeal to the Commissioner (Appeals), an appeal to the Appellate Tribunal, a reference to the High Court or an appeal to the Supreme Court, on the date of receipt of such order by the Commissioner;[or]

(b) in the case of a refund required to be made as a consequence of a revision order under section [122A], on the date the order is made by the Commissioner; or

(c) in any other case, on the date the refund order is made.

Explanation.-- For the removal of doubt, it is clarified that where a refund order is made on an application under subsection (1) of section 170, for the purpose of compensation, the refund becomes due from the date refund order is made and not from the date the assessment of income treated to have been made by the Commissioner under section 120."

MWA/H-6/SC Petition dismissed.

**2020 S C M R 1185**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Sayyed Mazahar Ali Akbar Naqvi, JJ**

**RAZA and another---Petitioners**

**Versus**

**The STATE and others---Respondents**

Criminal Petitions Nos. 1124-L and 1120-L of 2015, decided on 25th June, 2020.

(Against the judgment of the Lahore High Court, Lahore dated 14.09.2015 passed in Murder Reference No. 276/2011 and Criminal Appeal No. 996/2011)

**Penal Code (XLV of 1860)---**

----Ss. 302(b) & 302(c)---Qanun-e-Shahadat (10 of 1984), Art. 27---Qatl-i-amd---Reappraisal of evidence---Sentence, reduction in---Instigation by accused---Single fire shot---First plea that accused took after his arrest and commencement of investigation was that deceased had made an attempt to commit rape with sister of accused; that when mother of accused went to reprimand the deceased, he started abusing his mother and also grappled with her; that resultantly the accused flared up and under the heat of passion made a single fire shot on the deceased---Such stance taken by the accused remained consistent throughout during the course of investigation as well as the trial---During investigation, the first plea raised by the accused was found correct by the Investigating Officer---Such first plea of accused was admissible in evidence under Art. 27 of the Qanun-e-Shahadat, 1984---Record clearly spelt out that occurrence had taken place due to the act of the deceased, which enraged the mental faculty of the accused and under the impulses of the same the present occurrence had taken place---Benefit of the same was available to the accused, for which many circumstances were not required rather a glimpse of the same was always deemed sufficient---Sentence inflicted upon the accused by Courts below under S. 302(b), P.P.C. was not made out, therefore, the Supreme Court converted the sentence from imprisonment for life under S. 302(b), P.P.C. to imprisonment for 10 years under S. 302(c), P.P.C.---Petition for leave to appeal was converted into appeal and partially allowed.

Ch. Walayat Ali, Advocate Supreme Court for Petitioner (in Criminal Petition No. 1124-L of 2015).

Nemo for Petitioner (in Criminal Petition No. 1120-L of 2015).

Jaffar, Additional Prosecutor General for the State.

Date of hearing: 25th June, 2020.

**JUDGMENT**

**SAYYED MAZAHAR ALI AKBAR NAQVI, J.**---Criminal Petition for leave to appeal under section 185(3) of the Constitution of Islamic Republic of Pakistan, 1973 has been assailed by the petitioner calling in question impugned judgment dated 14.09.2015 passed by Lahore High Court, Lahore in Murder Reference No.276/2011 and Crl. Appeal No.996/2011.

2. As per prosecution story portrayed in the FIR No.203/2009 dated 04.06.2009, offence under section 302, P.P.C. registered with Police Station Saddar Farooqabad Sheikhupura (Exh.PD) lodged at the instance of one Allah Ditta son of Lal Din, (PW-3) is that he is resident of Herchand and they are three brothers and he is eldest. The complainant and his younger brother Qurban reside with their parents at Herchand whereas brother Ramzan live separately. On 03.05.2009 at evening, the complainant along with his father came to the house of brother Muhammad Ramzan because his daughter was sick. They were talking to each other when at about 7:00 p.m. Raza son of Niaz i.e. a neighbor of Ramzan called him outside. The complainant with father also came out of the house along with Ramzan. Ayisha Bibi wife of Ramzan followed and came out of the house. Raza was armed with Carbine, he raised lalkara to Muhammad Ramzan that he had entered into an altercation with his mother, therefore, he will teach a lesson and thereafter accused made a fire shot with his Carbine 12 bore which hit Muhammad Ramzan on his abdomen, below the chest. Muhammad Ramzan fell down

being injured whereas accused fled away from there. The occurrence was witnessed by the complainant, his father and Bhabi Ayisha. The injured was taken to Sheikhupura Hospital but he was referred to Mayo Hospital, Lahore. Initially the FIR was registered under section 324, P.P.C. but when the injured died on 08.05.2009, offence under section 302, P.P.C. was added.

3. After registration of the aforesaid case, investigation was carried out and petitioner was challaned while placing his name in column No.3 of the report under section 173, Cr.P.C.

On receipt of challan, the learned Trial Court formally charge sheeted the petitioner vide order dated 12.08.2010 to which he pleaded not guilty and claimed trial. Prosecution in order to substantiate its case produced as many as 13 witnesses. The petitioner was examined under section 342, Cr.P.C., however, he opted not to appear in his defence as his own witness in terms of section 340(2), Cr.P.C. to disproof the allegations levelled against him.

4. The learned trial court after conclusion of trial found that the prosecution succeeded to prove allegations against the petitioner, hence convicted him under section 302(b), P.P.C. and sentenced him to death. The petitioner was further burdened to pay compensation of Rs.1,00,000/- to be paid to the legal heirs of the deceased in terms of section 544-A, Cr.P.C. In default thereof, he was further ordered to undergo simple imprisonment for six months.

5. The petitioner being aggrieved by the judgment of the learned trial court dated 07.06.2011 filed Criminal Appeal No.996 of 2011 before the Lahore High Court, Lahore whereas the learned trial court forwarded Murder Reference No.276 of 2011 for confirmation of the sentence of death inflicted upon the petitioner in terms of section 374, Cr.P.C. The learned Division Bench of High Court vide judgment dated 14.09.2015 converted death sentence of the petitioner into imprisonment for life whereas amount of compensation and imprisonment in its default prescribed by the learned Trial Court was ordered to be maintained. Benefit of section 382-B, Cr.P.C. was also given to him. Hence, instant petition.

6. At the very outset, learned counsel for the petitioner argued that in fact both the courts below have not attended the circumstances of the case in its true perspective and convicted the petitioner under section 302(b), P.P.C., which is not substantiated from the record. Contends that as far as occurrence is concerned, the same has been admitted by the petitioner while making his statement under section 342, Cr.P.C. Adds that a specific plea was taken by the petitioner before the Investigation Officer that the deceased made an attempt to commit rape with sister of the petitioner namely Saima Bibi. Contends that plea of the petitioner was found correct during the course of investigation as such the conviction and sentence recorded by learned Courts below is not sustainable in the eye of law. Contends that when it is established from the record that petitioner has committed the occurrence on the question of `ghairat', therefore, the petitioner is entitled for the benefit of the same and as such the appropriate sentence could be under section 302(c), P.P.C.

7. On the other hand, learned Law Officer has not seriously controverted the contentions raised by learned counsel for the petitioner as the same is spelled out from the record.

8. We have heard the learned counsel for the parties and gone through the record.

9. Admittedly, the occurrence had taken place within the local limits of Police Station Saddar Farooqabad, District Sheikhupura. There is no denial to this fact that the allegation against the petitioner is that he caused fire-arm injury with Carbine, which landed on the abdomen near the chest of the deceased Muhammad Ramzan. The injured was taken to District Headquarter Hospital, Sheikhupura from where he was referred to Mayo Hospital, Lahore however, he succumbed to the injuries on 08.05.2009 and as such the provision of section 302, P.P.C. was added in the crime report. The petitioner since his arrest and commencement of investigation has raised first plea wherein it has been mentioned that deceased had made an attempt to commit rape with his sister. The mother of petitioner Maqsoodan Bibi had gone to reprimand Muhammad

Ramzan deceased upon which he started abusing mother of the petitioner and also grappled with her. The petitioner approached there he could not afford the conduct of the deceased and as such he

flared up and under the heat of passion could not resist and as such made a single fire shot. The stance taken by the petitioner remained consistent throughout during the course of investigation as well as the trial. During investigation, the first plea raised by the petitioner was found correct by the Investigating Officer. It is an admitted fact that first plea of the accused is admissible in evidence under Article 27 of the Qanun-e-Shahadat Order, 1984 ("Order of 1984"). Article 27 of Order 1984 is general principle enabling the Investigating Officer to record the same whereas Article 28 is mere an exception. As a general rule evidence not forming part of the transaction is not admissible whereas Articles 27/28 are an exceptions to the said general principle by laying down a rule that admissibility of those fact which might not be tendered in evidence to prove it but these are relevant to prove the status/mind the person committing it. For example the guilt, intent, knowledge, negligence, malice etc., and in all the intentions qua these conditions would be an admissibility as it is provided under Article 27 of the Order of 1984. Article 27 of the Order of 1984 has extended the scope to meet the question qua the existence of person state of mind or bodily feeling and all these facts and their existence in the state of affair has turned relevant.

During the course of proceedings before the learned Trial Court, the suggestion qua the state of mind referred above was also put to the prosecution witnesses of ocular account PW-3 and PW-4, respectively. Now the question, which requires determination, only relates to the quantum of sentence in the given facts and circumstances narrated above.

10. As observed earlier, that the occurrence had taken place due to the act of the deceased, which enraged the mental faculty of the petitioner and under the impulses of the same the instant occurrence had taken place, the same is spelled out from the record and as such the benefit of the same is available for which so many circumstances are not required rather the glimpse of the same is always deemed sufficient, which has been established by the Superior Court from time to time.

11. For what has been discussed above, we are of the considered view that sentence inflicted upon the petitioner by learned Courts below under section 302(b), P.P.C. is not made out, therefore, keeping in view the facts narrated above, instant petition is converted into appeal and same is partially allowed and we convert the sentence from imprisonment for life under section 302(b), P.P.C. to imprisonment for 10 years under section 302(c), P.P.C. whereas amount of compensation and imprisonment in its default prescribed by the learned Trial Court is ordered to be maintained. Benefit of section 382-B, Cr.P.C. is also extended. The Criminal Petition No. 1120(L)/2015 filed by the complainant for enhancement of sentence, having no substance, is dismissed.

MWA/R-2/SC Order accordingly.

**2020 S C M R 1206**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Sayyed Mazahar Ali Akbar Naqvi, JJ**

**MUHAMMAD SHABBIR and others---Appellants**

**Versus**

**The STATE---Respondent**

Criminal Appeal No. 66-L of 2020 in Criminal Petition No. 1189-L of 2014, decided on 23rd June, 2020.

(Against the judgment of the Lahore High Court, Lahore dated 23.10.2014 passed in Capital Sentence Reference No. 34-T of 2007 and Criminal Appeal No. 534 of 2007)

**(a) Penal Code (XLV of 1860)---**

----Ss. 302(b), 324, 148, 149, 337-A(i), 337-A(ii), 337-F(i), 337-F(iii) & 337-F(vi)---Qatl-i-amd, attempt to commit qatl-i-amd, rioting armed with deadly weapons, unlawful assembly, shajjah-i-khafifah, shajjah-i-mudihah, ghayr-jaifah-damiyah, ghayr-jaifah-mutalahimah, ghayr-jaifah-munaqqillah, acts of terrorism---Reappraisal of evidence---During the occurrence three persons were done to death in a brutal manner and one person was seriously injured---As per post mortem reports, the first deceased received 28 injuries, the second as many as 34 injuries and the third deceased received 12 injures on different parts of their bodies---Injured witness also received as many as nineteen injures on different parts of his body---Occurrence had taken place in broad daylight and the presence of an eye-witness and injured witness at the scene of occurrence was quite natural and beyond any doubt---Statements of said prosecution witnesses were consistent, confidence inspiring and in consonance with the probability and circumstances of the case and were worthy of credence---Injured witness received firearms injures in the occurrence while sitting in a jeep and saw the occurrence, hence, his presence at the relevant time could not be considered as unnatural and improbable and he had no enmity or malice against the accused persons and his testimony was duly supported by medical evidence having been found confidence inspiring, truthful and unimpeachable---Report of Forensic Science Agency showed that all empties except some were fired from the weapons recovered from the accused persons---Convictions and sentences recorded by the High Court were maintained---Appeal was dismissed.

**(b) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Discrepancies in statements of prosecution witnesses---Effect---Where such discrepancies shattered the prosecution story on salient features then there was substance to intervene on the subject (of conviction) otherwise it had no impact on the veracity of the prosecution story.

Muhammad Iqbal v. The State PLD 2001 SC 222 ref.

**(c) Penal Code (XLV of 1860)---**

----S. 302(b)--- Qatl-i-amd--- Sentence, reduction in--- Mitigating factors---Revenge killing---Murders committed out of revenge depended human physiology---Human, being a creature of his environment was governed by the background of the society from where he hailed---Although such aspect did not cover the doctrine of provocation still the area from where a person belonged and other antecedent of such person were relevant factor while taking into account whether revenge killing could be regarded as a mitigating circumstance---Question of sentence in each criminal case definitely had direct nexus with the particular circumstances of the said case.

Ajun Shah v. The State PLD 1967 SC 185 ref.

Sher Afghan Asdi, Advocate Supreme Court for Appellants.

Imdad Hussain Hamdani Syed, Advocate Supreme Court for the Complainant.

M. Amjad Rafiq, Additional PG for the State.

Date of hearing: 23rd June, 2020.

**JUDGMENT**

**SAYYED MAZAHAR ALI AKBAR NAQVI, J**.---Criminal appeal, by leave of the Court, is directed against the impugned judgment of learned Division Bench of Lahore High Court, Lahore dated 23.10.2014 passed in Capital Sentence Reference No. 34-T/2007 and Criminal Appeal No. 534/2007 whereby the conviction of the appellants under section 302(b), P.P.C. awarded by the Special Judge, Anti-Terrorism Court, Sargodha vide judgment dated 29.03.2007 on three counts each was maintained but their sentences were converted from death each to imprisonment for life each. The compensation awarded by the learned trial court and sentence in default thereof was maintained. The benefit of section 382-B, Cr.P.C. was also given to the appellants. Convictions and sentences under sections 324, 337-A(i), 337-A(ii), 337-F(i), 337-F(iii), 337-F(vi), 148, 149, P.P.C. were also maintained.

2. As per prosecution story contained in the FIR No. 72/2005 dated 16.02.2005, offences under sections 302, 324, 148, 149, 395, P.P.C. read with section 7, Anti-Terrorism Act, 1997, registered with Police Station Jauharabad District Khushab (Exh.PBB) lodged at the instance of one Mazhar Anwaar (PW-20) is that he along with Gul Hayat son of Mian Muhammad, Gul Hayat son of Muhammad Feroze were going to Lorri Adda Hadali on feet and when they reached in the street near the house of Muhammad Mahboob, from opposite side Jeep No. B-4303/Swat came in which Naeemullah (his brother), Said Rasool (PW-21), Hafeezullah were coming and Naeemullah was sitting on front seat, Said Rasool on back seat whereas Hafeezullah was driving the jeep. It is further mentioned in the crime report that when the jeep reached near the shop of Muhammad Iqbal Lohar, due to speed breaker the jeep became slow and from the shop Muhammad Shabbir armed with GIII, Muhammad Ameer armed with Kalashnikov, Khuda Bakhsh (P.O.) armed with Kalashnikov, Imran son of Atta Muhammad armed with Kalashnikov, Imran Abbas son of Ghulam Rasool armed with Kalashnikov came in front of the jeep and appellant Muhammad Shabbir by raising lalkara made a fire shot of rifle G-III on Naeemullah which hit on his head. The crime report further reveals that appellant Muhammad Imran fired a shot with his Kalashnikov which landed on the chest of Naeemullah and thereafter Muhammad Ammer made fire with Kalashnikov which hit on front of the mouth of Hafeezullah who was driving the Jeep, thereafter Imran Abbas fired a shot with .12 bore repeater that hit on the left flank of Said Rasool; appellant Muhammad Munir made fire with Kalashnikov which hit on the mouth of Naeem Ullah; thereafter Khuda Bakhsh (P.O.) made fire with Kalashnikov which hit on the chest of Hafeezullah and then all the accused persons made indiscriminate firing which hit on their heads, chests and different parts of the bodies. It is further mentioned that the appellant Shabbir while escaping also took licensed rifle/Kalashnikov with magazine bag, ammunition and license which were lying in Jeep. At some distance, they found Hameedullah (deceased) and Fazal-e-Haq (PW), on this Khuda Bakhsh (P.O.), appellant Muhammad Shabbir and Muhammad Ameer made repeated fires on Hameedullah which hit on his chest, back, left hand and different parts of his body. The matter was reported to the police and as such instant crime report was registered with the local police.

3. After registration of the aforesaid case, it was found that the appellants Muhammad Shabbir etc. after committing the occurrence forcibly snatched a car No. LRZ-4949 Model 2004 2-OD on gun point within the view of Allah Bakhsh (PW-19) and fled away. The appellants were taken into custody and after the conclusion of the investigation; they were challaned while placing their names in column No.3 of the report under section 173, Cr.P.C. On receipt of challan, the learned Additional Sessions Judge, Khushab formally charge sheeted the appellants vide order dated 20.03.2007 to which they pleaded not guilty and claimed trial. The complainant moved application under section 12 of the Anti-Terrorism Act, 1997 which was dismissed vide order dated 14.11.2005 and complainant filed Writ Petition No.18694/2005 before learned High Court and vide order dated 26.02.2007 the learned High Court transferred this case from learned Additional Sessions Judge Khushab to the court of Special Judge, Anti-Terrorism, Sargodha and a fresh charge was framed against all the accused on 20.03.2007 to

which they pleaded not guilty and claimed trial. Prosecution in order to substantiate its case produced as many as 22 witnesses. The appellants were examined under section 342, Cr.P.C., however, they opted not to appear in their defence as their own witness in terms of section 340(2), Cr.P.C. to disproof the allegations levelled against them and they did not produce any defence evidence.

4. The learned trial court after conclusion of trial found that the prosecution succeeded to prove allegations against the petitioner, hence convicted the appellants under sections 302/149, P.P.C. and sentenced to death each on three counts for committing the murder of Naeemullah, Hafeezullah and Hameedullah along with compensation of Rs.1,00,000/- each under section 544-A of Cr.P.C. payable to each legal heirs of deceased and in default thereof further undergo six months each on three counts. They were also convicted under sections 324/149, P.P.C. and sentenced to ten years' R.I. each for attempting to commit the Qatl-i-amd of Said Rasool along with fine of Rs.50,000/- each and in default thereof further undergo three months' S.I. each. They were also convicted under sections 337-A(i)/149, P.P.C. and to pay Rs.25,000/- each as Daman for causing Shajjah-e-Khafifah to Said Rasool and in default thereof further undergo two years' R.I. They were also convicted under sections 337-A(ii)/149, P.P.C. and to pay Rs.15,000/- each for causing Shajjah-e-Mudiah to Said Rasool as five percent of Arsh and also undergo five years' R.I. as Tazir. They were also convicted under sections 337-F(i)/149, P.P.C. and to pay Rs.25,000/- each as Daman for causing Ghayr-Jaifah Damiyah to Said Rasool and also undergo one year's R.I. as Tazir. They were also convicted under sections 337-F(iii)/149, P.P.C. and to pay Rs.25,000/- each as Daman for causing Ghayr-Jaifah Mutalahimah to Said Rasool and also undergo three years' R.I. as Tazir. They were also convicted under sections 337-F(vi)/149, P.P.C. and to pay Rs.25,000/- as Daman for causing Ghayr-Jaifah Munaqqillah to Said Rasool and also undergo seven years' R.I. each as Tazir. They were also convicted under sections 148/149, P.P.C. and sentenced to undergo three years' R.I. each. The appellants were also convicted under section 7(a) of the Anti-Terrorism Act, 1997 and sentenced to death each along with fine of Rs.50,000/- each and in default thereof undergo three years' S.I. They were also convicted under section 7(c) of the Anti-Terrorism Act, 1997 read with section 149, P.P.C. and sentenced to imprisonment for life each along with fine Rs.50,000/- each and in default thereof further undergo three years' S.I.

5. The appellants being aggrieved by the judgment of the learned trial court dated 29.03.2007 filed Criminal Appeal No.534/2007 before the Lahore High Court, Lahore whereas the learned trial court forwarded Capital Sentence Reference No.34-T/2007 for confirmation of the sentence of death inflicted upon the appellants. The learned Division Bench of High Court vide judgment dated 23.10.2014 set aside the convictions and sentences recorded against the appellants under sections 7(a) and 7(c) of Anti-Terrorism Act, 1997, however, maintained their convictions under section 302(b), P.P.C. awarded by the learned trial court on three counts each but converted the sentence from death each to imprisonment for life each. The compensation awarded by the learned trial court and sentence in default thereof was maintained. The benefit of section 382-B, Cr.P.C. was also given to the appellants. Convictions and sentences under sections 324, 337-A(i), 337-A(ii), 337-F(i), 337-F(iii), 337-F(vi), 148, 149, P.P.C. were also maintained.

6. Leave to appeal was granted by this Court by means of order dated 20.02.2020 for reappraisal of entire evidence available on the record for safe administration of criminal justice.

7. At the very outset, it has been argued by learned counsel appearing on behalf of appellants that both the courts below have not taken the evidence available on the record in its true prospective and same has not been evaluated according to the established principles of law enunciated by superior courts from time to time. Contends that the prosecution has failed to prove its case against the present appellants as there are many major discrepancies in the statements of the PWs and there is conflict between ocular account and medical evidence. It has been further argued that firing is attributed to all the accused including Khuda Bakhsh (P.O.), hence, learned High Court has failed to appreciate the facts and law of the case in its true perspective and has drawn wrong conclusion due to which gross

miscarriage of justice has taken place in this case. Further contends that there are circumstances which created reasonable doubt in the prudent mind about the guilt of the appellants, then they would be entitled for the same not as a matter of grace and concession but as a matter of right. Further contends that besides causing specific injuries on the persons of deceased, they all resorted to indiscriminate firing and firearm injuries on the person of injured Said Rasool was specifically attributed to co-accused Muhammad Hussain who was acquitted by the learned High Court and when the injured eye-witness has not been believed qua his own injuries, his evidence cannot be used to convict the appellants when recoveries from the appellants were not relied by the learned High Court. Learned counsel further contends that the complainant in his statement as PW-20 has stated that no untoward incident had taken place after the acquittal of Naeem till the occurrence, hence, the motive setup by the prosecution remained far from being proved, therefore, it create a doubt in the genuineness of the prosecution version resulting into acquittal of the appellants.

8. On the other hand, learned Law Officer assisted by learned counsel appearing on behalf of complainant has argued that the prosecution has been succeeded to establish the case against the appellants. Further contends that three persons were done to death in brutal manner whereas one person was seriously injured which shows the highhandedness of the appellants which is spelled out from the facts and circumstance of this case. It is contended that the ocular account was furnished by the quite independent and trustworthy witnesses duly supported by the medical evidence. Lastly it was argued that the appellants by resorting to firing had taken the life of three innocent persons and the prosecution adduced its case through straight forward, reliable and confidence inspiring evidence, therefore, the learned High Court has rightly convicted and sentenced the appellants under the relevant provisions of law.

9. We have heard the learned counsel for the parties and gone through the record.

We have noticed that it is a case of highhandedness in which three persons were done to death in brutal manner and one person was seriously injured. It is noticed that as per post mortem reports, the deceased Naeemullah received 28 injuries, deceased Hafeezullah received as many as 34 injuries and deceased Hameedulah received 12 injures on different parts of their bodies. The injured PW Said Rasool also received as many as nineteen injures on different parts of his body. The occurrence initiated when both the deceased Naeem Ullah (sitting on front seat), Hafeezullah (driver) and injured Said Rasool (PW-21) (sitting on back seat) were passing on Jeep No.B-4303/Swat near the shop of Muhammad Iqbal Lohar, the appellants came from the shop and appellant Muhammad Shabbir made a fire shot of rifle G-III on Naeemullah which hit on his head; appellant Muhammad Imran made a fire shot with his Kalashnikov which hit on the chest of Naeemullah whereas appellant Muhammad Munir made fire with Kalashnikov which hit on the mouth of Naeem Ullah and all the accused persons made indiscriminate firing which hit on their heads, chests and different parts of the bodies. The injured Said Rasool (PW-21) also sustained serious injuries. It is further noticed that after committing the occurrence, when the appellants etc. were decamping, at some distance they found Hameedullah and one Fazal-e-Haq, the appellants etc. made repeated fires on Hameedullah which hit on his chest, back, left hand and different parts of his body. Subsequently, it was found that after committing the occurrence, the appellants etc. forcibly snatched a car No. LRZ-4949 (P-35) within the view of Allah Bakhash (PW-19) on gun point and on 17.02.2005 the appellants were arrested near Jhelum River while travelling on the same car. The ocular account has been furnished by Mazhar Anwaar (PW-20) and Said Rasool injured (PW-21) and prosecution also rely on the statement of Allah Bakhash (PW-19). So far as the contention of the learned counsel for the appellants that the firearm injuries of Said Rasool (PW-21) were specifically attributed to co-accused Muhammad Hussain who was acquitted by learned High Court, is concerned, careful perusal of the entire evidence produced by the prosecution reveals that since the occurrence had taken place in the broad daylight in the street near the shop of Muhammad Iqbal Lohar in the same village, therefore, the presence of Mazhar Anwaar (PW-20) and Said Rasool

injured (PW-21) at the scene of occurrence was quite natural and beyond any doubt and the statements of the prosecution witnesses are consistent, confidence inspiring and in consonance with the probability and circumstances of the case and being worthy of credence, which could not be brushed aside. Injured Said Rasool (PW-21) received firearms injures in the occurrence while sitting in the jeep and saw the occurrence, hence, his presence at the relevant time cannot be considered as unnatural and improbable and he has no enmity or malice against the appellants and his testimony is duly supported by medical evidence having been found confidence inspiring, truthful and unimpeachable. Furthermore it is noticed that co-accused Muhammad Hussain has been acquitted by learned High Court on the basis that his name has been replaced with Imran Abbas son of Ghulam Rasool, caste Kharal resident of Chak No. 47 North, District Sargodha by complainant Mazhar Anwaar (PW-20) in his second supplementary statement dated 18.02.2005 and no identification parade was held for identification of the co-accused Muhammad Hussain and prosecution is not certain about the identity of Muhammad Hussain, benefit of which was given to him. It is further noticed that the report of Forensic Science Agency (Ex.PZ) shows that all empties except some were fired from the weapons recovered from the appellants. So far as the contention of the learned counsel that there are major discrepancies in the statement of PWs, it is established law that if the discrepancies are shattering the prosecution story on salient feature then it has substance to intervene on the subject otherwise it has no impact on the veracity of the prosecution story. Reliance in this regard is placed on case titled "Muhammad Iqbal v. The State" (PLD 2001 Supreme Court 222). We have observed during the course of proceedings that the father of appellant Muhammad Shabbir was murdered wherein Naeemullah deceased was one of the accused. There is no denial to this fact that he was finally acquitted of the charge, therefore, the revenge in the mind of appellant continued cultivation and ultimately instant occurrence has taken place. In such like cases where the murders are committed as revenge depends upon human physiology. The human being a creature of the environment; therefore, he is governed by the background of the society from where he hails. Although this aspect do not cover the doctrine of provocation still the area and other antecedent of persons are relevant factor while taking into account which might be suggesting for a moment where revenge can be regarded as mitigating circumstances, however, the question of sentence in each criminal case definitely has direct nexus with the particular circumstances of the said case. This principle was considered and relied upon by salutary judgment titled "Ajun Shah v. The State" (PLD 1967 Supreme Court 185). The learned High Court while handing down the judgment impugned before us has already taken care of all established principles of law and converted the sentences of each appellant from death to imprisonment for life which seems to us appropriate and in accordance with law. The contentions raised by learned counsel are without any force which are repelled. As a consequence, this appeal is dismissed.

MWA/M-33/SC Appeal dismissed.

**2020 S C M R 1218**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Sayyed Mazahar Ali Akbar Naqvi, JJ**

**Mirza AAMER HASSAN---Appellant**

**Versus**

**COMMISSIONER OF INCOME TAX and others---Respondents**

Civil Appeal No. 158-L of 2011, decided on 30th June, 2020.

(On appeal from the judgment of Federal Service Tribunal, Lahore dated 27.05.2020, passed in Appeal No. 668(L)C.S/2001)

**Removal from Service (Special Powers) Ordinance (XVII of 2000)---**

----S. 3(1)(e)(iii)---Fundamental Rules, R. 29---Major penalty of reduction/reversion to the lowest of the time-scale---Whether such penalty could be imposed without any specified time---Held, that major penalty of reduction/reversion to the lowest of the time-scale had to be time bound---Once the time was served the officer under penalty could revert to his original position or status in service.

Section 3(1)(e)(iii) of the Removal from Service (Special Powers) Ordinance, 2000 ('the Ordinance') did not specify any time as to how long the reduction to the lowest post or time scale or lower stage in time scale was to last. However Rule 29 of the Fundamental Rules clearly provided that any such major penalty had to be time-bound. Consistent practice of the Supreme Court over the years was to specify the time in such like penalties by placing reliance on Fundamental Rule 29.

Muhammad Sadiq v. Superintendent of Police and others 2008 SCMR 1296; Member (A.C.E. and S.T.) Federal Board of Revenue, Islamabad and others v. Muhammad Ashraf and 3 others 2008 SCMR 1165; Secretary Kashmir Affairs and Northern Areas Division, Islamabad v. Saeed Akhtar and another PLD 2008 SC 392; Government of Pakistan through Secretary, Establishment Division, Islamabad and others v. Muhammad Umer Morio 2005 SCMR 436 and Tanvir Ahmed v. Chief Secretary, Government of Punjab, Lahore 2004 SCMR 647 ref.

Major penalty of reduction to a lower post or pay scale or to a lower stage in a pay scale was not akin to the board game of Snakes and Ladders, relegating a civil servant to a lower position and making him rise up again. It was not the scheme of the penalty under the Ordinance that the officer after such reduction was to a start all over again in the new position and rise up the ranks as if to re-live his service life again. This was not the purpose or the object of the major penalty. Such like penalties, by nature were time-bound, they were to punish an officer for the lapse committed and once the time was served, the officer under penalty could revert to his original position or status in service and stood restituted. A major penalty of reduction to lower position without specifying time not only defeated the object of the penalty but was also disproportionate with the lapse committed by the officer.

Sabir Iqbal v. Cantonment Board, Peshawar through Executive Officer and others PLD 2019 SC 189; Secretary to Government of the Punjab Food Department, Lahore and another v. Javed Iqbal and others 2016 SCMR 1120 and Muhammad Ali S. Bukhari v. Federation of Pakistan through Establishment Secretary, Islamabad and 2 others 2008 SCMR 214 ref.

Mian Muhammad Javaid, Advocate Supreme Court for Appellant.

Ibrar Ahmad, Advocate Supreme Court and Imtiaz A. Shaukat, Advocate-on-Record for Respondents.

Date of hearing: 30th June, 2020.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**Brief facts are that the appellant while working as Inspector in the Income Tax Department was proceeded against departmentally under The Removal from Service (Special Powers) Ordinance, 2000 ("Ordinance") on the allegations that there were persistent public complaints regarding harassment and corruption; inefficiency in the performance of his official duties

inspite of repeated warnings; failure to achieve budgetary targets; failure to furnish Annual Declarations of Assets and Liabilities; was appointed for extraneous political grounds in violation of the relevant rules. Vide order dated 26.05.2001 passed by the Competent Authority major penalty of reduction to the lowest of the time-scale was imposed upon the appellant. He filed a departmental appeal, which remained pending. As a consequence he filed an appeal before the Service Tribunal in terms of section 4 of the Service Tribunals Act, 1973, which was dismissed vide impugned judgment dated 27.05.2010. Leave was granted in this case on 24.05.2011 to consider whether the major penalty of reversion to the lowest of the time-scale can be without any specified time.

2. We have heard learned counsel for the parties. Section 3 (1), (e) (iii) reads as follows:

Section 3 Removal from Service.

(1)

(e)

(iii) reduction to a lower post or pay scale or to a lower stage in a pay scale.

The above provision does not specify any time as to how long the reduction to the lowest post or time scale or lower stage in time scale is to last. We, therefore, refer to Fundamental Rule 29, which provides as under:-

> "F.R. 29. If a Government servant is, on account of misconduct or inefficiency, reduced to a lower grade or post, or to a lower stage in his time-scale, the authority ordering such reduction shall state the period for which it shall be effective and whether, on restoration, it shall operate to postpone future increments and if so, to what extent."

The above Rule clearly provides that any such major penalty has to be time-bound. It has been the consistent practice of this Court over the years to specify the time in such like penalties by placing reliance on F.R. 29. See Muhammad Sadiq v. Superintendent of Police and others (2008 SCMR 1296), Member (A.C.E. and S.T.) Federal Board of Revenue, Islamabad and others v. Muhammad Ashraf and 3 others (2008 SCMR 1165), Secretary Kashmir Affairs and Northern Areas Division, Islamabad v. Saeed Akhtar and another (PLD 2008 SC 392), Government of Pakistan through Secretary, Establishment Division, Islamabad and others v. Muhammad Umer Morio (2005 SCMR 436) and Tanvir Ahmed v. Chief Secretary, Government of Punjab, Lahore (2004 SCMR 647).

3. The major penalty of reduction to a lower post or pay scale or to a lower stage in a pay scale is not akin to the board game of Snakes and Ladders, relegating a civil servant to a lower position and making him rise up again. It is not the scheme of the penalty under the Ordinance that the officer after such reduction is to a start all over again in the new position and rise up the ranks as if to re-live his service life again. This is not the purpose or the object of the major penalty. Such like penalties, by nature are time-bound, they are to punish an officer for the lapse committed and once the time is served, the officer under penalty, can revert to his original position or status in service and stand restituted. A major penalty of reduction to lower position without specifying time not only defeats the object of the penalty but is also disproportionate with the lapse committed by the officer. See Sabir Iqbal v. Cantonment Board, Peshawar through Executive Officer and others (PLD 2019 SC 189), Secretary to Government of the Punjab Food Department, Lahore and another v. Javed Iqbal and others (2016 SCMR 1120) and Muhammad Ali S. Bukhari v. Federation of Pakistan through Establishment Secretary, Islamabad and 2 others (2008 SCMR 214).

4. Considering the nature of the case made out against the appellant and the fact that it is pending since 2001, we instead of remanding the matter to the competent authority, specify a period of three years for the major penalty of reduction to the lowest time scale imposed upon the appellant. The respondent department shall actualize the same and fix the service record of the appellant accordingly.

5. This appeal is, therefore, partially allowed in the above terms.

MWA/A-25/SC Order accordingly.

**2020 S C M R 1225**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Sayyed Mazahar Ali Akbar Naqvi, JJ**

**ALI AKBAR---Petitioner**

**Versus**

**The STATE and others---Respondents**

Criminal Petition No. 443-L of 2020, decided on 24th June, 2020.

(Against the order of the Lahore High Court, Lahore dated 24.02.2020 passed in Criminal Misc. No. 72942-B of 2019)

Per Manzoor Ahmad Malik, J; Syed Mansoor Ali Shah, J agreeing; Sayyed Mazahar Ali Akbar Naqvi, J dissenting.

**(a) Criminal Procedure Code (V of 1898)---**

----S. 497(1), proviso 3--- Penal Code (XLV of 1860), Ss. 302, 324 & 34---Anti-Terrorism Act (XXVII of 1997), S. 7---Qatl-i-amd, attempt to commit qatl-i-amd, common intention, acts of terrorism---Bail, grant of---Statutory ground of delay in the conclusion of trial---[Per Manzoor Ahmad Malik, J (Majority view): Charge against accused was framed after more than two years of him being taken into custody---Report submitted by Trial Court showed that accused was not solely responsible for delay in the conclusion of trial, as such delay was also caused by the complainant and his private witnesses---Presently more than four years had passed since the arrest of the accused---Prosecution under instructions from the police admitted that there was no record of previous convictions of the accused---Single injury on the person of deceased was attributed to the accused, therefore, he could not be considered as a hardened, desperate or dangerous criminal---Accused had made out a case for his release on bail on the statutory ground of delay in the conclusion of trial---[Per Sayyed Mazahar Ali Akbar Naqvi, J dissenting (Minority view): Present occurrence took place in the backdrop of rivalry between two groups of criminal gangs---Gruesome act of double murder was committed by the accused and co-accused with nefarious designs to create a concocted counter-version against an earlier incident with ulterior motives---During the course of investigation the recovery of a rifle was effected from the accused which also matched with the empties collected from the place of occurrence---Investigation concluded and found the active participation of the accused in the double murder with a specific role of causing firearm injury to one of deceased on temporal region---After the accused was taken into custody, the co-accused persons did not appear before Trial Court on different dates one after the other, making it practically impossible for the Trial Court to frame charge against them---Nevertheless once charge was framed, the accused party continued playing the same tactics as co-accused persons absented themselves one by one on numerous dates of hearing---Accused with a criminal mindset deliberately adopted such tricks in order to delay the Court proceedings with an intent to exhaust the other party and to further avail the benefit of proviso 3 to S. 497(1), Cr.P.C.---Non-appearance of complainant and prosecution witnesses before the Trial Court could not be treated as intentional; rather they were forced to avoid appearance, because they apprehended serious threats to their lives---Complainant had already made several attempts to seek police protection but all efforts proved futile---Lawlessness of the rival groups could be gauged from the fact that 364 empties of sophisticated weapons were recovered from the spot---Furthermore material available on the record connected the accused as the main perpetrator of the gruesome act of double murder, which brought him in the category of a hardened, desperate and dangerous criminal as stipulated under proviso 4 of S. 497(1), Cr.P.C.---In such circumstances accused was not entitled to be enlarged on bail on statutory ground of delay in the conclusion of trial provided under proviso 3 of S. 497, Cr.P.C.]---Petition for leave to appeal was converted into appeal and allowed and accused was released on bail.

Moundar and others v. The State" PLD 1990 SC 934 ref.

Per Sayyed Mazahar Ali Akbar Naqvi, J

**(b) Criminal Procedure Code (V of 1898)---**

----S. 497(1), provisos 3 & 4---Bail, grant of---Statutory ground of delay in the conclusion of trial---Proviso 4 to S. 497(1), Cr.P.C.---Scope and applicability.

Provisos 3 and 4 to section 497(1), Cr.P.C. were co-existent qua their application; hence, the imports of the same could not be constructed in isolation rather they had to be interpreted conjointly. [p. 1234] J

Proviso 4 of section 497(1), Cr.P.C. envisaged distinct legal requisites in relation to its applicability;

(i) That the provision of third proviso of subsection 497(1), Cr.P.C. shall not apply to previously convicted offender in an offence punishable with death or imprisonment for life;

(ii) Or to a person who in the opinion of the court was hardened, desperate or dangerous criminal or involved in terrorism.

Plain reading of first requisite depicted it to be mandatory in nature by virtue of its language which was otherwise clear, unambiguous and transparent in its application. It spoke about those weighed down with criminal background. In other words any criminal who was previously convicted was outrightly barred from the consideration to avail the benefit of proviso 3 of section 497(1), Cr.P.C. This condition was to apply stricto sensu in all fairness without compromising it in any manner; hence, all those who were stigmatized/tainted with criminal background were ousted from consideration. However, the second limb of proviso 4 of section 497(1), Cr.P.C. was discretionary in its applicability. The language itself was self-explanatory ensuing the intent of said provision. While introducing this limb of said provision the legislature had empowered the court to form an opinion qua the person involved in a criminal case if brought forth while taking into consideration the act, mode and manner of occurrence and other existing circumstances placed before the court without being prejudiced by any previous record. The Court while forming opinion about the criminal declaration had to satisfy all norms of legal aspects so that opinion made should not frustrate any ethics of decency and fairness to meet the ends of justice. The opinion of the court should meet all legal justiciable requirements demanded by the law in the interest of safe administration of criminal justice.

Javed Bashir, Advocate Supreme Court for Petitioner.

Respondents Nos. 2-3 in person.

M. Amjad Rafiq, Additional P.G. and Farooq, SI for the State.

Date of hearing: 24th June, 2020.

**ORDER**

**MANZOOR AHMAD MALIK, J.**---Petitioner seeks leave to appeal against the order dated 24.02.2020, whereby bail was refused to him by the learned Lahore High Court-Lahore in case FIR No. 64 dated 05.02.2016, offence under sections 302, 324, 34, P.P.C. and section 7 of the Anti Terrorism Act, 1997, registered at Police Station Samanabad, Lahore.

2. As per contents of FIR registered on the statement of Ch. Muhammad Saleem respondent No.2, Soman alias Soom and Sajid Chaudhry while armed with firearms along with their co-accused resorted to firing and caused injuries to Muhammad Safdar Ali and Bahadar Ali who died as a result of the said injuries. Subsequently, Malik Sadaqat Ali respondent No.3 who was uncle of the said two deceased filed another application alleging therein that Ali Akbar petitioner along with his co-accused had in fact made firing upon the aforesaid deceased persons. Firearm injury on the person of Bahadar Ali (deceased) was specifically attributed to the present petitioner.

3. The petitioner is asking for bail on merits as well as on statutory ground i.e. non-conclusion of trial within the period specified under section 497, Code of Criminal Procedure. On the last date of hearing, a report was requisitioned from the learned trial court as to the status of trial, reasons and responsibility for its delay. The said report has since been received.

4. Learned counsel for the petitioner contends that petitioner was taken into custody on 11.06.2016 i.e. about four years back and charge against him was framed on 10.07.2018 i.e. after a lapse of about two years and one month of the arrest of the petitioner; that when the charge was framed, the petitioner had been in continuous custody for two years and the period for conclusion of trial as stipulated under section 497 Code of Criminal Procedure had already lapsed; that the learned trial court in its report has not held the petitioner solely responsible for delay in the conclusion of trial; that the complainant and other private witnesses have failed to appear before the trial court on numerous occasions and the trial court issued non-bailable warrants of arrest of complainant and two witnesses; that there is no previous record of conviction of the petitioner and in the circumstances of the case, the petitioner cannot be held to be a hardened, desperate or dangerous criminal.

5. Conversely, learned Additional Prosecutor General and respondent No.3 present in person have vehemently opposed the bail petition by contending that the trial has been delayed by the petitioner and his co-accused and that petitioner is a dangerous, desperate and hardened criminal within the meaning of Fourth Proviso to section 497, Code of Criminal Procedure.

6. Heard. Record perused.

7. Undisputedly, the petitioner was taken into custody in this case on 11.06.2016. It has also not been disputed that charge against him was framed on 10.07.2018 i.e. after a lapse of more than two years. As per Third Proviso to section 497, Code of Criminal Procedure, a person accused of an offence punishable with death, if detained for such an offence for a continuous period exceeding two years shall be released on bail, of course, with the exception contained in the Fourth Proviso to section 497, Code of Criminal Procedure that the provisions of Third Proviso shall not apply to a previously convicted offender for an offence punishable with death or imprisonment for life or to a person, who, in the opinion of the Court, is a hardened, desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life. After having gone through the report submitted by the trial court, it has been observed by us that in the said report the learned trial court has not held the petitioner solely responsible for delay in the conclusion of trial. The relevant portion of the said report is as under:-

"Number of accused persons have been nominated in the instant case and after declaring the accused Tauseef Zafar as proclaimed offender, charge in this case was framed on 10.07.2018 and case was fixed for prosecution evidence. Three prosecution witnesses have been recorded; two of them were injured witnesses, who have affected compromise with the accused persons and stated that they have no objection if all accused persons are acquitted from the case, whereas third witness namely Naeem ud Din stated that he knows nothing about the occurrence. From 05.09.2018 to 05.01.2019, the file of this case was remained pending before Hon'ble Lahore High Court, Lahore. Thereafter, the complainant and private witnesses were repeatedly summoned through non-bailable warrants of arrest but they did not turn up. On numerous dates of hearing, different accused persons have filed application for dispensation of their personal attendance. On issuance of non-bailable warrants of arrest through DIG (investigation) complainant and two witnesses appeared before the court on 20.02.2020. On the said date Mr. Sardar Azhar Hussain Advocate has filed power of attorney on behalf of complainant and requested for adjournment, which was granted for 05.03.2020. On 07.03.2020, fresh power of attorney was filed by Muhammad Abdul Qaddus, Advocate who also requested for adjournment and the same was granted for 14.03.2020 and thereafter the instant case was adjourned due to pandemic of Corona virus (COVID-19) and is fixed for 22.06.2020." (Emphasis supplied)

8. Qua responsibility of delay in the conclusion of trial, the learned trial court has explained in its report as under:-

".....The delay in conclusion of trial is also on the part of complainant and his private witnesses because they despite repeated adjournment failed to appear for evidence." (Emphasis Supplied),

9. In these circumstances, when the trial court has in its report, stated that the delay in the conclusion of trial is also on the part of complainant and his private witnesses, the petitioner cannot be solely held responsible for such delay particularly when the period of two years' continuous detention expired even before framing of charge. Now even four years have passed since the arrest of the petitioner (petitioner was arrested in this case on 11.06.2016). Learned Additional Prosecutor General under instructions of the police officer present in Court has confirmed that there is no record of previous conviction of the petitioner. So far as two deceased are concerned, single injury on the person of Bahadar Ali (deceased) is attributed to the petitioner, therefore, he cannot be considered as a hardened, desperate or dangerous criminal. Considering all these circumstances, we are of the view that petitioner has made out a case for his release on bail on the statutory ground of delay in the conclusion of trial.

10. For the foregoing, the instant criminal petition is converted into an appeal and the same is hereby allowed. The appellant Ali Akbar is allowed bail (in the instant FIR) subject to his furnishing bail bond in the sum of Rs.100,000/- (one hundred thousand) with one surety in the like amount to the satisfaction of the learned trial court.

11. The learned trial court seized of the matter is directed to expedite the proceedings of trial and ensure its conclusion in the shortest possible time. It is made clear that if the petitioner-appellant misuses the concession of bail or delay in the conclusion of trial is caused by him or anyone else acting on his behalf, the learned trial court shall be competent to recall the bail granted to him, after hearing the parties, strictly in accordance with law.

These are the reasons for our short order dated 24th of June, 2020, which is reproduced herein below:-

"For reasons to be recorded later, by majority of two to one (Sayyed Mazahar Ali Akbar Naqvi, J dissenting), the instant criminal petition is converted into an appeal and the same is hereby allowed. The appellant Ali Akbar is allowed bail (in the instant FIR) subject to his furnishing bail bond in the sum of Rs.100,000/ - (one hundred thousand) with one surety in the like amount to the satisfaction of the learned trial court."

Sd/-
Manzoor Ahmad Malik, J
Sd/-
Syed Mansoor Ali Shah, J

I have attached my dissenting note.

Sd/-
Sayyed Mazahar Ali Akbar Naqvi, J

ORDER OF THE COURT

By majority of two to one, the instant criminal petition is converted into an appeal and the same is hereby allowed.

Sd/-
Manzoor Ahmad Malik, J
Sd/-
Syed Mansoor Ali Shah, J
Sd/-
Sayyed Mazahar Ali Akbar Naqvi, J

I have gone through the order rendered by my learned brothers Mr. Justice Manzoor Ahmad Malik and Mr. Justice Syed Mansoor Ali Shah. With utmost respect, I do not agree with the reasonings recorded, hence, render my own findings.

Sd/-

Sayyed Mazahar Ali Akbar Naqvi, J

**SAYYED MAZAHAR ALI AKBAR NAQVI, J.---**The instant case bearing FIR No. 64/2016 dated 05.02.2016 offence under sections 302, 324, 34, P.P.C. read with section 7, Anti-Terrorism Act, 1997 registered with Police Station Samanabad, Lahore is a glaring example of atrocious act in a civilized society of 21st Century. The background of said untoward incident is that in fact there are two groups of criminals operating within the local limits of Police Station Samanabad, one led by Ch. Saleem while the other group is led by Sajid Chaudhary. Both the groups are at daggers drawn with each other. On 05.02.2016 at 3.15 p.m. two members of Sajid Chaudhary group were found in Rashid Amin Chowk, where they were confronted by their opponents. As a consequence, both of them were fired upon in the said Chowk. Another person from the same group namely Mashooq Butt reached there to rescue them but he was also dealt in the same manner. Thereafter, members of said group of criminals conspired with each to chalk out a plan to tackle with the situation. Hence to fulfill their nefarious design, present petitioner, co-accused Waqar under the patronage of Ch. Saleem entered into nearby street where the house of complainant is located. They resorted to reckless firing, one of the fire shot made by petitioner with rifle .223 bore hit Bahadar Ali aged 14 years on his temporal region while co-accused Waqar fired hitting Safdar Ali on his forehead, another minor aged 13 years when both brothers were standing in the balcony of their own house. The said gruesome act was committed with nefarious designs to create a concocted counter-version against the earlier incident with ulterior motives. The mode and manner of occurrence by the assailant show their inter-se connectivity qua their mindset. After committing the double murder, petitioner along with others restrained inmates of deceased family inside their house on gun point while their house was locked from outside. They were threatened not to report the matter to police or even to attend their children. The most nasty aspect of this case is that after the commission of said offence, Ch. Saleem being in league with the local police lodged First Information Report as complainant while depicting a false, baseless and concocted story by distorting actual facts and circumstances Sadaqat Ali real Chacha of both deceased rescued himself from the clutches of the accused person, he approached police station where he lodged a complaint which was recorded under section 161, Cr.P.C. with the intervention of high-ups of police. Due to sensational nature of this case it was investigated by senior police officers. During the course of investigation the recovery of rifle .223 bore was affected from the petitioner which was sent to Forensic Science Laboratory. It also matched with the empties collected from the place of occurrence. Therefore, report of Forensic Science Laboratory is positive in nature. The investigation concluded and found the active participation of the petitioner in the above said double murder with a specific role of causing firearm injury to one of deceased on temporal region.

2. Vide order dated 18.05.2020, this Court requisitioned report from the learned trial court. The said report bearing No. 55 dated 01.06.2020 is placed before us. The report of the trial court is ambiguous on many aspects. The trial court has not fixed the responsibility of delay rather a confusing picture has been portrayed. Order passed by the learned Single Bench of High Court dated 24.02.2020 while dismissing the bail application has demonstrated a different picture, which actually occasioned for delay in conclusion of trial from the record. Admittedly the petitioner was taken into custody on 11.06.2016, however, the co-accused escaped from appearance before trial court one after the other on 27.04.2017, 16.05.2017, 15.06.2017, 21.6.2017, 13.09.2017, 23.10.2017, 18.12.2017, 21.12.2017, 05.01.2018, 15.01.2018 and 24.01.2018. As such the accused party practically made it impossible for the trial court to frame charge against them. Nevertheless the trial court after marking the attendance of all the accused persons framed charge on 10.07.2018. The highhandedness of the accused party continued even after the framing of charge, the accused persons once again while playing the same tactics absented themselves one by one on 06.08.2018, 22.09.2018, 19.10.2018, 09.11.2018, 19.11.2018, 29.11.2018, 05.12.2018, 11.12.2018, 24.12.2018, 26.01.2019, 30.01.2019, 07.2.2019,

20.02,2019, 27.02.2019, 13.03.2019, 26.03.2019, 13.04.2019, 23.04.2019, 18.05,2019, 29.05.2019, 11.06.2019, 21.08.2019, 07.11.2019, 13.11.2019, 30.11.2019, 19.12.2019 and 13.02.2020. The data mentioned above speaks volume qua the attitude of the accused persons towards Court proceedings. Otherwise, it has now become customary that the accused with crude criminal mindset deliberately adopt such tricks in order to delay the Court proceedings with an intent to exhaust the other party and to further avail the benefit of proviso 3 of section 497(1), Cr.P.C. The element of ill design for the purpose of delay of trial is floating in abundance in this case. The report of trial court, wherein the complainant party was partly held responsible for delay is nothing but made beyond the real facts.

3. The real cause of non-appearance of complainant and PWs before the trial court cannot be attributed to them; as it was not intentional; rather they are forced to avoid appearance, because they are apprehending serious threats to their lives. The complainant has already made several attempts in order to seek police protection but all efforts made by the complainant proved futile. Even at one stage the police guards were deployed vide notification dated 29.08.2016 but unfortunately those were withdrawn due to influence of accused party. This very fact was not brought in our notice by the trial court. During the course of proceedings before this Court, Sadaqat Ali (complainant) was present in person. He was given the right of audience. He explained in the Court the reasons in detail for non-appearance of complainant and prosecution witnesses. He further apprised that he had already moved various applications to police hierarchy, even to the Chief Justice, Lahore High Court but all efforts proved fruitless. He further informed that lawlessness of the aforesaid groups can be gauged from the fact that (364) empties of sophisticated weapons were recovered from the spot. This statement of the complainant was not controverted by anyone present in the Court from either side. Another portion of report that three PWs had compromised with the accused person before trial court is in fact settlement in between the two groups having no nexus with the case of prosecution lodged at the instance of Sadaqat Ali complainant. The prosecution version advanced by Sadaqat Ali complainant is still intact in all respects. Nevertheless, the trial court has assured this Court that trial can be concluded within the shortest possible time subject to the cooperation of the parties.

4. Another alarming situation has been brought in the notice of this Court during record inspection that the police file was manipulated by distracting Case Dairies from the original record, during court custody. In this regard "Rapt" has already been recorded in local police station. This very fact alone is sufficient to raise alarm towards the gravity of situation.

5. Now the pivotal question which requires determination is whether after the expiry of certain period, benefit of proviso 3 of section 497(1), Cr.P.C. could be available to the accused in all eventualities or there can be any legal restriction imposed by the law. To construe the legal imports of law, it is advantageous to reproduce it:-

Section 497. When bail may be taken in cases of nonbailable offence.--

1. When any person accused of non-bailable offence is arrested or detained without warrant by an officer-incharge of a police station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of [an offence punishable with death or [imprisonment for life or imprisonment for ten years]]:

Provided that

Provided further that ..

Provided further that the Court shall, except where it is of opinion that the delay in the trial of the accused has been occasioned by an act or omission of the accused or any other person acting on his behalf or in exercise of any right or privilege under any law for the time being in force, direct that any person shall be released on bail--

(a) who, being accused of any offence not punishable with death, has been detained for such offence for a continuous period exceeding one year and whose trial for such offence has not concluded; or

(b) who, being accused of an offence punishable with death, has been detained for such offence for a continuous period exceeding two years and whose trial for such offence has not concluded.

Provided further that the provisions of the foregoing proviso shall not apply to a previously convicted offender for an offence punishable with death or imprisonment for life or to a person who, in the opinion of the Court, is a hardened, desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life.

The provisos 3 and 4 of section 497(1), Cr.P.C. are co-existent qua their application; hence, the imports of the same cannot be constructed in isolation rather to interpret it conjointly. The language of proviso 3 of section 497(1), Cr.P.C. demonstrates a general principle which is clear, unambiguous in its texture rather it in express terms confers jurisdiction upon the court to entertain and extend benefit of proviso 3 of section 497(1), Cr.P.C. in the spirit of language of said provision pursuant to the intent of the legislature, however, the said concession has been controlled while imposing certain restriction while introducing proviso 4 of section 497(1), Cr.P.C. The bare perusal of proviso 4 of section 497(1), Cr.P.C override to some extent proviso 3 of section 497(1), Cr.P.C. by limiting its efficacy by placing conditions against the general principle as such it has laid an embargo which has to satisfy prior to availing concession of proviso 3 of section 497(1), Cr.P.C., resultantly, these are practically exceptions to the general principle entails from proviso 3 of section 497(1), Cr.P.C. The proviso 4 of section 497(1), Cr.P.C. envisages distinct legal requisites in relation to its applicability.

(i) That the provision of third proviso of subsection shall not apply to previously convicted offender in an offence punishable with death or imprisonment for life.

(ii) Or to a person who in the opinion of the court is hardened, desperate or dangerous criminal or involved in terrorism.

The plain reading of first requisite depicts it to be mandatory in nature by virtue of its language which is otherwise clear unambiguous transparent in its application. It speaks about those weighed down with criminal background. In other words any criminal who is previously convicted is outrightly barred from the consideration to avail the benefit of proviso 3 of section 497(1), Cr.P.C. This condition is to apply stricto sensu in all fairness without compromising it in any manner; hence, all those who are stigmatized/tainted with criminal background are ousted from consideration. However, the second limb of proviso 4 of section 497(1), Cr.P.C. is discretionary in its applicability. The language itself is self-explanatory ensuing the intent of said provision. While introducing this limb of said provision the legislature has empowered the court to form an opinion qua the person involved in a criminal case if brought forth while taking into consideration the act, mode and manner of occurrence and other existing circumstances placed before the court without being prejudiced by any previous record. The Court while forming opinion about the criminal declaration has to satisfy all norms of legal aspects so that opinion made should not frustrate any ethics of decency and fairness to meet the ends of justice. The opinion of the court should meet all legal justiciable requirements demanded by the law in the interest of safe administration of criminal justice.

6. The instant case exclusively relates to second limb of the proviso 4 of section 497(1), Cr.P.C. Although there is no denial that this group is involved in eight other criminal cases of serious nature but even if this aspect is kept-a-aside the heinousness of the act committed by the petitioner in the present case when evaluated/scrutinized in its entirety, it is loaded with overwhelming material available on the record which connects the petitioner as main perpetrator of double murder case. Thus no other opinion can be formed in this case except that the petitioner while joining hands with others had committed a gruesome act of double murder. Hence, accumulative effect of the entire discussion leads towards one and the only opinion in the mind of the Court, which brings him in the category of

hardened, desperate and dangerous criminal as stipulated under proviso 4 of section 497(1), Cr.P.C. The findings recorded by this Court was subject matter of an earlier case, which was dealt by a Single Bench of Sindh High Court in a salutary judgment titled "Muhammad Hanif v. The State" (PLD 1986 Karachi 437) in which it was enunciated by the learned Court that even in the absence of previous record, an accused can be declared hardened, desperate or dangerous criminal subject to act, mode and manner of occurrence in that very case. A number of judgments with divergent view were in fields from other Courts, hence to resolve this controversy leave to appeal was granted to pronounce an authoritative judgment on the subject, even it was considered a case of first impression before this Court, Therefore, in the case titled "Mounder and others v. The State" (1988 SCMR 1113). A larger Bench of five Hon'ble Members was constituted which approved the judgment of Sindh High Court mentioned above in the case "Moundar and others v. The State" (PLD 1990 Supreme Court 934). Relevant at p/939 reproduced:-

"The word "criminal" cannot be given a special meaning as a person already convicted of a crime for in that case, the category of provision convicts having been separately mentioned as disentitled to the privilege of release on bail on the ground of statutory delay, the words under interpretation to the effect that the person is hardened, desperate or dangerous criminal, would be rendered completely redundant and meaningless. According to the learned Judge, therefore, opinion on this question can be based upon the materials available in the case under trial as well as any other material which may be produced by the prosecution to help the Court in formation of such opinion. Somewhat similar view was expressed by another learned Judge of the Sindh High Court in Gull Khan and others v. The State PLD 1986 Kar. 629, in which the word "criminal" was construed in the context of provision under consideration, to mean a person "accused of criminal offence or who is known to be or reputed to committing crime".

At page No. 941 it is observed as under:-

"In subsection (1) of section 497 the legislature has already empowered the Court even before the commencement of the trial to make a tentative assessment of the evidence collected against an accused person or likely to be produced in the trial against him, in order to reach the conclusion whether there appears a reasonable ground for believing that he has been guilty of an offence punishable with death or life imprisonment or imprisonment for 10 years. The provision under consideration here is a proviso to the same subsection, and, therefore, it will be reasonable to construe it in the same manner authorizing a Court to take into consideration the evidence collected by the prosecution for purpose of determining whether the accused is a criminal of the categories prescribed therein. Of course the Court can take into consideration and indeed in most of the cases it will take into consideration other materials produced by the prosecution in order to show that the case falls within the prohibitions contained in the 4th proviso".

7. As a consequence of the facts and circumstances, the law on the subject, this Court has no hesitation to conclude that the allegation levelled against the petitioner regarding commission of such a heinous offence squarely comes with the ambit of a hardened, desperate and dangerous criminal, hence, he is not entitled to avail the benefit of proviso 3 of section 497(1), Cr.P.C. Therefore, I do not find any force in the said petition which is hereby dismissed. Leave to appeal is declined.

MWA/A-27/SC Petition allowed.

**2020 S C M R 1237**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed, JJ**

**MUHAMMAD YASIN and another---Petitioners**

**Versus**

**The STATE through P.G. Punjab and others---Respondents**

Criminal Petitions Nos. 1292-L and 1196-L of 2015, decided on 14th July, 2020.

(Against the judgment dated 08.10.2015 passed by the Lahore High Court, Lahore in Criminal Appeals Nos. 2-J-ATA/2013, 2127/2010 with C.S.R. No. 51-T/2010)

**Penal Code (XLV of 1860)---**

----S. 302(b)---Anti-Terrorism Act (XXVII of 1997), S. 7---Qatl-i-amd, act of terrorism---Reappraisal of evidence---Autopsy of deceased, held as late as at 9:30 a.m. the following day of occurrence, despite arrival of the injured and the dead body during the preceding night at 10:20 p.m. was quite intriguing---Further it was mind boggling that examination of the injured in the hospital and recording of complaint at the spot were steps taking place at the same time i.e. 10:20 p.m.---Such coincidence when taken in the totality of circumstances admitted a possibility that crime report was not recorded at a point of time mentioned therein---Delayed autopsy in a tertiary hospital reinforced the said hypothesis that in retrospect cast its shadow on the ostensible promptitude behind the crime report---Argument that the foundation of the case was laid after deliberations and consultations could not be dismissed out of hand---Desertion of two prosecution witnesses, statedly won over by the accused, though reflected a possible societal phenomena, nonetheless, being the best witnesses in circumstances, their absence from the scene certainly called for extra caution---Witnesses unanimously blamed an acquitted co-accused to have targeted one of the deceased---Autopsy of said deceased clearly established the injury attributed to the said acquitted co-accused---Prosecution's failure qua said acquitted co-accused before the Trial Court as well as in the High Court entailed repercussions as the set of witnesses disbelieved qua said co-accused would essentially require independent corroboration vis- -vis the accused---Witnesses disbelieved with regard to an identically placed co-accused could not join themselves to corroborate each other against the accused---Motive set up by the prosecution was non-specific and vague and there were no consequential recoveries from the accused and co-accused persons--- Acquittal of four other co-accused persons, who were assigned role of indiscriminate firing only, further dented the prosecution case---On the whole prosecution case was found fraught with doubts, thus, it would be unsafe to maintain the convictions of the accused---Petition for leave to appeal was converted into appeal and allowed and accused was acquitted of all charges against him.

Naveed Ahmed, Kh., Advocate Supreme Court for Petitioners (in Cr. P. 1292-L of 2015).

Khurram Khan, Additional Prosecutor-General Punjab for the State.

Ch. Ghulam Sarwar Nihung, Advocate Supreme Court for the Complainant (in Cr. P. 1196-L of 2015).

Date of hearing: 14th July, 2020.

**JUDGMENT**

**QAZI MUHAMMAD AMIN AHMED, J**.---Muhammad Ashraf son of Nazeer Ahmed, 50, was shot dead at 9:30 p.m. on 4.6.2008 within the remit of Police Station Ghulam Muhammad Abad, Faisalabad; incident was reported by his nephew Muhammad Jameel (PW-10), 10:20 p.m. at the spot; prime target of the assault Rashid struggled with multiple injuries, breathed his last on 14.6.2008; from amongst the witnesses Muhammad Zaman and Qaisar survived the assault; they were medically noted with firearm injuries, however, opted to stay away from the witness-box.

According to the complainant, on the fateful night, he was at his grocery store along with Muhammad Ashraf son of Nazeer Ahmed, Muhammad Iqbal son of Muhammad Hussain and

Muhammad Ashraf son of Muhammad Rafique when Muhammad Yasin, Younas alias Kala, Shahid alias Mithu, Muhammad Azam, Imtiaz Butt and Ilyas accompanied by an unknown companion confronted Rashid deceased who alongside Zulfiqar Ali, on a motorbike had just arrived at the scene. Muhammad Yasin along with the co-accused subdued Rashid deceased and after hitting him with an iron rod forced him to board on a rickshaw; Muhammad Ashraf deceased, Qaisar Manzoor and Muhammad Zaman attempted to intervene when all the accused with their pistols resorted to firing; a fire shot by Muhammad Yasin, petitioner, trapped Muhammad Ashraf deceased on his left chest, a fire shot by Azam (P.O.) hit Rashid on his face followed by a fire shot by Ilyas landing on the backside of his shoulder. Unknown assailant targeted Muhammad Zaman on his left deltoid while Shahid alias Mithu fired on the left flank of Qaisar Manzoor whereafter all the accused resorted to indiscriminate firing and took to the heels within the view of terror stricken neighbourhood. It is alleged that the assailants dealt in narcotics and they suspected Rashid deceased to have intermediated information to the police.

Spot inspection includes seizure of blood as well as 22 casings; Muhammad Zaman and Qaisar Manzoor PWs were medically examined under a police docket at 10:20 p.m. followed by Rashid deceased at 10:40 p.m. however, autopsy on Ashraf deceased was conducted following day at 9:30 a.m. The accused, barring Azam and Shafqat, P.Os, unanimously claimed trial on 04.01.2010 that culminated into their acquittal except the petitioner vide judgment dated 21.07.2010; convicted on two counts of homicide as well as terrorism, he was sentenced to death on each, altered in appeal into imprisonment for life vide impugned judgment dated 8.10.2015.

2. Learned counsel for the petitioner contends that there was no occasion for the learned trial Court to return a guilty verdict qua the petitioner after it had disbelieved entire bulk of prosecution evidence qua majority of the accused that included Ilyas co-accused as well who was assigned a direct fire shot to Rashid deceased; an error repeated by the High Court in appeal; that prosecution's failure to bring forth Muhammad Zaman and Qaisar Manzoor, the injured witnesses of the episode, tremors the very foundation of the case; seizure of 22 casings notwithstanding, nonetheless, in the absence of recovery of weapons except for an iron rod, has been cited to argue that occurrence did not take place in the manner as alleged in the crime report. Learned Law Officer assisted by learned counsel for the complainant has faithfully defended the impugned judgment; the latter while referring to the magnitude of violence inflicted upon the deceased, including Rashid who laid his life for siding with the law, prayed for reversal of the alteration of sentence, contending death being a conscionable wage in circumstances.

3. Heard. Record perused.

4. Medical examination of Rashid deceased as well as given up witnesses unambiguously suggest that occurrence took place on or around the time mentioned in the crime report; venue being at a distance of 1- k.m. from the police station, arrival of the police and conclusion of complaint at 10:20 p.m. apparently reflect a remarkable promptitude, however, autopsy of Muhammad Ashraf deceased, held as late as at 9:30 a.m. following day, despite arrival of the injured and the dead body during the preceding night at 10:20 p.m. is quite intriguing. It is further mind boggling that examination of the injured in the hospital and recording of complaint at the spot are steps taking place at the same time i.e. 10:20 p.m. Coincidence even though without obliquity, nonetheless, when taken in the totality of circumstances admits a possibility that crime report was not recorded at a point of time purported therein. Delayed autopsy in a tertiary hospital i.e. Allied Hospital Faisalabad reinforces the above hypothesis that in retrospect cast its shadow on the ostensible promptitude behind the crime report and, thus, the argument that the foundation of the case was laid after deliberations and consultations cannot be dismissed out of hand.

Desertion of Muhammad Zaman and Qaisar Manzoor (given up PWs), statedly won over by the accused, though reflects a possible societal phenomena unfortunately not uncommon, nonetheless, being the best witnesses in circumstances, their absence from the scene certainly calls for extra caution.

The witnesses unanimously blamed Ilyas acquitted co-accused to have targeted Rashid deceased with a straight fire shot landing on the back of his left shoulder; while first Medical Officer i.e. Dr. Muhammad Yousaf (PW-1) who examined the deceased in injured condition remained somewhat reticent on the nature of injury, the autopsy conducted by Dr. Bashir Ahmed (PW-2) clearly established the injury attributed to Ilyas acquitted co-accused as an aftermath of entry wound, being exit of injury on the right cheek. Prosecution's failure qua Ilyas accused both before the trial Court as well as in the High Court entails inescapable repercussions as the set of witnesses disbelieved qua Ilyas would essentially require independent corroboration vis- -vis the remainder. With a non-specific and vaguely formulated motive, concurrently held out of consideration, in the absence of consequential recoveries, the witnesses, disbelieved with regard to an identically placed co-accused cannot join themselves to corroborate each other against the convicts; acquittal of Shahid alias Mithu, Imtiaz Butt, Muhammad Younas alias Kala and Saeed, though assigned roles that san harm to the deceased, nonetheless, further compound the prosecution predicament inasmuch as they were alleged to have resorted to indiscriminate firing; their departure cast away the entire case. On the whole prosecution case is found fraught with doubts, embedded in and deducible from the stated positions and, thus, it would be unsafe to maintain the convictions on the left over fragments. Criminal Petition No.1292-L of 2015 is converted into appeal and allowed; petitioner/appellant is acquitted of the charge and shall be released forthwith, if not required to be detained in any other case.

As a natural corollary, Criminal Petition No.1196-L of 2015 stands dismissed.

MWA/M-37/SC Order accordingly.

**2020 S C M R 1243**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed, JJ**

**AKHTAR ALI---Petitioner**

**Versus**

**The STATE---Respondent**

Criminal Petition No. 445-L of 2020, decided on 15th July, 2020.

(Against the order dated 17.3.2020 passed by the Lahore High Court, Lahore in T.A. No. 161169 of 2020)

**Criminal Procedure Code (V of 1898)---**

----S. 526---Transfer of case from one court to another, application for---Scandalous and frivolous application containing accusations directed at judges---Remorse and regret shown by applicant---Cost imposed by High Court, reduction in---Before the Courts below, during proceedings for transfer of case, the petitioner had directed outrageous and scandalous accusations against the Judges and also targeted the members and office bearers of the local Bar---Petitioner while hurling accusations threw both caution as well as courtesy to the wind and the High Court was well within the bounds of law to saddle him with a substantial cost of Rs. 50,000---Petitioner, present before the Supreme Court, had expressed remorse and regret, throwing himself at the mercy of the Court; he pledged profound respect and courtesy that had to be given to a tribunal with an undertaking to be extremely careful in the future---Restraint was a better part of judicial calling, nonetheless, given the gravity of petitioner's reckless behaviour he could not be off completely---Supreme Court with a stern warning and while exercising restraint, reduced the cost imposed by the High Court from Rs. 50,000 to Rs.2000 as a symbolic reminder to the petitioner for his mischief---Petition for leave to appeal was dismissed and leave was refused.

Petitioner in person.

Khurram Khan, Additional Prosecutor General Punjab for the State.

Respondent No. 3 in person.

Date of hearing: 15th July, 2020.

**ORDER**

**QAZI MUHAMMAD AMIN AHMED, J.**---Akhtar Ali, petitioner, is engaged in litigation with his estranged wife Tania Kousar; he is also accused in a criminal case registered at the instance of one Mst. Ghazala Bibi; he has arrayed both of them in his quest for transfer of cases pending adjudication before a learned Judicial Magistrate at Sheikhupura to a Court at Gojra District Nankana Sahib. After his failure before the learned District and Sessions Judge Sheikhupura, his request before a learned Judge-in-Chamber of the Lahore High Court Lahore met with no better fate and the learned Judge having found the motion scandalous and frivolous, burdened him with a cost of Rs.50,000/-. It is in this backdrop that he has resigned before us as a last resort.

2. In his move before the Courts below, we have found his accusations directed against the learned Judges as outrageous as well as scandalous; he has also targeted the members and office bearers of the local Bar, apparently having no axe to grind in his trivial contests wherein we have found the respondents equally reckless and abrasive. We view the repugnant course adopted by the parties before the learned Courts with disdain. It is fundamentally important for the peaceful preservation of any society that its Judges attend call of their office fearlessly with dignity, respect and independence so as to sit on the judgment between the contestants, regardless of their status or station, without let or hindrance. A society cannot countenance obstruction or interference with the administration of justice without incurring disastrous consequences, therefore, to ensure freedom to a Judge within the remits of law is a duty cast upon all and sundry without exception and immunity.

3. The petitioner while hurling accusations threw both caution as well as courtesy to the wind and the learned Judge-in-Chamber was well within the bounds of law to saddle him with a substantial cost. The petitioner, however, before us has expressed remorse and regret, throwing himself at the mercy of the Court; he pledged profound respect and courtesy that appertains to a tribunal with an undertaking to be extremely careful in the future.

4. Restraint is a better part of judicial calling; we would never exercise coercive authority of the State vesting in us since time immemorial in order to wreak vengeance or as a means to uphold our dignity or respect that we solemnly believe 'must rest on surer foundations', nonetheless, given the gravity of petitioner's reckless behavior we would not let him off without a tag. With a stern warning and while exercising restraint, we reduce the cost imposed by the High Court to a sum of Rs.2000/- as a symbolic reminder to the petitioner for his mischief.

5. We entertain no manner of doubt that the learned Magistrate, conscious of his calling as a tryst with divinity, uninfluenced by the scandalous conduct of the parties, would dispose of the pending matters in accordance with law, in the fullness of time with all convenient dispatch. The petitioner shall deposit Rs.2000/- as cost with the District Nazir Sheikhupura within a fortnight. Petition fails. Leave declined.

MWA/A-29/SC Order accordingly.

**2020 S C M R 1250**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Sayyed Mazahar Ali Akbar Naqvi, JJ**

**SARWAR and another---Petitioners**

**Versus**

**The STATE and others---Respondents**

Criminal Petitions Nos. 1116-L and 1143-L of 2015, decided on 25th June, 2020.

(Against the judgment dated 10.09.2015 passed by the Lahore High Court, Lahore in Crl. Appeal No. 12-J of 2011 and Murder Reference No. 125 of 2011)

**(a) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Reappraisal of evidence---Occurrence took place at 0:800 a.m. and it was reported to the police on the same day at 10:15 p.m.---Delay of two hours and fifteen minutes in reporting the crime to the police was not material keeping in view the peculiar circumstances of the case such as the gender of the complainant, who was a female, and 11 miles distance between the place of occurrence and the police station---Record did not show any deliberate or conscious delay in reporting the matter to the police---Ocular account was furnished by widow (complainant) and brother in law of the deceased---Occurrence took place in front of the house of the complainant and place of occurrence was never disputed by the defence---Presence of the complainant at the time and place of occurrence could not be doubted by any stretch of imagination---Ocular account was fully supported by the medical evidence---Prosecution had successfully brought home guilt against the accused beyond any reasonable doubt---Petition for leave to appeal was dismissed and leave was refused.

**(b) Penal Code (XLV of 1860)---**

----S. 302(b)--- Qatl-i-amd--- Reappraisal of evidence---Sentence, reduction in---Death sentence reduced to imprisonment for life---Mitigating circumstances---Circumstances which rightfully persuaded the High Court to alter the sentence of death of accused to imprisonment for life were that the recovery of 12 bore double barrel gun was not believable; that motive behind the occurrence could not be proved; and that single fire shot on the person of deceased was attributed to the accused---Alteration of the sentence of death to imprisonment for life by the High Court was fully justified in such circumstances---Petition for leave to appeal was dismissed and leave was refused.

Malik Rab Nawaz, Advocate Supreme Court for Petitioner (in Criminal Petition No. 1116-L of 2015).

Mian Ghulam Rasool, Advocate Supreme Court for Petitioner (in Criminal Petition No. 1143-L of 2015).

Muhammad Amjad Rafiq, Additional P.G. for the State.

Mian Ghulam Rasool, Advocate Supreme Court for the Complainant.

Date of hearing: 25th June, 2020.

**JUDGMENT**

**MANZOOR AHMAD MALIK, J.**---Sarwar petitioner with his sister Sugharan Bibi faced trial before the learned Additional Sessions Judge Chiniot in case FIR No.371 of 2001 dated 03.09.2001 offence under sections 302/34, P.P.C. registered at Police Station Saddar Chiniot. After regular trial, he was convicted under section 302(b), P.P.C. and sentenced to death with compensation of Rs.200,000 (rupees two hundred thousand only) payable to the legal heirs of the deceased and in default thereof to undergo simple imprisonment for six month. Through the same judgment, Sugharan Bibi was acquitted of the charge. Aggrieved of his conviction and sentence, the petitioner filed a criminal appeal whereas the learned trial court transmitted murder reference. Both these matters were taken up together by a learned Division Bench of the Lahore High Court and through the impugned judgment, appeal filed by

the petitioner was dismissed. His sentence of death, however, was altered to life imprisonment. Amount of compensation and the sentence of imprisonment in default thereof as ordered by the learned trial court were maintained. He was extended benefit of section 382-B, Code of Criminal Procedure. Aggrieved of the decision of the learned appellate court, Sarwar petitioner has filed Criminal Petition No.1116-L of 2015 whereas Mst. Parveen Bibi complainant has filed Criminal Petition No.1143-L of 2015.

2. Precisely, the prosecution case as set out in the FIR and narrated by both the witnesses of ocular account, while appearing before the learned trial court, is that Sarwar petitioner while armed with a .12 bore gun fired at Anwar (deceased) as a result whereof he died at the spot.

3. We have heard learned counsel for the petitioner as well as learned Additional Prosecutor General for the State assisted by learned counsel for the complainant and with their able assistance have gone through the relevant record.

4. The occurrence in this case took place at 0.800 a.m. on 03.09.2001 and it was reported to the Police on the same day at 10.15 p.m. The delay is two hours and fifteen minutes in reporting the crime to the Police is not material keeping in view the peculiar circumstances of the case such as the gender of the complainant and 11 miles distance between the place of occurrence and the Police Station. Therefore, we hold that there was no deliberate or conscious delay in reporting the matter to the Police.

5. Ocular account in this case was furnished by Mst. Parveen Bibi (PW.2) widow of the deceased and Jahangir (PW.3) who was brother in law (sala) of the deceased. The occurrence took place in front of the house of the complainant and place of occurrence was never disputed by the defence. Presence of the complainant at the time and place of occurrence cannot be doubted by any stretch of imagination. Jahangir was resident of other village but has given a specific reason for his presence at the place of occurrence which is to the effect that he along with others had visited the house of the deceased to patch up the matter between Anwar (deceased) and Sarwar (petitioner). Therefore, we hold that both the witnesses of ocular account were present at the spot and had witnessed the crime being committed by Sarwar petitioner.

6. It is case of the prosecution that Sarwar petitioner fired two shots at Anwar (deceased) with a .12 bore double barrel gun and only one shot landed on the person of the deceased. While conducting post mortem on the dead body of Anwar (deceased) Dr. Saif Ullah Haral (PW.5) observed one firearm entry wound. Therefore, we hold that the ocular account is fully supported by the medical evidence.

7. In the circumstances, we hold that the prosecution has successfully brought home guilt against the petitioner beyond any reasonable doubt. Therefore there is no merit in Criminal Petition No.1116, which is dismissed and leave to appeal is refused.

8. Now we take up Criminal Petition No.1143-L of 2015, filed by the complainant. We have observed that there are certain circumstances in this case which persuaded the learned Lahore High Court for altering the sentence of death of Sarwar respondent No.1 to imprisonment for life inasmuch as recovery of .12 bore double barrel gun was not believed by both the learned courts below; motive behind the occurrence could not be proved and single fire shot on the person of deceased is attributed to the petitioner. In these circumstances, the alteration of the sentence of death to imprisonment for life by the learned appellate court is fully justified. Resultantly, there is no merit in Criminal Petition No.1143-L of 2015, which is dismissed and leave to appeal is refused.

MWA/S-27/SC Petition dismissed.

**2020 S C M R 1519**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik and Syed Mansoor Ali Shah, JJ**

**PROVINCE OF THE PUNJAB through Secretary School Education, Government of the Punjab, Lahore and others---Petitioners**

**Versus**

**Mst. NARGAS PARVEEN and others---Respondents**

Civil Petitions Nos. 194-L, 229-L to 233-L, 243-L to 247-L, 271-L to 275-L, 283-L to 285-L, 322-L, 323-L, 330-L to 332-L, 348-L, 349-L, 370-L, 378-L, 381-L, 397-L to 404-L, 422-L to 433-L, 443-L, 444-L, 452-L to 455-L and 478-L to 480-L of 2020, decided on 24th July, 2020.

(On appeals from the order of Punjab Service Tribunal dated 09.10.2019 passed in Appeals Nos. 565, 865 to 902 of 2015)

**Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974---**

----R. 22(5), proviso---Punjab Civil Servants Act (III of 1974), S. 2(1)(a)---Ad hoc employees regularized in service---Seniority---Seniority in the case of ad-hoc employees was to be granted from the date of their regularization and not from the date of their ad-hoc appointment.

In the present case the respondents were appointed in the year 1995 on ad-hoc basis and their services were terminated after one year in accordance with Rule 22(2) of the Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974. However, the respondents and others challenged their termination and were successful in obtaining injunctive orders in their favour and since then the matter of regularization remained pending before the courts or the administrative authorities. Finally in the year 2009, the Government was directed by the court that the case of the ad-hoc employees be considered in light of a certain Supreme Court precedent. As a result vide order dated 15.06.2012 passed by the department the services of the respondents were regularized from the date of issuance of the order. The respondents while accepting their regularization from the said date contended that their seniority be reckoned from the date of their ad-hoc appointments. Any such claim of the respondents was opposed to proviso to Rule 22(5) of the Civil Servants (Appointment and Conditions of Service) Rules, 1974. Seniority in the case of ad-hoc employees was to be granted from the date of their regularization.

Abu Bakar Farooq through Chairman and others v. Muhammad Ali Rajpar and others 2019 SCMR 830; Nadir Shah, S.D.O. Minor Canal Cell, Irrigation Sub-Division, Dera Murad Jamali and 2 others v. Secretary, Irrigation and Power Department, Balochistan, Quetta and 7 others 2003 PLC (C.S.) 961; Federation of Pakistan and others v. Rais Khan 1993 SCMR 609 and Mian Muhammad Afzal and others v. Government of the Punjab and others 1982 SCMR 408 ref.

In light of provision of proviso to Rule 22(5) of the Civil Servants (Appointment and Conditions of Service) Rules, 1974, especially when the department was not at fault and did not extend any expectations to the ad-hoc employees in such regard, the regularization of ad-hoc employee shall be reckoned from the order of regularization and seniority was also to be reckoned from the date of regularization and not from the date of their ad-hoc appointment.

Petitions for leave to appeal were converted into appeals and allowed.

Rana Shamshad Khan, Additional A.G., Asif Afzal Bhatti, Additional A.G. along with Ali Ahmad Sial, CEO, Faisalabad, Aftab Ahmed, CEO, T.T. Singh, M. Ramzan, Litigation Officer, Saeed Shahid, Litigation Officer, Ahmed Naseem, Litigation Officer and Ammad ud Din, Litigation Officer for Petitioners (in all Petitions).

Sharjeel Adnan Sheikh, Advocate Supreme Court for Respondents (in all Petitions except C.Ps. Nos. 233-L, 397-L, 443-L and 444-L of 2020).

Nemo for Respondents (in C.Ps. Nos. 233-L, 397-L and 444-L of 2020).

Mahmood Ahmed Qazi, Advocate Supreme Court for Respondents (in C.P. No. 443-L of 2020).

Date of hearing: 21st July, 2020.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**Brief facts are that the respondents were appointed as Secondary School Teachers ("SST") by the Director of Secondary Education, Faisalabad Division, Faisalabad in the year 1995 on ad hoc basis, thereafter, their services were terminated in the year 1996; aggrieved of the same they approached Lahore High Court by invoking its constitutional jurisdiction and obtained an interim relief to continue as SSTs vide order dated 22.05.1996. Thereafter, in the year 2001, High Court observed that the matter of termination could not be looked into, in view of the bar contained in Article 212 of the Constitution, however, in the interest of justice and fair play dispatched the matter to the Secretary concerned to look into the matter and pass appropriate orders. The issue of regularization of ad hoc SSTs kept tossing around between the Courts and the administration as similarly placed employees had also agitated this matter. Thereafter in the year 2009 vide order dated 25.03.2009 passed in C.Ps. Nos.1086-L to 1571-L, 1973-L of 2008, the Government was directed that the case of the Ad hoc employees be considered in the light of case reported as Dr. Naveeda Tufail and 72 others v. Government of Punjab and others (2003 SCMR 291). As a result the, services of the respondents were regularized vide order date 15.06.2012 from the date of issuance of the order. Aggrieved of the said order, respondents claiming their regularization from the date of their ad hoc appointment, challenged the said order before the Service Tribunal, which were disposed of vide judgment dated 18.12.2013 with the direction to the Chief Secretary, Punjab to decide all the pending appeals of the respondents expeditiously. Thereafter the departmental appeals were rejected vide order dated 30.12.2014. Against the same, the respondents once again approached the Punjab Service Tribunal, which vide impugned order dated 09.10.2019 allowed the appeals and granted regularization of their services from the date of the initial appointment. This has been impugned before us.

3. We have heard the learned counsel for the parties and have examined the record as well as the law on the subject.

4. At the very outset it is pointed out by the respondents that their grievance before this Court is somewhat different, they accept their regularization from the date of order of regularization i.e., in the year 2011, however, they seek seniority from the date of; their ad hoc appointment. Ad hoc appointment has been defined in section 2(1)(a) of the Punjab Civil Servants Act, 1974 in the following manner:-

"2. Definitions. (1) In this Act, unless there is anything repugnant in the subject or context:-

(a) "ad hoc appointment" means appointment of a duly qualified person made otherwise than in accordance with the prescribed method of recruitment, pending recruitment in accordance with such method;"

Rules 22(2) of the Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974 provides that a post to be filled on ad hoc basis, shall be for a period not exceeding one year. In the present case the respondents were appointed in the year 1995 and their services were terminated in the light of the above Rule, however, the respondents and others challenged their termination and were successful in obtaining injunctive orders in their favour and since then the matter of regularization remained pending before the courts or the administrative authorities. Finally in the year 2009 vide order dated 25.03.2009 passed in C.Ps. Nos. 1086-L to 1571-L, 1973-L of 2008, the Government was directed that the case of the Ad hoc employees be considered in the light of Dr. Naveeda Tufail and 72 others v. Government of Punjab and other (2003 SCMR 291). As a result vide order dated 15.06.2012 passed by the department the services of the respondents were regularized from the date of issuance of the order. The respondents while accepting their regularization from the said date pray that their seniority be reckoned from the date of their ad hoc appointment. Any such claim is opposed to proviso to Rule 22(5) of the Rules, which states as follows:-

"Provided further that ad hoc appointment shall not confer any right on the persons so appointed in the matter of regular appointment of the same post nor the service will count towards seniority in the grade." (emphasis supplied)

It has been a consistent jurisprudence of this Court that seniority in the case of ad hoc employees is to be granted from the date of their regularization. See Abu Bakar Farooq through Chairman and others v. Muhammad Ali Rajpar and others (2019 SCMR 830), Nadir Shah, S.D.O. Minor Canal Cell, Irrigation Sub-Division, Dera Murad Jamali and 2 others v. Secretary, Irrigation and Power Department, Balochistan, Quetta and 7 others (2003 PLC (C.S.) 961), Federation of Pakistan and others v. Rais Khan (1993 SCMR 609) and Mian Muhammad Afzal and others v. Government of the Punjab and others (1982 SCMR 408).

4. In the light of the law settled by this Court and clear provision of proviso to Rule 22(5) of the Rules, especially when the department was not at fault and did not extend any expectations to the Ad hoc employees in this regard, we are of the view that the regularization of ad hoc employee shall be reckoned from the order of regularization and seniority is also to be reckoned from the date of regularization and not from the date of their ad hoc appointment. The impugned order of the Punjab Service Tribunal is, therefore, set aside. These petitions are converted into appeal and allowed in the above terms.

5. It is pointed out that some of the petitions are barred by time, however, their period of limitation has been condoned.

MWA/P-4/SC Petitions allowed.

**2020 S C M R 2044**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik and Syed Mansoor Ali Shah, JJ**

**WARIS and another---Petitioners**

**Versus**

**The STATE and others---Respondents**

Jail Petition No. 456 of 2015, Criminal Petitions Nos. 121-L of 2017 and 1304-L of 2015, decided on 23rd July, 2020.

(On appeal against the judgment dated 01.10.2015 passed by the Lahore High Court, Lahore in Criminal Appeals Nos. 116-J, 700 of 2011 and Murder Reference No. 222 of 2011)

**Penal Code (XLV of 1860)---**

----S. 302(b)---Constitution of Pakistan, Art. 185(3)---Qatl-i-amd---Leave to appeal, petition for---Contentions of accused that that there was a delay of about three hours in the registration of FIR: that the doctor stated in his cross examination that death might have been caused twelve hours prior to the postmortem examination; that as per prosecution case apart from the accused, two other co-accused persons also caused kasi blows on the head of the deceased, whereas another co-accused caused a blunt injury on the back of the deceased; that the doctor observed that the three injuries on the body of deceased individually and collectively were sufficient to cause death in ordinary course of nature; that the Trial Court while disbelieving the evidence of complainant and a prosecution witness acquitted all three co-accused persons; that the appeal against acquittal of said co-accused persons was dismissed by the High Court through the impugned judgment: that motive behind the occurrence was disbelieved by the High Court and kasi recovered on pointation of accused was not blood stained; that the same set of evidence which had been disbelieved by the courts below qua acquitted co-accused persons could not be relied to convict the accused on a capital charge particularly when there was no independent corroboration---Held, that said contentions needed consideration---Leave to appeal was granted to re-appraise the entire evidence on record for safe administration of justice.

Malik Rab Nawaz, Advocate Supreme Court for Petitioners (in J.P. No. 456 of 2015).

Muhammad Amjad Rafiq, Additional P.G., Punjab for the State.

Dr. Abdul Basit, Advocate Supreme Court for the Complainant.

Date of hearing: 23rd July, 2020.

**ORDER**

**MANZOOR AHMAD MALIK, J**.---

Jail Petition No. 456 of 2015: Learned counsel for the petitioner contends that there is delay of about three hours in the registration of FIR that doctor (PW.5) stated in his cross-examination that death might have been caused twelve hours prior to the post-mortem examination, that it is the case of' prosecution that along with the petitioner Waris, co-accused Zafar and Nasir alias Lachoo caused kasi blows on the head of deceased Noor Muhammad whereas co-accused Hakim alias Hako caused a blunt injury on the back of Noor Muhammad (deceased); that the doctor (PW.5) observed that injuries Nos.1, 2 and 3 individually and collectively were sufficient to cause death in ordinary course of nature; that the learned trial court while disbelieving the evidence of complainant (PW.3) and Umer Hayat (PW.4) acquitted co-accused Zafar, Nasir alias Lachoo and Hakim alias Hako; that the appeal against acquittal of aforesaid co-accused was dismissed by the learned High Court through the impugned judgment that motive behind the occurrence was disbelieved by the learned High Court and kasi recovered on the pointation of petitioner, was not blood-stained. He vehemently contended that the same set of evidence which has been disbelieved by the learned courts below qua co-accused of the petitioner (since acquitted) cannot be relied to convict the petitioner on a capital charge particularly when there is no independent corroboration.

2. The contentions raised need consideration. Leave to appeal is therefore, granted in this case to reappraise entire evidence available on record for safe administration of justice.

Criminal Petitions Nos.121-L of 2017 and 1304-L of 2015: To be heard along with the appeal arising out of connected jail petition.

MWA/W-4/SC Leave granted.

**P L D 2020 Supreme Court 1**

**Present: Asif Saeed Khan Khosa, C J, Mazhar Alam Khan Miankhel and Syed Mansoor Ali Shah, JJ**

**JURISTS FOUNDATION through Chairman---Petitioner**

**Versus**

**FEDERAL GOVERNMENT through Secretary, Ministry of Defence and others---Respondents**

Constitutional Petition No.39 of 2019, decided on 28th November, 2019

(In the matter of the Tenure and Extension of the Chief of the Army Staff).

Per Syed Mansoor Ali Shah, J; Asif Saeed Khan Khosa, CJ and MazharAlam Khan Miankhel, J agreeing.

**(a) Constitution of Pakistan---**

----Art. 184(3)---Public interest litigation before the Supreme Court---Withdrawal of petition with permission of Court---Scope and principles---Public interest litigation could only be withdrawn with the permission of the Court, because it did not raise a personal issue limited to the petitioner; it was not a dominis litis (the person to whom a suit belongs) that would give a right to the petitioner to withdraw it as a matter of choice---In granting the permission (to withdraw) the Court would be guided by considerations of public interest and would also ensure that it did not result in the abuse of the process of law---Courts must guard against possibilities of such litigants settling the matters out of Court to their advantage and then seeking withdrawal of the case---Sometimes withdrawal of a public interest litigation, for oblique ends, could be used to the detriment of the public interest agitated therein---Court had to be cautious not to fall prey to such oblique motives---Proceedings in public interest litigation were inquisitorial in nature and, therefore, the request for withdrawal of such litigation must always be weighed in the light of the question of public importance raised in it---Petitioner initiating public interest litigation was, therefore, not entitled to withdraw the petition at his sweet will---Court, however, may permit withdrawal of such litigation on considering the nature of the matter agitated therein and ensuring that it did not involve abuse of the process of law.

AIR 1997 SC 272; PLD 2017 Lah. 588; PLD 2014 Bal. 1 and AIR 1988 SC 2211 ref.

**(b) Constitution of Pakistan---**

----Arts. 9, 19A, 27, 243(4)(b) & 245---Pakistan Army Act (XXXIX of 1952), S.8(2)---Army Regulations (Rules), 1998, Regln. 19---Constitutional petition before the Supreme Court relating to the tenure and extension of the Chief of the Army Staff---Maintainability---Armed Forces were to defend the country against external aggression and threat of war, under the Constitution---Chief of the Army Staff (COAS) was an officer commanding the Army and was responsible for the command, discipline, training, administration, organization and preparedness for war of the Army; he was also the Chief Executive in the General Headquarters and an adviser to the Government on military matters --- Appointment of the COAS of the Army was, thus, inextricably linked with the life, security and liberty of every citizen and was undoubtedly a question of grave and vital public importance---Army was perceived to play an intrinsic role in upholding constitutional values of sovereignty, freedom, democracy and the fundamental rights relating to life, liberty and dignity---Hence, the questions relating to its structure, command, governance and organization were of public importance with reference to the enforcement of the fundamental rights---In today's age of information, the issues raised in the present petition also attracted fundamental right to information under Art.19A, as well as, the right to non-discrimination in services under Article 27 of the Constitution---Present petition was held to be maintainable accordingly.

**(c) Constitution of Pakistan---**

----Pt. II, Chapt. 1 [Arts. 8 to 28]---Fundamental rights---Interpretation---Fundamental rights in a living Constitution were to be liberally interpreted so that they continued to embolden freedom,equality, tolerance and social justice.

**(d) Constitution of Pakistan---**

----Art. 243(4)(b)---Pakistan Army Act (XXXIX of 1952), S. 8(2)---Army Regulations (Rules), 1998, Reglns. 19 & 255---Pakistan Army Act Rules, 1954---Constitutional petition before the Supreme Court relating to the tenure and extension of the Chief of the Army Staff---Incumbent Chief of the Army Staff (COAS) was provided an extension/re-appointment for a fresh term of three years in such office after expiry of his first term---Constitutionality and legality---No provision existed in the Army laws for the tenure and age of retirement of a General and as a consequence of the Chief of the Army Staff, as well as, for the extension of tenure or fresh appointment for another tenure---Summaries initiated by the Ministry of Defence and approved by the President, the Prime Minister and the Cabinet, for the reappointment, extension and fresh appointment of the incumbent COAS, were, therefore, meaningless and of no consequence---Exercising judicial restraint the Supreme Court gave an opportunity to the Federal Government in the light of the assurance of the Attorney-General to carry out appropriate legislation through an Act of Parliament within a period of six months---In order to preserve smooth functioning of the Army, the Supreme Court directed that the current status of the incumbent Chief of the Army Staff shall continue for a period of six months, whereafter the new legislation (Act of the Parliament) shall determine his tenure and other terms of his service; that in case the Federal Government remained unable to regulate the tenure and terms of service of a General and as a consequence of the COAS through an appropriate legislation by the Parliament, within a period of six months, the institutional practice of retirement of a General on completion of the tenure of three years shall stand enforced to regulate the tenure of incumbent COAS, from the date of his promotion to the rank of General and appointment as COAS, i.e. 29.11.2016, and the President shall, on advice of the Prime Minister, appoint a serving General officer as the new Chief of the Army Staff---Constitutional and legal flaws in the exercise of jurisdiction by the President, the Prime Minister, the Cabinet and the Ministry of Defence, in the extension, reappointment and appointment of the incumbent COAS highlighted.

Following are some of the constitutional and legal flaws in the exercise of jurisdiction by the President, the Prime Minister, the Cabinet and the Ministry of Defence, in the extension, reappointment and appointment of the incumbent Chief of the Army Staff (COAS):

(i) The Prime Minister appointed the incumbent COAS as the Chief of the Army Staff for another term of three years from the date of completion of the current tenure vide his "order" dated 19.08.2019, while the Prime Minister had no such power under the Constitution.

(ii) The tenure of 3 years mentioned in the above order of the Prime Minister had no legal basis.

(iii) The extension of the tenure of COAS for a further period of three years vide notification dated 19-08-2019 was not supported by law as there was no provision of tenure or extension of tenure prescribed under the Constitution or the law.

(iv) The summary initiated by the Ministry of Defence dated 19.08.2019 stated that the incumbent COAS was due for retirement from 29.11.2019 by tenure but did not state the law providing for such tenure for retirement.

(v) The said summary mentioned that the General Officer may be granted extension of one further tenure of three years under Regulation 255 of the Army Regulations (Rules), despite the fact that there was no tenure prescribed for a General and that there was no provision for extension for another tenure in the Pakistan Army Act, 1952, Pakistan Army Act Rules, 1954 or the Army Regulations (Rules).

(vi) The President under Article 243(4)(b) of the Constitution granted extension to the incumbent COAS for three years on 19-08-2019, while the President had no power to grant extension under the Constitution or the law.

(vii) The Government, the very next day, i.e. 20-08-2019, retracted from the earlier position and without withdrawing the notification regarding grant of extension to the incumbent COAS, issued under the approval/authority of the President a day before, took up the matter of extension of the tenure of the COAS with the Cabinet relying on Army Regulation 255 in the absence of any tenure or age of retirement prescribed for a General.

(viii) Only 11 members of the Cabinet out of 25 approved the above summary through circulation. However, no notification was issued under the authority or approval of the Federal Government regarding extension of the tenure of the incumbent COAS. Thus, this exercise served no purpose.

(ix) This approval through circulation failed to comply with Rule 19 of the Rules of Business, 1973 which required that the Cabinet Secretary was to specify the time by which the opinions of the Ministers should be communicated to him. No such timeframe was specified.

(x) The Ministry of Defence issued notification dated 26.11.2019 stating that retirement of incumbent COAS, as a General Officer had been limited and he had been granted extension for further three years. This exercise conducted under the freshly amended Army Regulations (Rules) 255 (including the word "extension") could only be useful if there had been tenure or retirement age of a General provided under the law.

(xi) Finally on 28-11-2019, a fresh summary was put up before the Prime Minister for appointment of incumbent COAS as the Chief of the Army Staff w.e.f. 28-11-2019 under Article 243(4)(b) of the Constitution which was approved by the President, leading to notification dated 28-11-2019. This Notification stated that the notification dated 26.11.2019 regarding limiting retirement and granting extension of service to incumbent COAS stood withdrawn. This shows that there remained no notification in the field regarding limiting retirement and granting extension of service to the incumbent COAS. The appointment of the incumbent COAS on 28.11.2019 was again based on the assumption that his tenure had expired. [p. 21] D

Detailed examination of the laws relating to the Army revealed that there was no provision providing for the tenure and age of retirement of a General and as a consequence of the Chief of the Army Staff, as well as, for the extension of tenure or fresh appointment for another tenure; nor was there any consistent and continuous institutional practice of granting such extension, which could be enforced in absence of the law on the subject. The summaries initiated by the Ministry of Defence and approved by the President, the Prime Minister and the Cabinet, for the re-appointment, extension and fresh appointment of the incumbent COAS seemed to be meaningless and of no consequence in the absence of the law prescribing tenure of a General and providing extension for another tenure. Attorney General had assured the Court that the Federal Government would carry out legislation through the Parliament in the shape of an Act within six months to provide for the terms of service of a General (and as a consequence of COAS) so that effect could be given to Article 243 of the Constitution in letter and spirit and functionality of the constitutional provisions be realized at the earliest.

Supreme Court observed that exercising judicial restraint it was appropriate to leave the matter to the Parliament and the Federal Government to clearly specify the terms and conditions of service of the COAS through an Act of Parliament within a period of six months, and to clarify the scope of Article 243 of the Constitution in such regard; that the Federal Government may also, if deemed appropriate, specifically provide for extension of the tenure of an army officer of the rank of a General in the Act with grounds for granting such an extension, so that the discretion of the Federal Government in granting extension to a General was structured.

Sindh High Coiurt Bar Association v. Federation of Pakistan PLD 2009 SC 879; Government of Sindh v. Sharaf Faridi, 1990 SCMR 91, PLD 1994 SC 105 and Nadeem Ahmad v. Federation of Pakistan PLD 2010 SC 1165 ref.

In the present state of legal vacuum regarding the tenure of a COAS and in the light of the assurance given by the Federal Government to address these issues through fresh legislation within six months,

and considering that the COAS was the commanding officer of the Army and was responsible for the command, discipline, training, administration, organization and preparedness for war of the Army and in order to preserve smooth functioning of the Army, the Supreme Court directed that the current status of the incumbent COAS shall continue for a period of six months, where after the new legislation (Act of the Parliament) shall determine his tenure and other terms of his service; that in case the Federal Government remained unable to regulate the tenure and terms of service of a General and as a consequence of the COAS through an appropriate legislation by the Parliament, within a period of six months, the tenure of the constitutional post of COAS could not be left totally unregulated and to continue forever; that in case of such failure of the Federal Government the institutional practice of retirement of a General on completion of the tenure of three years as borne out from the record, shall stand enforced to regulate the tenure of incumbent COAS consequentially his tenure as COAS, from the date of his promotion to the rank of General and appointment as COAS, i.e.29.11.2016, and the President shall, on advice of the Prime Minister, appoint a serving General officer as the new COAS.

Supreme Court observed that its exercise of judicial restraint in the present matter may not be mixed up or confused with the application of the doctrine of necessity, which amounted to going against the law of the land to attend to some political or other goal; that this was not so in the present case where there was no law, in fact, there was a total legal vacuum regarding the tenure of a General.

**(e) Constitution of Pakistan---**

----Art. 243---Command of Armed Forces---History and evolution of Art.243 of the Constitution traced.

**(f) Interpretation of statutes---**

----Words in a provision could not be read and interpreted in isolation---Meaning and scope of a provision was determined by looking not to the isolated words used therein but by reading its text in context.

**(g) Constitution of Pakistan---**

----Art. 243(4)(b)---Army Regulations (Rules), 1998, Regln. 125---Pakistan Army Act (XXXIX of 1952), Preamble---Chief of the Army Staff, appointment of---Qualifications---Only a serving General could be appointed as the Chief of the Army Staff, because only a serving army officer was subject to the Pakistan Army Act, 1952---Retired army officer had no terms of service and was not regulated under the said Act.

**(h) Army Regulations (Rules), 1998---**

----Regln. 262-A---Pakistan Army Act, (XXXIX of 1952), S. 18---Pakistan Army Act Rules, 1954, R. 12---Constitution of Pakistan, Arts.240 & 243(3) & 243(4)(b)---Constitutional petition before the Supreme Court relating to the tenure and extension of the Chief of the Army Staff---Chief of the Army Staff (COAS) or an Army General (commissioned after the year 1970)---Retirement age and extension of tenure---Regulation 262-A of the Army Regulations (Rules), 1998, which dealt with officers commissioned after 1970, did not provide the retirement age of an officer of the rank of a General---Pakistan Army Act, 1952 fell deficient of the structural requirements for raising and maintaining an Army under clause (3) of Art.243 of the Constitution, as it did not provide for essential elements required to raise and maintain an Army, particularly the grant of Commissions in the Army and the terms of service of the Commissioned Officers including tenure and extension of a General---At present the tenure of a General and consequentially of a COAS was three years as per institutional convention and practice---Supreme Court observed that such an institutional practice could not be a valid substitute of the law required to be made in pursuance of the constitutional mandate under Art.243(3) of the Constitution; that this was a serious legislative omission, yet in the absence of such law the institutional convention and practice could be enforced to remove uncertainty as to the tenure of a General and to make the constitutional post of Chief of the Army Staff functional; that service in the Armed Forces being "Service of Pakistan" must be regulated by or under the law in accordance with the provisions

of Art.240 of the Constitution read with Art.243(3), otherwise, it was inconceivable that the highest rank in the Army, would have no tenure or age of retirement or other terms of service; that in the first instance, the matter should be allowed to be regulated by law, made by the legislature, as mandated by the Constitution.

**(i) Army Regulations (Rules), 1998---**

----Regln. 255---Army officer---Delaying or suspending retirement or extending date of retirement---Scope---Regulation 255 of the Army Regulations (Rules), 1998, could only be invoked for an officer who had retired or was about to retire---Emphasis was to delay the retirement either by limiting the retirement or by extending the date of retirement or suspending retirement after retirement---Such an act was a temporary arrangement and could only be availed if the exigencies of service and public interest so required---Essence of Regln. 255 was that if an officer was on the way out (about to retire) and urgent or pressing circumstances required that he be retained in service, said Regulation came into play---Exercise of discretion by the Federal Government under Regln. 255 had to be structured on parameters of exigency of service with a corresponding temporary period in mind---Words suspension, limiting retirement and extension did not connote permanency and could not be equated with grant of new tenure or a fresh appointment, therefore, a new tenure or fresh appointment or extension of another full tenure could not be given or granted to an army officer, including a General, under Army Regulation (Rules) 255.

**(j) Legislation---**

----Delegated legislation---Rules and Regulations---Delegatee must have legislative guidelines to formulate Rules and Regulations, and such guidelines, contours or boundaries must come from the Legislature (Parliament) itself---Legislature could confer upon any person or body the power to make subordinate/delegated legislation (Rules, Regulations or byelaws, etc.) in order to give effect to the law enacted by it yet it must perform itself the essential legislative function, i.e. to exercise its own judgment on vital matters of policy and enact the general principles providing guidance for making the delegated legislation.

**(k) Separation of powers, doctrine of---**

----Delegation of an "essential legislative function" by the Legislature to the Executive was not permissible under the Constitution---Foundation of such embargo owed its genesis to the concept of trichotomy of powers between the Legislature, the Executive and the Judicature, which was a fundamental principle of the constitutional construct.

**(l) Pakistan Army Act (XXXIX of 1952)---**

----S. 176A---Army Regulations (Rules), 1998---Power to make Regulations---Section 176A of the Pakistan Army Act, 1952, vires of---In order to provide a legal cover to the Army Regulations (Rules), S.176A was inserted in the Pakistan Army Act, 1952, which empowered the Federal Government to make Regulations---Army Regulations (Rules) once brought within the statutory fold must flow from the Pakistan Army Act, 1952---Regulations which did not meet such requirement would be ultra vires the said Act---Scope of the Pakistan Army Act, 1952 or the vires of the Army Regulations (Rules) could not be determined by the words inserted in S.176A like governance, command, discipline, recruitment, terms and conditions of service, rank, precedence and administration of the Pakistan Army---Said words were mere words when there was no essential or core legislation on these subjects---Section 176-A after its insertion provided a shortcut and authorized the Federal Government to regulate areas like governance, command, discipline, recruitment, terms and conditions of service, rank, precedence and administration of the Pakistan Army through the Army Regulations (Rules)---Power of the Parliament under the Constitution could not be delegated to the Federal Government without the Parliament performing the basic essential legislative function, i.e. providing policy guidelines on these areas---Through S.176A, the Parliament appeared to have divested itself of the essential legislative function which amounted to excessive delegation, as neither said section nor any

other section of the Pakistan Army Act, 1952 provided the essential legislative policy guidelines for making the delegated legislation, viz. the Regulations, on the subjects mentioned therein---Army Regulations (Rules) would be rendered ultra vires if they did not draw their power from the parent Act, i.e. the Pakistan Army Act, 1952 and would suffer from excessive delegation if they drew their strength only from S.176A of the Act---Army Regulations (Rules) appeared to be without any legal cover and fell outside the scope of the Pakistan Army Act, 1952---Said Regulations had to be fully examined in the light of said principles---Supreme Court observed that it was for the Federal Government to bring about appropriate legislation to remove such defects so that the Army Regulations (Rules) had a proper legal cover and were fully enforceable under the law.

**(m) Right of Access to Information Act (XXXIV of 2017)---**

----Ss. 3 & 7(e)---Army Regulations (Rules), 1998---Inaccessible for public---Acts of the Parliament or subordinate legislation were public documents and must be readily available to the citizen of the country subject to the exceptions provided under the Right of Access to Information Act, 2017---Said exceptions extended only to record relating to defence forces, defence installations or connected therewith and ancillary to defence and national security and not to the Army laws---Every legislative instrument must be made accessible to public.

**(n) Administration of justice---**

----Institutional practice, reliance upon---Scope---Institutional practice followed continuously and consistently by an institution for a considerable period of time may be used to resolve a controversy, in the absence of the law.

2011 SCMR 408 and PLD 1990 SC 612 ref.

**(o) Judicial restraint, doctrine of---**

----Scope---Constitutional questions---Judicial restraint in its substantial approach urged Judges considering constitutional questions to give deference to the views of the elected branches and invalidate their actions only when constitutional limits had clearly been violated---While the principle, "if it is not necessary to decide more, it is necessary not to decide more" well stated the procedural aspect of judicial restraint---Judicial restraint (exercised so as not to intrude in other branches of Government) was essential to the continuance of rule of law, and for the continued public confidence in the political impartiality of the judiciary and the voluntary respect for the law as laid down and applied by the Courts.

Judicial Restraint, definition by Kermit Roosevelt, available online at https://www.britannica.com/topic/judicial-restraint; PDK Labs., Inc. v. Drug Enforcement Admin., 362 F. 3d 786 (CADC 2004), per John Roberts, J. and Imtiaz Ahmad v. Government of Pakistan 1994 SCMR 2142 ref.

**(p) Constitution of Pakistan---**

----Arts. 184(3) & 199---Judicial review, power of---Scope---Power of judicial review was a great weapon in the hands of Judges, but the Judges must observe the Constitutional limits set by the parliamentary system on their exercise of this beneficial power, namely, the separation of powers between the Parliament, the Executive and the Courts---Judicial review must, therefore, remain strictly judicial and in its exercise Judges must take care not to intrude upon the domain of the other branches of Government.

Per Asif Saeed Khan Khosa, CJ; agrreing with Syed Mansoor Ali Shah, J.

**(q) Constitution of Pakistan---**

----Arts. 243(3) & 243(4)(b)---Pakistan Army Act (XXXIX of 1952), S.8(2)---Army Regulations (Rules), 1998, Regln. 255---Constitutional petition before the Supreme Court relating to the tenure and extension of the Chief of the Army Staff---Terms and conditions of service of Chief of the Army Staff, the tenure of his office, extension in the tenure of his office or his reappointment to that office had remained unregulated by any law so far---Clause (3) of Art.243 of the Constitution mandated that the

President's power to raise and maintain the armed forces was to be "subject to law" and, thus, leaving some vital aspects relevant to the office of Chief of the Army Staff without being regulated by any law militated against the said express provision of the Constitution---His Lordship observed with hope and optimism that framing of a law by the Parliament regulating the terms and conditions of the office of Chief of the Army Staff may go a long way in rectifying multiple historical wrongs and in asserting sovereign authority of the chosen representatives of the people besides making exercise of judicial power of the Courts all pervasive, and that the democratic maturity of the nation had reached a stage where the Supreme Court could proclaim that "Howsoever high you may be; the law is above you".

Petitioner in person.

For the Respondents:

Anwar Mansoor Khan, Attorney-General for Pakistan with Sajid Ilyas Bhatti, Addl. Attorney-General Amir-ur-Rehman, Addl. Attorney-General Ch. Ishtiaq Ahmed, Addl. Attorney-General.

Sohail Mehmood, Dy. Attorney-General.

Mian Asghar Ali, Dy. Attorney-General Assisted by Ms. Faryal Shah Afridi, Advocate.

Syed Iqbal Hashmi, Advocate Supreme Court.

Brig. Falak Naz, Director (Law), Ministry of Defence.

Flt. Lt. Khalid Abbas, Asst. Director (Law), Ministry of Defence.

Brig. Muhammad Khalid Khan, JAG Department, GHQ.

Lt. Col Rai Tanveer Ahmed Kharral, OIC, JAG Department, GHQ.

Dr. Farogh Nasim, Advocate Supreme Court for Respondent No.4, along with Abid S. Zuberi, Advocate Supreme Court, assisted by Ayan Memon, Shahid

Naseem Gondal and Barrister Maleeka Ali Bukhari.

Mehmood A. Sheikh, Advocate-on-Record.

Supreme Court Research Centre (SCRC) for Research Assistance.

Dates of hearing: 26th, 27th and 28th November, 2019.

**JUDGEMENT**

**SYED MANSOOR ALI SHAH, J.**---At the heart of this case lies the fundamental question of rule of law: Is our government of laws or of men?[1] The case before us questions whether the top military post in the country, that of the Chief of the Army Staff ("COAS"), the commanding officer of the Pakistan Army, is regulated by the Constitution and the law; whether the COAS has a tenure or can seek an extension or has any terms of service under the law.

2. The proceedings of the case brought to fore more questions: Whether the constitutional mandate since 1956 of raising and maintaining an Army under the law, has been fulfilled by the Pakistan Army Act, 1952; whether Regulation 255 of the Army Regulations (Rules) is designed to grant extension to a COAS for another term; whether at all, the Army Regulations (Rules), inherited from the British India, enjoy the protection of the Pakistan Army Act, 1952? This judgment addresses these questions.

3. The history of our Army has seen successive appointments, retirements and extensions of several Chiefs of the Army Staff since Independence. However, for the first time the matter has come to the highest Court of the land questioning the legal framework under which these appointments, retirements and extensions take place.

Facts

4. The Prime Minister appointed the current COAS for another term of three years through his "order" dated 19.08.2019. Thereafter, the President on the advice of the Prime Minister granted "extension" for one further tenure of three years to the COAS w.e.f. 29.11.2019. This public interest litigation (PIL) has challenged the extension of the COAS on the ground that it is offensive to Article 243(4)(b) of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution"), thereby urging the Court to strike it down.

5. The petitioner did not appear on the first date of hearing. The Court Associate placed an undated handwritten application before the Court, which prayed that the petitioner be allowed to withdraw the petition. This application was not entertained by the Court for the following reasons recorded in the order dated 26.11.2019:

> "The Court-Associate has produced before us a handwritten application statedly submitted by the petitioner seeking permission to withdraw this petition. The petitioner has failed to appear in person nor anybody else has appeared on his behalf. The application received does not carry any date and the same is not accompanied by any affidavit. There is nothing before us to accept or to presume that the said application has actually been summited by the petitioner himself or that he has submitted the same voluntarily. Be that as it may the petition in hand invokes Article 184(3) of the Constitution and the subject matter of the petition involves a question of public importance with reference to enforcement of fundamental rights and, thus, the individual capacity of the petitioner pales into insignificance even if he decides not to pursue the present petition. The application attributed to the petitioner is, therefore, not entertained."

The Petitioner appeared in person, on the next date of hearing and made an oral request seeking permission to withdraw the petition. He was apprised of the above quoted observation of the Court, and his request was turned down.

Public Interest Litigation (PIL) - Withdrawal

6. A public interest litigation (PIL) can only be withdrawn with the permission of the Court. This is because it does not raise a personal issue limited to the petitioner; it is not a dominis litis (the person to whom a suit belongs) that would give a right to the petitioner to withdraw it as a matter of choice. "In granting the permission (to withdraw) the Court would be guided by considerations of public interest and would also ensure that it does not result in the abuse of the process of law. Courts must guard against possibilities of such litigants settling the matters out of Court to their advantage and then seeking withdrawal of the case."[2] Sometimes withdrawal of a public interest litigation, for oblique ends, can be used to the detriment of the public interest agitated therein. The Court has to be cautious not to fall prey to such oblique motives. The proceedings in public interest litigation are inquisitorial in nature and, therefore, the request for withdrawal of such litigation must always be weighed in the light of the question of public importance raised in it. A petitioner initiating public interest litigation is, therefore, not entitled to withdraw the petition at his sweet will.[3] The Court, however, may permit withdrawal of such litigation on considering the nature of the matter agitated therein and ensuring that it does not involve abuse of the process of law.

Maintainability and Jurisdiction under Article 184(3)

7. The Armed Forces are to defend Pakistan against external aggression and threat of war, under our Constitution.[4] The COAS is an officer commanding the Pakistan Army[5] and is responsible for the command, discipline, training, administration, organization and preparedness for war of the Army. He is also the Chief Executive in the General Headquarters and an adviser to the Government on military matters.[6] The appointment of the COAS of the Pakistan Army is, thus, inextricably linked with the life, security and liberty of every citizen and is undoubtedly a question of grave and vital public importance. The Army is perceived to play an intrinsic role in upholding constitutional values of sovereignty, freedom, democracy and the fundamental rights relating to life, liberty and dignity. Hence, the questions relating to its structure, command, governance and organization are of public importance with reference to the enforcement of the fundamental rights. In this age of information, the issues raised also attract fundamental right to information under Article 19A, as well as, the right to non-discrimination in services under Article 27 of the Constitution. Fundamental rights in a living Constitution are to be liberally interpreted so that they continue to embolden freedom, equality, tolerance and social justice.

8. Even the learned Attorney-General appearing for the Federal Government and the learned counsel for the COAS thought it appropriate, in this case, not to raise any objection to the assumption of jurisdiction by this Court or to the maintainability of this petition. They, during the hearing, rather tried to satisfy and convince the Court about the legality of the extension granted to the COAS and practically demonstrated that "it is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law."[7] They in the course of arguments beseeched the Court to provide guidance to the Federation in this important matter.

9. The case proceeded as the Attorney-General for Pakistan ("Attorney-General") was already in attendance on his own, on the first date of hearing, and took us through the Summaries, approvals and orders passed regarding the extension of the COAS. The Court in its order dated 26.11.2019 identified some prima facie constitutional and legal flaws in the process of granting extension to the COAS and issued notices to all the respondents after impleading General Qamar Javed Bajwa, the COAS, as a respondent in the petition. The Court also suspended the operation of the notification of his extension dated 19.08.2019. The case was fixed for hearing the next day, on the request of the Attorney General. Relevant extract of the order dated 26.11.2019 is given as follows for ready reference:

"i) A summary had initially been moved by the Ministry of Defence for extension of the term of office of the Chief of the Army Staff and subsequently he was appointed as Chief of the Army Staff for a second term of three years after completion of his first term in that office but the learned Attorney-General for Pakistan has not been able to refer to any provision in any legal instrument regarding extension in service of a Chief of the Army Staff upon completion of his first term in that office or for his re-appointment to that office after completion of his first term.

ii) In the case in hand the Prime Minister had himself passed an order appointing the current Chief of the Army Staff for a second term in that office on 19.08.2019 whereas under Article 243 of the Constitution it is the President who is the appointing authority for that office. Apparently that mistake came to notice straightaway and on the same day, i.e. 19.08.2019 a summary was moved from the Prime Minister's office to the President for extension/re appointment of the incumbent Chief of the Army Staff and on that very day, i.e. 19.08.2019 the President was pleased to approve the summary in that regard and, hence, the advice of the Prime Minister was apparently accepted and acted upon. It appears that even that process was found to be flawed and on that very day it was realized that the Prime Minister or the President could not take the above mentioned actions without the approval of the Cabinet and, thus, on the next day, i.e. 20.08.2019 a summary was moved in the relevant regard for approval of the Cabinet and on 21.08.2019 the Cabinet was said to have approved the said proposal through circulation. The opinion of the Cabinet recorded in this regard, photocopies whereof have been produced before us, shows that there are 25 members of the Cabinet and out of those 25 members only 11 had agreed to the proposal which shows that the majority of the Cabinet had not approved the said proposal. Yet another peculiar aspect is that after the purported or so-called approval of the Cabinet regarding extension/re-appointment of the incumbent Chief of the Army Staff the matter was never sent to the Prime Minister or the President again for the purposes of a fresh advice or a fresh order of the Prime Minister and the President respectively.

iii) After our repeated queries the learned Attorney-General for Pakistan has referred to Regulation No. 255 of the Army Regulations (Rules) according to which a retirement of an Army officer can temporarily be suspended or limited. By placing reliance upon the said Regulation the learned Attorney-General for Pakistan has maintained that the Federal Government has the requisite authority to re-appoint or extend the services of an incumbent Chief of the Army Staff prior to his retirement if the exigencies of the service so require or the public interest so demands. A bare perusal of Regulation No. 255, however, prima facie shows that the said provision can be invoked after an officer has already retired from service and that is why the

said Regulation speaks of suspension of retirement or limiting of retirement. Suspending a retirement or limiting a retirement before the retirement has actually taken effect may amount to putting the cart before the horse. The learned Attorney-General for Pakistan has, however, very candidly submitted before us that in the entire body of laws pertaining to the Pakistan Army there is no express provision available regarding re-appointment or extension in the service of a Chief of the Army Staff.

iv) The stated purpose for the proposed re-appointment/extension in the term of office of the incumbent Chief of the Army Staff is "regional security environment". The said words are quite vague and if at all there is any regional security threat then it is the gallant armed forces of the country as an institution which are to meet the said threat and an individual's role in that regard may be minimal. If the said reason is held to be correct and valid then every person serving in the armed forces would claim re-appointment/extension in his service on the basis of the said reason."

Submissions of Attorney-General

10. The Attorney-General defended the Federal Government by arguing that the fresh appointment/ extension of the COAS is fully within the constitutional and legal fold. He submitted that the tenure of a General/COAS is three years as per unwritten convention and practice; that the tenure of a General/COAS can be extended under Regulation 255 of the Army Regulations (Rules); that the said Regulations have been framed under section 176-A of the Pakistan Army Act, 1952 and, therefore, have statutory force; and that even a retired Army General can be appointed as COAS under Article 243(4) of the Constitution, as the said clause of Article 243 is not subject to law. The Attorney-General took us through a series of documents, prepared prior to the filing of the instant petition and also those prepared during the course of hearing of the case, comprising the Summaries put up before the President, Prime Minister and the Cabinet; the subsequent approvals; and the relevant notifications regarding "reappointment", "extension", "limit-in-retirement" and "appointment" of General Qamar Javed Bajwa. A brief summary of the said documents is given as follows:

Initial appointment of General Bajwa as COAS

a. On 15.11.2016, the Ministry of Defence moved a Summary for the Prime Minister seeking approval of the Prime Minister under Rule 12 of the Pakistan Army Act Rules, 1954 for the retirement of General Raheel Sharif, COAS w.e.f. 29.11.2016.

b. On 28.11.2016, the Ministry of Defence notified the approval granted by the Federal Government for the retirement of General Raheel Sharif, COAS w.e.f. 29.11.2016.

c. On 26.11.2016, the Prime Minister gave advice to the President to promote General Qamar Javed Bajwa to the rank of General and to appoint him as COAS under Article 243(4)(b) of the Constitution. The President approved the advice on the same date.

d. On 26.11.2016, the Ministry of Defence notified the promotion of General Bajwa to the rank of General and his appointment as COAS w.e.f. 29.11.2016.

Extension of General Bajwa as COAS

First Proceedings dated 19.08.2019

e. The Prime Minister of Pakistan made an "order" appointing General Bajwa, as the COAS for another term of three years from the date of completion of current tenure. He stated "the regional security environment" as a reason of his said order.

f. The Prime Minister's office addressed a letter to the Defence Secretary stating that the Prime Minister had desired the extension of service of General Bajwa as COAS for another term of three years from the date of completion of the current tenure, and directed the Ministry of Defence to initiate a Summary to that effect.

g. The Ministry of Defence initiated a Summary for the Prime Minister stating therein that General Bajwa was due for retirement from 29.11.2019 by tenure and the Prime Minister was desirous

for the extension of tenure of the General Officer for another term of three years from the date of completion of current tenure. The Ministry recommended that the General Officer may be granted extension under the Army Regulations (Rules) 255 for one further tenure (3 years) w.e.f. 29.11.2019 and beyond superannuation. The Ministry proposed the Prime Minister to advise the President to approve the recommendation regarding extension of the General Officer under Article 243(4)(b) of the Constitution. The Prime Minister advised accordingly and the President approved the Summary on the same day.

h. The Ministry of Defence notified that General Bajwa, COAS, had been granted extension for one further tenure (03 years) w.e.f. 29.11.2019 to 29.11.2022.

Second Proceedings dated 20.08.2019 and 21.08.2019

i. The Ministry of Defence, on 20.08.2019, initiated a Summary stating that the President has been pleased to approve the extension of the term of the General Officer for another 3 years from 29 Nov. 2019 to 29 Nov. 2022; that Rule 255 of the Army Regulations (Rules) stipulates that the retirement of officers will always be subject to the exigencies of service. Full power is reserved to Federal Government to "limit retirement in general or in individual cases whenever it may be necessary to do so in the public interest". With the said statements of fact and of law, the Ministry of Defence recommended that approval of the Federal Government was solicited for extension of the term of the General Officer for another 3 years from 29 Nov. 2019 to 29 Nov. 2022 and proposed obtaining approval of the Summary from the Cabinet through circulation.

j. The Cabinet Division, on 21.08.2019, circulated the said Summary amongst the members of the Cabinet with the approval of the Prime Minister. 11 (eleven) members of the Cabinet endorsed the Summary, while approval of 11 (eleven) members remained "awaited", while 03 (three) members were stated to be out of city or country. The Cabinet Division, however, considered the Summary to have been endorsed by the available members of the Cabinet by circulation. But the extension purportedly granted by the Federal Government was not notified.

Third Proceedings dated 26.11.2019

k. The Ministry of Defence moved the following three Summaries for the consideration of the Cabinet:-

i. Summary for withdrawal of the earlier Summary dated 20.08.2019 which was got approved by circulation on 21.08.2019;

ii. Summary for amendment/ substitution of Rule 255 of the Army Regulations (Rules); and

iii. Summary for limiting the retirement of and grant of extension in service to General Qamar Javed Bajwa.

The Cabinet approved all the said three Summaries in its meeting held on 26.11.2019.

Fourth Proceedings dated 26.11.2019

l. The Ministry of Defence notified the amendment/ substitution of Rule 255 of the Army Regulations (Rules), and also moved the following two Summaries for the Prime Minister:-

i. Summary for proposing withdrawal of the advice dated 19.08.2019 given to the President so that the President may withdraw the appointment of the COAS dated 19.08.2019 and any subsequent order or notification; and

ii. Summary for proposing the Prime Minister to advise the President to re-appoint General Bajwa for another term of three years as COAS under Article 243(4)(b) of the Constitution.

The Prime Minister advised accordingly, and the President approved the said Summaries.

m. The Ministry of Defence issued Notification No.3 / 11 / D-2 (A-II)/2019 dated 26.11.2019 stating thus:

"This Ministry's Notification of even No. dated 19 August, 2019 regarding extension in service in respect of PA-19617 General Qamar Javed Bajwa, NI(M), HI(M), Chief of the Army Staff (CAOS) is hereby withdrawn."

The Ministry of Defence, on the same day, issued another Notification No. F.3/11/D-2 (A-II)/2019 stating that:

"PA-19617 General Qamar Javed Bajwa, NI(M), HI(M), Chief of the Army Staff's (CAOS) retirement has been limited and he has been granted extension for one further tenure (03 years) with effect from 29 November 2019 to 29 November 2022."

Fifth Proceedings dated 28.11.2019

n. The Ministry of Defence initiated yet another Summary stating that the earlier Summaries and subsequent orders and notifications are liable to be withdrawn, and proposed the Prime Minster to advise the President:-

i. to approve the appointment of General Qamar Javed Bajwa, Chief of the Army Staff (CAOS) with effect from 28.1.2019, in view of the exigencies and highest public interest, in terms of Article 243 (4) (b) of the Constitution of the Islamic Republic of Pakistan, 1973;

ii. to determine that General Qamar Javed Bajwa, Chief of the Army Staff, shall be entitled to salary and allowances as prescribed under the Pay and Allowances Regulations (Army) as amended from time to time; and

iii. to supersede the earlier approval of the President on the advice of the Prime Minister dated 26.11.2019.

The PM advised accordingly and the President approved the Summaries.

o. The Ministry of Defence, on the same day, finally issued Notification No.F.3/11/D-2(A-II)/2019 stating thus:

"In exercise of the powers conferred under Article 243 (4) (b) of the Constitution of the Islamic Republic of Pakistan, 1973, the President, on advice of the Prime Minister, is pleased to appoint PA-19617 General Qamar Javed Bajwa, NI(M), HI(M), Chief of the Army Staff (CAOS) with effect from 28th November 2019, on salary and allowances prescribed under the Pay and Allowances Regulations (Army) as amended from time to time.

2. This Ministry's Notification No.3/11/D-2(A-II)/2019 dated 26 Nov, 2019 regarding limiting retirement and granting extension in service to the above named General Officer and Notification No.3/ 11 /D-2(A-II)/2019 dated 27 November 2019 are hereby withdrawn."

Flaws in the above process

11. In addition to the flaws noted in the process in our order dated 26.11.2019, the exercise of jurisdiction by the President, the Prime Minister, the Cabinet and the Ministry of Defence, Government of Pakistan in the extension, reappointment and appointment of the COAS highlights some further constitutional and legal flaws which are stated as follows:

a. The Prime Minister appointed General Bajwa as the COAS for another term of three years from the date of completion of the current tenure vide his "order" dated 18.09.2019, while the Prime Minister has no such power under the Constitution.

b. The tenure of 3 years mentioned in the above order of the Prime Minister has no legal basis.

c. The extension of the tenure of COAS for a further period of three years vide Notification dated 19.08.2019 is not supported by law as there is no provision of tenure or extension of tenure prescribed under the Constitution or the law.

d. The Summary initiated by the Ministry of Defence dated 19.08.2019 stated that General Qamar Javed Bajwa was due for retirement from 29.11.2019 by tenure but did not state the law providing for such tenure for retirement.

e. The said Summary mentioned that the General Officer may be granted extension of one further tenure of three years under the Army Regulations 255, despite the fact that there is no tenure

prescribed for a General and that there is no provision for extension for another tenure in the Pakistan Army Act, 1952, Pakistan Army Act Rules, 1954 or the Army Regulations (Rules).

f. The President under Article 243(4) (b) of the Constitution granted extension to General Bajwa for three years on 19.08.2019, while the President has no power to grant extension under the Constitution or the law.

g. The Government, the very next day, i.e. 20.08.2019, retracted from the earlier position and without withdrawing the notification regarding grant of extension to General Bajwa, issued under the approval/ authority of the President a day before, took up the matter of extension of the tenure of General Bajwa with the Cabinet relying on Army Regulation 255 in the absence of any tenure or age of retirement prescribed for a General.

h. Only 11 members of the Cabinet out of 25 approved the above Summary through circulation. However, no notification was issued under the authority or approval of the Federal Government regarding extension of the tenure of General Bajwa. Thus, this exercise served no purpose.

i. This approval through circulation failed to comply with Rule 19 of the Rules of Business, 1973 which requires that the Cabinet Secretary is to specify the time by which the opinions of the Ministers should be communicated to him. No such timeframe was specified.

j. The Ministry of Defence issued notification dated 26.11.2019 stating that retirement of General Bajwa, as a General Officer has been limited and he has been granted extension for further three years. This exercise conducted under the freshly amended Army Regulations (Rules) 255 (including the word "extension") could only be useful if there had been tenure or retirement age of a General provided under the law.

k. Finally on 28.11.2019, a fresh Summary was put up before the Prime Minister for appointment of General Bajwa as COAS w.e.f. 28.11.2019 under Article 243(4)(b) of the Constitution which was approved by the President, leading to notification dated 28.11.2019. This Notification stated that the notification dated 26.11.2019 regarding limiting retirement and granting extension of service to General Bajwa stands withdrawn. This shows that there remains no notification in the field regarding limiting retirement and granting extension of service to General Bajwa. The appointment of General Bajwa on 28.11.2019 is again based on the assumption that his tenure has expired.

12. Some Summaries mention that the same have been prepared in due deference to observations of the Supreme Court of Pakistan. This generates an impression that the same have been made on the orders or directions of this Court. This is totally incorrect. In fact the Court simply highlighted steps taken by the President, the Prime Minister and the Cabinet, without any supporting law and as a consequence they on its own tried to rectify the same. The impression generated that the said steps were taken on the desire, orders or directions of the Court is dispelled.

Scope of Article 243 of the Constitution

13. The questions highlighted above require us to understand the legal structure of the Pakistan Army and the terms of service of its Commander, i.e. the Chief of the Army Staff. Therefore, it is most appropriate to begin with the understanding of the scope of Article 243 of the Constitution, which relates to raising and maintaining the Armed Forces and the appointment of their Chiefs.

14. "It is a constitution we are expounding[8]." As Chief Justice Dickson of the Supreme Court of Canada noted that "the task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary

is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.[9]" "Any interpretation of the Constitution must be grounded in its own language." It is a language written in invisible ink, between the lines, and derived from the structure of the Constitution.[10]

15. The history of Article 243 of the Constitution begins with Article 40 of the Constitution of the Islamic Republic of Pakistan, 1956 ("1956 Constitution") and travels through 54 years to take its present shape in the year 2010 through the Constitution (Eighteenth Amendment) Act, 2010. Evolution of Article 243 through time has been traced and is reproduced hereunder for better understanding of the Article.

Comparative History of Article 243

| 1956 Constitution | 1962 Constitution | 1973 Constitution (Original Provision) | 1973 Constitution (Present Provision) |
|---|---|---|---|
| 40. Supreme Command of the Armed Forces.- | 17. President to have Supreme Command of the Defence Services.- | 243. Command of Armed Forces. | 243. Command of Armed Forces. |
| (1) The Supreme Command of the Armed Forces shall vest in the President, and the exercise thereof shall be regulated by law. | (1) The Supreme Command of the Defence Services of Pakistan is vested in the President, to be exercised by him subject to law. | (1) The Federal Government shall have control and command of the Armed forces. | (1) The Federal Government shall have control and command of the Armed Forces. (2) Without prejudice to the generality of the foregoing provision, the Supreme Command of the Armed Forces shall vest in the President. |
| (2) Until Parliament makes provision by law in that behalf the President shall have the power- (a) to raise and maintain the Naval Military and Air Forces of Pakistan and the Reserves of such Forces; (b) to grant Commissions in such Forces; and (c) to | (2) Without limiting the generality of clauses (1) of this Article, the President has power, subject to law; (a) to raise and maintain the Defence Services of Pakistan and the Reserves of those Services; (b) to grant Commissions in those Services; and (c) to appoint chief commanders of those Services and determine their salaries and allowances. | (2) The President shall subject to law, have power--- (a) to raise and maintain the Military, Naval and Air Forces of Pakistan; and the Reserves of such Forces; (b) to grant Cmmissions in such Forces; and (c) to appoint the | (3) The President shall subject to law have power--- (a) to raise and maintain the Military, Naval and Air Forces of Pakistan and the Reserves of such Forces; and (b) to grant Commissions in such Forces. (4) The President shall, on advice the Prime Minister, apooint- (a) the Chairman, Joint Chiefs of Staff Committee; (b) the Chief of the Army Staff; (c) The Chief of the Naval Staff; and (d) the Chief of the Air Staff, and shall also determine their salries and allowances. |

| | | | |
|---|---|---|---|
| appoint Commanders-in-Chief of the Army, Navy and Air Forces and determine their salaries and allowances. | | Chief of the Army Staff, the Chief of the Naval Staff and the Chief of the Air Staff, and determine their salaries and allowances. | |

16. Article 40 of the 1956 Constitution shows that the President was made the Supreme Commander of the Armed Forces and the said command was to be exercised by him under the law. The Article further provided that until the Parliament made law, the President would raise and maintain an Army and grant Commissions in Forces and appoint, inter alia, Commander-in-Chief of the Army. The underlying constitutional spirit gathered from the said Article is that the President was to raise and maintain an Army, to command it, to grant Commissions in it and to appoint its Commander-in-Chief under the law. It is important to note that the Pakistan Army Act, 1952 ("Act") was in force at the time of promulgation of the 1956 Constitution and despite its existence the framers of the Constitution required the Parliament to make provision by law to regulate the above matters. Article 40, thus, underlined that the Act had to provide the necessary structural underpinning that would constitute raising and maintaining of an Army, granting Commissions in the Forces and appointing its Commander-in-Chief.

17. Article 17 of the Constitution of the Republic of Pakistan, 1962 ("1962 Constitution") carried the spirit of Article 40 of the erstwhile Constitution; this time without awaiting for the legislation by the Parliament made the exercise of the President in relation to raising and maintaining the Armed Forces and granting Commissions in and appointing Chiefs of, such Forces, subject to law. No changes had been made in the Pakistan Army Act, 1952 since 1956 till 1962, therefore, the Act remained devoid of these constitutional structural requirements, in as much as, no provisions were added therein as to command of the Armed Forces by the President as the Supreme Commander, the powers to be exercised by him to raise and maintain an Army, to grant Commissions in the Forces and to make appointment of the "Chief Commander." This constitutional mandate was not actualized in law by the Legislature and the Government of the time, and remains unrealized even today.

18. This brings us to the present Constitution of 1973. The unrealized constitutional mandate once again is repeated in Article 243 with the same vigour and flair as it was done in the Constitutions of 1956 and 1962. Clauses (1) and (2) of Article 243 of the Constitution provide that the Federal Government shall command and control the Armed Forces and the President shall be its Supreme Commander. Clause (3) Article 243 of the Constitution provides that the President shall subject to law raise and maintain the Military, Naval and Air Forces of Pakistan and the Reserves of such Forces and grant Commissions in the Forces. Integral and intrinsic to raising and maintaining an Army is to first provide for the post of Commander in Chief of the Army, the General Officers and other Commissioned Officers that stand behind him and constitute the body of the valiant Army. No Army can be visualized without its gallant commanders. Once the structure including terms of service and tenure of the General Officers is put in place under the law envisaged by the Constitution, the role of the President to appoint the Chief of the Army Staff, under clause (4) of Article 243, from amongst the General Officers, on the advice of the Prime Minister is then simply a matter of selecting the most appropriate and suitable General officer to act as COAS. The power to appoint COAS under Article 243(4) is, therefore, not an

exercise in isolation but stands rooted and connected to the Army raised and maintained under Article 243(3) of the Constitution.

19. Review of the Military Laws of other countries shows that the law must provide for essential structural areas that would pass for raising and maintaining an Army. A comparative chart of the Laws of the Armed Forces of different countries is given hereunder:

Constituents of raising and maintaining Armed Forces

| Structural Areas | United States (10 U.S. Code Title Armed Forces). | Australia (Defence Act 1903) | Canada (National Defence Act 1985) | Singapore (Armed Forces Act 1972) | Malaysia (Aremed Forces Act, 1972) | New Zealand (Defence Act, 1990). |
|---|---|---|---|---|---|---|
| Organization Control and Administration | Organization and General Military Powers | Control and administeration (Part II) | Canadian Forces Organization (Part II) | Organiztion of Singapore Armed Forces (Part II) | The Regular Forces of Malaysia (Part II) | Mew Zealand defence Part II |
| Appoitment, Resignation Termination, Remuneration Superannuation and other Terms and Conditions. | Personnel | Appointment Resignation, Termination Remuneration Superannuation | Enrolment, Promotion, Service, Pay (Part (II) | Appointments Pay. Pension, Terms and Conditions, Remuneration (Ss.10-10C, 192-197,202-208). | Appointment of Officers of The Regular Forces and Terms of Service (Parts III, IV and VI). | Appointment of Chiefs, Terms and Conditions of Service in Armed Forces and Superannu-ation (Part 3-5) |
| Military Offences | Punitive Matters (Subchapter VIII) | Offences and Offences in relation to service tribunl (Parts VII-VIII) | Service Offences and Punishments infraction (Part III Dv2). | Military Offences (Part III) | Service Offences and Punishments (Part V) | Offence punishable by Civil Courts (Part VII) |
| Trial by Subordinate Military Courts | Uniform Code of Military Justice (Chapter 47). | Defence Force Discipline Act, 1982. | Trial by Court Martial and Civil Court (Part-III Dv6, Part-VII) | Trial by Subordinate Military Courts (Part V). | Offences relating to the Armed Forces punishable by Civil Courts (Part VII) | Redress of complaints (Sec.49) and Armed Forces Discipline Act, 1971 |

| | | | | | | |
|---|---|---|---|---|---|---|
| Punishments of Military Offences | Punitive Articles (Subchapter X) and Sentences (Subchapter VI) | Penalty (Part VII Sec.73-F) | Service Offences and Punishments infraction (Part-III Dv2). | Punishments of Military Offences and Execution of Sentences (Part VI). | Service Offences and Punishments (Part V) | Members may be discharged or released for incompatible behaviour and disciplinary proceedings (57 and 57A). |
| Court of Appeal | Uniform Code of Military Justice (Chapter 47) | Defence Honors and Awards Appeals Tribunal (Part VIIIC) | Grievances (Right of Appeal) (Part -II Dv9). | Military Court of Appeal (Part VII) | Offences relating to the Armed Forces punishable by Civil Courts (Part VII) | Court Martial Appeals Act 1953 and Armed Forces Discipline Act 1971. |
| Training and Development | Training and Education ($$) | Australian Defence Force Cadets (Part V) | The Governor in Council make regulations for the training and discipline of Armed Forces (Sec 12 (1)). | General Orders of Ministry of Defence (Sec 208 d) | Training and attachment (Sections 191, 201 and 201B). | Cadet Forces (Part VI). |

20. The above mentioned laws provide the essential structural areas that constitute raising and maintaining an Army. The key structural areas include Organization; Control; Personnel; Terms and Conditions of services of officers of the Armed Forces including Appointments, Ranks, Remuneration, Promotion, Resignation, Termination, Superannuation, Command, Rank; Discipline, Administration, Training and Development, Education and Offences. The United States Law of Armed Forces also provides for Procurement, Supply and Acquisitions for the Armed Forces. The above laws strongly underline that the officers, who are to command and control the Army, unquestionably form an essential component of the Army and must, therefore, be explicitly recognized under the law.

Review of the Pakistan Army Act, 1952

21. When the Pakistan Army Act, 1952 is reviewed in the context of raising and maintaining an Army, we see that it largely deals with offences, courts martial and punishments. There is no mention of the Chief of the Army Staff, the commanders of the Pakistan Army. There is no mention of the

General Officers or the other Commissioned Officers or terms of their service. Only three chapters briefly touch upon definitions, appointment and termination of service. While the Act governs Commissioned Officers there is nothing in the Act that prescribes the terms and conditions of service of the said Officers. Chapter II deals with the Appointment, Enrolment and Attestation of Junior Commissioned Officers and Warrant Officers and not of Commissioned Officers, while section 18 in Chapter III, relating to Termination of Service deals with the retirement, release or discharge of persons subject to the Act. The Act is silent about key structural areas that constitute raising and maintaining an Army especially about the Commissioned Officers and their Commander-in-Chief.

22. In order to meet this structural constitutional requirement of Article 243(3) of the Constitution, it seems that a hurried effort was made and some key structural areas that are necessary for raising and maintaining an Army were inserted in section 176A of the Act in the year 1965[11] empowering the Federal Government to make Regulations in respect of "governance, command, discipline, recruitment, terms and conditions of service, precedence, and administration of the Pakistan Army." This slipshod legislative upload, however, does not meet the requirement of Article 243(3) of the Constitution, without providing for core, primary and essential legislation on these structural areas by the Parliament. This aspect is discussed in detail in later part of the judgment while examining the status of the Army Regulations (Rules). For now it would suffice to observe that the Pakistan Army Act, 1952, falls deficient of the Constitutional requirement under Article 243(3) as it does not provide for essential elements required to raise and maintain an Army, in particular, the grant of Commissions in the Army and the terms of service of the Commissioned Officers. Had this been done, the questions raised before the Court today, would not have arisen.

Post of COAS - Whether Unregulated

23. The appointment to the post of COAS is made under Article 243(4)(b) of the Constitution. It would be advantageous to have a look at the history of the successive amendments in the said Article before discussing various aspects surrounding the appointment of the COAS. The trajectory of constitutional amendments made in Article 243 is given as under:-

Constitutional amendments in Article 243

(Amendments are given in bold for convenience)

| 1973 Original Position | After 1985 Amendment | After 1997 Amendment | After 2002 Amendment | After 2003 Amendment | After 2010 Amendment/ Substituiton |
|---|---|---|---|---|---|
| (1) The Federal Government shall have control and command of the Armed Forces | (1) The Federal Government shall have control and command of the Armed Forces | (1) The Federal Government shall have control and command of Armed Forces | (1) The Federal Government shall have control and command of the Armed Forces | (1) The Federal Government shall have control and command of the Armed Forces | (1) The Federal Government shall have control and command of the Armed Forces |
| | (1A) Without prejudice to the generality of the foregoing provision, the Supreme Command of | (1A) Without prejudice to the generality of the foregoing provision, the Supreme Command of | (1A) Without prejudice to the generality of the foregoing provision, the Supreme Command of | (1A) Without prejudice to the generality of the foregoing provision, the Supreme Command of | (2) Without prejudice to the generality of the foregoing provision, the Supreme Command of |

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|---|---|---|---|---|---|
| | the Armed Forces shall vest in the President. (This clause was added). | the Armed Forces shall vest in the President. | the Armed Forces shall vest in the President. | the Armed Forces shall vest in the President. | the Armed Forces shall vest in the President. (This clause was renumbered as clause (2). |
| (2) The President shall subject to law, have power--- (a) to raise and maintain the Military, Naval and Air Forces of Pakistan; and the Reserves of such Forces; (b) to grant Commisisons in such Forces; and (c) to appoint the Chief of the Army Staff, the Chief of the Naval Staff and the Chief of the Air Staff and determine their salaries and allowances. | (2) The President shall subject to law, have power--- (a) to raise and maintain the Military, Naval and Air Forces of Pakistan; and the Reserves of such Forces; (b) to grant Commisisons in such Forces; and (c) to appoint in his discretion the Chairman, Joint Chiefs of Staff Committee, the Chief of the Army Staff, the Chief of the Naval Staff and the Chief of the Air Staff and determine their salaries and allowances. (The highlighted | (2) The President shall subject to law, have power--- (a) to raise and maintain the Military, Naval and Air Forces of Pakistan; and the Reserves of such Forces; (b) to grant Commissions in such Forces; and (c) to appoint the Chairman Joint Chief of Staff Committee, the Chief of Army Staff, the Chief of the Naval Staff and the Chief of the Air Staff and determine their salaries and allowances (Words "in his discretion" from clause 2(c) were omitted). | (2) The President shall subject to law, have power--- (a) to raise and maintain the Military, Naval and Air Forces of Pakistan; and the Reserves of such Forces; and (b) to grant Commissions in such Forces, Paragraph (c) of clause (2) was omitted and clause (3) was added. | (2) The President shall subject to law, have power--- (a) to raise and maintain the Military, Naval and Air Forces of Pakistan; and the Reserves of such Forces; and (b) to grant Commissions in such Forces, | (3) The President shall subject to law, have power--- (a) to raise and maintain the Military, Naval and Air Forces of Pakistan; and the Reserves of such Forces; (b) to grant Commissions in such Forces. (This clause was renumbered as clause (3). |

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|---|---|---|---|---|---|
| | words were added) | | | | |
| | | | (3) The President shall, in his discretion, appoint. (a) the Chairman, Joint Chiefs of Staff Committee; (b) the Chief of the Army Staff; (c) the Chief of the Naval Staff; and (d) the Chief of the Air Staff, and shall also determine their salaries and allowances. | (3) The President shall, in consultation with the Prime Minister, appoint- (a) the Chairman Joint Chiefs of Staff Committee; (b) the Chief of the Army Staff; (c) the Chief of the Naval Staff; and (d) the Chief of the Air Staff and shall also determine their salaries and allowances (In clause (3), for the words "in his discretion" the words "in consultation with the Prime Mihister" were substituted.) | (4) The President shall, on advice the Prime Minister, appoint- (a) the Chairman, Joint Chiefs of Staff Committee; (b) the Chief of the Army Staff; (c) the Chief of the Naval Staff; and (d) the Chief of the Airm Staff, and shall also determine their salries and allowances. (In clause (4), for the words "in consultation with the Prime Minister" the words "on advice of the Prime Minister" were substituted.) |

24. Article 243(4), which carries a long constitutional ancestry since 1956, provided in its original form that the President shall "subject to law" appoint and determine salary and allowances of the COAS, alongwith matters of raising and maintaining Armed Forces and granting Commissions in Forces. Under the Legal Framework Order, 2002 the matter of appointment of COAS was separated and provided for under clause (3) of Article 243 which was renumbered as clause (4) in the year 2010. Post 2002, clause (3), now clause (4) of Article 243, does not contain the expression "subject to law." Relying on the current language of clause (4) of Article 243 the learned Attorney-General submitted

that the post of the COAS not being "subject to law" allows appointment of even a retired General as the COAS.

25. The submission of the learned Attorney-General, if accepted, immediately gives rise to a number of questions: Who can be appointed as a COAS? Can a COAS be a serving or a retired army officer? What will be the rank of such army officer? What will be the tenure of COAS? What will be the age of his retirement? Can he be removed from service? Can he resign or step down due to personal reasons? How will the President, the Supreme Commander of the Armed Forces or the Federal Government having the command and control of the Armed Forces regulate the post of COAS? These questions are of importance for the nation and for the Armed Forces as a premier security institution of the country. It is inconceivable that the constitutional appointment to the post of the COAS in the "service of Pakistan[12]" goes unregulated under a written Constitution.

26. The interpretation put by the learned Attorney General, to the provisions of clause (4) of Article 243 is the result of reading it in isolation from the other clauses of Article 243, particularly the immediately preceding clause, i.e. clause (3), and in oblivion of the overall constitutional scheme of appointment to the constitutional posts and their tenure. It is a settled principle of interpretation that the words in a provision cannot be read and interpreted in isolation. The meaning and scope of a provision is determined by looking not to the isolated words used therein but by reading its text in context. The relevant provision of the Constitution is, therefore, to be read in its immediate context as well as in the overall scheme of the constitutional appointments.[13]

27. Clause (3) of Article 243 as elaborated earlier, contemplates raising and maintaining the Armed Forces and granting Commissions in such Forces under a law enacted by the Parliament. Such a law must provide for a cadre of commanders who will eventually head the Army. Article 243(4) simply deals with selection/ appointment of the COAS by the President on the advice of the Prime Minister. This selection/ appointment is naturally to be made from amongst the General Officers of the Army raised and maintained under Article 243(3) and is solely the prerogative of the President on the advice of the Prime Minister which cannot be curtailed by law. Both clauses (3) and (4) of Article 243 work in tandem, without disturbing each others powers. Therefore, separation by the Legal Framework Order 2002 of clause (4) from that of clause (3) and omission of the expression "subject to law" in clause (4) has only given more autonomy to the Prime Minister, the head of the Executive branch, in selection and appointment of a General Officer as a COAS. The removal of the term "subject to law" does in no manner lessen the importance of Article 243(3), which envisages that the terms of service of the General Officers should be provided under the law.

28. A look at the scheme of the Constitution shows that the President in whom the Supreme Command of the Armed Forces vests, has a fixed tenure under the Constitution.[14] The Prime Minister, on whose advice the COAS is appointed, being a Member of the National Assembly, has also a fixed term under the Constitution. A survey of the constitutional appointments to be made by the President is given as under:

Constitutional Appointments

| **Article** | **Constitutional Office** | **Article** | **Tenure or Age of Retirement** |
|---|---|---|---|
| 92(1) | Federal Ministers and Minister of State | 92(3) | May be removed from office at anytime on the advice of the Prime Minister (Not a Service of Pakistan- Article 260) |
| 93(1) | Advisors | 93(1) | The terms and conditions of appointment are determined by the President, on the advice of the Prime Minister. (Not a Service of Pakistan- Article 260) |

| | | | |
|---|---|---|---|
| 100(1) | Attorney-General for Pakistan | 100(2) | Holds office during the pleasure of the President. (Not a Service of Pakistan- Article 260) |
| 92(1) | Federal Ministers and Minister of State | 92(3) | May be removed from office at anytime on the advice of the Prime Minister (Not a Service of Pakistan- Article 260) |
| 101(1) | Governors of Provinces | 101(3) | Hold offices during the pleasure of the President. |
| 168(1) | Auditor General of | 168(3) | 4 years tenure, or age of 65 years |
| 177(1) | Chief Justice of Pakistan | 179 | No tenure or age of retirement Connected with the Judge of the Supreme Court who holds office till age of 65 years. |
| 177(1) | Judges of the Supreme Court | 179 | Hold offices till age of 65 years |
| 193 | Chief Justices of High Courts | 195 | No tenure or age of retirement Connected with the Judge of the High Court who holds office till the age of 62 years. |
| 193 | Judges of High Courts | 195 | Hold offices till age of 62 years |
| 203C(2) | Chief Justice Federal Shariat Court | 203C(4) | Tenure not exceeding 3 years; and may be appointed for further term(s) |
| 203C(2) | Judges of Federal Shariat Court | 203C(4) | Tenure not exceeding 3 years; and may be appointed for further term(s) |
| 203F | Judges of Supreme Court Shariat Appellate Bench | 203F(4) | Holds office for such period as the President may determine |
| 213(1) | Chief Election Commissioner | 215(1) | 5 years tenure |
| 218(2)(b) | Members of Election Commission | 215(1) | 5 years tenure |
| 228(2) | Members of Council of Islamic Ideology | 228(5) | 3 years tenure |
| 228(4) | Chairman, Council of Islamic Ideology | 228(5) | No tenure. But same as that of a Member, i.e., 3 years under Article 228(5). |
| 242(1A) | Chairman of Public Service Commission | | No tenure or age of retirement. Terms of service of a Member applicable. Section 4(1) of the FBSC Ordinance, 1977 provides a tenure of three years or an age of 65 years, whichever is earlier of a Member the Commission. |
| 243(4) | Chairman, Joint Chiefs of Staff Committee; and Chiefs of Armed Forces | | No tenure prescribed in the Constitution and the law relating to the Armed Forces. |

The above provisions of the Constitution provide for the following constitutional positions as to tenure or age of retirement: (i) posts with specific tenure or age of retirement in the Constitution, (ii) posts with no specific tenure or age of retirement but are regulated at the pleasure of the President, and (iii) posts with no specific tenure or age of retirement but are regulated with the tenure or age of retirement of the persons so appointed to the posts. A quick reference can be made to the appointment of Chief

Justice of the Supreme Court or of a High Court, which is an appointment without a tenure or age of retirement. This falls in the third category. Chief Justice of the Supreme Court or of a High Court is appointed from amongst the Judges of these Courts and it is the age of retirement of these Judges, under the Constitution, that regulates the age of retirement of the Chief Justices. Therefore, if a Judge of Supreme Court retires at 65 years of age, so does the Chief Justice of Pakistan. Similarly, the Chairman of the Council of Islamic Ideology has no tenure or age of retirement under the Constitution. However, as the Chairman of the Council is appointed from amongst the Members of the Council, it is his tenure as a Member that regulates his tenure in the post of Chairman. Another example is of the tenure of the Chairman of the Public Service Commission, who is not provided under Article 242(1A). However, being a Member[15] of the Public Service Commission his tenure and age of retirement stand regulated under section 4(1) of the Federal Public Service Commission Ordinance, 1997 which determines tenure and age of retirement of a Member.

29. Army Regulations (Rules) 125 read with Annex D shows that an officer of the Army holding the rank of a "General" is appointed as a COAS. This is also an admitted position according to the submissions made by the Attorney-General besides being visible from the appointment notifications of the earlier and the present COAS, placed on the record. The appointment notifications provide that a Lieutenant-General is first promoted to the rank of a General and then appointed to the post of COAS. It is for this reason that the Federal Government in the Summaries and notifications, referred to above, have taken pains to extend the tenure of General Bajwa for a period of three years either through extension in service or limiting his retirement in order to make him available for re-appointment to the post of COAS. Therefore, the substantive rank of the army officer who is posted as a COAS is that of a General, which in turn then regulates the tenure, as well as, the other terms of service of the COAS. This puts to rest the impression that the post of COAS is without any tenure under Article 243(4)(b). Thus, the constitutional appointment of COAS, like similar constitutional appointments, stands regulated and falls in line with the constitutional scheme. It is important to underline that it is only a serving General who can be appointed as the COAS. This is because only a serving army officer is subject to the Pakistan Army Act, 1952.[16] A retired army officer has no terms of service and is not regulated under the Act. Therefore, the terms of service of the rank of the General appointed as COAS regulates the tenure and terms of service of the COAS, other than his salary and allowances which are to be determined by the President under Article 243(4) of the Constitution.

Tenure or Age of Retirement of a General

30. We have examined the laws relating the Pakistan Army to determine the terms of service of a General, in particular his tenure and age of retirement. The Pakistan Army Act, 1952 and the Pakistan Army Act Rules, 1954 are totally silent about the tenure or age of retirement of a General. Section 18 of the Act states that the prescribed Authority may, in conformity with such rules as may be prescribed in this behalf, retire, release, or discharge from the service any person subject to this Act. While Rule 12 of the Rules provides that the retirement or release of an officer shall be authorized by the Federal Government and notified in the official Gazette. Both these provisions do not provide the age of retirement or tenure of army officers including a General.

31. The Army Regulations, however, contain the provisions regarding the retirement of the army officers. Regulations 262, 262-A and 262-C deal with normal retirement of officers. Regulation 262 deals with normal retirement of officers who were on the Effective List[17] on 1.07.1970 (commissioned prior to 1970) and provides their retirement age and service limit including that of a General as follows:

| Rank | Age (yrs) | Service |
|---|---|---|
| (a) Major and below | 47 | 23 |
| (b) Lieut-Colonel | 50 | 25 |
| (c) Colonels | 53 | 26 |

| | | |
|---|---|---|
| (d) Brigadiers | 55 | 28 |
| (e) Major Generals | 57 | 30 |
| (f) Lieut-Generals | 58 | 32 |
| (g) Generals | 60 | 35 |

Regulation 262-A deals with officers commissioned after 1970 which includes the incumbent COAS, while Regulation 262-C deals with the officers commissioned after 1988. Regulation 262-A, which is applicable to General Bajwa, does not provide for age of retirement for the officer of the rank of a General as seen from the relevant provision reproduced hereunder:

| Rank | Age Limit |
|---|---|
| (a) Major and below | 48 |
| (b) Lieut-Colonel | 50 |
| (c) Colonel | 52 |
| (d) Brigadier | 53 |
| (e) Major General | 55 |
| (f) Lieut-General | 57 years or on completion of one tenure of four years which ever is earlier. However, an officer may be retained in service as a special case by the Federal Government for an extra year on completion of his tenure of four years. |

32. The laws relating to the Army discussed above do not provide for the tenure or age of retirement of a General. The learned Attorney-General has also conceded this legal deficiency and submitted that the tenure of a General, at present, is being regulated by the institutional convention and practice. As per the said practice, he submitted, the tenure of a General and consequentially of a COAS is three years. This institutional practice pleaded by the Attorney-General is discussed in detail in the later part of the judgment. It would suffice here to observe that such an institutional practice cannot be a valid substitute of the law required to be made in pursuance of the constitutional mandate under Article 243(3) of the Constitution. This is a serious legislative omission. Service in the Armed Forces being "Service of Pakistan" must be regulated by or under the law in accordance with the provisions of Article 240 of the Constitution read with Article 243(3). Otherwise, it is inconceivable that the highest rank in the Army, would have no tenure or age of retirement or other terms of service.

Extension in service and limit in retirement of a General

33. The re-appointment, extension or fresh appointment of General Bajwa as COAS has been structured by the Federal Government by first limiting the retirement of the General under Regulation 255 for three years and then appointing him as COAS for another term under Article 243(4) of the Constitution. During the course of hearing of this case, the said Regulation was amended overnight by the Federal Government on 26.11.2019 to include the expression "extension" in limiting retirement. In the absence of a tenure or age of retirement for the rank of a General under the law, this exercise to amend the Regulation 255 did not serve any purpose.

Scope and Meaning of Army Regulation (Rules) 255

34. The above Regulation has been provided in the Chapter dealing with Termination of Service of Army Regulations (Rules) and bears the heading Retirement and Resignation. This Regulation can only be invoked for an officer who has retired or is about to retire. The emphasis is to delay the retirement either by limiting the retirement or by extending the date of retirement or suspending retirement after retirement. This is a temporary arrangement and can only be availed if the exigencies of service and public interest so require. The essence of the Regulation is that if an officer is on the way out (about to retire) and urgent or pressing circumstances require that he be retained in service,

this Regulation comes into play. An example could be that during war, an army officer may not be allowed to leave the war front just because he is about to retire or has retired, in such a situation the retirement can be limited, extended or suspended. This is in line with Regulation 255A. The exercise of discretion by the Federal Government under the said Regulation has to be structured on parameters of exigency of service with a corresponding temporary period in mind. The words suspension, limiting retirement and extension do not connote permanency and cannot be equated with grant of new tenure or a fresh appointment. Therefore, a new tenure or fresh appointment for a full new tenure cannot be given or granted to an army officer under Army Regulation (Rules) 255.

Status of Regulations 255

35. Reading of Regulation 255 in the light of the relevant provisions of the Act and the Rules has given rise to some serious doubts as to the vires of its provisions which we would like to highlight in the public interest so that the Federal Government when initiates a legislative process on the subject, may take it also into consideration. Section 18 of the Act provides as under:

> 18. Retirement, release or discharge.-- The prescribed Authority may, in conformity with such rules as may be prescribed in this behalf, retire, release, or discharge from the service any person subject to this Act.

Section 176(2)(a) empowers the Federal Government to make Rules on the subject of "retirement" and as a consequence Rule 12 of the Pakistan Army Act Rules, 1965 provide as follows:

> 12. Authorities empowered to authorize retirement, release or discharge.--(a) The retirement or release of an officer shall be authorized by the Federal Government and notified in the official Gazette. The Federal Government may at any time terminate the services of an officer.

36. Army Regulation (Rules) 255 appears in Chapter XI of the Regulations dealing with Termination of Service under the head Retirement and Resignation. Regulation 255, prior to the recent amendment, provided as follows:

> Retirement and Resignation
>
> 255. General Provision:- Retirement of officers will always be
>
> subject to the exigencies of service. Full power is reserved to the Federal Government temporarily or limit retirement, in general or in individual cases wherever it may be necessary to do so in public interest. Officer of the rank of Colonel and above will not be permitted to retire voluntarily unless deemed expedient by the Federal Government.

The above Regulation was amended in one day on 26.11.2019 during the pendency of this case. This was done when the Court asked the Attorney-General to show if there was any provision of the law dealing with "extension" of the tenure of a General or COAS. The amended Regulation is as follows:

> Retirement and Resignation
>
> 255. General Provision:- Notwithstanding anything contained in the Army Regulations, Volume-I (Rules), 1998, the Federal Government shall have the power to suspend temporarily or limit retirement, the latter including the grant of extension in the service of any officer, in general or in individual cases, during the currency of tenure or upon reaching retirement, wherever it is necessary to do so in any exigency or in the public interest. Officer of the rank of Colonel and above will not be permitted to retire voluntarily unless deemed expedient by the Federal Government

37. Section 176A of the Act clearly provides that the Federal Government shall make Regulations for all or any of the purposes of the Act but other than those in respect of which Rules have been made under section 176. Rule 12 specifically covers the subject of "retirement"; therefore, Regulations could not deal with the subject of retirement. While the Act and the Rules mention simple retirement, the Regulation introduces a totally new concept of suspending, limiting in and extending retirement, which apparently exceeds the mandate of the Act.

Status of Section 176A of the Act and the Army Regulations

38. The examination of Regulation 255 has lead us to examine the history and constitutionality of section 176A of the Act and the vires of the Army Regulations as a whole. Before Independence, Army of the British India was governed by the Indian Army Act, 1911. After 1947, the Pakistan Army continued to be governed by the said Act by virtue of section 18 of the Indian Independence Act, 1947. The Act of 1911 was repealed and replaced by the Pakistan Army Act, 1952. We could not trace the history of Army Regulations (Rules) and their legislative authority before 1960 or 1965 when they are said to have been made under section 176A of the Act. The Regulations were in existence even in 1945 but did not have a legislative cover under the Indian Army Act, 1911 as there was no provision under the said Act to make the Regulations. India resolved this anomaly by adding sections 192, 193 and 193A in the Indian Army Act, 1950; and Pakistan did this in the year 1965 by adding section 176A to the Pakistan Army Act, 1952.

Essential Legislative Function - Excessive Delegation

39. In order to provide a legal cover to the Army Regulations, section 176A was inserted in the Act vide the Pakistan Army (Amendment) Ordinance, 1965 (Act XV of 1965) which empowered the Federal Government to make Regulations in the following manner:

> 176A. Power to make regulations. The Federal Government may make regulations for the governance, command, discipline, recruitment, terms and conditions of service, rank, precedence, and administration of the Pakistan Army and generally for all or any of the purposes of this Act, other than those in respect of which rules have been made under section 176. (emphasis supplied)

It is useful to refer to the debates[18] in the National Assembly when Section 176-A was introduced through the Pakistan Army (Amendment) Ordinance, 1965. Dr. Aleem Al-Razi, the then Member of the National Assembly pointed out as follows:

> "Thirdly, the last clause in section 176 of the Act is absolutely unnecessary. It takes away the entire thing from the purview of this Legislature to the Executive Government alone who will be determining the factors whom to be given precedence and whom to be given a new title or new favour this is absolutely in the hand of the Central Government. Under the previous rules, under section 176 of the Pakistan Army Ordinance, 1952, Mr. Speaker, the wording of that section are not so quiet but unfortunately by adding new section 176-A a comprehensive power we are giving to the Executive Government and we shall not know anything. Even there is no provision of publication of those rules and regulations in the official Gazette of Pakistan. So, Mr. Speaker, Sir, may I ask the Members of the Treasury Benches that they may publish these rules and regulations in the Official Gazette and if necessary produce those rules and regulations on the floor of the House if not for approval may be for our reading, for our understanding so that we may know the fate of our Army, we may know the rules and regulations by which our Armed Forces are governed so that we may also go in the Armed Forces of Pakistan." (emphasis supplied)

Mr. Muhammed Qasim Malik, the then Parliamentary Secretary to the Defence Division, who tabled the Ordinance for approval by the Assembly under clause (3) of Article 29 of the Constitution, 1962 pointed out as under:

> "... This is actually to legalize the Pakistan Army Regulations which are already in existence. But unfortunately it was found later on that they had no legal force under the Army Act. Under the Army Act, Army regulations can be made and they already exist and there is a great necessity of these Regulations. Therefore, this Ordinance had to be brought in. The main purpose is to legalize this and to give a certain legal force behind those regulations because they could not be framed unless and until this Ordinance was passed or this Resolution is passed "

40. The debates are self-explanatory and set out the purpose of inserting section 176A in the Act. It can be safely maintained that the said Regulations existing from the time of the British India were

promulgated as statutory Regulations by the Federal Government under section 176A of the Act after 1965. The only problem is that these Regulations once brought within the statutory fold must flow from the Act. Regulations which do not meet this requirement would be ultra vires the Act. The scope of the Act or the vires of the Regulations cannot be determined by the words inserted in section 176A like governance, command, discipline, recruitment, terms and conditions of service, rank, precedence and administration of the Pakistan Army. These words are mere words when there is no essential or core legislation on these subjects. Article 142(a) of the Constitution provides that the Parliament shall have exclusive power to make laws with respect to any matter in the Federal Legislative List. Item No. 1 of the said List provides for Military, Naval and Air Forces raised and maintained by the Federation. However, no such legislation was ever made since it was first clearly mandated under the 1956 Constitution. Section 176-A inserted in 1965 provided a shortcut and authorized the Federal Government to regulate areas like governance, command, discipline, recruitment, terms and conditions of service, rank, precedence and administration of the Pakistan Army through Regulations. The power of the Parliament under the Constitution cannot be delegated to the Federal Government without the Parliament performing the basic essential legislative function, i.e. providing policy guidelines on these areas.

41. This Court has time and again held that the essential legislative function of the Parliament cannot be delegated.[19] The wisdom behind it is that the delegatee must have legislative guidelines to formulate Rules and Regulations, and that guidelines, contours or boundaries must come from the Legislature itself. Delegation of an "essential legislative function" by the Legislature to the Executive is not permissible under the Constitution. The foundation of embargo owes its genesis to the concept of trichotomy of powers between the Legislature, the Executive and the Judicature, which is a fundamental principle of our constitutional construct. Under the Constitution, these three organs of the State have been entrusted with separate and specified functions. The primary function of the Legislature is to legislate laws, of the Executive to execute laws, and of the Judicature to interpret laws.[20] The words of Chief Justice Marshall of the US Supreme Court frequently quoted, in explaining the doctrine of separation of powers, by the Courts of various jurisdictions in the last about two centuries still hold: "the Legislature makes, the Executive executes, and the Judiciary construes, the law." The Legislature cannot abdicate performance of the function assigned to it by the Constitution and set up a parallel Legislative authority. Though the Legislature can confer upon any person or body the power to make subordinate/delegated legislation (rules, regulations or byelaws, etc) in order to give effect to the law enacted by it yet it must perform itself the essential legislative function, i.e. to exercise its own judgment on vital matters of policy and enact the general principles providing guidance for making the delegated legislation. Through section 176A, the Parliament appears to have divested itself of the essential legislative function which amounts to excessive delegation.

42. The Army Regulations (Rules) will be rendered ultra vires if they do not draw their power from the parent Act, i.e. the Pakistan Army Act, 1952 and will suffer from excessive delegation if they draw their strength only from section 176A of the Act. The Regulations have to be fully examined in the light of these principles. Once again it is for the Federal Government to bring about appropriate legislation to remove these defects so that the Regulations have a proper legal cover and are fully enforceable under the law.

Accessibility of Regulations

43. The copy of the Army Regulations (Rules) carries a stamp of "Restriction" stating as follows:

> RESTRICTED The information given in this document is not to be communicated either directly or indirectly, to the press or to any person not authorized to receive it.

Acts of the Parliament or subordinate legislation are public documents and must be readily available to the citizen of the country subject to the exceptions provided under the Right of Access to Information Act, 2017. Those exceptions extend only to record relating to defence forces, defence installations or connected therewith and ancillary to defence and national security,[21] and not to the Army Laws. It is important to remember that when there is information, there is enlightenment and when there is debate, there are solutions.[22] Had the Army Regulations been made accessible to public and had these matters been discussed earlier, the omissions pointed out for the first time since 1947 could have been remedied much earlier. Therefore, every legislative instrument must be made accessible to public.

Legal Vacuum and the Assurance by the Federal Government

44. After detailed examination of the laws relating to the Army it is concluded that there is no provision providing for the tenure and age of retirement of a General and as a consequence of the COAS, as well as, for the extension of tenure or fresh appointment for another tenure. The Summaries initiated by the Ministry of Defence and approved by the President, the Prime Minister and the Cabinet, for the reappointment, extension and fresh appointment of the COAS seems to be meaningless and of no consequence in the said legal vacuum. The learned Attorney-General has assured the Court that the Federal Government will carry out legislation through the Parliament in the shape of an Act within six months to provide for the terms of service of a General (and as a consequence of COAS) so that effect can be given to Article 243 in letter and spirit and functionality of the constitutional provisions be realized at the earliest. Even otherwise, this Court could have directed[23] the Federal Government to initiate and process legislation to give effect to a constitutional mandate. The Federal Government may also, if deems appropriate, specifically provide for extension of the tenure of an army officer of the rank of a General in the Act with grounds for granting such an extension, so that the discretion of the Federal Government in granting extension to a General is structured. It may also carry out necessary amendments in the law to protect the Army Regulations (Rules) as discussed above, which appear to be without any legal cover and fall outside the scope of the Pakistan Army Act, 1952.

Institutional Practice

45. When confronted with the legal vacuum regarding the tenure, age of retirement and other terms of service of a General, the learned Attorney-General candidly responded that there is an unwritten institutional practice in vogue since long whereby the tenure of a General is considered to be of three years. He admitted that no tenure or age of retirement of a General has been provided under the law. Perusal of the earlier notifications placed before us relating to the former Chiefs of Army Staff and the process of reappointment, extension and fresh appointment of the incumbent, pre-suppose a fixed tenure of three years for a General/COAS. An institutional practice followed continuously and consistently by an institution for a considerable period of time may be used to resolve a controversy, in the absence of the law.[24] We can, therefore, place reliance on the institutional practice in order to ensure realization of the constitutional scheme under which it is inconceivable for a constitutional post in the service of Pakistan to be left totally unregulated and to continue forever. We are, however, of the view that, in the first instance, this matter should be allowed to be regulated by law as mandated by the Constitution, so that the people of Pakistan decide through their chosen representatives the length of tenure of a General, as this will consequentially determine the tenure of the COAS. The people of Pakistan may accept or reject the institutional practice through their chosen representatives in the Parliament. Besides, the question before us is not only regarding the tenure but also regarding the extension of tenure for another term, which in any case, requires legislation. The Attorney-General has assured us that necessary legislation will be brought into effect within six months to plug this legal vacuum. This assurance has tempted us to exercise judicial restraint in the matter, so that people of Pakistan may decide this question through the Parliament.

Judicial Restraint

46. Judicial restraint in its substantial approach urges Judges considering constitutional questions to give deference to the views of the elected branches and invalidate their actions only when constitutional limits have clearly been violated;[25] while the principle, "if it is not necessary to decide more, it is necessary not to decide more"[26] well states the procedural aspect of judicial restraint. The power of judicial review is a "great weapon in the hands of Judges", but the Judges must observe the Constitutional limits set by our parliamentary system on their exercise of this beneficial power, namely, the separation of powers between the Parliament, the Executive and the Courts. Judicial review must, therefore, remain strictly judicial and in its exercise Judges must take care not to intrude upon the domain of the other branches of Government. Judicial restraint, in this perspective, is essential to the continuance of rule of law, and for the continued public confidence in the political impartiality of the judiciary and the voluntary respect for the law as laid down and applied by the Courts.[27]

47. Separation of powers is a cornerstone of a constitutional democracy and we do not wish to encroach upon the domain of the legislature. This Court has, therefore, in many cases, exercised judicial restraint in deference to the principle of trichotomy of powers and given the other branches of Government a fair opportunity to fulfill their constitutional mandate before making a final verdict on the disputed matters. The cases of Sindh High Court Bar Association[28], Sharaf Faridi[29] and Nadeem Ahmad[30] may be cited with advantage. We, therefore, exercise judicial restraint and give an opportunity to the Federal Government in the light of the assurance of the Attorney-General to carry out appropriate legislation through an Act of Parliament within a period of six months.

Continuity of Incumbent COAS for Six Months

48. In this state of legal vacuum regarding the tenure of a COAS and in the light of the assurance given by the Federal Government to address these issues through fresh legislation within six months, we considering that the COAS is the commanding officer of the Pakistan Army[31] and is responsible for the command, discipline, training, administration, organization and preparedness for war of the Army [32] and in order to preserve smooth functioning of the Pakistan Army, find it appropriate to allow the current status of the COAS to continue for a period of six months, whereafter the new legislation (Act of the Parliament) shall determine his tenure and other terms of his service.

49. This exercise of judicial restraint may not be mixed up or confused with the infamous and unpopular application of the doctrine of necessity, which amounts to going against the law of the land to attend to some political or other goal. This is not so in the present case where there is no law; in fact, there is a total legal vacuum regarding the tenure of a General. It is also instructive to refer to the spirit of Article 203D of the Constitution whereunder the Court can direct the Federal Government to initiate process for making appropriate legislative amendments in the relevant law and can grant reasonable time for doing the needful.

Summary of Findings of the Court

50. In our endeavour to address the legal questions raised in this case, we have explored the scope of Article 243 of the Constitution, reviewed the Pakistan Army Act, 1952, the Pakistan Army Act Rules, 1954, and the Army Regulations (Rules) and have found:

1) That the Pakistan Army Act, 1952 falls deficient of the structural requirements for raising and maintaining an Army under clause (3) of Article 243 of the Constitution. It does not provide for essential elements required to raise and maintain an Army, particularly the grant of Commissions in the Army and the terms of service of the Commissioned Officers including tenure and extension of a General.
2) That the terms of service of the rank of General regulates the tenure and other terms of service (except salary and allowances) of the post of the COAS. The salary and allowances of the COAS are to be determined by the President under clause (4) of Article 243 of the Constitution.
3) That no tenure or age of retirement for the rank of General is provided under the law. As per the institutional practice a General retires on completion of a tenure of three years. Although an

institutional practice cannot be a valid substitute of the law required to be made under clause (3) of Article 243 yet in the absence of such law the said practice can be enforced to remove uncertainty as to the tenure of a General and to make the constitutional post of COAS functional. However, in the first instance, the matter should be allowed to be regulated by law, made by the legislature, as mandated by the Constitution.

4) That there is no provision in the law for extending service of a General for another tenure; nor is there any consistent and continuous institutional practice of granting such extension, which could be enforced in absence of the law on the subject.

5) That the Summaries of the Ministry of Defence approved by the President, the Prime Minister and the Cabinet for the reappointment, extension and fresh appointment of General Bajwa seem to be meaningless and of no consequence, in absence of the law prescribing tenure of a General and providing extension for another tenure.

6) That Regulation 255 of the Army Regulations (Rules), in its original as well as amended form, does not confer authority on the Federal Government to grant extension of another full tenure to a General. This Regulation provides for only a temporary arrangement for a short term, if the exigencies of service so requires in the public interest.

7) That Regulation 255 and other Regulations of the Army Regulations (Rules) on the subject of "retirement" appear to be ultra vires the Pakistan Army Act, as Section 176 of the Pakistan Army Act has assigned the subject of "retirement" to be regulated under the Rules and not under the Regulations. The Regulations can be made only for the matters other than those which are to be dealt with under the Rules.

8) That Section 176A of the Pakistan Army Act and the Regulations made under it appear to suffer from the excessive delegation of the essential legislative function, as neither that section nor any other section of the Pakistan Army Act provides the essential legislative policy guidelines for making the delegated legislation, viz. the Regulations, on the subjects mentioned therein.

9) That in view of the assurance of the Attorney-General given on behalf of the Federal Government to process the legislation for meeting the deficiencies in the Pakistan Army Act, in particular, the tenure, age of retirement and if deemed proper, the extension of tenure of a General, it is appropriate to leave the matter, at the first instance, to be decided by the chosen representative of the people of Pakistan by making an appropriate legislation.

10) That in view of the legal vacuum regarding tenure and extension of a General and the assurance given by the Attorney-General to process legislation on the subject within six months, and also considering the importance of the responsibilities of the COAS regarding administration and organization of the Army, it is appropriate that the incumbent COAS may continue for a period of six months, in order to preserve continuity of the institution.

51. These are the detailed reasons of our short order dated 28.11.2019 whereby the instant petition was disposed of in the following terms:

"The learned Attorney-General has categorically assured the Court that this practice being followed is to be codified under the law and undertakes that the Federal Government shall initiate the process to carry out the necessary legislation in this regard and seeks a period of six months for getting the needful done. Considering that the COAS is responsible for the command, discipline, training, administration, organization and preparedness for war of the Army and is the Chief Executive in General Headquarters, we, while exercising judicial restraint, find it appropriate to leave the matter to the Parliament and the Federal Government to clearly specify the terms and conditions of service of the COAS through an Act of Parliament and to clarify the scope of Article 243 of the Constitution in this regard. Therefore, the current appointment of General Qamar Javed Bajwa as COAS shall be subject to the said legislation and shall

continue for a period of six months from today, whereafter the new legislation shall determine his tenure and other terms and conditions of service."

52. It is, however, claried that in case the federal Government remains unable to regulate the tenure and terms of service of a General and as a consequence of the COAS through an appropriate legislation by the Parliament as assured by the Attorney-General, within a period of six months, the tenure of the constitutional post of COAS could not be left totally unregulated and to continue forever. This would be inconceivable and amount to a constitutional absurdity. Therefore, in case of such failure of the Federal Government the institutional practice of retirement of a General on completion of the tenure of three years as pleaded by the Attorney-General and borne out from the record, shall stand enforced to regulate the tenure of General Bajwa and consequentially his tenure as COAS, from the date of his promotion to the rank of General and appointment as COAS, i.e. 29.11.2016. And the President shall, on advice of the Prime Minister, appoint a serving General officer as the new COAS.

53. In the end, we would like to emphasise that this crucial matter of the tenure of COAS and its extension, which has a somewhat chequered history, is before the Parliament, to fix for all times to come. It is now for the people of Pakistan and their chosen representatives in the Parliament to come up with a law that will provide certainty and predictability to the post of COAS, remembering that in strengthening institutions, nations prosper.

(Sd)

(Syed Mansoor Ali Shah)

Judge

54. I agree.

(Sd)

(Mazhar Alam Khan Miankhel)

Judge

ASIF SAEED KHAN KHOSA, C J.

55. I agree with the judgment authored by my learned brother Syed Mansoor Ali Shah, J., and would like to add that in our peculiar historical context Chief of the Army Staff holds a powerful position in ways more than one. Unbridled power or position, like unstructured discretion, is dangerous. It has been a shocking revelation to us that the terms and conditions of service of Chief of the Army Staff, the tenure of his office, extension in the tenure of his office or his reappointment to that office have remained unregulated by any law so far. Clause (3) of Article 243 of the Constitution of the Islamic Republic of Pakistan, 1973 mandates that the President's power to raise and maintain the armed forces is to be "subject to law" and, thus, leaving some vital aspects relevant to the office of Chief of the Army Staff without being regulated by any law militates against the said express provision of the Constitution. In the backdrop of the last three scores and twelve years of our history I may observe with hope and optimism that framing of a law by the Parliament regulating the terms and conditions of the office of Chief of the Army Staff may go a long way in rectifying multiple historical wrongs and in asserting sovereign authority of the chosen representatives of the people besides making exercise of judicial power of the Courts all pervasive. I understand that democratic maturity of our nation has reached a stage where this Court can proclaim that, as declared by Chief Justice Sir Edward Coke of England in the Commendam case in the year 1616 regarding the powers of King James I, "Howsoever high you may be; the law is above you".

(Sd.)

Asif Saeed Khan Khosa, CJ

MWA/J-6/S Order accordingly.

**PLD 2020 Supreme Court 48**

**Present: Asif Saeed Khan Khosa, C J, Mazhar Alam Khan Miankhel and**

**Syed Mansoor Ali Shah, JJ**

**JURISTS FOUNDATION through Chairman---Petitioner**

**Versus**

**FEDERAL GOVERNMENT through Secretary, Ministry of Defence and others---Respondents**

Constitutional Petition No.39 of 2019, decided on 28th November, 2019

(Against Extension of Tenure of Chief of the Army Staff).

**Constitution of Pakistan---**

----Arts. 243(4)(b) & 184(3)---Pakistan Army Act, (XXXIX of 1952), S.8(2)---Pakistan Army Act Rules, 1954, R. 12 Army Regulations (Rules), 1998, Regln. 255---Constitutional petition before the Supreme Court regarding extension/re-appointment of the incumbent Chief of the Army Staff for a fresh term of three years in such office after expiry of his first term---Constitutionality and legality---Examination of Art.243(4)(b) of the Constitution, the Pakistan Army Act, 1952, the Pakistan Army Act Rules, 1954 and the Army Regulations (Rules), 1998 showed that none of the said laws contained any provision relating to the tenure of the Chief of the Army Staff (COAS) or of a General and whether the COAS could be reappointed or his term could be extended or his retirement could be limited or suspended under the Constitution or the law---Attorney-General categorically assured the Court that the Federal Government shall initiate the process to carry out the necessary legislation in this regard and sought a period of six months for getting the needful done---Supreme Court while exercising judicial restraint observed that considering that the COAS was responsible for the command, discipline, training, administration, organization and preparedness for war of the Army and was the Chief Executive in General Headquarters, it was appropriate to leave the matter to the Parliament and the Federal Government to clearly specify the terms and conditions of service of the COAS through an Act of Parliament and to clarify the scope of Art.243 of the Constitution in this regard---Supreme Court directed that the current appointment of incumbent COAS as Chief of the Army Staff shall be subject to the said legislation and shall continue for a period of six months from present date, whereafter the new legislation shall determine his tenure and other terms and conditions of service---Petition was disposed of accordingly.

Petitioner in person.

For Respondents:

Anwar Mansoor Khan, Attorney-General for Pakistan with Sajid Ilyas Bhatti, Addl. Attorney-General Amir-ur-Rehman, Addl. Attorney-General and Ch. Ishtiaq Ahmed, Addl. Attorney-General.

Sohail Mehmood, Dy. Attorney-General.

Mian Asghar Ali, Dy. Attorney-General Assisted by Ms. Faryal Shah Afridi, Advocate.

Syed Iqbal Hashmi, Advocate Supreme Court.

Brig. Falak Naz, Director (Law), Ministry of Defence.

Flt. Lt. Khalid Abbas, Asst. Director (Law), Ministry of Defence.

Brig. Muhammad Khalid Khan, JAG Department, GHQ.

Lt. Col. Rai Tanveer Ahmed Kharral, OIC, JAG Department, GHQ.

Dr. Farogh Nasim, Advocate Supreme Court for Respondent No.4, along with Abid S. Zuberi, Advocate Supreme Court, assisted by Ayan Memon, Shahid, Naseem Gondal and Barrister Neelum Ali Bukhari.

Date of hearing: 28th November, 2019.

**ORDER**

For detailed reasons to be recorded later we pass the following short order:-

2. The extension/reappointment of General Qamar Javed Bajwa, Chief of the Army Staff ("COAS") has been challenged before us. In the proceedings before us during the last three days the Federal

Government has moved from one position to another referring to it as reappointment, limiting of retirement or extension of tenure and has also interchangeably placed reliance on Article 243(4)(b) of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution") and Regulation 255 of the Army Regulations (Rules), 1998. However, finally today the Federal Government through the learned Attorney General for Pakistan has presented this Court with a recent summary approved by the President on the advice of the Prime Minister along with Notification dated 28.11.2019 which shows that General Qamar Javed Bajwa has been appointed as COAS under Article 243(4)(b) of the Constitution with effect from 28.11.2019.

3. We have examined Article 243(4)(b) of the Constitution, Pakistan Army Act, 1952, Pakistan Army Act Rules, 1954 and Army Regulations (Rules), 1998 and inspite of the assistance rendered by the learned Attorney-General, we could not find any provision relating to the tenure of COAS or of a General and whether the COAS can be reappointed or his term can be extended or his retirement can be limited or suspended under the Constitution or the law. The learned Attorney-General has taken pains to explain that the answers to these questions are based on practice being followed in the Pakistan Army but the said practice has not been codified under the law.

4. Article 243 of the Constitution clearly mandates that the Federal Government shall have control and command of the Armed Forces and the supreme command of the Armed Forces shall vest in the President. It further provides that the President shall, subject to law, have power to raise and maintain the military, etc. and it is the President who on the advice of the Prime Minister shall appoint, inter alia, COAS. Article 243 of the Constitution, therefore, clearly shows that the President shall, subject to law, raise and maintain the military, however, the laws referred, to above do not specify the tenure, retirement, re-appointment and extension of the COAS or of a General of the Pakistan Army.

5. The learned Attorney-General has categorically assured the Court that this practice being followed is to be codified under the law and undertakes that the Federal Government shall initiate the process- to carry out the necessary legislation in this regard and seeks a period of six months for getting the needful done. Considering that the COAS is responsible for the command, discipline, training, administration, organization and preparedness for war of the Army and is the Chief Executive in General Headquarters, we, while exercising judicial restraint, find it appropriate to leave the matter to the Parliament and the Federal Government to clearly specify the terms and conditions of service of the COAS through an Act of Parliament and to clarify the scope of Afticle 243 of the Constitution in this regard. Therefore, the current appointment of General Qamar Javed Bajwa as COAS shall be subject to the said legislation and shall continue for a period of six months from today, whereafter the new legislation shall determine his tenure and other terms and conditions of service.

6. This petition is disposed of in the above terms.

(Sd.)
Asif Saeed Khan Khosa,
Chief Justice
(Sd.)
Mazhar Alam Khan Miankhel,
Judge
(Sd.)
Syed Mansoor Ali Shah,
Judge

MWA/J-5/S Order accordingly.

**P L D 2020 Supreme Court 52**

**Present: Asif Saeed Khan Khosa, C J, Mazhar Alam Khan Miankhel and Syed Mansoor Ali Shah, JJ**

**JURISTS FOUNDATION through Chairman---Petitioner**

**Versus**

**FEDERAL GOVERNMENT through Secretary, Ministry of Defence and others---Respondents**

Constitutional Petition No.39 of 2019, decided on 26th November, 2019

(Against Extension of Tenure of Chief of the Army Staff).

**(a) Constitution of Pakistan---**

----Arts. 243(4)(b) & 184(3)---Army Regulations (Rules), 1998, Regln.255---Constitutional petition before the Supreme Court regarding extension/re-appointment of the incumbent Chief of the Army Staff for a fresh term of three years in such office after expiry of his first term---Constitutionality and legality---Plea by Attorney General that in terms of Regulation No. 255 of the Army Regulations (Rules), 1998, retirement of an Army officer could temporarily be suspended or limited; that the Federal Government had the requisite authority to re-appoint or extend the services of an incumbent Chief of the Army Staff prior to his retirement if the exigencies of the service so required or the public interest so demanded---Held, that perusal of Regln. No.255, prima facie, showed that the said provision could be invoked after an officer had already retired from service and that was why the said Regulation spoke of suspension of retirement or limiting of retirement---Suspending a retirement or limiting a retirement before the retirement had actually taken effect may amount to putting the cart before the horse---Attorney-General was unable to refer to any provision in any legal instrument regarding extension in service of a Chief of the Army Staff upon completion of his first term in that office or for his re-appointment to that office after completion of his first term---Since present issue called for a detailed examination of the matter of extension/re-appointment of incumbent Chief of the Army Staff, therefore, he was made a respondent to present case---Supreme Court suspended the operation of the impugned order/notification in respect of extension/re-appointment of incumbent Chief of the Army Staff for another term in the said office---Matter was adjourned till next date of hearing.

**(b) Constitution of Pakistan---**

----Arts. 243(4)(b) & 184(3)---Constitutional petition before the Supreme Court regarding extension/re-appointment of the incumbent Chief of the Army Staff for a fresh term of three years in such office after expiry of his first term---Procedure adopted for issuing notification of extension in service---Lapses---Prime Minister had himself passed the order appointing the current Chief of the Army Staff for a second term in that office on 19-08-2019 whereas under Art.243 of the Constitution it was the President who was the appointing authority for such office---When such mistake came to notice straightaway on the same day, i.e. 19.08.2019 a summary was moved from the Prime Minister's office to the President for extension/reappointment of the incumbent Chief of the Army Staff and on that very day, i.e. 19.08.2019 the President approved the summary in that regard and, hence, the advice of the Prime Minister was apparently accepted and acted upon---Even said process was found to be flawed and on that very day it was realized that the Prime Minister or the President could not take action on extension/re-appointment of current Chief of the Army Staff without the approval of the Cabinet and, thus, on the next day, i.e. 20-08-2019 a summary was moved in the relevant regard for approval of the Cabinet and on 21.08.2019 the Cabinet was said to have approved the said proposal through circulation---Opinion of the Cabinet recorded in this regard, showed that there were 25 members of the Cabinet and out of those 25 members only 11 had agreed to the proposal for extension/ reappointment of the current Chief of the Army Staff, which showed that the majority of the Cabinet had not approved the said proposal---Another peculiar aspect was that after the purported approval of the Cabinet regarding extension/re-appointment of the incumbent Chief of the Army Staff the matter was never sent to the Prime Minister or the President again for the purposes of a fresh advice or a fresh

order of the Prime Minister and the President respectively---Since present issue called for a detailed examination of the matter of extension/re-appointment of incumbent Chief of the Army Staff, therefore, he was made a respondent to present case---Supreme Court suspended the operation of the impugned order/notification in respect of extension/re-appointment of incumbent Chief of the Army Staff for another term in the said office---Matter was adjourned till next date of hearing.

**(c) Constitution of Pakistan---**

----Arts. 243(4)(b) & 184(3)---Constitutional petition before the Supreme Court regarding extension/re-appointment of the incumbent Chief of the Army Staff for a fresh term of three years in such office after expiry of his first term---Purpose of extension/re-appointment---Stated purpose for the proposed reappointment/extension in the term of office of the incumbent Chief of the Army Staff was "regional security environment"---Supreme Court observed that the said words were quite vague and if at all there was any regional security threat then it was the gallant armed forces of the country as an institution which were to meet the said threat and an individual's role in that regard may be minimal; that if the said reason/purpose was held to be correct and valid then every person serving in the armed forces would claim re-appointment/extension in his service on the basis of the said reason---Since present issue called for a detailed examination of the matter of extension/re-appointment of incumbent Chief of the Army Staff, therefore, he was made a respondent to present case---Supreme Court suspended the operation of the impugned order/notification in respect of extension/re-appointment of incumbent Chief of the Army Staff for another term in the said office---Matter was adjourned till next date of hearing.

Nemo for Petitioner.

Anwar Mansoor Khan, Attorney-General for Pakistan and Mian Asghar Ali, Deputy Attorney General for Pakistan for Respondents.

Date of hearing: 26th November, 2019.

**ORDER**

**ASIF SAEED KHAN KHOSA. C J**.---The Court-Associate has produced before us a handwritten application statedly submitted by the petitioner seeking permission to withdraw this petition. The petitioner has failed to appear in person nor anybody else has appeared on his behalf. The application received does not carry any date and the same is not accompanied by any affidavit. There is nothing before us to accept or to presume that the said application has actually been submitted by the petitioner himself or that he has submitted the same voluntarily. Be that as it may the petition in hand invokes Article 184(3) of the Constitution and the subject matter of the petition involves a question of public importance with reference to enforcement of fundamental rights and, thus, the individual capacity of the petitioner pales into insignificance even if he decides not to pursue the present petition. The application attributed to the petitioner is, therefore, not entertained.

2. The learned Attorney-General for Pakistan is in attendance on his own and he has presented before us photocopies of many documents leading to an order passed by the President approving the summary sent to him by the Prime Minister along with his advice for extension/re-appointment of General Qamar Javed Bajwa, Chief of the Army Staff for a fresh term of three years in that office after expiry of his first term in that office. With the assistance of the learned Attorney-General for Pakistan we have gone through the said documents and have ex facie noticed the following things:

i) A summary had initially been moved by the Ministry of Defence for extension of the term of office of the Chief of the Army Staff and subsequently he was appointed as Chief of the Army Staff for a second term of three years after completion of his first term in that office but the learned Attorney-General for Pakistan has not been able to refer to any provision in any legal instrument regarding extention in service of a Chief of the Army Staff upon completion of his first term in that office or for his re-appointment to that office after completion of his first term.

ii) In the case in hand the Prime Minister had himself passed an order appointing the current Chief of the Army Staff for a second term in that office on 19.08.2019 whereas under Article 243 of the Constitution it is the President who is the appointing authority for that office. Apparently that mtstake came to notice straightaway and on the same day, i.e. 19.08.2019 a summary was moved from the Prime Minister's office to the President for extension/re-appointment of the incumbent Chief of the Army Staff and on that very day, i.e. 19.08.2019 the President was pleased to approve the summary in that regard and hence, the advice of the Prime Minister was apparently accepted and acted upon. It appears that even that process was found to be flawed and on that very day it was realized that the Prime Minister or the President could not take the above mentioned actions without the approval of the Cabinet and, thus, on the next day, i.e. 20.08.2019 a summary was moved in the relevant regard for approval of the Cabinet and on 21.08.2019 the Cabinet was said to have approved the said proposal through circulation. The opinion of the Cabinet recorded in this regard, photocopies whereof have been produced before us, shows that there are 25 members of the Cabinet and out of those 25 members only 11 had agreed to the proposal which shows that the majority of the Cabinet had not approved the said proposal. Yet another peculiar aspect is that after the purported or so-called approval of the Cabinet regarding extension/re-appointment of the incumbent Chief of the Army Staff the matter was never sent to the Prime Minister or the President again for the purposes of a fresh advice or a fresh order of the Prime Minister and the President respectively.

iii) After our repeated queries the learned Attorney-General for Pakistan has referred to Regulation No. 255 of the Army Regulations (Rules) according to which a retirement of an Army officer can temporarily be suspended or limited. By placing reliance upon the said Regulation the learned Attorney-General for Pakistan has maintained that the Federal Government has the requisite authority to re-appoint or extend the services of an incumbent Chief of the Army Staff prior to his retirement if the exigencies of the service so require or the public interest so demands. A bare perusal of Regulation No. 255, however, prima facie shows that the said provision can be invoked after an officer has already retired from service and that is why the said Regulation speaks of suspension of retirement or limiting of retirement. Suspending a retirement or limiting a retirement before the retirement has actually taken effect may amount to putting the cart before the horse. The-learned Attorney-General for Pakistan has, however, very candidly submitted before us that in the entire body of laws pertaining to the Pakistan Army there is no express provision available regarding re-appointment or extension in the service of a Chief of the Army Staff.

iv) The stated purpose for the proposed re-appointment/extension in the term of office of the incumbent Chief of the Army Staff is "regional security environment". The said words are quite vague and if at all there is any regional security threat then it is the gallant armed forces of the country as an institution which are to meet the said threat and an individual's role in that regard may be minimal. If the said reason is held to be correct and valid then every person serving in the armed forces would claim re-appointment/extension in his service on the basis of the said reason.

3. The points noted above call for a detailed examination of the matter of extension/re-appointment of General Qamar Javed Bajwa, Chief of the Army Staff and, therefore, he is hereby made a respondent to this petition and the office is directed to carry out the necessary addition in the memorandum of this petition. Let notice of this petition be issued to all the respondents for tomorrow, i.e. 27-11-2019, as requested by the learned Attorney-General for Pakistan. In the meanwhile the operation of the impugned order/Notification in respect of extension/re-appointment of General Qamar Javed Bajwa, Chief of the Army Staff for another term in the said office shall remain suspended.

(Sd.)

Asif Saeed Khan Khosa,
Chief Justice
(Sd.)
Mazhar Alam Khan Miankhel,
Judge
(Sd.)
Syed Mansoor Ali Shah,
Judge

**P L D 2020 Supreme Court 57**

**Present: Asif Saeed Khan Khosa, C.J., Sardar Tariq Masood and Syed Mansoor Ali Shah, JJ**

**QAISER JAVED KHAN---Petitioner**

**Versus**

**The STATE through Prosecutor General Punjab, Lahore and another---Respondents**

Crimin al Petition No.733 and Criminal Miscellaneous Application No.1019 of 2019, decided on 18th December, 2019.

(On appeal against the judgment of Lahore High Court, Lahore dated 18-4-2019, passed in Criminal Appeal No.213202 of 2018).

**(a) Control of Narcotic Substances (Government Analysts) Rules, 2001 ---**

----R. 6---Control of Narcotic Substances Act (XXV of 1997), S. 36---Report of Government Analyst---Essential requirements---Report of the Government Analyst must show that the test applied was in accordance with a recognized standard protocol---Any test conducted without a protocol lost its reliability and evidentiary value---To serve the purposes of the Control of Narcotic Substances Act, 1997 and the Control of Narcotic Substances (Government Analysts) Rules, 2001, the report of the Government Analyst must contain three elements, i.e the tests applied; the protocols applied to carry out these tests; and, the result of the test(s)---Report of the Government Analyst which did not specify the protocols of the tests applied did not meet the requirements of the law---Such a Report could not be relied upon for the conviction of an accused. [Context of 'protocols' as explained in the judgment reported as (Ikramullah's case 2015 SCMR 1002, Imam Bakhsh's case 2018 SCMR 2039 and Khair-ul-Bashar's case 2019 SCMR 930) further clarified].

2015 SCMR 1002; 2018 SCMR 2039 and 2019 SCMR 930 ref.

**(b) Control of Narcotic Substances (Government Analysts) Rules, 2001---**

----R. 6---Control of Narcotic Substances Act (XXV of 1997), S. 36---Criminal Procedure Code (V of 1898), S. 510, proviso---Report of Government Analyst---Essential requirements---Power of Court to summon Analyst---Scope---To serve the purposes of the Control of Narcotic Substances Act, 1997 and the Control of Narcotic Substances (Government Analysts) Rules, 2001, the report of the Government Analyst must contain three elements, i.e the tests applied; the protocols applied to carry out these tests; and, the result of the test(s)---Once the said three requirements under R. 6 were contained in the Report of the Government Analyst, any ambiguity therein may be resolved by the Trial Court by exercising its power under proviso to S. 510, Cr.P.C.---Said provision stated that the Court may, if it considered necessary in the interest of justice, summon and examine the person by whom such report had been made---Trial Court while examining the said report had the power to summon the Government Analyst in case there was any ambiguity in the said Report and seek clarification thereof---Such clarification could only be based on the existing record of the Government Analyst and did not mean to allow the Government Analyst to conduct a fresh test or prepare another Report, for that would amount to giving the prosecution a chance of filling the gaps and lacunas in the report---Trial Court must also be mindful of the legal position that the per se admissibility of the report i.e. without examining the Analyst (expert) did not vouch for its evidentiary value---Courts were free to examine the contents of the report and to assess its evidentiary value (weight), a matter distinct from its admissibility.

2019 SCMR 930 ref.

Malik Matee Ullah, Advocate Supreme Court for Petitioner.

M. Jaffar, Addl. P.G. for Respondents.

Date of hearing: 18th December, 2019.

**JUDGEMENT**

**SYED MANSOOR ALI SHAH, J.--**

Criminal Miscellaneous Application No. 1019 of 2019

For the reasons given in the application, this application is allowed and delay in the filing of the petition is condoned.

Criminal Petition No. 733 of 2019

2. The petitioner was apprehended in a search operation allegedly selling drugs on a public street and 1150 grams of charas garda was recovered from him. In this background, he was booked in FIR No.452 dated 23.10.2017, registered at Police Station Saddar, Mianwali. After regular trial, he was convicted by the Trial Court under section 9(c) of the Control of Narcotic Substances Act, 1997 ("Act") and sentenced to rigorous imprisonment for 04 years and 06 months along with fine of Rs.20,000/-, and in case of default in payment of fine to undergo simple imprisonment for further 05 months. On appeal, the High Court, upheld the said conviction and sentence vide the impugned judgment dated 18.04.2019.

3. We have heard the learned counsel for the parties and, at the outset, have examined the Report of the Government Analyst of the Punjab Forensic Science Agency dated 15.11.2017 and found it deficient in terms of Rule 6 of the Control of Narcotic Substances (Government Analysts) Rules, 2001 ("Rules") as interpreted repeatedly by this Court in the cases of Ikramullah.[1] Imam Bakhsh[2] and Khair-ul-Bashar.[3]

4. In Ikramullah, this Court while referring to Rule 6 of the Rules observed that the Government Analyst is to refer the necessary protocols, and mention the tests applied and their results, in his report. The Court further observed that the failure in compliance of the said Rule affects the reliability of the report, and that such a deficient report does not qualify to be called a report in the context of section 36 of the Act, so as to be treated as a "conclusive" proof of recovery of narcotic substance from an accused person.

5. In Imam Bakhsh, the question of mandatory or directory nature of Rule 6 was considered in detail. The Court held that its compliance to the extent of mentioning the full protocols of the test applied in the Report, to be mandatory with the observation that its non-compliance can frustrate the purpose and object of the Act, and held that its non-compliance will render the report of the Government Analyst inconclusive and unreliable. The Court elaborated the expression "protocol" to mean an explicit, detailed plan of an experiment, procedure or test. With this elaboration, it was held that the report under Rule 6 must specify every test applied for the determination of the seized substances with the full protocols adopted to conduct such tests. In Khair-ul-Bashar this interpretation was reinforced.

6. The Report of the Government Analyst in this case specifies only the tests applied and not the protocols thereof. The term "protocol" has not been defined in the Rules. Its dictionary meaning is: "A plan of scientific experiment or other procedure.[4]" It is also referred to as "the precise method for carrying out or reproducing a given experiment[5]." These definitions are in line with the elaboration of the term "protocol" given in Imam Bakhsh wherein the Court stated the expression "protocol" to mean an explicit plan of an experiment, procedure or test.lt is clarified that "protocol" is, therefore, a recognized standard method or plan for carrying out the test applied to ascertain the nature of the substance under examination. No test can take place without a protocol. The Report of the Government Analyst must show that the test applied was in accordance with a recognized standard protocol. Any test conducted without a protocol loses its reliability and evidentiary value. Therefore, to serve the purposes of the Act and the Rules, the Report of the Government Analyst must contain (i) the tests applied (ii) the protocols applied to carry out these tests (iii) the result of the test(s). This sequence, for clarity and better understanding can be envisaged as follows:

| Test Applied | Protocols (applied to carry out the tests)) | Results of the test(s) |
|---|---|---|

7. Once the above three requirements under Rule 6 are contained in the Report of the Government Analyst, any ambiguity therein may be resolved by the Trial Court by exercising its power under Proviso to section 510, Cr.P.C. The said provision states that the Court may, if it considers necessary in the interest of justice, summon and examine the person by whom such report has been made.Therefore, the Trial Court while examining the said Report has the power to summon the Government Analyst in case there is any ambiguity in the said Report and seek clarification thereof. This clarification can only be based on the existing record of the Government Analyst and does not mean to allow the Government Analyst to conduct a fresh test or prepare another Report, for that would amount to giving the prosecution a chance of filling the gaps and lacunas in the Report. The Trial Court must also be mindful of the legal position that the per se admissibility of the Report i.e. without examining the Analyst (expert) does not vouch for its evidentiary value, as observed in Khair-ul-Bashar. The Courts are free to examine the contents of the Report and to assess its evidentiary value (weight), a matter distinct from its admissibility.

8. The Report of the Government Analyst in the instant case does not specify the protocols of the tests applied and thus does not meet the requirements of the law as interpreted by this Court in the cases of Imam Bakhsh and Khair-ul-Bashar (supra). The said Report cannot be relied upon for the conviction of the petitioner. Therefore, the petition is converted into an appeal and allowed. The conviction and sentence of the petitioner are set aside. He shall be released forthwith if not required to be detained in any other case.

9. We have observed in a number of cases before us that the import of the above cited judgments have not been fully understood in the context of "protocols", which has been further clarified in this judgment. Therefore, it will be appropriate if a copy of this judgment is dispatched to all the High Courts for their reference and for further circulation to the Trial Courts dealing with such matters and to the Forensic Science Laboratories in their respective areas.

MWA/Q-1/S Petition allowed.

**P L D 2020 Supreme Court 61**

**Present: Asif Saeed Khan Khosa, C.J., Mushir Alam, Manzoor Ahmad Malik, Sardar Tariq Masood, Ijaz ul Ahsan, Mazhar Alam Khan Miankhel and Syed Mansoor Ali Shah, JJ**

**GHULAM HUSSAIN and others---Appellants**

**Versus**

**The STATE and others---Respondents**

Criminal Appeals Nos. 95 and 96 of 2019, Civil Appeal No.10-L of 2017 and Criminal Appeal No.63 of 2013, decided on 30th October, 2019.

(Against the judgments dated 5-12-2007, 27-4-2017, 22-11-2016 and 24-9-2012 passed by the Lahore High Court, Lahore in Criminal Appeals Nos.397-J of 2006, 587-J of 2014 and 342-J of 2011 and Capital Sentence References Nos.1-T of 2006 and 40-T of 2014 and Writ Petition No.15608 of 2016).

**(a) Anti-Terrorism Act (XXVII of 1997)---**

----S. 6---"Terrorism"---Historical account of different acts, events, episodes and phenomena that have from time to time been perceived or understood in different parts of the world to be "terrorism", provided.

**(b) Anti-Terrorism Act (XXVII of 1997)---**

----S. 6 & Third Sched. Entry No.4---Anti-Terrorism Court, jurisdiction of---Scope---Heinous offences specified under Entry No.4 to Third Sched. of the Anti-Terrorism Act, 1997, that did not constitute terrorism---Such heinous offences did not per se constitute the offence of terrorism but were to be tried by an Anti-Terrorism Court because of their inclusion in the Third Sched.---In such cases an Anti-Terrorism Court could punish the person committing such specified heinous offences only for commission of those offences and not for committing terrorism because such offences did not constitute terrorism---Supreme Court observed that definition of 'terrorism' contained in S. 6 of the Anti-Terrorism Act, 1997 ('the Act') as it stood at present was too wide and the same included many actions, designs and purposes which had no nexus with the generally recognized concept of what terrorism was; that including some other heinous offences in the Preamble and the Third Sched. to that Act for trial of such offences by an Anti-Terrorism Court when such other offences did not qualify to be included in the definition of "terrorism" put an extra and unnecessary burden on such courts and caused delay in trial of actual cases of terrorism; that the Parliament may consider substituting the present definition of 'terrorism' by a more succinct definition bringing it in line with the international perspectives of that offence and focusing on violent activities aimed at achieving political, ideological or religious objectives and that the Parliament may also consider suitably amending the Preamble to the Act and removing all those offences from the Third Sched. to the Act which offences had no nexus with the offence of terrorism.

Farooq Ahmed v. State and another 2020 SCMR 78; Amjad Ali and others v. The State PLD 2017 SC 661 and Muhammad Bilal v. The State and others 2019 SCMR 1362 ref.

**(c) Anti-Terrorism Act (XXVII of 1997)---**

----Ss. 6 & 7(e) & Third Sched. Entry No.4---Penal Code (XLV of 1860), S. 365-A---Explosive Substances Act (VI of 1908), Ss. 4(b), 5 & 6---Terrorism, kidnapping or abduction for ransom, possessing explosives---Offences mentioned under Entry No. 4 to Third Sched. of the Anti-Terrorism Act, 1997---Conviction for such offences under the Anti-Terrorism Act, 1997---Scope---Offence of abduction or kidnapping for ransom under S.365-A, P.P.C. was included in Entry No. 4 of the Third Sched. to the Anti-Terrorism Act, 1997 and kidnapping for ransom was also one of the actions specified in S.7(e) of the Anti-Terrorism Act, 1997---Abduction or kidnapping for ransom was a heinous offence but the scheme of the Anti-Terrorism Act, 1997 showed that an ordinary case of abduction or kidnapping for ransom under S.365-A, P.P.C. was merely triable by an Anti-Terrorism Court but if kidnapping for ransom was committed with the design or purpose mentioned in cl. (b) or cl. (c) of

subsection (1) of S.6 of the Anti-Terrorism Act, 1997 then such offence amounted to terrorism attracting S.7(e) of that Act---In the former case the convicted person was to be convicted and sentenced only for the offence under S. 365-A, P.P.C. whereas in the latter case the convicted person was to be convicted both for the offence under S.365-A, P.P.C. as well as for the offence under S.7(e) of the Anti-Terrorism Act, 1997---Same rule may also be applied to the other offences mentioned in Entry No. 4 of the Third Sched. to the Act pertaining to "Use of firearms or explosives by any device, including bomb blast in a mosque, imambargah, church, temple or any other place of worship, whether or not any hurt or damage is caused thereby", "Firing or use of explosive by any device, including bomb blast in the court premises", "Hurt caused by corrosive substance or attempt to cause hurt by means of a corrosive substance" and "Unlawful possession of an explosive substance or abetment for such an offence under the Explosive Substances Act, 1908"---Such distinction between cases of terrorism and other heinous offences by itself explained and recognizes that all heinous offences, howsoever serious, grave, brutal, gruesome, macabre or shocking, did not ipso facto constitute terrorism which was a species apart.

**(d) Anti-Terrorism Act (XXVII of 1997)---**

----Ss. 6(1) & 6(2)---"Terrorism"---Acts constituting terrorism in terms of S.6 of the Anti-Terrorism Act, 1997 ('the Act')---Scope---'Actus reus' and 'mens rea' for terrorism---Scope---For an action or threat of action to be accepted as terrorism within the meanings of S.6 of the Anti-Terrorism Act, 1997 the action must fall in subsection (2) of S.6 of the said Act and the use or threat of such action must be designed to achieve any of the objectives specified in cl. (b) of subsection (1) of S.6 of Act or the use or threat of such action must be to achieve any of the purposes mentioned in cl. (c) of subsection (1) of S.6 of that Act---Requirements that needed to be satisfied for invoking cl.(c) of subsection (1) of S.6 were that the use or threat of action should be for "the purpose of advancing areligious, sectarian or ethnic cause" or for the purpose of"intimidating and terrorizing the public, social sectors, media persons, business community" or for the purpose of "attacking the civilians, including damaging property by ransacking, looting, arson, or by any other means, government officials, installations, security forces or law enforcement agencies"---Clause (b) of subsection (1) of S.6 specified the 'design' and cl.(c) of subsection (1) of S.6 earmarked the 'purpose' which should be the motivation for the act and the actus reus had been clearly mentioned in subsection (2) of S.6---Only when the actus reus specified in subsection (2) of S.6 was accompanied by the requisite mens rea provided for in cl.(b) or cl.(c) of subsection (1) of S.6 that an action could be termed as 'terrorism'---Thus, it was not the fear or insecurity actually created or intended to be created or likely to be created which would determine whether the action qualified to be termed as terrorism or not but it was the intent and motivation behind the action which would be determinative of the issue irrespective of the fact whether any fear and insecurity was actually created or not---Any action constituting an offence, howsoever grave, shocking, brutal, gruesome or horrifying, did not qualify to be termed as terrorism if it was not committed with the design or purpose specified or mentioned in cls. (b) or cl.(c) of subsection (1) of S.6 of the Act---Action could be termed as terrorism if the use or threat of that action was designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect, etc. or if such action was designed to create a sense of fear or insecurity in the society or the use or threat was made for the purpose of advancing a religious, sectarian or ethnic cause, etc.---Creating fear or insecurity in the society was not by itself terrorism unless the motive itself was to create fear or insecurity in the society and not when fear or insecurity was just a by product, a fallout or an unintended consequence of a private crime---Mere shock, horror, dread or disgust created or likely to be created in the society did not transform a private crime into "terrorism"---"Terrorism" was a totally different concept which denoted commission of a crime with the design or purpose of destabilizing the government, disturbing the society or hurting a section of the society with a view to achieve objectives which were essentially political, ideological or religious---Violent activity against civilians that had

no political, ideological or religious aims was just an act of criminal delinquency, a felony, or simply an act of insanity unrelated to "terrorism".

Muhammad Ajmal v. The State 2000 SCMR 1682; Mumtaz Ali Khan Rajban and another v. Federation of Pakistan and others PLD 2001 SC 169; Muhammad Mushtaq v. Muhammad Ashiq and others PLD 2002 SC 841; Mst. Raheela Nasreen v. The State and another 2002 SCMR 908; Muhammad Amin v. The State 2002 SCMR 1017; Zia Ullah v. Special Judge, Anti-Terrorist Court, Faisalabad and 7 others 2002 SCMR 1225; State through Advocate-General, N.-W.F.P., Peshawar v. Muhammad Shafiq PLD 2003 SC 224; Naeem Akhtar and others v. The State and others PLD 2003 SC 396; Sh.Muhammad Amjad v. The State PLD 2003 SC 704; Mst. Najam-un-Nisa v. Judge, Special Court constituted under Anti-Terrorism Act, 1997 2003 SCMR 1323; Abdul Ghafoor Bhatti v. Muhammad Saleem and others 2003 SCMR 1934; Muhammad Farooq v. Ibrar and 5 others PLD 2004 SC 917; Azizullah and another v. The State and another 2005 SCMR 802; Mirza Shaukat Baig and others v. Shahid Jamil and others PLD 2005 SC 530; Zahid Imran and others v. The State and others PLD 2006 SC 109; Muhammad Idrees and others v. The State 2008 SCMR 1544; Nazeer Ahmed and others v. Nooruddin and another 2012 SCMR 517; Shahid Zafar and 3 others v. The State PLD 2014 SC 809; Kashif Ali v. The Judge, Anti-Terrorism, Court No.II, Lahore and others PLD 2016 SC 591 and Shahbaz Khan alias Tippu and others v. Special Judge, Anti-Terrorism, Court No.3, Lahore and others PLD 2016 SC 1 distinguished and held not to be followed.

Mehram Ali and others v. Federation of Pakistan and others PLD 1998 SC 1445; Jamat-i-Islami Pakistan through Syed Munawar Hassan, Secretary-General v. Federation of Pakistan through Secretary, Law, Justice and Parliamentary Affairs PLD 2000 SC 111; Ch. Bashir Ahmad v. Naveed Iqbal and 7 others PLD 2001 SC 521; Muhammad Mushtaq v. Muhammad Ashiq and others PLD 2002 SC 841; Fazal Dad v. Col. (Rtd.) Ghulam Muhammad Malik and others PLD 2007 SC 571; Mohabbat Ali and another v. State and another 2007 SCMR 142; Tariq Mahmood v. State 2008 SCMR 1631; Muhammad Yaqoob and others v. The State and others 2009 SCMR 527; Bashir Ahmed v. M. Siddique PLD 2009 SC 11; Ahmad Jan v. Nasrullah and others 2012 SCMR 59; Malik Muhammad Mumtaz Qadri v. The State and others PLD 2016 SC 17; Khuda-e-Noor v. The State PLD 2016 SC 195; Sagheer Ahmed v. The State and others 2016 SCMR 1754; Ch. Shaukat Ali v. Haji Jan Muhammad and others 2016 SCMR 533; Waris Ali and 5 others v. The State 2017 SCMR 1572; Sajid Rasheed Qureshi v. Munawar Ahmad 2017 SCMR 162; Amjad Ali and others v. The State PLD 2017 SC 661; Abdul Nabi v. The State 2017 SCMR 335; Province of Punjab through Secretary Punjab Public Prosecution Department and another v. The State PLD 2018 SC 178 and Dilwar Mehmood alias Dulli and another v. The State 2018 SCMR 593 ref.

**(e) Anti-Terrorism Act (XXVII of 1997)---**

----S. 6(3)---"Terrorism"---Section 6(3) of the Anti-Terrorism Act, 1997---Scope---Subsection (3) of S.6 of the Act, provided that "The use or threat of use of any action falling within subsection (2) which involves the use of firearms, explosive or any other weapon is "terrorism", whether or not subsection (1)(c) is satisfied" which meant that if for commission of the actions mentioned in subsection (2) of S.6, a firearm, an explosive substance or any other weapon was actually used or a threat regarding use of the same was extended then all such actions were to constitute the offence of terrorism even if the other requirements of cl.(c) of subsection (1) of S. 6 were not satisfied or fulfilled---Provisions of S.6(3) of the Act were quite problematic as they did not piece well with the remaining provisions of S. 6 as far as the matter of defining "terrorism" was concerned---If provisions of subsection (3) of S.6 of the Act, as they were worded, were to be given effect then the distinction between the peculiar offence of terrorism and most of the run of the mill offences committed in the society in routine would be obliterated---Supreme Court observed that the legislature may like to have another look at the provisions of S.6(3) of the Act and to consider deleting or suitably amending the same so as to bring them in harmony with the remaining provisions of the Act.

**(f) Anti-Terrorism Act (XXVII of 1997)---**

----S. 6(2)---"Terrorism"---Offence committed due to personal enmity or vendetta---Actions specified in subsection (2) of S.6 of the Anti-Terrorism Act, 1997 did not qualify to be labeled or characterized as terrorism if such actions were taken in furtherance of personal enmity or private vendetta.

In attendance:

Shahid Azeem, Advocate Supreme Court.

Javed Iqbal Raja, Advocate Supreme Court.

Burhan Moazam Malik, Advocate Supreme Court.

Mian Pervaiz Hussain, Advocate Supreme Court.

Syed Tayyab Mehmood Jaffari, Advocate Supreme Court.

Muhammad Ishtiaq Ahmad Raja, Advocate Supreme Court.

Raja Abdul Ghafoor, Advocate-on-Record.

Malik Ghulam Mustafa Kandwal, Advocate Supreme Court.

Kamran Murtaza, Advocate Supreme Court.

Abid Hussain Saqi, Advocate Supreme Court.

Muhammad Sadiq Baloch, Advocate Supreme Court.

Ch. Munir Sadiq, Advocate Supreme Court.

Zulfiqar Khalid Maluka, Advocate Supreme Court.

Khadim H. Sandhu, Advocate Supreme Court.

On Court's Notice

Sajid Ilyas Bhatti, Deputy Attorney-General of Pakistan.

Tariq Mehmood Jehangiri, Advocate General, Islamabad.

Ahmed Awais, Advocate General, Punjab.

Ch. Faisal Farid, Additional Advocate-General, Punjab.

Ahmed Raza Gillani, Additional Prosecutor-General, Punjab.

Barrister Shabbir Hussain Shah, Additional Advocate-General, Sindh.

Salim Akhtar, Additional Prosecutor-General, Sindh.

Zahid Yousaf Qureshi, Additional Advocate-General, Khyber Pakhtunkhwa.

Syed Baqar Shah, State Counsel, Balochistan.

Ayaz Khan Swati, Additional Advocate-General, Balochistan.

Date of hearing: 2nd April, 2019.

**JUDGMENT**

**ASIF SAEED KHAN KHOSA, C.J.---**The meanings, scope and import of the term 'terrorism' defined in section 6 of the Anti-Terrorism Act 1997, as amended from time to time, have been a subject of controversy in this Court for some time and different Honourable Benches of varying strength deciding different cases have differed with each other in the past and have understood and interpreted the said term differently. It is in this backdrop that the present Larger Bench has been constituted so as to put an end to that controversy.

2. The facts of the present appeals giving rise to the issue at hand are summed up as follows:

Ghulam Hussain v. The State

(Criminal Appeal No. 95 of 2019)

After a regular trial Ghulam Hussain appellant was convicted by the trial court on two counts of the charge under section 302(b), P.P.C. for killing two minors and was sentenced to death on each count. He was also convicted on two counts of the charge under section 7(a) of the Anti-Terrorism Act, 1997 and was sentenced to death on each such count. His appeal filed before the High Court was dismissed and all his convictions and sentences recorded by the trial court were upheld and confirmed. Leave to appeal was granted by this Court in order the reappraise the evidence and also to consider as to whether

the provisions of the Anti-Terrorism Act, 1997 were applicable to the facts and circumstances of the case or not.

Muhammad Azeem and 3 others v. The State

(Criminal Appeal No. 96 of 2019)

The appellants were convicted by the trial court for offences under section 302(b), P.P.C. and section 7(a) of the Anti-Terrorism Act, 1997 and were sentenced to death each for committing the said offences besides having been convicted and sentenced for some other offences. The appellants filed a joint appeal before the High Court which was dismissed and all their convictions and sentences were upheld and maintained except their sentences of death on two counts of the charge which sentences of death were reduced by the High Court to imprisonment for life each on each of the relevant counts of the charge. Leave to appeal was granted by this Court in order to reappraise the evidence and also to consider as to whether the provisions of the Anti-Terrorism Act, 1997 were attracted to the facts and circumstances of the case or not.

Tanvir v. Prosecutor General Punjab, Lahore, etc.

(Civil Appeal No. 10-L of 2017)

In this case the investigating agency had deleted section 7 of the Anti-Terrorism Act, 1997 from the FIR and the Anti-Terrorism Court-II, Lahore had refused to treat the case as one of terrorism. A writ petition filed in that regard before the High Court succeeded and the case was ordered to be transferred to the Anti-Terrorism Court for trial. Leave to appeal was granted by this Court to determine as to whether the provisions of the Anti-Terrorism Act, 1997 were attracted to the case or not.

Sikandar Hayat v. The State

(Criminal Appeal No. 63 of 2013)

The appellant was convicted by the trial court for an offence under section 302(b), P.P.C. read with section 149, P.P.C. and was sentenced to imprisonment for life besides having been convicted and sentenced for an offence under section 148, P.P.C. read with section 149, P.P.C. The appellant's appeal was dismissed by the High Court and leave to appeal was granted by this Court in order to reappraise the evidence.

3. Before making an attempt to understand as to what the term 'terrorism' defined in section 6 of the Anti-Terrorism Act, 1997 denotes it may be advantageous to recapitulate how different acts, events, episodes and phenomena have from time to time been perceived or understood in different parts of the world as terrorism and distinct from ordinary and usual crimes howsoever heinous in nature.

4. History is full of instances where likeminded groups of people have resorted to violence as a tool for achieving political, ideological and religious ends. Jewish sects Zealots and Sicarii (or Sicarris), using small daggers called sicae hidden in their cloaks to stab people in crowds and then melting away in the throng, attacking the Roman occupiers of Judea and their allies in public places between 2 B.C. and 70 A.D.; the Assassins of Persia and Syria, Muslims belonging to the Ismaili sect who were called the Assassins because they were given hashish (hashishin) before being launched for terrorist acts, killing their targets and threatening the governments of several states between the 11th and 13th centuries; suicidal attacks carried out by different groups against the colonial rule in India, Indonesia and Philippines in the 18th and 19th centuries; Russian anarchists attacking members and supporters of the Tsarist regime with explosives at the end of the 19th century; Japanese Kamikaze pilots launching suicide attacks against American ships in the Pacific ocean during World War II, particularly in the Battle of Okinawa in April 1945 wherein some 2,000 Kamikaze pilots rammed fully fuelled planes into more than 300 ships killing about 5,000 Americans and about 2000 Kamikaze; Hizbullah supporters launching devastating attacks against the American and French forces in Lebanon in the year 1983; the Liberation Tigers of Tamil Eelam (LTTE) using hundreds of suicide bombers and killing thousands of people including Indian Prime Minister Rajiv Gandhi in the year 1991 and Sri Lankan President Premadasa in the year 1993; and the Marxist-Nationalist Kurdistan Worker's Party (PKK)

carrying out many suicide attacks in Turkey against a range of targets during the end of the last century and beginning of the current century have all been universally perceived and acknowledged as terrorists indulging in acts of terrorism.

5. There are also many other instances in history where some individual acts or collective activity were, and are, perceived and accepted as terrorism and not just commission of normal, though heinous, offences. In the year 1881 anarchists killed the Russian Tsar Alexander II and 21 bystanders; in the year 1901 anarchists killed the US President McKinley as well as King Humbert I of Italy; World War I started in the year 1914 when anarchists killed Archduke Ferdinand of Austria; the British Raj referred to Bhagat Singh, Chandrasekhar Azad and many other Indian freedom fighters as terrorists; guerrilla fighters from Mao Zedong to Ho Chi Minh and Fidel Castro killed civilians during their revolutionary campaigns and they too were called terrorists until they triumphed; after World War II some Jewish groups in Palestine, i.e. Haganah, Irgun and Stern Gang fought for the creation of a Jewish state, bombing hotels and installations and killing civilians and the British, who then governed Palestine, called those Jewish groups terrorists and many of those terrorists including Moshe Dayan, Yitzhak Rabin, Menachem Begin and Ariel Sharon later became leaders of the independent state of Israel and, ironically, those former terrorists then derided terrorism, applying this label to the Arabs, including Yasser Arafat, fighting for the very same nationhood that the Jews had fought for earlier; in Germany in the years 1968 to 1992 the Baader-Meinhoff Gang killed dozens, including the head of Treuhand, the German privatization agency; in Italy the Red Brigades kidnapped and killed Aldo Moro, a former prime minister, and the Japanese Red Army was an Asian version of that; Japan was also the home of Aum Shinrikyo, a Buddhist cult that tried to kill thousands in the Tokyo metro system using nerve gas in the year 1995; in Europe the Irish Republican Army has been a Catholic terrorist organization for almost a century; Spain and France face a terrorist challenge from ETA and the Basque terrorist organization; Lord's Salvation Army in Uganda and Boko Haram in Nigeria are universally acknowledged as terrorist outfits; the Afghan freedom fighters were called the Mujahideen (holy warriors) by the West when they were fighting the Soviet occupying forces but they are now branded as terrorists when they are fighting to oust the American occupying forces; the Muslim freedom fighters in the Indian occupied Kashmir, the Sikhs led and inspired by Bhindranwale in Punjab, the United Liberation Front and Bodo of Assam, militant groups in Tripura, Christian Mizos mounting an insurrection for decades, Christian Nagas waging a freedom struggle and the Maoist groups operating in no less than 150 out of India 's 600 districts are all termed by India as terrorists; and the savagery perpetrated by Talibans of different shades in Afghanistan and Pakistan for the last many decades is generally accepted and treated as acts of terrorism.

6. The historical context of terrorism given above shows that at different times in history terrorism has been resorted to for achieving different political, ideological or religious objectives. There are many explanatory theories about terrorism in modern times but the one advanced by David C. Rapoport, Professor Emeritus of Political Science at the University of California, Los Angeles, in the year 2004 (published in his journal Terrorism and Political Violence) has received wide acceptance. The theory propounded by him is known as the 'waves of terrorism' theory and according to him modern terrorism can be divided into four waves which are Anarchists (1880s-1920s), Anti-Colonial (1920s-1960s), Left Wing (1960s-1990s) and Religious (1990 to date). He maintains that each wave came and died out and that these waves have at times overlapped also. The common factor in all those waves is that all the relevant acts of violence were and are universally recognized as terrorism because the unlawful use of violence was and is meant to achieve political, ideological or religious goals. By now the international community understands quite well that terrorism is a species quite distinct from all other usual and private crimes howsoever heinous or gruesomely executed.

7. In his book 21 Lessons for the 21st Century (published by Random House LLC, New York in 2018) the author Yuval Noah Harari has come up with a very interesting, and quite apt, analysis of

how terrorists operate and succeed in their objectives. The following part of his analysis is quite enlightening:

> "Though the challenges are unprecedented, and though the disagreements are intense, humankind can rise to the occasion if we keep our fears under control and be a bit more humble about our views.
>
> Terrorists are masters of mind control... terrorism is a military strategy that hopes to change the political situation by spreading fear rather than by causing material damage.
>
> In this respect, terrorists resemble a fly that tries to destroy a china shop. The fly is so weak that it cannot move even a single tea-cup. So how does a fly destroy a china shop? It finds a bull, gets inside its ear, and starts buzzing. The bull goes wild with fear and anger, and destroys the china shop. This is what happened after 9/11, as Islamic fundamentalists incited the American bull to destroy the Middle Eastern china shop. Now they flourish in the wreckage. And there is no shortage of short-tempered bulls in the world.
>
> Terrorism is a very unattractive military strategy, because it leaves all the important decisions in the hands of the enemy. Terrorists are so weak that they cannot wage war so they opt instead to produce a theatrical spectacle that they hope will provoke the enemy and cause him to overreact. By killing a handful of people the terrorists cause millions to fear for their lives.
>
> Terrorists don't think like army generals. Instead, they think like theatre producers. Because we intuitively understand that terrorism is theatre, we judge it by its emotional rather than material impact.
>
> Terrorists undertake an impossible mission: to change the political balance of power through violence, despite having no army.
>
> Every now and then a state loses its temper and reacts far too forcefully and publicly, thus playing into the hands of the terrorists. The legitimacy of the modern state is based on its promise to keep the public sphere free of political violence. Consequently, sporadic acts of political violence that kill a few dozen people are seen as a deadly threat to the legitimacy and even survival of the state. A small coin in a big empty jar makes a lot of noise.
>
> The theatre of terror generates visceral fear of anarchy, making people feel as if the social order is about to collapse. The state is driven to respond to the theatre of terror with its own theatre of security. So instead of acting quietly and efficiently, the state unleashes a mighty storm, which not infrequently fulfills the terrorists' most cherished dreams.
>
> How then should the state deal with terrorism? A successful counter-terrorism struggle should be conducted on three fronts: First, governments should focus on clandestine actions against the terrorist networks. Second, the media should keep things in perspective and avoid hysteria. The theatre of terror cannot succeed without publicity. The third front is the imagination of each and every one of us. The success or failure of terrorism therefore depends on us. If we allow our imagination to be captured by the terrorists and then we overreact to our own fears, terrorism will succeed. If we free our imagination from the terrorists and then we react in a balanced and cool way, terrorism will fail."

This analysis also confirms that terrorists operate on a level different from that on which ordinary criminals operate, their operations and tactics are different and the offence of terrorism is more concerned with the object and design behind an action than with the action itself.

8. Since the year 1974 different laws have been introduced in our country in order to deal with the menace of terrorist activities and terrorism and the first serious attempt to understand the nature and scope of such an offence was made by a Division Bench of the Lahore High Court, Lahore in the case of Basharat Ali v Special Judge, Anti-Terrorism Court-II, Gujranwala and 2 others (PLD 2004 Lahore 199). In that case the history of terrorism was traced, different definitions of 'terrorism' adopted in the

laws of different countries were mentioned, all the precedent cases available on the subject till then in Pakistan and India were referred to and all the relevant issues were exhaustively discussed.

As all the ensuing discussion in the judicial and legal circles that followed that decision generally revolved around the judgment rendered in that case, therefore, some parts of that judgment are being reproduced here in extenso:

"4. Terror and terrorism are concepts quite distinct from each other and the quintessence of the two notions is not difficult to distil. Terror as a manifestation of fright, dread, fear or insecurity is a consequential effect created by an act that may not necessarily be motivated to create such an effect whereas terrorism is an activity designed to create such an effect of terror. The critical difference between the two is the design and purpose understood in the criminal jurisprudence as mens rea. In the case of terror the act, or the actus reus, is not motivated to create fear and insecurity in the society at large but the same is actuated with a desire to commit a private crime against targeted individuals, etc. and the fear and insecurity created by the act in the society at large is only an unintended consequence or a fall out thereof whereas in the case of terrorism the main purpose is creation of fear and insecurity in the society at large and the actual victims are, by and large, not the real targets. Every crime, no matter what its magnitude or extent, creates some sort of fear and insecurity in some section of the society but every felony or misdemeanor cannot be branded or termed as terrorism. As against that an act of terrorism designed to create fear and insecurity in the society at large may or may not succeed in achieving the desired effect but nonetheless it can be accepted as nothing but terrorism because of the object or purpose behind such act. Thus, the real test to determine whether a particular act is terrorism or not is the motivation, object, design or purpose behind the act and not the consequential effect created by such act. In this context terrorism has to be understood as a species different and apart from terror, horror, shock, fear, insecurity, panic or disgust created by an ordinary crime. The history of recent terrorism in the world and an insight into how the world has understood and tried to define the same may be of significant help and of critical importance in appreciating the true meanings and import of the term 'terrorism'.

5. The history of terrorism as it is known today has essentially a political tone and background.----

6. The question of a definition of terrorism has haunted the debate among States for decades.----

7. The discussion made above shows, and shows quite clearly, that out of the various facets of the world view about terrorism one factor is constant and that is that in order to qualify as terrorism an act must be designed to achieve a political and a larger objective and the same is not primarily directed against the actual victims themselves who are treated merely as 'collateral damage'. It is also quite evident that the extent of the actual damage caused or injuries inflicted by the act is not the determinative factor in this regard.

8. Like its counterparts in rest of the world Pakistan has also been groping for the last many decades to find a suitable and appropriate definition of terrorism. Eversince the introduction of anti-terrorism laws in our country our legislature has constantly been in search of an apt definition of terrorism and in the process different laws have been enacted from time to time and different definitions of terrorism have been introduced at different occasions. In such definitions emphasis has been placed upon different aspects at different times. Although Suppression of Terrorist Activities (Special Courts) Act, 1974, Special Courts for Speedy Trials Ordinance, 1987, Terrorist Affected Areas (Special Courts) Ordinance, 1990, Special Courts for Speedy Trials Ordinance, 1991, Special Courts for Speedy Trials Act, 1992 and many other laws were also enacted in this regard from time to time yet for the purposes of the present judgment we intend to focus mainly on the two major enactments in this field, i.e. the Suppression of Terrorist Activities (Special Courts) Act, 1975 and the Anti-Terrorism Act, 1997.

9. The first major piece of legislation introduced in Pakistan specifically in the context of terrorism was the Suppression of Terrorist Activities (Special Courts) Act, 1975 ----- It is of critical importance to point out here that although the word terrorism had been used in the Preamble of the said Act yet the same had not been defined in the Act at all and the Schedule of that Act created an impression that the word terrorism was to be understood in the context of any offence of serious and grave nature.

10. The Anti-Terrorism Act, 1997 was a major step forward in Pakistan's quest for dealing with the menace of terrorism and its Preamble provided as follows:

"Whereas it is expedient to provide for the prevention of terrorism, sectarian violence and for speedy trial of heinous offences and for matters connected therewith and incidental thereto."

Section 12 of the Act conferred jurisdiction to try the scheduled offences exclusively upon the Special Courts constituted under the said Act. Section 6 of that Act defined a 'terrorist act' in the following terms:

"Whoever, to strike terror in the people, or any section of the people, or to alienate any section of the people or to adversely affect harmony among different sections of the people, does any act or thing by using bombs, dynamite or other explosive or inflammable substances, or fire-arms, or other lethal weapons or poisons or noxious gases or chemicals or other substances of a hazardous nature in such a manner as to cause, or to be likely to cause the death of, or injury to, any person or persons, or damage to, or destruction of, property or disruption of any supplies of services essential to the life of the community or displays fire-arms, or threatens with the use of force public servants in order to prevent them from discharging their lawful duties commits a terrorist act."

Section 7 of the Act specified various punishments for the terrorist acts mentioned in section 6, section 8 defined an offence regarding stirring up sectarian hatred and section 9 of the said Act provided for punishment for the offence under section 8. The Schedule of the said Act read as follows:

"1. Any offence punishable under this Act.

2. Any offence punishable under any of the following sections of the Pakistan Penal Code (Act XLV of 1860), namely:-

(a) section 302, --

(i) if committed with a cannon, grenade, bomb, rocket or a light or heavy automatic weapon;

(ii) if the victim is a member of police, armed forces or civil armed forces or is a public servant;

(iii) if there is more than one victim; or

(iv) the victim was subjected to cruelty, brutality, torture or burning; and

(b) offences under sections 295-A, 298-A, 364, 364-A, 365, 365-A, 392 to 402 of the Pakistan Penal Code (Act No. XLV of 1860).

3. An offence punishable under sub-section (4) of section 10 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (Ordinance No. VII of 1979).

4. Any attempt or conspiracy to commit or any abetment of any of the aforesaid offences."

The core and essence or the pith and substance of a 'terrorist act' defined by this Act was striking terror in the people or any section of the people or alienating any section of the people or adversely affecting harmony among different sections of the people. The emphasis appeared to be on the gravity of the offence and its effect upon the general populace rather than on the actual motivation behind the act.

11. The above mentioned definition of a 'terrorist act' contained in section 6 was subsequently amended through the Anti-Terrorism (Second Amendment) Ordinance, 1999 (Ordinance No. XIII of 1999) and the new definition read as follows:

"A person is said to commit a terrorist act if he -

(a) in order to, or if the effect of his actions will be to, strike terror or create a sense of fear and insecurity in the people, or any section of the people, does any act or thing by using bombs, dynamite or other explosive or inflammable substances, or such fire-arms or other lethal weapons as may be notified, or poisons or noxious gases or chemicals, in such a manner as to cause, or be likely to cause, the death of, or injury to, any person or persons, or damage to, or destruction of, property on a large scale, or a widespread disruption of supplies of services essential to the life of the community, or threatens with the use of force public servants in order to prevent them from discharging their lawful duties; or

(b) commits a scheduled offence, the effect of which will be, or be likely to be, to strike terror, or create a sense of fear and insecurity in the people, or any section of the people or to adversely affect harmony among different sections of the people; or

(c) commits an act of gang rape, child molestation, or robbery coupled with rape as specified in the Schedule to this Act; or

(d) commits an act of civil commotion as specified in section 7-A."

Through this amendment the focus on the effect of the action was extended to a potential or likely effect besides the actual effect of the action and the focal point still remained the effect of the action rather than the incentive or inspiration behind the same.

12. It is of vital importance to mention here that while providing in the amended section 6 that "in order to, or if the effect of his actions will be to, strike terror or create a sense of fear and insecurity in the people, or any section of the people, does any act or thing ---" the legislature never specified the motivation for that "act or thing" on the part of the perpetrator which propelled or prompted him to commit a terrorist act. Thus, the actus reus was itself considered to be determinative if the same was intended to create fear and insecurity, etc. in the public at large, had the effect of creating such fear and insecurity, etc. or had a potential for creating such fear and insecurity, etc. According to this definition what was of paramount consideration was the effect of the act, whether actual, intended or potential, and not the design or the purpose behind that act. It was in that context that the Hon'ble Supreme Court of Pakistan had interpreted the provisions of section 6 of this Act in many cases, to be discussed later on in this judgment, and had held that an act was to be considered a terrorist act if its effect, whether actual, intended or potential, was to create fear and insecurity, etc. in the society at large.

13. On August 15, 2001 the Anti-Terrorism Act, 1997 was drastically amended through the Anti-Terrorism (Amendment) Ordinance, 2001 (Ordinance No. XXXIX of 2001). Through the amending Ordinance the Schedule of the Act containing various offences to be tried under the said Act was done away with and the term 'terrorist act' with its definition contained in section 6 of the Act was substituted and replaced by the term 'terrorism' with the following definition thereof:

"(1) In this Act "terrorism" means the use or threat of action where:

(a) the action falls within the meaning of subsection (2), and

(b) the use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect or create a sense of fear or insecurity in society; or

(c) the use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause.

(2) An "action" shall fall within the meaning of sub-section (1), if it:

(a) involves the doing of anything that causes death;

(b) involves grievous violence against a person or grievous bodily injury or harm to a person;

(c) involves grievous damage to property;

(d) involves the doing of anything that is likely to cause death or endangers a person's life;

(e) involves kidnapping for ransom, hostage-taking or hijacking;

(f) incites hatred and contempt on religious, sectarian or ethnic basis to stir up violence or cause internal disturbance;

(g) involves stoning, brick-batting or any other form of mischief to spread panic;

(h) involves firing on religious congregations, mosques, imambargahs, churches, temples and all other places of worship, or random firing to spread panic, or involves any forcible takeover of mosques or other places of worship;

(i) creates a serious risk to safety of the public or a section of the public, or is designed to frighten the general public and thereby prevent them from coming out and carrying on their lawful trade and daily business, and disrupts civic life;

(j) involves the burning of vehicles or any other serious form of arson;

(k) involves extortion of money ("bhatta") or property;

(l) is designed to seriously interfere with or seriously disrupt a communications system or public utility service;

(m) involves serious coercion or intimidation of a public servant in order to force him to discharge or to refrain from discharging his lawful duties; or

(n) involves serious violence against a member of the police force, armed forces, civil armed forces, or a public servant.

(3) The use or threat of use of any action falling within sub-section (2), which involves the use of fire-arms, explosives or any other weapon, is terrorism, whether or not subsection 1(c) is satisfied.

(4) In this section "action" includes any act done for the benefit of a proscribed organization.

(5) In this Act, terrorism includes any act done for the benefit of a proscribed organization.

(6) A person who commits an offence under this section or any other provision of this Act, shall be guilty of an act of terrorism.

(7) In this Act, a "terrorist" means:

(a) a person who has committed an offence of terrorism under this Act, and is or has been concerned in the commission, preparation or instigation of acts of terrorism;

(b) a person who is or has been, whether before or after the coming into force of this Act, concerned in the commission, preparation or instigation of acts of terrorism, shall also be included in the meaning given in clause (a) above."

14. The resume of our legislative developments in the field of terrorism shows that with different laws and definitions of terrorist act or terrorism the emphasis has been shifting from one criterion to another including the gravity of the act, lethal nature of the weapon used, plurality of culprits, number of victims, impact created by the act and effect of fear and insecurity brought about or likely to be created in the society by the action. The last definition of a 'terrorist act' contained in section 6 of the Anti-Terrorism Act, 1997 squarely focused on the effect of fear and insecurity intended to be created by the act or actually created by the act or the act having the potential of creating such an effect of fear and insecurity in the society. It, however, appears that subsequently the legislature did not feel convinced of the aptness or correctness of that definition and resultantly the erstwhile definition of a 'terrorist act' contained in section 6 of the Anti-Terrorism Act, 1997 was repealed and a totally fresh and new definition of 'terrorism' was introduced through an amended section 6 of the Anti-Terrorism Act, 1997 and this was accomplished through the Anti-Terrorism (Amendment) Ordinance, 2001 (Ordinance No. XXXIX of 2001) promulgated on 15.08.2001. The legislature had probably realized by then that an effect of an act may not always be a correct indicator of the nature of such an act as every crime, especially of violence against person or property, does create some sense of fear and insecurity in some section of the society and a definition of terrorism based upon the magnitude or potential of an effect created or intended to be created or having a

potential of creating would necessarily require a premature, speculative and imaginary quantification of the effect so as to determine the nature of the act in order to decide about the jurisdiction of a criminal court to try such an act. That surely was an unsure test and the result of such a premature, speculative and presumptive test could vary from court to court and from Judge to Judge reminding a legal scholar of the Star Chamber and the early days of a Court of Equity in England where equity was said to vary with the size of the Chancellor's foot. The new definition of 'terrorism' introduced through the amended section 6 of the Anti-Terrorism Act, 1997 as it stands today appears to be the most comprehensive and the clearest definition of 'terrorism' introduced in our legal system thus far. It appears that in its quest for an apt and appropriate definition of terrorism and after stumbling through various approaches in that regard the legislature in our country has finally hit upon a definition of terrorism which is not only closest to its real meaning but the same is also in accord with the international perceptions about the same. The earlier emphasis on the speculative effect of the act has now given way to a clearly defined mens rea and actus reus. The amended section 6(1)(b) now specifies the 'design' and section 6(1)(c) earmarks the 'purpose' which should be the motivation for the act and the actus reus has been clearly mentioned in section 6(2)(a) to (n) and now it is only when the actus reus specified in section 6(2) is accompanied by the requisite mens rea provided for in section 6(1)(b) or (c) that an action can be termed as 'terrorism'. Thus, it is no longer the fear or insecurity actually created or intended to be created or likely to be created which would determine whether the action qualifies to be termed as terrorism or not but it is now the intent and motivation behind the action which would be determinative of the issue irrespective of the fact whether any fear and insecurity was actually created or not. After this amendment in section 6 an action can now be termed as terrorism if the use or threat of that action "is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect" or if such action is designed to "create a sense of fear or insecurity in society" or the use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause. Now creating fear or insecurity in the society is not by itself terrorism unless the motive itself is to create fear or insecurity in the society and not when fear or insecurity is just a byproduct, a fall out or an unintended consequence of a private crime. In the last definition the focus was on the action and its result whereas in the present definition the emphasis appears to be on the motivation and objective and not on the result. Through this amendment the legislature seems to have finally appreciated that mere shock, horror, dread or disgust created or likely to be created in the society does not transform a private crime into terrorism but terrorism as an 'ism' is a totally different concept which denotes commission of a crime with the object and purpose of destabilizing the society or government with a view to achieve objectives which are political in the extended sense of the word. This approach appears to be in harmony with the emerging international perception about terrorism according to which, as referred to above, "the aim of the activity is always political, i.e. the goal is to attain political objectives like changing the regime, changing the people in power, changing social or economic policies, etc. In the absence of a political aim, the activity in quest will not be defined as terrorism. A violent activity against civilians that has no political aim is, at most, an act of criminal delinquency, a felony, or simply an act of insanity unrelated to terrorism. Some scholars tend to add ideological or religious aims to the list of political aims." This metamorphosis in the anti-terrorism law in our country has brought about a sea change in the whole concept as we have understood it in the past and it is, therefore, of paramount importance for all concerned to understand this conceptual modification and transformation in its true perspective. In view of this conceptual transformation even the interpretations of a 'terrorist act' or 'terrorism' rendered by our courts in the past on the basis of the earlier law may, it is

observed with great respect, require revisiting and reinterpretation so as to be in line with the newly introduced definition and concept of terrorism.

15. Adverting to the case-law on the subject we may straightaway observe with profound respect that, barring a few exceptions, the judgments rendered on the subject thus far by the Hon'ble Supreme Court of Pakistan appear to be heavily influenced by the erstwhile definition of a 'terrorist act' contained in the original Act and even the new definition of 'terrorism' contained in the amended Act has, by and large, been looked at with the same mindset. For instance in the case of -------

16. One cannot help noticing that all the cases referred to in the last paragraph pertained to offences committed for private purposes with no motivation to destabilize the society at large but they were all adjudged to be cases of terrorist acts or terrorism on the basis of a presumptive and speculative quantification of the effect that the relevant actions could have created in the society. In all such cases, it is observed with great deference, the change brought about by the new definition of 'terrorism' with its resultant shifting of focus from the effect of the action to the design or purpose behind the action had not been noticed and all those cases had been decided on the basis and on the yardstick of the principles provided for by the earlier definition of a 'terrorist act'. In the above mentioned cases the gravity of the offence with its resultant actual, intended or potential effect on the people at large was considered as the measure for determining whether the act constituted terrorism or not. We can appreciate that the mindset inherited by us in the background of the Summary Military Courts, Speedy Trial Courts and Special Courts for Suppression of Terrorist Activities, which were different courts constituted at different stages in the past for separate and special handling of offences of grave nature, may take some time to be dispelled and it may take us a while to appreciate and realize that an act of 'terrorism' is not just a grave offence but it is a class and species apart and this class or species has to be understood in its true and correct perception and perspective otherwise every serious offence may be found by one Judge or the other to involve terrorism depending upon a subjective assessment of the potential of the act to create some sense of fear or insecurity in some section of the society. Such an approach, it may be observed with great veneration, may not be wholesome as it may ultimately result in every case of a serious offence landing in a Special Court and thereby rendering the ordinary courts substantially redundant. It ought not to be lost sight of that the legislature's repeal of the Suppression of Terrorist Activities (Special Courts) Act, 1975, doing away with the Schedule of the Anti-Terrorism Act, 1997 and also its retraction from the 'effect' through the fresh definition of 'terrorism' cannot be without any significance or purpose. That drastic change of the definition manifestly indicated a change of meanings and of focus and such a change has to be given its proper effect. After all if the newly introduced term 'terrorism' is still to be interpreted in the same manner as the erstwhile term 'terrorist act' then there was hardly any occasion or need for the legislature to amend the definition and to bring about any change in the existing law in that regard. The legacy and interpretations pertaining to the Suppression of Terrorist Activities (Special Courts) Act, 1975 and of the original provisions of the Anti-Terrorism Act, 1997 have now to be shrugged off so as to correctly understand the new definition of 'terrorism' introduced through the latest amendment in the latter Act. The Hon'ble Supreme Court of Pakistan had itself declared in the above mentioned case of Mumtaz Ali Khan Rajban and another v. Federation of Pakistan and others (PLD 2001 SC 169) that the subject matters of the Suppression of Terrorist Activities (Special Courts) Act, 1975 and the Anti-Terrorism Act, 1997 were "different" and their respective applicability was "governed by different criteria".

17. We understand, and we observe so with all the respect at our command, that in the above mentioned cases the Hon'ble Supreme Court of Pakistan had, wittingly or otherwise, detracted

or moved away from the principle of nexus so painstakingly carved out by itself in the case of Mehram Ali and others v. Federation of Pakistan and others (PLD 1998 SC 1445). -----

18. It may be advantageous to mention here that the

definition of 'terrorism' introduced in Pakistan in 2001 through the latest amendment in the Anti-Terrorism Act, 1997 proceeds on lines somewhat similar, if not identical, to the corresponding definitions contained in the relevant laws of Northern Ireland, United Kingdom, United States of America, Australia and India. Section 58 of the Northern Ireland (Emergency Provisions) Act, 1996 defined terrorism in the following words: -----Section 1 of the United Kingdom's Terrorism Act, 2000 reads as follows:-----

Section 802 of the Uniting and Strengthening America Act by Providing Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 of the United States of America defines "domestic terrorism" as follows: --- In Australia Section 5 of the Terrorism (Emergency Powers) Act, 2003 defines a 'terrorist act' in the following words: --- In India the Terrorist and Disruptive Activities (Prevention) Act, 1987 (Act No. 28 of 1987) defined a 'terrorist act' in section 3(1) thereof as follows: -- The Terrorist and Disruptive Activities (Prevention) Act, 1987 was subsequently repealed in India and was substituted by the Prevention of Terrorism Act, 2002 (Act No. 15 of 2002) and section 3 of the said Act provides as follows:---

19. The similarities, nay resemblances, in the definitions of a 'terrorist act' or 'terrorism' enacted in Northern Ireland, United Kingdom, United States of America, Australia, India and Pakistan are too striking to be merely coincidental and, therefore, in the larger interests of global harmony and communion their interpretations ought also not be different. ---- In the case of Niranjan Singh Karam Singh Punjabi, Advocate v. Jitendra Bhimraj Bijja and others (AIR 1990 SC 1962) ----This, to us, appears to be an approach which is not only in complete harmony with the change of focus brought about by the new definition of 'terrorism' through the amended section 6 of the Anti-Terrorism Act, 1997 in Pakistan but is also in perfect accord with the global perceptions about the true nature of terrorism according to which the determinative factor is the design or purpose behind the act and not the presumptive effect created by the act upon those who were not even the targets of the private act. ----- the Hon'ble Supreme Court of India had reiterated in the case of Niranjan Singh Karam Singh Punjabi, Advocate v. Jitendra Bhimraj Bijja and others (AIR 1990 SC 1962) that: ---- In the subsequent case of Kartar Singh v. State of Punjab ((1994) 3 Supreme Court Cases 569) the Hon'ble Supreme Court of India reproduced the above mentioned passages from the judgments in the cases of Niranjan Singh Karam Singh Punjabi, Advocate v. Jitendra Bhimraj Bijja and others (AIR 1990 SC 1962) and Usmanbhai Dawoodbhai Memon v. State of Gujarat ((1988) 2 SCC 271) and commented upon them with approval and reiteration. The later case of Hitendra Vishnu Thakur and others v. State of Maharashtra and others (AIR 1994 SC 2623) can truly be described as a milestone in the context of identifying the true meanings of terrorism and the Hon'ble Supreme Court of India had observed in its judgment in that case as follows: ---- A similar approach was adopted by the Hon'ble Supreme Court of Pakistan in 1998 in the above mentioned case of Mehram Ali and others v. Federation of Pakistan and others (PLD 1998 SC 1445) by carving out the principle of nexus with the objects of the Anti-Terrorism Act, 1997. However, it appears that in the last few years the said principle has either been side tracked or placed on the back burner in our country and the law is not only being stretched in a different direction but the same is also often being misapplied and misused by the police and the subordinate courts. An appropriate and correct restatement of the relevant law for its proper application is, therefore, not only necessary but also a crying need so that the relevant law may be saved from being derailed from its real objectives.

20. By way of summing up we may observe that, keeping in view the latest definition of 'terrorism' contained in section 6 of the Anti-Terrorism Act, 1997, mere gravity or brutal nature of an offence does not provide a valid yardstick for branding the same as terrorism. In order to qualify as terrorism the motivation behind the offence has to be political in the extended sense of the word and, as provided in the United Kingdom law, "the use or threat is made for the purpose of advancing a political, religious or ideological cause" and the act has to be designed to destabilize the society at large. The history of crimes in the human society is replete with macabre, gruesome and horrifying offences shocking the society at large yet such crimes were never treated or accepted as terrorism because the motivation was personal and private. As against that even an unsuccessful attempt at sabotage of public supplies or services has readily been accepted as terrorism because the purpose behind the act is to destabilize the society at large. Even a petty theft in a house in a street is likely to create a sense of insecurity in the people living in that street, a rape of a young girl is bound to send jitters in every family having young girls living in the relevant locality, a murder in the vicinity surely creates a grave sense of fear in the inhabitants of the area, a bloodbath in furtherance of an on-going feud shocks the society as a whole, a massive fraud in a bank may send shockwaves throughout the banking and financial sectors and an offence committed against a member of any profession may render the other members of that profession feeling vulnerable and insecure. But all such offences are ordinary crimes distinguishable from terrorism because for the former the motivation is personal and private whereas for the latter the purpose has to be to destabilize the society at large. In this backdrop a premature, speculative, presumptive and imaginary quantification of the effect of an action so as to determine the nature of the act as terrorism or not appears to be an unsure and subjective test and it would be safer and consistent to revert to the principle of nexus carved out by the Hon'ble Supreme Court of Pakistan which is not only now a statutory requirement but the same is also consistent with the first major enunciation of the relevant law by our Supreme Court and that too by a Bench larger than any other Bench deciding any of the other cases mentioned above.

21. ---------

22. Judged on the basis of the requirements of the amended provisions of section 6 of the Anti-Terrorism Act, 1997 and examined on the touchstone of the principle of nexus propounded by the largest Bench of the Hon'ble Supreme Court of Pakistan in the case of Mehram Ali and others v. Federation of Pakistan and others (PLD 1998 SC 1445), reiterated by an equally large Bench of it in the case of Jamat-i-Islami Pakistan through Syed Munawar Hassan, Secretary-General v. Federation of Pakistan through Secretary, Law, Justice and Parliamentary Affairs (PLD 2000 SC 111) and applied by it in the case of Ch. Bashir Ahmad v. Naveed Iqbal and 7 others (PLD 2001 SC 521) the case in hand, despite the brutality displayed by the culprits and the consequent horror, shock, fear and insecurity likely to be created by the savagery perpetrated by the offenders, has not appeared to us to be a case of terrorism as the motive for the alleged offences was nothing but personal enmity and private vendetta and the motivation on the part of the accused party was not to overawe or intimidate the government, etc. or to destabilize the society at large or to advance any sectarian cause, etc.. The intention of the accused party did not depict or manifest any 'design' or 'purpose' as contemplated by the provisions of section 6(1)(b) or (c) of the Anti-Terrorism Act, 1997 and, thus, the actus reus attributed to it was not accompanied by the necessary mens rea so as to brand its actions as terrorism triable exclusively by a Special Court constituted under the Anti-Terrorism Act, 1997. The stand taken before us by the learned Assistant Advocate-General appearing for the State also proceeds on the same lines and it is for these very reasons that the State has chosen not to oppose this petition. This writ petition is, therefore, allowed, the impugned order passed

by the learned Judge, Anti-Terrorism Court-II, Gujranwala on 04.10.2003 is declared to be without lawful authority and of no legal effect and the same is set aside, the application filed by the petitioner before the said court under section 23 of the Anti-Terrorism Act, 1997 is accepted and the petitioner's case is declared to be triable by a court of ordinary jurisdiction. The learned Judge, Anti-Terrorism Court-II, Gujranwala is directed to transmit the record of the petitioner's case to the learned District and Sessions Judge, Gujranwala forthwith for further proceedings in the matter. There shall be no order as to costs."

The said judgment passed by the Lahore High Court, Lahore (authored by one of us, Asif Saeed Khan Khosa, CJ, in his capacity as a Judge of that Court at that time) was initially set aside by this Court in the case of Mirza Shaukat Baig and others v. Shahid Jamil and others (PLD 2005 SC 530) but subsequently in the cases of Bashir Ahmed v. M. Siddique (PLD 2009 SC 11), Ahmad Jan v. Nasrullah and others (2012 SCMR 59) and Farooq Ahmed v. State and another (2020 SCMR 78) it was not only referred to with approval and relied upon by this Court but it was also held to be laying down correct law regarding the scope and meanings of 'terrorism' as defined in section 6 of the Anti-Terrorism Act, 1997.

9. Section 6 of the Anti-Terrorism Act, 1997 has been amended from time to time and in its present shape it provides as follows:

6. Terrorism. - (1) In this Act, "terrorism" means the use or threat of action where:

(a) the action falls within the meaning of subsection (2), and

(b) the use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect or create a sense of fear or insecurity in society; or

(c) the use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause or intimidating and terrorizing the public, social sectors, media persons, business community or attacking the civilians, including damaging property by ransacking, looting, arson, or by any other means, government officials, installations, security forces or law enforcement agencies:

Provided that nothing herein contained shall apply to a democratic and religious rally or a peaceful demonstration in accordance with law.

(2) An "action" shall fall within the meaning of subsection (1), if it:

(a) involves the doing of anything that causes death;

(b) involves grievous violence against a person or grievous bodily injury or harm to a person;

(c) involves grievous damage to property including government premises, official installations, schools, hospitals, offices or any other public place or private property including damaging property by ransacking, looting or arson or by any other means;

(d) involves the doing of anything that is likely to cause death or endangers a person's life;

(e) involves kidnapping for ransom, hostage-taking or hijacking;

(ee) involves use of explosive by any device including bomb blast or having any explosive substance without any lawful justification or having been unlawfully concerned with such explosive;

(f) incites hatred and contempt on religious, sectarian, or ethnic basis to stir up violence or cause internal disturbance;

(g) involves taking the law in own hand, award of any punishment by an organization, individual or group whatsoever, not recognized by the law, with a view to coerce, intimidate or terrorize public, individuals, groups, communities, government officials and institutions, including law enforcement agencies beyond the purview of the law of the land;

(h) involves firing on religious congregations, mosques, imambargahs, churches, temples and all other places of worship, or random firing to spread panic, or involves any forcible takeover of mosques or other places of worship;

(i) creates a serious risk to safety of the public or a section of the public, or is designed to frighten the general public and thereby prevent them from coming out and carrying on their lawful trade and daily business, and disrupts civic life;

(j) involves the burning of vehicles or any other serious form of arson;

(k) involves extortion of money ("bhatta") or property;

(l) is designed to seriously interfere with or seriously disrupt a communication system or public utility service;

(m) involves serious coercion or intimidation of a public servant in order to force him to discharge or to refrain from discharging his lawful duties;

(n) involves serious violence against member of the police force, armed forces, civil armed forces, or a public servant;

(o) involves in acts as part of armed resistance by groups or individuals against law enforcements agencies; or

(p) involves in dissemination, preaching ideas, teachings and beliefs as per own interpretation on FM stations or through any other means of communication without explicit approval of the government or its concerned departments.

(3) The use or threat of any action falling within subsection (2) which involves the use of firearms, explosive or any other weapon is terrorism, whether or not subsection (1) (c) is satisfied.

(4) In this section "action" includes an act or a series of acts.

(5) In this Act, terrorism includes any act done for the benefit of a proscribed organisation.

(6) A person who commits an offence under this section or any other provision of this Act, shall be guilty of an act of terrorism.

(7) In this Act, a "terrorist" means:-

(a) an individual who has committed an offence of terrorism under this Act, and is or has been concerned in the commission, preparation, facilitation, funding or instigation of acts of terrorism;

(b) an individual who is or has been, whether before or after the coming into force of this Act, concerned in the commission, preparation, facilitation, funding or instigation of acts of terrorism, shall be included in the meaning given in clause (a) above.

On the basis of the said definition of 'terrorism' and the precedent cases available on the subject all the learned counsel for all the parties as well as all the learned law officers, except the learned Attorney-General for Pakistan, have argued before us in unison that an act of terrorism is not to be confused with an ordinary crime committed in the background of a personal enmity or private vendetta and gravity of an offence, shocking nature of the violence committed or mere fear and insecurity generated or likely to be generated by commission of a brutal, gruesome or heinous act are not to be treated as the yardsticks for determining whether an action is to be labeled as terrorism or not and only that action is to be accepted as terrorism which action falls within the purview of subsection (2) of section 6 and such action is committed with a 'design' or 'purpose' specified in clauses (b) or (c) of subsection (1) of section 6 of the Anti-Terrorism Act, 1997. The learned Attorney-General for Pakistan has, however, submitted his written submissions and through the same he has maintained that "all "actions" that fall within the contemplation of sub-section (3) of section 6 would have to be registered as an act of terror, within the meaning of terrorism. However punishments contemplated by Sec 7 would be awarded, subject to subsequent evidence being led, that, the 'actions' where weapons are used and has caused fear/terror etc., it would be termed as 'terrorism', as defined in section 6(1), (2) and (3), else, the person could be acquitted to the extent of the charge of terrorism. In other cases not involving the contemplation of subsection (3) of section 6, the FIR cannot be lodged under the provisions of ATA, however, where during investigation and available evidence, any of the provision of sub section (2) of section 6 comes to surface, Anti-Terrorism Act can be included." The main thrust of the stand taken

by the learned Attorney-General is that in terms of subsection (3) of section 6 of the Anti-Terrorism Act, 1997 use or threat of use of firearms, explosive or any other weapon for all the actions mentioned in subsection (2) of section 6 of that Act ipso facto constitutes terrorism and an FIR can be registered on that basis in respect of the offence of terrorism but conviction for committing the offence of terrorism can be recorded at the end of the trial only if the alleged action is proved through evidence to have been taken with the 'design' or 'purpose' specified in clauses (b) and (c) of subsection (1) of section 6 of the Anti-Terrorism Act, 1997. According to the learned Attorney-General subsections (1), (2) and (3) of section 6 of the said Act are to be read in conjunction and for determining whether an action constitutes terrorism or not it is the action with its actual or likely consequences which is relevant and not the intention behind the action which remains hidden in the mind of the perpetrator of the action. However, in the same written submissions the learned Attorney-General has also observed that "terrorism as a concept is not 'ordinary' in even the way that intention, guilt and dishonesty are. Nor is it a term belonging to some science; its natural home is in polemical, ideological, and propagandist contexts or, less alarmingly, highly political ones." The learned Additional Prosecutor-General, Punjab has added that the provisions of subsection (3) of section 6 of the Anti-Terrorism Act, 1997 are quite problematic as they do not piece well with the remaining provisions of the said section as far as the matter of defining terrorism is concerned. According to him if the provisions of subsection (3) of section 6 of the Anti-Terrorism Act, 1997, as they are worded, are to be given effect then almost every offence in commission of which firearms, explosive or any other weapon is used or threatened to be used would constitute terrorism and such an approach would obliterate any distinction between the peculiar offence of terrorism and most of the run of the mill offences committed in the society in routine.

10. We have heard the learned counsel for the parties at some length and have attended to the relevant statutory provisions and all the precedent cases available on the subject so far. As the opinion of this Court has remained divided on the issue as to what constitutes terrorism in the context of section 6 of the Anti-Terrorism Act, 1997, therefore, it is imperative to examine and scrutinize all the precedent cases available on either side of the divide with care. In the following cases this Court has held that the actions specified in subsection (2) of section 6 of the Anti-Terrorism Act, 1997 are to constitute the offence of terrorism only if such actions are accompanied by the 'design' or 'purpose' specified in clauses (b) or (c) of subsection (1) of section 6 of the said Act and it has consistently been maintained in these cases that an act of terrorism is not to be confused with the usual and run of the mill crimes committed in the background of any personal enmity or private vendetta and also that gravity of an offence, shocking nature of the violence committed or mere fear and insecurity generated or likely to be generated by commission of a brutal, gruesome or heinous offence are not to be treated as the determining factors for deciding whether an action is to be labeled and accepted as terrorism or not.

Mehram Ali and others v. Federation of Pakistan and others (PLD 1998 SC 1445)

> "However, it may be observed that the offences mentioned in the Schedule should have nexus with the object of the Act and the offences covered by sections 6, 7 and 8 thereof. It may be stated that section 6 defines terrorist acts, section 7 provides punishment for such acts, and section 8 prohibits acts intended or likely to stir up sectarian hatred mentioned in clauses (a) to (d) thereof. If an offence included in the Schedule has no nexus with the above sections, in that event notification including such an offence to that extent will be ultra vires. --- It will suffice to observe that if a Government servant or any other employee of the Government functionaries is murdered because he belongs to the above service and that there was no enmity or plausible reason for commission of the above offence, such a killing is an act of terrorism within the ambit of the Act and can lawfully be included in the Schedule, but if the murder is committed solely on account of personal enmity, such murder will have no nexus with the above provisions of the Act and will not be triable under the Act."

Jamat-i-Islami Pakistan through Syed Munawar Hassan, Secretary-General v. Federation of Pakistan through Secretary, Law, Justice and Parliamentary Affairs

(PLD 2000 SC 111)

" ---- to make an act punishable under the Act, it must be shown that the act bears nexus to sections 6, 7 and 8 of the Act."

Ch. Bashir Ahmad v. Naveed Iqbal and 7 others

(PLD 2001 SC 521)

"A person would commit a terrorist act if in order to, or if the effect of his actions will be "to strike terror or create a sense of fear and insecurity in the people, or any section of the people---". In the instant case as the facts of the case reveal, the alleged sprinkling of the spirit on the person of the victim was within the boundary walls of the appellant's house. It was not in public and, therefore, the element of striking terror or creating sense of fear and insecurity in the people, or any section of the people is not made discernible in the FIR and for that matter on the record of the case as a whole. Similarly the perusal of the Schedule to the Act also indicates that the element of striking terror or creation of sense of fear and insecurity in the people or any section of the people by doing an act or thing by using bombs, dynamite or other explosive or inflammable substances etc. is a sine qua non for the attraction of the provisions of section 6 of and the Schedule to the Act---. In the instant case no doubt the offence committed was certainly most heinous in nature but it does not mean that it does qualify to be a terrorist act within the contemplation of section 6 or the Schedule to the Act."

Muhammad Mushtaq v. Muhammad Ashiq and others

(PLD 2002 SC 841)

"It would thus appear that ordinary crimes are not to be dealt with under the Act. A physical harm to the victim is not the sole criterion to determine the question of terrorism."

Fazal Dad v. Col. (Rtd.) Ghulam Muhammad Malik and others

(PLD 2007 SC 571)

"In case the aforesaid provisions and contents of F.I.R. are put in a juxta position then section 6 of the said ordinance is not attracted. It is a settled law that preamble is always key to interpret the statute. The very object to promulgate the Anti-Terrorism Act, 1997 was to control the acts of terrorism, sectarian violence and other heinous offences as defined in section 6 of the Act and their speedy trial to bring the offence within the ambit of the act, it is essential to examine that the said offence should have nexus with the object of the act and offences covered by its relevant provisions such as section 6. It is a settled law that provisions of law must be read as a whole in order to determine its true nature, import and scope ---. It is abundantly clear that in case the provisions of act be read as a whole with the offence which creates a sense of fear or insecurity in society, causes of death or endangers a person's life commits an act of vehicle snatching or lifting, damage to or disturbance of, State or private property failing to create panic charging bhatta or criminal trespasser (Illegal qabza). As mentioned above, the ingredients of aforementioned offences have no nexus while reading the aforesaid provisions along with the contents of the impugned FIR It is pertinent to mention here that nothing was on record to show that occurrence created terror, panic or sense of insecurity among people by securing possession of the land in question by the respondent. The word illegal Qabza must be read with the previous words used by the legislature in clause (d) of section 6 of the Anti-Terrorism Act, 1997 on well-known principle that statutory provisions ought not to be construed in isolation and courts always to lean towards reasonable interpretation of statute. The learned High Court was justified to examine the scope of terrorism at the time of deciding the constitutional petition with regard to the transfer of case from special court to ordinarily court on the well known maxim that legislative intent as a guide to interpretation of statute

should be gathered primarily from words used in statute. The case in hand did not qualify to be a terrorist act within the contemplation of section 6 or schedule of Anti-Terrorism Act and the learned High Court was justified to transfer the case to the ordinary court. It is settled law that promulgation of special law by itself is not sufficient to supersede provisions of law contained in Cr.P.C. In case, the offence has no nexus with the parameters of special law, then general law will apply. The judgment of the learned High Court is in consonance with the law laid down by this court in various pronouncements. See Mehram Ali's case PLD 1998 SC 1445 and Jamat-e-Islami Pakistan's case PLD 2000 SC 111."

Mohabbat Ali and another v State and another

(2007 SCMR 142)

"In order to determine as to whether an offence would fall within the ambit of section 6 of the Act, it would be essential to have a glance over the allegations made in the FIR, record of the case and surrounding circumstances. It is also necessary to examine that the ingredients of alleged offence has any nexus with the object of the case as contemplated under sections 6, 7 and 8 thereof. Whether a particular act is an act of terrorism or not, the motivation, object, design or purpose behind the said Act is to be seen. It is also to be seen as to whether the said Act has created a sense of fear and insecurity in the public or any section of the public or community or in any sect. Examining the case in hand on the above touchstone, it is manifest on the face of it that the alleged offence took place because of previous enmity and private vendetta. The incident admittedly took place inside the fields of sugarcane and Banana cultivated in jungle about 14/15 miles away from the main road. Motive as defined in the FIR is also to be given a specific attention which indicates that there was a personal enmity between the parties over the land and murder case of Haries of complainant."

"From the entire resume, it is manifest on record that intention of the petitioner was not at all to create sense of insecurity or in destabilize the public-at-large or to advance any sectarian cause. Thus, we are of the view that the design or purpose of the offence as contemplated by the provisions of section 6 of the Act is not attracted. Reference can be made to the case of this Court reported as Bashir Ahmad v. Naveed Iqbal PLD 2001 SC 521 whereby sprinkling of spirit on the person of victim was made within the boundary walls of the house of appellant which was not a public place and accordingly the element of a striking terror or creating sense of fear and insecurity in the people or any section of the people was found missing, therefore, the order of transferring the case to the Court of learned Sessions Judge passed by the High Court was upheld."

Tariq Mahmood v. State

(2008 SCMR 1631)

"In our opinion, the case of the respondent accused, who have clean past, rests on a lower pedestal than that on terrorists and sectarian criminals who killed innocent persons either to weaken the State or to cause damage to the parties of the rival sect. The terrorist or the sectarian killers do not have any personal grudge or motive against the innocent victims. The instant case is clearly distinguishable as admittedly a feud existed between the parties over a piece of land prior to the occurrence."

Muhammad Yaqoob and others v. The State and others

(2009 SCMR 527)

"Though learned counsel for the appellants has not specifically challenged convictions of the appellants under section 7 of the Anti-Terrorism Act, 1997 and occurrence in the case allegedly took place in Samoote Bazaar, opposite U.B.L. Branch, wherein three persons were done to death and another sustained grievous injuries yet, in the absence of any stipulation in the FIR to the effect that the incident had struck terror or panic in the public and in the absence of any

evidence to the effect that the incident had created sense of fear or insecurity in the public or any section of public or community or any sect, it could not have been contended that section 7 of the Anti-Terrorism Act, 1997 was attracted in the instant case. It would be pertinent to mention here that in order to bring a particular act within the ambit of section 7, it is to be seen as to whether the said act had created sense of fear or insecurity in public or in any section of public or community or any sect, or the occurrence was simply the result of previous enmity or personal vendetta.

Since in the instant case it has been established that motive behind the incident was previously strained relations between the parties and an iota of evidence has not been brought on record to show that object was not to kill the deceased but also to strike terror or create sense of fear or insecurity in the general public or community or any sect thereof, therefore, in our view section 7 of the Anti-Terrorism Act was not attracted. In the case of Tariq Mahmood v. The State 2008 SCMR 1631, the occurrence had allegedly taken place in a Bazaar which was heavily populated and it was claimed that due to firing there was stampede in the traversers yet, since it was found that there was no evidence that the act of respondents/accused struck terror amongst the masses and the place of occurrence was not a busy populated area rather it took place on a service road, therefore, the provisions of Anti- Terrorism Act were not attracted. In the case of Muhammad Idrees and others v. The State 2008 SCMR 1544, occurrence took place on the bank of canal. It was not established on record that the act done by the accused persons had created sense of fear or insecurity in public, therefore, it was held that section 7 of the Anti-Terrorism Act was not attracted. In the case of Mohabbat Ali v. The State 2007 SCMR 142, the alleged incident took place because of previous enmity and private vendetta inside the fields of sugarcane and banana, about 14/15 miles away from main road, it was held that intention of the accused was not at all to create sense of fear or insecurity or to destabilize public at large or to advance any sectarian cause and design or purpose of offence as contemplated by provisions of section 6 of Anti-Terrorism Act, 1997 was not attracted. In the case of Fazal Dad v. Col. (Retd.) Ghulam Muhammad Malik PLD 2007 SC 571, since nothing was brought on record to show that the occurrence created terror, panic or sense of insecurity among people by securing possession of land in question by the accused persons, therefore, the case did not qualify to be a terrorist act within the contemplation of section 6 of the Anti-Terrorism Act or its schedule. Convictions and sentences recorded against the appellants under section 7 of the Anti-Terrorism Act, are, therefore, set aside."

Bashir Ahmed v. M. Siddique

(PLD 2009 SC 11)

"In order to determine as to whether an offence would fall within the ambit of section 6 of the Anti-Terrorism Act, 1997, it would be essential to have a glance over the allegations made in the FIR record of the case and surrounding circumstances. It is also necessary to examine that the ingredients of alleged offence have any nexus with the object of the case as contemplated under sections 6, 7 and 8 thereof. Whether a particular act is an act of terrorism or not, the motivation, object, design or purpose behind the said act is to be seen. It is also to be seen as to whether the said act has created a sense of fear and insecurity in the public or any section of the public or community or in any sect. Examining the case in hand on the above touchstone, it is manifest on the face of it that the alleged offence took place because of previous enmity and private vendetta. A perusal of the record would reveal, that occurrence has taken place in front of the `haveli' of the respondents, situated in village 'Fatoowala'. The motive for the occurrence is enmity inter-se the parties on account of some previous murders. In this view of the matter, we are of the opinion that since motive was enmity inter-se the parties, the application of section 7 of the Act, which primarily requires the spread of sense of insecurity and fear in the common

mind is lacking in the present case. The occurrence neither reflects any act of terrorism nor it was a sectarian matter instead the murders in question were committed owing to previous enmity between the two groups. The present case, as observed above, does not fulfil the requirements laid down in the judgment titled as "Basharat Ali v. Special Judge Anti-Terrorism Court-II, Gujranwala (PLD 2004 Lah.199), wherein it was held that fear or insecurity must not be a by-product, fall out or unintended consequence of a private crime. As such, creation of fear and insecurity in the society is not itself terrorism unless the same is coupled with the motive. The gist of the citation is that act of terrorism desires to be determined from the yardstick and scale of motive and object, instead of its result or after effect. From the facts of case, the definition of terrorism is not attracted as the said offence has neither created any threat to coerce or intimidate or overawe the Government or the public or a section of the public or community or sect or create a sense of fear or insecurity in society. Reference in this regard can be made on Ch. Bashir Ahmad v. Naveed Iqbal and 7 others (PLD 2001 SC 521), Muhammad Mushtaq v. Muhammad Ashiq and others (PLD 2002 SC 841) and Basharat Ali v. Special Judge, Anti-Terrorism Court-II, Gujranwala (PLD 2004 Lah. 199) ."

Ahmad Jan v. Nasrullah and others

(2012 SCMR 59)

"In Bashir Ahmed v. State (PLD 2009 SC 11) by considering the law laid down in Basharat Ali v. Special Judge, Anti-Terrorism Court-II (PLD 2004 Lahore 199), a judgment authored by one of us (Asif Saeed Khan Khosa, J), Bashir Ahmed v. Naveed Iqbal and others (PLD 2001 SC 521) and Muhammad Mushtaq v. Muhammad Ashiq and others (PLD 2002 SC 841), the case in question was held not to be triable by a Special Court established under the Anti-Terrorism Act, 1997 because "The motive for the occurrence is enmity inter se the parties on account of some previous murders. In this view of the matter, we are of the opinion that since motive was enmity inter se the parties, the application of section 7 of the Act, which primarily requires the spread of sense of insecurity and fear in the common mind is lacking in the present case. The occurrence neither reflects any act of terrorism nor it was a sectarian matter instead the murders in question were committed owing to previous enmity between the two groups.""

Malik Muhammad Mumtaz Qadri v. The State and others

(PLD 2016 SC 17)

"The next question to be considered is as to whether by committing the murder of Mr. Salman Taseer, the then Governor of the Province of the Punjab, the appellant had also committed the offence of 'terrorism' as defined by section 6 of the Anti-Terrorism Act, 1997 or not which offence is punishable under section 7(a) of the said Act. A plain reading of section 6 of the Anti-Terrorism Act, 1997 shows that while defining 'terrorism' the said section bifurcates the same into two parts, the mens rea for the offence falling in section 6(1)(b) or (c) and the actus reus of the offence falling in section 6(2) of the Act and in order to attract the definition of terrorism in a given case the requisite mens rea and actus reus must coincide and coexist. The provisions of section 6(5), (6) and (7) of the Act also indicate that there may be some other actions of a person which may also be declared or recognized as acts of terrorism by some other provisions of the same Act. Restricting ourselves to the provisions of section 6 of the Anti-Terrorism Act, 1997 for the present purposes we note that in a case where the action involves the doing of anything that causes death [section 6(2)(a)] and such causing of death is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect or create a sense of fear or insecurity in society [section 6(1)(b)] or such causing of death is for the purpose of advancing a religious, sectarian or ethnic cause [section 6(1)(c)] there the causing of death of the victim is to be accepted and treated as terrorism triable exclusively by an Anti-Terrorism Court. As far as the case in hand is

concerned the action of Malik Muhammad Mumtaz Qadri appellant involved firing at Mr. Salman Taseer and thereby causing his death and, thus, his actus reus fell within the ambit of section 6(2)(a) of the Anti-Terrorism Act, 1997. As regards the appellant's mens rea he had himself stated in his statement recorded by the trial court under section 342, Cr.P.C. that the murder of Mr. Salman Taseer committed by him was "a lesson for all the apostates, as finally they have to meet the same fate". That statement of the appellant clearly established that he not only wanted to punish Mr. Salman Taseer privately for the perceived or imagined blasphemy committed by him but the appellant also wanted to send a message or teach a lesson to all others in the society at large who dared to follow Mr. Salman Taseer's suit. In this view of the matter the causing of death of Mr. Salman Taseer by the appellant was surely designed to intimidate or overawe the public or a section of the public or to create a sense of fear or insecurity in the society so as to attract the requisite mens rea contemplated by section 6(1)(b) of the Anti-Terrorism Act, 1997. Apart from that it cannot be seriously contested that the appellant had committed the murder of Mr. Salman Taseer for the purpose of advancing a religious cause and, thus, even the mens rea contemplated by section 6(1)(c) of the Anti-Terrorism Act, 1997 stood fully attracted to the case of the appellant. In these circumstances we have entertained no manner of doubt that the action of the appellant and the intention, design or purpose behind such action fully attracted the definition of terrorism contained in section 6 of the Anti-Terrorism Act, 1997 and, therefore, he was correctly and justifiably punished by the trial court under section 7(a) of the said Act for committing the offence of terrorism. In paragraph No. 44 of the impugned judgment the Islamabad High Court, Islamabad had set aside the appellant's conviction and sentence recorded by the trial court under section 7(a) of the Anti- Terrorism Act, 1997 on the sole ground that sufficient evidence had not been brought on the record by the prosecution to establish that the murder committed by the appellant had in fact created any sense of fear or insecurity in the society. We have found such an approach adopted by the Islamabad High Court, Islamabad vis-a-vis the offence of terrorism to be utterly misconceived. The provisions of section 6(1)(b) of the Anti-Terrorism Act, 1997 quite clearly contemplate creation of a sense of fear or insecurity in the society as a design behind the action and it is immaterial whether that design was actually fulfilled or not and any sense of fear or insecurity was in fact created in the society as a result of the action or not. It is the specified action accompanied by the requisite intention, design or purpose which constitutes the offence of terrorism under section 6 of the Anti-Terrorism Act, 1997 and the actual fallout of the action has nothing to do with determination of the nature of offence. In this view of the matter we find ourselves in agreement with the learned Advocate-General, Islamabad that Malik Muhammad Mumtaz Qadri appellant's acquittal by the Islamabad High Court, Islamabad from the charge under section 7(a) of the Anti-Terrorism Act, 1997 is liable to be set aside and consequently his conviction for the said offence recorded by the trial court needs to be restored."

Khuda-e-Noor v. The State

(PLD 2016 SC 195)

"The crucial question involved in this appeal is as to whether the learned Sessions Judge, Mastung was justified in holding that the case in hand was one of honour killing and, thus, it was a case of "terrorism" attracting the exclusive jurisdiction of an Anti-Terrorism Court or not. It also needs to be examined as to whether the High Court of Balochistan, Quetta was justified in declaring in the case of Gul Muhammad (supra) that by virtue of the provisions of section 6(2)(g) of the Anti-Terrorism Act, 1997 all cases of honour killing are to be tried by an Anti-Terrorism Court. We have minutely gone through the said judgment passed by the High Court of Balochistan, Quetta and have found that for holding that all cases of honour killing attracted

the definition of "terrorism" the High Court had only relied upon the provisions of section 6(2)(g) of the Anti-Terrorism Act, 1997 without appreciating that by virtue of the provisions of section 6 of the Anti-Terrorism Act, 1997 any action falling within any of the categories of cases mentioned in subsection (2) of section 6 of the Anti-Terrorism Act, 1997 could not be accepted or termed as "terrorism" unless the said action was accompanied by a "design" or "purpose" specified in section 6(1)(b) or (c) of the said Act. If the interpretation of section 6(2)(g) of the Anti-Terrorism Act, 1997 advanced by the High Court of Balochistan, Quetta in the said judgment were to be accepted as correct then all cases of a person taking the law in his own hands are to be declared or accepted as cases of terrorism but that surely was not the intention of the legislature. The provisions of section 6 of the Anti-Terrorism Act, 1997 which define "terrorism" clearly show that the said section is divided into two main parts, i.e. the first part contained in section 6(1) (b) and (c) of the said Act dealing with the mens rea mentioning the "design" or the "purpose" behind an action and the second part falling in section 6(2) of the said Act specifying the actions which, if coupled with the mens rea mentioned above, would constitute the offence of "terrorism". This scheme of section 6 of the Anti-Terrorism Act, 1997 had unfortunately not been considered by the High Court of Balochistan, Quetta while rendering the judgment mentioned above and, thus, we have every reason to declare that the said judgment passed by the High Court of Balochistan, Quetta had not laid down the law correctly and had in fact misconceived the legal position contemplated by section 6 of the Anti-Terrorism Act, 1997."

"The case in hand was a case of a private motive set up in the FIR and during the trial the motive set up in the FIR was changed by the prosecution and an element of honour killing was introduced but even that did not change the character of the offence which was nothing but a private offence committed in the privacy of a home with no design or purpose contemplated by section 6(1)(b) or (c) of the Anti-Terrorism Act, 1997. We have thus, entertained no manner of doubt that the allegations levelled against the appellant and his co-accused in the present criminal case did not attract the jurisdiction of an Anti-Terrorism Court, the learned Sessions Judge, Mastung was not justified in transferring the case to an Anti-Terrorism Court and the High Court was also not legally correct in dismissing the appellant's revision petition."

Sagheer Ahmed v. The State and others

(2016 SCMR 1754)

"High Court in the impugned judgment has observed as follows:

"10. The averments of FIR are silent regarding the financial status and source of income of the complainant against which accused have been demanding Bhatta. Complainant has also not disclosed the specific dates, times and places of demanding Bhatta by accused persons nor any such evidence was produced before the Investigating Officer to prima facie establish such allegations. In absence of any tangible material, mere allegations of demanding Bhatta do not attract section 6(2)(k) of Anti-Terrorism Act, 1997, in the present case nor said section was mentioned in the FIR and Challan. Perusal of Challan reflects that Investigating Officer had made a request to the Anti-Terrorism Court for return of FIR and other documents so that Challan may be submitted before the ordinary Court of law as no case under the provisions of Anti-Terrorism Act, 1997 was made out, but his request was declined by the Anti-Terrorism Court vide order dated 09.06.2014, and cognizance was taken by the Court.

11. Cumulative effect of the averments of FIR, surrounding circumstances and other material available on record have replicated that offence having been committed on account of previous old enmity with a definite motive. The alleged offence occurred at Faiz Wah bridge, which is not situated in any populated area, consequently, the allegations of aerial firing have not appeared to us to be a case of terrorism as the motive for the alleged offence was nothing but

personal enmity and private vendetta. The intention of the accused party did not depict or manifest any act of terrorism as contemplated by the provisions of the Anti-Terrorism Act, 1997. Consequently, we are of the considered view that complainant has failed to produce any material before the Investigating Officer that at the time of occurrence sense of fear, panic, terror and insecurity spread in the area, nevertheless it was a simple case of murder due to previous enmity, thus, alleged offence does not fall within purview of any of the provisions of Anti-Terrorism Act, 1997."

4. We note that observation made by the High Court is based upon the record of the case and no misreading in this respect was pointed out before us."

Ch. Shaukat Ali v. Haji Jan Muhammad and others

(2016 SCMR 533)

"In view of the discussion in Para 7 above and the report of police under section 173, Code of Criminal Procedure, prima facie it appears that altercation between the parties occurred all of a sudden when the procession of the complainant side on winning the election was passing in front of house of Haji Jan Muhammad accused and there was no prior 'object/ design.'

10. During the course of arguments, we have observed that basic premise of the arguments of learned counsel for the petitioner pivots around the judgment of a Five Member Bench of this Court in Kashif Ali v. The Judge, Anti-Terrorism Court No.II, Lahore and others (PLD 2016 SC 951), wherein the issue of jurisdiction has been dealt with. It is appropriate to reproduce the relevant portion of Para 12 of the said judgment for ready reference:

"12. In order to determine whether an offence falls within the ambit of Section 6 of the Act, it would be essential to have a glance over the allegations levelled in the FIR, the material collected by the investigating agency and the surrounding circumstances, depicting the commission of offence. Whether a particular act is an act of terrorism or not, the motivation, object, design or purpose behind the said Act has to be seen "

11. We have gone through the allegations levelled in the FIR, the material collected by the investigating agency during course of investigation and other surrounding circumstances as discussed above and are of the considered view that present case is not triable by a Court established under the provisions of Anti-Terrorism Act, 1997."

Waris Ali and 5 others v. The State

(2017 SCMR 1572)

"Under the jurisprudence, "mens rea" is an essential ingredient of every crime, needs to be attended first by the Courts of law however, in cases of terrorism or terrorist activities the "mens rea" becomes twofold, i.e. the first object is to commit a crime, while the primary object of "mens rea" in the second fold speaks of terrorism related ideology, purpose and object, the most nefarious and detestable designs to commit crimes, creating sense of fear, insecurity and instability in the society and community with the ultimate object to destabilize the State as a whole. The true and perceivable object of this second "mens rea" is to create chaos, large scale disturbances, widespread sense of insecurity in the society/public and to intimidate and destabilize the State as a whole by means of terrorist activities.

10. In cases of this nature, "mens rea" is essentially with an object to accomplish the act of terrorism and carrying out terrorist activities to overawe the State, the State Institutions, the public at large, destruction of public and private properties, make assault on the law enforcing agencies and even at the public at large. The ultimate object and purpose of such acts is to terrorize the society or to put it under constant fear while in ordinary crimes committed due to personal vengeance/blood feud or enmity, the element to create fear or sense of insecurity in the society, public by means of terrorism is always missing.

11. True, that the offences contained in the Schedule to the Anti-Terrorism Act would fall within the definition of terrorism and terrorist activities but the crimes committed due to private revenge or to say traditional crimes, cannot be dragged into the fold of terrorism and terrorists activities.
12. The mere fact that the crimes for personal motive are committed in a gruesome or detestable manner, by itself would not be sufficient to bring the acts within the meaning of terrorism or terrorist activities. The Courts of law should not lose sight of the fact that terrorism and terrorist activities are committed and are carried out by a person, group of persons and well equipped organizations, whose primary aim and object is to destabilize the society and the State as a whole through such activities. The object and "mens rea" behind such activities is clearly spelled out from the nature of the crime committed, which must be attended to by the Courts with a deep judicial thought, as in the latter category the sole object/purpose in committing different crimes is to cause alarm, dread, fright inducing sense of insecurity in the mind of the people.
13. The acts of terrorism and terrorist activities are committed and carried out in a wolfish manner by terrorists and terrorist groups, to whom training and skills are imparted, their brainwash is made in a planned manner so that, while committing gruesome and sickening crimes, they have to act in cruel manner and in pursuance of creating terror, the prime and ultimate object to be accomplished. The suicidal attacks and blasts in busy markets/business places, hospitals, mosques, other religious and educational institutions where peoples are slaughtered/butchered and their limbs are blown apart through bomb blast, are some of the instances of such activities, conveying dreadful message to the community/ society at large of terror, for no motive other than the one to create fear and sense of insecurity.
14. Albeit, murder, attempted murder, causing bodily harm or hurt and damage to property and some other offences have been included in the Third Schedule, appended to the Anti-Terrorism Act however, on plain reading, it becomes apparent that these offences are triable by the Special Courts, constituted under the Special Act but, there is no reference either expressed or implied in the Schedule that the Special Court shall award punishment under section 7 read with section 6 of the Act to accused persons charged for such crimes. There is another category of offences, which are squarely mentioned in the substantive provision of section 7 read with section 6 of the Special Act, which are specifically described to be acts of terrorism and shall fall within that definition however, the qualifying words, attached thereto, create a subtle distinction between the ordinary crimes, committed out of personal revenge, enmity or private motive and those committed for the object of creating terror. This aspect needs to be interpreted and construed in a meaningful and objective manner so that the two categories of crimes i.e. ordinary crimes and those related to terrorism, are neither mixed up nor intermingled because construction placed on it at random without judicial thoughts, the cardinal principle relating to construction of Statute, would be defeated and ordinary crimes having no nexus with terrorism or terrorist activities would be incorrectly or wrongly placed in the grey category of crimes, which is not the object and intent of the Legislature. If ordinary crimes committed due to personal revenge or motive are given the colour of terrorism or terrorist activities, hundreds and hundreds of Criminal Courts (Sessions Courts) and other Courts would be rendered inoperative and their vested jurisdiction would be taken away for no justifiable reason. The Prosecution and disgruntled complainants have been noticed making crude attempts to paint an ordinary crime as an act of terrorism so that the rival/opposite party is put to maximum mental agony. Here, it becomes the duty of the Court of law to draw a fine distinction between two kinds of crimes, which are definitely pole apart."

"19. Keeping in view the above narrative, it is thus essential to look at the legislation and the new enactments, as to how these were introduced and what was the purpose and object of the same. The conventional and ordinary crimes of murder, hurt, etc. were being committed due to personal motives however, in committing these crimes unlike in the past, where the same were being committed through clubs, sharp weapons, shotguns or non-automatic rifles, the old crime weapons were substituted by sophisticated weapons, fully or semi automatic which fell in the hands of the majority of the peoples. Now invariably these crimes are committed with modern weapons, which has no doubt a devastating effect. However, this category of crimes is committed due to longstanding blood feud and is the result of personal motive. There is no intention (mens rea) in committing these crimes to create fear, terrorize the society/ community at large or to put it under constant fear and terror. In terrorism cases, evil elements are always persuasive factor and integral parts of it, therefore, due care and caution shall have to be observed by the Courts so that ordinary crimes might not be pushed to the grey area of terrorism or terrorist activities to be dealt with under the law, meant for a particular class of peoples, group of persons/organizations, which are to be treated altogether differently under the special law. The careful reading of all the relevant provisions of Anti-Terrorism Act, 1997 would show that the sole and primary object of the same is to curb and eliminate terrorism and terrorist activities and also the groups involved in the same, besides to eliminate the sectarian and factional violence committed with the same object therefore, ordinary crimes due to personal motive or revenge shall not be taken at par with acts of terrorism or terrorist activities, the sole object of which is nothing but to terrorize the society/community and the State as a whole. There is a sky high difference between the crimes of the old category and the new one, for which special law has been enacted."

"30. In the present case, besides many infirmities highlighted in the earlier paras of the judgment, it appears that the noose was thrown wider, the act/acts, the crimes committed and executed were the consequence of personal motive and in the course of the transaction no element of terrorism defined by Legislature was involved, although it was gruesome in nature, however, the punishment provided under section 302(a) and (b), P.P.C. is also death sentence besides compensation too was awardable under section 544-A, Cr.P.C. Therefore, in the matter of punishment there is no marked distinction, if the penal provision of P.P.C. is applied. The parties are having a blood feud since long and the object to be achieved was to take revenge for the previous murder and attempted murder, therefore, in our considered view, both the Courts below have not taken due care by applying correct provision of law to the established facts of the case. The construction on the provisions of Anti-Terrorism Act and the principle laid down in the cases cited at the bar i.e. Shahbaz Khan alias Tippu v. Special Judge Anti-Terrorism Court (PLD 2016 SC 1) and Kashif Ali v. The Judge Anti-Terrorism Court, No.II, Lahore (PLD 2016 SC 951) proceeds on different premises, both legal and factual and are not attracted to the facts and circumstances of the present case."

Sajid Rasheed Qureshi v. Munawar Ahmad

2017 SCMR 162)

Amjad Ali and others v. The State

(PLD 2017 SC 661)

"The last aspect of this case highlighted in the leave granting order is as to whether the courts below were justified in convicting and sentencing the appellants for an offence under section 7(a) of the Anti-Terrorism Act, 1997 or not. We note in that context that a mere firing at one's personal enemy in the backdrop of a private vendetta or design does not ipso facto bring the case within the purview of section 6 of the Anti-Terrorism Act, 1997 so as to brand the action as terrorism. There was no 'design' or 'object' contemplated by section 6 of the Anti-Terrorism Act, 1997

involved in the case in hand. We further note that by virtue of item No. 4(ii) of the Third Schedule to the Anti-Terrorism Act, 1997 a case becomes triable by an Anti-Terrorism Court if use of firearms or explosives, etc. in a mosque, imambargah, church, temple or any other place of worship is involved in the case. That entry in the Third Schedule only makes such a case triable by an Anti-Terrorism Court but such a case does not ipso facto become a case of terrorism for the purposes of recording convictions and sentences under section 6 read with section 7 of the Anti-Terrorism Act, 1997. The case in hand had, thus, rightly been tried by an Anti-Terrorism Court but the said Court could not have convicted and sentenced the appellants for an offence under section 7(a) of the Anti-Terrorism Act, 1997 as it had separately convicted and sentenced the appellants for the offences of murder, etc. committed as ordinary crimes."

Abdul Nabi v. The State

(2017 SCMR 335)

"After hearing the learned counsel for the parties and going through the record we have observed that the case in hand was not a case of terrorism but was a case of a private offence committed in secrecy. The "design" or "purpose" provided for by section 6 of the Anti-Terrorism Act, 1997 were non-existent in the present case and apparently there was no intention on the part of the appellant to create a sense of fear or insecurity in the public at large. Apart from that in view of the conclusions which are to follow in the later part of this judgment the case in hand was not a case of a gang-rape and, thus, even from that angle the Schedule to the Anti-Terrorism Act, 1997 did not stand attracted to the present case. In this view of the matter we are of the considered opinion that the courts below were not justified in convicting and sentencing the appellant for the offence under section 7(a) of the Anti-Terrorism Act, 1997."

Province of Punjab through Secretary Punjab Public Prosecution Department and another v. The State

(PLD 2018 SC 178)

"The preamble of the Act, 1997 clearly indicates that the Act, 1997 was promulgated for the prevention of terrorism, sectarian violence and for speedy trial of heinous offences. So, in the cases of the terrorism, the mens-rea should be with an object to accomplish the act of terrorism and carrying out terrorist activities to overawe the state, the state institutions, the public at large, destruction of public and private properties, make assault on the law enforcing agency and even at the public at large in sectarian matters. The ultimate object and purpose of such act is to terrorize the society but in ordinary crimes committed due to personal vendetta or enmity, such elements are always missing so the crime committed only due to personal revenge cannot be dragged into the fold of terrorism and terrorist activities. The same was the view in the case of Mehram Ali v. Federation of Pakistan (PLD 1998 SC 1445) passed by a full bench (five members bench) of this Court.

After the amendment the term "design" was used in Section 6 of the Act, which has widened the scope of the Act. The word "design" was substituted to see that if the act is designed to create sense of fear or insecurity in the society then the Anti-Terrorism Court will have the jurisdiction to try the same. The word "design" can be considered the scheme and object in the mind of accused for its subsequent execution. So the Courts while deciding the question of attraction of the provisions of the Act, has to see the manners in which the incident had taken place including the time and place and should also take note of the fact of the act as to create terror or insecurity in the general public where the action of the accused results in striking terror or creating fear, panic and sense of insecurity among the people in a particular vicinity, it amounts to terror within the ambit of Section 6 of the Act. The Courts are required to see whether the terrorist act was such that it would have the tendency to create the sense of fear or insecurity in the mind of general public as well as psychological impact created in the mind of the society.

The Courts can form opinion after going through the facts, circumstances and material so collected by the police in the case under discussion because the facts are varies from case to case."

Dilawar Mehmood alias Dulli and another v. The State

(2018 SCMR 593)

"During the course of arguments, learned counsel for the petitioner vehemently contended that the learned Courts below have also convicted the petitioner under the provisions of Anti-Terrorism Act, 1997 without adverting to the fact that the said provisions are not attracted in the circumstances of the present case. Therefore, we have undertaken a detailed scrutiny of the evidence available on record in order to see whether the provisions of the Anti-Terrorism Act, 1997 are attracted to the present case or not. The occurrence in this case took place at cattle Market, Kundian. It is alleged by the prosecution that petitioner along with his co-accused Muhammad Arshad (P.O.) armed with Kalashnikovs came at the spot and made straight firing at deceased Muhammad Afzal, as a result whereof the latter succumbed to the injuries. The motive behind the occurrence as stated in the FIR was previous enmity. Having a look at the time of occurrence, place of occurrence, the mode and manner of the occurrence and the alleged motive between the parties coupled with other circumstances, we are of the considered view that provisions of Anti-Terrorism Act, 1997 are not attracted in this case and the learned Courts below have erred in law in convicting/sentencing the petitioner under the said provisions of the Anti-Terrorism Act, 1997."

11. As against the above mentioned cases there are many other cases decided by this Court wherein the fallout, consequences or effect of an action were held to determine as to whether the action amounted to terrorism or not. The following cases may be referred to in this category of cases:

Muhammad Ajmal v. The State

(2000 SCMR 1682)

"On the face of it this seems to be an act of terrorism fully falling within the ambit of section 6 of the Act. Admittedly, the petitioner has behaved in an inhuman manner who while entering inside the Court-room made indiscriminate firing at the complainant party and the personnel of the Court staff and killed complainant's brother namely, Abdul Ghafoor and Muhammad Munir Naib Qasid and severely injured Reader of the Court namely, Umar Draz, thus created a sense of fear and insecurity among the people. All the witnesses examined at trial have fully supported the case of prosecution against the petitioner on the score that he fired indiscriminately in the Court-room on the abovementioned persons and that he was apprehended there and then along with his .30 bore pistol the crime weapon. Not only this but 5 crime empties with lead bullets were recovered from the Courtroom which were sealed and sent for expert opinion along with crime weapon and the same were opined to have been fired from the said weapon."

Mumtaz Ali Khan Rajban and another v. Federation of Pakistan and others

(PLD 2001 SC 169)

In this case a Professor was gunned down because he did not allow a candidate appearing in an examination to adopt unfair means and this Court held that the act of the accused "struck terror and also created sense of fear and insecurity amongst people in general and Teachers/ Professors in particular" and, therefore, the case was adjudged as one of a terrorist act. It was observed by this Court as follows:

"It is contended with reference to Petition No. 1675 that the act of the petitioner does not fall within the ambit of "Terrorism Act" as defined in above-quoted section. Precisely stated the contention is that Professor Abdul Latif, deceased only prevented the petitioner from copying in the examination hall and immediately thereafter nothing happened and that the threat, as

contemplated in above section, shall precede before a public servant is prevented from discharging his lawful duties. Learned counsel argued that at the time of occurrence the deceased was not performing any official duty, as such, alleged threat in the examination hall did not bring the case within the purview of above-quoted section. The contention is devoid of any force. The threat was translated into reality, and the deceased was killed. It is not necessary that the force must have been used immediate after the threat. The act of the petitioner squarely fell within the scope of "terrorist act", for the reasons that as a consequences of said threat the deceased was killed. Besides in the examination hall, as well as, in the college every body knew about it. It struck terror and also created sense of fear and insecurity amongst people in general and Teachers/ Professors in particular."

Muhammad Mushtaq v. Muhammad Ashiq and others

(PLD 2002 SC 841)

In this case four persons were murdered by their adversaries when they were proceeding to the premises of the District Courts, Lahore to attend a hearing of a case and this Court held that to be a terrorist act because:

"The cumulative fall-out of the occurrence as to the time, place and manner of the act created a sense of the fear and insecurity in society. . The Lahore High Court fell in error by taking into consideration only the element of the alleged enmity existing between the parties. The High Court failed to advert to the terrorizing effect of the occurrence created on the minds of the people at large and of the concerned locality and passer-by who had no means to ascertain the background or motive for the crime or the enmity of the parties inter se."

Mst. Raheela Nasreen v. The State and another

(2002 SCMR 908)

In the said case a Batman of a Major serving in the Pakistan Army had allegedly murdered the Major in connivance with the Major's wife and this Court held that to be a case of terrorism by observing that:

"From a bare reading of section 6(b) of the Act, it is manifest that it is not necessary that the offence as alleged had in fact, caused terror as the requirement of the said provision of law could be adequately satisfied if the same was likely to strike terror or sense of fear and insecurity in the people.--- The learned Judges of the High Court came to the conclusion that a Batman who was a trusted person of an army officer if he kills as alleged his master in connivance with his (master's) wife, the same was likely to strike terror or feeling of insecurity among the army officers which reasonings in our view are based on relevant consideration having logical nexus with the relevant law and do not suffer from any legal infirmity."

Muhammad Amin v. The State

(2002 SCMR 1017)

A person had been murdered in this case during a dacoity at a house and another person had been shot at and injured by the fleeing dacoits and this Court found the case to be of terrorism by observing that:

"The accused entered in the Baithak of the house of complainant armed with pistol with the purposes to commit robbery and in consequence to the resistance put by the father of complainant he was killed by the petitioner and further the petitioner with a view to create terror also fired at Nasir Ahmed in the street when he along with others, made an attempt to apprehend the petitioner and thus, the manner in which the petitioner while committing robbery took the life of deceased and caused fire-arm injuries to Nasir Ahmed in the broad daylight would squarely bring the case with the ambit of "terrorism" in term of section 6 of the Anti-Terrorism Act, 1997."

Zia Ullah v. Special Judge, Anti-Terrorist Court, Faisalabad and 7 others

(2002 SCMR 1225)

In this case an Advocate proceeding towards a court in his robes was done to death by his enemies and this Court decided that the case was one of terrorism. It was observed that:

"The alleged murder was committed in wanton, reckless and brutal manner and resultantly learned Advocate who was in his robe was done to death in Court vicinity. The gravity of the offence could not be diminished or minimized merely on the ground that alleged murder was not committed exactly within the Court premises as pressed time and again by the learned counsel for the respondents. It is to be noted that one Assistant Sub-Inspector of Police was seriously injured by means of fire-arms. We are not having the slightest doubt while holding that the alleged occurrence must have caused fear, panic and wave of sensation and thus the matter squarely falls within the ambit and jurisdiction of Special Court."

State through Advocate-General, N.-W.F.P., Peshawar v. Muhammad Shafiq

(PLD 2003 SC 224)

A person was murdered in this case by firing at and sprinkling petrol on him and resultantly his body was charred and some of his bones were also burnt. The said murder had been committed at a deserted place and was a consequence of an on-going personal enmity. Apparently this Court was not properly assisted in that case and the newly introduced definition of 'terrorism' had not been brought to the notice of the Court and in that background, while reproducing and expressly referring to the deleted and inapplicable definition of a 'terrorist act' contained in the unamended section 6 of the Anti-Terrorism Act, 1997, this Court observed that:

"A reading of the above provision of the Act demonstrates that it is not necessary that the commission of murder must have created panic and terror among the people. The Courts have only to see whether the terrorist act was such which would have the tendency to create sense of fear or insecurity in the minds of the people or any section of the society. We have to see the psychological impact created upon the minds of the people. ---The moment such a charred dead body was brought for its funeral rites within the area of the deceased's residence, it would had certainly caused shock, fear and insecurity among the people of the vicinity. The body was completely charred and the onlookers must have felt fear and insecurity on seeing the barbaric and callous manner in which the human body was mutilated."

Naeem Akhtar and others v. The State and others

(PLD 2003 SC 396)

In this case an accused person's mother was medically treated by a doctor for an accidental fracture of her leg but the accused party felt dissatisfied with her treatment by the doctor and with that motive the said doctor was abducted by the accused party and was murdered. This Court found the case to be of a terrorist act as:

"The motive for the occurrence no doubt related to the personal grievance of the appellant who held the deceased responsible for imputation of leg of his mother but murder of the doctor after his abduction for such a motive would be an alarming situation for all doctors and would be a direct source of creating panic and terror in the medical profession."

"In general terms a fright, dread or an apprehension in the mind of a person induced by an horrible act of a person or causing fear and terror to the people is terrorism and if an act done by a person which is a source of terror in any section of people, which may cause damage to life or property of an individual, is a terrorist act and is an offence as defined in section 6 of A.T.A., 1997 and punishable under section 7 of the said Act. The act of abduction of the deceased and Dr. Javed Umer from an open place on gun point and subsequent murder of Dr.Muhammad Aslam for the reason that patient could not get desired result by the treatment given by him, would create unrest, panic and terror against the doctors who are discharging very sacred duty in the medical field."

Sh. Muhammad Amjad v. The State

(PLD 2003 SC 704)

A young Barrister was abducted for ransom and was killed in this case. This Court held the case to be one of terrorism by observing that:

"Even if by act of terrorism actual terror is not created, yet, above quoted subsection (b) [of section 6(1) of the Anti-Terrorism Act, 1997] will be applicable if it was likely to do any harm contemplated in the said subsection. It is the cumulative effect of all the attending circumstances which provide tangible guidelines to determine the applicability or otherwise of said subsection. It is noted that about 300/400 people gathered at the house of the complainant and they would have destroyed the house of the appellant, if the police would not have intervened. Lawyer community was also annoyed over the murder of a member of their community and had passed a resolution in this regard.

Under the circumstances, the case was rightly assigned to Anti-Terrorism Court for trial."

Mst. Najam-un-Nisa v. Judge, Special Court constituted under Anti-Terrorism Act, 1997

(2003 SCMR 1323)

In this case seven persons had been killed in a house at night in furtherance of a private enmity and this Court held the case to be one of terrorism. It was observed that:

"The venue of the commission of a crime, the time of occurrence, the motive which had led to the commission of a crime and the fact whether the said crime had or had not been witnessed by the public at large are not the only factors determining the issue whether a case did or did not fall within the parameters of the ATA of 1997. The crucial question is whether the said crime had or had not the effect of striking terror or creating a sense of fear and insecurity in the people or any section of the people. Needless to mention here that a crime of the kind in hand committed even in a remote corner does not remain unnoticed in the area in which is committed or even in the country on account of the print and electronic media. Seven persons being butchered in a house at night is not the kind of occurrence which would not create terror and horror in the people or any section of the people."

Abdul Ghafoor Bhatti v. Muhammad Saleem and others

(2003 SCMR 1934)

In this case after a dacoity in a house the dacoits kidnapped two minors for ransom who were subsequently retrieved after payment of the demanded ransom. This Court found the case to be that of terrorism and observed that:

"The Courts have to see the impact of the act which the miscreants have perpetrated. In the case in hand two minors were abducted for ransom by the miscreants. Such-like act has certainly got the tendency to create sense of fear and insecurity in the minds of the people or any section of the society. The psychological effect created upon the minds of the people would be the guiding feature so as to see whether the act complained of has got nexus with sections 6 and 7 of the Act. It is not necessary that the said act must have created insecurity. As already stated the Courts have to see only the tendency whether nature of such act would create sense of insecurity. By no stretch of imagination, it can be said that the abduction of minors at gun points would not create terror among reasonable and prudent persons of the society."

Muhammad Farooq v. Ibrar and 5 others

(PLD 2004 SC 917)

"8. The very object to promulgate Anti-Terrorism Act, 1997 was to control the acts of terrorism, sectarian violence and other heinous offences as defined in section 6 of the Act and their speedy trials. To bring an offence within the ambit of the Act, it is essential to examine that the said offence should have nexus with the object of the Act and the offences covered by its sections 6, 7 and 8. On bare perusal of sub-clauses (b), (d), (h), and (i) of subsection (1) of section 6 of

the Act, it is abundantly clear that the offence which creates a sense of fear or insecurity in society, causes death or endangers a person's life, involves firing on religious congregations, mosques, imambargahs, churches, temples and all other places of worship, or random firing to spread panic, or involves any forcible takeover of mosques or other places of worships, falls within its ambit.

9. In the case in the hand, though the motive is shown to be a previous enmity, yet paramount consideration to be taken note of is the culminative fall out of the occurrence. The incident having taken place in Mosque a public place particularly during Jumma prayer, where a large number of people usually assemble to offer prayer is sufficient to attract the provisions of section 6 of the Act. In such cases, the time, place and, manner of the act is of eminence importance."

Azizullah and another v. The State and another

(2005 SCMR 802)

"The main object to promulgate the Act was to prevent and control the acts of terrorism, sectarian violence, hijacking, hostages taking and kidnapping or abduction for ransom. It was for this purpose that the offences falling within the ambit of the Act were to be disposed of expeditiously by way of speedy trial. In the instant case, it is alleged that wife and children of the complainant were called by the petitioners in their house on the pretext of Qura'n Khani and were made hostages and demand of ransom for their release was made. Not only this but also the brothers and grand-daughter of complainant who went to the house of petitioners to rescue the above mentioned detenus were also made hostages. It is revealed from the investigation that police in order to rescue the hostages when arrived at the house of petitioners, firing was made upon them and in retaliation police also fired at the abductors resulting in the death of one of the abductors namely Rahimullah. As discussed above, the material available with the prosecution prima facie shows that the abductees were kidnapped and ransom of Rs. 5 lacs was paid and further demand of ransom was also made and that the abductees were made hostages by the petitioners in their house. The above act created sense of fear or insecurity in the public as such the ingredients of sections 6 and 7 of the Act are attracted."

Mirza Shaukat Baig and others v. Shahid Jamil and others

(PLD 2005 SC 530)

"The language as employed in the section is unambiguous, plain and simple which hardly requires any scholarly interpretation and is capable enough to meet all kinds of terrorism. It is an exhaustive section and does not revolve around the word "designed to" as used in section 6(1)(b) of the Act or mens rea but the key word, in our opinion is "action" on the basis whereof it can be adjudged as to whether the alleged offence falls within the scope of section 6 of the Act or otherwise? The significance and the import of word "action" cannot be minimized and requires interpretation in a broader prospective which aspect of the matter has been ignored by the learned High Court and the scholarly interpretation as made in the judgment impugned has no nexus with the provisions as contained in section 6 of the Act, the ground realities, objects and reasons, the dictums laid down by this Court and is also not inconsonance with the well-entrenched principles of interpretation of criminal statutes..."

"Where a criminal act is designed to create a sense of fear or insecurity in the mind of the general public that can only be adjudged by keeping in view the impact of the alleged offence and manner of the commission of alleged offence. A farfetched interpretation of the words "designed to" as used in section 6 of the Act has been made by the learned High Court which we are afraid is not correct as the impact of the alleged offence and the manner in which it is committed has been ignored on the basis whereof the design of the alleged offence can be unveiled. There is absolutely no doubt in our mind that the Act was brought into force for the

prevention and elimination of terrorism, sectarian violence and for expeditious dispensation of justice in the heinous offences as stipulated in Act itself. We have also surveyed the case law on the subject. It is, however, to be noted here at this juncture that so far as the concept of "terrorism" is concerned there is no substantial change between the Suppression of Terrorism Activities (Special Courts) Act (XV of 1975) and the Anti-Terrorism Act (XXVII of 1997) except a few minor changes having no bearing on the meaning and scope of terrorism."

"After having gone through the entire law as enunciated by this Court in different cases the judicial consensus seems to be that striking of terror is sine qua non for the application of the provisions as contained in section 6 of the Act which cannot be determined without examining the nature, gravity and heinousness of the alleged offence, contents of FIR, its cumulative effects on the society or a group of persons and the evidence which has come on record. In so far as the factum of intention is concerned that cannot be evaluated without examining the entire evidence which aspect of the matter squarely falls within the jurisdictional domain of the Court constituted under the Act and such questions cannot be decided by invocation of Constitutional jurisdiction without scrutinizing all the circumstances in a broader prospect by keeping in view the ground realities in mind. There could be no second opinion that where the action of an accused results in striking terror or creating fear, panic, sensation, helplessness and sense of insecurity among the people in a particular vicinity it amounts to terror and such an action squarely falls within the ambit of section 6 of the Act and shall be triable by a Special Court constituted for such purpose. What was the real intention of the offender could only be adjudged on the basis of evidence which cannot be determined by invocation of Constitutional jurisdiction and learned Special Judge who is usually a Senior Sessions Judge can take care of the matter which can be transferred by him if it does not fall within his jurisdictional domain. There is no denying the fact that it was never the intention of legislature that every offender irrespective of the nature of the offence and its overall impact on the society or a section of society must be tried by the Anti-Terrorist Court but the question as to whether such trial shall be conducted or not initially falls within the jurisdictional domain of Anti-Terrorist Court which cannot be interfered with in the absence of sufficient lawful justification which appears to be lacking in these cases. It is, however, obligatory for such Courts to watch carefully the nature of accusation and examine the entire record with diligent application of mind to determine as to whether the provisions as contained in the Act would prima facie be attracted or otherwise? Where such Courts are of the view after taking cognizance of the offence that the alleged offence does not fall prima facie under the provisions of the Act it must transfer the same to regular Court without loss of time."

Zahid Imran and others v. The State and others

(PLD 2006 SC 109)

"The language as employed in the section is unambiguous, plain

and simple which hardly requires any scholarly interpretation

and is capable enough to meet all kinds of terrorism. It is an exhaustive section and does not revolve around the word "designed to" as used in section 6(1)(b) of the Act or mens rea but the key word, in our opinion, is "action" on the basis whereof it can be adjudged as to whether the alleged offence falls within the scope of section 6 of the Act or otherwise? After having gone through the provisions as contained in section 6 of the Act we are of the firm opinion that "terrorism" means the use or threat of "action" where the "action" falls within the meaning of subsection (2) of section 6 of the Act and creates a serious risk to safety of the public or a section of the public, or is designed to frighten the general public and thereby prevent them from coming out and carrying on their lawful trade and daily business, and disrupts civil life shall amount to terrorism as enumerated in section 6 of the Act."

"The judicial consensus seems to be that striking of terror is sine qua non for the application of the provisions as contained in section 6 of the Act 1997 which cannot be determined without examining the nature, gravity and heinousness of the alleged offence, contents of the FIR, its cumulative effects on the society and a class of persons and the evidence which has come on record. There could be no second opinion that where the action of an accused person results in striking terror or creating fear, panic, sensation, helplessness and sense of insecurity among the people in a particular vicinity it amounts to terror and such an action squarely falls within the ambit of section 6 of the Act 1997."

Muhammad Idrees and others v. The State

(2008 SCMR 1544)

"However, since it was not established on record that the acts done by the accused had created sense of fear or insecurity in public, nor any section of public or community or any sect was shown to have been affected, as the incident had taken place at night on a bank of canal which by no stretch of imagination could be termed as a public place, therefore, in our view, section 7 of the Anti-Terrorism Act, 1997, was not attracted in the instant case."

Nazeer Ahmed and others v. Nooruddin and another

(2012 SCMR 517)

"We have heard the learned Advocate Supreme Court and have perused the record. The learned High Court has examined the material at length and has rightly concluded that the act of the petitioners created sense of insecurity amongst the villagers and did destabilize the public at large and, therefore, attracts the provisions of section 6 of the Anti-Terrorism Act. The learned Advocate Supreme Court in support of his contentions has relied upon the Judgments reported in the case of Mohabat Ali v. The State reported in 2007 SCMR 142 and the case of Bashir Ahmed v. Muhammad Siddiq, reported in PLD 2009 SC 11, which are distinguishable on facts. Neither the motive nor intent for commission of the offence is relevant for the purpose of conferring jurisdiction on the Anti-Terrorism Court. It is the act which is designed to create sense of insecurity and or to destabilize the public at large, which attract the provisions of section 6 of the AT Act, which in the case in hand was designed to create sense of insecurity amongst the co-villagers."

Shahid Zafar and 3 others v. The State

(PLD 2014 SC 809)

"As to learned Advocate Supreme Court's contention that the incident could not be defined as an act of terrorism, we are quite clear in our minds that such a gruesome murder at the hands of a law enforcing agency would certainly create a sense of terror, insecurity and panic in the minds and hearts of those who were available at the scene and the entire public who had watched this DVD on air. In this regard a reference may be made to the definition of terrorism in Section 6(1)(b) of the Anti-Terrorism Act according to which this is the use or threat of action where the use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect or create a sense of fear or insecurity in society. In our opinion therefore such definition can be bifurcated into two i.e. where the use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect or where it creates a sense of fear or insecurity in society. Although the offence under consideration may not have been designed to coerce and intimidate or overawe the Government or a section of the public or community or sect but it certainly created a sense of fear or insecurity in the society. What could be a more grievous and heinous crime then to shoot an unarmed young boy who was begging for his life and thereafter let him bleed to death despite his pleading that he should be taken to the hospital. This certainly did create a sense of fear and insecurity in the public at large and hence we are of the opinion that

the appellants were correctly charged, tried, convicted and sentenced under Section 302(b), P.P.C. and section 7(a) of the Anti-Terrorism Act, 1997."

Kashif Ali v. The Judge, Anti-Terrorism, Court No.II, Lahore and others

(PLD 2016 SC 591)

"12. The term "design" now used in Section 6 of the Act has widened the scope of the Act and the terms "intention" and "motive" previously used have been substituted with the sole object that if the act is designed to create a sense of fear or insecurity in society, then the Anti-Terrorism Court will have the jurisdiction. From the above definition of the term "design" it is clear that it means a plan or scheme conceived in mind and intended for subsequent execution. In order to determine whether an offence falls within the ambit of Section 6 of the Act, it would be essential to have a glance over the allegations levelled in the FIR, the material collected by the investigating agency and the surrounding circumstances, depicting the commission of offence. Whether a particular act is an act of terrorism or not, the motivation, object, design or purpose behind the said Act has to be seen. The term "design", which has given a wider scope to the jurisdiction of the Anti-Terrorism Courts excludes the intent or motive of the accused. In other words, the motive and intent have lost their relevance in a case under Section 6(2) of the Act. What is essential to attract the mischief of this Section is the object for which the act is designed."

"17. The judgment relied upon by the learned High Court in the case of Basharat Ali v. Special Judge, Anti-Terrorism Court-II, Gujranwala (PLD 2004 Lahore 199) was overruled by this Court in the case of Mirza Shaukat Baig and others v. Shahid Jamil and others (PLD 2005 SC 530), which is the correct law. It was held by this Court in the case of Mirza Shoukat Baig (supra) that there could be no second opinion that where the action of an accused results in striking terror, or creating fear, panic sensation, helplessness and sense of insecurity among the people in a particular vicinity it amounts to terror and such an action squarely falls within the ambit of Section 6 of the Act and shall be tried by a Special Court constituted for such a purpose. Moreover, in State through Advocate General v. Muhammad Shafiq (PLD 2003 SC 224) it was held by this Court that the Courts are only required to see whether the terrorist act was such that it would have the tendency to create sense of fear or insecurity in the minds of the people or any section of the society, as well as the psychological impact created on the minds of the society. Whereas a strictly narrow interpretation of the term "design" in Section 6 of the Act is undoubtedly one where a premeditated plan to create terror is the object behind the said act, we cannot simply rule out from the ambit of Section 6 an individual's action which is implemented in a setting where a creation of feeling of fear in the society was an inevitable consequence of the said act."

Shahbaz Khan alias Tippu and others v. Special Judge, Anti-Terrorism, Court No.3, Lahore and others

(PLD 2016 SC 1)

"7. It is clear from a textual reading of Section 6 of ATA that

an action categorized in subsection (2) thereof constitutes the offence of terrorism when according to Section 6(1)(b) ibid it is "designed" to, inter alia, intimidate or overawe the public or to create a sense of fear or insecurity in society. Therefore, the three ingredients of the offence of terrorism under Section 6(1)(a) and (b) of ATA are firstly, taking of action specified in Section 6(2) of ATA; secondly, that action is committed with design, intention and mens rea; and thirdly, it has the impact of causing intimidation, awe, fear and insecurity in the public or society."

8. There is no doubt that the brutal killing of five unarmed

persons on a public street would have stricken panic, fear and insecurity among the residents in the locality. However, because of the motive of a family dispute given in the FIR, there is a challenge that the required third element of "design," intention or mens rea to commit terrorism is lacking in the present case. This element of the offence of terrorism has been treated as the pivotal criterion for ascertaining the jurisdiction of a learned ATC in the two judgments referred in the leave granting order: namely Bashir Ahmed v. Muhammad Siddique (PLD 2009 SC 11) and Ahmed Jan v. Nasrullah (2012 SCMR 59). The judgment in Ahmed Jan's case ibid endorses the law enunciated in Bashir Ahmed's case ibid to the effect that under Section 6(1)(b) of ATA a design that is intention or mens rea of an accused to cause the prescribed public or social reaction to an action specified in Section 6(2) of ATA is essential for the commission of the offence of terrorism."

"11. Primarily, the rule laid down in Bashir Ahmed's case ibid requiring the ascertainment of the design, intention and mens rea of an act for establishing the jurisdiction of a learned ATC rests on dicta given in Mehram Ali's case ibid. However, Bashir Ahmed's case ibid does not consider the ways and means by which the design, intention or mens rea, for an act of terrorism, requiring in essence the proof of an assailant's state of mind, should be ascertained by a Court of law. Whether the Court should mechanically consider the motive alleged by a complainant in the FIR to be decisive or should it also scrutinize other aspects of an occurrence to assess if the culprits had any design, intention or mens rea to commit a terrorist act?

12. In most cases, the nature of the offences, the manner of their commission and the surrounding circumstances demonstrate the motive given in the FIR. However, that is not always the case. When offences are committed by persons with impunity disregarding the consequence or impact of their overt action, the private motive or enmity disclosed in the FIR cannot be presumed to capture their true intent and purpose. In such cases, it is plain that action taken and offences committed are not instigated "solely" by the private motive alleged in the FIR. It is settled law that intention, motive or mens rea refer to the state of mind of an offender. It is equally well established that a state of mind cannot be proven by positive evidence or by direct proof. The intention of an accused for committing an offence is to be gathered from his overt acts and expression. It has been held in the case of State v. Ataullah Khan Mangal (PLD 1967 SC 78) that an accused person "must be deemed to have intended the natural and inevitable consequences of his action." Thus apart from the overt acts of the accused, the injuries caused by him or consequences ensuing from his actions and the surrounding circumstances of the case are all relevant to ascertain the design intention or mens rea that instigated the offences committed. These principles are enunciated in Zahid Imran v. The State (PLD 2006 SC 109) and Pehlwan v. Crown (1969 SCMR 641). Intention is presumed when the nature of the act committed and the circumstances in which it is committed are reasonably susceptible to one interpretation. In such event, the rule of evidence that the natural and inevitable consequences of a person's act are deemed to have been intended by him is applicable: Jane Alam v. The State (PLD 1965 SC 640). In Muhammad Mushtaq v. The State (PLD 2002 SC 841) the inevitable consequence of an act was considered as its design. Four persons were killed to settle a blood feud while they were on their way for a Court hearing at the nearby District Courts, Lahore. This Court observed that the learned ATC was the competent trial forum in the case:

"7. It would thus appear that ordinary crimes are not to be dealt with under the Act. A physical harm to the victim is not the sole criterion to determine the question of terrorism. What is to be seen is the psychological effect produced by the violent action or with the potential of producing such an effect on the society as a whole or a section thereof. There may be a death or injury caused in the process. Thus where a criminal act is designed to create a sense of fear or insecurity in the minds of the general public disturbing even tempo of life and tranquility of

the society, the same may be treated to be a terrorist act. There may be just a few killings, random or targeted, resorted to with single-mindedness of purpose. But nevertheless the impact of the same may be to terrorize thousands of people by creating a panic or fear in their minds".

8. In the present case, we, prima facie, find that the occurrence took place during the peak hours of the day on the busy Court Road near the District Courts, Lahore, wherein four persons while on their way to attend the Court were allegedly murdered by the use of kalashnikovs. The cumulative fall-out of the occurrence as to the time, place and manner of the act created a sense of the fear and insecurity in society. The case was, therefore, triable by the Anti-Terrorism court established under the said Act ..."

13. When wanton overt acts committed by an accused lead to horrendous consequences then the motive given in the FIR merely indicates the background. The presumption that the natural and inevitable consequences of the acts of an accused are deemed to be intended, provides a reliable touchstone for gathering the design, intention or mens rea of an assailant in the context of Section 6(1)(b) of ATA.

14. Indeed neither Mehram Ali's case nor Bashir Ahmed's case ibid have confined judicial recourse solely to the motive disclosed in the FIR for ascertaining the mens rea for the offence of terrorism. For the existence or otherwise of mens rea of the said offence, a Court of law may rightfully interpret the different aspects of a prosecution case noted above in order to ascertain the design behind the acts committed by an assailant. In the present case the assailants who committed the brutal acts of causing the death of five persons had no personal grouse against their victims. Prima facie, they executed the instructions given by the other accused. This was done with impunity because doing the job was material and not the consequence and impact of their overt action. A dispute about the possession of a family house thus exploded disproportionately to a scale depicting wanton ruthlessness and impunity in the multiple killing of victims in a public place inhabited by public residents. To our minds, the motive of a domestic family property dispute is merely the spark that triggered the occurrence, or metaphorically, the fire. The rule that the accused in the present case are deemed to intend the natural and inevitable consequences of action taken is apt and accurate in depicting their design, intention and mens rea. The three ingredients under Section 6 of ATA that constitute the offence of terrorism are prima facie available in the present case.

15. Therefore, the approach in the impugned judgment to interpret overt acts of the accused and the surrounding circumstances of the case in order to ascertain whether the case falls within the ambit of the ATA, is justified. Equally, the reliance placed by the learned ATC solely on the motive disclosed in the FIR No. 247 of 2014 lodged by the complainant in the case adopts a course meant for simple cases wherein the motive disclosed in the FIR is duly demonstrated by the other criteria for ascertainment of mens rea."

12. One cannot help noticing that all the cases referred to in the last paragraph and falling in the second category pertained to offences committed for private purposes with no motivation to destabilize the State or the society at large but they were all adjudged to be cases of terrorist acts or terrorism on the basis of a presumptive and speculative quantification of the effect that the relevant actions could have created in the society. In all such cases, it is observed with great deference, the changed definition of 'terrorism' with its resultant shifting of focus from the effect of the action to the design or purpose behind the action had not been noticed and all those cases had been decided on the basis and on the yardstick of the principles provided for by the earlier definition of a 'terrorist act'. In the above mentioned cases the gravity of the offence with its resultant actual, intended or potential effect on the people at large was considered as the measure for determining whether the act constituted terrorism or not. We can appreciate that the mindset inherited by us in the background of the Summary Military Courts, Speedy Trial Courts and Special Courts for Suppression of Terrorist Activities, which were

different courts constituted at different stages in the past for separate and special handling of offences of grave nature, may take some time to be dispelled and it may take us a while to appreciate and realize that an act of 'terrorism' is not just a grave offence but it is a class and species apart and this class or species has to be understood in its true and correct perception and perspective otherwise every serious offence may be found by one Judge or the other to involve terrorism depending upon a subjective assessment of the potential of the act to create some sense of fear or insecurity in some section of the society. Such an approach, it may be observed with great veneration, may not be wholesome as it may ultimately result in every case of a serious offence landing in a Special Court and thereby rendering the ordinary courts substantially redundant. It ought not to be lost sight of that the legislature's repeal of the Suppression of Terrorist Activities (Special Courts) Act, 1975, doing away with the Schedule of the Anti-Terrorism Act, 1997 at one stage and also its retraction from the 'effect' through the fresh definition of 'terrorism' cannot be without any significance or purpose. That drastic change of the definition manifestly indicated a change of meanings and of focus and such a change has to be given its proper effect. After all if the term 'terrorism' as defined today is still to be interpreted in the same manner as the erstwhile term 'terrorist act' then there was hardly any occasion or need for the legislature to amend the definition and to bring about any change in the existing law in that regard. The legacy and interpretations pertaining to the Suppression of Terrorist Activities (Special Courts) Act, 1975 and of the original provisions of the Anti-Terrorism Act, 1997 have now to be shaken or shrugged off so as to correctly understand the definition of 'terrorism' introduced through the later Act and its amendments. This Court had itself declared in the above mentioned case of Mumtaz Ali Khan Rajban and another v.Federation of Pakistan and others (PLD 2001 SC 169) that the subject matters of the Suppression of Terrorist Activities (Special Courts) Act, 1975 and the Anti-Terrorism Act, 1997 were "different" and their respective applicability was "governed by different criteria".

13. We understand, and we observe so with all the respect at our command, that in the above mentioned cases falling in the second category this Court had, wittingly or otherwise, detracted or moved away from the principle of nexus so painstakingly carved out by it in the case of Mehram Ali and others v. Federation of Pakistan and others (PLD 1998 SC 1445). As already noticed above, one of the reasons for such drifting away from the principle of nexus was the effect-based definition of "terrorist act" provided in the repealed Suppression of Terrorist Activities (Special Courts) Act, 1975. Another reason for the lack of clarity in this respect was an incorrect understanding of the words "speedy trial of heinous offences" contained in the Preamble to the Anti-Terrorism Act, 1997. In many of the judgments referred to above those words appearing in the Preamble were mentioned and relied upon for holding that commission of heinous offences also amounted to terrorism even if the 'design' or 'purpose' mentioned in clauses (b) and (c) of subsection (1) of section 6 of the Anti-Terrorism Act, 1997 did not stand attracted to a case. For removal of any confusion in that respect the scheme of the Anti-Terrorism Act, 1997 needs to be understood and appreciated in its correct perspective. The Preamble to the said Act reads as follows:

> "An act to provide for the prevention of terrorism, sectarian violence and for speedy trial of heinous offences;
>
> Whereas it is expedient to provide for the prevention of terrorism, sectarian violence and for speedy trial of heinous offences and for matters connected therewith and incidental thereto;
>
> It is hereby enacted as follows:---"

Section 12 of that Act provides as under:

> 12. Jurisdiction of Anti-terrorism Court.- (1) Notwithstanding anything contained in the Code or in any other law, a scheduled offence committed in an area in a Province or the Islamabad Capital Territory shall be triable only by the Anti-Terrorism Court exercising territorial jurisdiction in relation to such area."

Section 2(t) of the Act defines a scheduled offence in the following terms:

" "Scheduled offence" means an offence as set out in the Third Schedule."

The Third Schedule to the Act reads as under:

THE THIRD SCHEDULE

(Scheduled Offences)

[See section 2(t)]

1. Any act of terrorism within the meaning of this Act including those offences which may be added or amended in accordance with the provisions of section 34 of this Act.
2. Any other offence punishable under this Act.
3. Any attempt to commit, or aid or abetment of, or any conspiracy to commit, any of the aforesaid offences.
4. Without prejudice to the generality of the above paragraphs, the Anti-Terrorism Court to the exclusion of any other Court shall try the offences relating to the following, namely:-

(i) Abduction or kidnapping for ransom;

(ii) Use of firearms or explosives by any device, including bomb blast in a mosque, imambargah, church, temple or any other place of worship, whether or not any hurt or damage is caused thereby; or

(iii) Firing or use of explosive by any device, including bomb blast in the court premises; or

(iv) Hurt caused by corrosive substance or attempt to cause hurt by means of a corrosive substance; and

(v) Unlawful possession of an explosive substance or abetment for such an offence under the Explosive Substances Act, 1908 (VI of 1908).

A careful reading of the Third Schedule shows that an Anti-Terrorism Court has been conferred jurisdiction not only to try all those offences which attract the definition of terrorism provided by the Act but also some other specified cases involving heinous offences which do not fall in the said definition of terrorism. For such latter category of cases it was provided that although those offences may not constitute terrorism yet such offences may be tried by an Anti-Terrorism Court for speedy trial of such heinous offences. This distinction between cases of terrorism and cases of specified heinous offences not amounting to terrorism but triable by an Anti-Terrorism Court has already been recognized by this Court in the cases of Farooq Ahmed v. State and another (2020 SCMR 78), Amjad Ali and others v. The State (PLD 2017 SC 661) and Muhammad Bilal v. The State and others (2019 SCMR 1362). It has been clarified by this Court in those cases that such specified heinous offences are only to be tried by an Anti-Terrorism Court and that court can punish the person committing such specified heinous offences only for commission of those offences and not for committing terrorism because such offences do not constitute terrorism. For the purposes of further clarity on this issue it is explained for the benefit of all concerned that the cases of the offences specified in entry No. 4 of the Third Schedule to the Anti-Terrorism Act, 1997 are cases of those heinous offences which do not per se constitute the offence of terrorism but such cases are to be tried by an Anti-Terrorism Court because of their inclusion in the Third Schedule. It is also clarified that in such cases of heinous offences mentioned in entry No. 4 of the said Schedule an Anti-Terrorism Court can pass a punishment for the said offence and not for committing the offence of terrorism. It may be pertinent to mention here that the offence of abduction or kidnapping for ransom under section 365-A, P.P.C. is included in entry No. 4 of the Third Schedule and kidnapping for ransom is also one of the actions specified in section 7(e) of the Anti-Terrorism Act, 1997. Abduction or kidnapping for ransom is a heinous offence but the scheme of the Anti-Terrorism Act, 1997 shows that an ordinary case of abduction or kidnapping for ransom under section 365-A, P.P.C. is merely triable by an Anti-Terrorism Court but if kidnapping for ransom is committed with the design or purpose mentioned in clauses (b) or (c) of subsection (1) of section 6 of the Anti-Terrorism Act, 1997 then such offence amounts to terrorism attracting section 7(e) of that Act. In the former case the convicted person is to be convicted and sentenced only for the

offence under section 365-A, P.P.C. whereas in the latter case the convicted person is to be convicted both for the offence under section 365-A, P.P.C. as well as for the offence under section 7(e) of the Anti-Terrorism Act, 1997. The same may also be said about the other offences mentioned in entry No. 4 of the Third Schedule to the Act pertaining to "Use of firearms or explosives by any device, including bomb blast in a mosque, imambargah, church, temple or any other place of worship, whether or not any hurt or damage is caused thereby", "Firing or use of explosive by any device, including bomb blast in the court premises", "Hurt caused by corrosive substance or attempt to cause hurt by means of a corrosive substance" and "Unlawful possession of an explosive substance or abetment for such an offence under the Explosive Substances Act, 1908 (VI of 1908)". Such distinction between cases of terrorism and other heinous offences by itself explains and recognizes that all heinous offences, howsoever serious, grave, brutal, gruesome, macabre or shocking, do not ipso facto constitute terrorism which is a species apart. Through an amendment of the Third Schedule any heinous offence not constituting terrorism may be added to the list of offences which may be tried by an Anti-Terrorism Court and it was in this context that the Preamble to the Act had mentioned "Whereas it is expedient to provide for the prevention of terrorism, sectarian violence and for speedy trial of heinous offences".

14. Adverting now to the written submissions of the learned

Attorney-General based upon the provisions of subsection (3) of

section 6 of the Anti-Terrorism Act, 1997 we may straightaway observe that we have felt nothing but sympathy for the learned Attorney-General because he had to make some effort to make some sense of the said provisions which, with respect, make no sense to us. He has urged that subsections (1), (2) and (3) of section 6 of the said Act are to be read in conjunction. The said provisions read as follows:

6. Terrorism. - (1) In this Act, "terrorism" means the use or threat of action where:

(a) the action falls within the meaning of subsection (2), and

(b) the use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect or create a sense of fear or insecurity in society; or

(c) the use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause or intimidating and terrorizing the public, social sectors, media persons, business community or attacking the civilians, including damaging property by ransacking, looting, arson, or by any other means, government officials, installations, security forces or law enforcement agencies:

Provided that nothing herein contained shall apply to a democratic and religious rally or a peaceful demonstration in accordance with law.

(2) An "action" shall fall within the meaning of subsection (1), if it:

(3) The use or threat of any action falling within subsection (2) which involves the use of firearms, explosive or any other weapon is terrorism, whether or not subsection (1) (c) is satisfied.

Reading of subsections (1) and (2) of the said section together makes good sense, i.e. all the actions specified in subsection (2) shall constitute terrorism if they are committed with the 'design' mentioned in clause (b) of subsection (1) or are committed for the 'purpose' referred to in clause (c) of subsection (1) of that section. Subsection (3) of that section, however, provides that "The use or threat of any action falling within subsection (2) which involves the use of firearms, explosive or any other weapon is terrorism, whether or not subsection (1) (c) is satisfied" which means that if for commission of the actions mentioned in subsection (2) a firearm, an explosive substance or any other weapon is actually used or a threat regarding use of the same is extended then all such actions are to constitute the offence of terrorism even if the other requirements of clause (c) of subsection (1) of section 6 are not satisfied or fulfilled. The requirements that need to be satisfied for invoking clause (c) of subsection (1) of section 6 are that the use or threat of action should be for "the purpose of advancing a religious, sectarian or ethnic cause" or for the purpose of "intimidating and terrorizing the public, social sectors, media persons, business community" or for the purpose of "attacking the civilians, including damaging

property by ransacking, looting, arson, or by any other means, government officials, installations, security forces or law enforcement agencies". If the said requirements and purposes mentioned in clause (c) of subsection (1) of section 6 do not need to be satisfied and if mere use or threat of use of a firearm, an explosive substance or any other weapon for commission of the actions mentioned in subsection (2) of section 6 is to ipso facto constitute the offence of terrorism then every murder committed (action under clause (a) of subsection (2) of section 6), every grievous bodily injury or harm caused (action under clause (b) of subsection (2) of section 6), every grievous damage to private property (action under clause (c) of subsection of section 6), doing anything that is likely to cause death or endangers a person's life (action under clause (d) of subsection (2) of section 6) or creating a serious risk to safety of the public or a section of the public (action under clause (i) of subsection (2) of section 6) even if committed with an ordinary stick, a brickbat or a stone when used as a weapon would constitute the offence of terrorism! Such trivializing of the diabolical offence of terrorism surely could not be the intention of the legislature when framing a law for the offence of terrorism which is a class apart and a species different from any other ordinary crime. In this context we have found the learned Additional Prosecutor-General, Punjab to be quite justified in maintaining that the provisions of subsection (3) of section 6 of the Anti-Terrorism Act, 1997 are quite problematic as they do not piece well with the remaining provisions of the said section as far as the matter of defining terrorism is concerned. He has also been found by us to be correct in submitting that if the provisions of subsection (3) of section 6 of the Anti-Terrorism Act, 1997, as they are worded, are to be given effect then the distinction between the peculiar offence of terrorism and most of the run of the mill offences committed in the society in routine would be obliterated. In this backdrop his submission that the provisions of subsection (3) of section 6 may be read down in order to save the main Act and its purposes has been found by us to be meriting serious consideration. We may add here that the Anti-Terrorism Act, 1997 was introduced about twenty-two years ago but in all these years, to the best of our knowledge, the provisions of subsection (3) of section 6 of that Act have never before been pressed into service in any reported case in the country. It appears that the Judges and lawyers in the country have found the said provisions to be so confusing and incentive-incompatible that they have kept themselves away from the same so far. It is about time that the legislature may like to have another look at the said provisions and to consider deleting or suitably amending the same so as to bring them in harmony with the remaining provisions of the Act.

15. The resume of our legislative developments in the field of terrorism shows, as already observed in the case of Basharat Ali (supra), that with different laws and definitions of terrorist act or terrorism the emphasis has been shifting from one criterion to another including the gravity of the act, lethal nature of the weapon used, plurality of culprits, number of victims, impact created by the act and effect of fear and insecurity brought about or likely to be created in the society by the action. The last definition of a 'terrorist act' contained in section 6 of the Anti-Terrorism Act, 1997 squarely focused on the effect of fear and insecurity intended to be created by the act or actually created by the act or the act having the potential of creating such an effect of fear and insecurity in the society. It, however, appears that subsequently the legislature did not feel convinced of the aptness or correctness of that definition and resultantly the erstwhile definition of a 'terrorist act' contained in section 6 of the Anti-Terrorism Act, 1997 was repealed and a totally fresh and new definition of 'terrorism' was introduced through an amended section 6 of the Anti-Terrorism Act, 1997. The legislature had probably realized by then that an effect of an act may not always be a correct indicator of the nature of such an act as every crime, especially of violence against person or property, does create some sense of fear and insecurity in some section of the society and a definition of terrorism based upon the magnitude or potential of an effect created or intended to be created or having a potential of creating would necessarily require a premature, speculative and imaginary quantification of the effect so as to determine the nature of the act in order to decide about the jurisdiction of a criminal court to try such

an act. That surely was an unsure test and the result of such a premature, speculative and presumptive test could vary from court to court and from Judge to Judge reminding a legal scholar of the Star Chamber and the early days of a Court of Equity in England where equity was said to vary with the size of the Chancellor's foot. The new definition of 'terrorism' introduced through the amended section 6 of the Anti-Terrorism Act, 1997 as it stands today appears to be closer to the universally understood concept of terrorism besides being easier to understand and apply. The earlier emphasis on the speculative effect of the act has now given way to a clearly defined mens rea and actus reus. The amended clause (b) of subsection (1) of section 6 now specifies the 'design' and clause (c) of subsection (1) of section 6 earmarks the 'purpose' which should be the motivation for the act and the actus reus has been clearly mentioned in subsection (2) of section 6 and now it is only when the actus reus specified in subsection (2) of section 6 is accompanied by the requisite mens rea provided for in clause (b) or clause (c) of subsection (1) of section 6 that an action can be termed as 'terrorism'. Thus, it is no longer the fear or insecurity actually created or intended to be created or likely to be created which would determine whether the action qualifies to be termed as terrorism or not but it is now the intent and motivation behind the action which would be determinative of the issue irrespective of the fact whether any fear and insecurity was actually created or not. After this amendment in section 6 an action can now be termed as terrorism if the use or threat of that action is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect, etc. or if such action is designed to create a sense of fear or insecurity in the society or the use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause, etc. Now creating fear or insecurity in the society is not by itself terrorism unless the motive itself is to create fear or insecurity in the society and not when fear or insecurity is just a byproduct, a fallout or an unintended consequence of a private crime. In the last definition the focus was on the action and its result whereas in the present definition the emphasis appears to be on the motivation and objective and not on the result. Through this amendment the legislature seems to have finally appreciated that mere shock, horror, dread or disgust created or likely to be created in the society does not transform a private crime into terrorism but terrorism as an 'ism' is a totally different concept which denotes commission of a crime with the design or purpose of destabilizing the government, disturbing the society or hurting a section of the society with a view to achieve objectives which are essentially political, ideological or religious. This approach also appears to be in harmony with the emerging international perspective and perception about terrorism. The international perception is also becoming clearer on the point that a violent activity against civilians that has no political, ideological or religious aims is just an act of criminal delinquency, a felony, or simply an act of insanity unrelated to terrorism. This metamorphosis in the anti-terrorism law in our country has brought about a sea change in the whole concept as we have understood it in the past and it is, therefore, of paramount importance for all concerned to understand this conceptual modification and transformation in its true perspective.

16. For what has been discussed above it is concluded and declared that for an action or threat of action to be accepted as terrorism within the meanings of section 6 of the Anti-Terrorism Act, 1997 the action must fall in subsection (2) of section 6 of the said Act and the use or threat of such action must be designed to achieve any of the objectives specified in clause (b) of subsection (1) of section 6 of that Act or the use or threat of such action must be to achieve any of the purposes mentioned in clause (c) of subsection (1) of section 6 of that Act. It is clarified that any action constituting an offence, howsoever grave, shocking, brutal, gruesome or horrifying, does not qualify to be termed as terrorism if it is not committed with the design or purpose specified or mentioned in clauses (b) or (c) of subsection (1) of section 6 of the said Act. It is further clarified that the actions specified in subsection (2) of section 6 of that Act do not qualify to be labeled or characterized as terrorism if such actions are taken in furtherance of personal enmity or private vendetta.

17. Before parting with this judgment we may observe that the definition of 'terrorism' contained in section 6 of the Anti-Terrorism Act, 1997 as it stands at present is too wide and the same includes so many actions, designs and purposes which have no nexus with the generally recognized concept of what terrorism is. Apart from that including some other heinous offences in the Preamble and the Third Schedule to that Act for trial of such offences by an Anti-Terrorism Court when such other offences do not qualify to be included in the definition of terrorism puts an extra and unnecessary burden on such courts and causes delay in trial of actual cases of terrorism. It is, therefore, recommended that the Parliament may consider substituting the present definition of 'terrorism' by a more succinct definition bringing it in line with the international perspectives of that offence and focusing on violent activities aimed at achieving political, ideological or religious objectives. We further recommend that the Parliament may also consider suitably amending the Preamble to the Act and removing all those offences from the Third Schedule to the Act which offences have no nexus with the offence of terrorism.

18. The office is directed to fix the captioned appeals for hearing before appropriate Benches of this Court for their decision in terms of the legal position declared through the present judgment.

MWA/G-6/S Order accordingly.

**P L D 2020 Supreme Court 193**

**Present: Mushir Alam, Mazhar Alam Khan Miankhel and Syed Mansoor Ali Shah, JJ**

**NATIONAL ACCOUNTABILITY BUREAU through Chairman---Appellants**

**Versus**

**SHABBIR AHMED MALIK and others---Respondents**

Civil Appeals Nos.621 to 624 of 2019, decided on 8th January, 2020.

(On appeal from the judgment of High Court of Sindh, Sukkar Bench dated 3-6-2016, passed in Const. Ps. Nos. 424, 425, 1626 and 1627 of 2016).

**(a) National Accountability Ordinance (XVIII of 1999)---**

---Ss. 25(a) & 33E---Voluntary Return settlement ('VR settlement')---Default in payment under the VR settlement---Whether such default vitiated the VR settlement, resulting in initiation of further proceedings by the National Accountability Bureau ("NAB") against a holder of public office or any other person under the National Accountability Ordinance, 1999 ("Ordinance") or whether NAB could recourse to S.33E of the Ordinance to recover the amount of VR settlement as arrears of land revenue---Held, that default in deposit of the amount under a VR settlement vitiated the settlement resulting in initiation of further proceeding by the NAB against the accused under the Ordinance, and the NAB could not take recourse to S.33E of the Ordinance to recover the amount determined in VR settlement as arrears of land revenue---However, any partial payment under VR settlement would be available for adjustment even after VR stood vitiated and could be adjusted against Plea Bargain ("PB") or the liability determined by the court, as the case may be---Further more absence of time frame under a VR settlement could not be relied upon to make the VR arrangement continue indefinitely.

Voluntary Return ('VR') was an option available to a person under inquiry or even before inquiry but prior to authorization of investigation against him, to come forward to discharge his liability by making a voluntary return of the amount due against him. Voluntary Return settlement, as a concept was structured around and dependent upon the volition of the person who wished to settle. Voluntary Return, therefore, constituted (i) an offer of a holder of public office or any other person to make a voluntary return of the assets acquired or gains made by him in the course, or as a consequence, of any offence under the Ordinance; (ii) acceptance of that offer by the Chairman NAB; (iii) determination of the amount due from such person by the Chairman NAB; and (iv) deposit by such person with the NAB, of the amount so determined. Anything short of this did not constitute a valid VR settlement. Voluntary Return was, therefore, a one off voluntary return facility linked with the liability of the accused as determined by the Chairman NAB. Being a voluntary payment, any failure thereof, simple put an end to the facility of VR. Any short payment or partial payment did not constitute a valid VR settlement and thus did not discharge the person from his liability in respect of the matter or transaction in issue and the proceeding initiated under the Ordinance continued unabated.

In case the NAB granted time to a person to arrange for money so as to discharge his liability under the VR settlement, any such concession extended to the accused had no bearing on the essential constituent of VR, i.e., the deposit of the determined amount. Facility of VR became effective once the entire determined amount was paid or else the facility of VR came to an end. Even if the accused was allowed to pay the amount in installments, VR would only be effective once the determined amount was deposited in full. Voluntary return envisaged a voluntary deposit against the liability and there was no concept of any outstanding amount.

Under VR, there was either a deposit of the determined amount voluntarily or there was no VR. Therefore, the question of the recovery of the outstanding amount under VR did not arise in order to attract Section 33E of the Ordinance. However, any partial payment under VR would be available for adjustment even after VR stood vitiated and could be adjusted against Plea Bargain ("PB") or the liability determined by the court, as the case may be.

Mahesh Kumar v. Chairman NAB PLD 2008 Kar. 38 and Haji Khan Muhammad v. Government of Pakistan 2013 PCr.LJ 1571 distinguished.

Elahi Bux v. State PLD 2015 Sindh 165 and Raheel Sabir Jadoon v. Chairman, NAB PLD 2014 Pesh. 95 ref.

Absence of time frame under a VR settlement could not be relied upon to make the VR arrangement continue indefinitely.

**(b) National Accountability Ordinance (XVIII of 1999)---**

----Ss. 25(a), 25(b) & 33E---"Voluntary Return ('VR')"---"Plea Bargain" ('PB')---Distinction---Recovery of amount of fines, etc., as arrears of land revenue---Scope---Voluntary Return ('VR') under cl.(a) to S.25 of the National Accountability Ordinance, 1999 ('the Ordinance') used the phrase "deposit with the NAB", while Plea Bargain ('PB') under cl. (b) to S.25 used the phrase "agrees to return to the NAB"---Both said concepts presented two different transactional arrangements---Former envisaged full deposit and the latter a commitment to pay---Voluntary Return was linked with the condition of full deposit whereas Plea Bargain became operative if the accused "agrees to return" to the National Accountability Bureau (NAB) the amount determined by the Chairman, NAB and the Court approved such agreement---Amount so agreed to be returned under Plea Bargain [section 25(b)] became due under the Ordinance and was thus recoverable as arrears of land revenue under S.33E of the Ordinance, whereas NAB could not take recourse to S.33E to recover the amount determined in a VR settlement as arrears of land revenue.

Imran ul Haq, Addl. P.G. NAB and Ahmed Nawaz Chaudhry, Advocate-on-Record for Appellants.

Aftab Alam Yasir, Advocate Supreme Court, Syed Rifaqat Hussain Shah, Advocate-on-Record for Respondent No.1 (in C.As. Nos.621 and 623 of 2019).

Nemo. (in C.As.622 and 624 of 2019).

Dates of hearing: 7th and 8th January, 2020.

**JUDGMENT**

**SYED MANSOOR ALI SHAH. J.--**These appeals raise a specific legal question: whether default of payment under a Voluntary Return ("VR") settlement vitiates the settlement, resulting in initiation of further proceedings by the National Accountability Bureau ("NAB") against a holder of public office or any other person under the National Accountability Ordinance, 1999 ("Ordinance") or whether NAB can recourse to section 33E of the Ordinance to recover the amount of VR as arrears of land revenue?

2. Brief facts are that the respondents were Food Inspectors who, at the time, also held the charge of the Wheat Procurement Centre in District Jacobabad. During the inquiry initiated by the NAB against the respondents on the basis of an alleged misappropriation of wheat bags causing loss to the national exchequer, the respondents voluntarily came forward to settle the matter by offering VR under section 25(a) of the Ordinance, of the gains acquired through the said misappropriation. The applications requesting VR dated 24.4.2013, submitted by the respondents, stated that the respondents with free consent and without any coercion, duress or undue influence had voluntarily come forward and admitted that they were in possession of the gains made in consequence of an offence under the Ordinance and undertook to deposit the amount as determined by the NAB, with the prayer to be discharged of their liability in respect of the subject inquiry.

3. The said request for VR was processed by the NAB and liabilities of both the accused respondents were determined by the Chairman NAB in the sum of Rs.19,677,000/- (against Shabbir Ahmed Malik) and Rs.29.853.000/- (against Abdul Ghaffar Kalwar). Deposit of the said amount was to be made in three installments; however, no timeframe was provided for making payment of these installments. This settlement was recorded in affidavits drawn up by the respondents. The appellants paid the first installment/down payment in the sum of Rs.10,300 000/- and Rs.14,700.000/- respectively. However, they failed to pay the remaining amount inspite of notices issued to them by the NAB on 30.6.2014, 09.7.2014, 27.10.2014 and 29.10.2014. On remaining unsuccessful for a period of almost two years, the NAB cancelled the VR settlement on 04.2.2015 and proceeded with the investigation of the case on 16-3-

2015. The investigation allegedly led to discovery of further misappropriation on the part of the respondents and their liability soared to Rs.21,085,350/- and Rs.36,911,100/- resulting in the filing of References Nos. 17 and 18 of 2015 against both the respondents, respectively. Thereon, the Accountability Court Sukkar issued non-bailable warrants (NBWs) against them vide its order dated 9.1.2016, to face trial in the References.

4. The respondents approached the High Court challenging the NBWs and seeking bail before arrest, as well as, quashment of the References through separate petitions. These petitions were heard together and finally through impugned judgement dated 03.06.2016 the References against the respondents were quashed on the grounds: (i) that after a VR agreement, the outstanding amount can only be recovered under section 33E of the Ordinance as arrears of land revenue; (ii) that there was no timeframe provided in the VR agreement hence the agreement could not have been rescinded or enforced; (iii) that parallel criminal proceedings[1] for the same offences before the Anti-Corruption Court amounted to double jeopardy. Leave was granted on 19.03.2019 only to consider the question whether section 33E is applicable in case of default of payment under the VR settlement.

5. Learned Additional Prosecutor General NAB submits that the sole ground for quashment of the References by the High Court was its reliance on section 33E of the Ordinance. He submits that after the respondents failed to honour the voluntary return arrangement, the facility under section 25(a) of the Ordinance came to an end and NAB proceeded against the respondents in accordance with the Ordinance. He places reliance on Elahi Bux v. State (PLD 2015 Sindh 165), Minhon Khan Chandio v. National Accountability Bureau (2011 PCr.LJ 79), and Raheel Sabir Jadoon v. Chairman, NAB (PLD 2014 Peshawar 95) to submit that the failure of the respondents to honour the voluntary return does not attract section 33E of the Ordinance.

6. Learned counsel for the respondents on the other hand submits that in case of failure of an accused to honour the voluntary return, NAB can only proceed under section 33E of the Ordinance for recovery of the amount as arrears of land revenue and places reliance on Mahesh Kumar v. Chairman, NAB (PLD 2008 Karachi 38), Khan Muhammad v. Government of Pakistan, NAB (2013 PCr.LJ 1571), Ali Muhammad v. State (PLD 2009 Lahore 312). He adds that Shabbir Ahmed Malik, one of the accused was also booked in FIR No.3/2014 under section 409 P.P.C. read with section 5(2) of the Prevention of Corruption Act, 1947 and after regular trial was acquitted by the Special Judge, Anti-Corruption Court, Larkana vide judgment dated 25.04.2017, and as a consequence, he cannot undergo trial for the same offence afresh.

7. We have heard the learned counsel for the parties at some length, examined the record of the case and the provisions of the Ordinance. The answer to the legal question that has arisen in these appeals hinges upon the interpretation of sections 25(a) and 33E of the Ordinance, which are reproduced hereunder for ready reference:-

Section 25:(a)

"25.(a) Notwithstanding anything contained in section 15 or in any other law for the time being in force, where a holder of public office or any other person, prior to the authorization of investigation against him, voluntarily comes forward and offers to return the assets or gains acquired or made by him in the course, or as the consequence, of any offence under this Ordinance, the Chariman NAB may accept such offer and after determination of the amount due from such person and its deposit with the NAB discharge such person from all his liability in respect of the matter or transaction in issue:

Provided that the matter is not sub judice in any court of law."

Section 33E:

"33E. Any fine or other sum due under this Ordinance, or as determined to be due by a Court, shall be recoverable as arrears of land revenue"

Without going into the constitutionality of section 25(a), which we have been informed is the subject matter of another case,[2] we restrict ourselves to the meaning and scope of VR under section 25(a). VR is

an option available to person under inquiry or even before inquiry but prior to authorization of investigation against him, to come forward to discharge his liability by making a voluntary return of the amount due against him. A VR settlement, as a concept is structured around and dependent upon the volition of the person who wishes to settle. VR, therefore, constitutes (i) an offer of a holder of public office or any other person to make a voluntary return of the assets acquired or gains made by him in the course, or as a consequence, of any offence under the Ordinance; (ii) acceptance of that offer by the Chairman NAB; (iii) determination of the amount due from such person by the Chairman NAB; and (iv) deposit by such person with the NAB, of the amount so determined. Anything short of this does not constitute a valid VR settlement. VR is, therefore, a one off voluntary return facility linked with the liability of the accused as determined by the Chairman NAB. Being a voluntary payment, any failure thereof, simple puts an end to the facility of VR. Any short payment or partial payment does not constitute a valid VR settlement and thus does not discharge the person from his liability in respect of the matter or transaction in issue and the proceeding initiated under the Ordinance continues unabated. VR under the law is a one-time facility of depositing the determined amount and not a long-term repayment arrangement. In case the NAB grants time to a person to arrange for money so as to discharge his liability under the VR settlement, any such concession extended to the accused has no bearing on the essential constituent of VR, i.e., the deposit of the determined amount. Facility of VR becomes effective once the entire determined amount is paid or else the facility of VR comes to an end. Even if the accused is allowed to pay the amount in installments, VR will only be effective once the determined amount is deposited in full. Voluntary return envisages a voluntary deposit against the liability and there is no concept of any outstanding amount. "Outstanding amount" or "any sum due" imply that a person is otherwise bound to pay and hasn't paid. Under VR, there is either a deposit of the determined amount voluntarily or there is no VR. Therefore, the question of the recovery of the outstanding amount under VR does not arise in order to attract section 33E of the Ordinance. However, any partial payment under VR will be available for adjustment even after VR stands vitiated and can be adjusted against Plea Bargain ("PB") or the liability determined by the court, as the case may be.

8. The case law referred to by learned counsel for the respondents and relied upon by the High Court is misconceived and has no relevance to the matter in hand. Mahesh Kumar v. Chairman NAB (PLD 2008 Karachi 38) and Haji Khan Muhammad v. Government of Pakistan (2013 PCr.LJ 1571) relate to the cases of PB under clause (b) of section 25, and not of VR unde clause (a) of that section of the Ordinance. There is a clear difference between the two clauses; under clause (a) the phrase "deposit with the NAB" and under clause (b) "agrees to return to the NAB" present two different 'transactional arrangements. One envisaging full deposit and other a commitment to pay. VR is linked with the condition of full deposit whereas PB becomes operative if the accused "agrees to return" to the NAB the amount determined by the Chairman, NAB and the Court approves such agreement. The amount so agreed to be returned under clause (b) becomes due under the Ordinance and is thus recoverable as arrears of land revenue under section 33E of the Ordinance. Mahesh Kumar actually involved the question whether non-deposit of amount of PB was an offence within the provisions of section 5(r) of the Ordinance, when the remedy of recovery of such amount was available under section 33E of the Ordinance; while the controversy in Haji Khan Muhammad pertained to imposition of interest on actual amount of PB. None of these cases relate to VR and therefore do not advance the case of the respondents. Elahi Bux v. State (PLD 2015 Sindh 165) and Raheel Sabir Jadoon v. Chairman, NAB (PLD 2014 Peshawar 95) however, espouse the view expressed by this Court.

9. The legal question involved in these appeals is therefore answered in the terms that default in deposit of the amount under a VR settlement vitiates the settlement resulting in initiation of further proceeding by the NAB against the accused under the Ordinance, and the NAB cannot recourse to section 33E of the Ordinance to recover the amount determined in VR settlement as arrears of land revenue. The absence of time frame under the present VR arrangement cannot be relied upon to make the VR arrangement

continue indefinitely. In the present case sufficient time (2 years) was given to the respondents to pay up and inspite of several notices sent to the respondents there was no response, hence the cancellation of the VR settlement. In view of this legal position, the impugned judgment[3] is set aside; as a consequence, References Nos.17 and 18 of 2015 against the respondents shall be deemed to be pending before the Accountability Court concerned, to be decided strictly in accordance with law.

10. It is stated that respondent Shabbir Ahmed Malik has been acquitted by the Anti-Corruption Court on 25.04.2017 after the impugned judgment dated 03.06.2016. Bare perusal of the order of the Anti-Corruption Court shows that the sole ground for the acquittal of the respondent was the quashment of the Reference made through the impugned judgment. Be that as it may, the effect of acquittal of the respondent Shabbir Ahmed Malik by the Anti-Corruption Court, under Article 13 of the Constitution read with section 403 Cr.P.C. may be considered and decided by the Accountability Court in view of the provisions of sections 3, 16, 16A and 18 of the Ordinance in accordance with the law, if the same is agitated by the respondents before it.

11. Learned counsel for the respondent Shabbir Ahmed Malik prays for his bail before arrest. He submits that in compliance of Order dated 03.06.2016 of the High Court, the said respondent has deposited the remaining amount determined under the VR, which forms a major portion of the amount assessed against him in the Reference. This fact is borne out from the Certificate dated 16.10.2017 issued by the Sindh High Court and is confirmed by the Additional Prosecutor General, NAB. We, therefore, admit respondent Shabbir Ahmed Malik to bail subject to his furnishing a bond in the amount of Rs.200,000/- with one surety of the like amount to the satisfaction of the Accountability Court concerned.

12. These appeals are allowed in the above terms.

Sd/- Mushir Alam,
Judge
Mazhar Alam Khan Miankhel,
Judge
Syed Mansoor Ali Shah,
Judge

CORRIGENDUM*

Certain typographical errors were observed in paragraphs 3, 4, 7 and 9 of the judgment. The same have been corrected today and the judgment has been updated.

Sd/- Mushir Alam,
Judge
Mazhar Alam Khan Miankhel,
Judge
Syed Mansoor Ali Shah,
Judge

MWA/N-2/S Appeals allowe

**P L D 2020 Supreme Court 201**

**Present: Manzoor Ahmad Malik, Saradar Tariq Masood and Syed Mansoor Ali Shah, JJ**

**ALI AHMAD and another---Appellant/Petitioner**

**Versus**

**The STATE and others---Respondents**

Criminal Appeal No.154-L of 2013 and Criminal Petition No.366-L of 2013, decided on 14th March, 2019.

(On appeal from the judgment of Lahore High Court, Lahore dated 26-2-2013, passed in Crl. A. No.1053 of 2007).

**(a) Penal Code (XLV of 1860)---**

----Ss. 302(b) & 302(c)---Criminal Procedure Code (V of 1898), S.342---Qanun-e-Shahadat (10 of 1984), Art.121---Qatl-i-amd---Re-appraisal of evidence---Defence plea of sudden and grave provocation---Admission or confession by accused in his statement under S. 342, Cr.P.C, in circumstances where prosecution on basis of its own evidence had failed to prove its case---Whether such statement of accused could be relied upon for convicting the accused---Held, that prosecution on basis of its evidence had failed to prove its case beyond reasonable doubt as presence of eye-witnesses at scene of occurrence was doubtful and contradictions were found between their statements on material aspects---However, the accused had admitted in his statement under S.342, Cr.P.C. that he killed his sister and her paramour (deceased) under grave and sudden provocation when he saw them committing zina---Such statement of the accused made under S.342, Cr.P.C was to be accepted in its entirety without requiring the proof under Art.121 of Qanun-e-Shahadat, 1984---Said statement, when taken as a whole, established sudden and grave provocation, and it was not improbable or unbelievable, nor was it inconsistent with the overall facts and circumstances of the case; therefore, it could safely be relied and acted upon (for convicting the accused)---Case of accused to the extent of deceased paramour fell within the scope of S.302(c), P.P.C, instead of S.302(b), P.P.C and his conviction was modified as such with a sentence of 15 years rigorous imprisonment, whereas his conviction to the extent of murder of his sister had already been set aside in lieu of a compromise with the legal heirs---Order accordingly.

**(b) Criminal trial---**

----Prosecution---Burden of proof---Scope---Burden, in a criminal case, to prove the guilt of the accused was always on the prosecution---Court, in the first instance, was to discuss and assess the prosecution evidence, in order to arrive at the conclusion as to whether or not the prosecution had succeeded in proving the charge against the accused on the basis of its evidence.

**(c) Qanun-e-Shahadat (10 of 1984)---**

----Art. 121---Criminal trial---Defence plea---Shifting of burden from prosecution to the accused---Scope---Burden shifted upon the accused under Art.121 of the Qanun-e-Shahadat, 1984 to prove his defence plea, only when a prima facie case was made out against him by the prosecution on the basis of its evidence---If the prosecution failed to prove its case against the accused, the question of shifting of burden on the accused did not arise.

**(d) Criminal trial---**

----Defence plea---Examination of such plea by the court---Scope---Burden of proof---Scope---In a case where the accused had not taken any specific plea (e.g. self defence, grave and sudden provocation etc.) or had not produced any evidence in his defence, the court was to decide the question of success or failure of the prosecution in proving the charge against the accused on the basis of the prosecution evidence alone---Where the accused had taken a specific plea or had produced evidence in his defence, then the court was to appraise the prosecution case and the defence version in juxtaposition, in order to arrive at a just conclusion---Even in such situation the burden remained on the prosecution to prove

the necessary ingredients of the offence charged against the accused, and it did not shift upon the accused merely by taking a defence plea or producing evidence in his defence.

**(e) Penal Code (XLV of 1860)---**

----S. 302---Qatl-i-amd---Defence plea of sudden and grave provocation---Court was not to examine such defence plea in isolation from the prosecution evidence---Approach adopted by court of not appraising the prosecution evidence at all and convicting an accused, under S. 302(b), P.P.C., on the basis of its finding that he had failed to establish his defence plea of grave and sudden provocation was contrary to the law declared by the Supreme Court in the cases of Wali Muhammad v. State 1969 SCMR 612 and Ashiq Hussain v. State 1993 SCMR 417---Accused could not be convicted on the ground that his defence plea appeared unconvincing---Prosecution was duty bound to prove its case against the accused beyond reasonable doubt on the basis of its own evidence and was not absolved of this duty even if the accused had taken a defence plea.

Wali Muhammad v. State 1969 SCMR 612 and Ashiq Hussain v. State 1993 SCMR 417 ref.

Feroze v. State 2008 SCMR 696 distinguished.

**(f) Penal Code (XLV of 1860)---**

----S. 302 ---Qatl-i-amd---Defence plea---'Grave and sudden provocation' and 'honour killing'---Distinction---In case of honour killing the act of murder was well thought out, calculated and pre-mediated, while in case of grave and sudden provocation the act was committed on the spur of the moment without any pre-planning or deliberation---Family honour may be at the root of both the acts, still there was a difference between the two.

Muhammad Qasim v. State PLD 2018 SC 840; Muhammad Ameer v. State PLD 2006 SC 283; Ali Muhammad v. Ali Muhammad PLD 1996 SC 274 and Naseer Hussain v. Nawaz 1994 SCMR 1504 ref.

**(g) Penal Code (XLV of 1860)---**

----S. 302---Qatl-i-amd---Defence plea---'Grave and sudden provocation'---Meaning and scope.

Expression "grave and sudden provocation" was used by the Legislature in Exception-1 to the erstwhile section 300 of P.P.C. as: "Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation." It is clearly spelt out from the said provisions that the provocation offered by the act of the victim must be so grave and sudden that it would deprive the offender of the power of self-control. Provocation in law thus consisted mainly of three elements: (i) the act of provocation, (ii) the loss of self-control, and (iii) the retaliation/reaction proportionate to the provocation. The relationship of these elements to each other, particularly in point of time, was of the foremost importance to determine whether there was time for passion to cool and reason to resume.

Ali Muhammad v. Ali Ali Muhammad PLD 1996 SC 274 ref.

Doctrine relating to provocation depended on the fact that it causes, or may cause, a sudden and temporary loss of self-control,whereby malice which was the formation of an intention to kill or to inflict grievous bodily harm, was negatived.The proportionality of the reaction to the provocation was tested on the touchstone of the reaction expected from a reasonable person. What a reasonable man would do in certain circumstances depended upon various factors including the customs, traditions, social and cultural values, and way of life of the society to which he belonged. No abstract standard of reasonableness could be laid down, in this regard.

Holmes v. Director of Public Prosecutions (1946) AC 588 and K.M. Nanavati v. State of Maharashtra AIR 1962 SC 605 ref.

**(h) Criminal Procedure Code (V of 1898)---**

----S. 342---Power of Court to examine the accused---Scope and purpose.

Primary purpose of section 342, Cr.P.C. was to enable the accused to know and to explain and respond to the evidence brought against him by the prosecution. It was essential that attention of the accused must be brought to all the vital parts of the evidence brought against him by the prosecution,

especially if he was an ignorant person who could not be expected to know or understand what particular parts of the evidence were or were likely to be considered by the Court to be against him. The purpose was to establish a direct dialogue between the Court and the accused and to put every important incriminating piece of evidence to the accused and grant him an opportunity to answer and explain.

Tani v. Emperor 20 Cr.LJ 12 (Nag); Md Illias Mistri v. The King (1949) ILR 1 Cal 43; Abdul Wahab v. Crown PLD 1955 FC 88 at p.90; Santan Naskar v. State of West Bengal AIR 2010 SC 3570 ref.

**(i) Criminal Procedure Code (V of 1898)---**

----S. 342---Admission or confession by accused in his statement under S.342, Cr.P.C.---Probative value---Admission or confession which was improbable or unbelievable, or was not consistent with the overall facts and circumstances of a case may not have any probative value and thus could not be relied upon by the court for reaching to a conclusion.

Manjeet Singh v. State PLD 2006 SC 30; Ghulam Abuzar v. State 1991 PCr.LJ 697 and Nisar Ahmad v. State 1989 PCr.LJ 1445 ref.

**(j) Criminal Procedure Code (V of 1898)---**

----S. 342---Prosecution failing to prove its case---Admission or confession by accused in his statement under S.342, Cr.P.C.---Evidentiary value---Where prosecution had failed to prove its case, the statement of accused under S.342, Cr.P.C., could be taken into consideration by the court (for convicting him) but in its entirety---Reliance could not be placed on only inculpatory part of such statement---Principles.

If the prosecution failed to prove its case against the accused, the court could take into consideration the statement of the accused under section 342, Cr.P.C. whether in favour of or against the accused; but it must take into consideration such statement in its entirety and could not select and place reliance on the inculpatory part of the statement only. However where there was prosecution evidence which disproved the exculpatory part of the statement of the accused under section 342, Cr.P.C., then reliance could be placed on the inculpatory part of the statement by excluding the exculpatory part, but not otherwise. In other words, if the prosecution had proved a case against the accused beyond reasonable doubt, the court may, if it deemed expedient to get further support, take into consideration also the inculpatory part of the statement of the accused under section 342, Cr.P.C., only if the prosecution evidence negated the exculpatory part of the statement and it could be safely severed from the inculpatory part but not otherwise. Even if this exercise was not undertaken the conviction of the accused stood as the prosecution had already proved its case against the accused beyond reasonable doubt, on the basis of its evidence. The inculpatory part of the statement was not being considered to fill up gaps in the case of the prosecution but simply to draw support in a case already established by the prosecution and no more.

Rahim Bakhsh v. Crown PLD 1952 FC 1; Mehrban Shah v. State 1969 SCMR 839; Najib Raza Rehmani v. State PLD 1978 SC 200; Hanumani Govind Nargundi v. State of Madhya Pardesh AIR 1952 SC 343; Faiz v. State 1983 SCMR 76; Waris Khan v. Ishtiaq PLD 1986 SC 335 and Sultan Khan v. Sher Khan PLD 1991 SC 520 ref.

Once the prosecution evidence was disbelieved, rejected or excluded from consideration, the facts explained by the accused in his statement under section 342, Cr.P.C. were to be accepted in their entirety without requiring their proof. The court was then to examine the said facts to give due effect to the statement of the accused, under the law, whether in favour of or against the accused. The object of such examination was to determine whether or not the facts narrated by the accused constituted an offence under the law or fit into any exception of the offence provided under the law.

Jagdeo v. Emperor 38 IC 740; Bhola Nath v. Emperor AIR 1929 Allahabad 1; Gul Mahomed v. Emperor AIR 1945 Sindh 42 and Muhammad Azam v. State 2009 SCMR 1232 ref.

**(k) Penal Code (XLV of 1860)---**

----S. 302(c)---Qatl-i-amd---Illicit sex with a female family member---Defence plea of sudden and grave provocation---Scope---Supreme Court observed that our culture and social values reflected in the jurisprudence developed so far was that an act of illicit sex with a female family member of the offender was considered sufficient to cause provocation so grave and sudden that it would deprive the offender of the power of self-control.

Muhammad Qasim v. State PLD 2018 SC 840; Gul Nissa v. Muhammad Yousuf PLD 2006 SC 556; Naseer Hussain v. Nawaz 1994 SCMR 1504 and Noor Muhammad v. State 1993 SCMR 208 ref.

Muhammad Akram Qureshi, Advocate Supreme Court for Appellant.

Ch. Tahir Nasrullah, Advocate Supreme Court for Petitioner and for Respondent No.2 (in Crl.A. No.154 of 2013).

Mazhar Sher Awan, Addl. P.G. for the State.

Supreme Court Research Centre for the Research Assistance.

Date of hearing: 14th March, 2019.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.--**Ali Ahmad (the appellant), murdered his sister, Rabia Khalil and her paramour, Raheel Arif, in his own house, in the wee hours of the night (3:00 am) on 23.04.2006. He was thereafter booked in FIR No. 155 of the same date registered at Police Station, City Gojra, District Toba Tek Singh for offences punishable under section 302 P.P.C. After regular trial, he was convicted under section 302(c) P.P.C. and sentenced to rigorous imprisonment for 10 years by the Trial Court. Upon appeal by the complainant the High Court through impugned judgment dated 26.02.2013 set-aside the judgment of the trial court and convicted the appellant under section 302(b), P.P.C. and sentenced him to imprisonment for life, thereby the criminal appeal of the complainant was allowed, whereas the criminal appeal filed by the appellant seeking acquittal was dismissed.

2. When this appeal came up for hearing before this Court on 27.3.2014, it was pointed out that the heirs of the deceased Rabia Khalil had entered into compromise with the appellant. Criminal Misc. Application No.512-L/2013 was placed on the record in this regard, which was allowed and the appeal of the appellant was partly accepted to the extent of Rabia Khalil and conviction of the appellant qua her murder was set aside, while the appeal to the extent of conviction qua the murder of Raheel Arif was kept pending, which has come up for hearing before us today.

3. Story of the prosecution is that the brother of the complainant, Muhammad Nawaz, was hospitalized due to a heart condition at Bashir Clinic, Gojra Road, Gojra on 21.04.2006. The appellant, having close terms with Muhammad Nawaz and his family, regularly visited him at the clinic. At the end of one of his visits to the clinic on 23.04.2006, the appellant, around 2:15 a.m., requested Raheel Arif, nephew of the complainant, to walk him home from the clinic. Around 3:00 am, the same night, the complainant, who was also at the clinic, went out to drop Hassan Iftikhar (PW-12) and Adeel Arif (brother of Raheel Arif) home on his motorbike. The complainant party on their way home and while passing by Mehdi Mohalah, heard a fire shot in a street and on hearing the same, turned and drove into that street and saw the appellant firing at Raheel Arif, who succumbed to his injuries and died in the street. The crime report continues to state that thereafter the appellant went into the house and locked the door and more fire shots were heard from inside the house. According to prosecution the motive behind the murder was that the appellant suspected that Raheel Arif had illicit relations with his sister Rabia Khalil.

4. The defence version, as per statement of the appellant recorded under section 342, Cr.P.C, is that he murdered the deceased and his sister due to grave and sudden provocation when he saw his sister in a compromising position with the deceased, as he returned home from medical clinic in the wee hours of the night on 23.4.2006.

5. We have heard the learned counsel for the parties and have examined the record and the judgments of the courts below. The trial court disbelieved the presence of the eye-witnesses, the

complainant, Ali Ahmad (PW-11) and Hassan Iftikhar (PW-12) at the site of the occurrence after a careful appraisal of their testimony, supported by cogent reasons. The High Court has not upset the said findings in the impugned judgment. Additionally, we find that according to the prosecution the complainant (PW-11) set out on his motorbike to drop Hassan Iftikhar (PW-12) and Adeel Arif (brother of the deceased Raheel Arif) at their respective homes. In the cross-examination the eye-witnesses (PW-11 and PW-12) and Syed Kazim Hussin (PW-1), the draftsman who prepared the site plan (Ex-PA), stated that the place of occurrence does not fall on the way to their homes. The site plan (Ex-PA) does not even show that the road to Samundari Road, Gulshan Colony or Abdullahpur (areas where residences of PW-12, Adeel Arif and PW-11 are situate) passes through the place of occurrence. According to the site plan the complainant party saw the occurrence from a distance of 297 feet, in the dead of the night. There is a contradiction between the statements of the two eye-witnesses (PW-11 and PW-12) regarding their distance from the site of occurrence, PW-12 categorically stated in his cross-examination that he was present during the occurrence at a distance of 14/15 feet from the place of occurrence, while PW-11 supports the site plan which describes the distance to be 297 feet. This inconsistency between the statement of the two eye-witnesses casts doubt on the case of the prosecution. The light of the motorcycle and a private bulb installed in the doorway of the house of the appellant is also suspect as neither the said bulb nor the motorcycle was recovered. Adeel Arif, one of the three eye-witnesses, being the real brother of the deceased and as a consequence being the most aggrieved amongst them, was given up by the prosecution as being "unnecessary," giving rise to an adverse inference regarding his presence at the scene of the crime. The above analysis makes the presence of the eye-witnesses at the crime scene doubtful, as concluded by the trial court.

6. With the presence of the eye-witnesses doubtful at the scene of the crime, it is not safe to place reliance on the ocular account. As a consequence, the medical evidence or the recovery of the firearm from the appellant lends little support or corroboration, to the case of the prosecution. For the above reasons we are of the view that the prosecution failed to establish the culpability of the appellant, on the basis of its evidence.

7. The High Court did not examine the case of the prosecution and appraise its evidence to find out whether the prosecution had succeeded to prove the charge against the accused but instead, examined only the defence plea by placing reliance on Article 121 of the Qanun-e-Shahadat Order, 1984 ("QSO") and held that the appellant had failed to prove his plea of grave and sudden provocation as taken in his statement under section 342, Cr.P.C and proceeded to convict him under section 302(b) P.P.C. for the offence of "honour killing", as alleged by the prosecution.

Process of appraising evidence and scope of Article 121 of QSO

8. In a criminal trial, it is now jurisprudentially well- entrenched, the proper course for the court is to first discuss and assess the prosecution evidence, particularly the reliability of the eye-witnesses, in order to arrive at the conclusion as to whether or not the prosecution has succeeded in proving the charge against the accused on the basis of its evidence.[1] Burden is always on the prosecution to prove its case and it is only when a prima facie case is made out against the accused sufficient to justify his conviction, does the burden shift upon the accused under Article 121 of the QSO, if he relies on any of the General Exceptions in the P.P.C or within any special exception or proviso contained in any other part of the P.P.C. or in any law defining the offence charged.[2.] If the prosecution fails to prove its case against the accused, the question of shifting of burden upon the accused does not arise as it becomes immaterial. Where the accused has taken a defence plea (like, self defence, provocation, accident, etc.) which relates to an essential ingredient of the offence charged, the court is to appraise the prosecution case and the defense version in juxtaposition to adjudicate the matter.[3]

9. The approach adopted by the High Court, in the instant case, in examining the defence plea of grave and sudden provocation in isolation from the prosecution evidence was incorrect. The High Court did not appraise the prosecution evidence at all and convicted the appellant, under section 302(b),

P.P.C., on the basis of its finding that he had failed to establish his defence plea of grave and sudden provocation. This approach of the High Court in coming to the conclusion of the culpability of the appellant was contrary to the law declared by the two larger benches of this Court in the cases of Wali Muhammad[4] and Ashiq Hussain.[5] In the cited cases this Court authoritatively declared that the accused cannot be convicted on the ground that his defense plea appears unconvincing. The prosecution is duty bound to prove its case against the accused beyond reasonable doubt on the basis of its own evidence and is not absolved of this duty even if the accused has taken a defence plea.

10. Reliance by the High Court on Feroze[6] is misplaced; because in Feroze the learned trial court convicted the accused, and the High Court affirmed it, on the basis of the evidence of the prosecution and not on failure of the accused to prove its defence plea and this Court maintained the decisions of the courts below by refusing leave to appeal. However, if Feroze creates an impression that the prosecution evidence needs not to be appraised/examined in a case where the accused has taken a defence plea, we strongly dispel the same and reinforce the aforesaid view of the larger benches of this Court expressed in Wali Muhammad and Ashiq Hussain.

11. Consistent jurisprudence has evolved over the years by several judgments of this Court, wherein the accused persons were acquitted by accepting their plea taken in statement under section 342, Cr.P.C., of having acted in furtherance of self-defence, when the prosecution had failed to prove its case against them. The cases of Mehrban,[7] Najib Raza,[8] Waris Khan,[9] Muhammad Aksar,[10] Faiz[11] and Sultan[12] may be referred in this regard. These cases do not discuss Article 121, QSO[13] as the accused is not required to prove his plea of self-defense, on failure of the prosecution to prove its case.

Honour killing vis-a-vis grave and sudden provocation

12. The High Court has also relied on Ameer[14], for holding that the case is one of honour killing and not of grave and sudden provocation, without fully appreciating the difference between the two. In case of honour killing the act of murder is well thought out, calculated and pre-mediated, while in case of grave and sudden provocation the act is committed on the spur of the moment without any pre-planning or deliberation[15]. Family honour may be at the root of both the acts, still there is a difference between the two; in case of honour killing the act is pre-meditated and a planned one, while in case of grave and sudden provocation the act is so sudden that it entails no prior deliberation or planning. Reliance by the High Court on Ameer is misplaced as the murder in that case was a pre-meditated one. This glaring distinguishing fact has not been appreciated by the High Court. It is also important to shed some light on the meaning and scope of the expression, "grave and sudden provocation."

Meaning and scope of grave and sudden provocation

13. The expression "grave and sudden provocation" was used by the Legislature in Exception-1 to the erstwhile section 300 of P.P.C. as: "Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation." It is clearly spelt out from the said provisions that the provocation offered by the act of the victim must be so grave and sudden that it would deprive the offender of the power of self-control. Provocation in law thus consists mainly of three elements: (1) the act of provocation, (2) the loss of self-control, and (3) the retaliation/ reaction proportionate to the provocation. The relationship of these elements to each other, particularly in point of time, is of the foremost importance to determine whether there was time for passion to cool and reason to resume.[16] The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control, whereby malice which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived.[17.] The proportionality of the reaction to the provocation is tested on the touchstone of the reaction expected from a reasonable person. What a reasonable man will do in certain circumstances depends upon various factors including the customs, traditions, social and cultural values, and way of life of the society to which he belongs.[18] No abstract standard of reasonableness can be laid down, in this regard.

14. In his statement under section 342, Cr.P.C, the appellant stated that he murdered the deceased and his sister due to grave and sudden provocation when he saw Raheel Arif committing zina with his sister, as he returned home from the medical clinic in the wee hours of the night on 23.4.2006. His statement made under section 342, Cr.P.C is reproduced below, for ready reference:

"Statement of accused Ali Ahmed son of Khalil Ahmed caste Butt aged 30 years businessman resident of Mehdi Mohallah, Gojra under section 342, Cr.P.C without oath.

"

Q.14 Have you any thing else to say?

Ans. I am innocent. The real facts of the present case are that I had a family terms and good relations with Muhammad Nawaz Gill and also friendly terms with Raheel Gill. Muhammad Nawaz Gill suffered heart attack on 21.4.2006. He was admitted in Bashir Clinic Quaid-i-Azam Road, Gojra. His wife and daughter remained present with him round the clock and I used to visit him during night regularly and during day hours occasionally. On the night between 22/23.4.2006 I was present with Muhammad Nawaz in Bashir Clinic. At mid night he felt a severe pain in his left arm. I had informed the dispenser about the precarious condition of Muhammad Nawaz Gill and on his information doctor had attended the patient. At that time through telephonic message I had informed Ijaz Gill Nazim U.C., the real brother of Nawaz Gill and Raheel Gill, real Bhanja of Nawaz Gill about the serious condition of Muhammad Nawaz. They both had come to the clinic after some time, the condition of Muhammad Nawaz Gill became O.K. Then Raheel Arif had gone on the pretext that his mother is alone at home. At about 3 p.m. when Muhammad Nawaz's condition was satisfactory, I left the clinic for my home. When I reached my house towards St.No.4, gate was lying open. Thereafter, I went inside my office and found my sister Rabia Khalil and Raheel Arif both committing zina with each other. I was holding my licensed pistol, I lost senses and self control and in the above said circumstances under grave and sudden provocation I made fire with my pistol on Raheel Arif when he was trying to flee away from the spot and he sustained injury on his shin in the deohri and he fell down outside the house in street. Then I made successive fires with pistol which landed on different parts of his body and in the same mental condition I went inside the house and made fire with repeater gun on my sister Rabia Khalil and she also fell down. Thereafter, I came back in the street and I made further firing on Raheel Arif with repeater gun 12 bore. The occurrence was not witnessed by the PWs. After the occurrence I had informed the police at PS through telephone and informed them about the present occurrence. On the arrival of the I.O., I had informed Ijaz Gill Nazim U.C through telephonic message, thereafter the complainant had come to the place of occurrence with Mehtab Ahmed Cheema and concocted this false story and involved me in this false case. I was in police custody since 23.4.2006. On the asking of I.O. on 24.4.2006, I had written my statement and produced the same before him which is now on judicial record as Ex.DG. The underwear of Rabia Khalil was found to be stained with semen " (emphasis supplied)

Scope and purpose of section 342, Cr.P.C

15. Before examining the effect of statement of the appellant made under section 342, Cr.P.C, it is necessary to explore the scope and evidentiary value of a statement made under Section 342 of the Cr.P.C, which is reproduced below:-

342. Power to examine the accused. (1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial without previously warning the accused, put such questions to him as the Court considers necessary, and shall for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

(2) The accused shall not render himself liable to punishment by refusing to answer such questions or by giving false answers to them; but the Court may draw such inference from such refusal or answer as it thinks just.

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(4) Except as provided by subsection (2) of S. 340 no oath shall be administered to the accused. (emphasis supplied)

16. Bare reading of section 342, Cr.P.C shows that its primary purpose is to enable the accused to know and to explain and respond to the evidence brought against him by the prosecution. It is essential that attention of the accused must be brought to all the vital parts of the evidence brought against him by the prosecution, especially if he is an ignorant person who cannot be expected to know or understand what particular parts of the evidence are or are likely to be considered by the Court to be against him. The purpose is to establish a direct dialogue between the Court and the accused and to put every important incriminating piece of evidence to the accused and grant him an opportunity to answer and explain.[19] Muhammed Sharif, J. in Abdul Wahab[20] eloquently explained the object of section 342, Cr.P.C in the following words: "It should not ... be overlooked that the real object of section 342 is not to subject the accused to a detailed cross-examination. It is, as a matter of fact, inviting his attention to the point or points in the evidence which are likely to influence the mind of the judge in arriving at conclusions adverse to the accused, and before such an adverse inference can be drawn, the accused should be afforded an opportunity to offer an explanation, if he has any."

Status of a statement under section 342, Cr.P.C

17. The words "taken into consideration" appearing in section 342(3), Cr.P.C are very wide. The statement of an accused recorded under section 342, Cr.P.C, has no less probative value than any other "matter" which may be taken into consideration against him within the contemplation of the definition of "proved" given in Article 2(4) of the QSO[21] (previously section 3 of the Evidence Act, 1872), which states that a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Muhammad Munir, J., in Rahim Bakhsh[22], regarding statement under section 342, Cr.P.C. wrote: "I know of no law which says that an admission made by an accused person in or out of court unless it is vitiated by any such circumstances as are mentioned in the Indian Evidence Act, cannot be considered to be a matter which the court may take into consideration in coming to its conclusion." The circumstances which can vitiate an admission or confession, referred to by the learned Judge, may be of inducement, threat or promise under which a particular statement is made. A statement under section 342, Cr.P.C. having been made by an accused before court in presence of his counsel has little chance of suffering from such circumstances.[23] However, an admission or confession which is improbable or unbelievable, or is not consistent with the overall facts and circumstances of a case may not have any probative value and thus cannot be relied upon by the court for reaching to a conclusion.[24]

Conviction on the basis of the statement of the accused under section 342, Cr.P.C.

18. In Abdur Rehman,[25] Amin,[26] Mehrban,[27] Maqsood,[28] and Sattar,[29] the High Court disbelieved the prosecution evidence but convicted the accused persons for the offence punishable under section 302(c), P.P.C. or the erstwhile section 304-I, P.P.C. on the basis of the statements under section 342, Cr.P.C., of having committed the offences on account of grave and sudden provocation, without requiring them to prove their statements. This Court maintained the conviction recorded by the High Court, in those cases.

19. Hanif[30] and Ali Muhammad[31] may also be referred in this regard. In Hanif, this Court maintained the judgment of the trial court whereby the accused had been convicted for offence under

section 302(c), P.P.C., after rejection of the prosecution evidence, on the basis of his plea of having committed the murder under the circumstances of grave and sudden provocation. In Ali Muhammad, this Court reversed the acquittal judgment of the High Court and convicted the accused under section 302(c), P.P.C., despite rejection of the prosecution evidence, on the basis of version of the accused taken in statement under section 342, Cr.P.C. The version of the accused, in that case, was that he saw the deceased and his wife lying on the same bed in an objectionable position, and acted under sting of grave and sudden provocation. In Shamoon,[32] this Court while relying upon the plea of the accused narrated in statement under section 342, Cr.P.C, of having acted under grave and sudden provocation converted his sentence from section 302, P.P.C. to 304-II, P.P.C., as both the Courts below had disbelieved the ocular testimony of the prosecution witnesses. This Court, in Gul Nissa,[33] made an explicit and unequivocal statement of law that "accused can be convicted on his own statement even if the prosecution evidence is rejected".

Principles governing section 342, Cr.P.C

20. The principles surrounding section 342, Cr.P.C have evolved for over a period of the last about two hundred years beginning with the case of Sarah Jones[34] (decided in 1827) and taking shape in Balmakund[35] as follows:

> "...where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible."

These principles have been refined and rearticulated by our own courts.

A. When prosecution fails to prove its case - the statement of the accused, under section 342 Cr.P.C. is to be considered in its entirety and accepted as a fact.

Sir Abdul Rashid J., the then Chief Justice of Federal Court of Pakistan observed in Rahim Bakhsh[36] that if the conviction of an accused is to be based solely on his statement in Court then that statement should be taken into consideration in its entirety. In Mehrban[37] S.A. Rahman J. speaking for a five member bench of this Court held that "[i]t was not open to the learned Judges, after having rejected the prosecution evidence as unreliable, to dissect the accused's statement and accept it in part and reject the rest of it." In Najib Raza[38] this Court agreed with Mahajan J. who observed that "it is settled law that an admission made by a person whether amounting to a confession or not cannot be split up and part of it used against him.[39]" In Faiz,[40] another five member Bench of this Court held that where the conviction is based entirely on the statement of the accused then the statement should be taken into consideration in its entirety as the reply or the narration of the accused "is not tested or completed either by cross-examining him or by putting him further questions. The state of his [accused's] mind is not prodded. His bare statement about it exists on record, for whatever its worth. In the absence of any other evidence, it has to be accepted as a fact"[41], and cannot be rejected by adopting a process of appraisement and analysis.[42] In Sultan,[43] Abdul Qadeer Chaudhry, J. spoke for the Court to hold that when the prosecution fails to setup a case against the accused and the entire evidence of the prosecution has been discarded and disbelieved the statement of the accused under section 342, Cr.P.C has to be taken into consideration in toto (in its entirety) and the Court cannot select a portion out of the statement that goes against the accused.

B. The inculpatory part of the statement of the accused cannot be used or construed to fill up gaps in the case of the prosecution as the prosecution has to prove the case on its own evidence.

21. Sultan[44] went ahead to add that if there is prosecution evidence which disproves the exculpatory part of the statement of the accused under section 342, Cr.P.C, then reliance can be placed on the inculpatory part of the statement by excluding the exculpatory part, but not otherwise. In other words, if the prosecution has proved a case against the accused beyond reasonable doubt, the court may, if it deems expedient to get further support, take into consideration also the inculpatory part of the statement

of the accused under section 342, Cr.P.C., only if the prosecution evidence negatives the exculpatory part of the statement and it can be safely severed from the inculpatory part but not otherwise. It is underlined that even if this exercise is not undertaken the conviction of the accused stands as the prosecution has already proved its case against the accused beyond reasonable doubt, on the basis of its evidence. The inculpatory part of the statement is not being considered to fill up gaps in the case of the prosecution but simply to draw support in a case already established by the prosecution and no more.

C. Where prosecution has failed and the statement of the accused under section 342, Cr.P.C. is accepted in entirety, the court is then to give due effect to the statement of the accused, under the law, whether in favour of or against the accused.

22. Next comes the question, how such a statement of the accused when "accepted as a fact[45]" and taken in its entirety is to be given effect and acted upon, once the prosecution has failed to make out a case? Once the prosecution evidence is disbelieved, rejected or excluded from consideration, and the facts explained by the accused in his statement under section 342, Cr.P.C. are accepted entirely, the court is then to examine the said facts to give due effect to the statement of the accused, under the law, whether in favour of or against the accused.[46] The object of such examination is to determine whether or not the facts narrated by the accused constitute an offence under the law or fit into any exception of the offence provided under the law. In this respect, the observation of Sir Mukerji J., made in the case of Bhola Nath[47] is quoted to explain the purpose of this examination of the statement of the accused. The learned Judge observed, at page 5:

> "If on the whole of the statement of the accused, taken together, his guilt is established, and his plea, say, of acting in self-defence or of the case falling within any of the general or special exceptions (sic) is not made out on the facts admitted, there cannot be any bar to a conviction, simply because the prosecution evidence, by itself, would not have secured a conviction " (emphasis supplied)

This legal examination was also aptly explained and applied by Lobo C.J. in Gul Mahomed[48]. The learned Judge found that accepting the statement of the appellant as true, the act of the appellant in killing his wife and another was under grave provocation but it was not under sudden provocation. The facts narrated by the appellant though were accepted but those were found not to fit in the legal parameters of Exception-I to section 300, P.P.C. for making the case of the appellant as one of grave and sudden provocation. Likewise, this Court, in Muhammad Azam[49], though admitted the statement under section 342, Cr.P.C. as a whole, but found, even in those admitted facts, the accused to have exceeded in his right of self-defence and convicted him accordingly. In Sattar referred above the accused while explaining the circumstances in which he inflicted injuries to him, claimed to have acted in the exercise of right of self-defence. But the High Court though accepted his statement of facts in its entirety, but convicted him under section 304-I, P.P.C. by treating his version not to fit in the legal requirement of the valid exercise of right of self-defence as the accused as per his own version of facts had chased the deceased in street who was attempting to escape from the place of occurrence.

Summary of principles of law regarding Article 121, QSO and section 342 Cr. P. C.

23. We consider it appropriate to recapitulate and summarise key principles of law discussed in this judgment, regarding Article 121, QSO and section 342, Cr.P.C., for convenience, which are stated as under:

i. The burden, in a criminal case, to prove the guilt of the accused is always on the prosecution. Therefore, the court, in the first instance, is to discuss and assess the prosecution evidence, in order to arrive at the conclusion as to whether or not the prosecution has succeeded in proving the charge against the accused on the basis of its evidence.

ii. In a case where the accused has not taken any specific plea (e.g. self defence, grave and sudden provocation etc.) or has not produced any evidence in his defence, the court should decide the

question of success or failure of the prosecution in proving the charge against the accused on the basis of the prosecution evidence alone.

iii. In a case where the accused has taken a specific plea or has produced evidence in his defence, the court should appraise the prosecution case and the defense version in juxtaposition, in order to arrive at a just conclusion. Even in such situation the burden remains on the prosecution to prove the necessary ingredients of the offence charged against the accused, and it does not shift upon the accused merely by taking a defence plea or producing evidence in his defence.

iv. The burden shifts upon the accused under Article 121 of the QSO to prove his defense plea, only when a prima facie case is made out against him by the prosecution on the basis of its evidence. If the prosecution fails to prove its case against the accused, the question of shifting of burden on the accused does not arise.

v. The primary purpose of section 342 Cr.P.C. is to enable the accused to know and to explain and respond to the evidence brought against him by the prosecution. A direct dialogue is established between the Court and the accused by putting every important incriminating piece of evidence to the accused and granting him an opportunity to answer and explain.

vi. If the prosecution fails to prove its case against the accused, the court can take into consideration the statement of the accused under section 342 Cr.P.C. whether in favour of or against the accused; but it must take into consideration that statement in its entirety and cannot select and place reliance on the inculpatory part of the statement only.

vii. In the last mentioned circumstance, the facts narrated by the accused in his statement under section 342 Cr.P.C. are to be accepted without requiring their proof. The court, however, should examine the said facts in order to give due effect to them under the law. The object of such examination is to determine whether or not the facts narrated by the accused constitute an offence under the law or fit into any exception of the offence provided under the law.

viii. An admission or confession made in statement under section 342 Cr.P.C., which is improbable or unbelievable, or is not consistent with the overall facts and circumstances of a case do not have any probative value and thus it cannot be relied upon by the court for reaching a conclusion.

24. The above settled principles of law when applied to the present case, we find that the prosecution has failed to prove the case against the appellant beyond reasonable doubt, on the basis of its evidence. We, therefore, revert to the defense plea and the statement of the appellant made under section 342, Cr.P.C., which is to be accepted in its entirety without requiring the proof under Article 121, QSO. The appellant, in his statement under section 342 Cr.P.C., has explained that he killed his sister and her paramour on grave and sudden provocation as he saw them committing zina when entered in his house at 03:00 am in the night, on his return from the hospital. His statement is not improbable or unbelievable, nor is it inconsistent with the overall facts and circumstances of the case; therefore, it can safely be relied and acted upon. Our culture and social values reflected in the jurisprudence[50] developed so far is that an act of illicit sex with a female family member of the offender is considered sufficient to cause provocation so grave and sudden that it would deprive the offender of the power of self-control. The arguments on behalf of the complainant have been made only to convince this Court to believe the prosecution story, though they could not succeed; and it has not even been argued that the facts and circumstances narrated by the appellant under which he committed the murder of Raheel Arif, if admitted to be correct, do not constitute grave and sudden provocation. In the light of the scope and meaning of grave and sudden provocation discussed in para 13 above, the statement of the appellant when taken as a whole, establishes grave and sudden provocation. The case of the appellant to the extent of murder of Raheel Arif, therefore, falls within the scope of section 302(c) P.P.C; hence, his appeal is partly allowed to the extent of the impugned judgment of the High Court. The judgment of the High Court whereby the appellant was convicted under section 302(b) P.P.C. for

the murder of Raheel Arif is set aside, while that of the Trial Court convicting the appellant under section 302(c) P.P.C. is restored. However, the sentence of the appellant is modified. The appellant is sentenced to rigorous imprisonment for a period of 15 years, in the peculiar circumstances of the case. He is also directed to pay compensation of Rs.100,000/- (one hundred thousand) to the legal heirs of the deceased, in terms of section 544-A, Code of Criminal Procedure, and in default whereof to undergo simple imprisonment for six months. Benefit of Section 382-B, Code of Criminal Procedure is extended to the appellant. Consequently, criminal petition for leave to appeal filed by the complainant for enhancement of the sentence of the appellant from life imprisonment to death is dismissed for being without merit and leave to appeal is refused.

25. Foregoing are the reasons for our short order of even date.

MWA/A-2/S Order accordingly.

**P L D 2020 Supreme Court 299**

**Present: Manzoor Ahmad Malik, Sardar Tariq Masood and Syed Mansoor Ali Shah, JJ**

**AMJAD ALI KHAN---Petitioner**

**Versus**

**The STATE and others---Respondents**

Criminal Petition No.74-L of 2018, decided on 13th March, 2020.

(On appeal from the judgment of the Lahore High Court, Lahore dated 30.10.2017, passed in Crl. A. No. 146 of 2016 and W.P. No.33366 of 2016).

**(a) Control of Narcotic Substances Act (XXV of 1997)---**

----S. 32(2)---Vehicle used in transportation of narcotics---Confiscation of such vehicle---Scope---Under S.32(2) of the Control of Narcotic Substances Act, 1997 vehicles, vessels and other conveyances were liable to confiscation if they were used in carrying both narcotics or narcotics along with lawful drugs and substances---Vehicles, vessels and other conveyances were liable to confiscation irrespective whether they were used in carrying narcotics alone or joint category of narcotics and lawful drugs and substance.

**(b) Control of Narcotic Substances Act (XXV of 1997)---**

----Ss. 32(2) & 74, proviso---Criminal Procedure Code (V of 1898), S.516-A---Superdari/custody of vehicle used in transportation of narcotic---Scope---Applicant could seek release of a vehicle on superdari, which had been seized under the Control of Narcotic Substances Act 1997 and was a case property in a criminal case; if the applicant could show that he was the lawful owner of the vehicle; and that he was neither the accused nor an associate or a relative of the accused or an individual having any nexus with the accused.

Under the proviso to section 74 of Control of Narcotic Substances Act, 1997 ('the 1997 Act'), the provisions of Cr.P.C to the extent of custody and disposal of a conveyance under general law were not applicable under the 1997 Act. Vehicle used in the commission of an offence under the 1997 Act could not be released or given on custody (superdari) to the accused or any of his associate or relative or any private individual till the conclusion of the case.

Joint reading of sections 32 and 74 of the 1997 Act showed that an applicant could seek release of a vehicle on superdari, which had been seized under the 1997 Act and was a case property in a criminal case; if the applicant could show that he was the lawful owner of the vehicle; that he was neither the accused nor an associate or a relative of the accused or an individual having any nexus with the accused. While the prosecution had to show/prove that the applicant knew that the offence was being or was to be committed. It was during trial that the prosecution had to prove that the owner knew that the offence was being or was to be committed. Under section 33 if the vehicle was finally held not liable to confiscation it could be released to its owner. As a corollary, where the court could pass a final order, it could also pass an interim order, therefore, a vehicle could also be released as an interim measure or temporarily on superdari under the 1997 Act after the court was prime facie satisfied regarding the ownership of the applicant and the absence of the association of the owner with the accused and the commission of the offence. Applicant while asserting his ownership of the vehicle must specify in his application for superdari how he was deprived of the vehicle, how and when he found out that his vehicle was missing, and the legal proceedings initiated by him thereafter, if any.

Allah Ditta v. The State 2010 SCMR 1181 and Abdul Salam v. The State 2003 SCMR 246 ref.

**(c) Control of Narcotic Substances Act (XXV of 1997)---**

----S. 32(2)---Criminal Procedure Code (V of 1898), S. 516-A---Motor Vehicles Ordinance (XIX of 1965), S. 2(24)---Superdari of vehicle used in transportation of narcotic---Scope---Ownership of vehicle - Proof - Vehicle on 'open transfer letter' - Applicant must be the owner of the vehicle prior to the commission of the offence---Open transfer letter was not a valid document of title and it did not

transfer ownership of a vehicle in terms of the Motor Vehicles Ordinance, 1965---Legal title of a vehicle confiscated under the Control of Narcotic Substances Act, 1997 stood frozen till the conclusion of the trial and as a result the owner stood cautioned not to deal or transact with the title of the vehicle till the conclusion of the trial.

In the present case, the applicant/petitioner moved an application for seeking superdari of the vehicle on 20-11-2015, described himself as the owner of the vehicle, but at the time, he only had an open transfer letter. Open transfer letter was not a valid document of title and it did not transfer ownership of a vehicle in terms of the Motor Vehicles Ordinance, 1965. Subsequently, the vehicle was duly registered in the name of the applicant on 21-01-2016, which was too late as at the time of alleged commission of the offence, the seizure of the vehicle and the registration of the criminal case on 20-08-2015 the applicant was not the owner of the vehicle. Applicant must be the owner of the vehicle prior to the commission of the offence.

On 20-08-2015, when the applicant made application for superdari of the vehicle, he was not the owner of the vehicle and, therefore, did not pass the requirement laid down in proviso to section 32 of the Control of Narcotic Substances Act, 1997 ('the 1997 Act'). Further, the applicant did not assert a word, in the application, to show that he was not an associate or relative of the accused or an individual having any nexus with the accused or the offence. His failure to explain how the vehicle, whose ownership he claimed, had gone into the possession and use of the accused was fatal to his prayer for superdari of the same. As the petitioner had failed to establish his ownership of the vehicle, there was no reason to burden the prosecution to show if the applicant was aware of the commission of the offence. Application made for release of the vehicle by the applicant was, therefore, not maintainable, and was wrongly allowed by the trial court.

Vehicle was registered in the name of the applicant by the Motor Registration Authority under the Motor Vehicles Ordinance, 1965, when the vehicle had already been seized by the police and had become case property in a criminal case, hence becoming liable to confiscation under the 1997 Act. As a result the disposal of the vehicle came under the control of the court and the owner stood cautioned not to deal or transact with the title of the vehicle till the conclusion of the trial. In fact there was a freeze on the legal title of the owner of the vehicle till the conclusion of the trial. The rationale behind this being that any transfer or change in the title of the vehicle (case property) would undermine the safe administration of criminal justice system; as any such transfer (registration of the vehicle in the name of a third party) would amount to interference in the powers of the criminal court and in eroding the sanctity and security of the evidence in an ongoing criminal trial. Therefore, transfer of ownership of the vehicle by the Motor Registration Authority on 21-01-2016 was not permissible and was, therefore, without lawful authority.

Supreme Court directed that the Provincial Government, and Chief Commissioner, ICT should consider amendment(s) in the Motor Vehicles Ordinance, 1965 and the Rules thereunder to prevent registration of vehicles involved in the commission of crime; that in addition, the Provincial Governments and ICT may consider that the Motor Registration Authority and the police develop an online verification system to identify vehicles involved in the commission of crime; that the transferor/transferee at the time of registration of the vehicle may be required to obtain a No Objection Certificate from the police or to submit an Affidavit to the effect that the vehicle was not involved in any criminal case.

**(d) Motor Vehicles Ordinance (XIX of 1965)---**

----Ss. 27 & 32---Transfer of ownership of vehicle in favour of subsequent transferee---Physical verification of vehicle---Requirement of S.27 of the Motor Vehicles Ordinance, 1965 regarding physical verification of the vehicle prior to registration was an essential requirement and was fully applicable to subsequent registrations of vehicles under S.32 of the Ordinance.

Sardar Khurram Latif Khan Khosa, Advocate Supreme Court for Petitioner.

Rana Abdul Majeed, Addl. P.G. for the State.

Wajeeh Ullah Kundi, Secy. Excise Punjab, Suhail Shahzad, D.G. Excise, Punjab, Mian Latif ETO, Mianwali, Bilal Azam, Director Excise ICT and Sharif Gul, ETO, ICT for the State/Respondents.

Date of hearing: 13th March, 2020.

**ORDER**

**SYED MANSOOR ALI SHAH, J**.---Upon a spy-information, the Police conducted a raid by intercepting a vehicle, i.e., Toyota Corolla bearing registration No. UH 608 (the "Vehicle") and apprehended its two passengers. The Police allegedly recovered narcotics and weapons from the Vehicle, as well as, from the passengers. In this background a criminal case (FIR No. 397) was registered against the two passengers at Police Station Mustafabad, District Lahore on 20.08.2015 under the provisions of the Control of Narcotic Substances Act, 1997 (the "CNSA") and the Arms Ordinance, 1965. The Police also seized the Vehicle on the same day. According to the Report submitted before this Court by the Additional Sessions Judge, Lahore dated 24.11.2018, the trial of the case is pending adjudication and the Additional Prosecutor General has not stated otherwise.

2. Brief facts, pertaining to the instant matter, are that during trial, the petitioner, claiming himself to be the "owner" of the Vehicle and not being an accused in the case, submitted an application before the trial court on 20.11.2015 for release of the Vehicle to him on superdari. The petitioner asserted in the application that he was the owner of the Vehicle and if the Vehicle was not handed over to him he would suffer irreparable loss; besides, there was a probability that the Vehicle may suffer damage in the possession of the Police.

3. The trial court allowed the application for superdari vide order dated 18.12.2015 with the direction to hand over the custody of the Vehicle to the petitioner. The State challenged the order in appeal before the High Court. As the Vehicle had not been released, the petitioner also filed a writ petition praying that the Police be directed to hand over the Vehicle to him in compliance with the order of the trial court. The High Court allowed the appeal of the State and dismissed the writ petition filed by the petitioner vide impugned consolidated Order dated 30.10.2017, on the ground that the petitioner could not establish his ownership of the Vehicle on the basis of an open transfer letter. Learned counsel for the petitioner has pointed out, that the Vehicle was subsequently registered in the name of the petitioner by the relevant Authority on 21.01.2016. Admittedly, the registration of the Vehicle in favour of the petitioner has been made after the commission of the offence; the seizure of the Vehicle by the Police; and the registration of the criminal case.

4. We have heard the learned counsel for the parties, gone through the record of the case, considered the submissions of the officials of the Motor Registration Authority ("Authority") and examined the relevant law.

5. This case brings up for determination two distinct yet interconnected legal issues. First, whether a vehicle involved in the commission of an offence under CNSA, after being seized by the Police and put up before the court as case property, can be temporarily released on superdari? And second, whether a vehicle that has been seized and is a case property in a criminal case under the Act can be transferred and registered in the name of a third party by the Authority under the Motor Vehicles Ordinance, 1965 (the "MVO") till the conclusion of the trial and the final disposal or confiscation of the vehicle by the court?

A. Release of Vehicle (Case Property) on Superdari under CNSA

6. Under the scheme of general criminal law, a vehicle seized by the Police and having become case property, can be released on custody (superdari), during the trial, under section 516-A or an order be made for its disposal to the person entitled to its possession by the Magistrate under section 523 of the Cr.P.C. Things are, however, different under the CNSA which does not envisage release of a conveyance (vehicle, etc.) during the trial, except as provided in the proviso to sections 32(2) and 74

of CNSA. Examining the scheme of the Act, we note that section 32 deals with Articles connected with narcotics in the following manner:-

32. Articles connected with narcotics.---(1) Whenever any offence has been committed which is punishable under this Act, the narcotic drug, psychotropic substance or controlled substance, materials, apparatus and utensils in respect of which, or by means of which, such offence has been committed shall be liable to confiscation.

(2) Any narcotic drug, psychotropic substance or controlled substance lawfully imported, transported, manufactured, possessed, or sold along with, or in addition to, any narcotic drug, psychotropic substance or controlled substance which is liable to confiscation under subsection (1) and the receptacles or packages, and the vehicles, vessels and other conveyances used in carrying such drugs and substances shall likewise be liable to confiscation:

Provided that no vehicle, vessel or other conveyance shall be liable to confiscation unless it is proved that the owner thereof knew that the offence was being, or was to be, committed.

7. The word "narcotics" in the title of the section refers to narcotic drugs, psychotropic substance or controlled substance in respect of which an offence has been committed under the CNSA (hereinafter referred to as "narcotics"). Sub-section (1) of section 32 provides that any narcotics or materials, apparatus and utensils in respect of which or by means of which an offence punishable under CNSA has been committed shall be liable to confiscation. It is pointed out that section 32(1) does not refer to any conveyance including a vehicle used in the commission of the offence. Subsection (2) of section 32 deals with articles, which are connected with narcotics; These articles are (i) narcotic drug, psychotropic substance or controlled substance lawfully imported, transported, manufactured, possessed or sold (for convenience referred to as " lawful drugs and substances" as compared to "narcotics" mentioned above) along with or in addition to, any narcotics and articles like of (ii) receptacles or packages, and the vehicles, vessels and other conveyances used in carrying such drugs and substances. Both the set of articles mentioned in (i) and (ii) above are liable to confiscation. Therefore, vehicles, vessels and other conveyances are liable to confiscation if they are used in carrying both narcotics or narcotics along with lawful drugs and substances.

8. We wish to point out that at first blush, reading of section 32(2) does create an impression that the vehicles, vessels and other conveyances liable to confiscation are only those which are used in carrying joint category of narcotics and lawful drugs and substance. However, a more holistic reading of the provision shows that it would be absurd to imagine that only vehicles, vessels and other conveyances carrying joint category of narcotics and lawful drugs and substances are liable to confiscation, while vehicles, vessels and other conveyances carrying narcotics alone are not liable to confiscation. Therefore, the second set of articles connected with narcotics i.e., vehicles, vessels and other conveyances are liable to confiscation irrespective whether that are used in carrying narcotics alone or joint category of narcotics and lawful drugs and substance.

9. The proviso to section 32 excludes certain vehicles, vessels and other conveyances from being liable to confiscation. According to the proviso unless it is proved that the owner of the vehicles, vessels and other conveyances knew that the offence was being or was to be committed, the vehicles, vessels and other conveyances are not liable to confiscation.

10. This view is further strengthened by the proviso to section 74 of CNSA, which provides:

74. Application of other laws. If an offence punishable under this Act, is also an offence in any other law for the time being in force, nothing in that law shall prevent the offender from being punished under this Act:

Provided that nothing contained in Section 523 of the Code of Criminal Procedure, 1898 (Act V of 1898), or any other provision of the said Code or any other law for time being in force, the custody of narcotic drugs, psychotropic substances, controlled substances, any material utensils used for production or manufacture of such drugs or substances or any conveyance used in

> import, export, transport or transshipment thereof or for commission of an offence under this Act, shall not be given on custody to the accused or any of his associate or relative or any private individual till the conclusion of the case except as provided in the second proviso to subsection (2) of section 33.

Under the proviso to section 74 of CNSA, the provisions of Cr.P.C to the extent of custody and disposal of a conveyance under general law are not applicable under CNSA. A vehicle used in the commission of an offence under CNSA cannot be released or given on custody (superdari) to the accused or any of his associate or relative or any private individual till the conclusion of the case. The terms "associate" and "relative" have been defined in clauses (b) and (z-b) of section 2 of CNSA, and the expression "any private individual" used in the proviso to section 74 has been explained by this Court in the case of Allah Ditta[1] to be an individual who has some nexus with the offender or the offence.

11. Joint reading of sections 32 and 74 of CNSA show that an applicant can seek release of a vehicle on superdari, which has been seized under CNSA and is a case property in a criminal case; if the applicant can show that he is the lawful owner of the vehicle; that he is neither the accused nor an associate or a relative of the accused or an individual having any nexus with the accused. While the prosecution has to show that the applicant knew that the offence was being or was to be committed. See Allah Ditta[2]. Under section 33 if the vehicle is finally held not liable to confiscation it can be released to its owner. As a corollary, where the court can pass a final order, it can also pass an interim order. See Abdul Salam[3]. Therefore, a vehicle can also be released as an interim measure or temporarily on superdari under CNSA after the court is prime facie satisfied regarding the ownership of the applicant and the absence of the association of the owner with the accused and the commission of the offence. The applicant while asserting his ownership of the vehicle must specify in his application for superdari how he was deprived of the vehicle, how and when he found out that his vehicle was missing, and the legal proceedings initiated by him thereafter, if any. This becomes important in the light of section 109 of MVO which attracts criminal liability if one drives a vehicle without the consent of the owner. On the other hand, in order to oppose the release of vehicle on superdari, the prosecution has to prima facie show from the record that the owner knew that the offence was being or was to be, committed. It is underlined that it is during the trial that the prosecution has to prove that the owner knew that the offence was being or was to be, committed.

12. Coming to the facts of the present case, the first and the foremost condition is that the petitioner must be the "owner" of the vehicle. "Owner" is defined in section 2(24) of MVO to mean a person in whose name the motor vehicle is registered and includes the transferee. Transferee must be duly registered under MVO. In the present case, the petitioner moved an application for seeking superdari of the Vehicle on 20.11.2015, described himself as the owner of the Vehicle, but at the time, he only had an open transfer letter. An open transfer letter is not a valid document of title[4] and it does not transfer ownership of a vehicle in terms of MVO. Subsequently, the Vehicle was duly registered in the name of the petitioner on 21.01.2016. This was too late as at the time of alleged commission of the offence, the seizure of the Vehicle and the registration of the criminal case on 20.08.2015 the petitioner was not the owner of the Vehicle. An applicant must be the owner of the vehicle prior to the commission of the offence. The registration certificate of the Vehicle shows that the original owner of the Vehicle was Muslim Khan, who sold the Vehicle to Asif Kamal and then finally the Vehicle was transferred in the name of the petitioner on 21.01.2016. Asif Kamal, was the owner of the vehicle at the time of the offence, but did not approach the court to seek release of the Vehicle. On 20.08.2015, when the petitioner made application for superdari of the Vehicle, he was not the owner of the Vehicle and, therefore, does not pass the requirement laid down in proviso to section 32 of CNSA.

13. Further, the petitioner did not assert a word, in the application, to show that he was not an associate or relative of the accused or an individual having any nexus with the accused or the offence. His failure to explain how the Vehicle, whose ownership he claims, had gone into the possession and

use of the accused was fatal to his prayer for superdari of the same. As the petitioner has failed to establish his ownership of the Vehicle, we see no reason to burden the prosecution to show if the petitioner was aware of the commission of the offence. The application made for release of the Vehicle by the petitioner was, therefore, not maintainable, and was wrongly allowed by the trial court.

B. Transfer of ownership of a seized vehicle and its registration under the Ordinance

14. The Vehicle was registered in the name of the petitioner by the Motor Registration Authority under MVO when the Vehicle had already been seized by the Police and had become case property in a criminal case, hence becoming liable to confiscation under CNSA. As a result the disposal of the vehicle comes under the control of the court and the owner stands cautioned not to deal or transact with the title of the vehicle till the conclusion of the trial. Infact there is a freeze on the legal title of the owner of the vehicle till the conclusion of the trial. The rationale behind this being that any transfer or change in the title of the vehicle (case property) would undermine the safe administration of criminal justice system; as any such transfer (registration of the vehicle in the name of a third party) would amount to interference in the powers of the criminal court and in eroding the sanctity and security of the evidence in an ongoing criminal trial. Therefore, transfer of ownership of the Vehicle by the Motor Registration Authority on 21.01.2016 was not permissible and is, therefore, without lawful authority.

15. Section 23 of MVO provides that no person shall drive a vehicle or no owner shall permit the vehicle to be driven in any place unless the vehicle is registered in accordance with provisions of MVO. Section 27 requires physical production of the vehicle before the Authority or any authority as the Government may appoint for this purpose, in order that the Authority is satisfied that the particulars contained in the application are true and the vehicle complies with the requirements of Chapter VI and of the Rules thereunder. Physical verification of the vehicle prior to registration has many advantages. First, it helps the registering authority verify that the vehicle being registered is the same as mentioned in the application form (Form F), e.g. class of vehicle, type of body, maker's name, year of manufacture, etc. Second, it confirms that the vehicle physically exists at the time of registration and thirdly, the owner is in lawful possession of the vehicle (moveable property). Section 32 provides for transfer of ownership in favour of a subsequent transferee. We see no reason why the process of registration of a vehicle provided under section 27 be any different for the vehicle being registered subsequently in the name of a new transferee and for any further transfers. The importance of physical verification remains equally important in subsequent transfers, as has come to surface in the instant case, where a vehicle allegedly involved in the commission of a crime, which had been seized by the police and was a case property in a criminal case, yet it was registered in the name of the petitioner on the basis of wrongful assumption that the transferor holds an absolute legal title of the Vehicle and is in lawful possession of the same. The application for registration (Form F) or the application for transfer of ownership, rests upon a fundamental assumption that the vehicle is in lawful ownership and possession of the owner of the vehicle. In order to effectively regulate the vehicles under MVO, physical verification of the vehicle at the time of registration and its subsequent registration is critical and is also in the public interest besides advancing the purposes of MVO. Physical verification of the vehicle also helps actualize sections 34 and 35 of MVO dealing with suspension and cancellation of registration of the vehicle. We, therefore, hold that the requirement of section 27 regarding physical verification of the vehicle prior to registration is an essential requirement and is fully applicable to subsequent registrations of vehicles under section 32 of MVO. We, therefore, refer the matter relating to the registration of the Vehicle in favour of the petitioner dated 21.01.2016 to the concerned Motor Registration Authority for necessary action under the law.

Direction to the Government, Motor Registration Authority and the Police.

16. We deem it appropriate to direct the Provincial Government, and Chief Commissioner, ICT to consider amendment(s) in MVO and the Rules thereunder to prevent registration of vehicles involved in the commission of crime as discussed above. In addition, the Provincial Governments and ICT may

consider that the Motor Registration Authority and the Police develop an online verification system to identify vehicles involved in the commission of crime. The transferor/ transferee at the time of registration of the vehicle may be required to obtain a No Objection Certificate from the Police or to submit an Affidavit to the effect that the vehicle is not involved in any criminal case.

17. For what has been discussed above we find that the order of the trial court whereby the petitioner had been allowed superdari of the Vehicle was not sustainable under the law and was, therefore, rightly set aside by the High Court. We uphold the impugned order, decline leave and dismiss this petition, with the above direction to the Provincial Governments and ICT, Motor Registration Authority and the Police. The Deputy Registrar of this Court at the Lahore Branch Registry shall send copy of this order to the Secretaries, Excise and Taxation Department of all the Provincial Governments and Director, Excise and Taxation Department, ICT, as well as, Inspectors General Police of the respective Governments, for information and appropriate action at their end. These are the reasons for our short order dated 13.03.2020.

MWA/A-17/SC Petition dismissed.

**P L D 2020 Supreme Court 356**

**Present: Manzoor Ahmad Malik and Syed Mansoor Ali Shah, JJ**

**SALEEM KHAN---Petitioner**

**Versus**

**The STATE and others---Respondents**

Criminal Petition No.251-L of 2020, decided on 20th May, 2020.

Against the order of the Lahore High Court, Lahore dated 24.2.2020 passed in Crl. Misc. No.8158-B of 2020).

**(a) Juvenile Justice System Act (XXII of 2018) ---**

----Ss. 4(7) & 8---Determination of age by police or court---Scope---Police were to determine the juvenility of the accused and thereafter the case was put up before the Juvenile Court for trial---Determination of age of an accused who appeared or claimed to be a juvenile was, therefore, initially the statutory responsibility of the police---In the absence of any inquiry by the police the determination of age and juvenility of the accused could be determined by the court having taken cognizance of the matter.

**(b) Juvenile Justice System Act (XXII of 2018) ---**

----Ss. 6(5) & 8---Penal Code (XLV of 1860), Ss. 302 & 394---Qatl-i-amd, voluntarily causing hurt in committing robbery---Release of juvenile on bail---Statutory delay in conclusion of trial---Whether any time spent by court in determining age of accused could be treated as delay caused by accused---Held, that in the present case, the police had not carried out any exercise of determining age of accused and therefore the court on the application of the juvenile-accused issued the required declaration of juvenility---Determination of age by the court was also a statutory obligation, hence the time spent in obtaining the said finding or declaration by the court could not possibly be termed as delay caused in the trial by the accused, so as to deprive him of his right to bail on the ground of statutory delay---Any such determination of age by the court was a statutory requirement and formed part of the trial---Accused being a juvenile offender was entitled to bail on statutory ground, which was granted to him accordingly. [p.361] D & E

Mian Abdul Quddous, Advocate Supreme Court for Petitioner.

Mian Liaqat Ali Malik, Advocate Supreme Court for Respondent No.2.

M. Amjad Rafiq, Addl. PG along with Gulzar Ahmad, SI. for the State.

Date of hearing: 20th May, 2020.

**ORDER**

**SYED MANSOOR ALI SHAH, J**.--Leave has been sought against order of the Lahore High Court whereby second bail application of the petitioner (a juvenile offender) moved on statutory ground was dismissed. Briefly, according to the crime report on the night of 21.05.2018, the complainant and his brother left their house on their motorcycle to attend to some domestic errands. On the way, two unknown persons on a motorcycle, came up from behind and over-powered them and demanded to handover their mobiles and cash to them. As the brother of the complainant resisted, one of the two unknown persons shot him in his left leg and thereafter both fled away. In this background FIR No. 241 of 2018 was registered on 22.05.2018 at Thana Lower Mall, Lahore against the petitioner and his co-accused, initially under section 394, P.P.C. and later on as the brother of the complainant succumbed to his injuries and died, offence under section 302, P.P.C. was added to the crime report.

2. The first bail application of the petitioner was dismissed on merit by both the courts below on 29.08.2018 and 26.12.2018, respectively. Thereafter, charge was framed against the petitioner on 8.04.2019 and the petitioner on 22.04.2019 moved an application seeking declaration of his juvenility at the time of the crime, having been born on 01.01.2001 according to Form "B" maintained by NADRA. He also moved an application on 24.4.2019 for an ossification test. After examining the birth

certificate issued by NADRA, the medical report and the ossification test, the trial court declared the petitioner to be a juvenile on 27.11.2019. Thereafter, on 11.02.2020 the petitioner moved the second bail application on the basis of statutory ground as he was arrested on 7.06.2018. The bail applications were dismissed by both the courts below, hence the instant petition for leave to appeal.

3. The learned prosecutor and the counsel for the complainant, opposed the bail on two main grounds: they relied on the proviso to section 10(7) of the Juvenile Justice System Ordinance, 2000 ("Juvenile Ordinance") to submit that if the juvenile is over 15 years of age, bail can be refused to him if he is involved in a heinous crime or has a previous criminal record; and that the delay in the trial caused in determining the age of juvenility on the application of the petitioner is a delay attributable to the petitioner and not to the prosecution. Learned counsel for the petitioner, however, argued otherwise to submit that the petitioner is entitled to bail on statutory ground under the law.

4. After hearing the parties, we felt it important to reproduce sections 7 and 10 (7) of the Juvenile Ordinance and sections 4(7), 6 (5) and 8 of the Juvenile Justice System Act, 2018 ("Juvenile Act") which repealed the Juvenile Ordinance. It is important to highlight that the Juvenile Act came into force on 18.05.2018[1] while the occurrence, as reported in the crime report took place on 21.5.2018. Juvenile Act was, therefore, fully applicable to the case in hand.

Sections 7 and 10 (7) of the Juvenile Ordinance:

7. Determination of age. If a question arises as to whether a person before it is a child for the purposes of this Ordinance, the juvenile Court shall record a finding after such inquiry which shall include a medical report for determination of the age of the child.

10. Arrest and bail.-

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(7) Notwithstanding anything contained in the Code and except where a juvenile court is of the opinion that the delay in the trial of the accused has been occasioned by an act or omission of the accused or any other person acting on his behalf or in exercise of any right or privilege under any law for the time being in force, a child who, for commission of an offence, has been detained, shall be released on bail,-

(a) if, being accused of an offence punishable with death has been detained for such an offence for a continuous period exceeding one year and whose trial for such an offence has not concluded;

(b) if, being accused of any offence punishable for imprisonment for life has been detained for such an offence for a continuous period exceeding six months and whose trial for such offence has not concluded; or

(c) who, being accused of any offence not punishable with death, or imprisonment for life, has been detained for such an offence for a continuous period exceeding four months and whose trial for such an offence has not concluded:

Provided that where a child of the age of fifteen years or above is arrested, the Court may refuse to grant bail if there are reasonable grounds to believe that such child is involved in an offence which in its opinion is serious, heinous, gruesome, brutal, sensational in character or shocking to public morality or he is a previous convict of an offence punishable with death or imprisonment for life.

Sections 4(7), 6 (5) and 8 of the Juvenile Act:

4. Juvenile Court.-

.....

(7) If any court taking cognizance of an offence finds that an accused brought before it is a juvenile, it shall transfer his case to the Juvenile Court for further proceedings.

6. Release of a juvenile on bail.-

(5) Where the Juvenile Court is of the opinion that the delay in the trial of a juvenile has not been occasioned by an act or omission of such juvenile or any other person acting on his behalf or

in exercise of any right or privilege under any law for the time being in force, such juvenile shall be released on bail if he has been detained for a continuous period exceeding six months and whose trial has not been completed.

8. Determination of age. (i) Where a person alleged to have committed an offence physically appears or claims to be a juvenile for the purpose of this Act, the officer-in-charge of the police station or the investigation officer shall make an inquiry to determine the age of such person on the basis of his birth certificate, educational certificates or any other pertinent documents. ln absence of such documents, age of such accused person may be determined on the basis of a medical examination report by a medical officer.

(2) When an accused person who physically appears to be a juvenile for the purpose of this Act is brought before a Court under section 167 of the Code, the Court before granting further detention shall record its findings regarding age on the basis of available record including the report submitted by the police or medical examination report by a medical officer.

Determination of age

5. The determination of the age or juvenility of the accused under the Juvenile Ordinance was the responsibility of the trial court, requiring the trial court to hold an inquiry including obtaining a medical report for the determination of age. However, this process underwent change under section 8 of the Juvenile Act, wherein if the accused physically appears or claims to be a juvenile, the Police shall make an inquiry to determine the age of the accused on the basis of his birth certificate, educational certificate or any other pertinent document. In the absence of such documents, age of such accused person may be determined on the basis of a medical examination report by a medical officer. Therefore, the Police are to determine the juvenility of the accused and thereafter the case is put up before the Juvenile Court for trial. Section 8(2) provides that if the accused physically appears to be a juvenile when brought before a court (of general criminal jurisdiction) under section 167 Cr.P.C the court shall before granting further detention record its finding regarding age of the accused. Section 4(7) of the Juvenile Act provides that a criminal court of general jurisdiction can find the accused to be a juvenile and thereafter transfer the case to the juvenile court for further proceedings. Therefore, in the absence of any inquiry by the Police the determination of age and juvenility of the accused can be determined by the court having taken cognizance of the matter. This is what happened in the instant case, when the court declared the petitioner to be a juvenile on the application of the petitioner.

6. Determination of age of an accused who appears or claims to be a juvenile is, therefore, initially the statutory responsibility of the Police. In the absence of which, the court of general jurisdiction enjoys the power to determine the age of the accused, and if declared to be a juvenile, transfer the case to the concerned Juvenile Court. In the instant case, the Police had not carried out any such exercise and therefore the court on the application of the petitioner issued the required declaration. The determination of age by the court is also a statutory obligation, hence the time spent in obtaining the said finding or declaration by the court cannot possibly be termed as delay caused in the trial by the accused, so as to deprive him of his right to bail on the ground of statutory delay. Any such determination of age by the court is a statutory requirement and forms part of the trial.

Trial and the period of statutory delay

7. The period of statutory delay of one year for offences punishable for death under the Juvenile Ordinance has been reduced to six months under the Juvenile Act and the proviso under section 10(7) of the erstwhile Ordinance stating that bail may be refused to a juvenile offender if he is 15 years of age or above and there are reasonable grounds to believe that the juvenile is involved in a heinous offence or is a previous convict for an offence punishable under death or imprisonment for life, has been repealed under the new Juvenile Act. Section 6(5) of the Juvenile Act provides that the juvenile will be entitled to be released on bail if he has been detained for a continuous period exceeding six months while his trial has not been concluded, unless the delay has been occasioned by the act or

omission of such a juvenile. The petitioner was arrested on 7.06.2018 and the petitioner was declared a juvenile on 27.11.2019 the trial has still not been concluded. The second bail application on statutory ground was moved on 11.12.2019 which is much after the period of six months from the date of arrest as provided under section 6(5) of the Juvenile Act. For the above reasons the petitioner being a juvenile offender was entitled to bail on statutory ground.

9(sic). These are the reasons for our short order dated 20.05.2020 reproduced hereunder for convenience and completion of record. The instant petition is, therefore, converted into an appeal and allowed.

> "For reasons to be recorded later, the instant criminal petition is converted into an appeal and the same is hereby allowed. Appellant Saleem Khan is allowed bail (in the instant FIR) subject to his furnishing bail bond in the sum of Rs.200,000/- (Rupees two hundred thousand) with one surety in the like amount, to the satisfaction of the trial court."

MWA/S-23/S Petition allowed.

**P L D 2020 Supreme Court 414**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Sayyed Mazahar Ali Akbar Naqvi, JJ**

**ADAMJEE INSURANCE COMPANY LTD.---Petitioner**

**Versus**

**MUHAMMAD RAMZAN and others---Respondents**

Civil Petitions Nos. 1483-L to 1495-L of 2018, decided on 2nd July, 2020.

(On appeal from the orders of Lahore High Court, Lahore dated 30-05-2018, passed in W.Ps. Nos. 215957/2018, 215958/2018, 215959/2018, 215960/2018, 215962/2018, 215963/2018, 215966/2018, 215967/2018, 215969/2018, 215971/2018, 215972/2018, 215973/2018 and 215974/2018).

**(a) Constitution of Pakistan---**

----Art. 199--- Constitutional petition--- Scope--- Sub-constitutional legislation could not curtail or abridge the jurisdiction of a constitutional court---Legislature, being the creature of the Constitution could not take away the jurisdiction of a constitutional court conferred by the Constitution---Sub-constitutional legislation could not control the constitutional remedy available under Art.199 of the Constitution---While the constitutional courts may consider the legislative object and purpose of a statute, still they could not shut their doors to an aggrieved person who invoked the constitutional jurisdiction of the court under Art. 199 of the Constitution.

Arshad Mehmood v. Commissioner/Delimitation Authority Gujranwala and others PLD 2014 Lah. 221; Khan Asfandyar Wali and others v. Federation of Pakistan through Cabinet Division Islamabad and others PLD 2001 SC 607; Mrs. Shahida Zahir Abbasi and 4 others v. President of Pakistan and others PLD 1996 SC 632; Malik Muhammad Mukhtar, through Legal Heirs v. Province of Punjab through Deputy Commissioner (Collector) Bahawalpur and others PLD 2005 Lah. 251; Miss Asma Jilani v. The Government of the Punjab and another PLD 1972 SC 139; Government of West Pakistan and another v. Begum Agha Abdul Karim Shorish Kashmiri PLD 1969 SC 14 and Federation of Pakistan and another v. Malik Ghulam Mustafa Khar PLD 1986 SC 26 ref.

**(b) Insurance Ordinance (XXXIX of 2000)---**

----S. 124--- Constitution of Pakistan, Art. 199--- Constitutional petition before the High Court against a decision passed by the Insurance Tribunal on a miscellaneous application---Maintainability---Constitutional jurisdiction under Art.199 of the Constitution could be invoked to challenge miscellaneous decisions passed during the course of proceedings before the Insurance Tribunal covered under S.124(1) of the Insurance Ordinance, 2000 (the 'Ordinance')---In the present case, the order of the Insurance Tribunal passed against the insurance-company through which the right to file a written statement had been denied, did not fall within the purview of S.124(2) of the Ordinance and could only be challenged by invoking the constitutional jurisdiction of the High Court under Art.199 of the Constitution---Constitutional court then had to examine whether such a petition met the requirements of Art.199 and required interference in the light of the established jurisprudential principles that guided a constitutional court---Constitutional court may also consider the decision in the overall scheme of the Ordinance under which it arose and give due deference to the legislative object and purpose---Petitions for leave to appeal were converted into appeals and allowed, the order passed by the Tribunal, as well as, the impugned order of the High Court were set-aside and the Supreme Court directed the parties to appear before the Tribunal where the insurance-company would file its written statement and there from the Tribunal shall proceed further and decide the matter strictly in accordance with law.

Federation of Pakistan and another v. Malik Ghulam Mustafa Khar PLD 1986 SC 26 and Hashwani Hotels Limited through Senior Manager v. Sindh Insurance Tribunal, Karachi 2016 CLD 1790 approved.

Farooq Amjad Meer, Advocate Supreme Court for Petitioner (in all cases).

Ms. Tasneem Amin, Advocate-on-Record along with Munir Ahmad Khan Sadhana, AHC (appeared with special persmission of the Court).

Date of hearing: 2nd July, 2020.

**ORDER**

**SYED MANSOOR ALI SHAH, J.**---Legal question regarding the scope of Appeal provided under section 124 of the Insurance Ordinance, 2000 ("Ordinance") has come up before us. This question emerges from the following factual background: Respondent policy holder filed an application for the recovery of insurance claim and liquidated damages under his Crop Insurance Policy against the insurer (the petitioner) before the Insurance Tribunal ("Tribunal") under the Ordinance. In the course of these proceedings the right of the petitioner to file its written reply was closed vide order dated 28.03.2018 of the Tribunal. This order was challenged by the petitioner before the High Court by invoking the constitutional jurisdiction under Article 199 of the Constitution. The writ petition was dismissed vide impugned order dated 30.05.2018, inter alia, on the ground that alternate remedy of a statutory appeal was available against the said order under section 124(2) of the Ordinance.

2. Learned counsel for the petitioner argued that the constitutional petition was maintainable against order dated 28.03.2018 as appeal under section 124(2) of the Ordinance has a limited scope and is available against decisions that finally adjudicate upon the insurance claim or the penalty thereof. He also pointed out that different High Courts have expressed conflicting opinions and therefore a definitive opinion of this Court will help clarify the legal position. He referred to State Life Insurance Corporation of Pakistan through Chairman and another v. Additional District Judge-I and another (2010 CLD 845), UBL Insurers Limited v. Ashiq Hussain and another (2014 CLC 1155), Hashwani Hotels Limited through Senior Manager v. Sindh Insurance Tribunal, Karachi (2016 CLD 1790) and State Life Insurance Corporation of Pakistan through Attorney v. Additional District Judge and others (2019 CLD 144). Learned counsel for the respondent supported the impugned judgment.

3. We have heard the learned counsel for the parties and have examined the Ordinance and the case law cited before us. Section 124 of the Ordinance provides as under:-

> 124. Appeal.- (1) Subject to the right of appeal conferred by subsection (2) hereof, the decision of the Tribunal on any application shall be final and shall not be questioned in any Court or before any other authority.
>
> (2) Any party aggrieved by a decision of the Tribunal may, if the amount of the claim in dispute or the penalty prescribed, as the case may be, is not less than one hundred thousand rupees, prefer an appeal to the High Court within a period of thirty days from the date of such decision.
>
> (3) An appeal under subsection (2) shall be heard by a Bench of not less than two judges of the High Court having territorial jurisdiction over the relevant Tribunal.

Under the statutory scheme of the Ordinance, not all decisions or orders of the Tribunal are appealable under Section 124. Infact under section 124(1) the Ordinance provides that these decisions on miscellaneous applications shall not be questioned before any court or authority. However, section 124(2) provides that if any party is aggrieved by a decision of a Tribunal which decides a claim in dispute or the penalty prescribed of an amount of not less than one hundred thousand rupees may prefer an appeal under section 124(2) before the High Court. Section 124(2), therefore, refers to the final decision regarding the insurance claim or the penalty prescribed. Any such appeal is to be heard by a bench of not less than two judges of the High Court having territorial jurisdiction over the relevant Tribunal. Limiting the right of appeal to a select category of final decisions, the legislative design of the Ordinance is to provide for an expeditious disposal of insurance claims.

4. There can be a variety of decisions passed on miscellaneous applications during the course of the proceedings before the Tribunal with varying consequences on the parties to the proceedings. Irrespective of the gravity of these decisions/orders on the parties, the statutory scheme of the Ordinance remains neutral and does not provide for a right of statutory appeal against any of these

decisions. So like in the instant case where the right to file written statement of the petitioner has been closed, is the petitioner to accept his fate and wait to file an appeal after the final decision of the Tribunal or does he have a remedy?

5. Remedy is available outside the legislative framework of the Ordinance and on a constitutional plane. It is axiomatic and by now a judicial cliche that sub-constitutional legislation cannot curtail or abridge the jurisdiction of the constitutional court. Legislature, being the creature of the Constitution cannot take away the jurisdiction of a constitutional court conferred by the Constitution[1]. The Ordinance is a sub-constitutional legislation and cannot control the constitutional remedy available under Article 199 of the Constitution. While the constitutional courts may consider the legislative object and purpose of a statute, still they cannot shut their doors to an aggrieved person who invokes the constitutional jurisdiction of the court under Article 199 of the Constitution. This well settled constitutional principle loudly resonates through our jurisprudence[2].

6. Order dated 28.03.2018 passed against the petitioner by the Tribunal through which the right to file a written statement has been denied, does not fall within the purview of Section 124(2) of the Ordinance and can only be challenged by invoking the constitutional jurisdiction of the High Court under Article 199 of the Constitution. It is then for the constitutional court to examine whether such a petition meets the requirements of Article 199 and requires interference in the light of the established jurisprudential principles that guide a constitutional court. The constitutional court may also consider the decision in the overall scheme of the Ordinance under which it arises and give due deference to the legislative object and purpose. The views expressed by the High Courts in Hashwani Hotels Limited through Senior Manager v. Sindh Insurance Tribunal, Karachi (2016 CLD 1790) and State Life Insurance Corporation of Pakistan through Chairman and another v. Additional District Judge-I and another (2010 CLD 845) regarding the nature of appeal under section 124 of the Ordinance and the right to access to a constitutional court are correct.

7. We have noticed that the High Court while holding that the petitions before the High Court are not maintainable due to the statutory remedy of appeal under section 124, went ahead and gave a finding on the merits of the case, which was not appropriate. We were minded to remand the matter to the High Court to decide the case afresh, on merits. However, at this stage learned counsel for the respondent, on instructions, conceded that he has no objection, as far as the merits of the case are concerned, if order dated 28.03.2018 passed by the Tribunal is set aside and the petitioner is allowed to file its written statement, before the Tribunal, provided this Court directs the Tribunal to decide the matter expeditiously.

8. While holding that constitutional jurisdiction under Article 199 of the Constitution can be invoked to challenge miscellaneous decisions passed during the course of proceedings before the Tribunal covered under section 124(1) of the Ordinance, we on the concession of the learned counsel on merits set aside order dated 28.03.2018 passed by the Tribunal, as well as, the impugned order. The parties are directed to appear before the Tribunal on 20.07.2020 when the petitioner company will file its written statement and therefrom the Tribunal shall proceed further and decide the matter strictly in accordance with law definitely before the close of this year.

9. We are aware that the petitioner could have filed an intra-court appeal under Section 3 of the Law Reforms Ordinance, 1972 against the impugned order but considering that there are conflicting judgments of the two High Courts on the interpretation of Section 124 of the Ordinance and also that the learned counsel for the respondent has conceded that the petitioners be allowed to file their written statement and keeping in view the fact that insurance claim was filed way back in the year 2015, we thought it best in the interest of justice to entertain these petitions and resolve the legal question involved without further ado.

10. For completion of record it is pointed out that Mr. Munir Ahmad Khan Sadhana, advocate, who is not an advocate of this Court, has been granted special permission to argue this matter considering

that he has been attending to this case, before the Tribunal since beginning and is well versed with the facts of the case. The fact that the application for the recovery of the insurance claim filed by the respondents is pending since the year 2015, also weighed on our minds in granting this permission.

11. For the above reasons, we set-aside impugned order dated 30.05.2018, convert these petitions into appeals and allow the same.

MWA/A-26/S Petitions accepted.

**P L D 2020 Supreme Court 518**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed, JJ**

**COMMISSIONER OF INLAND REVENUE, LEGAL DIVISION, LAHORE and others---Petitioners**

**Versus**

**Messrs RAFEH LIMITED---Respondent**

Civil Petitions Nos. 310-L to 314-L of 2017, 741-L, 742-L, 752-L, 782-L to 784-L of 2019, 979-L of 2019, 2557-L of 2018, 3119-L of 2017, 3747-L of 2019 and 3749-L of 2019, decided on 15th July, 2020.

(On appeals from the orders of Lahore High Court, Lahore dated 14.12.2016, passed in PTR Nos.414 to 418 of 2010, dated 19.09.2017 in PTR No.174 of 2009, dated 31.10.2016 in PTR No. 147/2007, dated 23.11.2016 in PTR No.311/2008, dated 06.12.2016 in PTR Nos. 450 and 451 of 2012, dated 23.11.2016 in PTR No. 425 of 2012, dated 23.11.2016 in I.T.As. Nos. 01, 02, 03 of 2001, dated 12.09.2018 in PTR No.282/2004, dated 12.06.2018 in PTR No.281 of 2004, dated 12.09.2018 in PTR No. 194 of 2007).

**(a) Income Tax Ordinance (XLIX of 2001)---**

----S. 133(1)---Tax Reference/Application filed before the High Court under S.133(1) of the Income Tax Ordinance, 2001---Nature and scope---Application under section 133(1) of the Income Tax Ordinance, 2001, also referred to as a "Tax Reference", was in effect an appeal and it must be construed as such---Misimpression and confusion that a Tax Reference invoked advisory jurisdiction of the High Court and therefore the High Court was bound to answer the question of law brought before it was a misconception and should be dispelled.

Messrs Squibb Pakistan Pvt. Ltd. and another v. Commissioner of Income Tax and another 2017 SCMR 1006 ref.

**(b) Income Tax Ordinance (XLIX of 2001)---**

----S. 133(1)---Limitation Act (IX of 1908), First Sched. Art. 168---Tax Reference/Application filed before the High Court under S.133(1) of the Income Tax Ordinance, 2001 ('the Ordinance')---Dismissed for non-prosecution---Application for restoration of the Tax Reference/ Application, limitation for---Since Reference/Application under S.133(1) of the Ordinance was in effect an appeal, Art. 168 of the First Schedule of the Limitation Act, 1908 was fully applicable and provided 30 days as the period of limitation for readmission or restoration of an appeal dismissed for want of prosecution.

Messrs Squibb Pakistan Pvt. Ltd. and another v. Commissioner of Income Tax and another 2017 SCMR 1006 ref.

Sajid Ijaz Hotian, Advocate Supreme Court for Petitioners (in C.Ps. Nos.310-L to 314-L of 2017).

Imtiaz A. Shaukat, Advocate-on-Record and Ibrar Ahmad, Advocate Supreme Court for Petitioners (in C.P. No.3119-L of 2017).

Imtiaz A. Shaukat, Advocate-on-Record and Mian Yousaf Umar, Advocate Supreme Court for Petitioners (in C.Ps. Nos.2557-L of 2018, 9797-L of 2019, 741, 742, 752, 782 to 784-L of 2019).

Ch. Muhammad Zafar Iqbal, Advocate Supreme Court for Petitioner (in C.Ps. Nos. 3747 and 3749-L of 2019).

Amir Umer Khan, Advocate Supreme Court for Respondents (in C.Ps. Nos.741, 742-L, 782 and 783-L of 2019).

M. Iqbal Hashmi, Advocate Supreme Court (in C.P. No.3749-L of 2019 and 782 to 784-L of 2019).

Date of hearing: 15th July, 2020.

**ORDER**

**SYED MANSOOR ALI SHAH, J.**---Brief facts of the case are that the Income Tax Reference filed by the petitioner (the Commissioner of Inland Revenue) under Section 133(1) of the Income Tax

Ordinance, 2001 ("Ordinance") before the High Court was dismissed for non-prosecution vide order dated 08.09.2015. Thereafter, an application for restoration of the said Tax Reference was filed on 04.06.2016, after a period of almost nine months, which was also dismissed vide impugned order dated 14.12.2016. This order has been assailed before us.

2. Learned counsel for the petitioners argued that Tax Reference filed under Section 133 (1) of the Ordinance, cannot be dismissed for non-prosecution as it invokes the advisory jurisdiction of the High Court and therefore, the legal questions raised in the Tax Reference are to be answered by the High Court, irrespective of the presence of the parties or their counsel. He next contended that keeping in view the unique nature of the Tax Reference, only Article 181 of the Limitation Act, 1908 ("Act") is applicable, and therefore the petitioner had a period of three years to file an application for the restoration of the Tax Reference.

3. We have heard the learned counsel for the parties at some length and gone through the record of the case, as well as, the law on the subject.

4. Tax Reference is filed under section 133(1) of the Ordinance which states as under:

> 133. Reference to High Court:---(1) Within ninety days of the communication of the order of the Appellate Tribunal under subsection (7) of section 132, the aggrieved person or the Commissioner may prefer an application, in the prescribed form along with a statement of the case, to the High Court, stating any question of law arising out of such order.

The above shows that against the order of the Appellate Tribunal an aggrieved person or the Commissioner can prefer an Application before the High Court. This Application, perhaps because of the title of the section or its historical legacy, is commonly referred to as a Tax Reference, when in effect it is an Application. This Court in Squibb Pakistan Pvt. Ltd.[1] has elaborately and authoritatively traced the legislative history of section 133 and concluded that it is appellate in nature and must be construed and applied as such. The relevant extracts from Squibb Pakistan Pvt. Ltd. are as under:

> 48. To recapitulate, the problem all along has been the unfortunate legacy of the Act, 1918. This provided a true illustration of advisory jurisdiction, since advice was to be rendered to the Revenue Authority prior to its having passed an order. In 1922, this advisory jurisdiction was retained under section 66(1) of the Act, 1922 which was similarly framed. However, this subsection had, in sum and substance, lost its importance because of subsection (2), which conferred the right to challenge the decision of the Tribunal on questions of law. It was this remedy which was followed thereafter. Section 66(1) ibid thereafter became redundant for all practical purposes and was eventually deleted through a subsequent amendment in 1939 and the same position continued under the Ordinance, 1979 and succeeding law. Thereafter, no advisory jurisdiction remained in any shape or form. But since the significance of the change was not appreciated, the concept of advisory jurisdiction continued to confuse the courts - the corpus had disappeared, but the shadow remained. The law as it stands after the 2005 amendment is now clear beyond any conceptual doubt. There is no question of advisory jurisdiction (which phrase was never used in the law at any stage) and the plain words of the section must now be given their ordinary meaning. No hypertechnicalities now stand as barriers in the way of substantive justice.
>
> 49. An independent interpretation of section 133 of the Ordinance, 2001, as it stands today, on the plain language of the law, liberated from the burden or benefit of earlier judgments, would make the position very clear. Subsection (1) confers a right on any person or the Commissioner aggrieved by a final order of the Appellate Tribunal to file an application before the High Court along with a statement of the case stating any questions of law arising out of the Tribunal's order. There is a direct right to approach the High Court in a similar manner as in appeals, revisions, reviews etc. The order being challenged is the final order but the challenge is limited to questions of law only. The statement must set out the facts, the Tribunal's determination and

the questions of law which arise out of its order in terms of subsection (3). The questions of law which may be referred are only those which "arise" out of the order of the Tribunal. On the plain language of the law , this would include any question which can be made out from the order of the Tribunal. There is nothing in the scheme of the section to impute any extraordinary limitations on the type of questions which may be posed. The facts as stated in the Tribunal's order have to be taken as recorded and any question which can be made out from those facts may be raised in an application under section 133 ibid, regardless of whether it was previously urged or not. There is absolutely no reason for confining the questions which may be referred to only those which were argued before the Tribunal on the hypothesis that this is an advisory jurisdiction as that is not what the language of the law contemplates. The law, as it stands, allows all questions "arising" out of the order to be referred and not just questions "argued" or "raised" before the Tribunal.

50. Section 133 ibid clearly states that upon hearing a case, the High Court is obligated to decide the question of law raised by the reference and pass judgment thereon and the Tribunal's order automatically stands modified by the order of the High Court. This is an extremely significant aspect as it is the essence of an appellate order that it per se modifies the order of the lower forum, or, in other words, merges into it. As pointed out above, this particular aspect of section 133 ibid was introduced for the first time by way of the 2005 amendment and was not present in section 66 of the Act, 1922 during the brief period between 1971 and 1974 when the law was similar to the present one. It is therefore clear beyond any doubt that the remedy under section 133 ibid is appellate in nature and must be construed and applied as such. The language of the law must be given effect to, rather than unnecessarily restricting the scope of the jurisdiction on the basis of judgments from an era when the law and circumstances were completely different. The civilized world, including our own country, has been moving towards greater rights for citizens over the last century to the extent that the privilege of a fair trial has now become a constitutional right. In these circumstances, it is not appropriate to restrict the scope of a legal remedy available to citizens on the basis of old decision, especially when the language of the law is clearly pointing in the opposite direction.

The above shows that the Application under section 133(1), also referred to as the Tax Reference, is in effect an Appeal and it must be construed as such. The misimpression and confusion in some quarters that a Tax Reference invokes advisory jurisdiction of the High Court and therefore the High Court is bound to answer the question of law brought before it is a misconception and is hereby dispelled. Application under section 133(1) of the Ordinance is no different than an appeal and must be construed and applied as such.

5. Now coming to the question of limitation for filing an application for the restoration of the Application/Tax Reference. As held in Squibb Pakistan Pvt. Ltd., taking Application under section 133(1) of the Ordinance to be an appeal, Article 168 of the First Schedule of the Act is fully applicable to the case and provides 30 days as the period of limitation for readmission or restoration of an appeal dismissed for want of prosecution. In the presence of a specific provision under Article 168, Article 181 stands excluded and does not apply. Both the Articles are reproduced hereunder for convenience:-

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| Description of application | Period of limitation | Time for which period begins to run |
|---|---|---|
| 168. For the readmission of an appeal dismissed | Thirty days | The date of the dismissal. |

| | | |
|---|---|---|
| for want of prosecution. | | |

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| Description of application | Period of limitation | Time for which period begins to run |
|---|---|---|
| 181. Applications for which no period of limitation is provided elsewhere in this schedule or by section 48 of the Code of Civil Procedure 1908. | Three years | When the right to apply accrues. |

6. Even the merits of the restoration application hopelessly fail to furnish sufficient cause for the restoration of the Application/Tax Reference.

7. For the above reasons, we see no reason to interfere in the impugned order, hence these petitions are dismissed and leave refused.

MWA/C-16/SC Petitions dismissed.

**P L D 2020 Supreme Court 523**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Sayyed Mazahar Ali Akbar Naqvi, JJ**

**RAZA and another---Petitioners**

**Versus**

**The STATE and 2 others---Respondents**

Criminal Petitions Nos. 1124-L and 1120-L of 2015, decided on 25th June, 2020.*

(Against the judgment of the Lahore High Court, Lahore dated 14.09.2015 passed in Murder Reference No. 276 of 2011 and Criminal Appeal No. 966 of 2011).

Per Syed Mansoor Ali Shah, J; Manzoor Ahmad Malik, J. agreeing; Sayyed Mazahar Ali Akbar Naqvi, J. reaching the same conclusion as the majority view but with different reasoning. [Majority view]

**(a) Criminal trial---**

----Appreciation of evidence---Scope---In a criminal trial the proper course for the court was to first discuss and assess the prosecution evidence in order to arrive at the conclusion as to whether or not the prosecution had succeeded in proving the charge against the accused on the basis of the evidence---In case where the accused had taken a specific plea the court was to appreciate the prosecution evidence and the defence version in juxtaposition in order to arrive at a just conclusion.

Ali Ahmad v. State PLD 2020 SC 201 ref.

**(b) Criminal Procedure Code (V of 1898)---**

----S. 161---Examination of accused by police---Scope---Statement of the accused after his arrest or during investigation was covered by S.161, Cr.P.C.---Where the accused gave version of the same occurrence which was different from the one recorded in FIR, such version was also recorded under S.161, Cr.P.C.

Expression "any person" used in section 161, Cr.P.C. had to be understood in its context. It required a police officer making an investigation to examine "any person" supposed to be acquainted with the facts and circumstances of the case. Said expression was extensive and, in its plain and ordinary meaning, included all persons who were supposed to be acquainted with the facts and circumstances of the case, and not only the witnesses but also those who were alleged to have committed the offence under investigation in a case. A person who was alleged to have committed the offence, was as much supposed to be acquainted with the facts and circumstances of the case as an alleged eye-witness was.

Pakala Narayana Swami v. Emperor AIR 1939 PC 47; Nandini Satpathy v. P.L. Dani AIR 1972 SC 1025; Ratanlal and Dhirajlal. Code of Criminal Procedure, p. 612. 20th Edition. Lexis Nexis; Deoman Upadhyaya v. State AIR 1960 All 1; Ghulam Hussain v. State PLD 1974 Kar. 91 and Sughran Bibi v. State PLD 2018 SC 595 ref.

In most cases a version of the same occurrence different from the one recorded in FIR was given by the accused. Such version of an accused was to be, and is, recorded under section 161, Cr.P.C. Statement of the accused after his arrest or during investigation was covered by section 161, Cr.P.C.

Sughran Bibi v. State PLD 2018 SC 595 ref.

**(c) Criminal Procedure Code (V of 1898)---**

----Ss. 161 & 162---Qanun-e-Shahadat (10 of 1984), Art. 38---First statement of accused made before police under S.161, Cr.P.C---Relevancy and admissibility in evidence---Scope---Statement (first version) made by an accused before a police officer was relevant and admissible (in evidence) and not barred under Art.38 of the Qanun-e-Shahadat, 1984 or S.162, Cr.P.C., if used by the accused in his own favour.

Article 38 of Qanun-e-Shahadat, 1984 prohibited the admissibility of a confession made to a police officer if proved against the accused but did not bar the use of it by the accused in his own favour. The Legislature could not be attributed by implication the intent to deprive an accused from his right to

make use of any of his statements, if they were relevant and admissible under any provision of the Qanun-e-Shahadat, 1984. Article 38 had been enacted for the benefit of the accused, to eradicate the apprehension that police may misuse their extensive powers if confessions made to them were made admissible in evidence, against the accused. A provision enacted for the benefit of the accused could not be construed to his detriment.

Imperatix v. Pitamber (1877) 2 Bom. 61; Karan Singh v. Emperor AIR 1928 All 25; Hasil v. Emperor AIR (29) 1942 Lahore 37; Lal Khan v. Emperor AIR 1948 Lah. 43; Ghulam Abbas v. State PLD 1968 Lah. 101 and Muhammad Yaqub v. State PLD 1969 Lah. 548 ref.

Like Article 38 of the Qanun-e-Shahadat, 1984, section 162 Cr.P.C was also for the protection of the accused and benefitted the accused. A confessional statement of the accused before a police officer, setting out his first version and used by the accused in his own favour was not barred by the provision of section 162, Cr.P.C. Confessional statement recorded of the accused in the police diary was not hit by section 162, Cr.P.C, if used by the accused in his favour.

Biram Sardar v. Emperor AIR 1941 Bom. 146; Ghulam Hussain v. State PLD 1974 Kar. 91 and Hasil v. Emperor AIR (29) 1942 Lahore 37 ref.

**(d) Criminal trial---**

---"Confession" and "admission"---Distinction.

Confession was as an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime. Confession was defined as a statement made by an accused which "either admit in terms the offence, or at any rate substantially all the facts which constitute the offence." A confession was thus a species of admission, and could briefly be stated to be an admission of the guilt by the accused. There was a distinction between admissions and confessions. Confessions were a species of which admission was the genus. All admissions were not confessions, but all confessions were admissions. If the statement by itself was sufficient to prove the guilt of the maker, it was a confession. If, on the other hand, the statement fell short of it, it amounted to an admission. No statement, which contained self-exculpatory matter, could amount to a confession, if the exculpatory statement was of some fact which, if true, would negate the guilt. A confession was thus an admission by an accused in a criminal case and if he did not incriminate himself, the statement could not be said to be a confession.

Sir J F Stephen, Digest of Evidence , Vol. I (3rd Edition); Pakala Narayana Swami v. Emperor AIR 1939 PC 47; Laiq Shah v. State 1990 MLD 581; Sahoo v. Uttar Pradesh AIR 1966 SC 40; Woodroffe and Amir Ali, Law of Evidence, p.1179, vol-1, 20th Edition; Ram Singh v. State AIR 1959 All 518 and Sobar Singh v. State AIR 1966 Pat. 488 ref.

**(e) Qanun-e-Shahadat (10 of 1984)---**

----Arts. 37 & 41---Voluntary confession of the accused---Scope---Such confession was a relevant fact under the Qanun-e-Shahadat, 1984.

**(f) Qanun-e-Shahadat (10 of 1984)---**

----Art. 27---Facts showing existence of state of mind, or of body, or bodily feeling---Scope and admissibility in evidence.

Article 27 of the Qanun-e-Shahadat, 1984 dealt with such external or collateral facts which showed the existence of any state of mind. Evidence of such external or collateral facts was admitted to prove a person's state of mind, and not to prove the occurrence itself. Thus, the scope of Article 27 was that there must be a cluster of facts outside and around the fact in issue or the occurrence from which inference could be drawn to show and support the state of mind in question; such surrounding facts became relevant under Article 27. Such construction was supported by Explanation 1 to Article 27, which provided that relevant facts must show that the state of mind existed not generally but in reference to the particular matter in question. Both previous and subsequent events may be relevant under Article 27 as showing the state of mind.

Hussain v. Mansoor Ali PLD 1977 Kar. 320; AIR 1947 PC 135; [1922] 2 KB 555 and (1936) 25 Cr. App R 150 ref.

Liaqat Ali v. State 1998 PCr.LJ 216 not approved.

**(g) Criminal Procedure Code (V of 1898)---**

----Ss. 161, 162, 340(2) & 342---First statement or confession of accused made before police under S.161, Cr.P.C---Evidentiary value.

Confessional statement of the accused before a police officer at the time of his arrest showed his own version put forward at the earliest possible opportunity and was referred to as the "first version" or the "first plea." First version was a statement made before a police officer which was not otherwise admissible under section 162, Cr.P.C., except in the case of a confessional statement to be used by the accused in his favour. First version of the accused by itself had no special evidentiary value or weight. Once it was found to be relevant and admissible it was to be examined in the light of the overall evidence of the case i.e., the statement of the accused recorded under section 342, Cr.P.C., his statement, if any, under section 340(2), Cr.P.C. along with the defence evidence, if any, and the overall evidence of the prosecution. The attribution of high probative value to the first version of the accused, in some cases, pretending it as a principle of law had no basis in criminal jurisprudence. The probative value of such version of the accused, if found relevant and admissible under the law, was to be determined like any other piece of evidence in the peculiar facts and circumstances of each case as it did not stand on any special footing.

**(h) Criminal trial---**

----Defence plea---Reasonable possibility of defence plea being true---Benefit of same had to go to the accused.

If after examination of the whole evidence, the Court was of the opinion that there was reasonable possibility that the defence put forward by the accused might be true, then the whole of the prosecution case was viewed in context of this reasonable possibility, entitling the accused to the benefit of the doubt. It would be enough for the accused if, in the final analysis, the defence plea was substantiated to the extent of creating reasonable doubt in the credibility of the prosecution case. Thus, reasonable possibility of the defence plea of being true could benefit the accused.

LR 1935 AC 462; Safdar Ali v. Crown PLD 1953 FC 93; Shamir v. State PLD 1958 SC 242; Mir Ahmed v. State PLD 1962 SC 489; Rahmat v. State 1969 PCr.LJ 1067; Waris v. State PLD 1981 SC 127; Nadeem v. State 1985 SCMR 510; Saifullah v. State 1994 SCMR 1462; State v. Misbahuddin 2003 SCMR 150; Waqar Nazir v. State 2007 SCMR 661; Inayat Ali v. Shahzada 2008 SCMR 1565; Sabir Ali v. State 2011 SCMR 629; Ashiq Hussain v. State 1993 SCMR 417 and Abdul Haque v. State PLD 1996 SC 1 ref.

**(i) Criminal Procedure Code (V of 1898)---**

----S. 342---Power of court to examine the accused---Statement of accused under S.342, Cr.P.C.---Scope---Such statement did not strictly constitute evidence but may provide valuable material to the courts for appraising the prosecution evidence in arriving at its findings.

Statement of the accused under section 342, Cr.P.C. was not evidence, it is only the stand or version of the accused by way of an explanation when incriminating material against him was brought to his notice. The statement was not made on oath, and could not be tested by cross-examination, and was made under the protection of immunity, of the maker of the statement from punishment for making false statement. Such statement could not be placed on the same footing as statements made by witness in court on oath, which were tested by cross-examination. Such statement thus did not strictly constitute evidence, but in view of the presumption of innocence in favour of the accused, the statement may provide valuable material to the courts for appraising the prosecution evidence in arriving at its findings. The version given in such statement if found by the court to be reasonable and in accord with

the probabilities of the established facts and circumstances, the same may be accepted by the court even without requiring defence evidence, unless the version was falsified by the prosecution evidence.

Devandar Kumar Singla v. Baldev Krishan Singla AIR 2004 SC 3084; Hate Singh Bhagat Singh v. Madhya Bharat AIR 1953 SC 468 and K K Dutta, Treatise on Criminal Law. Pp. 380-389. Eastern Book Company. ref.

**(j) Penal Code (XLV of 1860)---**

----Ss. 302(b) & 302(c)---Qanun-e-Shahadat (10 of 1984), Art. 27---Qatl-i-amd---Re-appraisal of evidence---Sentence, reduction in---Grave and sudden provocation---First plea that accused took after his arrest and commencement of investigation was that deceased had made an attempt to commit rape with the sister of accused; that when mother of accused went to reprimand the deceased, he started abusing his mother and also grappled with her; that resultantly the accused flared up and acting under grave and sudden provocation made a single fire shot on the deceased---[Per Mansoor Ali Shah, J (Majority view)]: Article 27 of the Qanun-e-Shahadat, 1984 provided that if a state of mind was a fact in issue or a relevant fact then facts that established the state of mind were also relevant---Such surrounding facts were obviously other than the facts in issue, therefore, Art. 27 had little relevance to the present case---Two eye-witnesses were the brother and wife of the deceased, respectively, but harboured no prior enmity to falsely implicate the accused, hence their testimony could not be discarded merely because of their relationship with the deceased, especially when their presence at the scene of the crime was not unnatural or unusual---Ocular account was fully supported by medical evidence, which confirmed the firearm injuries on the body of the deceased---However, recovery of the carbine was ineffective due to the inconclusive Forensic Science Laboratory Report and, therefore, did not support the prosecution case---Regarding motive both the eye-witnesses had given an inconsistent and contradictory account of the motive behind the incident---Defence plea of grave and sudden provocation found support from the statement of investigating officer made in his cross-examination---Finding of the High Court that the occurrence was without premeditation and pre-planning was in line with the first version of the accused---Confessional statement of the accused made to the investigating officer was relevant and admissible to be used in his favour; said statement was not inherently improbable or unbelievable, nor was it inconsistent with the overall facts and circumstances of the case---First version of the accused did not appear to be a concocted one or an afterthought, as it had been his consistent stance since his arrest in the case till recording of his statement under S.342, Cr.P.C.---Benefit of the possibility of the existence of another version emerging out of the statement of the accused under S.342, Cr.P.C. and his first version before the police officer, if extended to him, brought his case under S. 302(c), P.P.C. instead of S.302(b), P.P.C. and in the circumstances of the case the accused was entitled to such benefit---Conviction and sentence of the accused recorded by the trial court and maintained/modified by the High Court under S. 302(b), P.P.C. were set aside, and instead he was convicted under S.302(c), P.P.C. and sentenced to rigorous imprisonment for 10 years---[Per Mazahar Ali Akbar Naqvi, J [Minority view]: First plea of grave and sudden provocation taken by the accused remained consistent throughout during the course of investigation as well as the trial---During investigation, the first plea raised by the accused was found correct by the investigating officer---Such first plea of accused was admissible in evidence under Art.27 of the Qanun-e-Shahadat, 1984---Record clearly spelt out that occurrence had taken place due to the act of the deceased, which enraged the mental faculty of the accused and under the impulses of the same the present occurrence had taken place---Benefit of the same was available to the accused, for which many circumstances were not required rather a glimpse of the same was always deemed sufficient---Sentence inflicted upon the accused by Courts below under S.302(b), P.P.C. was not made out, therefore, the same was converted from imprisonment for life under S.302(b), P.P.C. to imprisonment for 10 years under S.302(c), P.P.C.]---Petition for leave to appeal was converted into appeal and partially allowed.

Per Syed Mansoor Ali Shah, J [Majority view]

**(k) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Re-appraisal of evidence---Sentence, reduction in---Mitigating factors---Motive, absence of---Generally absence of motive was a mitigating factor that had a bearing on the quantum of punishment---Absence of motive, therefore, became relevant if there was possibility of further reduction in the quantum of punishment---In a case where the accused in his first version (before the police) had raised a plea of grave and sudden provocation, motive assumed crucial importance; it was not only explanatory of the conduct of persons concerned in the incident in the given situation, but also helped in the proper appreciation of evidence in the case, in the light of motivation of their conduct.

Per Sayyed Mazahar Ali Akbar Naqvi, J. [Minority view]

**(l) Qanun-e-Shahadat (10 of 1984)---**

----Arts. 27 & 28---Facts showing existence of state of mind, or of body, or bodily feeling---First plea of accused---Admissibility in evidence---First plea of the accused was admissible in evidence under Art.27 of the Qanun-e-Shahadat, 1984 ("Order of 1984")---Article 27 of Order of 1984 was a general principle enabling the Investigating Officer to record the same whereas Art. 28 was merely an exception---As a general rule evidence not forming part of the transaction was not admissible whereas Arts. 27 & 28 were exceptions to the said general principle by laying down a rule qua admissibility of those facts which might not be tendered in evidence to prove it but were relevant to prove the status of mind of the person committing it---Guilt, intent, knowledge, negligence, malice etc., and intentions qua these conditions would be admissible as it was provided under Art. 27 of the Order of 1984---Article 27 of the Order of 1984 had extended the scope to meet the question qua the existence of a person's state of mind or bodily feeling and all these facts and their existence in the state of affairs became relevant. [Minority view]

**(m) Qanun-e-Shahadat (10 of 1984)---**

----Art. 27---Penal Code (XLV of 1860), S. 302(b)---Act of deceased enraging the mental faculty of the accused, with the latter committing murder of deceased under the same impulse---Benefit of the same (impulse) was available to the accused, for which many circumstances were not required rather a glimpse of the same was always deemed sufficient. [Minority view]

Ch. Walayat Ali, Advocate Supreme Court for Petitioner (in Criminal Petition No. 1124-L of 2015).

Nemo for Petitioner (in Criminal Petition No. 1120-L of 2015).

Jaffar, Additional Prosecutor General for the State.

Date of hearing: 25th June, 2020.

**ORDER**

**SAYYED MAZAHAR ALI AKBAR NAQVI, J.---**Criminal petition for leave to appeal under section 185(3) of the Constitution of Islamic Republic of Pakistan, 1973 has been assailed by the petitioner calling in question impugned judgment dated 14.09.2015 passed by Lahore High Court, Lahore in Murder Reference No.276 of 2011 and Crl. Appeal No.996 of 2011.

2. As per prosecution story portrayed in the FIR No.203/2009 dated 04.06.2009, offence under section 302, P.P.C. registered with Police Station Saddar Farooqabad Sheikhupura (Exh.PD) lodged at the instance of one Allah Ditta son of Lal Din, (PW-3) is that he is resident of Herchand and they are three brothers and he is eldest. The complainant and his younger brother Qurban reside with their parents at Herchand whereas brother Ramzan live separately. On 03.05.2009 at evening, the complainant along with his father came to the house of brother Muhammad Ramzan because his daughter was sick. They were talking to each other when at about 7:00 p.m. Raza son of Niaz i.e. a neighbor of Ramzan called him outside. The complainant with father also came out of the house along with Ramzan. Ayisha Bibi wife of Ramzan followed and came out of the house. Raza was armed with Carbine, he raised lalkara to Muhammad Ramzan that he had entered into an altercation with his

mother, therefore, he will teach a lesson and thereafter accused made a fire shot with his Carbine 12 bore which hit Muhammad Ramzan on his abdomen, below the chest. Muhammad Ramzan fell down being injured whereas accused fled away from there. The occurrence was witnessed by the complainant, his father and Bhabi Ayisha. The injured was taken to Sheikhupura Hospital but he was referred to Mayo Hospital, Lahore. Initially the FIR was registered under Section 324, P.P.C. but when the injured died on 08.05.2009, offence under Section 302, P.P.C. was added.

3. After registration of the aforesaid case, investigation was carried out and petitioner was challaned while placing his name in column No.3 of the report under Section 173, Cr.P.C.

On receipt of challan, the learned Trial Court formally charge sheeted the petitioner vide order dated 12.08.2010 to which he pleaded not guilty and claimed trial. Prosecution in order to substantiate its case produced as many as 13 witnesses. The petitioner was examined under Section 342, Cr.P.C, however, he opted not to appear in his defence as his own witness in terms of Section 340(2), Cr.P.C. to disproof the allegations levelled against him.

4. The learned trial court after conclusion of trial found that the prosecution succeeded to prove allegations against the petitioner, hence convicted him under section 302(b), P.P.C. and sentenced him to death. The petitioner was further burdened to pay compensation of Rs.1.00,000/- to be paid to the legal heirs of the deceased in terms of Section 544-A, Cr.P.C. In default thereof, he was further ordered to undergo simple imprisonment for six months.

5. The petitioner being aggrieved by the judgment of the learned trial court dated 07.06.2011 filed Criminal Appeal No.996 of 2011 before the Lahore High Court, Lahore whereas the learned trial court forwarded Murder Reference No.276 of 2011 for confirmation of the sentence of death inflicted upon the petitioner in terms of Section 374, Cr.P.C. The learned Division Bench of High Court vide judgment dated 14.09.2015 converted death sentence of the petitioner into imprisonment for life whereas amount of compensation and imprisonment in its default prescribed by the learned Trial Court was ordered to be maintained. Benefit of Section 382-B, Cr.P.C. was also given to him. Hence, instant petition.

6. At the very outset, learned counsel for the petitioner argued that in fact both the courts below have not attended the circumstances of the case in its true perspective and convicted the petitioner under Section 302(b), P.P.C., which is not substantiated from the record. Contends that as far as occurrence is concerned, the same has been admitted by the petitioner while making his statement under Section 342, Cr.P.C. Adds that a specific plea was taken by the petitioner before the Investigation Officer that the deceased made an attempt to commit rape with sister of the petitioner namely Saima Sibi. Contends that plea of the petitioner was found correct during the course of investigation as such the conviction and sentence recorded by learned Courts below is not sustainable in the eye of law Contends that when it is established from the record that petitioner has committed the occurrence on the question of 'ghairat', therefore, the petitioner is entitled for the benefit of the same and as such the appropriate sentence could be under Section 302(c), P.P.C.

7. On the other hand, learned Law Officer has not seriously controverted the contentions raised by learned counsel for the petitioner as the same is spelled out from the record.

8. We have heard the learned counsel for the parties and gone through the record.

9. Admittedly, the occurrence had taken place within the local limits of Police Station Saddar Farooqabad, District Sheikhupura. There is no denial to this fact that the allegation against the petitioner is that he caused fire-arm injury with Carbine, which landed on the abdomen near the chest of the deceased Muhammad Ramzan. The injured was taken to District Headquarter Hospital, Sheikhupura from where he was referred to Mayo Hospital, Lahore however, he succumbed to the injuries on 08.05.2009 and as such the provision of Section 302, P.P.C. was added in the crime report. The petitioner since his arrest and commencement of investigation has raised first plea wherein it has been mentioned that deceased had made an attempt to commit rape with his sister. The mother of petitioner Maqsoodan Bibi had gone to reprimand Muhammad Ramzan deceased upon which he started

abusing mother of the petitioner and also grappled with her. The petitioner approached there he could not afford the conduct of the deceased and as such he flared up and under the heat of passion could not resist and as such made a single fire shot. The stance taken by the petitioner remained consistent throughout during the course of investigation as well as the trial. During investigation, the first plea raised by the petitioner was found correct by the Investigating Officer. It is an admitted fact that first plea of the accused is admissible in evidence under Article 27 of the Qanun-e-Shahadat Order, 1984 ("Order of 1984"). Article 27 of Order 1984 is general principle enabling the Investigating Officer to record the same whereas Article 28 is mere an exception, As a general rule evidence not forming part of the transaction is not admissible whereas Articles 27/28 are an exceptions to the said general principle by laying down a rule that admissibility of those fact which might not be tendered in evidence to prove it but these are relevant to prove the status/ mind the person committing it. For example the guilt, intent, knowledge, negligence, malice etc., and in all the intentions qua these conditions would be admissible as it is provided under Article 27 of the Order of 1984, Article 27 of the Order of 1984 has extended the scope to meet the question qua the existence of person state of mind or bodily feeling and all these facts and their existence in the state of affair has turned relevant.

During the course of proceedings before the learned Trial Court, the suggestion qua the state of mind referred above was also put to the prosecution witnesses of ocular account PW-3 and PW-4, respectively. Now the question, which requires determination, only relates to the quantum of sentence in the given facts and circumstances narrated above.

10. As observed earlier, that the occurrence had taken place due to the act of the deceased, which enraged the mental faculty of the petitioner and under the impulses of the same the instant occurrence had taken place, the same is spelled out from the record and as such the benefit of the same is available for which so many circumstances are not required rather the glimpse of the same is always deemed sufficient, which has been established by the Superior Court from time to time.

11. For what has been discussed above, we are of the considered view that sentence inflicted upon the petitioner by learned Courts below under Section 302(b), P.P.C. is not made out, therefore, keeping in view the facts narrated above, instant petition is converted into appeal and same is partially allowed and we convert the sentence from imprisonment for life under Section 302(b), P.P.C. to imprisonment for 10 years under Section 302(c), P.P.C. whereas amount of compensation and imprisonment in its default prescribed by the learned Trial Court is ordered to be maintained, Benefit of Section 382-B, Cr.P.C. is also extended, The Crl. Petition No.1120(L)/2015 filed by the complainant for enhancement of sentence, having no substance, is dismissed.

See para 43.

Sd/-

Manzoor Ahmad Malik, J

I disagree with the reasoning of my learned brother and therefore have appended my own judgment.

Sd/-

Syed Mansoor Ali Shah, J

Sd/-

Sayyed Mazahar Ali Akbar Naqvi, J

**JUDGMENT**

**12. SYED MANSOOR ALI SHAH, J.---**I have had the opportunity of going through the order of my learned brother Sayyad Mazahar Ali Akbar Naqvi J. While I agree with the conclusion regarding the conviction and quantum of sentence awarded to the petitioner under section 302(c) instead of section 302(b) of the Pakistan Penal Code, 1860 ("P.P.C."), however, with respect, I find myself unable to agree with the reasoning in paragraphs 9 and 10 of the Order of my learned brother.

13. In the instant case, the First Information Report[1] by the complainant Allah Ditta (PW-3), records that on 03.05.2009 around 7 p.m., Raza ("petitioner") called his neighbour, Ramzan ("deceased"), to come out of his house. As soon as Ramzan came out in the street outside his house, the petitioner shot him with his 12 bore carbine in the belly. Ramzan suffered several injuries all over the abdomen and the chest. He was rushed to the local hospital in Sheikhupura and then to hospital in Lahore but unfortunately he succumbed to his injuries on 08.05.2009. Motive behind this gory incident, as reported, was the quarrel between the mother of the petitioner and the deceased. In this background the petitioner was sent up for trial. He was convicted for murder under section 302(b), P.P.C. and sentenced to death[2] by the trial court and upon appeal to the High Court his conviction was maintained but his sentence was reduced to imprisonment for life, while the remaining sentence awarded by the trial court was kept intact vide impugned judgment dated 14.09.2015.

14. Main reliance of the prosecution evidence is on the ocular account of PW-3 and PW-4; the brother and wife of the deceased who witnessed the crime; and the medical evidence which supports the ocular account. On the other hand, the defence plea of the petitioner (accused) in the statement under section 342 of the Criminal Procedure Code, 1898 ("Cr.P.C.") is that he acted under grave and sudden provocation as the deceased attempted to rape his sister and then abused and grappled with his mother. This was also the first version taken by the petitioner (accused) before the investigating Police Officer after his arrest.

15. In a criminal trial, it is now jurisprudentially settled that the proper course for the court is to first discuss and assess the prosecution evidence in order to arrive at the conclusion as to whether or not the prosecution has succeeded in proving the charge against the accused on the basis of the evidence. In case where the accused has taken a specific plea the court is to appreciate the prosecution evidence and the defence version in juxtaposition in order to arrive at a just conclusion.[3]

16. In the present case, the statement of the petitioner under section 342, Cr.P.C. refers to the statement (first version) of the petitioner made before the Police Officer after his arrest. Therefore, before appraising the prosecution evidence and the defence version, it is imperative to answer the following important legal questions that have arisen in this case:

(i) What is the provision of law under which the statement of an accused is recorded by the Police Officer during the investigation?

(ii) Whether the statement of the accused recorded by the Police Officer during investigation is relevant and admissible, particularly in view of the bar contained in Article 38 of the Qanun-e-Shahdat Order, 1984 ("QSO") and Section 162 of the Cr.P.C.?

(iii) What is the meaning and scope of Article 27 of the QSO and its applicability to the present case?

(iv) Whether reasonable possibility of the defence plea of being true can benefit the accused?

17. I endeavour to answer the above questions as under:--

(i) What is the provision of law under which the statement of an accused is recorded by the investigating Police Officer during investigation?

There is no specific provision under Cr.P.C that deals with the recording of the statement of the accused during police investigation. High Courts in British India had divergent opinions on the applicability of Sections 161 and 162, Cr.P.C to the statements of accused persons recorded by investigating officers in the course of investigation. This conflict of opinion was resolved by the decision of the Privy Council in Pakala Narayana Swamy.[4] While discussing the phrase "any person" under section 162, Cr.P.C. Lord Atkin, observed: "That the words in their ordinary meaning would include any person though he may thereafter be accused seems plain. Investigation into crime often includes the examination of a number of persons none of whom or all of whom may be suspected at the time ... but eventually accused." A full bench of the Allahabad High Court observed in Upadhyaya[5]. "After the decision of the Privy Council ... it is no longer possible to accept the argument that sections 161 and 162 Criminal Procedure

Code do not cover statements made by accused persons and that under those sections an investigating officer is not authorised to record the statements of such persons. Nor is there anything in the section to show that only non-confessional or non-incriminatory statements of such accused persons can be recorded. The words used are wide enough to include all kinds of statements, provided of course, they throw some light on the offences under investigation." Likewise, Dorab Patel, J., in Ghulam Hussain,[6] observed: "After the Judicial Committee's observations in Naryana Swami's case it cannot even be argued that statements by the accused do not fall within the ambit of section 162 of the Code."

18. The relevant extracts of Sections 161 and 162 are reproduced hereunder:-

"161. Examination of witnesses by police.--(1) Any Police-officer making an investigation under this Chapter or any police-officer not below such rank as the Provincial Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

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162. Statements to police not to be signed: Use of such statements in evidence. (1) No statement made by any person to a police-officer in the course of an investigation under this Chapter shall if reduced into writing be signed by the person making it; nor shall any such statement or any record thereof, whether In a police-diary or otherwise or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made.

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This expression "any person" has to be understood in the context of section 161, Cr.P.C. It requires a police officer making an investigation to examine "any person" supposed to be acquainted with the facts and circumstances of the case. This expression is extensive and, in its plain and ordinary meaning, includes all persons who are supposed to be acquainted with the facts and circumstances of the case, and not only the witnesses but also those who are alleged to have committed the offence under investigation in a case. A person who is alleged to have committed the offence, is as much supposed to be acquainted with the facts and circumstances of the case as an alleged eye-witness is. There is no reason to modify or restrict that plain and ordinary meaning of the expression "any person" by interpretation, especially when it does not present any absurdity or inconsistency. "If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the law-giver."[7] Besides "when the meaning of the words is plain it is not the duty of the courts to busy themselves with the supposed intentions".[8] I see no reason to restrict the simple meaning of the phrase "any person" and exclude the "accused" from its ambit.

19. In a recent decision of this Court in Sughran Bibi,[9] a seven-member bench of this Court in to which one of us (Malik, J.) was a member, supports this interpretation. Khosa, ACJ., speaking for the bench therein declared that: "During the investigation conducted after registration of an FIR the investigating officer may record any number of versions of the same incident brought to his notice by different persons which versions are to be recorded by him under section 161, Cr.P.C. in the same case. No separate FIR is to be recorded for any new version of the same incident brought to the notice of the investigating officer during the investigation of the case." It is common that in most cases a version of the same occurrence different from the one recorded in FIR is given by the accused, as it happened in the present case. And in view of the law declared in Sughran Bibi, it can be said with certainty that such version of an accused is to be, and is, recorded under section 161, Cr.P.C.

20. The answer to the above question is that the statement of the accused after his arrest or during investigation is covered by section 161, Cr.P.C.

(ii) Whether the statement of the accused recorded by the investigating Police Officer during investigation is relevant and admissible, particularly in view of the bar contained in Article 38 of the QSO and Section 162 of the Cr.P. C?

21. The term "relevant" means what is logically probative and "admissible" means that which is legally receivable. The legal admissibility of facts is for the most part determined by their logical relevancy to the issue.[10] Admissibility is determined according to the rule of evidence, while the relevancy of a fact is determined by the issue in a case.[11] The scheme of the QSO is to make all relevant facts admissible, as said by Lord Hobhouse,[12] that "relevant in this Act[13] means admissible".

22. Statement made by the accused, after his arrest, before the Police Officer may include a statement (i) where he admits the commission of the crime and therefore amounts to a confession; or (ii) where the accused denies the commission of the crime; or (iii) the accused admits the commission of the crime but gives his own version of it. Out of the above three, we specially examine the last category of statement (version), as the same is relevant in this case.

23. "Confession" has been defined as an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime.[14] The Privy Council in Pakala Narayana Swami[15] defined confession as a statement made by an accused which "either admit in terms the offence, or at any rate substantially all the facts which constitute the offence." A confession is thus a species of admission, and can briefly be stated to be an admission of the guilt by the accused.[16] The expression "confession" has been used in Articles 37 to 43, QSO, but it is not defined therein. There is a distinction between admissions and confessions. It would appear that confessions are a species of which admission is the genus. All admissions are not confessions, but all confessions are admissions. If the statement by itself is sufficient to prove the guilt of the maker, it is a confession. If, on the other hand, the statement falls short of it, it amounts to an admission.[17] No statement, which contains self-exculpatory matter, can amount to a confession, if the exculpatory statement is of some fact which, if true, would negate the guilt.[18] A confession is thus an admission by an accused in a criminal case and if he does not incriminate himself, the statement cannot be said to be a confession.[19]

24. Article 37 of QSO provides that a confession is irrelevant if caused by inducement, etc. and Article 41 provides that if the inducement, etc. mentioned in Article 37 is removed, confession becomes relevant. Joint reading of Articles 37 and 41 leads to an unambiguous corollary that a voluntary confession of the accused is a relevant fact under QSO.

25. Article 38, QSO states that no confession made to a police officer shall be proved as against a person accused of any offence. Section 162, Cr.P.C declares that no statement made by any person to a police-officer in the course of an investigation shall be used for any purpose at any inquiry or trial in respect of any offence under investigation at the time when such statement was made, except the statement of a prosecution witness to contradict him in cross-examination, or to explain any matter referred to in cross-examination of that witness in re-examination. The question which has remained under judicial debate since 1872 is whether Article 38, QSO and Section 162, Cr.P.C. bar the admissibility of a confessional statement of an accused, which is used by the accused in his favour.

Bar of Article 38, QSO

26. Article 38 states that no confession made to a police officer shall be proved as against a person accused of any offence. What if the confession is to be used by the accused in his favour? Is such a confession admissible? Can the converse be a logical corollary of Article 38? The very first case that can be referred to in this regard, is Pitamber[20] where a full bench of the Bombay High Court held that "there is not anything ... in the Indian Evidence Act ... that would justify us in excluding such evidence when sought to be given on behalf of the co-accused, provided it be relevant." Hasil[21] is the most important case on the question as it was frequently referred to and consistently followed in later cases

by courts not only in Pakistan, but in India also. In Hasil, A division bench of the Lahore High Court held: "The prohibition contained in section 25 [of the Evidence Act, 1872] can be treated as applying only to confessions which are to be proved as against the accused, that is, in support of the prosecution case, and cannot apply to statements on which the accused himself wishes to rely in connection either with his conviction or his sentence." Similar views were expressed in Lal Khan,[22] Ghulam Abbas[23] and Muhammad Yaqub.[24]

27. The legal position as to the scope and purpose of Article 38, QSO is thus well settled now. This Article prohibits the admissibility of a confession made to a police officer if proved against the accused but does not bar the use of it by the accused in his own favour. The Legislature cannot be attributed by implication the intent to deprive an accused from his right to make use of any of his statements, if they are relevant and admissible under any provision of the QSO. Article 38 has been enacted for the benefit of the accused, to eradicate the apprehension that Police may misuse their extensive powers if confessions made to them are made admissible in evidence, against the accused. A provision enacted for the benefit of the accused cannot be construed to his detriment.

Bar of Section 162, Cr.P.C.

28. Having come to the conclusion that the statement made by the petitioner to the investigating officer as his first version of the alleged occurrence is recorded under section 161, Cr.P.C., the question that arises for determination is how can it be used in favour of the accused in view of the restriction prescribed by Section 162, Cr.P.C.? Section 162 states as under:

> S.162 Statement to police not to be signed: use of such statements in evidence:---(1) No statement made by any person to a police officer in the course of an investigation under this Chapter shall if reduced into writing be signed by the person making it; nor shall any such statement or any record thereof whether in a police-diary or otherwise or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:
>
> Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid the Court shall on the request of the accused, refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by section 145 of the Evidence Act, 1872 (I of 1872) When any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination:
>
> Provided further, that, if the Court is of opinion that any part of any such statement is not relevant to the subject-matter of the inquiry or trial or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests, it shall record such opinion (but not the reasons therefore) and shall exclude such part from the copy of the statement furnished to the accused.
>
> (2) Nothing in this section shall be deemed to apply to any statement falling within the provision of section 32, clause (1), of the Evidence Act, 1872 (or to affect the provisions of Section 27 of that Act).

Although there was a divergence of opinion in the High Courts of British India on this question, but most of the High Courts found the provisions of the Evidence Act (now QSO) on the subject of confession to be a special law and declared that the provisions of the Evidence Act on the subject of confession are not affected by section 162, Cr.P.C. The observations of Beaumont, C.J. made in Biram Sardar,[25] are notable:--

> "Most, if not all, of the learned Judges agree that section 27, Evidence Act, is a special law in force at the date of the passing of the amended section 162, and that point seems to me beyond question. It is a law applicable to a particular subject within section 41, I.P.C. . . . Section 1(2)

enacts a rule of construction to be applied in the interpretation of the Code. That rule is that where there is a conflict between the Code and a special law, the special law is to prevail in the absence of a specific provision to the contrary. . .I am myself inclined to think that "specific provision" is a stronger expression than "express provision" and means a provision clearly expressed. I do not see how a provision arising by implication only can be said to be specific. But if this is going too far, I am clearly of opinion that the language of the Code giving rise to the implication must at any rate be so directly contradictory to the special law that it can be affirmed with certainty that the Legislature intended to override the special law. There is, however, nothing in the language of section 162 which suggests that the Legislature had in mind section 27, Evidence Act. The language of the two sections is quite distinct and to a large extent the respective subject-matters are not identical. Section 162 deals with all statements made to a police officer in the course of an investigation; section 27, Evidence Act, merely deals with information received from a person accused of an offence in the custody of a police officer which leads to a discovery. The two sections only overlap in respect of statements made to a police officer in course of an inquiry which lead to a discovery. It seems to me impossible to hold that section 162 contains a specific provision that section 27, Evidence Act, is not to prevail over it."

29. Similar question arose in Ghulam Hussain[26] as to whether the admissibility of a statement falling under section 25 of the Evidence Act, 1872 (Article 30 of QSO) is affected by the provisions of Section 162, Cr.P.C.? Dorab Patel J. writing for the High Court in Ghulam Hussain observed that "section 162 of the Code does not draw any distinction between statements by the accused on which the prosecution wished to rely and statement on which accused himself wished to rely .... the Courts have evolved a rule that a provision intended to protect the accused is not used against him[27]. In cases of this kind, when two versions of the same incident are being put forward, it is often of the greatest importance for an accused to be able to show that his own explanation was put forward at the earliest possible opportunity, and we do not think that it can ever have been the intention of the Legislature that an accused person should be deprived of the right to make use of such a statement, merely because to a certain extent it goes against him[28]. After an exhaustive survey of almost all the previous decisions the court in Ghulam Hussain concluded that the confessional statement recorded of the accused in the police diary was not hit by Section 162 of the Cr.P.C. if used by the accused in his favour.

30. It is observed that Section 1(2), Cr.P.C. states that the Criminal Procedure Code, 1898 extends to the whole of Pakistan but, in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law or any special jurisdiction or power conferred or any special form of procedure prescribed by any other law for the time being in force. Section 41 of P.P.C. defines "special law" to be a law applicable to a particular subject and section 4(2) of Cr.P.C. provides that all words and expressions used in the Cr.P.C. but not defined therein shall have the same meanings as in P.P.C. Like Article 38 of the QSO, Section 162, Cr.P.C. is also for the protection of the accused and benefits the accused (see provisos to section 162), I, therefore, agree with the view taken in the cases discussed above, that a confessional statement of the accused before a police officer, setting out his first version and used by the accused in his own favour are not barred by the provision of Section 162, Cr.P.C.

31. The answer to the above question is that a statement (first version), as discussed above, made by an accused before a Police Officer is relevant and admissible and not barred under Article 38 of the QSO or section 162 of the Cr.P.C, if used by the accused in his own favour.

(iii) What is the meaning and scope of Article 27 of the QSO and its applicability to the present case?

32. Article 27 falls under Chapter III of the QSO which deals with Relevancy of Facts. The Article states:

27. Facts showing existence of state of mind, or of body, or bodily feeling. Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or goodwill towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant, when the existence of any such state of mind or body or bodily feeling is in issue or relevant.

Explanation 1. A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.

Explanation 2. But where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this Article, the previous conviction of such person shall also be a relevant fact.

Article 27 deals with such external or collateral facts which show the existence of any state of mind.[29] Evidence of such external or collateral facts is admitted to prove a person's state of mind, and not to prove the occurrence itself. Thus, the scope of this Article is that there must be a cluster of facts outside and around the fact in issue or the occurrence from which inference can be drawn to show and support the state of mind in question; such surrounding facts become relevant under Article 27. This construction is supported by Explanation 1 to the Article, which provides that relevant facts must show that the state of mind exists not generally but in reference to the particular matter in question. Both previous and subsequent events may be relevant under this Article as showing the state of mind.[30] Illustration (e) refers to "previous publication" and illustration (j) refer to threatening letters "previously sent," but in illustration (m) the test is merely proximity of time, not priority. Similarly illustrations (i), (k), (l) and (o) to Article 27 are self-explanatory and support the above view.

33. The above view is supported by R v. Armstrong[31] where the accused was charged with the murder of his wife by administering arsenic, evidence that the accused had attempted to poison another person with arsenic on a subsequent occasion, was held to have been rightly admitted to rebut the defence that the wife had committed suicide and that the arsenic was kept by the accused for an innocent purpose, namely, for killing weeds. So also in R v. Mortimer,[32] where the charge was one of murder by deliberately running down a woman bicyclist with a motorcar, evidence was admitted of similar attacks on other women, immediately before or after the offence charged.

34. Previous decisions on the subject of relevancy and admissibility of such first version of accused persons in their favour have not referred to Article 27 while dealing with the question. There is no case law that relies upon Article 27 for this purpose except Liaqat Ali,[33] and the judgments[34] that relied upon Liaqat Ali.

35. In Liaqat Ali, Dr. Khalid Ranjha, J. mainly relied upon the afore-referred cases of Hasil, Muhammad Yaqoob and Ghulam Hussain, for decision of the question involved in the case; he referred to Article 27 as an additional ground only. His words are quoted for ready reference:

"It may also be added that the statement of an accused person immediately after the occurrence is in a way relevant fact within the meaning of Article 27 of Qanun-e-Shahadat and as such there can be no legal bar in bringing it on record as an admissible fact."[35] (Emphasis supplied)

There is no discussion on how the said Article is applicable for determining relevancy of the statement of the accused made to the investigating officer in the course of investigation. An important aspect that escaped the notice of the learned Judge is that the accused in that case, had taken a plea of self-defence in his statement made to the investigating officer. That statement was therefore not inculpatory. It was thus not a confessional statement, as discussed above. The plea of self-defence, if true, definitely negatives the offence alleged. But it is not so in a case of plea of grave and sudden provocation which simply diminishes the criminal liability and consequentially entails lesser punishment only, and does not negative the offence altogether. The statement of the accused in that case was a self-serving statement equal to the statement denying, and not admitting, the guilt by the accused. The statement having been made by the accused to the investigation officer in the course of investigation, and not

falling within the scope of the special law of confession in the QSO, was clearly hit by the bar of Section 162, Cr.P.C. The reliance by the learned Judge on Hasil, Muhammad Yaqoob and Ghulam Hussain was, submitted with respect, is grossly misplaced.

36. Article 27 of the QSO provides that if a state of mind is a fact in issue or a relevant fact then facts that establish the state of mind are also relevant. These surrounding facts are obviously other than the facts in issue. Therefore, Article 27 has little relevance to the instant case.

First version of the accused - no special evidentiary value

37. The confessional statement of the accused before a police officer at the time of his arrest shows his own version put forward at the earliest possible opportunity and has over the years come to be referred to as the "first version" or interchangeably used as the "first plea." First version is a statement made before a police officer which is not otherwise admissible under section 162, Cr.P.C., except in the case of a confessional statement to be used by the accused in his favour, as discussed above. It is, however, underlined that the first version of the accused by itself has no special evidentiary value or weight. Once it is relevant and admissible (as discussed above), it is to be examined in the light of the overall evidence of the case i.e., the statement of the accused recorded under section 342, Cr.P.C., his statement, if any, under section 340(2) of the Cr.P.C along with the defence evidence, if any, and the overall evidence of the prosecution. The attribution of high probative value to the first version of the accused, in some cases, pretending it as a principle of law has no basis in criminal jurisprudence. The probative value of such version of the accused, if found relevant and admissible under the law, is to be determined like any other piece of evidence in the peculiar facts and circumstances of each case as it does not stand on any special footing.

(iv) Whether reasonable possibility of the defence plea of being true can benefit the accused?

38. In Woolmington,[36] a famous English case, Viscount Sankey, Lord Chancellor, in his "Golden thread" speech laid down: "While the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence. ... Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt ... If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal." The application of the Woolmington principle in Pakistan was considered by the Federal Court[37] of Pakistan in Safdar Ali.[38] Abdul Rashid, CJ., in that case, held:

> "If, after an examination of the whole evidence, the Court is of the opinion that there is a reasonable possibility that the defence put forward by the accused might be true, it is clear that such a view reacts on the whole prosecution case. In these circumstances, the accused is entitled to the benefit of doubt, not as a matter of grace, but as of right, because the prosecution has not proved its case beyond reasonable doubt. ... The principles laid down in Woolmington's case are applicable with full force in Pakistan." (emphasis supplied)

Thus if after examination of the whole evidence, the Court is of the opinion that there is reasonable possibility that the defence put forward by the accused might be true, then the whole of the prosecution case is viewed in context of this reasonable possibility, entitling the accused to the benefit of the doubt. This principle has since then been consistently followed and applied by this Court,[39] and has received endorsement of larger benches of this Court in the cases of Ashiq Hussain[40] and Abdul Haque.[41] This Court, in Ashiq Hussain, said that it would be enough for the accused if, in the final analysis, the defence plea is substantiated to the extent of creating reasonable doubt in the credibility of the prosecution case, and in Abdul Haque held that: "In criminal jurisprudence general principle is that prosecution prove the case against the accused beyond doubt and this burden does not shift from prosecution even if accused takes up any particular plea and fails in it. If there is any room for benefit

of doubt in the case of prosecution, the same will go to accused and not to prosecution." Thus, reasonable possibility of the defence plea of being true can benefit the accused.

Statement of the accused under section 342 Cr.P.C

39. It is important to underline that the statement of the accused under section 342, Cr.P.C. is not evidence, it is only the stand or version of the accused by way of an explanation when incriminating material against him is brought to his notice.[42] The statement is not made on oath, and cannot be tested by cross-examination, and is made under the protection of immunity of the maker of the statement from punishment for making false statement.[43] Such statement cannot be placed on the same footing as statements made by witness in court on oath, which are tested by cross-examination. Such statement thus does not strictly constitute evidence, but in view of the presumption of innocence in favour of the accused, the statement may provide valuable material to the courts for appraising the prosecution evidence in arriving at its findings. The version given in such statement if found by the court to be reasonable and in accord with the probabilities of the established facts and circumstances, the same may be accepted by the court even without requiring defence evidence, unless the version is falsified by the prosecution evidence.[44]

40. Coming to the present case, it is observed that the two eye-witnesses i.e., the complainant (PW-3) and Ayesha Bibi (PW-4), are the brother and wife of the deceased, respectively. PW-4 lives in a village nearby and was visiting the deceased to inquire about his indisposed daughter. Both of the eye-witnesses even though close relatives of the deceased, harbour no prior enmity to falsely implicate the petitioner, hence their testimony cannot be discarded merely because of their relationship with the deceased, especially when their presence at the scene of the crime is not unnatural or unusual. The ocular account is fully supported by medical evidence, which confirm the firearm injuries on the body of the deceased. However, it has been observed by us that recovery of the carbine is ineffective due to the inconclusive FSL Report and, therefore, does not support the case of the prosecution. Regarding motive the crime report states that the incident happened as a result of the quarrel between the deceased and the mother of the petitioner; while PW-3 and PW-4 give two different accounts. PW-3 deposed that a quarrel had taken place between his mother and the petitioner. PW-4, the widow of the deceased, stated that the quarrel took place between her and the mother of the petitioner on lighting fire to the garbage/trash. Both the eye-witnesses have given an inconsistent and contradictory account of the motive behind the incident.

41. We now examine the statement of the accused under section 342, Cr.P.C. which states as under:

Q.5. Why this case against you and why the P.Ws. deposed against you?

A. Complainant got registered the instant case after twisting the true facts of the case. As a matter of fact on 03.05.2009, Ramzan deceased made attempt to commit rape with my sister, namely Saima Bibi. My mother, namely, Maqsoodan Bibi came there and interrupted and reprimanded to Ramzan deceased. Upon which he started abusing her and grappled with her. Meanwhile, I came there after listening the reason of quarrel and abuses of Ramzan deceased. I flared up and under grave and sudden provocation, I made a single shot. I have no intention to kill Ramzan deceased, so I did not repeat the fire. During investigation, I took the same stance which was found correct. P.W. 10/Investigating Officer, had admitted this fact during cross-examination.

The defence version as to the circumstances that led to the occurrence is that the deceased attempted to outrage the modesty of accused's sister, Saima Bibi. The mother of the accused reprimanded the deceased, whereupon the deceased started abusing and grappling with her. Meanwhile, the petitioner (accused) reached there and made a fire shot to the deceased, acting under grave and sudden provocation. This defence version finds support from the statement of PW-10 (investigating Police Officer) made in his cross-examination which is relevant and admissible as discussed above. Reading the prosecution evidence in juxtaposition with the defence version, we see that while the prosecution has been successful in establishing and proving that it was the petitioner who fired at the deceased

whereby his death occurred. However, it has been noticed that the High Court for valid reasons has observed that "during the trial the motive alleged in the complaint and the FIR was not substantiated and as such remained shrouded in mystery" and concluded that "the occurrence was without premeditation and pre-planning." The finding of the High Court that the occurrence was without premeditation and pre-planning is in line with the first version of the petitioner. The confessional statement of the petitioner made to the investigating officer has been held relevant and admissible to be used in his favour; the statement is not inherently improbable or unbelievable, nor is it inconsistent with the overall facts and circumstances of the case; the first version of the petitioner does not appear to be a concocted one or an afterthought, as it has been his consistent stance since his arrest in the case till recording of his statement under section 342, Cr.P.C.[45] It is underlined that generally absence of motive is a mitigating factor that has a bearing on the quantum of punishment. Absence of motive, therefore, becomes relevant if there is possibility of further reduction in the quantum of punishment. In a case like this, where the petitioner in his first version has raised a plea of grave and sudden provocation, motive assumes crucial importance. It is not only explanatory of the conduct of persons concerned in the incident in the given situation, but also helps in the proper appreciation of evidence in the case, in the light of motivation of their conduct. In the attending circumstances of the present case, a reasonable possibility has arisen that the act of the petitioner may have been induced by grave and sudden provocation to the petitioner. The benefit of the possibility of the existence of another version emerging out of the statement of the petitioner under section 342, Cr.P.C. and the first version of the accused before the Police Officer, if extended to the petitioner, brings his case under Section 302(c) instead of Section 302(b), P.P.C. and in the circumstances of the case the petitioner is entitled to this benefit.

42. For the foregoing reasons and in the circumstances of the case, the instant criminal petition is converted into an appeal and is partly allowed. The conviction and sentence of the petitioner-appellant recorded by the trial court and maintained/ modified by the High Court under Section 302(b), P.P.C are set aside. Instead the petitioner-appellant is convicted under Section 302(c), P.P.C. and sentenced to rigorous imprisonment for 10 years. He shall also pay compensation of Rs. 100,000/- (one hundred thousand) to the legal heirs of the deceased, in terms of Section 544-A, Cr.P.C., and in default of its payment he shall undergo simple imprisonment for a period of six months. Benefit of Section 382-B, Cr.P.C. is extended to him. The criminal petition filed by the complainant for enhancement of the sentence of the petitioner-appellant being devoid of merits is dismissed and leave to appeal is refused.

Sd/-

Syed Mansoor Ali Shah,

Judge

43. MANZOOR AHMAD MALIK, J.---I have read the order passed by my learned brother Sayyed Mazahar Ali Akbar Naqvi, J. and the judgment authored by my learned brother Syed Mansoor Ali Shah, J. While agreeing with the conclusion drawn by my learned brothers, I fully agree with the reasoning given by my learned brother Syed Mansoor Ali Shah, J.

Sd/-

Manzoor Ahmad Malik,

Judge

MWA/R-2/SC Order accordingl

**P L D 2020 Supreme Court 586**

**Present: Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ**

**WAFAQI MOHTASIB SECRETARIAT, ISLAMABAD and others---Petitioners**

**Versus**

**SNGPL, LAHORE and others---Respondents**

Civil Petition No. 205-L of 2017, decided on 11th August, 2020.

(On appeal from the order of Lahore High Court, Lahore dated 13.12.2016, passed in W.P. No.36461 of 2016)

**Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order (I of 1983)---**

----Art. 9---Federal Ombudsmen Institutional Reforms Act (XIV of 2013), S. 10---Wafaqi Mohtasib (Investigation and Disposal of Complaints) Regulations, 2003, Regln. 2(m)---Wafaqi Mohtasib (Ombudsman) and Wafaqi Mohtasib's Secretariat---Legal status and powers---Wafaqi Mohtasib's Secretariat was not a legal entity, and did not enjoy any legal status or the power to sue or be sued under the law---Furthermore the Ombudsman, being a creature of the statute, could not challenge the powers vested in him by the legislature, however, the parties to the proceedings may bring such a challenge---Ombudsman by law and by design was not empowered to defend its decisions before a higher forum by becoming a party to the proceedings---Ombudsman had no locus standi to challenge an order passed by the constitutional court that interpreted its jurisdiction or powers under the law.

Wafaqi Mohtasib's Secretariat gave its findings in the present matter and recommended respondent (Sui Northern Gas Pipeline Ltd.) to reconsider the matter by adopting proper procedure and take disciplinary action against its delinquent officers, etc. Respondent challenged said Recommendations of the Ombudsman before the High Court and vide the impugned order the High Court held that the disputes pertaining to detection bills on allegations of meter tampering fell within the exclusive jurisdiction of the Oil and Gas Regulatory Authority ("OGRA") and Ombudsman had no jurisdiction over such like matters.

Wafaqi Mohtasib's Secretariat/petitioner (not the Ombudsman) filed present petition for leave to appeal before the Supreme Court with the prayer that order of the High Court be set aside. The alleged grievance of the petitioner, arose from the curtailment of the jurisdiction and powers of the Ombudsman in matters pertaining to gas detection bills and meter tampering. Primary questions in the present case were whether Wafaqi Mohtasib's Secretariat (or for that matter even the Ombudsman) could maintain the present petition for leave to appeal by challenging the order of the High Court whereby the jurisdiction and powers of the Ombudsman under the Establishment of the Office of the Wafaqi Mohtasib (Ombudsman) Order, 1983 ("Order I of 1983") read with the Federal Ombudsman Institutional Reforms Act, 2013 ("Act") had been interpreted and determined; as to how was the Wafaqi Mohtasib's Secretariat or the Wafaqi Mohtasib (Ombudsman) aggrieved by the impugned order; and more importantly, could the Ombudsman and his Secretariat be aggrieved of an order which interpreted and determined the jurisdiction and powers of the Wafaqi Mohtasib under the Order of 1983 and the Act.

Perusal of Order of 1983 revealed that Wafaqi Mohtasib's Secretariat was not a legal entity, infact it was not a defined term under said Order, and did not enjoy any legal status or the power to sue or be sued under the law. Wafaqi Mohtasib's Secretariat was at best an administrative term and referred to the establishment of the offices of the Ombudsman under Wafaqi Mohtasib (Investigation and Disposal of Complaints) Regulations, 2003. The filing of the present petition by the Wafaqi Mohtasib's Secretariat was, therefore, hopelessly misconceived as it had no locus standi to maintain the instant petition.

Assuming, for the sake of argument, that the present petition was filed by the Ombudsman. Still the question arose, whether the Ombudsman was an aggrieved person in the present matter. The answer to such question required an understanding of the distinction between the two roles enjoyed by the

Ombudsman under Order I of 1983. One was personal, that related to the terms and conditions of service of the Ombudsman; while the other was the neutral quasi-judicial institutional role (or statutory) of the Ombudsman to "redress and rectify" mal-administration. In the first case the Ombudsman could be (personally) aggrieved regarding any order that affected his terms and conditions of service under Order of 1983, as that would be affecting his rights to service under the law. However, in the second case, the Ombudsman, could not be said to be aggrieved, if the powers to redress mal-administration vested in him under the law were modified (enhanced or curtailed) by the Parliament or through interpretation of the constitutional court. Challenging the powers would be challenging the law and intent of the Parliament. Ombudsman, being a creature of the statute, could not challenge the powers vested in him by the legislature, however, the parties to the proceedings may bring such a challenge. The powers enjoyed by the Ombudsman could not be confused with his rights under the law.

A neutral quasi-judicial adjudicatory forum created under a statute could not become a party to the proceedings brought before it. Such a forum was simply to redress mal-administration by exercising its powers under the law. The Ombudsman by law and by design was not empowered to defend its decisions before a higher forum by becoming a party to the proceedings. This would totally tarnish its neutrality.

Even the Ombudsman had no locus standi to challenge an order passed by the constitutional court that interpreted its jurisdiction or powers under the law. Therefore, the present petition filed by the Wafaqi Mohtasib's Secretariat was hopelessly misconceived, not maintainable and passed for frivolous litigation resulting in wasting the time of the court. Petition for leave to appeal was dismissed with costs of Rs.100,000/- [p. 591] E & F

Hafiz Ahsaan Ahmad Khokhar, Advocate Supreme Court, Imtiaz A. Shaukat, Advocate-on-Record and M. Usman Arif, D.A.G. for Petitioners.

Umar Sharif, Advocate Supreme Court for Respondent No.1.

Date of hearing: 11th August, 2020.

**ORDER**

**SYED MANSOOR ALI SHAH, J**.---Brief facts of the case are that Respondent No.2, an industrial gas consumer, approached the Wafaqi Mohtasib (Ombudsman) to complain about the excessive gas billing by Sui Northern Gas Pipeline Ltd. (SNGPL), Respondent No.1 and the "mal-administration" at the hands of its officials. In the "Findings Recommendations" issued by Wafaqi Mohtasib's Secretariat dated 28.10.2014 the complaint of Respondent No.2 against Respondent No.1 was rejected finding no maladministration on the part of Respondent No. 1. Thereafter, the Respondent No.2 filed a review and in its "Revised Findings" and "Final Recommendations for Implementation" issued by the Wafaqi Mohtasib's Secretariat on 26.02.2016, Respondent No.1 was recommended to reconsider the matter by adopting proper procedure and take disciplinary action against the delinquent officers, etc. Respondent No.1 challenged these Recommendations of the Ombudsman before the High Court and vide impugned order dated 13.12.2016 the High Court[1] held that the disputes pertaining to detection bills on allegations of meter tampering fell within the exclusive jurisdiction of the Oil and Gas Regulatory Authority ("OGRA") under the Oil and Gas Regulatory Authority Ordinance, 2002 ("Ordinance") and Ombudsman had no jurisdiction over such like matters. The writ petition was decided through the impugned order in favour of Respondent No.1 on 13.12.2016 and the said order, as per the learned counsel for the parties has not been challenged before this Court by the parties.

2. The petitioner before us is the Wafaqi Mohtasib's Secretariat (not the Ombudsman) with the prayer that order of the High Court be set aside. The alleged grievance of the petitioner, as disclosed in the petition, arises from the curtailment of the jurisdiction and powers of the Ombudsman in matters pertaining to gas detection bills and meter tampering which fall under the OGRA Ordinance. Without going into the merits of the case or commenting upon the merits of the impugned judgment, the primary

question before us is whether Wafaqi Mohtasib's Secretariat (or for that matter even the Ombudsman) could maintain the instant petition by challenging the order of the High Court whereby the jurisdiction and powers of the Ombudsman under the Establishment of the office of the Wafaqi Mohtasib (Ombudsman) Order, 1983 ("Order, 1983") read with the Federal Ombudsmen Institutional Reforms Act, 2013 ("Act") have been interpreted and determined. How is the Wafaqi Mohtasib's Secretariat or the Wafaqi Mohtasib (Ombudsman) aggrieved by the impugned order? And more importantly, can the Ombudsman and his secretariat be aggrieved of an order which interprets and determines the jurisdiction and powers of the Wafaqi Mohtasib under the Order and the Act?

3. Perusal of Order, 1983 reveals that Wafaqi Mohtasib's Secretariat is not a legal entity, infact it is not a defined term under Order, 1983[2] and does not enjoy any legal status or the power to sue or be sued under the law. Wafaqi Mohtasib's Secretariat is at best an administrative term and refers to the establishment of the offices of the Ombudsman under Wafaqi Mohtasib (Investigation and Disposal of Complaints) Regulations, 2003. The filing of the instant petition by the Wafaqi Mohtasib's Secretariat is, therefore, hopelessly misconceived as it has no locus standi to maintain the instant petition.

4. Assuming, for the sake of argument, that the petition was filed by the Ombudsman, as he was arrayed as a respondent in the writ petition. Still the question arises, whether the Ombudsman is an aggrieved person in the instant matter? The answer to this question requires an understanding of the distinction between the two roles enjoyed by the Ombudsman under Order, 1983. One is personal, that relates to the terms and conditions of service of the Ombudsman; while the other is the neutral quasi-judicial institutional role (or statutory) of the Ombudsman to "redress and rectify" mal-administration. In the first case the Ombudsman can be (personally) aggrieved regarding any order that affects his terms and conditions of service under Order, 1983, as that would be affecting his rights to service under the law. However, in the second case, the Ombudsman, cannot be said to be aggrieved, if the powers to redress mal-administration vested in him under the law are modified (enhanced or curtailed) by the Parliament or through interpretation of the constitutional court. Challenging the powers would be challenging the law and intent of the Parliament. Ombudsman, being a creature of the statute, cannot challenge the powers vested in him by the legislature, however, the parties to the proceedings may bring such a challenge. The powers enjoyed by the Ombudsman cannot be confused with his rights under the law.

5. Another way to look at it is that a neutral quasi judicial adjudicatory forum created under a statute cannot become a party to the proceedings brought before it. Such a forum is to simply to redress mal-administration by exercising its powers under the law. The Ombudsman by law and by design is not empowered to defend its decisions before a higher forum by becoming a party to the proceedings. This would totally tarnish its neutrality.

6. For the above reasons, even the Ombudsman has no locus standi to challenge an order passed by the constitutional court that interprets its jurisdiction or powers under the law. Therefore, the instant petition filed by the Wafaqi Mohtasib's Secretariat is hopelessly misconceived and not maintainable.

7. The filing of this petition by the Wafaqi Mohtasib's Secretariat through its Secretary has left us concerned and disturbed. We, therefore, direct the Ombudsman to hold an inquiry into the matter and submit a report to this Court within two months from today as to who had authorized the filing of the instant petition and the action taken against the concerned officials.

8. This hopelessly misconceived petition passes for frivolous litigation and has resulted in wasting the time of the court. Therefore, this petition is dismissed with costs of Rs.100,000/- imposed under Order XXVIII, Rule 3 of the Supreme Court Rules, 1980. The costs shall be deposited with any approved, recognized and well-known Charitable Organization and receipt thereof be submitted with the Deputy Registrar of this Court (Lahore Registry) within two months from today. In case of failure to comply with the directions in this paragraph or paragraph 7 (above), the office shall fix this petition

before the Court for necessary orders. Leave is, therefore, declined and this petition stands dismissed with costs.

MWA/W-3/SC Petition dismissed.

**P L D 2020 Supreme Court 599**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed, JJ**

**Malik UBAIDULLAH---Petitioner**

**Versus**

**GOVERNMENT OF PUNJAB and others---Respondents**

Civil Petition No. 140-L of 2015, decided on 14th July, 2020.

**(a) Disabled Persons (Employment and Rehabilitation) Ordinance (XL of 1981)---**

----Preamble---UN Convention on the Rights of Persons with Disabilities (UNCRPD), 2006,Art. 27---Concept of Disability and the importance of role of employment in the lives of persons with disabilities as compared to persons without disabilities stated.

Silvers, Anita. 2010. 'An Essay on Modeling: The Social Model of Disability.' In Philosophical Reflections on Disability, Philosophy and Medicine, 104, edited by Christopher D. Ralston, and Justin Ho. Berlin: Springer; Oliver, Mike. 1983. Social Work with Disabled People. Basingstoke: Macmillan and 1990. The Politics of Disablement: A Sociological Approach. London: Macmillan; Finkelstein, Victor. 1980. Attitudes and Disabled People. New York: World Rehabilitation Fund; Oliver, M., and C. Barnes, 1998. Disabled people and socially. From exclusion to inclusion - London LPC Group; Kamal Lamichhane. Disability, Education and Employment in Developing Countries- From charity to investment. Cambridge University Press. 2005; Moving from the margin - Mainstreaming persons with disabilities in Pakistan. British Council and The Economist Intelligence Unit- 2014; O'Day, B., and M. Killeen. 2002. 'Does U.S. Federal Policy Support Employment and Recovery for People with Psychiatric Disabilities?' Behavioral Sciences and the Law 20: 559-83; Linn, M. W., R. Sandifer, and S. Stein. 1985. 'Effects of Unemployment on Mental and Physical Health.' American Journal of Public Health 75 (5): 502-06; Ewa Giermanowska, Mariola Raclaw, Dorota Szawarska - Employing People with Disabilities, Palgrave, Macmillan, 2020; Kamal Lamichhane. Disability, Education and Employment in Developing Countries- From charity to investment. Cambridge University Press. 2005; Tushti Chopra, 'Expanding the Horizons of Disability Law in India: A Study from a Human Rights Perspective' (2013) 41 J.L. Med. and Ethics 807 and Cotter, Anne M. 2007. This Ability: An International Legal Analysis of Disability Discrimination. Aldershot, Hampshire: Ashgate ref.

**(b) Constitution of Pakistan---**

----Arts. 9, 14(1) & 25(1)---Persons with disabilities---Fundamental rights under the Constitution---Scope---Constitution, as a whole, did not distinguish between a person with or without disabilities; it recognized inherent dignity of a human being; equal and inalienable rights of all the people as the foundation of freedom, justice and peace---Every person was entitled to all the rights and freedoms set forth therein, without distinction of any kind, therefore, it applied equally to persons with disabilities, guaranteeing them full enjoyment of their fundamental rights without discrimination---Triangular construct of the right to life, dignity and equality under the Constitution provided a robust platform for mainstreaming persons with disabilities.

Junaid Mahmood v. Government of Punjab PLD 2017 Lah. 1 ref.

**(c) Constitution of Pakistan---**

----Art. 14(1)---Right to human dignity---Scope and purpose---Purpose of the constitutional right to human dignity was to realize the constitutional value of human dignity; to realize a person's humanity; his free will; the freedom to shape his life and fulfill himself; a person's freedom to write his life story---Such vibrancy and vitality was the hallmark of a living constitution in a democracy.

Aharon Barack- Human Dignity- The Constitutional Value and the Constitutional Right, Cambridge 2015 p.144; Pakistan Tobacco Co. Ltd. and others v. Government of N. W.F.P. through Secretary Law and others PLD 2002 SC 460 and Reference No.01/2012 (Reference by the President of Pakistan under Article 186 of the Constitution of Islamic Republic of Pakistan, 1973 PLD 2013 SC 279 ref.

**(d) Disabled Persons (Employment and Rehabilitation) Ordinance (XL of 1981)---**

----S. 10---Constitution of Pakistan, Arts. 9, 14(1) & 18---Employment of persons with disabilities---Disability quota---Allocation of 2% disability quota against sanctioned posts---Scope and meaning---Disability Quota was to be calculated on the basis of the total sanctioned posts of the establishment---In every tier of the establishment, the total Disability Quota was to be further apportioned and allocated amongst different categories of posts in the establishment---Determination of different categories was on the basis of their distinct qualifications, selection criteria and separate merit list---In case the sanctioned strength of a post was less than 50, it would be for the establishment to allocate seat(s) from the overall Disability Quota against such a post---If a particular post was not fit for a person with disabilities, the establishment may shift the Disability Quota and adjust it against another post in the establishment so that the overall Disability Quota was maintained at all times.

Section 10 of the Disabled Persons (Employment and Rehabilitation) Ordinance, 1981 provided that not less than 2% of the total number of persons employed by an establishment at any time shall be persons with disabilities (PWDs). The total number of persons employed meant the total sanctioned posts of the establishment, i.e., an Organization, Authority, Department or Ministry. Two percent (2%) of the total sanctioned posts or workforce of the establishment became the Disability Quota for the establishment. Every establishment had a variety of posts with different qualifications; job descriptions and skill sets. Appointments to these posts were based on different selection criteria and separate merit lists. The mechanism for appointment against 2% Disability Quota was also to work side by side with the general recruitment process for every category of posts. Therefore, the total Disability Quota for the establishment was further apportioned and allocated against the sanctioned strength of various category of posts which had a separate selection criteria.

Phrase "disabled persons" is not approved should be persons with disabilities. Barrister Asfandyar Khan Tareen and others v. Government of the Punjab and others PLD 2018 Lah. 300 and Sajjad Ali v. Vice-Chancellor through Registrar University of Malakand at Chakdara, Dir Lower and others 2020 PLC (C.S.) 235 ref.

There may arise a situation where the posts in a particular category were less than 50, in that case it would be upto the establishment to allocate Disability Quota to respective categories of posts even though they were less than 50 posts in a particular category in order to maintain the overall Disability Quota of the establishment. It may also be the case that a particular category of posts in an establishment may not be fit for a person with disability, in that case the establishment may shift the Disability Quota to posts which are fit for PWDs. The prime objective was to maintain a 2% Disability Quota within the establishment and it was for the establishment to allocate the posts against respective categories in case they were less than 50 in a particular category or not suited to PWDs.

Allocation of 2% Disability Quota on the basis of the advertised posts as compared to the sanctioned posts was adverse to the interest of the PWDs for the reasons that 2% Disability Quota could only be actualized if there was a minimum of 50 posts advertised to secure one post for the PWDs. If the advertisement was for less than 50 posts (due to the vacancies arising at that particular time), Disability Quota on the basis of the advertised posts could not be worked out, depriving the PWDs of their prospect of employment. This could go on for a longtime as posts were advertised as per vacancies which varied from time to time, therefore, if Disability Quota were to be based on the advertised posts, the fate of the PWDs would continue to hang in the balance and remain uncertain unless the posts advertised happened to be above 50. It was, therefore, in the interest of the PWDs that the Disability Quota for the establishment was first worked out on the basis of the total sanctioned posts and then apportioned against the total sanctioned strength of different categories of posts. Thereafter, the posts could be successively filled as and when the vacancies arose through advertisement, keeping the total Disability Quota in mind rather than the number of posts advertised.

Filling the Disability Quota on the basis of advertised posts was, therefore, detrimental to the interest and welfare of the persons with disabilities; was against the letter of the law and offended their fundamental right to life and livelihood and their right to dignity

The advertisement for any category of post must clearly provide the total Disability Quota for that category of posts and the number of seats vacant under the said Disability Quota at the time of the advertisement. [p. 611] M

**(e) Disabled Persons (Employment and Rehabilitation) Ordinance (XL of 1981)---**

----Preamble---Constitution of Pakistan, Art. 14(1)---Words "disabled," "physically handicapped" and "mentally retarded"---Such words deeply bruised and offended human dignity of persons with different abilities---Supreme Court directed that the Federal Government and the Provincial Governments were to discontinue the use of such words in official correspondence, directives, notifications and circulars and shift to "persons with disabilities" or "persons with different abilities"; that the view taken by the (Lahore) High Court in the judgment Barrister Asfandyar Khan Tareen and others v. Govt. of the Punjab and others (PLD 2018 Lahore 300) was approved and must be given effect to.

PLD 2018 Lah. 300 approved.

**(f) Disabled Persons (Employment and Rehabilitation) Ordinance (XL of 1981)---**

----S. 10---Constitution of Pakistan, Arts. 9, 14(1), 18 & 25(1)---UN Convention on the Rights of Persons with Disabilities (UNCRPD), 2006, Art. 2---Employment of persons with disabilities---Disability quota of 2% against sanctioned posts---Persons with disabilities must be provided with the infrastructure, access, support, and facilities at their workplaces---Appropriate modification and adjustments, including assistive technology, where needed, were to be provided to ensure that persons with disabilities could enjoy on an equal basis with others all human rights and fundamental freedoms.

Appointing persons with disabilities under Disability Quota of 2% was half the story. The other half and perhaps the more important half was to provide the infrastructure, access, support, and facilities, so that persons with disabilities, once appointed to a post, could perform their job without feeling physically or emotionally incapacitated in any manner. The biggest barriers to the employment of persons with disabilities was the accessibility and their social acceptability at the workplace. The Government and the concerned establishment was bound to make provisions for it, for otherwise, the Disability Quota and the purpose of the Disabled Persons (Employment and Rehabilitation) Ordinance, 1981, would stand frustrated and serve no useful purpose. This support and facilitation for persons with disabilities had been recognized as 'Reasonable Accommodation' under the Convention on the Rights of Persons with Disabilities (CRPD) that Pakistan had ratified in 2011. It means necessary and appropriate modification and adjustments where needed in a particular case to ensure persons with disabilities the enjoyment on an equal basis with others of all human rights and fundamental freedoms.

Reasonable accommodation could be through assistive technology, which was an umbrella term that included assistive, adaptive, and rehabilitative devices for people with disabilities. Assistive technology promoted greater independence by enabling persons with disabilities to perform tasks that they were formerly unable to accomplish, or had great difficulty accomplishing, by providing enhancements to, or changing methods of interacting with, the technology needed to accomplish such tasks.

Dr. K. Thiyagu, Assistive Technology and Inclusive Education, Laxmi Book Publications, 2014 ref.

Ishtiaq A. Ch., Advocate High Court appeared with permission of the Court along with petitioner for Petitioner.

S.N. Khawar, Addl. A.G. and Asif Mahmood Cheema, Addl. A.G. along with Tariq Habib, DEO/D.R. for Respondents.

Date of hearing: 14th July, 2020.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**The Petitioner applied for the post of Senior Elementary School Educator Arabic ("SESE [Arabic]") on the disability quota ("Disability Quota") in pursuance to the advertisement put out by the Education Department, Local Government, Multan. According to the advertisement, in addition to the other posts, a total of 81 posts of SESE [Arabic] were advertised with 42 posts in female category and 39 posts in the male category at the Girls and Boys schools, respectively. Thereafter, only one Mst. Asma Qasim was appointed against the said post under the Disability Quota and the petitioner failed to secure a position. Admittedly, Mst. Asma Qasim with 62.78 Marks topped the merit list for the post of SESE [Arabic] under the Disability Quota and the petitioner with 43.53 Marks could not be offered a post. Aggrieved of not being offered a place, the petitioner challenged the selection process under Disability Quota before the High Court by invoking its constitutional jurisdiction. His writ petition was dismissed vide order dated 28.10.2013 and so did his appeal before the High Court (ICA) vide impugned order dated 01.12.2014.

2. After hearing the parties and having gone through the record, the legal question that arises in this case is the manner of allocation of 2% Disability Quota for employment under the Disabled Persons (Employment and Rehabilitation) Ordinance, 1981 ("Ordinance")[1]. The Ordinance requires that 2% of the total number of persons employed by an establishment at any time shall be "disabled persons"[2]. In order to fully understand the allocation mechanism of the Disability Quota under the Ordinance, it would be useful to first understand the concept of Disability and the importance of role of employment in the lives of persons with disabilities ("PWDs") as compared to persons without disabilities.

CONCEPT OF DISABILITY

3. Disability means lacking one or more physical powers, such as the ability to walk or to coordinate one's movements, as from the effects of a disease or accident, or through mental impairment.[3] According to the UN Convention on the Rights Of Persons With Disabilities ("CRPD" or "Convention") ratified by Pakistan in 2011, persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Medical and Social model

4. There are two main threads to the concept of disability: the medical model and the social model. Both models regard disability as a difficult predicament commonly faced by people; however, while the medical model looks at disability as a condition requiring medical intervention, the social model looks at it as a condition that requires the transformation of societal attitudes and state policies.[4] The medical model views disability as an impairment due to various health related factors which can be identified and eradicated through medical treatment.[5] While the social model identifies systemic barriers, negative attitudes and exclusion by society and argues that societal attitudes and environment are the main barriers for people with disabilities.

5. The social model argues that Disability is the loss or limitation of opportunities to participate in activities - social, economic and political - on an equal footing with those with no impairments. "Disability is the outcome of an oppressive relationship between people with impairments and the rest of society".[6] It has been argued that society is the cause of disability and reject the idea of it being a personal tragedy.[7]

6. The social and economic inclusion of people with disabilities in development has not been realized, despite the fact that disability belongs to the socio-economic development agenda. There is a reluctance to consider disability from the viewpoint of investment. Human capital development such as education and employment are among the most important factors for inclusion and economic empowerment. When these factors are made inclusive and accessible to persons with disabilities, it not only leads to an improvement in their livelihoods but also improves the prospects of their families and of society as a whole.[8] Disability is thus not just a health problem. It is a complex phenomenon,

reflecting the interaction between features of a person's body and features of the society in which he or she lives.[9]

Employment for persons with disabilities

7. According to International Labour Organization (ILO) an estimated 386 million of the world's working-age are PWDs. The unemployment among the PWDs is as high as 80 per cent in some countries. Often employers assume that persons with disabilities are unable to work. In Pakistan, estimates of the number of persons living with disabilities vary between 3.3 million and 27 million.[10]

8. Employment is equally important to all people, without it, social inclusion and economic independence are unlikely to be achieved. Among the crucial social functions that employment can facilitate are financial independence and social inclusion. It has also been found to improve social status, provide social support and enable workers to make a contribution, thereby leading to an increase in self-worth[11]. Employment has the potential to improve a person's financial situation, open up opportunities for social contact, build (new) friendships and increase people's self-esteem. By contrast, unemployment can cause not only poverty and social exclusion but also result in a lower sense of self-worth. The effects of unemployment on physical health like symptoms of somatization disorder, depression and anxiety were significantly greater in unemployed than employed individuals.[12] The situation for people with disabilities may have consequences of a greater extent as they tend to be looked upon as dependents of their families and relatives and are not expected to be gainfully employed or independent. Work has been, and will undoubtedly continue to be, central to all human societies.

9. One of the major difficulties faced by persons with disabilities is that employers have the erroneous assumption that these people will probably underperform in most areas of their duties - something which is actually not the case. Another plausible issue is that when the majority of workplaces are not made accessible to people with disabilities, employers may feel that they will have to make an unwarranted investment to provide facilities for people with disabilities, and some do not believe in the employment potential of such people.[13]

Rights based approach towards disability

10. The paradigm in disability has shifted from charity to investment, exclusion to inclusion and sympathy to rights-based approach towards disability.[14] Disabled people initially were not considered worthy of any rights. The disabled were treated as abnormal or different from society, and thus needed to be given medical treatment under the medical model. Under the social model, disability is explained as a condition created by society and the environment, and not the result of an individual's impairment. The human rights model or rights-based model embodies the values or principles of dignity, respect, equality, and social justice to the disabled. The UN Convention on the Rights of Persons with Disabilities of 2006 ("CRPD") created a binding framework for the rights-based model of disability law. Disabled persons by virtue of being a human have the right to enjoy life, liberty, equality, security and dignity.[15]

11. In Pakistan, policy approaches to disability have largely been focused on rehabilitation, welfare handouts and related charity. This has been changing since CRPD, which Pakistan ratified in 2011, but progress around building an inclusive society has been woefully slow. The Convention, which became operational in 2008, is the first human rights treaty of the 21st century and the first UN treaty protecting the fundamental rights of persons with disability. In line with the general discourse around development-related issues today, the treaty is a move towards viewing disability from a rights-based approach.[16]

12. CRPD works to promote and protect the human rights of people with disabilities. With Article 27 explicitly recognizing their right to work on an equal basis with others. The same Article further emphasizes the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to people with disabilities. CRPD also prohibits all forms of employment discrimination, promotes access to vocational training, promotes opportunities for self-employment and calls for reasonable accommodation in the workplace. The new

dimension in the treatment of persons with disabilities, which the Convention sanctions, is the departure from the perception of people with disabilities as "objects" of mercy, treatment and social protection, to the perception of disabled people as "subjects" possessing rights, which they are able to claim, make decisions and be active members of society. This legal act is based on values arising from fundamental human rights. It guarantees people with disabilities equal access to institutions and the possibility of pursuing social activities and fulfilling the roles on the same principles as those who are able-bodied.[17]

DISABILITY AND OUR CONSTITUTION

13. Our Constitution, as a whole, does not distinguish between a person with or without disabilities. It recognizes inherent dignity of a human being; equal and inalienable rights of all the people as the foundation of freedom, justice and peace. Every person is entitled to all the rights and freedoms set forth therein, without distinction of any kind. It, therefore, applies equally to persons with disabilities, guaranteeing them full enjoyment of their fundamental rights without discrimination. The triangular construct of the right to life, dignity and equality under the Constitution provides a robust platform for mainstreaming persons with disabilities.[18] "The purpose of the constitutional right to human dignity is to realize the constitutional value of human dignity; to realize a person's humanity; his free will; the freedom to shape his life and fulfill himself. It is a person's freedom to write his life story."[19] Such vibrancy and vitality is the hallmark of a living constitution in a democracy.[20]

2% DISABILITY QUOTA - HOW TO BE WORKED OUT.

14. Understanding Disability and the importance of employment for PWDs, we now examine the relevant provision of the Ordinance. The preambular statement of the law is that it is an Ordinance to provide for the employment, rehabilitation and welfare of PWDs. Section 10 of the Ordinance provides as under:-

10. Establishments to employ disabled persons.[21]

(1) Not less than two percent of the total number of persons employed by an establishment at any time shall be disabled persons whose names have been registered with the Employment Exchange of the area in which such establishment is located and against whose names in the register maintained under section 12 an endorsement exists to the effect that they are fit to work.

(2) The disabled persons employed against any post in pursuance of subsection (1) shall be entitled to the terms and conditions which are not less favourable than those of the other persons employed by the establishment against similar posts.

(3) When calculating the percentage of the posts in an establishment for the purposes of employment of disabled persons, the fraction of 0.5 and above shall count as a whole number.

Section 10 of the Ordinance provides that not less than 2% of the total number of persons employed by an establishment at any time shall be PWDs. The total number of persons employed means the total sanctioned posts[22] of the establishment, i.e., an Organization, Authority, Department or Ministry. 2% of the total sanctioned posts or workforce of the establishment becomes the Disability Quota for the establishment. Every establishment has a variety of posts with different qualifications; job descriptions and skill sets. Appointments to these posts are based on different selection criteria and separate merit lists. The mechanism for appointment against 2% Disability Quota is also to work side by side with the general recruitment process for every category of posts. Therefore, the total Disability Quota for the establishment is further apportioned and allocated against the sanctioned strength of various category of posts which have a separate selection criteria. For example in the instant case the Disability Quota in the respondent Education Department is as follows, including the Disability Quota for the post of SESE [Arabic]:

CADRE WISE POSTS - 2009

| # | POST | SANCTION | 2% DISABILITY QUOTA |
|---|---|---|---|
| 1 | SSE/SST | 1326 | 27 |
| 2 | EST/SESE (Arts, Science) | 1699 | 34 |
| 3 | EST (OT) | 299 | 6 |
| 4 | EST (ARABIC) | 252 | 5 |
| 5 | EST (DM) | 159 | 3 |
| 6 | EST (Phy) | 291 | 6 |
| 7 | ESE/PST | 5900 | 118 |
| 8 | NON TEACHING POSTS | 2306 | 46 |
| TOTAL Sanctioned Posts | | 12,232 | 245 |

15. There may arise a situation where the posts in a particular category are less than 50, in that case it will be upto the establishment to allocate Disability Quota to respective categories of posts even though they are less than 50 posts in a particular category in order to maintain the overall Disability Quota of the establishment. It may also be the case that a particular category of posts in an establishment may not be fit for a person with disability, in that case the establishment may shift the Disability Quota to posts which are fit for PWDs. The prime objective is to maintain a 2% Disability Quota within the establishment and it is for the establishment to allocate the posts against respective categories in case they are less than 50 in a particular category or not suited to PWDs.[23]

16. The Allocation of 2% Disability Quota on the basis of the advertised posts as compared to the sanctioned posts is adverse to the interest of the PWDs for the reasons that 2% Disability Quota can only be actualized if there is a minimum of 50 posts advertised to secure one post for the PWDs. If the advertisement is for less than 50 posts (due to the vacancies arising at that particular time), Disability Quota on the basis of the advertised posts cannot be worked out, depriving the PWDs of their prospect of employment. This can go on for a longtime as posts are advertised as per vacancies which vary from time to time, therefore, if Disability Quota were to be based on the advertised posts, the fate of the PWDs would continue to hang in the balance and remain uncertain unless the posts advertised happen to be above 50. It is, therefore, in the interest of the PWDs that the Disability Quota for the establishment is first worked out on the basis of the total sanctioned posts and then apportioned against the total sanctioned strength of different categories of posts. Thereafter, the posts can be successively filled as and when the vacancies arise through advertisement, keeping the total Disability Quota in mind rather than the number of posts advertised.

17. In the present case the posts advertised for SESE [Arabic] were 81 which allows for one post in the Disability Quota, while if the Disability Quota is worked out on the total sanctioned strength of the posts of SESE [Arabic] it comes to 5 posts (see chart above) and 4 more PWDs could have been appointed against the said posts against the advertisement in question. Filling the Disability Quota on the basis of advertised posts is, therefore, detrimental to the interest and welfare of the persons with disabilities; is against the letter of the law and offends their fundamental right to life and livelihood and their right to dignity.

18. Summarizing the above we hold that: (i) The 2% (and now 3%)[24] Disability Quota is to be calculated on the basis of the total sanctioned posts of the establishment. (ii) In order to ensure fair and equitable representation of persons with disabilities (PWDs) in every tier of the establishment, the total Disability Quota is to be further apportioned and allocated amongst different categories of posts in the establishment. The determination of different categories is on the basis of their distinct qualifications, selection criteria and separate merit list. (iii) In case the sanctioned strength of a post is less than 50, it will be for the establishment to allocate seat(s) from the overall Disability Quota against such a post (iv) if a particular post is not fit for a PWD, the establishment may shift the Disability Quota and adjust it against another post in the establishment so that the overall Disability Quota is not disturbed and maintained at all times. (v) The advertisement for any category of post must clearly provide the total Disability Quota for that category of posts and the number of seats vacant under the said Disability Quota at the time of the advertisement.

Use of inappropriate and insensitive words

19. It is also observed that words like "disabled," "physically handicapped" and "mentally retarded" deeply bruise and offend human dignity of persons with different abilities. The Federal Government and the Provincial Governments are directed to discontinue the use of these words in official correspondence, directives, notifications and circulars and shift to "persons with disabilities" or "persons with different abilities". The view taken by the Lahore High Court in Barrister Asfandyar Khan case[25] is approved and must be given effect to.

Employment is half the story

20. Appointing persons with disabilities under Disability Quota of 2% is half the story. The other half and perhaps the more important half is to provide the infrastructure, access, support, and facilities, so that persons with disabilities, once appointed to a post, can perform their job without feeling physically or emotionally incapacitated in any manner. The biggest barriers to the employment of persons with disabilities is the accessibility and their social acceptability at the workplace. The Government and the concerned establishment is bound to make provisions for it, for otherwise, the Disability Quota and the purpose of the Ordinance will stand frustrated and serve no useful purpose. This support and facilitation for persons with disabilities has been recognized as Reasonable Accommodation under the Convention on the Rights of Persons with Disabilities (CRPD) that Pakistan has ratified in 2011. It means necessary and appropriate modification and adjustments where needed in a particular case to ensure persons with disabilities the enjoyment on an equal basis with others of all human rights and fundamental freedoms.

21. It is elaborated that Reasonable Accommodation can be through assistive technology, which is an umbrella term that includes assistive, adaptive, and rehabilitative devices for people with disabilities. Assistive technology promotes greater independence by enabling PWDs to perform tasks that they were formerly unable to accomplish, or had great difficulty accomplishing, by providing enhancements to, or changing methods of interacting with, the technology needed to accomplish such tasks.[26] The Convention provides that no one can be discriminated on the ground of disability and obligates the State to take steps to provide Reasonable Accommodation in order to provide inclusion and access to persons with disabilities in the society.

Relief

22. In the present case the Disability Quota for 252 posts[27] of SESE [Arabic] is 5 posts but only one post out of this Disability Quota has been filled by Mst. Asma Qasim. Therefore, respondents are directed to reconsider the case of the petitioner, preferably along with the other applicants with disabilities who had applied for the said posts (if they can be reached out) and fill the Disability Quota for SESE [Arabic] only if petitioner and other applicants (if any) meet the selection criteria fixed for the said post. Let this exercise be completed within a period of one month from the receipt of this

judgment through a speaking order. For the above reasons the impugned orders of the High Court are set aside. This petition is converted into an appeal and allowed in the above terms.

MWA/U-2/SC Petition allowed.

**P L D 2020 Supreme Court 617**

**Present: Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ**

**FAROOQ HUSSAIN and others---Petitioners**

**Versus**

**Sheikh AFTAB AHMAD and others---Respondents**

C.R.Ps. Nos. 104-L, 114-L in C.Ps. 258-L, 257-L of 2019, decided on 18th August, 2020.

(Against the order of the Supreme Court of Pakistan dated 01.08.2019, passed in C.Ps. Nos.257-L and 258-L/2019).

**(a) Constitution of Pakistan---**

----Arts. 10-A, 184, 185 & 188---Judgments/orders challenged before the Supreme Court---Judgment given by the Supreme Court---Scope and contents---If the Supreme Court, having examined the judgment challenged before it, was satisfied with its reasoning and conclusions and was of the view that it did not call for any interference, the Supreme Court could simply endorse the impugned judgment and adopt the reasoning of the court below---In such cases re-tracing the same path travelled by the court below appeared to be an unnecessary exercise and a waste of public time---Finding no reversible error in the judgment, a concise, simple order could suffice, however if the Court was to reverse or modify the judgment of the court below, the reasons for the reversal or modification must be set forth---Such approach was by no means a short-cut which was offensive to fair trial under Art. 10-A of the Constitution.

One of the grounds for review in the present case was that the order under review was without any reason. The order under review passed by the Supreme Court read:- "We have heard the learned counsel for the petitioners at some length and have gone through the impugned judgment of the High Court, the record of the case and the law on the subject. We have not been able to take any exception to the reasoning of the impugned judgment and are of the view that it does not warrant any interference. Leave is, therefore, declined and these petitions are dismissed."

If the Supreme Court, having examined the judgment challenged before it, was satisfied with its reasoning and conclusions and was of the view that it did not call for any interference, the Supreme Court could simply endorse the impugned judgment and adopt the reasoning of the court below. In such a case, re-tracing the same path travelled by the court below appeared to be an unnecessary exercise and a waste of public time - time which could be allocated to other cases where the decisions of the courts below had been overturned or modified. Finding no reversible error in the judgment, a concise, simple order could suffice. On the other hand, if the Court was to reverse or modify the judgment of the court below, the reasons for the reversal or modification must be set forth.

Such approach adopted by the court, was by no means a short-cut which was offensive to fair trial under Article 10-A of the Constitution nor did it in any manner undermine due process and fair-play. It was simply a creative way forward that spared the Court from writing opinions where a mere adoption of a well-reasoned judgment of the court below through a short order served the purpose adequately.

**(b) Administration of justice---**

----Case management and time management by courts---Nothing was cast in stone---Old practices evolved with changing times---Burgeoning population and the corresponding rapid increase in litigation required imaginative solutions (from the courts)---Courts all over the world had moved on to efficient time and case management techniques.

Dr. Abdul Basit, Advocate Supreme Court for Petitioners (in both cases).

Mian Muhammad Hussain Chotya, Advocate Supreme Court for Respondents (in both cases).

Date of hearing: 18th August, 2020.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**After condoning the period of limitation (as under), we heard the learned counsel for the parties at some length and have gone through the impugned order, the record of the case and the law on the subject. We find that no ground for review of the impugned order dated 01.08.2019 is made out.

2. We have also noticed that one of the grounds for review is that the order under review is without any reason. The order passed by this Court on 01.08.2019 was as under:-

> "We have heard the learned counsel for the petitioners at some length and have gone through the impugned judgment of the High Court, the record of the case and the law on the subject. We have not been able to take any exception to the reasoning of the impugned judgment and are of the view that it does not warrant any interference. Leave is, therefore, declined and these petitions are dismissed."

It is emphasised that if this Court, having examined the judgment challenged before it, is satisfied with its reasoning and conclusions and is of the view that it does not call for any interference, this Court can simply endorse the impugned judgment and adopt the reasoning of the court below. In such a case, re-tracing the same path travelled by the court below appears to be an unnecessary exercise and a waste of public time - time which can be allocated to other cases where the decisions of the courts below have been overturned or modified. Finding no reversible error in the judgment, a concise, simple order can suffice. On the other hand, if the Court is to reverse or modify the judgment of the court below, the reasons for the reversal or modification must be set forth.[1]

3. This approach adopted by the court, is by no means a short-cut which is offensive to fair trial under Article 10-A of the Constitution nor does it in any manner undermine due process and fair-play. It is simply a creative way forward that spares the Court from writing opinions where a mere adoption of a well-reasoned judgment of the court below through a short order serves the purpose adequately.

4. Nothing is cast in stone. Old practices evolve with changing times. Burgeoning population and the corresponding rapid increase in litigation require imaginative solutions. Courts all over the world have moved on to efficient time and case management techniques. Therefore this ground for review is absolutely misconceived.

5. As no ground for review is made out, these civil review petitions are, therefore, dismissed.

C.M.As. Nos. 2831-L/2019 and 3746-L of 2019)

6. These are applications for condonation of delay in filing the titled civil review petitions. For the reasons given in the said applications, the same are allowed.

MWA/F-13/SC Order accordingly.

**P L D 2020 Supreme Court 641**

**Present: Mushir Alam, Faisal Arab and Syed Mansoor Ali Shah, JJ**

**Messrs KHURSHID SOAP AND CHEMICAL INDUSTRIES (PVT.) LTD. through Sheikh Muhammad Ilyas and others---Petitioner**

**Versus**

**FEDERATION OF PAKISTAN through Ministry of Petroleum and Natural Resources and others---Respondents**

CIVIL APPEALS NOS.1113 TO 1155 OF 2017 AND CIVIL PETITIONS NOS.3124, 387-P, 389-P, 392-P, 393-P, 394-P, 399-P, 400-P, 3027, 3028, 3029, 3030, 3138, 3241, 3259, 3260, 3327 AND 3411 OF 2017 AND 3385 OF 2018

(On appeal against the judgments dated 31.05.2017, 28.5.2019, 9.8.2017, 18.8.2017, 21.8.2017, 11.6.2015 passed by the Peshawar High Court, Peshawar in Writ Petitions Nos. 2178-P/2015 and 2729 to 2731, 3056, 3057, 3058, 3081, 3082, 3109, 3110, 3111, 3112, 3113, 3118, 3137, 3157, 3216, 3268, 3297, 3413, 3489, 3890 of 2014, 542, 858, 885, 2160 to 2166, 2179 to 2182, 2164 to 2166, 2179 to 2198, 2210 to 2233, 2254, 2263 to 2265, 2287 to 2290, 2305, 2307, 2308, 2329, 2373, 2466 to 2468, 2533, 2556, 2558, 2575, 2576, 2589 to 2591, 2593, 2606, 2607, 2608, 2723, 2820, 2852, 2870, 3133, 3163, 3496, 3881, 3915, 3974, 4074, 4522 of 2015, 19, 165, 1415, 1757, 3569, 3849 of 2016, 1601, 1650, 1849, 3270-P, 33104-P, 3302-P, 2843-P of 2017, 2293-P, 778-A, 2232-P to 2234-P, 2427-P to 2429-P, 2472-P, 2938-P, 2939-P, 2940-P, 4300-P of 2016, 589-P, 2408-P of 2017 and 3085-P of 2014).

AND

CIVIL MISCELLANEOUS APPLICATIONS NOS. 20, 86, 812, 813, 814, 815, 1022, 2014 OF 2020 AND 8277, 8278, 8279, 3076, 9149, 9186, 9301, 9305, 9521, 9746, 9844, 10608 OF 2019, 8497 OF 2018, 5307 AND 9153 OF 2017.

(Applications for Impleadment)

AND

CIVIL MISCELLANEOUS APPLICATIONS NOS. 5295, 5511, 5635, 5637, 5639, 5641, 5643, 5645, 5647, 5649, 5651, 5678 TO 5686, 5689 TO 5696, 5699, 5701, 5703, 5705, 5707, 5709, 5711, 5713 AND 5715 TO 5721 OF 2017.

(Applications for Stay)

Per Faisal Arab, J; Mushir Alam, J agreeing; [Majority view]

**(a) Res judicata, principle of---**

----Scope---Principle of res judicata was a principle of peace---Once a controversy with regard to a right in property or a right to office was adjudicated upon and attained finality through a judicial pronouncement of a competent Court of law, it no more remained open to challenge in any subsequent judicial proceedings between the same parties on the same subject matter---Said principle was intended not to afford a litigant more than one opportunity for resolution of a judicial dispute and thus eliminated the chances of repetitious and successive litigation against a party on the same issue---Maxim "that there should be an end to litigation" was germane to such matters.

**(b) Res judicata, principle of---**

----Applicability and scope---Vires of a statute---Conflicting judgments of two High Courts---In case of conflicting decisions on the vires of a legislative enactment of two High Courts, when decision of one remained unchallenged in the hierarchy as no appeal was preferred and the other was challenged before the Supreme Court, then the verdict of the High Court that went unchallenged, which was in conflict with the final decision of the Supreme Court had to be treated as outmoded and no longer executable---Such a situation warranted departure from the doctrine of res judicata.

Any relief which a litigant sought in a judicial proceeding with regard to any power or a right or an obligation connected with some property or an office which power or right or obligation was not

dependent upon the legitimacy of a legislative enactment and stood or fell on its own strength then in such cases when the decision rendered by a court of competent jurisdiction attained finality, there was no difficulty in applying the principle of res judicata to such a decision. However, it would be difficult to apply such a principle in matters where a power or a right or an obligation solely depended upon the very legitimacy of the enactment that had come under challenge in a Court of law on the touchstone of the Constitution. In such a situation the existence of such power or right or obligation would solely depend on the final adjudication as to the legal validity of the enactment itself. This could be understood from a situation where a controversy as regards constitutional validity of an enactment had come under challenge before two High Courts, one declaring the enactment ultra vires the Constitution and the other intra vires. If the principle of res judicata was applied to the decision of the High Court that declared the law ultra vires as the same was not challenged any further by the Government then two conflicting declarations would stand side by side on the legitimacy of a legislative enactment, one party treating the law valid and the other invalid. This would lead to treating an Act of the parliament valid for some and invalid for others though both the set of persons were similarly placed. If the decision rendered by the High Court that declared the law intra vires the Constitution was only challenged before the Supreme Court and after examining the merits of the case the enactment was declared by the Supreme Court to be intra vires the Constitution, then in such peculiar situation when the Supreme Court finally validated the legislative enactment then the same had to be applied uniformly to every person falling within its ambit. Such final judicial determination on the legitimacy of a legislative enactment had to be treated as a judgment in rem regardless of the fact that the judgment of the High Court that invalidated the very same enactment was not challenged before the Supreme Court. Such a situation warranted departure from the doctrine of res judicata. Omission of a public functionary to file appeal could not put fetters on the universal application of a legislative enactment declared by the Supreme Court to be constitutionally valid as it would amount to repealing the statute for some and treating it valid for others.

Hence where there were conflicting decisions on the vires of a legislative enactment of two High Courts, and decision of one remained unchallenged in the hierarchy as no appeal was preferred and the other was challenged before the Supreme Court, then the verdict of the High Court that went unchallenged, which was in conflict with the final decision of the Supreme Court had to be treated as outmoded and no longer executable.

United States v. Stone and Downer Co. [274 U.S. 225 (1927)] ref.

Pir Bukhsh and others v. Chairman Allotment Committee PLD 1987 SC 145 distinguished.

The final determination of the Supreme Court on the legitimacy of a law had to apply even to those who had succeeded in obtaining a judgment from a Court lower in the hierarchy that the law was ultra vires the Constitution, they too would be bound by the judgment of the Supreme Court, if it had through a judicial pronouncement declared a legislative enactment to be valid.

**(c) Limitation Act (IX of 1908)---**

----S. 3---Matter instituted after period of limitation---Connected case filed within limitation period---Matter filed after the period of limitation could also be decided on merits with a connected case that was filed within time.

Mehran Zaibun Nisa and others v. Land Commissioner, Multan and others PLD 1975 SC 397 and Province of Punjab v. Muhammad Tayyab 1989 SCMR 1621 ref.

**(d) Constitution of Pakistan---**

----Arts. 73, 77 & Fourth Sched. Pt. II, Entries Nos. 47 to 53---Taxes and fees, levy of---Prerogative of the Legislature---Under the Constitution it was the prerogative of the legislature to raise revenue for the government on matters that fell within its legislative competence---Legislature enjoyed the privilege to identify the base of the levy i.e. those upon whom the incidence of the levy would fall and

also determine the quantum to be charged from them, which could either be at a fixed rate or ad valorem---Under the Constitution the legislature could levy taxes as well as fees.

**(e) Fee---**

----Fee imposing legislative enactments, types of---'Fee-simplicitor' and 'Cess-fee'---Distinction---Basic difference between an enactment where fee simplicitor was imposed and where Cess-fee was imposed was that in the former a service or a privilege was made available to the payer directly on the strict principle of quid pro quo whereas in the latter case, the declared purpose came with a promise to bring some benefit or advantage in future which was basically meant for its payers---In order to remain as a fee-levying enactment, the purpose for which the Cess was to be charged should be well spelled out and defined in the enactments as narrowly as possible lest it may convert it into a tax-levying enactment---Proceeds of Cess should be clearly identifiable in the accounts by using separate accounting codes so that its collection and utilization was reconcilable with the purposes stated in the enactment.

There were two kinds of fee-imposing legislative enactments. One was based purely on the principle of quid pro quo i.e. a charge was payable for rendering a specific service or extending a specific privilege which the payers could avail subject to the conditions that may be attached to it. In other words, it could be called as 'fee-simplicitor'. In such an enactment there was direct and immediate correlation in absolute terms between the service that was rendered and the fee that was charged for it. The other kind of a fee-levying legislation was where 'Cess' was imposed as a compulsory exaction in the same manner where taxes were imposed with the distinction that it was imposed for achieving a specific purpose promised in the enactment itself which when realized would bring some advantage or benefit for the payers in future. Such benefit or privilege once made available on the ground may be availed by others as well but that would not change the status of such fee-levying enactment. It would remain a specie of fee-levying enactment in contradistinction to tax-levying enactment in which no specific purpose or specific service needed to be disclosed by the legislature in order to justify its imposition. Cess-fee could be described as 'purpose specific'. In such a form of levy, the specified purpose was pre-committed to the payers before the revenue was collected under the legislation. For example, Cess was imposed to meet the extraordinary costs involved in providing infrastructure such as construction of dams or for importing oil or gas from abroad through pipelines or to build farm to mill roads in order to facilitate marketing of the agricultural produce or for conducting research and development in some specialized field. In such a form of levy the rule of quid pro quo did not exist in the same sense as it existed in a case where an existing service was rendered or a privilege was extended directly to the payer for a fee. What needed to be taken into consideration was whether the enactment had promised some benefit or advantage for the payers to be made available in future by utilizing the revenue, making it more akin to a fee then a pure revenue raising measure like taxes in general were imposed with no precondition attached for their spending.

Hinger-Rampur Coal Co. Ltd. and others v. The State of Orissa AIR 1961 SC 459; Sona Chandi Oal Committee v. State of Maharashtra AIR 2005 SC 635; State of West Bengal v. Kesoram Industries Limited AIR 2005 SC 1646 and Messrs Gasket Radiators Pvt. Ltd. v. Employees' State Insurance Corporation and another AIR 1985 SC 790 ref.

When Cess as a fee was levied to meet an earmarked financial exigency spelt out in an enactment, it preserved the levy for such purpose only even with the change in the government setup. It could not be levied as a general revenue collecting tool and the government would not be justified to collect it if the funds were diverted to some other expenditure. So it was like a 'promised spending' to be applied to the specific purpose described in the enactment. Hence, in order to remain as a fee-levying enactment, the purpose for which the Cess was to be charged should be well spelled out and defined in the enactments as narrowly as possible lest it may convert it into a tax-levying enactment. The proceeds of Cess should be clearly identifiable in the accounts by using separate accounting codes so that its

collection and utilization was reconcilable with the purposes stated in the enactment. A correlation between the revenue collected and the expenditure incurred for the promised specific purpose should always be maintained. In such manner the earmarked levy also provided information on the amount collected and spent. This also inculcated confidence in the payers as it contained the promise that the revenue would be utilized for the specific purpose only for which it was collected and they would have a claim to transparency and accountability of the utilization of the revenue so collected. When the revenue could only be utilized for the purpose promised in the fee-levying enactment then in that sense the levy could also be regarded as a temporary levy. Once the purpose for which it was imposed stood served, the justification for its imposition also came to an end. The collection of Cess therefore should be based on some calculation keeping in view the funding requirements and as and when the purpose was achieved, the government lost its right to collect Cess regardless of the fact that the enactment continued to remain in force.

**(f) Legislation---**

----Legislature, powers of---Re-enacting a law on the same subject with retrospective effect---Scope---Legislature had the right to re-enact a law on the same subject, which on account of legal infirmities in its enactment process had been declared invalid by a Court of law, by removing the causes that led to its invalidity---Legislature was also competent to make the re-enacted law applicable retrospectively in order to bind even the past transactions that had been declared invalid.

Molasses Trading and Export (Pvt.) Limited v. Federation of Pakistan 1993 SCMR 1905; Mamukanjan Cotton Factory v. Punjab Province PLD 1975 SC 50; FECTO Belarus Tractor Ltd v. Government of Pakistan through Finance Economic Affairs PLD 2005 SC 605; Dr. Mobashir Hassan v. Federation of Pakistan PLD 2010 SC 265 and Contempt Proceedings against Chief Secretary, Sindh 2014 PLC (C.S.) 82 ref.

**(g) Interpretation of statutes---**

----Constitutionality of a statute---Courts should lean towards the constitutionality of a legislative enactment instead of destroying it, keeping in view the rules of constitutional interpretations.

Dr. Mobashir Hassan v. Federation of Pakistan PLD 2010 SC 265 ref.

**(h) Constitution of Pakistan---**

----Fourth Sched.---Entries in Legislative Lists----Liberal interpretation---Entries to the Legislative Lists were not the source of legislative power but were merely topics of fields of legislation and allocation of the subjects to the lists was not by way of scientific or logical definition but by way of mere simple enumeration of broad catalogue---Such entries must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense---If a legislation purporting to be under a particular legislative entry was assailed for lack of legislative competence, the State could always show that the law was supportable under any other entry within its legislative competence.

Ujagar Prints v. Union of India and others AIR 1989 SC 516 and Elahi Cotton Mills Ltd. v. Federation of Pakistan PLD 1997 SC 582 ref.

Per Faisal Arab, J; Mushir Alam, J. agreeing; Syed Mansoor Ali Shah, J. dissenting.

**(i) Gas Infrastructure Development Cess Act (IV of 2015)---**

----Ss. 3 & 4---Constitution of Pakistan, Arts. 18, 24(1), 25, 70 & Fourth Sched., Pt. I, Entry Nos. 27, 51 & 54---Industrial and commercial consumers of natural gas---Gas Infrastructure Development Cess('GIDC cess')---Gas Infrastructure Development Cess Act, 2015 ('GIDC Act, 2015), vires of---[Per Faisal Arab, J [Majority view]: Entries 27, 51 & 54 of Part I of the Federal Legislative List contained in the Fourth Schedule to the Constitution enabled the legislature to legislate GIDC Act, 2015---Fee imposed under the GIDC Act, 2015 was clearly intended to facilitate import into Pakistan of natural gas on the basis of trade agreements executed with foreign countries which acts clearly fell within the ambit of Entry No. 27---Whole purpose of enacting GIDC Act, 2015 was to facilitate import of natural gas / LNG into the country from nearby countries in order to meet the ever expanding energy

needs of the country and the cheapest way to import it was through overland transnational pipelines---As the GIDC Act, 2015 contained a well-defined object meant for making future availability of natural gas more convenient and without interruption that would mainly benefit the industrial and commercial consumers, therefore, in pith and substance the GIDC Act, 2015 was a fee-imposing enactment---Object which the Parliament had promised in the GIDC Act, 2015 was clearly 'purpose based' which was distinctly defined and carried with it an element of quid pro quo, making it a fee-imposing enactment instead of a tax-imposing enactment---Whatever Cess had been collected to date had been accounted for by the Federal Government in its annual accounts recording it under separate code numbers and was thus identifiable separately from the other revenues of the Federal Government---Provisions of S.8 of the GIDC Act 2015, which gave retrospective effect to the charge and recovery of GIDC cess levied from the year 2011 were also valid being within the legislative competence of the Parliament---Levy imposed under Gas Infrastructure Development Cess Act, 2015 was in accordance with the provisions of the Constitution---Per Syed Mansoor Ali Shah, J., dissenting. [Minority view]: Gas consumers had been paying GIDC cess for almost a decade, however, there had been no work on the ground for the projects for which the cess was being collected---Admittedly not a single Annual Report, as required under S.4(2) of the GIDC Act, 2015, was tabled before the Houses of the Parliament except the one placed before the Parliament after the filing of present cases---Government had hoodwinked the Parliamentary oversight, paying little heed to the energy crisis in the country; the interest of the gas consumers who had been regularly paying GIDC cess and the welfare of the general public---Any fiscal legislation that imposed a Fee, must clearly spell out the nature of service to be rendered and the reasonable timeline for the delivery of such service---Legislation (including subordinate legislation) must provide a complete mechanism including the consequences of stoppage of collection of Fee or extension of time or refund of Fee in case the project was delayed or could not be executed in the proposed timeline, respectively---Legislation must safeguard and protect the reciprocity behind a Fee (unlike a tax) by providing corresponding obligations and duties on the parties to the levy---Present GIDC Act, 2015 did not meet such fundamental requirements of a Fee levying legislation, resulting in imposing an unconstitutional levy in the garb of a Fee---Such unlawful exaction (levy) offended the rights to property, trade and non-discrimination of the industrial gas consumers---GIDC cess imposed under the GIDC Act, 2015 was declared to be unconstitutional and illegal in its present form]---Appeals, petitions and applications were disposed of accordingly with relevant directions.

Per Faisal Arab, J. [Majority view]: Legislature introduced the bill of Gas Infrastructure Development Cess Act, 2015 ('GIDC Act, 2015) under Article 70 of the Constitution which was passed by both the houses of the Parliament as a fee-levying enactment. National Assembly was fully competent to impose tax on natural gas through a Money Bill on the strength of Entry No.51 of Part I of the Federal Legislative List contained in the Fourth Schedule [pp. 677, 687] L & EE

The provision of the Constitution that enabled the legislature to legislate GIDC Act, 2015 was Entry No.54 of Part I of the Federal Legislative List. Said entry stated 'Fees in respect of any of the matters in this Part, but not including fees taken in any court.' Furthermore Entry No.27 of Part I of the Federal Legislative List provided 'Import and export across customs frontiers as defined by the Federal Government, inter-provincial trade and commerce, trade and commerce with foreign countries; standard of quality of goods to be exported out of Pakistan'. Said entry, inter alia, covered legislation that related to subjects of import into Pakistan and trade with foreign countries and the mode through which natural gas could be cheaply and efficiently imported from nearby countries through overland pipeline where it was more than sufficient for their needs. This was exactly the purpose and object of the GIDC Act, 2015 as reflected by its section 4 which provided that the revenue that was to be generated from the GIDC cess shall be utilized for facilitating import of natural gas into Pakistan through two separate transnational pipelines and for ancillary projects. For such purpose trade

agreements had also been executed with two countries (Iran and Turkmenistan) separately. In addition to this section 4 of the GIDC Act, 2015 also provided that the GIDC cess was required for the purposes of LNG which under a trade agreement with Qatar was being imported on ships and after its discharge at the port of Karachi and gasification, was planned to be transported upcountry through a pipeline project named 'North South pipeline'. From this it had become evident that the whole purpose of enacting GIDC Act, 2015 was to facilitate import of natural gas, a very important source of energy from the nearby countries under trade agreements executed with them. The fee imposed under the GIDC Act, 2015 was clearly intended to facilitate import into Pakistan of natural gas on the basis of trade agreements executed with foreign countries which acts clearly fell within the ambit of Entry No. 27 of Part I of the Federal Legislative List contained in the Fourth Schedule to the Constitution.

Whole purpose of enacting GIDC Act, 2015 was to facilitate import into the country of a very important source of energy i.e. natural gas / LNG from nearby countries in order to meet the ever expanding energy needs of the country as our own resources of energy were fast depleting and the cheapest way to import it was through overland transnational pipelines. The supply of imported LNG to various parts of the country after its import on ships through trans-provincial pipeline was also a project of the Federal Government. The incidence of the cost involved in doing so fell on the industrial and commercial consumers whose consumption accounted for more than three-fourth of the total supply of natural gas. The industrial and commercial consumers of natural gas in the country, from whom GIDC cess was being collected, consumed about 76% of the total supply of natural gas. They would be mainly benefited once the promised projects were completed. It did not matter if domestic consumers of natural gas would also be benefitted.

As the GIDC Act, 2015 contained a well-defined object meant for making future availability of natural gas more convenient and without interruption that would mainly benefit the industrial and commercial consumers, therefore, in pith and substance the GIDC Act, 2015 was a fee-imposing enactment and use of terms like 'levied' or 'charged' would not change the object with which it was legislated.

The object which the Parliament had promised in the GIDC Act, 2015 was clearly 'purpose based' which was distinctly defined and carried with it an element of quid pro quo, making it a fee-imposing enactment instead of a pure revenue raising measure like taxes in general were imposed with no precondition attached for their spending. After seeing the purpose of the enactment and the fact that its revenue was duly accounted for and had also not been diverted to any other use, the imposition of GIDC cess under GIDC Act, 2015 was not a tax-imposing enactment.

Whatever GIDC cess had been collected right from the day when the erstwhile Gas Infrastructure Development Cess Act, 2011 (since declared unconstitutional), came into force had been accounted for by the Federal Government in its annual accounts recording it under separate code numbers and was thus identifiable separately from the other revenues of the Federal Government. This would facilitate in seeking information on the amount collected as against the amount that was going to be spent for the purposes promised in the GIDC Act, 2015. Thus a correlation between the revenue collected and the expenditure which was going to be incurred for the promised specific purpose could be maintained. It mattered not if the revenue so collected formed part of the Federal Consolidated Fund as it was the mandate of Article 78 of the Constitution itself that all revenues of the Federal Government had to made part of Federal Consolidated Fund.

The provisions of Section 8 of the GIDC Act, 2015, which gave retrospective effect to the charge and recovery of GIDC cess levied from the year 2011 were also valid being within the legislative competence of the Parliament.

Mamukanjan Cotton Factory v. Punjab Province PLD 1975 SC 50 ref.

Levy imposed under Gas Infrastructure Development Cess Act, 2015 was in accordance with the provisions of the Constitution.

Supreme Court disposed of the appeals, petitions and applications with the following directions:

(i) From the date of present judgment, the Federal Government was restrained from charging GIDC cess, which power of the Federal Government shall remain suspended until the Cess-revenue collected and that which was accrued so far but not yet collected was expended on the projects listed in section 4 of the GIDC Act, 2015;

(ii) In the remaining period of the financial year 2020-21 while considering fixation of sale price of Compressed Natural Gas (CNG), the Oil and Gas Regulatory Authority (OGRA) shall not take into consideration the element of GIDC cess under GIDC Act, 2015 as one of the costs of sale of GNG;

(iii) As all industrial and commercial entities which consumed gas for their business activities passed on the burden to their customers / clients therefore all arrears of 'GIDC cess' that had become due upto 31-07-2020 and had not been recovered so far shall be recovered by the companies responsible under the GIDC Act, 2015 from their consumers. However, as a concession, the same be recovered in twenty-four equal monthly instalments starting from 01-08-2020 without the component of late payment surcharge. The late payment surcharge shall only become payable for the delays that may occur in the payment of any of the twenty-four instalments; and

(iv) The Federal government shall take all steps to commence work on the laying of the North-South pipeline within six months and on TAPI pipeline as soon as its laying in Afghanistan reached the stage where the work of laying pipeline on Pakistan soil could conveniently start and on IP pipeline as soon as the sanctions on Iran were no more an impediment in its laying. In case no work was carried out on North-South pipeline within the prescribed time and for laying any of the two other major pipelines (IP and TAPI) though the political conditions became conducive, the purpose of levying GIDC cess shall be deemed to have been frustrated and the GIDC Act, 2015 would become permanently in-operational and considered dead for all intents and purposes.

Per Syed Mansoor Ali Shah, J. dissenting [Minority view]:

Utilization of GIDC cess as per the earlier and the recent GIDC Act, 2015 was for setting up infrastructure development of Iran Pakistan Pipeline Project (IP), Turkmenistan-Afghanistan-Pakistan-India (TAPI) Pipeline Project, LNG or other ancillary projects. These projects were financed through the imposition of GIDC (Fee), used as a tool of public finance. The gas consumers had been paying GIDC cess for almost a decade, and a total of Rs 295.40 billion had been collected to-date, however, there had been no work on the ground and these gas projects had no physical existence, whatsoever, in Pakistan. No development phase expenditure had taken place and project development cost funded by GIDC cess was nil. Even though, there was nothing on the ground, these projects were announced in the year 2011 and GIDC cess was since then being collected.

The GIDC Act, 2015 in its wisdom, considering the long-term nature of the infrastructure development gas pipeline projects required the Federal Government to inform both the Houses of the Parliament regarding the utilization of GIDC cess by tabling an Annual Report under Section 4(2) of the Act. Admittedly not a single Annual Report was tabled before the Houses of the Parliament except the one placed before the Parliament after the filing of present cases. The Government had unabashedly and successively hoodwinked the Parliamentary oversight, paying little heed to the energy crisis in the country; the interest of the gas consumers who had been regularly paying GIDC cess and the welfare of the general public. More disturbingly, the Parliament itself, inspite of acute energy crisis in the country never took the Federal Government to task and allowed a decade to pass by. The Executive and the Legislature both had failed the industrial gas consumers and public expectations besides wasting valuable time and opportunity to utilize and divert the money collected to some other projects to alleviate the gas shortage in the country. Had the Executive apprised the Parliament under the GIDC Act, 2015 legislative intervention may have followed, saving everyone the long drawn litigation and better financial management and use of Rs.295 Billion, which was sitting unused with the Federal Government.

For the Fee to have a constitutional existence, the service to be rendered in return or the quid pro quo must be certain, clear, unambiguous and within a definite time. It was by all means a legitimate expectation of the payer of Fee to know when will the service be delivered. Any law that levied a Fee must first unambiguously and clearly spell out the nature of the service to be rendered in return (quid pro quo) and then provide for a reasonable and definite timeline for the delivery of such service. Legislature must also consider the entire mechanism at work behind such relationship of reciprocity e.g., the obligations of the provider of Fee, the consequences of delay and failure to render service including refund. The GIDC Act, 2015 was silent on all these counts and therefore passed for colourable legislation as it actually imposed a levy unknown to the Constitution in the garb of a Fee. The GIDC Act, 2015 did not provide a level playing field for the parties and was devoid of the basic fairness, protection and due process that was required to be meted out to a payer who was the source of the public finance required for funding the long-term gas projects. Such a law offended and renders constitutional protections of right to property, business and non-discrimination, absolutely hollow and meaningless. The GIDC Act, 2015 imposed an unconstitutional levy in the garb of a Fee.

As a consequence, the amount of GIDC cess collected over the years should be returned and refunded to the payers in full, unless in some cases, it was impractical to so do. The Federal Government shall constitute a Committee to work out a mechanism for refund of GIDC cess so that payers of the said cess were fully restituted; be it the gas consumers under the GIDC Act, 2015 or the final consumers. Even if the gas consumers had passed on the Fee to its customers, technology may be available to credit such customers, so that there was no unjust enrichment on the part of the State. The amount of GIDC that cannot be refunded after exploring all other avenues, shall remain earmarked and be utilized only for the infrastructure development of the gas sector. [Minority view]

Per Faisal Arab, J [Majority view]

**(j) Interpretation of statutes---**

----Fiscal statute---Fee imposing enactment---Use of terms 'levy' or 'charge'---When terms like 'levy' or 'charge' were used in any revenue raising enactment, it did not mean that it could not be a fee imposing enactment---Terms 'levied' or 'charged' meant 'to impose by legal authority'---Whether tax was being imposed or a fee, it entirely depended upon the object of the legislation and had nothing to do with the use of such terms---Mere use of terms like 'levied' or 'charged' could not be made basis to describe a law as tax imposing enactment.

**(k) Interpretation of statutes---**

----Commencement date---Enforcement---When an Act of Parliament provided that it will come into force at once then every provision of it became enforceable from the day the Act received the assent of the President unless any provision of the Act itself suggested that it would come into force only when some authority nominated in such behalf so decided or on the happening of an event---Where the legislature intended to leave a matter for the Federal Government to decide before it was given effect to then it specifically stated so in the law itself.

**(l) Gas Infrastructure Development Cess Act (IV of 2015)---**

----S. 3(1)---Industrial and commercial consumers of natural gas---Gas Infrastructure Development Cess ('GIDC cess')---Whether excluding domestic users from the ambit of the cess/levy was discriminatory---Held, that GIDC cess which the industrial and commercial concerns paid became part of the cost of the goods which they sold or the cost of the services they rendered and thus was ultimately borne by the buyers of their goods and services---Domestic consumers were indirectly burdened with the incidence of GIDC cess in a way that whatever product or service they bought/availed from an industrial or commercial enterprise, the element of cost of cess having already been factored in the price of their purchases, it ultimately passed on to them---Every industrial and commercial entity using natural gas for its business activity was entitled to claim the burden of GIDC cess as their business expense, being part of the cost of their goods sold or services rendered, and get it adjusted against their

business profits---GIDC cess had been levied only on those consumers of natural gas who on account of their industrial or commercial dealings passed on its burden to their customers/clients; this was not the case with the domestic consumers of gas as the question of passing on the burden in their case obviously did not arise---Domestic consumers of natural gas being treated as a distinct class of consumers from industrial and commercial consumers, no discrimination in favour of domestic consumers emerged on account of their exclusion from the levy of GIDC cess.

**(m) Constitution of Pakistan---**

----Fourth Sched. Pt. I, Entry No. 51---Expression 'Taxes on mineral oil, natural gas and minerals for the use in generation of nuclear energy'---Interpretation---'Mineral oil' and 'natural gas' though being sources of energy were distinct from the source that generated nuclear energy, thus, 'mineral oil' and 'natural gas' appearing in Entry No. 51 of Part I of the Federal Legislative List were to be read disjunctively from 'nuclear energy'.

Regarding generation of nuclear energy, the scientific reality was that it originated from splitting of atoms of the uranium which generated heat. This process of splitting the atoms of uranium was called fission. The heat so generated helped in producing steam which was then used to operate turbines to generate electricity. As nuclear energy was produced only through the process of fission, fuels such as mineral oil or natural gas could not be used for such purpose. There were several other primary sources of generating energy such as fossil fuels like coal, petroleum, natural gas and sources like hydroelectric, solar and wind. None could be used as nuclear fuel to generate nuclear energy except uranium and its by-product plutonium. When such was the scientific reality then mineral oil and natural gas appearing in Entry No.51 of Part I of the Federal Legislative List on which the process of fission could not apply to generate nuclear energy were to be read disjunctively, as both were sources of energy other than nuclear energy.

Per Syed Mansoor Ali Shah, J. dissenting [Minority view]

**(n) Tax---**

----'Fee' and 'tax'---Salient features of a 'tax' and 'Fee' and distinction between the two concepts stated. [Minority view]

Normatively, theoretically and legislatively three prominent tasks had been entrusted to taxation, namely; revenue augmentation, redistribution of wealth in society and regulatory function to ensure expected economic behaviour. Fee, on the other hand, had a narrower scope and was premised on a corresponding service in return or quid pro quo. Whereas tax was devoid of quid pro quo, it was a sine qua non for Fee.

Haji Dossa Limited, Karachi v. Province of Punjab through Collector, Sahiwal and others 1973 SCMR 2; Workers' Welfare Funds, Ministry of Human Resources Development, Islamabad through Secretary and others v. East Pakistan Chrome Tannery Pvt. Through G.M. Finance Lahore and others PLD 2017 SC 28; Sheikh Muhammad Ismail & Co. Ltd., Lahore v. The Chief Cotton Inspector, Multan Division, Multan and others PLD 1966 SC 388; Pakistan Flour Mills Association and another v. Government of Sindh and others 2003 SCMR 162; Hirjina Salt Chemicals (PAK.) Ltd. v. Union Council, Gharo and others 1982 SCMR 522; Noon Sugar Mills Ltd. v. Market Committee and others PLD 1989 SC 449; Azad Government of the State of Jammu and Kashmir through Chief Secretary, Azad Kashmir Government, Civil Secretariat, Muzaffarabad v. Haji Mir Muhammad Naseer and others 1999 PLC (C.S.) 1173; Pakcom Limited and others v. Federation of Pakistan and others PLD 2011 SC 44; Collector of Customs and others v. Sheikh Spinning Mills 1999 SCMR 1402; The Hingir-Rampur Coal Co. v. The State of Orissa 1961 SCR (2) 537; Sreenivasa General Traders v. State of Andhra Pradesh AIR 1983 SC 1246; Upaj Mandi Samiti v. Orient Paper and Industries 1995 RRR (1) 327; Bangalore Development Authority v. Air Craft Employee Society 2012 (1) JLJR 503; H.H. Sudhundra Thirtha Swamiar and others v. The Commissioner for Hindu Religious and Charitable Endowments, Mysore and another AIR 1963 SC 966; Southern Pharmaceuticals and Chemicals, Trichur and others

v. State of Kerala and others AIR 1981 SC 1863; The Chief Commissioner, Delhi and another v. The Delhi Cloth and General Mills Co. Ltd. and others AIR 1978 SC 1181; Calcutta Municipal Corporation and others v. Shrey Mercantile Pvt. Ltd. and others AIR 2005 SC 1879; Bhagwan Dass Sood v. State of Himachal Pradesh and others AIR 1997 SC 1549; Kewal Krishan Puri and another v. State of Punjab and others AIR 1980 SC 1008; Agriculture Market Committee, Rajam and others v. Rajam Jute and Oil Millers Association, Rajam AIR 2003 SC 1742; The City Corporation of Calicut v. Thachambalath Sadasivan and others AIR 1985 SC 756; Kishan Lal Lakhmi Chand v. State of Haryana 1993 Supp (4) SCC 461; The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt AIR 1954 SC 282; The State of West Bengal and another v. Kesoram Industries Ltd. and others AIR 2005 SC 1646; Municipal Corporation of Delhi and others v. Mohd. Yasin AIR 1983 SC 617 and Gasket Radiators Pvt. Ltd. v. Employees' State Insurance Corporation and another AIR 1985 SC 790 ref.

A tax was a compulsory contribution to the government, imposed in the common interest of all, for the purpose of defraying the expenses incurred in carrying out the public functions or imposed for the purpose of regulation, without reference to the special benefits conferred on the one making the payment. As a corollary, tax being instrumental in revenue augmentation, its quantum need not commensurate with costs incurred by such public authority. Further, tax was devoid of any quid pro quo. Even where any benefit seemed to flow, in case of tax, it was merely incidental and not primary. In other words, there existed no connection, whether direct and immediate or broad and casual between the contributor of tax and benefits.

Martin T Crowe, The Moral Obligation of Paying Just Taxes 12 (Catholic University of American Press, Washington D.C., 1944) ref.

In a glaring contrast, Fee, was generally defined to be a charge for a special service rendered to individuals by some governmental agency. Ordinarily, Fees were uniform and no account was taken of the varying abilities of different recipients to pay. A Fee may either be regulatory or compensatory. Where a Fee was commensurate with the cost of rendering the service, though not in exact arithmetical equivalence, it was a compensatory Fee. On the other hand a Fee charged to regulate or control, was validly classifiable as regulatory Fee, provided it was not excessive or not dominantly intending to raise revenues for the public authority. Whilst both tax and Fee were compulsory exactions of money by public authority, their real distinction comprised in primarily what was known as quid pro quo test and proportionality of amount test.

Accordingly, a levy to be identified as Fee must have an element of quid pro quo between the payer and the public authority that imposed it. This quid pro quo or service rendered in return envisaged an intimate and immediate relationship between rendition of service and the payer, who was direct beneficiary of such service, on a one-on-one basis. This proximity between the beneficiaries and services could also be categorized for simplicity as "proximate quid pro quo". So the classical approach of Fee comprised the following: a proximate quid pro quo i.e., rendition of certain services to the payers by government agency which amounted to special benefit/advantage to the payer; proportionality i.e., the amount imposed ought to commensurate with cost of services to be rendered; specific fund that ensured dedicated spending from an earmarked fund for specific purpose of that service, Merger of proceeds with general revenue to be spent for general purposes was not acceptable; and primary objective that was to enquire whether the primary purpose of imposing levy was rendition of services and it was not merely incidental to augmentation of revenue. If latter predominated, it acted as negative restriction and the levy would be tax.

With passing of time as economies grew, Fee was imposed to render services to a large class of people or specified sector or area as a whole. In such cases, the relationship between the beneficiary and the services rendered became more generic, broad and remote. This was because such a service was to reach a general class of people or a specified sector or a designated area and not to an individual

per se and therefore the service may also extend to free riders who were not the payers of Fee, hence the bond of proximity stood diluted. This shift has also been termed as "remote quid pro quo" which is used to describe the situation where services targeted beneficiaries which was a generic class comprising of a certain free riders but inclusive of payers. The shift from proximate to remote quid pro quo overtime did not mean that the service to be rendered to the payers of Fee would be any different or in any manner less. The scope and depth of service to be rendered depended on the nature of the service.

Merely because collections for services rendered or grant of a privilege or license were taken to the consolidated fund of the state and not separately appropriated towards the expenditure for rendering the service was not by itself decisive.

The modern approach to Fee therefore consisted of three-point check: Primary object test- whether the plenary objective of the levy was rendition of service to specified class and this service was something other than something merely incidental; Remote quid pro quotest- whether the payer received a general benefit from the authority imposing levy; Proportionality test- whether there existed a broad and generic co-relationship between services rendered and the amount of Fee charged. [Minority view]

**(o) Fee---**

----'Quid pro quo in future'---'Service to be rendered'---'Time dimension' of service to be rendered---Scope---Simultaneity or contemporaneity of payment and benefit was not the most vital or crucial test to determine whether a levy was a Fee or not, especially in long-term projects---While "service to be rendered" or quid pro quo in future was permissible it was equally important that the prospects of such a future service were certain, as if tied in time, with the payment of Fee---For the Fee to have a constitutional existence, the service to be rendered in return or the quid pro quo must be certain, clear, unambiguous and within a definite time---Payment of Fee by the payer could not be towards a service that floated in a timeless zone; was open-ended and uncertain---Failure in providing future service within reasonable timeline, deprived the Fee of its essential character, and gave it the complexion of a tax.

It was not a requirement that all the required services against a Fee must be in place before a Fee could be levied. Merely because the benefits to be received were postponed, it could not be said that there was no 'quid pro quo'. It was true that ordinarily a return 'in praesenti' was generally the case when Fee was levied but simultaneity or contemporaneity of payment and benefit was not the most vital or crucial test to determine whether a levy was a Fee or not, especially in long-term projects. In fact, it may often happen that the rendering of a service or the conferment of a benefit may only follow after the consolidation of a fund from the Fee levied. Hospitals, for instance, could not be built in a day nor medical facilities or gas supply provided right from the day of the commencement of the scheme. It was only after infrastructure development was available that one may reasonably expect a compensating return. How soon a return may be expected or ought to be given must necessarily depend on the nature of the services required to be rendered and benefits required to be conferred. So while "service to be rendered" or quid pro quo in future was permissible it was equally important that the prospects of such a future service were certain, as if tied in time, with the payment of Fee.

Agriculture Market Committee, Rajam and others v. Rajam Jute and Oil Millers Association, Rajam AIR 2003 SC 1742 and Messrs Gasket Radiators Pvt. Ltd. v. Employees' State Insurance Corporation and another AIR 1985 SC 790 ref.

Fee was a constitutional levy against a service rendered, which could not be structured on assumptions, suppositions, expectations and verbal commitments of the Executive but required a clear, crisp and certain statutory timeline. For the Fee to have a constitutional existence, the service to be rendered in return or the quid pro quo must be certain, clear, unambiguous and within a definite time. While there was an obligation of the payer to deposit Fee on time which was subject to a surcharge for

late payment, there must also be a corresponding obligation on the State or the authority responsible to provide the service in return, to do the same within a definite timeline. Without this corresponding obligation, the legislation failed to recognize the core ingredient of a Fee - the quid pro quo. It was by all means a legitimate expectation of the payer of Fee to know when would the service be delivered. The payment of Fee by the payer could not be towards a service that floated in a timeless zone; was open-ended and uncertain. Any service to be rendered in such like cases became a disservice. The relationship in a Fee must exist till the end. Failure in providing future service within reasonable timeline, deprived the Fee of its essential character, sheds its complexion as a Fee and gave that of a Tax. As such failure and the uncertainty of time diminished the requisite degree of correlation between the payment of Fee and provision of service in return. This indefiniteness negated the concept of Fee and partakes the character of a Tax. Therefore, service against a Fee was not simply a theoretical recognition of the service to be rendered but must also have certainty in its applied form i.e., the timeline for the actual delivery. If the constituent of time was missing the service became practically non-existent and the levy no more retained the character of Fee and became a tax rendering the levy (of fee) unconstitutional. [Minority view]

**(p) Constitution of Pakistan---**

----Arts. 50 & 91(6)---Parliament, functions of---Executive answerable to the Parliament---Scope---Parliament was a multi-functional institution performing variety of roles---Some of the cardinal roles and functions of the Parliament were: Legislation, Oversight of the Government actions and Financial Accountability of the Government and the public sector---Parliament made laws, authorized the Government to spend public money, scrutinized the Government activities and was a forum for debate on national issues---Worst thing that the Government in a parliamentary system could do was to deny information to the Parliament---Executive was answerable to the Parliament---Article 91(6) of the Constitution declared it in unequivocal terms that the Cabinet, together with the Ministers of the State, shall be collectively responsible to the Senate and the National Assembly---One of the functions of the Parliament was to exercise political and financial control over the Executive---To call for information was perhaps the greatest power of Parliament---Even otherwise, it was the duty of the Government itself to feed Parliament with information, which was full, truthful, precise and supplied in time---Ministers made statements on the floor of the House, and laid reports and papers on the Table of the House---All these constituted a wealth of information, which became immediately public and could be issued to raise discussion in the House.

Subhash C Kashyap, Parliamentary Procedure, Universal 2006 pp. 19, 23 and 25 ref.

**(q) Interpretation of statutes---**

----Fiscal statute---Fee---Principles of interpretation of a fiscal statute applied equally to a Fee as they did to a tax - both being compulsory exactions of money by the State.

**(r) Interpretation of statutes---**

----Fiscal statute---In interpreting a taxing statute, equitable considerations were entirely out of place---Nor could taxing statute be interpreted on any presumptions or assumptions---Court must look squarely at the words of the statute and interpret them---Court could not imply anything that was not expressed, it could not import provisions in the statutes so as to supply an assumed deficiency---Taxing statues, if it professed to impose a charge, its intention must be expressed in clear, unequivocal and unambiguous language---Hunting into the intention to find a charge was impermissible---No equitable construction of a charging section was to be applied---Charging section was to be construed strictly regardless of its consequences that may appear to the judicial mind to be---Function of the court was not to hunt out ambiguities by strained and unnatural meaning.

Cape Brandy Syndicate v. IRC [1921] 1KB 64; Pakistan Television Corporation Limited v. Commissioner Inland Revenue (Legal), LTU, Islamabad and others 2017 SCMR 1136; Commissioner of Income Tax and another v. Baluchistan Concrete and Block Works Ltd. and others 2017 SCMR 1;

Chairman, Federal Board of Revenue, Islamabad v. Al-Technique Corporation of Pakistan Ltd. and others PLD 2017 SC 99; Commissioner of Income Tax Legal Division, Lahore and others v. Khurshid Ahmad and others PLD 2016 SC 545; Zila Council Jehlum through District Coordination Officer v. Pakistan Tobacco Company Ltd. and others PLD 2016 SC 398; Bechu Company v. Assistant Commissioner 2003 STC (132) 68 (also See N.S. Bindra's - Interpretation of Statutes. p.863 (12th Edition) and Film Exhibiter's Guild v. State of Andhra Pardesh AIR 1987 AP 110 ref.

**(s) Interpretation of statutes---**

----Fiscal statute---Fee---Fiscal legislation required that any law that levied a Fee must first unambiguously and clearly spell out the nature of the service to be rendered in return (quid pro quo) and then provide for a reasonable and definite timeline for the delivery of such service---Legislature must also consider the entire mechanism at work behind such relationship of reciprocity -e.g., the obligations of the provider of Fee, the consequences of delay and failure to render service including refund. [Minority view]

**(t) Interpretation of Constitution---**

----Progressive interpretation---'Living tree', doctrine of---Scope---Constitution was organic and a living testament of the aspirations of the people it governed---"Living tree" doctrine allowed the Constitution to change and evolve over time while still acknowledging its original intentions---Said doctrine achieved a balance between two seemingly contradictory goals: predictability and flexibility---To be effective, the Constitution must consist of a predictable set of rules---On the other hand, flexible interpretation accommodated the realities of changing modern life---If the Constitution could not be interpreted in such way, it would be frozen in time and become more obsolete than useful---Contemporary interpreters must focus on what the originators intended the Constitution to accomplish rather than what the text actually stated before allowing the Constitution to evolve or remain unchanged---Progressive interpretation was (important) to preserve the vitality of the Constitution---Courts have repeatedly underlined that the Constitution was a living document and encouraged its progressive interpretation.

Living Tree Doctrine, Centre for Constitutional Studies. Also see: Edwards v. Canada (Attorney General) 1930 AC 124 and Reference Re Same Sex Marriage 2004 SCC 79 (CanLII) [Same-Sex] ref.

**(u) Precedent---**

----'Distinguishing' a precedent---Scope---If a new case was dissimilar to an earlier case in ways that seemed important, the court would 'distinguish" it and reach a result different from what the precedent would otherwise suggest or even dictate---In common parlance, either the precedent or the pending case may be said to be "distinguished" from the other---In such way the former decision might be said to be "rerationalized"---Precedent, whether persuasive or binding, need not be applied or followed if it could be distinguished; that is, there was a material distinction between the facts of the precedent case and the case in question---Technique of distinguishing a past case was a powerful engine of legal change---Crucial question was, whether there were any material differences between the facts of the case at bar and the facts of the prior cases to warrant the rule being different---In principle, the distinguishing of an apparent decision presented no problem for the doctrine of precedent.

Bryan A Garner. The Law of Judicial Precedent, 2016 p.97; Joseph Raz, The Authority of Law 186 (1979); Theodore, The Rule of Precedent, op cit. p. 99; Raz, The Authority of Law, p. 185 and Muhammad Munir, Precedent in Pakistan Law, Oxford, 2014. P.219 ref.

**(v) Gas Infrastructure Development Cess Act (IV of 2015)---**

----S. 3 & Second Sched.---Industrial and commercial consumers of natural gas---Gas Infrastructure Development Cess ('GIDC cess')---Different rates of GIDC cess fixed for different industries under Second Schedule to the Gas Infrastructure Development Cess Act, 2015 ('GIDC Act, 2015')---Discriminatory---Held, that purpose of the GIDC Act, 2015 was to raise public finance for the infrastructure development of the gas projects mentioned in the Act through levy of Fee on different

categories of industrial gas consumers---No intelligible differentia was found amongst the different gas consumers mentioned in the Second Schedule for the purposes of the GIDC Act, 2015---One justification for charging different rates from amongst the industrial gas consumers could have been their overall consumption of natural gas, however the data provided to the court showed that differentiation of rates was not based on the consumption pattern of the gas consumers---Rates of GIDC cess fixed for different gas consumers were, therefore, ex-facie discriminatory and could not be allowed to stand. [Minority view]

Makhdoom Ali Khan, Senior Advocate Supreme Court, Saad Hashmi, Advocate for Appellants (in C.As. Nos. 1150 to 1155 of 2017).

Rashid Anwar, Advocate Supreme Court (via video link @ Karachi) and Syed Rifaqat Hussain Shah, Advocate-on-Record for Appellants (in C.As. Nos. 1115 to 1123 of 2017).

Isaac Ali Qazi, Advocate Supreme Court (via video link @ Peshawar) and M.S. Khattak, Advocate-on-Record for Appellants (in C.As. Nos. 1124 to 1127, 1133, 1134 of 2017, C.Ps. Nos. 3027 to 3030 and 3411 of 2017).

Anwar Kamal, Senior Advocate Supreme Court and Br. Ahmed Pervaiz for Appellants (in C.M.A. No. 86 of 2020).

Kh. Muhammad Saeed, Advocate Supreme Court for Appellants (in C.A. No. 1114 of 2017).

Syed Haziq Ali Shah, Advocate Supreme Court and M. S. Khattak, Advocate-on-Record for Appellants (in C.As. Nos. 1128 to 1131, 1135 to 1140 of 2017, C.Ps. Nos. 3124, 3259 and 3260 of 2017).

Sardar Muhammad Ghazi, Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Appellants (in C.A. No. 1132 of 2017, C.M.As. Nos. 8277, 8278 and 9521 of 2019).

Ms. Navin Merchant, Advocate Supreme Court for Appellants (in C.M.A. No. 9746 of 2019).

Abid S. Zuberi, Advocate Supreme Court for Appellants (in C.M.A. No. 9153 of 2019)

Qazi Ghulam Dastgir, Advocate Supreme Court for Appellants (in C.As. Nos. 1113, 1141 to 1149 of 2017, 3076 of 2019).

Salman Akram Raja, Advocate Supreme Court (via video link @ Lahore) and Mehmood A. Sheikh, Advocate-on-Record for Appellants (in C.P. No. 3138 of 2017 and C.M.As. Nos. 9186, 9301 of 2019).

Ijaz Ahmed Zahid, Advocate Supreme Court and Habib Bhatti, Advocate Supreme Court for Appellants (in C.M.A. No. 1022 of 2020).

Abdul Munim Khan, Advocate Supreme Court and Tasleem Hussain, Advocate-on-Record (via video link @ Peshawar) for Appellants (in C.Ps. Nos. 387-P, 389-P, 3327 of 2017).

Tasleem Hussain, Advocate Supreme Court/Advocate-on-Record (via video link @ Peshawar) for Appellants (in C.Ps. Nos. 392-P to 394-P, 399-P, 400-P and 3241 of 2017).

Muneer A. Malik, Sr. Advocate Supreme Court, Ch. Atif Rafique, Advocate Supreme Court (via video link @ Karachi) Kassim Mirjat, Advocate-on-Record and Syed Rifaqat Hussain Shah, Advocate-on-Record for Appellants (in C.M.As. Nos. 8497 of 2018 and 9149 of 2019).

Syed Iqbal Hashmi, Advocate Supreme Court and Ch. Akhtar Ali, Advocate-on-Record for Appellants (in C.M.A. No. 9746 of 2019).

Waqar Ahmed Rana, Advocate Supreme Court for SNGPL (in all Appeals/ Petitions).

Br. Mian Belal, Advocate Supreme Court and Br. Muhammad Adil Fayyaz for SNGPL (in C.M.As. Nos. 812-815 of 2020).

Anwar Mansoor Khan, Attorney General, Ch. Aamir Rehman, Addl. AGP, Sohail Mehmood, D.A.G. and Sajjid Ilyas Bhatti, Addl. AG for the Federation.

Niaz Ullah Niazi, Advocate General for ICT.

M. Ayaz Swati, Addl. A.G. and M. Farid Dogar, A.A.G. for Government of Balochistan.

Ch. Faisal Farid, Addl. A.G. for the Government of Punjab.

Shumail Butt, A.G. for Government of Khyber Pakhtunkhwa.

Sardar Azmat Shafi, Accountant General of Pakistan in person.

Rizwan ul Haq, Sr. Executive Director (Litigation) (OGRA), Mrs. Taybbah Ahsan, JED, Finance (OGRA) Ms. Samia Khalid, Advocate Supreme Court (OGRA), Aatif Sajjad, Executive Director Finance (OGRA) Sajid Zahid Rauf, JED Gas (OGRA), Syed Faisal Ishtiaq, Law Officer (OGRA), Dr. Abdul Basit Qureshi, Registrar, OGRA, Atif Hussain, JED Finance OGRA and Asif, JED (Gas) OGRA for OGRA.

Anwar, Sr. JS Finance Division, Tanvir Butt, Sr. JS (Budget) Finance Division, Sajjad Azhar, Deputy Secretary Budget Resources and Javed Iqbal Khan, JS, B-II Finance Division for Finance Division, Government of Pakistan.

Mobeen Solat, MD, ISGCL for ISGCL.

Abdul Maqsood Malik, EDG, Dir. Petroleum for Ministry of Petroleum.

Dates of hearing: 3rd, 10th, 11th, 12th, 13th, 17th, 18th, 19th and 20th February, 2020.

**JUDGMENT**

**FAISAL ARAB, J.---**The appellants as well as the petitioners and the intervenors all utilize natural gas for their industrial and commercial activities. Some of them even use natural gas as fuel for their in-house power generation facilities. Those who own CNG stations use natural gas for converting it into Compressed Natural Gas (CNG) at their filling stations and then sell it to their customers.

2. Before discussing the controversy involved in the case we find it appropriate to briefly discuss the background of the laws that imposed Cess from the year 2011.

3. In the year 2011 the Gas Infrastructure Development Cess Act, 2011 (GIDC Act, 2011) was legislated through a bill introduced in the National Assembly as a Money Bill by treating the imposition thereunder as a specie of 'tax' whereby Cess was imposed on industrial and commercial consumers of natural gas. This was done to finance the cost which Pakistan has to bear for laying the overland pipelines through which natural gas was to be imported into the country from Iran and Turkmenistan. Apart from import of natural gas from the above two countries, LNG imported from Qatar on ships, after its discharge at the Karachi port, was to be gasified and transported up-country through a pipeline called North-South pipeline. The said Act was challenged by the industrial and commercial consumers of natural gas located in the Province of Khyber Pakhtunkhwa in the Peshawar High Court in the year 2011 and they succeeded in seeking a declaration that it is ultra vires the Constitution in the year 2013. The Federal Government appealed which was dismissed by this Court on 22.08.2014 after holding that the GIDC Act, 2011 in its character is a fee-imposing enactment, its bill could not have been introduced in the National Assembly as a Money Bill under the provisions of Article 73 of the Constitution. The said Act was thus declared to be ultra vires the Constitution, which decision has come to be known as Durrani Ceramics case reported in 2014 SCMR 1630.

4. Soon after the decision in Durrani Ceramics case, the President on 25.09.2014 promulgated the Gas Infrastructure Development Cess Ordinance, 2014 through which Cess on natural gas was again imposed, which Ordinance was also given retrospective effect from 15.12.2011, the date when the GIDC Act, 2011 came into effect. While the GIDC Ordinance, 2014 was still in the field, the Federal Government sought review of Durrani Ceramics case which was dismissed by this Court vide judgment dated 15.04.2015 reported as Federation of Pakistan v. Durrani Ceramics (PLD 2015 SC 354).

5. Within a month of the dismissal of the review petition, the Parliament on 15.05.2015 passed the Gas Infrastructure Development Cess Act, 2015 (GIDC Act, 2015) whereby Cess was again imposed on all consumers of natural gas excluding the domestic sector consumers. The purpose of its imposition was the same as was stated in the GIDC Act, 2011. In terms of Section 8 of GIDC Act, 2015 the levy and collection of Cess made under the GIDC Act, 2011 as well as under GIDC Ordinance, 2014 was also legitimized with retrospective effect.

6. In this second round of litigation the industrial and commercial consumers assailed the vires of the GIDC Act, 2015 before the Sindh High Court as well as in the Peshawar High Court claiming that

like GIDC Act, 2011 the GIDC Act, 2015 be also declared ultra vires the Constitution as it has been enacted by the parliament beyond its legislative competence. The Sindh High Court declared the levy unconstitutional vide judgment dated 26.10.2016 whereas the Peshawar High Court upheld the levy vide judgment passed on 31.05.2017 declaring the GIDC Act, 2015 to be intra vires the Constitution. These appeals have arisen from such decision with the leave of this Court.

7. On 22.10.2019 when this case came up for hearing, it was pointed out to us by Mr. Muneer A. Malik, one of the counsel for the intervenors that 377 suits were filed by invoking Original jurisdiction of the Sindh High Court in which the vires of GIDC Act, 2015 were challenged and all were decreed vide common judgment dated 26.10.2016 whereby the GIDC Act, 2015 was declared to be ultra vires the Constitution. He further pointed out that the Federal Government has filed only one appeal bearing High Court Appeal No. 361 of 2016 against the plaintiff of one suit and not against the plaintiffs of the remaining 376 suits, including his client. They were not even made party in the said appeal and the time for filing appeal against them had already gone by. He contended that on account of such omission the decision rendered by the Single Judge has attained finality on the principle of res judicata for the rest of the plaintiffs and accordingly the GIDC Act, 2015 in their cases is to be treated as ultra vires the Constitution and Cess cannot be charged from them. In support of this argument Mr. Muneer A. Malik relied upon the judgment of this Court rendered in the case of Pir Bukhsh and others v. Chairman Allotment Committee (PLD 1987 SC 145). As these appeals and connected petitions have emanated only from the decision of the Peshawar High Court which declared the GIDC Act, 2015 to be intra vires the Constitution this led us to pass an order on the said date that in identical matters pending in other High Courts opportunity be given to such litigants and their counsel to present their case before us on the merits of the controversy. This was done so that the challenge to the vires of the said Act be adjudicated upon once and for all at this Court's level. Pursuant to our order dated 22.10.2019 several miscellaneous applications for joining in these proceedings as party were filed by those who had challenged the vires of the GIDC Act, 2015 in various other High Courts. All of them were given opportunity to present their point of view on the merits of the controversy. Certain other petitions which were filed against the judgment of the Peshawar High Court but did not come up for hearing at the time of grant of leave of these appeals were also taken up for hearing so that the same could be decided together with the appeals.

8. Before we proceed to decide the merits of the main controversy we prefer to address the plea of res judicata raised by the intervenors first.

9. The principle of res judicata is a principle of peace. Once a controversy with regard to a right in property or a right to office is adjudicated upon and attains finality through a judicial pronouncement of a competent Court of law, it no more remains open to challenge in any subsequent judicial proceedings between the same parties on the same subject matter. This principle is intended not to afford a litigant more than one opportunity for resolution of a judicial dispute and thus eliminates the chances of repetitious and successive litigation against a party on the same issue. The maxim that there should be an end to litigation is germane to such matters.

10. Any relief which a litigant seeks in a judicial proceeding with regard to any power or a right or an obligation connected with some property or an office which power or right or obligation is not dependent upon the legitimacy of a legislative enactment and stands or falls on its own strength then in such cases when the decision rendered by a court of competent jurisdiction attains finality, there is no difficulty in applying the principle of res judicata to such a decision. However, it would be difficult to apply such a principle in matters where a power or a right or an obligation solely depend upon the very legitimacy of the enactment that has come under challenge in a Court of law on the touchstone of the Constitution. In such a situation the existence of such power or right or obligation would solely depend on the final adjudication as to the legal validity of the enactment itself. This could be understood from a situation where a controversy as regards constitutional validity of an enactment has

come under challenge before two High Courts, one declaring the enactment ultra vires the Constitution and the other intra vires. If the principle of res judicata is applied to the decision of the High Court that declared the law ultra vires as the same was not challenged any further by the Government then two conflicting declarations would stand side by side on the legitimacy of a legislative enactment, one party treating the law valid and the other invalid. This would lead to treating an Act of the parliament valid for some and invalid for others though both the set of persons are similarly placed. If the decision rendered by the High Court that declared the law intra vires the Constitution is only challenged before the Supreme Court and after examining the merits of the case the enactment is declared by this Court to be intra vires the Constitution, then in such peculiar situation when this Court finally validates the legislative enactment then the same has to be applied uniformly to every person falling within its ambit. Such final judicial determination on the legitimacy of a legislative enactment has to be treated as a judgment in rem regardless of the fact that the judgment of the High Court that invalidated the very same enactment was not challenged before this Court. Such a situation warrants departure from the doctrine of res judicata. Omission of a public functionary to file appeal cannot put fetters on the universal application of a legislative enactment declared by this Court to be constitutionally valid as it would amount to repealing the statute for some and treating it valid for others. Hence conflicting decisions on the vires of a legislative enactment of two High Courts, decision of one remains unchallenged in the hierarchy as no appeal was preferred and the other is challenged before this Court, then the verdict of the High Court that went unchallenged, which is in conflict with the final decision of this Court has to be treated as outmoded and no longer executable. The Supreme Court of the United States of America took note of a similar situation in the case of United States v. Stone and Downer Co. [274 U.S. 225 (1927)] and held that if some of the persons are released from the application of a provision of legislative enactment on the principle of res judicata, it will lead to inequalities and discrimination causing injustice and confusion. It was held that in such a situation the plea of res judicata cannot be sustained. Following passages from the said judgment of the Supreme Court where it refused to apply the principle of res judicata in a revenue matter can be quoted with considerable advantage:

.One large importing house may secure a judgment in its favour from the Customs Court on a question of fact as to the merchandise of a particular importation or a question of construction in the classifying statute. If that house can rely upon a conclusion in early litigation as one which is to remain final as to it and not to be reheard in any way, while a similar importation made by another importing house may be tried and heard and a different conclusion reached, a most embarrassing situation is presented. The importing house which has by the principle of the thing adjudged obtained a favourable decision permanently binding on the government will be able to import the goods at a much better rate than that enjoyed by other importing houses, its competitors. Such a result would lead to inequality in the administration of the customs law, to discrimination and to great injustice and confusion. In the same way, if the first decision were against a large importing house and its competitors instituted subsequent litigation on the same issues with new evidence or without it and succeeded in securing a different conclusion, the first litigant, bound by the judgment against it in favour of the government must permanently do business in importations of the same merchandise at great and inequitable disadvantage with its competitors.

These were doubtless the reasons which actuated the Court of Customs Appeals when the question was first presented to it to hold that the general principle of res judicata should have only limited application to its judgments The fact that objection to the practice has never been made before in the history of this court or in history of the Court of Customs Appeals in 18 years of its life is strong evidence, not only of the wisdom of the practice, but of general acquiescence in its validity. The plea of res judicata cannot be sustained in this case.'

11. In the case of Pir Bukhsh and others v. Chairman Allotment Committee (PLD 1987 SC 145), on which much reliance was placed by Mr. Muneer A. Malik, the learned counsel for one of the intervenors, the controversy was with regard to a right of allotment of land which did not depend on the constitutionality of a legislative enactment. In that case, the principle of res judicata clearly applied but this principle, as discussed above, cannot be applied in the same manner to a case where any power or a right or an obligation of a person solely depend upon the legitimacy of a legislative enactment without which such power or right or obligation has no existence of its own. Hence, when the power of the government to charge and the obligation of the persons to pay a tax or a fee depends on the determination of vires of a legislative enactment then the final determination of this Court has to be uniformly applied on all those upon whom the law was intended to apply otherwise it would be applied in a discriminatingly manner to a section of persons belonging to one and the same class of persons. The final determination of this Court on the legitimacy of a law has to apply even to those who had succeeded in obtaining a judgment from a Court lower in the hierarchy that the law is ultra vires the Constitution, they too would be bound by the judgment of this Court which being the final Court of the judicature has through a judicial pronouncement declared a legislative enactment to be valid. The power of the Federal Government to charge the Cess and the obligation of the payers to pay under GIDC Act, 2015 would depend upon such final determination by this Court. Such power or obligation arising from an enactment will not cease to exist for the reason that the High Court in some other proceedings has declared the said Act ultra vires the Constitution which remained unchallenged. We in our minds are therefore clear that where there are two conflicting adjudications with regard to the constitutionality of a legislative enactment, standing side by side, then the one that has the binding effect on the other has to become the law of the land on the subject without any distinction whatsoever as an Act of the Parliament in its application cannot be allowed to be regarded as intra vires the Constitution for one set of persons and ultra vires for another at the same time when both belong to the same class of persons. If this is allowed, it would result in discrimination as some would be bound to discharge the obligation arising from the Act of the Parliament thereby putting them in disadvantageous position against those who are discharged from the obligation on the principle of res judicata. Such a position cannot be allowed to be sustained.

12. The validity of the plea of res judicata can be looked at from another angle also. The learned Additional Attorney General has pointed out that one High Court Appeal has been filed against the common judgment of the Single Judge of the Sindh High Court rendered in 377 suits and those decree holders who have been left out in that appeal would be made party in the pending appeal. If that has already been done then this Court in similar situation has held in the cases of Mehran Zaibun Nisa and others v. Land Commissioner, Multan and others (PLD 1975 SC 397) and Province of Punjab v. Muhammad Tayyab (1989 SCMR 1621) that a matter filed after the period of limitation can also be decided on merits with a connected case that was filed within time. So belated joining of some of the parties in the appeal as respondents who were initially not made party would not be of much consequence. In any case, the right of the Federal Government to challenge the judgment of the Single Judge of the Sindh High Court cannot be said to be altogether lost as one appeal is still pending. So, the decision of the Sindh High Court cannot be said to have attained finality in the strict sense of the word. Even otherwise, the right of the Federal Government to defend the decision of the Peshawar High Court in these proceedings before us does not get swallowed by the judgment of the Sindh High Court. That right also still subsists. There is yet another aspect of the matter. We vide our order dated 22.10.2019 had decided to hear all the parties who have challenged the GIDC Act, 2015 in the High Courts so that their point of view on the controversy could also be heard on merits. So, as intervenors, not only the plaintiff against whom High Court Appeal has been filed joined the proceedings and through its counsel addressed this Court on the merits of the main controversy but the counsel of those plaintiffs against whom no appeal was filed have also addressed this Court on merits of the controversy

so that the controversy relating to the validity of GIDC Act, 2015 is finally decided. For this reason too the principle of res judicata would also not come in the way of the Federal Government. In these circumstances the maxim that there should be end to litigation once the matter has been finally decided is not attracted as finality with regard to validity or otherwise of the GIDC Act, 2015 is yet to be reached in these proceedings. In the peculiar situation stated above, the plea of res judicata cannot be sustained.

13. We shall now proceed to examine the merits of the main controversy.

14. The bill of GIDC Act, 2015 was introduced under the provisions of Article 70 of the Constitution by treating it as a specie of fee-levying enactment which was accordingly passed by both houses of the Parliament. This was done for the reason that when the bill of GIDC Act, 2011 was introduced in the National Assembly through a Money Bill as a tax-imposing enactment the same was struck down in Durrani Ceramics case for the reason that the levy being a fee imposing enactment, its bill could not have been introduced in the National Assembly under Article 73 of the Constitution as a Money Bill.

15. Mr. Makhdoom Ali Khan as lead counsel for the appellants argued the case, whose arguments were adopted by several counsel appearing on behalf of the appellants, petitioners and the intervenors. The counsel who also made additional submissions were Mr. Muneer A. Malik, Mr. Salman Akram Raja, Mr. Rashid Anwar, Mr. Isaac Ali Qazi, Mr. Anwar Kamal, Syed Haziq Ali Shah, Sardar Muhammad Ghazi, Mr. Abid S. Zuberi, Qazi Ghulam Dastgir, Mr. Ijaz Ahmed, Mr. Abdul Munim Khan and Mr. Tasleem Hussain. Barrister Mian Bilal argued on behalf of Sui Northern Gas Pipeline Limited and Chaudhry Aamir Rehman, learned Additional Attorney General argued on behalf of the Federation.

16. The arguments that were advanced on behalf of the counsel for appellants / petitioners / intervenors, which are relevant for the disposal of these cases on merits of the main controversy can be summarized as follows:-

a) The GIDC Act, 2015 would survive only if the Federation can demonstrate that it is a fee-levying enactment and that too within the ambit of Entry 2 read with Entry 15 of Part II of the Federal Legislative List contained in the Fourth Schedule to the Constitution. The GIDC, Act, 2015 is neither a tax nor a fee which places it outside the Fourth Schedule, hence ultra vires the Constitution.

b) Fee can only be levied and collected if the state provides a service directly in return to the payer otherwise it would be a tax-imposing enactment. It is the direct nature of the service which marks the boundary between tax and fee. The Federation could not show that any direct or special service would be provided to the appellants as a reward or recompense for payment of the fee. There is no quid pro quo in the enactment.

c) There can be compulsory exactions but must be based on services which are available or may be made available immediately or shortly after the payment of the fee. It is not necessary that a service is rendered in full immediately on payment of fee as it can be rendered incrementally. There may also be a gap between the payment of fee and provision of service, however the provision of the service cannot be indefinitely postponed on a hope to be provided in the unforeseeable future.

d) Section 4 of the Act, 2015 provides that Cess is to be used for the development of Iran-Pakistan Pipeline Project (IP) as well as Turkmenistan-Afghanistan-Pakistan-India Pipeline Project (TAPI). Both projects mentioned in Section 4 of the Act 2015 have neither commenced nor has the government given any tangible timeframe for their launch or completion. The two terminals that are operated by Engro and PGPCL at Karachi port are financed from other sources so the Cess is no longer to be utilised for LNG and now can only be utilised for IP and TAPI projects and projects ancillary thereto.

e) Under Section 4 of GIDC Act, 2015, the Cess is a specific purpose levy, the Federation is not free to use it as it pleases. There was no evidence of the amount collected towards Cess ever having been spent for the specified purposes. Between 2011 and 30th June 2019 a sum of Rs.295,402,787,597.67 has been collected out of which Rs.279,575,000 and Rs.207,664,501 have been spent. The Government has failed to justify the collection of Cess.

f) Revenue of Cess so far collected has not been put in any special fund but has been made part of general revenues of the state and retained in the Federal Consolidated Fund.

g) The Second Schedule to GIDC Act, 2015 only mentions the maximum rates of tax but the actual rate of tax to be charged was not specified.

h) The supply of gas in the province of Khyber Pakhtunkhwa is in excess of the demand, therefore, the GIDC Act, 2015 conferred no benefit on its residents. The shortage was created for reasons extraneous to the demand in the Province.

i) Section 3(1) of the GIDC Act, 2015 used the terms 'levied' and 'charged' which indicate that it is a tax imposing enactment and not 'fee' and while enacting GIDC Act, 2011 which is a similar Act, legislated as a tax-imposing enactment.

17. In support of their arguments learned counsel for the appellants / petitioners / intervenors have placed reliance on the cases of Collector of Customs v. Shaikh Spinning Mills (1999 SCMR 1402), Abdul Majid v. Province of East Pakistan (PLD 1960 Dacca 502), Sohail Jute Mills v. Federation of Pakistan (PLD 1991 SC 329), Nishat Tek Ltd., Lahore v. Federation of Pakistan (PLD 1994 Lahore 347), Messrs Fatima Enterprises Ltd. v. Federation of Pakistan (1999 MLD 2889), Messrs Coca-Cola Beverages v. Cantonment Board Chaklala Rawalpindi (2011 MLD 1987), Soneri Bank Ltd. v. Federation of Pakistan (2013 PLC Labour 134), East Pakistan Chrome Tannery (Pvt.) Ltd. v. Federation of Pakistan and others (2011 PTD 2643), Pakcom Ltd. v. Federation of Pakistan (PLD 2011 SC 44), Azgard Nine v. Government of Pakistan (2013 PTD 1030), Tata Textile Mills v. Federation of Pakistan (2013 PTD 1459), Messrs Shahbaz Garments Pvt. Ltd. v. Federation of Pakistan (2013 PTD 969), Associated Industries Ltd. v. Government of Pakistan (2015 PTD 193), Workers' Welfare Funds, Ministry of Human Resources Development, Islamabad and others v. East Pakistan Chrome Tannery (Pvt.) Ltd. and others (PLD 2017 SC 28), Flying Cement Company v. Federation of Pakistan (PLD 2016 Lahore 35), Dr. Mahmood-ur-Rehman Faisal v. Secretary Ministry of Law (PLD 1992 FSC 195), ABN Amro Bank N.V. v. M.D KW&SB (2006 CLC 597), Kewal Krishan Puri and others v. State of Punjab and others (1980) 1 SCC 416), State of Maharashtra v. Salvation Army (AIR 1975 SC 846), Al-Samrez Enterprises v. Federation of Pakistan (1986 SCMR 1917), The Hingri-rempur Coal Co. Ltd. and others v. The State of Orissa and others (AIR 1961 SC 459), Sona Chandi Oaz Committee v. State of Maharashtra (AIR 2005 SC 635), FECTO Belarus Tractor Ltd. v. Government of Pakistan (PLD 2005 SC 605), Dr. Mohashir Hassan v. Federation of Pakistan (PLD 2010 SC 265), Contempt Proceedings against Chief Secretary, Sindh (2014 PLC (C.S.) 82), Pir Baksh v. The Chairman, Allotment Committee (PLD 1987 SC 145). Human Rights Case No. 14392 of 2013 and Suo Motu Case No.1 of 2013 (2014 PTD 243), Shahtaj Sugar Mills Ltd. v. Province of Punjab (1998 SCMR 2492), The Town Municipal Committee, Amravati v. Ramchandra Vasudeo Chimote and another (AIR 1964 SC 1166), Messrs Ujagar Prints and others v. Union of India and others (AIR 1989 SC 516), Baz Muhammad Kakar v. Federation of Pakistan (PLD 2012 SC 923), Kewel Krishan v. State of Punjab (AIR 1980 SC 1008) and State of Maharashtra v. Salvation Army (AIR 1975 SC 846).

18. Learned Additional Attorney General has placed reliance on the cases of B. S.E. Brokers' Forum, Bombay and others v. Securities and Exchange Board of India and others (2001 (3) SCC 482), Krishi Utpadan Mandi Samiti v. Ashok Kumar Dinesh Chandra and another (1996 (10) SCC 100), The City Corporation of Calicut v. Thachambalath Sadasivan and others (AIR 1985 SC 756), Messrs Gasket Radiators Pvt. Ltd. v. Employees' State Insurance Corporation and another (AIR 1985 SC 790). Barrister Mian Bilal has placed reliance on the case of The City Corporation of Calicut v.

Thachambalath Sadasivan (AIR 1985 SC Court 756), Gasket Radiators (Pvt.) Limited v. Employees' State Insurance Corporation (AIR 1985 SC 790), The Hinger-Ramper Coal Co. Ltd. v. The State of Orissa and others (AIR 1961 SC 459), Municipal Corporation of Delhi v. Mohd. Yasin (AIR 1983 SC 617), Sudhindra Thirtha Swamiar v. The Commissioner for Hindu Religious and Charitable Endowments, Mysore (AIR 1963 SC 966) and Jaora Sugar Mills (Pvt.) Limited v. The State of Madhya Pradesh (AIR 1966 SC 416).

19. Under the Constitution it is the prerogative of the legislature to raise revenue for the government on matters that fall within its legislative competence. The legislature enjoys the privilege to identify the base of the levy i.e. those upon whom the incidence of the levy would fall and also determine the quantum to be charged from them, which could either be at a fixed rate or ad valorem. Under our Constitution the legislature can levy taxes as well as fees. As GIDC Act, 2015 has been enacted by the Parliament as a fee-levying enactment, we deem it appropriate to briefly discuss the legal concept of such enactments.

20. There are two kinds of fee-imposing legislative enactments which have been defined in various judicial pronouncements, both from our as well as foreign jurisdictions. One is based purely on the principle of quid pro quo i.e. a charge is payable for rendering a specific service or extending a specific privilege which the payers can avail subject to the conditions that may be attached to it. In other words, it can be called as 'fee-simplicitor'. In such an enactment there is direct and immediate correlation in absolute terms between the service that is rendered and the fee that is charged for it. The other kind of a fee-levying legislation is where Cess is imposed as a compulsory exaction in the same manner where taxes are imposed with the distinction that it is imposed for achieving a specific purpose promised in the enactment itself which when realized would bring some advantage or benefit for the payers in future. It can be described as 'purpose specific' and in many judicial pronouncements have been termed as 'Cess-fee'. In such a form of levy, the specified purpose is pre-committed to the payers before the revenue is collected under the legislation. To quote a few examples, Cess is imposed to meet the extraordinary costs involved in providing infrastructure such as construction of dams or for importing oil or gas from abroad through pipelines or to build farm to mill roads in order to facilitate marketing of the agricultural produce or for conducting research and development in some specialized field. In such a form of levy the rule of quid pro quo does not exist in the same sense as it exists in a case where an existing service is rendered or a privilege is extended directly to the payer for a fee. What needs to be taken into consideration is whether the enactment has promised some benefit or advantage for the payers to be made available in future by utilizing the revenue, making it more akin to a fee then a pure revenue raising measure like taxes in general are imposed with no precondition attached for their spending. In a case from the Indian jurisdiction cited by one of the counsel of the appellants reported as Hinger-Rampur Coal Co. Ltd. and others v. The State of Orissa (AIR 1961 SC 459) the Supreme Court of India in paragraphs 9 and 10 while discussing a fee-imposing enactment observed as follows:

> 'If specific services are rendered to a specific area or to a specific class of persons or trade or business in any local area, and as a condition precedent for the said services or in return for them cess is levied against the said area or the said class of persons or trade or business, the cess is distinguishable from a tax and is described as a fee.'

21. In the case of Sona Chandi Oal Committee v. State of Maharashtra (AIR 2005 SC 635) the Indian Supreme Court while describing fee based levy observed as follows:

> ' .The levy does not cease to be a fee merely because there is an element of compulsion or coerciveness present in it, nor is it a postulate of a fee that it must have a direct relation to the actual service rendered by the authority to each individual who obtains the benefit of the service. Quid pro quo in the strict sense was not always a sine qua non for a fee. All that is necessary is that there should be a reasonable relationship between the levy of fee and the services rendered and it is not necessary to establish that those who pay the fee must receive

direct or special benefit or advantage of the services rendered for which the fee was being paid. It was held that if one who is liable to pay, receives general benefit from the authority levying the fee, the element of service required for collecting the fee is satisfied.'

22. Then in the case of State of West Bengal v. Kesoram Industries Limited (AIR 2005 SC 1646) the Indian Supreme Court in paragraph 145 of its judgment observed as under:

' . The impugned cess can, therefore, be justified as a fee for rendering such services as would improve the infrastructure and general development of the area, the benefits whereof would be availed even by the stone-crushers.'

23. Barrister Mian Bilal has placed reliance on the case of Messrs Gasket Radiators Pvt. Ltd. v. Employees' State Insurance Corporation and another (AIR 1985 SC 790) wherein it has been held as under:-

"Merely because the benefits to be received are postponed, it cannot be said that there is no quid pro quo. It is true that ordinarily a return in praesenti is generally present when fee is levied but simultaneity or contemporaneity of payment and benefit is not the most vital or crucial test to determine whether a levy is a fee or not. In fact, it may often happen that the rendering of a service or the conferment of a benefit may only follow after the consolidation of a fund from the fee levied. Hospitals, for instance, cannot be built in a day nor medical facilities provided right from the day of the commencement of the scheme. It is only after a sufficient nucleus is available that one may reasonably expect a compensating return. The question of how soon a return may be expected or ought to be given must necessarily depend on the nature of the services required to be performed and benefits required to be conferred."

24. The basic difference between the enactment where fee-simplicitor is imposed and where Cess-fee is imposed is that in the former a service or a privilege is made available to the payer directly on the strict principle of quid pro quo whereas in the latter case, the declared purpose comes with a promise to bring some benefit or advantage in future which is basically meant for its payers. Such benefit or privilege once made available on the ground may be availed by others as well but that would not change the status of such fee-levying enactment. It would remain a specie of fee-levying enactment in contradistinction to tax-levying enactment in which no specific purpose or specific service needs to be disclosed by the legislature in order to justify its imposition.

25. When Cess as a fee is levied to meet an earmarked financial exigency spelt out in an enactment, it preserves the levy for such purpose only even with the change in the government setup. It cannot be levied as a general revenue collecting tool and the government would not be justified to collect it if the funds are diverted to some other expenditure. So it is like a 'promised spending' to be applied to the specific purpose described in the enactment. Hence, in order to remain as a fee-levying enactment, the purpose for which the Cess is to be charged should be well spelled out and defined in the enactments as narrowly as possible lest it may convert it into a tax-levying enactment. The proceeds of Cess should be clearly identifiable in the accounts by using separate accounting codes so that its collection and utilization is reconcilable with the purposes stated in the enactment. A correlation between the revenue collected and the expenditure incurred for the promised specific purpose should always be maintained. In this manner the earmarked levy also provides information on the amount collected and spent. This also inculcates confidence in the payers as it contains the promise that the revenue would be utilized for the specific purpose only for which it was collected and they would have a claim to transparency and accountability of the utilization of the revenue so collected. They can claim that the revenue cannot be utilized for any other purpose other than for which they have been charged. When the revenue can only be utilized for the purpose promised in the fee-levying enactment then in that sense the levy could also be regarded as a temporary levy. Once the purpose for which it was imposed stands served, the justification for its imposition also comes to an end. The collection of Cess therefore should be based on some calculation keeping in view the funding requirements and as and when the purpose is achieved,

the government loses it right to collect Cess regardless of the fact that the enactment continues to remain in force.

26. After discussing the two kinds of fee-levying enactments, we shall now proceed to examine whether the GIDC Act, 2015 is a fee or tax-levying enactment and whether it was legislated within the legislative competence of the Parliament.

27. The counsel for the appellants in support of their argument that the Cess levied under GIDC Act, 2015 is a tax, basically made its comparison with such fee-levying enactments where the principle of quid pro quo was the only consideration i.e. comparison was made with service specific enactments describable as 'fee-simplicitor'. The controversy in the present case is comparable with the enactments that impose fee for a specific purpose that is promised to be achieved for the benefit of the payers in future i.e. a category described in various judicial pronouncements as 'Cess-fee'. In Durrani Ceramics case also it was held that practically the Federal Government has demonstrated that GIDC Act, 2011 was a fee imposing enactment, which for its object and purpose was no different from GIDC Act, 2015. In paragraph 22 of Durrani Ceramics case it was observed ' ..Similarly, in the Annual Budget Statement (Federal Budget 2013-14) that carries a similar worded preface, 'Gas Infrastructure Development Cess' has again been listed at C03916 as Non-Tax Revenue. Thus on the Government's own showing, as reflected in the Annual Budget, GIDC is not a 'tax'. No argument has been advanced on behalf of the appellants to explain away the categorization of GIDC as Non-Tax Revenue by the Government in the Annual Budget... . The above determination is sufficient to hold that being a 'fee' the same could not have been imposed through a money bill and on this score the levy was liable to be struck down.' Thus what invalidated the GIDC Act, 2011 in Durrani Ceramics case, as is evident from its paragraph 22 was that GIDC Act 2011 being a fee-levying enactment its bill could not have been introduced in the National Assembly as a Money Bill under Article 73 of the Constitution. This is precisely the ratio of Durrani Ceramics case which is evident from its concluding paragraph 45 also.

28. Keeping in mind the above legal infirmity with which the legislative process suffered in the legislation of GIDC Act, 2011 which led this Court in Durrani Ceramics Case to declare it invalid, the legislature introduced the bill of GIDC Act, 2015 under Article 70 of the Constitution which was passed by both the houses of the Parliament as a fee-levying enactment. By recasting the GIDC Act, 2015 as a fee-levying instead of tax-levying enactment the constitutional requirements that lacked in the GIDC Act, 2011 were met. This Court in several cases has recognized the right of the legislature to re-enact a law on the same subject, which on account of legal infirmities in its enactment process had been declared invalid by a Court of law, by removing the causes that led to its invalidity. The legislature is also competent to make the re-enacted law applicable retrospectively in order to bind even the past transactions that had been declared invalid. In the case of Molasses Trading and Export (Pvt.) Limited v. Federation of Pakistan (1993 SCMR 1905) this Court at page 1920 held as follows:-

> "Before considering this question it would be appropriate to make certain general observations with regard to the power of validation possessed by the legislature in the domain of taxing statute. It has been held that when a legislature intend to validate a tax declared by a Court to be illegally collected under an invalid law, the cause for ineffectiveness or invalidity must be removed before the validation can be said to take place effectively. It will not be sufficient merely to pronounce in the statute by means of a non-obstinate clause that the decision of the Court shall not bind the authority, because that will amount to reversing a judicial decision rendered in exercise of the judicial power, which is not within the domain of the Legislature. It is therefore necessary that the conditions on which the decision of the Court intended to be avoided is based, must be altered so fundamentally, that the decision would not any longer be applicable to the altered circumstances. One of the accepted modes of achieving this object by the Legislature is to re-enact retrospectively a valid and legal taxing provision, and adopting the fiction to make the tax already collected to stand under the re-enacted law. The Legislature

can even give its own meaning and interpretation of the law under which the tax was collected and by `legislative fiat' make the new meaning biding upon Court. It is in one of these ways that the Legislature can neutralize the earlier decision of the Court. The Legislature has within the bound of the Constitutional Limitation the power to make such a law and give it retrospective effect so as to bind even past transaction. In ultimate analysis therefore a primary test of validating piece of legislation is whether the new provision removes the defect, which the Court had found in the existing law, and whether adequate provisions in the validating law for a valid imposition of tax were made."

29. In the case of Mamukanjan Cotton Factory v. Punjab Province (PLD 1975 SC 50) this Court at pages 53-54 held as follows:-

"Mr. A. K. Brohi, appearing in support of these two petitions, frankly conceded, that he did not find it possible to question the vires of the validating Ordinance on the grounds canvassed in the High Court. With the permission of this Court, learned counsel, however, attacked the vires of the Ordinance and the resultant action of the Provincial Government on a fresh ground. His argument in nutshell was that the validating Ordinance purports to enable the Provincial Government to retain and claim, what according to the judgments of the High Court, the Government could not have at the material time, levied and collected. These judgments are rendered by the High Court, in exercise of its jurisdiction conferred by the Constitution itself. The validating Ordinance on the other hand, is sub-constitutional legislation, which according to learned counsel cannot undo or destroy, what he described as the "end product" of the Constitutional jurisdiction.

The argument, in my opinion, is without substance and which is accepted would indeed lead to startling results. It would strike at the very root of the power of Legislature, otherwise competent to legislate on a particular subject, to undertake any remedial or curative legislation after discovery of defect in an existing law as a result of the, judgment of a superior Court in exercise of its constitutional jurisdiction. The argument overlooks the fact, that the remedial or curative legislation is also "the end product" of constitutional jurisdiction in the cognate field. The argument if accepted, would also seek to throw into serious disarray the pivotal arrangement in the Constitution regarding the division of sovereign power of the State among its principal organs; namely, the executive, the Legislature and the judiciary each being the master in its own assigned field under the Constitution.

The argument of learned counsel also conveniently overlooks string of cases, in which the vires of the remedial legislation, competently made, was upheld by this Court, notwithstanding the earlier judgments of the Superior Courts, in exercise of their constitutional jurisdiction, to the contrary effect. The foremost and exactly in point among these cases is the judgment in Dossa Ltd. v. The Province of the Punjab, in which as in these cases, the vires of the validating Ordinance of 1971, was called in question. It was inter alia observed in that case:-

"The last contention, namely, that the Ordinance of 1971 could not validate something which was void ab initio in terms of the Act of 1949, loses sight of the fact that it is open to the Legislature to confer retrospective operation on the laws made by it. A reference to the provisions of this Ordinance leaves no doubt that the law maker expressly made its operation retrospective with the avowed object of conferring validity on a demand which was not valid under the original Act of 1949.

30. To the same effect are the judgments of this Court rendered in the cases of Molasses Trading and Export (Pvt.) Ltd. v. Federation of Pakistan (1993 SCMR 1905), FECTO Belarus Tractor Ltd. v. Government of Pakistan through Finance Economic Affairs (PLD 2005 SC 605), Dr. Mobashir Hassan v. Federation of Pakistan (PLD 2010 SC 265) and Contempt Proceedings against Chief Secretary, Sindh (2014 PLC (C.S.) 82).

31. In many landmark cases this Court has also held that Courts should lean towards the constitutionality of a legislative enactment instead of destroying it, keeping in view the rules of constitutional interpretations. A seventeen member full Court in paragraph 39 of its judgment rendered in the case Dr. Mobashir Hassan v. Federation of Pakistan (PLD 2010 SC 265) in paragraph 39 stated as follows:-

'There is another principle of law, which casts duty upon this Court to the effect that it should normally lean in favour of constitutionality of a statute and efforts should be made to save the same instead of destroying it. This principle of law has been discussed by this Court on a number of occasions. Reference in this behalf may be made to the cases of Abdul Aziz v. Province of West Pakistan (PLD 1958 SC 499), Province of East Pakistan v. Siraj-ul-Haq Patwari (PLD 1966 SC 854), Inam-ur-Rehman v. Federation of Pakistan (1992 SCMR 563), Sabir Shah v. Shad Muhammad Khan (PLD 1995 SC 66), Multiline Associates v. Ardeshir Cowasjee (PLD 1995 SC 423), Tariq Nawaz v. Government of Pakistan (2000 SCMR 1956), Asif Islam v. Muhammad Asif (PLD 2001 SC 499) and Federation of Pakistan v. Muhammad Sadiq (PLD 2007 SC 133). This principle has been appropriately dealt with in the case of Elahi Cotton Mills Ltd. v. Federation of Pakistan (PLD 1997 SC 582) in the following terms:-

"that the law should be saved rather than be destroyed and the Court must lean in favour of upholding the constitutionality of legislation, keeping in view that the rule of constitutional interpretation is that there is a presumption in favour of the constitutionality of the legislative enactments unless ex facie it is violative of a constitutional provision."'

32. As to the legislative competence of the Parliament to pass the GIDC Act, 2015 as a fee-imposing enactment, in a case from the Indian jurisdiction reported as Ujagar Prints v. Union of India and others (AIR 1989 SC 516) cited by one of the counsel of the appellants the Indian Supreme Court in paragraph 23 while discussing the application of legislative entries to an enactment observed that entries to the Legislative Lists are not the source of legislative power but are merely topics of fields of legislation and must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense. In paragraph 25 it was further observed that if a legislation purporting to be under a particular legislative entry is assailed for lack of legislative competence, the State can always show that the law was supportable under any other entry within its legislative competence. In the case of Elahi Cotton Mills Ltd. v. Federation of Pakistan (PLD 1997 SC 582) relied upon by one of the appellants' counsel this Court held that the entries in the Legislative List of the Constitution are not powers of legislation but only fields of legislative heads and allocation of the subjects to the lists is not by way of scientific or logical definition but by way of mere simple enumeration of broad catalogue.

33. The provision of the Constitution that enables the legislature to legislate GIDC Act, 2015 is Entry No.54 of Part I of the Federal Legislative List contained in the Fourth Schedule. This entry states 'Fees in respect of any of the matters in this Part, but not including fees taken in any court.' When we glance through the entries of Part I of the Federal Legislative List in order to see which specific entry enables the Parliament to cover the subject stated in the GIDC Act, 2015, we find Entry No.27. It provides 'Import and export across customs frontiers as defined by the Federal Government, inter - provincial trade and commerce, trade and commerce with foreign countries; standard of quality of goods to be exported out of Pakistan'. This entry, inter alia, covers legislation that relates to subjects of import into Pakistan and trade with foreign countries and the mode through which natural gas can be cheaply and efficiently imported from nearby countries where it is more than sufficient for their needs is through overland pipeline. This is exactly the purpose and object of the GIDC Act, 2015 as reflected by its Section 4 which provides that the revenue that is to be generated from Cess shall be utilized for facilitating import of natural gas into Pakistan through two separate transnational pipelines and for ancillary projects. It states 'The cess shall be utilized by the Federal Government for or in connection with infrastructure development of Iran-Pakistan Pipeline Project, Turkmenistan-

Afghanistan-Pakistan-India (TAPI) Pipeline Project, LNG or other ancillary projects.' For such purpose trade agreements have also been executed with Iran and Turkmenistan separately. In addition to this Section 4 of the GIDC Act, 2015 also provides that the Cess was required for the purposes of LNG which under a trade agreement with Qatar is being imported on ships and after its discharge at the port of Karachi and gasification, is planned to be transported upcountry through a pipeline project named 'North-South pipeline'. From this it has become evident that the whole purpose of enacting GIDC Act, 2015 was to facilitate import of natural gas, a very important source of energy from the nearby countries under trade agreements executed with them. The fee imposed under the GIDC Act, 2015 is clearly intended to facilitate import into Pakistan natural gas on the basis of trade agreements executed with foreign countries which acts clearly fall within the ambit of Entry No. 27 of Part I of the Federal Legislative List contained in the Fourth Schedule to the Constitution.

34. The industrial and commercial consumers of natural gas of this country, from whom Cess is being collected, consume about 76% of the total supply of natural gas, which fact was also brought to the notice of this Court in the Durrani Ceramics case. They would be mainly benefited once the promised projects are completed. It does not matter if domestic consumers of natural gas would also be benefitted. Mr. Salman Akram Raja had argued that as his client is getting sufficient supply of natural gas from the wellhead located very near to its installation therefore the imported gas would be of no benefit for his client who may be exempted from the levy of Cess as there exists no quid pro quo. In a legislative enactment where there is an element of compulsion, which can be even in an impost such as Cess-fee, the payer does not enjoy the privilege of avoiding the obligation at his choice. If such a plea is accepted then every consumer would be able to take it and that would virtually nullify the Act itself at the choice of the payers. In the case of Hinger-Rampur Coal Co. Ltd. v. The State of Orissa (AIR 1961 SC 459) the Indian Supreme Court in its paragraph 10 has observed:-

> 'There is, however, an element of compulsion in the imposition of both tax and fee. When the Legislature decides to render a specific service to any area or to any class of persons, it is not open to the said area or to the said class of persons to plead that they do not want the service and therefore they should be exempted from the payment of the cess.'

35. It was also argued that in Section 3(1) of the GIDC Act, 2015 the terms 'levied' and 'charged' are used which demonstrate that it is a tax imposing enactment and not 'fee'. The learned counsel attempted to strengthen this argument by relying on the stand which the Federal Government in Durrani Ceramics case took that the levy in the GIDC Act, 2011 was a tax-imposing enactment. When the terms like 'levy' or 'charge' are used in any revenue raising enactment, it does not mean that it cannot be a fee imposing enactment. A plea taken by a party on a point of law which was not accepted by a Court in an earlier round of litigation cannot be used against such party which on account of such decision has accordingly changed its plea in subsequent legal proceedings. In any case the terms 'levied' or 'charged' mean 'to impose by legal authority'. Whether tax is being imposed or a fee, it entirely depends upon the object of the legislation and has nothing to do with the use of such terms. Even in Article 279 of the Constitution the term 'levied' is used for tax as well as for fee imposing legislations. So mere use of terms like 'levied' or 'charged' cannot be made basis to describe a law as tax imposing enactment. As the GIDC Act, 2015 contains a well-defined object meant for making future availability of natural gas more convenient and without interruption that would mainly benefit the industrial and commercial consumers which the appellants, the petitioners and the intervenors undeniably are, therefore, in pith and substance the GIDC Act, 2015 is a fee-imposing enactment and use of terms like 'levied' or 'charged' would not change the object with which it was legislated.

36. It was also argued that in Section 3 (1) of the GIDC Act, 2015 it is stated that Cess shall be levied and charged by the Federal Government which means that Federal Government has been empowered to levy it as and when it so decides which decision is yet to come. It was contended that until the Federal Cabinet so decides and upon such decision the Federal Government issues notification

in this behalf, Section 3 (1) would remain inoperative. When an Act of Parliament provides that it will come into force at once then every provision of it becomes enforceable from the day the Act receives the assent of the President unless any provision of the Act itself suggests that it will come into force only when some authority nominated in this behalf so decides or on the happening of an event. No such precondition has been attached to Section 3(1) for its coming into operation. It clearly states that the Cess shall be levied and charged by the Federal Government from the gas consumers of the companies which are listed in the First Schedule and such companies shall be responsible for billing and collection and making onward payment of the Cess so collected from the gas consumers to the Federal Government. When such is the unqualified mandate of Section 3(1) of GIDC Act, 2015 and the responsibility of billing and collection has already been cast upon the companies listed in the First Schedule from the day when it comes into effect then the Cess becomes chargeable from that very day without leaving it to the Federal Government to first decide when to bring Section 3(1) into operation. On the other hand, where the legislature intends to leave a matter for the Federal Government to decide before it is given effect to then it specifically states so in the law itself. This can be seen from the contents of Section 7 of the GIDC Act, 2015 which provides 'The Federal Government may, by notification in the official Gazette, make such amendments in the First Schedule as it deems fit.' No such precondition is contained in Section 3 (1) of the GIDC Act, 2015.

37. It was also argued that the GIDC Act, 2015 is discriminatory as the domestic consumers of natural gas have been excluded from the levy. From the contents of Section 3 (1) of the GIDC Act, 2015 it is evident that the incidence of Cess falls only on commercial and industrial concerns. In our opinion this may have been for the reason that the Cess which the industrial and commercial concerns pay becomes part of the cost of the goods which they sell or the cost of the services they render and thus is ultimately borne by the buyers of their goods and services. Same is the case with the consumers of CNG. The burden of the Cess payable by the owners of CNG stations on their purchases of natural gas gets factored in towards fixation of sale price of CNG. Every industrial and commercial entity using natural gas for its business activity is entitled to claim the burden of Cess as their business expense, being part of the cost of their goods sold or services rendered, and get it adjusted against their business profits. They must have already done so in their books of account and the annual returns of their income must have been filed before the Income tax authorities accordingly. Thus the Cess under GIDC Act, 2015 has been levied only on those consumers of natural gas who on account of their industrial or commercial dealings pass on its burden to their customers/ clients. This is not the case with the domestic consumers of gas as the question of passing on the burden in their case obviously does not arise. For this reason, the domestic consumers may have been treated an altogether different class of gas consumers and consciously excluded from the levy of Cess, which reason appears to be very sound. This could be the only distinction on the basis of which the domestic consumers were not burdened with the incidence of Cess under GIDC Act, 2015. Needless to point out that the domestic consumers are indirectly burdened with the incidence of Cess in a way that whatever product or service they buy/avail from an industrial or commercial enterprise or purchase CNG from a CNG station, the element of cost of Cess having already been factored in the price of their purchases, it ultimately passes on to them. So looking from that angle too, the domestic consumer or an ordinary person becomes the ultimate payer of the Cess that is levied on industrial or commercial concerns who consume natural gas for their business activity. What emerges from this is that domestic consumers of natural gas being treated as a distinct class of consumers from industrial and commercial consumers, no discrimination in favour of domestic consumers emerges on account of their exclusion from the levy of Cess under GIDC Act, 2015.

38. Whatever Cess has been collected right from the day when when GIDC Act, 2011 came into force has been accounted for by the Federal Government in its annual accounts recording it under separate code numbers and is thus identifiable separately from the other revenues of the Federal

Government. This would facilitate in seeking information on the amount collected as against the amount that is going to be spent for the purposes promised in the GIDC Act, 2015. Thus a correlation between the revenue collected and the expenditure which is going to be incurred for the promised specific purpose can be maintained. It matters not if the revenue so collected forms part of the Federal Consolidated Fund as it is the mandate of Article 78 of the Constitution itself that all revenues of the Federal Government has to made part of Federal Consolidated Fund.

39. The background of the legal history of the controversy in question can be traced back to 2011, when the levy under GIDC Act, 2011 was challenged before the Peshawar High Court which in 2013 declared the levy as ultra vires the Constitution and struck down the GIDC Act, 2011. The Islamabad High Court followed the same course in its judgment in 2014. As a result of these decisions, the matter came before this Court in the case which has come to be known as Durrani Ceramics case. This Court in its judgment refused to interfere with the decision rendered by the Peshawar High Court and declared the GIDC Act, 2011 as unconstitutional, holding that the levy in question was in fact a fee and not a tax, hence, it could not have been imposed through a Money Bill. The case came before this Court again in review, which was dismissed in 2015. Later, the Government enacted the GIDC Act, 2015 as a fee imposing enactment. The constitutional validity of the said Act was also challenged before the High Courts. The Sindh High Court declared the levy unconstitutional vide its judgment dated 26.10.2016 whereas the Peshawar High Court upheld the constitutionality of the new Act vide its judgment dated 31.05.2017. While several other similar matters awaited adjudication before other High Courts issue came before this Court for a second time, in which we vide order dated 22.10.2019 allowed the parties concerned to join the present proceedings as intervenors so that they can have a chance to assist us in the present proceedings and get an opportunity to present their version of the case before us. If we look at this matter in retrospect, there has been continuous litigation pertaining to the constitutional validity of the GIDC cess right from 2011 till July 2020 when we are finally deciding the controversy in these proceedings. Apart from continuous litigation on the issue, we were also told that due to international sanctions on Iran, the response to international tender for EPC contract was very poor as no contractor was willing to undertake the project. On TAPI it is stated that land acquisition proceedings is at an advance stage however work on laying of the pipeline could not start in Afghanistan on account of the insurgency in Afghanistan. It is also stated at the bar that now there are signs that work on laying the pipeline in Afghanistan may commence soon as the final draft of TAPI Project Land Management Law is on final review of the Government of Afghanistan. Hence the delay in the commencement of work on laying the pipelines on account of continuous proceedings in the High Courts as well as before this Court and the levy under both the enactments having been struck down as unconstitutional in the year 2013 and 2016, geopolitical situations in the neighboring countries which are beyond the control of the Federal Government. This means that the projects have not been deliberately abandoned and there is also no material on record to doubt the intentions of Federal Government in this behalf. The Executive, therefore, cannot be blamed for not laying down the pipelines in question. In such a situation where work has not yet started on the laying of the pipelines and no contract has been awarded it would also be premature to ask for laying any report before the National Assembly.

40. At this stage, we like to refer to Entry No.51 of Part I of the Federal Legislative List contained in the Fourth Schedule to the Constitution. It reads 'Taxes on mineral oil, natural gas and minerals for the use in generation of nuclear energy.' As regards generation of nuclear energy is concerned, the scientific reality is that it originates from splitting of atoms of the uranium which generates heat. This process of splitting the atoms of uranium is called fission. The heat so generated helps in producing steam which is then used to operate turbines to generate electricity. As nuclear energy is produced only through the process of fission, fuels such as mineral oil or natural gas cannot be used for such purpose. Resultantly, no greenhouse gas emissions are produced while generating nuclear energy, hence it is

also a clean source of energy. There are several other primary sources of generating energy such as fossil fuels like coal, petroleum, natural gas and sources like hydroelectric, solar and wind. None can be used as nuclear fuel to generate nuclear energy except uranium and its by-product plutonium. When such is the scientific reality then mineral oil and natural gas appearing in Entry No.51 on which the process of fission cannot apply to generate nuclear energy are to be read disjunctively, as both are sources of energy other than nuclear energy.

41. While discussing the scope of Entry No.51 of Part I of the Federal Legislative List contained in the Fourth Schedule to the Constitution which was also examined in Durrani Ceramics case, we feel the need to highlight the fact that prior to the framing of the 1956 Constitution the subject of mineral development was under the exclusive domain of the Federal Government for legislation which was administered under the federal law i.e. 'The Regulation Mines and Oil Fields and Mineral Development (Government Control) Act, 1948'. Hence legislation with regard to all minerals before 1956 Constitution came into force, fell within the domain of the Federal Government. Under the 1956 Constitution only two sources of energy, the mineral oil and natural gas were exclusively retained by the Federal Legislature as is evident from its Entry No.15 and iron, coal and other minerals were placed under Entry 12 of the Part II of the Concurrent List and under Entry No.41 regulation of mines and mineral development, excluding those mentioned in the Federal and Concurrent Lists fell in the Provincial List. Now for the first time an item described as 'mineral resources for generation of nuclear energy' was added in the 1962 Constitution under Entry No. 23 of the Federal Legislative List and mineral oil and natural gas were listed under Entry No.24 of the Federal Legislative List. This also recognizes the fact that mineral oil and natural gas though being sources of energy are distinct from the source that generates nuclear energy. In the 1973 Constitution mineral oil, natural gas and minerals for use in generation of nuclear energy were clubbed together under Entry No.51 for the simple reason that all three denote a common feature i.e. these are all sources of energy which the Federal legislature continued to retain for itself for legislation. Placing all three items under one and the same Entry is understandable. However, mere mention of all three sources of energy in one and the same entry does not mean that scientific reality has changed and the first two sources of energy i.e. mineral oil and natural gas can now also be used to generate nuclear energy. In the Durrani Ceramics case all items contained in Entry No.51 were read conjunctively, meaning thereby that Federal Government can levy tax on natural gas and mineral oil only if these sources of energy can be used to generate nuclear energy. It appears that no proper assistance on scientific lines was rendered by the law officers to this Court during the hearing of the Durrani Ceramics case hence the scientific fact that it was not possible to generate nuclear energy from mineral oil and natural gas, as these sources cannot be used as nuclear fuel was not taken into consideration. In view of the fact that nuclear energy can only be generated from uranium and its by-product plutonium and not from natural gas or mineral oil, the National Assembly was fully competent to impose tax on natural gas through a Money Bill on the strength of Entry No.51 of the Federal Legislative List. However, in these proceedings we leave this aspect at that as the law which was the subject matter of the controversy in Durrani Ceramics case is not in existence anymore and in light of decision in that case, the Federal Government also changed its stance and opted to impose fee.

42. From what has been discussed above it can be concluded that the whole purpose of enacting GIDC Act, 2015 was to facilitate import into the country a very important source of energy i.e. natural gas / LNG from nearby countries in order to meet the ever expanding energy needs of the country as our own resources of energy are fast depleting and the cheapest way to import it is through overland transnational pipelines. The supply of imported LNG to various parts of the country after its import on ships through trans-provincial pipeline is also a project of the Federal Government. The incidence of the cost involved in doing so falls on the industrial and commercial consumers whose consumption account for more than three-fourth of the total supply of natural gas, which fact was also brought to

the notice of this Court in Durrani Ceramics case. Such consumers, apart from being major beneficiaries of the imported gas, would on account of their business activity pass on the burden to their clients/customers being part of the cost of their goods or services which they sell to their customers/clients. The object which the Parliament has promised in the GIDC Act, 2015 is clearly 'purpose based' which is distinctly defined and carries with it an element of quid pro quo, making it a fee-imposing enactment instead of a pure revenue raising measure like taxes in general are imposed with no precondition attached for their spending. After seeing the purpose of the enactment clearly and the fact that its revenue is duly accounted for and has also not been diverted to any other use, we hold that the imposition of Cess under GIDC Act, 2015 is not a tax-imposing enactment. It was passed through a bill moved in the Parliament under Article 70 of the Constitution deriving its legislative competence from Entry 54 read with the enabling Entry No. 27 of Part I of the Federal Legislative List contained in the Forth Schedule to the Constitution thereby curing the defect which lead to the invalidation of the GIDC Act, 2011 in Durrani Ceramics case. The provisions of Section 8 of the Act, which give retrospective effect to the charge and recovery of 'Cess' levied from the year 2011 are also declared to be valid being within the legislative competence of the Parliament. Exercise of such a power has been recognized by this Court in the Case of Mamukanjan Cotton Factory v. Punjab Province (PLD 1975 SC 50). The levy imposed under Gas Infrastructure Development Cess Act, 2015 is therefore in accordance with the provisions of the Constitution. However, keeping in view the ground realities discussed in the preceding paragraph and the fact that around 295 billion rupees have already been collected towards Cess-revenue and together with the outstanding amount the total sum by the end of this month would be in the vicinity of seven hundred billion rupees, which is more than what is the estimated cost of the projects mentioned in Section 4 of the GIDC Act, 2015, we are constraint to issue following directions: -

(i) From the date of this judgment, we restrain the Federal Govern-ment from charging Cess which power of the Federal Government shall remain suspended until the Cess-revenue collected and that which is accrued so far but not yet collected is expanded on the projects listed in Section 4 of the GIDC Act, 2015.

(ii) In the remaining period of the financial year 2020-21 while considering fixation of sale price of CNG, OGRA shall not take into consideration the element of Cess under GIDC Act, 2015 as one of the cost of sale of GNG.

(iii) As all industrial and commercial entities which consume gas for their business activities pass on the burden to their customers / clients therefore all arrears of 'Cess' that have become due upto 31.07.2020 and have not been recovered so far shall be recovered by the Companies responsible under the GIDC Act, 2015 to recover from their consumers. However, as a concession, the same be recovered in twenty-four equal monthly installments starting from 01.08.2020 without the component of late payment surcharge. The late payment surcharge shall only become payable for the delays that may occur in the payment of any of the twenty-four installments.

(iv) The Federal government shall take all steps to commence work on the laying of the North-South pipeline within six months and on TAPI pipeline as soon as its laying in Afghanistan reaches the stage where the work of laying pipeline on Pakistan soil can conveniently start and on IP pipeline as soon as the sanctions on Iran are no more an impediment in its laying. In case no work is carried out on North-South pipeline within the prescribed time and for laying any of the two other major pipelines (IP and TAPI) though the political conditions become conducive, the purpose of levying Cess shall be deemed to have been frustrated and the GIDC Act, 2015 would become permanently in-operational and considered dead for all intents and purposes.

43. Subject to the directions contained herein above, all these appeals and connected petitions are dismissed. In the light of this decision and the directions contained therein all listed applications also stand disposed of.

Sd/-

Faial Arab

Judge

Sd/-

Mushir Alam

Judge

I with respect disagree with the reasoning and conclusion of the majority judgment and have therefore appended my own judgment separately.

Sd/-

Syed Mansoor Ali Shah

Judge

44. **SYED MANSOOR ALI SHAH, J**.---I have had the privilege of reading the judgment authored by my learned brother Faisal Arab J. with which my learned brother Mushir Alam, J. has concurred ("Majority Judgment"). I, with respect, do not agree with the reasoning and conclusion of the Majority Judgment. I look at the issue somewhat differently. The principal question that concerns me is whether a fiscal levy imposed for a service to be rendered - a service dependent on the completion of long-term multinational infrastructural projects tied to the vagaries of international politics, exist without a reasonable time line? Is reasonable time, therefore, an essential constituent of quid pro quo? Can a fee levying legislation, resting on reciprocity, impose a one sided obligation on the gas consumers to pay the levy while providing no timeline nor any consequences for failure to deliver the proposed service? I venture to examine the constitutionality of the impugned levy (GIDC) in this background.

45. Constitutionality and legality of Gas Infrastructure Development Cess ("GIDC") imposed under the Gas Infrastructure Development Cess Act, 2015[1] ("Act") has come up for our consideration. Two provincial High Courts have expressed contrary views; Sindh High Court has struck down the levy and the Act, as being unconstitutional, vide judgment[2] dated 26.10.2016, whereas, Peshawar High Court has upheld the levy, vide judgment[3] dated 31.05.2017. Matters are still pending in other Provincial High Courts.

46. GIDC is levied and charged[4] by the Federal Government from the gas consumers[5], other than the domestic sector consumers. According to the Act, GIDC is to be utilized[6] by the Federal Government for infrastructure development of Iran Pakistan Pipeline Project (IP), Turkmenistan-Afghanistan-Pakistan-India (TAPI) Pipeline Project, LNG or other ancillary projects.

47. As a matter of background almost similar Cess (GIDC) was earlier imposed under The Gas Infrastructure Development Cess Act, 2011 ("Act, 2011").[7] Considering it to be a "tax" under item No.51 of Part I of the Federal Legislative List of the Constitution[8], it was passed as a Money Bill under Article 73 of the Constitution. It was soon challenged after its promulgation by the gas consumers, primarily on the grounds; that GIDC was infact a Fee and could not have been introduced through a Money Bill bypassing the bicameral legislative procedure provided under Article 70 of the Constitution; and that the Parliament did not enjoy the legislative competence to impose "Tax" on "natural gas."

48. Peshawar and Islamabad High Courts struck down the Act, 2011 and declared the levy of GIDC as being unconstitutional in Ashraf Industries (Pvt.) Ltd.[9] and Master Textile Mills.[10] Finally, the matter came up before this Court in Durrani Ceramics[11]. This Court also declared the law unconstitutional on the ground that GIDC under Act, 2011 was not a Tax but a Fee and therefore could not have been passed as a Money Bill. Review filed against the same was also dismissed in Durrani Ceramics -II.[12]

49. The Gas Infrastructure Development Cess Act, 2015 was promulgated on 21.05.2015 with modifications once again imposing GIDC (Cess) on all the gas consumers other than the domestic sector consumers. It drew its legislative competence from item No. 2[13] of Part II of the Federal Legislative List. The new Act is substantially a repeat of the previous Act, 2011 except that its legislative routing is through both the Houses of the Parliament in terms of Article 70 of the Constitution. The new legislation does not set out the essential constituents of the new levy (Fee) to show that GIDC is no more a Tax but a Fee. Perhaps the legislature simply banked on the declaration given in Durrani Ceramics and thought that no additional legislative design was required.

50. The constitutionality and legality of the new Act was challenged before the provincial High Courts in the country. Sindh High Court vide judgment dated 26.10.2016 struck down the levy as being unconstitutional, however, the Peshawar High Court upheld the levy in its judgment dated 31.05.2017. Litigation is still pending in other Provinces, therefore, this bench vide order dated 22.10.2019 had allowed parties in pending matters to join these proceedings as intervenors so that their contention and viewpoint can be heard. The matter has now come up before us for final determination.

Grounds of challenge

51. Several legal questions of varying complexities were raised before us in the startling backdrop of this case; the more fundamental and pivotal being whether the Act imposes a Fee under our constitutional framework, especially when the corresponding service or quid pro quo is to be rendered in some distant future; whether different Cess rates provided in the Second Schedule to the Act are discriminatory; the failure to seek prior approval of the Federal Cabinet before initiating the legislative process of the Act; and whether the Parliament can legislate without first allowing Council of Common Interest (CCI) to deliberate on the subject of natural gas which falls in Part II of the Federal Legislative List and without considering its recommendations of CCI. And in the absence of any notification and specification of the rates under section 3 of the Act, whether GIDC could be levied and charged and finally whether the validation provision under section 8 of the Act holds water and GIDC for the period prior to the Act was lawfully charged. I deal with the constitutionality of the Fee imposed and therefore some of the questions raised are not required to be answered in this case.

52. I have had the opportunity of hearing the learned counsel for the parties and the intervenors extensively over days. I have examined the record of the case; the current status of the infrastructure development gas projects on the ground; the recent trends in the sub-continental comparative jurisprudence on the subject of Tax and Fee; and tried to understand the contemporary concept and meaning of Fee (with future service), now used for raising public finance for large infrastructure projects and have examined its constitutionality and legality under our living Constitution.

OPINION

Concept of Fee

53. Summarizing the sub-continental jurisprudence[14] on Tax versus Fee, I see that normatively, theoretically and legislatively three prominent tasks have been entrusted to taxation, namely; revenue augmentation, redistribution of wealth in society and regulatory function to ensure expected economic behaviour. Fee, on the other hand, has a narrower scope and is premised on a corresponding service in return or quid pro quo. While tax is devoid of quid pro quo, it is a sine qua non for Fee. Tax and Fee both properly belong to the world of public finance.[15]

54. A tax is a compulsory contribution to the government, imposed in the common interest of all, for the purpose of defraying the expenses incurred in carrying out the public functions or imposed for the purpose of regulation, without reference to the special benefits conferred on the one making the payment.[16] As a corollary, tax being instrumental in revenue augmentation, its quantum need not commensurate with costs incurred by such public authority. Further, tax is devoid of any quid pro quo. Even where any benefit seems to flow, in case of tax, it is merely incidental and not primary. In other

words, there exists no connection, whether direct and immediate or broad and casual between the contributor of tax and benefits.

55. In a glaring contrast, Fee, is generally defined to be a charge for a special service rendered to individuals by some governmental agency. Ordinarily, Fees are uniform and no account is taken of the varying abilities of different recipients to pay. A Fee may either be regulatory or compensatory. Where a Fee is commensurate with the cost of rendering the service, though not in exact arithmetical equivalence, it is a compensatory Fee. On the other hand a Fee charged to regulate or control, is validly classifiable as regulatory Fee, provided it is not excessive or not dominantly intending to raise revenues for the public authority. Whilst both tax and Fee are compulsory exactions of money by public authority, their real distinction comprise in primarily what is known as quid pro quo test and proportionality of amount test.

56. Accordingly a levy to be identified as Fee must have an element of quid pro quo between the payer and the public authority that imposed it. This quid pro quo or service rendered in return envisages an intimate and immediate relationship between rendition of service and the payer, who is direct beneficiary of such service, on a one-on-one basis. This proximity between the beneficiaries and services can also be categorized for simplicity as "proximate quid pro quo.[17]" So the classical approach of Fee comprises the following: a) proximate quid pro quo i.e., rendition of certain services to the payers by government agency which amounts to special benefit/advantage to the payer; b) proportionality i.e., the amount imposed ought to commensurate with cost of services to be rendered; c) specific fund that ensures dedicated spending from an earmarked fund for specific purpose of that service. Merger of proceeds with general revenue to be spent for general purposes was not acceptable; d) primary objective that is to enquire whether the primary purpose of imposing levy is rendition of services and it is not merely incidental to augmentation of revenue. If latter predominates, it acts as negative restriction and the levy will be a tax[18].

57. As the economy grew, Fee was imposed to render services to a large class of people or specified sector or area as a whole. In such cases, the relationship between the beneficiary and the services rendered became more generic, broad and remote. This is because such a service is to reach a general class of people or a specified sector or a designated area and not to an individual per se and therefore the service may also extend to free riders who are not the payers of Fee, hence the bond of proximity stands diluted. This shift has also been termed as "remote quid pro quo"[19] which is used to describe the situation where services target beneficiaries which is a generic class comprising of a certain free riders but inclusive of payers. The shift from proximate to remote quid pro quo overtime does not mean that the service to be rendered to the payers of Fee would be any different or in any manner less. The scope and depth of service to be rendered depends on the nature of the service. Like in the instant case, the service of continuous and increased supply of natural gas, inspite of being a generic service, extending to a class of gas consumers including those who are not payers of GIDC, must still reach all the industrial gas consumers paying GIDC (Fee).

58. The requisite earmarking of funds stands diluted in subsequent case law. Merely because collections for services rendered or grant of a privilege or license are taken to the consolidated fund of the state and not separately appropriated towards the expenditure for rendering the service is not by itself decisive.

59. With proximate quid pro quo test replaced with remote quid pro quo test and the specific fund test being considered non-determinant factor, the only test that remained untouched from the classical package was proportionality test. This test coupled with primary object test became new determinants of Fee. The modern approach to Fee therefore consists of three point check: (a) Primary object test-whether the plenary objective of the levy is rendition of service to specified class and this service is something other than something merely incidental; (b) Remote quid pro quo test-whether the payer

receives a general benefit from the authority imposing levy; (c) Proportionality test - whether there exists a broad and generic co-relationship between services rendered and the amount of Fee charged[20]. Durrani Ceramics I and II

60. In Durrani Ceramics this Court held that GIDC was not a Tax but a Fee and declared Act, 2011 to be unconstitutional for having been passed as a Money Bill. Relevant extracts are as under:-

> 19. Upon examining the case-law from our own and other jurisdictions it emerges that the 'Cess' is levied for a particular purpose. It can either be 'tax' or 'fee' depending upon the nature of the levy. Both are compulsory exaction of money by public authorities. Whereas 'tax' is a common burden for raising revenue and upon collection becomes part of public revenue of the State, 'Fee' is exacted for a specific purpose and for rendering services or providing privilege to particular individuals or a class or a community or a specific area. However, the benefit so accrued may not be measurable in exactitude. So long as the levy is to the advantage of the payers, consequential benefit to the community at large would not render the levy a 'tax'. In the light of this statement of law it is to be examined whether the GIDC is a 'tax' or a 'fee'.
>
> 20. To recapitulate the 'Cess' collected is to be utilized for specific purposes, namely, development of infrastructure of Iran Pakistan Pipeline Project, Turkmenistan Afghanistan Pakistan India (TAPI) Pipeline Project, LNG or other projects or for price equalization of other imported alternative fuels including LPG. An annual report regarding utilization of the amount so collected is to be regularly placed before the House after three months of the end of each fiscal year (See S. 4 of GIDC Act). The levy therefore is to be utilized only for the purposes mentioned in the GIDC Act. The same is not a common burden for raising revenue generally. The money so collected from the levy is to be utilized for a specific purpose for the advantage and benefit of the consumers of gas. The 'Cess' is basically to be levied on all consumers of gas with certain exemption, mainly for domestic consumers. This exemption is by way of relief to such consumers. Even otherwise the data so provided to us regarding consumption of gas by different sectors shows that the domestic sector consumes only 20.3% of the total gas whereas 76 % of the total gas is consumed by those from whom the 'Cess' is collected (see Pakistan Energy Year Book, 2012). The latter sector has invested in development of the infrastructure for utilization of gas for their respective concerns. As envisaged in section 4 of GIDC Act, the 'Cess' is mainly to be utilized for development of the pipelines from other countries and other similar projects in order to ensure continuous and increased supply of gas to this sector. Undoubtedly other consumers of country as a whole would also benefit from such Projects but the same is inconsequential compared to the advantage that will accrue to the payers.
>
> ..
>
> 22. Another formidable argument on behalf of the respondents was based upon the National Assembly for the Financial Years 2012-13 and 2013-14 .... This Annual Budget Statement along with money bill is to be simultaneously transmitted to the Senate so that it may make recommendations to the National Assembly. Page-6 of the Statement contains list of Non-Tax Revenue, which under the Object Code C03916 includes 'Gas Infrastructure Development Cess'. Similarly in the Annual Budget Statement (Federal Budget 2013-14) that carries a similar worded preface, 'Gas Infrastructure Development Cess' has again been listed at C03916 as Non-Tax Revenue. Thus on the Government's own showing, as reflected in the Annual Budget, GIDC is not a 'tax'. No argument has been advanced on behalf of the appellants to explain away the categorization of GIDC as Non-Tax Revenue by the Government in the Annual Budget. This is not a mere accounting procedure as urged by Mr. Salman Akram Raja, Advocate Supreme Court, who in this context had relied upon Sheikh Muhammad Ismail & Co. v. Chief Cotton Inspector Council (supra), but were part of the Annual Budget Statements. As submitted by Mr. Makhdoom Ali Khan, Senior Advocate Supreme Court, the possible reason why the

levy has been reflected as Non-Tax Revenue in the Budget was to exclude it from the divisible pool under the National Finance Commission (NFC) Award. The above determination is sufficient to hold that being a 'fee' the same could not have been imposed through a money bill and on this score the levy was liable to be struck down.

....

31. Entry 51 mentions three items, namely 'mineral oil', 'natural gas' and 'minerals' which are followed by the words "for use in generation of nuclear energy". The basic rule for interpretation of statutes is to give the words their ordinary and natural meaning. Deviation from this rule is permissible only when it becomes necessary, for example to avoid or overcome absurdity or render certain words meaningless. This exercise is undertaken when assigning the words their ordinary meaning does not reflect the true intention of the Legislature. By the use of 'and' in between 'natural gas' and 'minerals' in Entry 51, all the three items are to be read conjunctively with the words following them. In the said Entry 'and' could have been substituted by 'or' only if without the change absurd consequences would have followed. Restricting 'mineral oil' or 'natural gas' to their use in the generation of nuclear energy would not lead to any absurdity.... After all the Constitution is a living document which caters for future development and progress. Thus Entry 51 can only be accorded its natural meaning and the same shall be read conjunctively. Similarly the Last Antecedent Rule is of no help to the appellants when the plain reading does not admit of any other interpretation but that only such items mentioned therein can be subjected to tax that are used in the generation of nuclear energy.

....

34. Admittedly 'natural gas' is subject to levy of Sales Tax and GIDC Act does not appear to suggest that it is another instance of Sales Tax levied by the Parliament on the supply of natural gas. As held in the above cited judgment, double taxation can be imposed only by clear and specific language and not by implication.

35. Thus under section 2(46) of the Sales Tax Act, 1990 the 'Cess' is one of the cost added to the price of the product for the calculation of sales tax. It cannot therefore be termed as another Sales Tax.

....

36. Coming to Entry 52, Mr. Salman Akram Raja, Advocate Supreme Court, had not urged that the GIDC can be levied under the said Entry. The learned Attorney General initially made submissions with regard to the said Entry but ultimately did not seriously press the same. Mr. Makhdoom Ali Khan, Senior Advocate Supreme Court, in response to the said argument submitted that Entry 49 imposing Sales Tax on 'natural gas' and other commodities and Entry 52 empowering the imposition of tax on capacity are mutually exclusive. That since the 'natural gas' has already been subjected to Sales Tax no additional tax can be levied on the capacity. The learned counsel in this context had referred to Kohinoor Industries Ltd., Faisalabad v. Government of Pakistan (ibid), Central Board of Revenue v. Seven-Up Bottling Company (Pvt.) Ltd. (ibid) and Ellahi Cotton Mills Ltd. v. Federation of Pakistan (supra). The above authorities clearly lay down, with reference to Entry 52 and other Entries in Part-1 of the Federal Legislative List, that tax cannot be levied under the said Entry if the goods or activity has already been subjected to tax or duty under any other Entry. It follows that the GIDC is not covered by either of the three Entries, i.e. 49, 51 or 52 of Part-I of the Federal Legislative List. It was admitted on behalf of the appellant that for a 'tax' to fall under the said Federal Legislative List it must be covered by Entries Nos. 43 to 53. Apart from the said three no other Entries were pressed in service on behalf of the appellants for declaring the 'Cess' as 'tax'. On

this count too the 'Cess' could not have been introduced through a money bill under Article 73 of the Constitution.

....

42. It was pointed out on behalf of the respondents that the Ministry of Petroleum and Natural Resources was of the view that the issue of levy of the 'Cess' may be placed for its approval before the Council of Commons Interest, which represents all the federating units. Similar was the opinion expressed by the Ministry of Law, Justice and Parliamentary Affairs. This fact was expressly averred in the Constitution Petitions filed before the Peshawar High Court and was not denied by the Federal Government. True that such an advice or opinion or non-reference of the matter to the Council of Common Interest would not render the levy illegal or invalid, nevertheless it would have been appropriate had the federating units been taken into confidence, particularly in the context of Article 160(3) of the Constitution.

....

45. To conclude the GIDC is a fee and not a tax, in the alternative it is not covered by any Entry relating to imposition or levy of tax under Part-I of the Federal Legislative List. On either counts the 'Cess' could not have been introduced through a money bill under Article 73 of the Constitution. The same was, therefore, not validly levied in accordance with the Constitution.

61. Durrani Ceramics declared that setting up of the infrastructure development gas projects would ensure continuous and increased supply of gas for the gas consumers, thereby constituting a service against the Fee (GIDC) charged. The continuous and increased supply of gas to the gas consumers was an assumption drawn by the Court, as no such legislative promise is borne out from Act, 2011. However, this assumption remained unchallenged in the review (Durrani Ceramics-II) by the parties and came to be the service rendered or quid pro quo under Act, 2011. The argument of the appellants that Durrani Ceramics has a limited precedential value, as it was restricted to the question of Tax and the legislative procedure of Money Bill, is not correct. This Court in answering these questions has also declared that GIDC is a Fee. This declaration was re-affirmed in review filed by the Federal Government. In the background of the jurisprudence discussed above, I see no reason to take a view different from that of Durrani Ceramics which simply holds that the concept of infrastructure development of gas pipeline projects leading to continuous and increased gas supply in the country constitutes service or quid pro quo for the appellants. The ground reality of the gas projects at the time of Durrani Ceramics was not so noticeable or stark as it is now (discussed hereunder) and, therefore, the delivery or actualization of the service, has come to be of critical importance.

62. Moved by the facts on the ground, I feel it necessary to re-examine the meaning and concept of Fee and the scope and extent of its inbuilt reciprocity - quid pro quo. The question, regarding "future service" which is of pivotal importance to this case, though raised in Durrani Ceramics, was not addressed or answered. I now move beyond Durrani Ceramics to grapple with the question of future service and look for a more contemporary meaning of quid pro quo.

FUTURE SERVICE AND TIMELINE

63. Existing jurisprudence informs us that it is not that all the required services against a Fee must be in place before a Fee can be levied.[21] Merely because the benefits to be received are postponed, it cannot be said that there is no 'quid pro quo'. It is true that ordinarily a return in praesenti is generally the case when Fee is levied but simultaneity or contemporaneity of payment and benefit is not the most vital or crucial test to determine whether a levy is a Fee or not, especially in long-term projects. In fact, it may often happen that the rendering of a service or the conferment of a benefit may only follow after the consolidation of a fund from the Fee levied. Hospitals, for instance, cannot be built in a day nor medical facilities or gas supply provided right from the day of the commencement of the scheme. It is only after infrastructure development is available that one may reasonably expect a compensating return. How soon a return may be expected or ought to be given must necessarily depend on the nature

of the services required to be rendered and benefits required to be conferred.[22] So while "service to be rendered" or quid pro quo in future is permissible it is equally important that the prospects of such a future service are certain, as if tied in time, with the payment of Fee. I come to this important question later in the judgment.

- Instant case and its unique facts

64. Let's leapfrog from 2011 (imposition of GIDC) to 2014 (Durrani Cermaics) and finally to 2020 (current case). The facts and figures of this case are admitted and show that utilization of GIDC as per the earlier and the recent statute is for setting up infrastructure development of Iran Pakistan Pipeline Project (IP), Turkmenistan-Afghanistan-Pakistan-India (TAPI) Pipeline Project, LNG or other ancillary projects. These projects were financed through the imposition of GIDC (Fee), used as a tool of public finance. The gas consumers have been paying GIDC for almost a decade, as is established from the accounts and the status of the projects placed before us by the Interstate Gas System (Pvt.) Ltd., which we are informed, is the company that is to set up these projects on behalf of the Federal Government. The figures hereunder undisputedly reveal that there has been no work on the ground and these gas projects have no physical existence, whatsoever, in Pakistan. Letter of the Finance Division, Government of Pakistan dated 18.02.2020 signed by the Deputy Secretary (Budget Resources) filed[23] in Court reveals that the total amount of GIDC accrued, collected and outstanding as on 30.6.2019 is as under and does not include Late Payment Surcharge under section 3(3) of the Act.

TOTAL COLLECTION OF GIDC

| Levy and Collection of GIDC | | | | Rs. In Million |
|---|---|---|---|---|
| Sr. # | Sector | GIDC Accrued | GIDC Collected | GIDC Outstanding |
| 1 | Fertilizer Feed (old) | 192,240.31 | 111,814.62 | 80,425.69 |
| 2 | Fertilizer Feed (New) | 68,281.71 | 1,142.89 | 67,138.82 |
| 3 | Fertilizer – Fuel | 31,772.12 | 15,205.66 | 16,566.46 |
| 4 | General Industry | 70,729.64 | 24,402.27 | 46,327.37 |
| 5 | IPPs | 60,845.19 | 51,713.50 | 9,131.69 |
| 6 | KESC | 40,421.05 | 3,912.18 | 36,508.87 |
| 7 | GENCO/WAPDA | 67,317.33 | 44,753.78 | 22,563.55 |
| 8 | Captive Power | 119,247.65 | 17,522.73 | 101,724.92 |
| 9 | CNG Region-I | 53,420.68 | 11,765.63 | 41,655.05 |
| 10 | CNG Region-II | 48,073.10 | 13,169.51 | 34,903.59 |
| | Grand Total | 752,348.78 | 295,402.77 | 456,946.01 |

The details of the funding and expenditure are as follows:-

INTER STATE GAS SYSTEM (PVT.) LIMITED

Summary of expenditure and funding of gas infrastructure projects:[24]

| Project | Iran Pakistan (IP) Gas Pipeline Project | TAPI Pipeline Project | North South Gas Pipeline Project | Under ground Gas Storages | Total |
|---|---|---|---|---|---|
| All amounts in PKR | | | | | |
| Estimated Project Cost | 271 billion | 1,500 billion | 405 billion | 75 billion | 2,251 billion |

| | | | | | |
|---|---|---|---|---|---|
| Pakistan share | 271 billion | 31.353 billion | 20.25 billion | 75 billion | 397.6 billion |
| Development Phase expenditure - already incurred funded through GIDC (received todate) | Nil | 0.483 billion | Nil | Nil | 0.483 billion |

| | | | | | |
|---|---|---|---|---|---|
| Development Phase expenditure- already incurred funded by GHPL | 3.3 billion | 0.756 billion | 0.135 billion | 0.040 billion | 4.2 billion |
| Total development and construction cost- to be funded through GIDC | 271 billion | 30.513 billion | 20.250 billion | 75 billion | 396.7 billion |

65. The Letter further states that a meeting was held in the Petroleum Division attended by relevant officers of Petroleum Division and Finance Division and the proposal for the way forward was that "the amount of GIDC (Rs. 295.403 billion) shall be utilized against projects to be submitted by Petroleum Division through budgetary mechanism in line with GIDC enactments." This proposal was to be approved by ECC/Cabinet. This was the state of affairs on 18.02.2020, almost nine years after the levy of GIDC.

66. Status of these projects has been attached with Letter dated 11.02.2020 issued by the Interstate Gas Systems (Pvt.) Ltd. and filed in Court.[25] The Project Brief on Turkmenistan-Afghanistan Pakistan-India (TAPI) Gas Pipeline Project does not mention about the actual development of the pipeline infrastructure in Pakistan or the date when supply of gas will be made available. And the Project Brief on Iran-Pakistan (IP) Gas Pipeline Project mentions that "the current status of the Project is that Pakistan's contractual obligations are suspended under the Agreement, however, the legally binding agreement is still in place and the Government of Pakistan is still committed with the Project. The two sides have recently given themselves a further period of five years for the implementation of the Project by signing Amendment Agreement No. 3 of GSPA on 5th September, 2019." The details of the Projects as given by the Federal Government are as follows:-

INTER STATE GAS SYSTEM (PVT.) LIMITED

a. Turkmenistan - Afghanistan - Pakistan-India (TAPI) Pipeline Project

| Description | USD | PKR[3] |
|---|---|---|
| Estimated Project Cost | 10,000 million | 1,500,000 million |
| Pakistan share @ 5% equity share under Investment Agreement | 209.02 million | 31,353 million |
| Development Phase expenditure-already incurred | | |
| Project development Cost - Paid by GoP through Supplementary Grant | 1.5 million | 153 million |
| Project development cost - funding through GIDC | 4.1 million | 483 million |

| | | |
|---|---|---|
| Project development and operational expenditure - funded by GHPL | 4.02 million[1] | 603 million[1] |
| Future development cost - to be incurred | 5 million[2] | 750 million[2] |
| Future construction Cost - to be incurred | 194.4 million[2] | 29,160 million[2] |
| Total development and construction cost - to be funded through GIDC | 203.42 million | 30,513 million |

1. The other development and operational costs were funded by GHPL, the parent company of ISGS, hence require replenishment from GIDC to settle the same with GHPL.
2. Development and construction expenditure are expected to be incurred in next 24 months.
3 All amounts have been converted @ PKR 150/US$.

INTER STATE GAS SYSTEM (PVT.) LIMITED

b. Iran Pakistan (IP) Gas Pipeline Project:

| Description | USD | PKR[3] |
|---|---|---|
| Estimated Project Cost | 1,806 million | 270,900 million |
| Development Phase expenditure-already incurred | | |
| Project development cost - funded from GIDC | Nil | Nil |
| Project development and operational cost - Funded by GHPL | 22.06 million[1] | 3,300 million[1] |
| Development cost - to be incurred | 5 million[2] | 750 million[2] |
| Construction Cost - to be incurred | 1.779 million[2] | 266,850 million[2] |
| Total development and construction cost - to be funded through GIDC | 1,806.06 million | 270,900 million |

1 The project development and operation costs were funded by Government Holding Private Limited (GHPL), the parent company of ISGS, hence require replenishment from GIDC to settle the same with GHPL.

2 Construction of the project will take 36 months after awards of construction contract, subject to easement of International sanctions on Iran.

3 All amounts have been converted @ PKR 150/US$.

INTER STATE GAS SYSTEM (PVT.) LIMITED

c. North South Gas Pipeline Project (NSGP)

| Description | USD | PKR[3] |
|---|---|---|
| Estimated Project Cost | 2,700 million | 405,000 million |
| Pakistan share of Cost @ 5% equity share | 135 million | 20,250 million |
| Development Phase expenditure-already incurred | | |
| Project development cost - funded from GIDC | Nil | Nil |
| Project development and operational Cost - funded by GHPL | 0.9 million[1] | 135 million[1] |
| Future development cost - to be incurred | 4 million | 600 million |
| Future construction cost - to be incurred | 130.1 million | 19,515 million |
| Total development and construction cost - to be funded through GIDC | 135 million[2] | 20,250 million[2] |

1 The other development and operational costs were funded by GHPL, the parent company of ISGS, hence require replenishment from GIDC to settle the same with GHPL.

2 Development and construction expenditure are expected to be incurred in next 2 to 3 years.

3 All amounts have been converted @ PKR 150/US$.

INTER STATE GAS SYSTEM (PVT.) LIMITED

d. Underground Gas Storages

| Description | USD | PKR[3] |
|---|---|---|
| Estimated Project Cost | 500 million | 75,000 million |
| Development Phase expenditure-already incurred | | |
| Project development cost - funded from GIDC | Nil | Nil |
| Project development and operational Cost - funded by GHPL | 0.27 million' | 40 million[1] |
| Future development cost - to be incurred | 3 million | 450 million |
| Future construction cost - to be incurred | 497 million | 74,550 million |
| Total development and construction cost - to be funded through GIDC | 500 million[2] | 75,000 million[3] |

1 The other development and operational costs were funded by GHPL, the parent company of ISGS, hence require replenishment from GIDC to settle the same with GHPL.

2 Development and construction expenditure are expected to be incurred in next 2 to 3 years.

3 All amounts have been converted @ PKR 150/US$.

67. The above record undisputedly reveals that no development phase expenditure has taken place and that project development cost funded by GIDC is Nil.[26] Even though, there is nothing on the ground, these projects were announced in 2011 and GIDC is since then being collected. The representatives of the concerned Ministries were at sea when asked to give a definite timeline for the service in return.

-Position of the Projects in the Pakistan Economic Survey

68. The Pakistan Economic Survey 2014-15[27] mentioned that the Government is taking steps to overcome the shortfall of natural gas by, inter alia, importing natural gas from Iran and Turkmenistan. It further provides as follows;

> The two transnational gas pipelines that Pakistan has pursued for over two decades have been delayed due to reasons beyond control. The 750 MMCFD Iran-Pakistan (IP) gas pipeline has been delayed due to international sanctions (although there is hope for removal of the sanctions) and the 1,325 MMCFD Turkmenistan Afghanistan-Pakistan-India (TAPI) pipeline has been delayed due to the security situation in Afghanistan and structural issues with project transaction.
>
> The Government of Pakistan is now successful to import 500 million cubic feet per day (mmcfd) of LNG from Qatar.

The same Survey (2014-15)[28] further states:

> During the recent visit of the Prime Minister to Turkmenistan .... the review of Turkmenistan Afghanistan-Pakistan-India (TAPI) pipeline and energy security remained main focus of the meeting. The project is expected to be materialized by end of 2017 will be providing the gas of 1.3 billion cubic feet to Pakistan.

69. There is no mention of IP or TAPI pipeline projects in the Pakistan Economic Surveys of 2015-16, 2016-17, 2017-18, 2018- 19 and 2019-20. And Chapter-14 on "Energy" in the latest Pakistan Economic Survey 2019-20 states as follows[29]:

> Pakistan is successfully overcoming energy crisis, which has direct and indirect impact on all sectors of the economy. Presently, Energy Sector is confronted with demand supply gap....in terms of energy-mix, Pakistan's reliance on thermal which includes imported coal, local coal and RLNG and natural gas has been decreasing over the last few years. Pakistan's dependence on natural gas in the overall energy mix is on decline and the reduction of its share in the energy mix may be attributed to declining natural gas reserves as well as to the introduction of LNG since 2015.
>
> Gas Sector
>
> Natural Gas is a clean, safe, efficient and environment friendly fuel. Its indigenous supplies contribute about 38 percent in total primary energy supply mix of the country. Pakistan produces around four (4) Billion Cubic Feet Per Day (Bcfd) of indigenous natural gas against an unconstrained demand of over six (6) Bcfd. To meet the shortfall, the GoP has initiated the import of LNG. (emphasis supplied)

70. Pakistan Economic Survey is silent regarding these projects since 2015 and shows that the shortfall in natural gas is being successfully plugged through the import of LNG, which surprisingly, is not a GIDC funded Project. The above documents show that after a decade of charging GIDC from gas consumers and after having collected Rs 295.40 billion to-date there is no sign of development of the gas pipeline projects in Pakistan. Absence of the said projects and highlighting the import of LNG in the latest Pakistan Economic Survey hazards a guess that the Government of Pakistan is not willing to or is unable to complete these projects anymore and therefore the shortfall in gas supply is being increasingly plugged through LNG imported from Qatar.

- Annual Reporting to the Parliament under section 4(2) of the Act and Parliamentary Practice.

71. The Act, in its wisdom, considering the long-term nature of the infrastructure development gas pipeline projects required the Federal Government to inform both the Houses of the Parliament regarding the utilization of GIDC by tabling an Annual Report under Section 4 (2) of the Act, which provides as follows:

> The annual report in respect of the utilization of the cess shall be laid before the both houses of Majlis-e-Shoora (Parliament) after three months at the end of each fiscal year.

72. This is the closest the Act came to realizing that the levy of Fee is not contemporaneous and entails a time-lag and therefore requires a Parliamentary oversight on the utilization of GIDC. This was to ensure that the Government delivers the promised service of continuous and increased gas supply, to the gas consumers, at the earliest and also to check that the funds collected are earmarked and utilized for these projects only. It is an admitted position that not a single Annual Report was tabled before the Houses of the Parliament except the one placed before the Parliament on 30.06.2019 after the filing of these cases. The Government has unabashedly and successively hoodwinked the Parliamentary oversight, paying little heed to the Energy crisis in the country; the interest of the gas consumers who have been regularly paying GIDC and the welfare of the general public. More disturbingly, the Parliament itself, inspite of acute Energy crisis in the country, never took the Federal Government to task and allowed a decade to pass by. The Executive and the Legislature both have failed the appellants and public expectations besides wasting valuable time and opportunity to utilize and divert the money collected to some other projects to alleviate the gas shortage in the country. I completely disagree with Majority View that the Executive has not been at fault. Had the Executive apprised the Parliament under the Act, legislative intervention may have followed, saving everyone this long drawn litigation and better financial management and use of Rs.295 Billion, which is sitting unused with the Federal Government.[30]

73. According to the legislative design behind section 4(2) of the Act, these Annual Reports would have disclosed the status of the projects and their funding to the Parliament. In case of inordinate delay or non-development of the projects the Parliament could take appropriate action. Under the Rules of

Procedure and Conduct of Business of the National Assembly, 2007 ("Rules") these Annual Reports under section 4(2) of the Act would stand referred to a Standing Committee concerned under Rule 181 read with Rules 198, 201 and 235 of the Rules. The Rules provide that the Standing Committees can examine the expenditure, administration and policies of the Ministry concerned and may forward its report of findings and recommendations to the Ministry to submit its reply to the Committee. This never happened as the Government admittedly failed to submit Annual Report regarding GIDC and the Projects to the Parliament. Timely interference by the Parliament would have borne different results.

74. It might not be out of place to mention that Parliament today has become more and more a multi-functional institution performing variety of roles. Some of the cardinal roles and functions of the Parliament are: Legislation, Oversight of the Government actions and Financial Accountability of the Government and the public sector. Parliament makes laws, authorizes the Government to spend public money, scrutinizes the Government activities and is a forum for debate on national issues.

75. The worst thing that the Government in a parliamentary system can do is to deny information to the Parliament. The Executive is answerable to the Parliament. Article 91(6) of the Constitution declares it in unequivocal terms that the Cabinet, together with the Ministers of State, shall be collectively responsible to the Senate and the National Assembly. It is the function of Parliament to exercise political and financial control over the Executive. To call for information is perhaps the greatest power of Parliament. Even otherwise, it is the duty of the Government itself to feed Parliament with information, which is full, truthful, precise and supplied in time. This is seen by Ministers making statements on the floor of the House, laying reports and papers on the Table of the House. All these constitute a wealth of information, which becomes immediately public and can be issued to raise discussion in the House.[31] Nothing of the sort took place in the Parliament on GIDC and almost ten years passed without a whimper. This failure on the part of the two prime institutions of the country reflects poor governance and unsatisfactory performance of their constitutional duties, to say the least.
Timeline - essential requirement for quid pro quo

76. I now re-visit the constitutional concept of Fee, a levy which appears as "Fee for any service rendered" in Articles 72(3)(a), 115(3)(a), 165(3) and as "Fee" in Articles 203B(c), 270AA(7), 279 and item Nos. 54 and 15 of Parts I and II of the Federal Legislative List, respectively. In the present case, Fee is being charged as a tool of public finance for raising funds for the infrastructure development of gas projects, with the corresponding service of continuous and increased supply of natural gas for the gas consumers, to meet the energy shortfall in the country. It is axiomatic that, in this case, service rendered in return or quid pro quo will materialize after the gas pipeline projects are set up, hence the service will be rendered after a time-lag and will therefore be a future service.

77. It is jurisprudentially settled that the concept of Fee, as opposed to Tax, is premised on a service in return or quid pro quo. This essential constituent of Fee needs further elaboration in the backdrop of the present case. Examination of the existing jurisprudence shows that courts have over time laboured to determine whether in a particular case there existed a service in return in order to justify the levy as a Fee as opposed to a Tax. The question never arose regarding the actual delivery of the service, perhaps for the reason that in most of the cases either the service was available or was easily made available in short span of time, so the payer never had a concern regarding the actual delivery of the service. This dimension of time has not come up for discussion in the existing jurisprudence or writings on "Tax v. Fee" in any detail. The facts of the present case have prompted me to consider the time dimension of service to be rendered in return for the payment of a Fee. It cannot be denied that words and phrases take colour, shape and character in a context and mean differently in different contexts. It is worthwhile to remember that there is a living content behind words and phrases, which breathes, and so, expands and contracts with changing times.

78. The staggering facts of this case beg the question whether the fundamental constituent of Fee i.e., service in return or quid pro quo or future service should have a certain timeline? Service in return

or quid pro quo seems to exist at two levels. First, at the theoretical level - the examination of the legislative design should show that there is a quid pro quo or service to be rendered in return for the Fee. Second, at the applied level - this deals with the actual delivery of the service or a definite timeline for the delivery of future service. The legitimization of Fee requires the existence of service at both the levels: theoretical, as well as, applied. It will be absurd and illogical to conceive that a payer of Fee, who is subject to compulsory exaction of money by the State, is left to grope in the dark, guessing when the promised service is to be rendered. Fee is a constitutional levy against a service rendered, which cannot be structured on assumptions, suppositions, expectations and verbal commitments of the Executive but require a clear, crisp and certain statutory timeline. For the Fee to have a constitutional existence, the service to be rendered in return or the quid pro quo must be certain, clear, unambiguous and within a definite time-frame. Durrani Ceramics settles the case at the theoretical level only. The case did not touch the applied level, because the facts of the case in the year 2014 did not necessitate the examination of this aspect, as the Court and the parties assumed at that time that the service would be rendered in a reasonable period of time.

79. The underlying theme of a Fee is based on relationship of reciprocity and mutuality- the quid pro quo. The legislation that imposes a Fee must cater for this reciprocity and guard this relationship premised on quid pro quo. While there is an obligation of the payer to deposit Fee on time which is subject to a surcharge for late payment, there must also be a corresponding obligation on the State or the authority responsible to provide the service in return, to do the same within a definite timeline. Without this corresponding obligation, the legislation fails to recognize the core ingredient of a Fee - the quid pro quo. It is by all means a legitimate expectation of the payer of Fee to know when will the service be delivered. His rights to property, trade and business under the Constitution require it. The payment of Fee by the payer cannot be towards a service that floats in a timeless zone; is open-ended and uncertain. Any service to be rendered in such like cases becomes a disservice. The relationship in a Fee must exist till the end. Failure in providing future service within reasonable timeline, deprives the Fee of its essential character, sheds its complexion as a Fee and gives that of a Tax, as such failure and the uncertainty of time diminishes the requisite degree of correlation between the payment of Fee and provision of service in return. This indefiniteness negates the concept of Fee and partakes the character of a Tax. Therefore, service against a Fee is not simply a theoretical recognition of the service to be rendered but must also have certainty in its applied form i.e., the timeline for the actual delivery. The theoretical and applied constituents of the levy must exist in the legislative design, for the levy to stand as a Fee under the Constitution otherwise it passes for a Tax.

80. The Act is silent on these counts and therefore passes for colourable legislation as it actually imposes a levy unknown to the constitution in the garb of a Fee. The Act does not provide a level-playing field for the parties and is devoid of the basic fairness, protection and due process that is required to be meted out to a payer who is the source of the public finance required for funding these long-term gas projects. Such a law offends and renders constitutional protections of right to property, business and non-discrimination, absolutely hollow and meaningless.

81. This unexpected delay and uncertainty in the supply of gas (service to be rendered or quid pro quo) is both a Legislative and an Executive failure. The Federal Government should have tabled Annual Reports before both the Houses of the Parliament under section 4(2) of the Act and apprised the Parliament of the delay and its reasons or furnished a timeline for the completion of these projects. Irrespective of these responsibilities, Executive is there only to implement the law and if the law is silent regarding the timeline of delivery of service, the Executive carries no obligation to provide the service, except an expectation or assumption of a reasonable time, which is not actionable under the law, as the law envisages no penalty for such an omission. There is even no penalty for not tabling the Annual Reports before the Parliament by the Executive. In the absence of any statutory obligation and corresponding penalty, the real failure is of the legislative design.

-nature of fiscal statute

82. The above discussion becomes more nuanced when considered in the backdrop of a fiscal statute. The principles of interpretation of a fiscal statute apply equally to a Fee as they do to a Tax - both being compulsory exactions of money by the State. It was expressed by Rowlatt J. in Cape Brandy Syndicate v. IRC[32] that 'in a taxing statute, one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can look fairly at the language used[33].' It is settled that interpreting a taxing statute, equitable consideration are entirely out of place. Nor can taxing statute be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. The court cannot imply anything that is not expressed, it cannot import provisions in the statutes so as to supply an assumed deficiency.[34] A taxing statues, if it professes to impose a charge, its intention must be expressed in clear, unequivocal and unambiguous language. A hunt into the intention to find a charge is impermissible. No equitable construction of a charging section is to be applied. The charging section is to be construed strictly regardless of its consequences that may appear to the judicial mind to be. It is not the function of the court to hunt out ambiguities by strained and unnatural meaning.[35] Fiscal legislation requires that any law that levies a Fee must first unambiguously and clearly spell out the nature of the service to be rendered in return (quid pro quo) and then provide for a reasonable and definite timeline for the delivery of such service. The legislature must also consider the entire mechanism at work behind this relationship of reciprocity - for example, the obligations of the provider of Fee, the consequences of delay and failure to render service including refund.

- Our Constitution and the living tree doctrine

83. I know that the Constitution is organic and a living testament of the aspirations of the people it governs. The "living tree" doctrine[36] allows the Constitution to change and evolve over time while still acknowledging its original intentions. The doctrine achieves a balance between two seemingly contradictory goals: predictability and flexibility. To be effective, the Constitution must consist of a predictable set of rules. On the other hand, flexible interpretation accommodates the realities of changing modern life. If the Constitution could not be interpreted this way, it would be frozen in time and become more obsolete than useful. Therefore, contemporary interpreters must focus on what the originators intended it to accomplish rather than what the text actually states before allowing the Constitution to evolve or remain unchanged.[37] I know that stability without change is degeneration. Change without stability is anarchy. The role of a judge is to help bridge the gap between the needs of the society and the law without allowing the legal system to degenerate or collapse into anarchy. The judge must ensure stability with change, and change with stability. Like the eagle in the sky, which maintains its stability only when it is moving, so too is the law stable only when it is moving. The life of law is complex. It is not mere logic. It is not mere experience. It is both logic and experience together.[38] As Roscoe Pound said "the law must be stable, yet it cannot stand still."[39] Progressive interpretation is to preserve the vitality of the constitution: unless interpreted in this way, it would be frozen in time and become more obsolete than useful. Our courts have repeatedly underlined that our Constitution is a living document and encouraged its progressive interpretation.[40] Therefore, the word "Fee" and the phrase "service rendered in return" or "quid pro quo" must also evolve to meet the new fiscal realities of the State. Fee, therefore, under the Constitution today would mean a fiscal levy that clearly and unambiguously describes the service rendered in return, so that Courts don't have to unnecessarily hunt the meaning and nature of the levy in the letter of the law. Secondly, the reciprocal service to be rendered in return or the quid pro quo must be structured to have a reasonably certain and definite timeline. If the constituent of time is missing (the applied part), the service becomes practically non-existent and the levy no more retains the character of Fee and becomes a Tax rendering the levy unconstitutional.

Distinguishing Durrani Ceramics

84. The factual matrix of the instant case is very different from that of Durrani Ceramics. It is settled law that if a new case is dissimilar to an earlier case in ways that seem important, the court will 'distinguish" it and reach a result different from what the precedent would otherwise suggest or even dictate. In common parlance, either the precedent or the pending case may be said to be "distinguished" from the other.[41] In this way, the former decision might be said to be "rerationalized[42]." A precedent, whether persuasive or binding, need not be applied or followed if it can be distinguished; that is, there is a material distinction between the facts of the precedent case and the case in question. According to Zander, 'distinguishing between factual situations and applying the appropriate rule of law is one of the lawyer's and judge's most crucial functions."[43] The technique of distinguishing past case is a powerful engine of legal change.[44] Distinguishing means that each case was decided correctly based solely on its own facts because the facts were materially different. Joseph Raz argues that the boundaries of distinguishing "are far from fixed," he asserts that, the [boundaries] undergo continual change."[45] The crucial question is: Are there any material differences between the facts of the case at bar and the facts of the prior cases to warrant the rule being different? In principle, the distinguishing of an apparent decision presents no problem for the doctrine of precedent.[46] The facts of this case, showing that the gas projects have not even started for almost a decade yet the Fee is being constantly charged since 2011 present us with new facts that were not so gravely present at the time of Durrani Ceramics, hence the said precedent is clearly distinguishable and stands on its own facts.

Cess Rates- discriminatory

85. The Act provides for the following rates for different Industrial Gas consumers:-

SECOND SCHEDULE OF THE ACT

| S.No. | Sector | Maximum Rate of Cess (Rs./MMBTU) |
|---|---|---|
| (1) | (2) | (3) |
| 1. | Fertilizer-Feed (Old) | 300.00 |
| 2. | Fertilizer-Feed (New) | 300.00 |
| 3. | Fertilizer-Fuel | 150.00 |
| 4. | Captive Power | 200.00 |
| 5. | Industry | 100.00 |
| 6. | KESC/GENCO | 100.00 |
| 7. | IPPs | 100.00 |

The purpose of the Act is to raise public finance for the infrastructure development of the gas projects mentioned in section 4 of the Act through levy of Fee on the above-mentioned gas consumers. There appears to be no intelligible differentia amongst the different gas consumers mentioned in the Schedule for the purposes of the Act. One justification for charging different rates from amongst the industrial gas consumers could have been their overall consumption of natural gas. The data provided by the latest Pakistan Energy Year Book 2018[47] shows as follows:

Natural Gas Consumption by Sector 2017-2018

| Sr. No. | Industry | Consumption (%) | Maximum Rate of Cess (Rs./MMBTU) |
|---|---|---|---|
| 1. | Fertilizer (feedstock) | 12.49% | 300 |
| 2. | Fertilizer (fuel) | 4.57% | 150 |

| | | | |
|---|---|---|---|
| 3. | Power | 37.44% | 200 (captive power); 100(IPPs); 100(KESC/GENCO) |
| 4. | Gen. Industry | 18.84% | 100 |
| 5. | Transport (CNG) | 4.84% | 263.56 (Region-I) and 200 (Region-II) |

The above shows that the differentiation of rates is not based on the consumption pattern of the gas consumers. The rates of GIDC fixed for different gas consumers are, therefore, ex-facie discriminatory and cannot be allowed to stand.

86. I, therefore, hold that any fiscal legislation that imposes a Fee, must clearly spell out the nature of service to be rendered and the reasonable timeline for the delivery of such service. The legislation (including subordinate legislation) must provide a complete mechanism including the consequences of stoppage of collection of Fee or extension of time or refund of Fee in case the project is delayed or cannot be executed in the proposed timeline, respectively. The legislation must safeguard and protect the reciprocity behind a Fee (unlike a tax) by providing corresponding obligations and duties on the parties to the levy. The present Act does not meet this fundamental requirement of a Fee levying legislation, resulting in imposing an unconstitutional levy in the garb of a Fee. This unlawful exaction (levy) offends the rights to property, trade and non-discrimination of the appellants and is hereby declared to be unconstitutional and illegal in its present form.

Refund of the amount collected

87. As a consequence, the amount of GIDC collected over the years should be returned and refunded to the payers in full, unless in some cases, it is impractical to so do. The Federal Government shall constitute a Committee to work out a mechanism for refund of GIDC so that payers of GIDC are fully restituted; be it the gas consumers under the Act or the final consumers (people of Pakistan). Even if the gas consumers have passed on the Fee to its customers, technology may be available to credit such customers, so that there is no unjust enrichment on the part of the State. The amount of GIDC that cannot be refunded after exploring all other avenues, shall remain earmarked and be utilized only for the infrastructure development of the gas sector.

Refund after Six Months

88. I cannot lose sight of the fact that Energy is vital to industry, transport, infrastructure, information technology, agriculture, household users and more. Any nation with a growing economy and improving living standards must secure a robust energy supply. The future of economic development hinges on energy security. Shortage of natural gas in the country is still a reality and the Energy Sector is confronted with demand supply gap which needs to be filled up. According to the latest Pakistan Economic Survey, 2019-20 the indigenous natural gas contributes around 38% in total primary energy supply mix of the country. Pakistan produces around 4 Billion Cubic Feet Per Day (Bcfd) against an unconstrained demand of 6 (Bcfd); the gas pipeline projects in question are based on bilateral and multilateral international agreements with other countries; a sum of Rs.295 billion has been collected as GIDC for the last almost 10 years. Keeping these facts in mind, and especially the issue of energy security, in the larger national interest, I allow the Federal Government a period of six months to initiate appropriate legislation in the light of the principles settled in this judgment including a clear description of the services being rendered, provision of a reasonable timeline for the delivery of service (supply of natural gas) to the gas consumers and a statutory mechanism of obligations and consequences that may arise, if the service is delayed or is not delivered at all. In case the Federal Government fails to do so, achieve this during this period, the Federal Government shall refund the amount of GIDC, in the manner mentioned above.

89. These appeals are allowed in the above terms.

Sd/-

Syed Mansoor Ali Shah

Judge

ORDER OF THE COURT

By majority of two to one (Syed Mansoor Ali Shah, J dissenting), all these appeals and petitions are dismissed. In the light of this decision and the directions contained therein all listed applications also stand disposed of.

Sd/-

Mushir Alam

Judge

Sd/-

Faisal Arab

Judge

Sd/-

Syed Mansoor Ali Shah

Judge

MWA/K-6/SC Appeals dismissed.

**2021 S C M R 194**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik and Syed Mansoor Ali Shah, JJ**

**Dr. ZOHARA JABEEN and others---Appellants**

**Versus**

**MUHAMMAD ASLAM PERVAIZ and others---Respondents**

C.As. 762-L to 766-L of 2012, decided on 2nd December, 2020.

(On appeals from the judgments of Punjab Service Tribunal, Lahore dated 26.03.2012, passed in Appeals Nos.3776 to 3780/2010)

**(a) Punjab Civil Servants Act (VIII of 1974)---**

----S. 7(2), proviso---Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974, R. 8(2), Explanation---Batch of 'promotees'---Seniority---Scope---Where civil servants were selected for promotion in a "batch'" or as a "group of persons" then the date of promotion of all the persons in the batch or the group shall be the date when anyone of them was first promoted to the post and they shall retain their inter se seniority---Word "batch" used in S. 7 of Punjab Civil Servants Act, 1974 ('the Act') had been interchangeably used as "group of persons" in R. 8 of Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974---Promotees in the same grade, when considered and recommended for promotion for the next grade in the same Departmental Promotion Committee (DPC) passed for a "batch" or "group of persons" and therefore as would be considered to have been promoted from the date when the first amongst the batch was promoted and would also retain their inter se seniority of the lower post.

**(b) Punjab Civil Servants Act (VIII of 1974)---**

----S. 7---Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974, R. 8---District Population Welfare Officers---'Promotees' and 'direct appointees'---Seniority---Scope---Direct appointees/respondents were appointed through initial appointment on 3-12-2003, a day after the promotion of the first promotees out of the batch of promotees; hence the direct appointees would fall under the promotees in the seniority list---Appeals were allowed.

Malik Muhammad Awais Khalid, Advocate Supreme Court for Appellants (in all cases).

Amir Sana Ullah, Advocate Supreme Court for Respondent No. 1.

Ch. Zafar Hussain Ahmed, Additional A.G., Ali Bahadur, Secretary, Population Welfare Department, Khalid Pervaiz, Additional Secretary along with Tania Malik, D.S. and Arooj Naseem, S.O. for Respondents Nos. 2 to 4.

Date of hearing: 10th November, 2020.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The question that arises in this case is regarding the seniority between the appellants (promotees) vis- -vis the respondents (direct appointees), both appointed to the post of District Population Welfare Officer/Deputy Director (Non-Technical) (BS-18) close in time to each other in the manner described hereunder.

2. Briefly the facts are that the direct appointees (respondents) were recommended by the Punjab Public Service Commission (PPSC) and appointed vide order dated 03.12.2003 as Deputy Director/District Population Welfare Officer (Non-Technical) in BS-18. On the other hand the appellants were recommended for promotion by the Departmental Promotion Committee (DPC) on 24.11.2003, however, their notifications for promotion were issued successively as follows: the promotion notification of Dr. Naureen Asghar was issued on 2.12.2003, while that of Dr. Zohra Jabeen and Dr. Farkhanda Almas, who were recommended for promotion in the same DPC but subject to the completion of their ACRs for the year 2001-2002 were notified for promotion on 10.4.2004 and 24.11.2004, respectively. Dr. Zubda Riaz (appellant No.3), however, was initially deferred in the DPC held on 24.11.2003 and was later on considered in the DPC held on 12.10.2007 and notified for

promotion on 26.4.2008. The seniority list prepared by the department placed the appellants over the respondents, who were appointed through direct recruitment. The respondents made a representation before the Chief Secretary, which was dismissed on 27.9.2010, whereafter they preferred an appeal before the Punjab Service Tribunal, which was allowed through the impugned judgment, holding that the respondents were senior to the appellants, with the direction to the department to re-draw the seniority list accordingly. To consider the question of seniority between the appellants and the respondents, leave was granted by this Court on 20.12.2012.

3. To answer the question regarding seniority between the appellants and the respondents, proviso to section 7(2) of the Punjab Civil Servants Act, 1974 ("Act") and Rule 8(2) along with its Explanation under the Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974 ("Rules") need to be examined. Both the provisions are reproduced hereunder:

"Section 7. Seniority.---(1)

(2) Seniority in a post, service, or cadre to which a civil servant is promoted shall take effect from the date of regular appointment to that post:

Provided that civil servants who are selected for promotion to a higher post in one batch shall on their promotion to the higher post retain their inter-se seniority in the lower post.

Rule 8. The seniority inter se of persons appointed to posts in the same grade in a functional unit shall be determined:

(2) The seniority of the persons appointed by initial recruitment to the grade vis- -vis those appointed otherwise shall be determined with reference to the date of continuous appointment to the grade; provided that if two dates are the same, the person appointed otherwise shall rank senior to the person appointed by initial recruitment; provided further that inter se seniority of person belonging to the same category will not be altered.

Explanation- In case a group of persons is selected for initial appointment at one time, the earliest date on which any one out of the group joined the service will be deemed to be the date of appointment of all persons in the group. Similarly in case a group of persons is appointed otherwise at one time in the same office order the earliest date on which any one out of the group joined the service will be deemed to be the date of appointment of all persons in the group. And the persons in each group will be placed with reference to the continuous date of appointment as a group in order of their inter se seniority."

According to the above provisions, if civil servants are selected for promotion in a "batch[1]" or as a "group of persons[2]" then the date of promotion of all the persons in the batch or the group shall be the date when anyone of them was first promoted to the post and they shall retain their inter se seniority. The word "batch" used in section 7 of Act has been interchangeably used as "group of persons" in Rule 8. Ordinary dictionary meaning of the word 'batch" is "people dealt with as a group or at the same time".[3] Therefore, appellants, in the same grade, when considered and recommended for promotion for the next grade in the same Departmental Promotion Committee (DPC) pass for a "batch" or "group of persons" and therefore as per the above provisions will be considered to have been promoted from the date when the first amongst the batch was promoted and will also retain their inter se seniority of the lower post. In this legal background, the three appellants were recommended for promotion to BS-18 in DPC dated 24.11.2003. One of them i.e., Dr. Naureen Asghar was promoted on 2.12.2003, thus the entire batch of appellants/promotees who were recommended for promotion in the same DPC namely Dr. Zohara Jabeen and Dr. Farkhanda Almas shall be considered to have been appointed w.e.f 2.12.2003, the date of promotion of Dr. Naureen Asghar, one of the promotees, from the same batch or group of persons. Further their inter se seniority amongst the promotees shall be the same as maintained in the lower post as per the provisions discussed above. However, Dr. Zubda Riaz (appellant No. 3) who was deferred in the DPC held on 24.11.2003 on the ground that she was on a long leave and was subsequently recommended in the DPC held on 12.10.2007 (after almost four years)

and promoted on 26.4.2008 cannot be considered to be from the same batch as that of the other appellants selected in the year 2003 and therefore the above provisions do not come to her rescue. Her seniority will be fixed according to the date of her promotion. The respondents were appointed through initial appointment on 03.12.2003, a day after the promotion of the first promottee out of the batch of promotes, hence the respondents will fall under the appellants. Therefore, the seniority of the appellants Nos.1 and 2 shall be re-fixed above the respondents in the manner discussed above and of appellant No.3 according to her date of promotion. For the above reasons the impugned judgment of the Tribunal dated 26.03.2012 is set aside and these appeals are allowed accordingly.

MWA/Z-9/SC Appeals allowed.

**2021 S C M R 328**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik, Sajjad Ali Shah and Syed Mansoor Ali Shah, JJ**

**PROVINCE OF PUNJAB through Conservator of Forest, Faisalabad and others---Petitioners**

**Versus**

**JAVED IQBAL---Respondent**

C.Ps. Nos. 1554-L to 1573-L of 2020, decided on 26th November, 2020.

(On appeals from the judgments of Punjab Service Tribunal, Lahore dated 18.06.2020, passed in Appeals Nos.532, 534, 535, 546, 537, 538, 539, 540, 541, 542, 543, 544, 545, 547, 548, 549, 550, 551, 552 and 553 of 2017)

**(a) Interpretation of statutes---**

---- Directory and mandatory provisions---Principles and tests to determine whether a provision in a statute was directory or mandatory in nature.

In order to determine whether a provision was directory or mandatory, the duty of the court was to try to unravel the real intention of the legislature. The ultimate test was the intent of the legislature and not the language in which the intent was clothed. The object and purpose of enacting the provision provided a strong and clear indicator for ascertaining such intent of the legislature. The intention of the legislature must govern and this was to be ascertained not only from the phraseology of the provision but also by considering its nature, its object, and the consequences which would follow from construing it one way or the other. This exercise entailed careful examination of the scheme of the Act in order to discover the real purpose and object of the Act. A provision in a statute was mandatory if the omission to follow it rendered the proceedings to which it related illegal and void, while a provision was directory if its observance was not necessary to the validity of the proceeding.

Collector of Sales Tax v. Super Asia 2017 SCMR 1427; State v. Imam Baksh 2018 SCMR 2039 and Crawford, Statutory Construction, pp. 515-516 ref.

One of the important test that must always be employed in order to determine whether provision was mandatory or directory in character was to consider whether the noncompliance of a particular provision caused inconvenience or injustice and, if it did, the court would say that that provision must be complied with and that it was obligatory in its character. There were three fundamental tests, which were often applied with remarkable success in the determination of this question. They were based on considerations of the scope and object, sometimes called the scheme and purpose, of the enactment in question, on considerations of justice and balance of convenience and on a consideration of the nature of the particular provision, namely, whether it affected the performance of a public duty or related to a right, privilege or power in the former case the enactment was generally directory, in the latter mandatory.

N S Bindra s Interpretation of Statutes. 12th edition. p. 435 ref.

Negative words used in a provision that prescribed some statutory requirement made, as a general rule, that requirement mandatory even if no penalty was prescribed for non-compliance of that requirement.

N S Bindra s, Interpretation of Statutes, pp. 996-998, (10th edition); Shujat Hussain v. State 1995 SCMR 1249 and Atta Muhammad v. Settlement Commissioner PLD 1971 SC 61 ref.

**(b) Punjab Employees Efficiency, Discipline and Accountability Act (XII of 2006)---**

----S. 21, proviso---Retired employee---Departmental proceedings, finalization of---Time frame---Scope---In terms of proviso to S. 21 of the Punjab Employees Efficiency, Discipline and Accountability Act, 2006 departmental proceedings initiated against a retired employee shall be finalized not later than two years of his retirement---Said proviso was mandatory in nature, therefore, insertion of the same had a specific purpose; to conclude the proceedings against a retired employee not later than two

years of his retirement---Any proceedings after the said statutory period shall stand abated and any orders passed after the efflux of the said time period were void and had no legal effect.

The focus of the Punjab Employees Efficiency, Discipline and Accountability Act, 2006 ( the Act ) was on the employees that were managing the affairs of the Government or the Corporation rather than those who had retired. Further, any long drawn departmental proceedings against a retired employee would be an unnecessary drain on the resources of the Government and would also distract the Government from its prime objective of regulating its employees. The scheme of the Act seemed to support the public policy that an employee who had served the Government all his life must enjoy his retirement in peace and must be spared from undergoing long drawn departmental proceedings during his retired life.

The importance of the proviso to section 21 of the Act could be gauged by supposing that there was no such proviso. As a consequence, there would be no statutory timeline for the conclusion of the departmental proceedings against a retired employee, as was the case with an (in service) employee under the Act. Therefore, the insertion of the proviso had a specific purpose; to conclude the proceedings against a retired employee not later than two years of his retirement.

Where a public official could impose liability on a retired employee if the power was exercised within a certain statutory timeframe and there was a delay in the exercise of such power on the part of a public official, no such liability could be imposed after the lapse of the statutory period..

The phrase not later than two years used in the proviso to section 21 of the Act passed for a negative phrase and gave an imperative effect. Such negative phrases or words were prohibitive in essence, and were ordinarily used as a legislative device to make a provision in a statute mandatory.

Finalization of the departmental proceedings not later than two years of the retirement of the employee under the proviso to section 21 of the Act was a mandatory provision and any proceedings after the said statutory period shall stand abated and any orders passed after the efflux of the said time period were void and had no legal effect. The Government must ensure that cases of retired employees were fast tracked so that they were concluded within the prescribed statutory timeframe allowing the retired employees to enjoy their retired life and the Government to save unnecessary expense and time in pursing matters against retired employees.

**(c) Interpretation of statutes---**

----Mandatory and directory provisions---Statutes regulating exercise of power by public officials---Principles to determine whether a provision in such a statute was directory or mandatory in nature.

As a general principle, a statute which regulated the manner in which public officials exercised the power vested in them was construed to be directory rather than mandatory, especially when neither private or public rights were injured or impaired thereby. But if the public interest or private rights called for the exercise of the power vested in a public official, the language used, though permissive and directory in form, was in fact peremptory or mandatory as a general rule. Where a public officer was directed by a statute to perform a duty within a specified time, the provision as to time were only directory. This general principle, however, did not apply where the phraseology of the provision, or the nature of the act to be performed, or the consequence of performing or failing to perform it within the prescribed timeframe was such that the prescription of timeframe was actually a limitation on the power of the public functionary. Or where a public functionary was empowered to create liability against a citizen only within the prescribed time, the performance of such a duty within the specified timeframe was mandatory.

Crawford in Maxwell s, Interpretation of Statutes, 11th edition, pp. 369, 380; Sutherland, Statutory Construction, p. 107, Vol.-III (3rd Edition); Nagina Silk Mill v. Income-Tax Officer PLD 1963 SC 322; CBR/Sales Tax Department v. Pace International PTCL 2005 CL. 841; Pace International v. CBR/Sales Tax Department 2005 PTD 340; Dandot Cement Company v. Secretary, Revenue Division

2008 PTD 609; Super Asia v. Collector of Sales Tax 2008 PTD 60 and Sales Tax v. Super Asia 2017 SCMR 1427 ref.

**(d) Interpretation of statutes---**

----Proviso to a provision---Effect of a qualifying proviso, according to the ordinary rules of construction, was to qualify something enacted in the preceding portion of the enactmen.

Craies on Statute Law, p.218, (7th edition) ref.

Raja M. Arif, Additional A.G. for Petitioners (in all cases).

Respondent in person.

Date of hearing: 26th November, 2020.

**JUDGMENT**

Civil Petitions Nos.1554-L to 1564-L, 1566-L to 1568-L and 1570-L of 2020.

**SYED MANSOOR ALI SHAH, J**.---The substantial question of law of public importance in terms of Article 212(3) of the Constitution that arises in these petitions is whether the proviso to section 21 of the Punjab Employees Efficiency, Discipline and Accountability Act, 2006 ( Act ) is directory or mandatory? Under the said proviso departmental proceedings initiated against a retired employee shall be finalized not later than two years of his retirement.

2. In Civil Petition No.1554-L/2020, brief facts of the case are that the Respondent while working as Forest Guard was departmentally proceeded against under the Act by way of show cause notice dated 19.12.2009 and was awarded major penalty vide order dated 23.10.2012. During the course of the said inquiry the petitioner retired from service on 15.04.2010. The departmental proceedings initiated against the petitioner on 19.12.2009 continued and were finalized on 23.10.2012, more than two years after his retirement. Similar facts are involved in rest of the listed cases.

3. Proviso to section 21 of the Act provides as under:

Section 21. Proceedings under this Act - Subject to this Act, all proceedings initiated against the employees having retired or in service, shall be governed by the provisions of this Act and the rules made thereunder:

Provided that in case of retired employee, the proceedings so initiated against him shall be finalized not later than two years of his retirement.

B

In order to determine whether the aforesaid proviso is directory or mandatory, the duty of the court is to try to unravel the real intention of the legislature. The ultimate test is the intent of the legislature and not the language in which the intent is clothed. The object and purpose of enacting the provision provide a strong and clear indicator for ascertaining such intent of the legislature.1 The intention of the legislature must govern and this is to be ascertained not only from the phraseology of the provision but also by considering its nature, its object, and the consequences which would follow from construing it one way or the other.2 This exercise entails careful examination of the scheme of the Act in order to discover the real purpose and object of the Act. A provision in a statute is mandatory if the omission to follow it renders the proceedings to which it relates illegal and void, while a provision is directory if its observance is not necessary to the validity of the proceeding. One of the important test that must always be employed in order to determine whether a provision is mandatory or directory in character is to consider whether the non-compliance of a particular provision causes inconvenience or injustice and, if it does, the court would say that that provision must be complied with and that it is obligatory in its character.3 There are three fundamental tests, which are often applied with remarkable success in the determination of this question. They are based on considerations of the scope and object, sometimes called the scheme and purpose, of the enactment in question, on considerations of justice and balance of convenience and on a consideration of the nature of the particular provision, namely, whether it affects the performance of a public duty or

relates to a right, privilege or power in the former case the enactment is generally directory, in the latter mandatory.4

4. Examining the scheme and object of the Act we notice that the preamble to the Act provides that the law has been promulgated with the object to improve the efficiency, discipline and accountability of employees in government and corporation service in order to achieve good governance. Further section 1(4)(iii) provides as follows:

Section 1. Short title, extent, commencement and application.- (1) This Act may be called the Punjab Employees Efficiency, Discipline and Accountability Act, 2006.

(2)

(3)

(4) It shall apply to-

(iii) retired employees of government and corporation service; provided that proceedings under this Act are initiated against them during their service or within one year after their retirement.

The above provision shows that the main purpose of Act is to enhance good governance in service matters and provide measures for improvement of efficiency, discipline and accountability of the employees. Employee5 is defined as a person who is in employment either in a Corporation or in the Government service. Employee (a person in service) is, therefore, the blue-eyed boy of the Act and the central focus of the law, which revolves around improving governance through improvement of efficiency, discipline and accountability of the serving employees. A retired employee, however, falls outside the focus and theme of the Act except a limited category of retired employees. The presence of a retired employee under the Act is recognized for the first time in the definition of the term accused6 under the Act, which provides for a person who is or has been an employee and against whom an action has been initiated under the Act. Retired employee is only recognized if there are disciplinary proceedings initiated against him and not otherwise. Section 1 (4) (iii) provides that the Act is applicable only to a retired employee against whom departmental proceedings have been initiated either while he was in service or within a period of one year after his retirement. Therefore, an employee who has retired for over an year and no departmental action has been initiated against him falls outside the mischief of the Act. Proviso to section 21 of the Act provides an upper time limit for finalizing the departmental proceedings initiated against a retired employee i.e., no later than two years from the date of his retirement. The scheme of the Act shows that a retired employee recognized by the Act has a restrictive meaning i.e., a person against whom departmental proceedings have been initiated and finalized within certain strict statutory timelines. First, those retired employees, against whom departmental proceedings have been initiated either in service or within one year of their retirement. Second, against whom departmental proceedings have been finalized within two years of their retirement. A retired employee falling outside these two timelines falls outside the mischief of the Act.

5. The aim of interpretation in law is to realize the purpose of the law. The objective purpose of the statute means the interests, values, objectives and policy that the law should realize. The focus of the Act is on the employees that are managing the affairs of the Government or the Corporation rather than those who have retired. Further, any long drawn departmental proceedings against a retired employee would be an unnecessary drain on the resources of the Government and would also distract the Government from its prime objective of regulating its employees. The scheme of the Act seems to supports the public policy that an employee who has served the Government all his life must enjoy his retirement in peace and must be spared from undergoing long drawn departmental proceedings during his retired life. It is only those employees against whom inquiry has been initiated prior to their retirement or within one year of their retirement that are relevant for the purposes of the Act. The Act further provides that any such departmental proceedings shall be finalized not later than two years of the retirement of the employee. The importance of the proviso can be gauged by supposing that there

was no proviso to section 21. As a consequence there would be no statutory timeline for the conclusion of the departmental proceedings against a retired employee, as is the case with an (in service) employee under the Act. Therefore, the insertion of the proviso has a specific purpose; to conclude the proceedings against a retired employee not later than two years of his retirement.

6. On a more textual level, as a general principle, a statute which regulates the manner in which public officials exercise the power vested in them is construed to be directory rather than mandatory, especially when neither private or public rights are injured or impaired thereby. But if the public interest or private rights call for the exercise of the power vested in a public official, the language used, though permissive and directory in form, is in fact peremptory or mandatory as a general rule.7 According to Sutherland;8 where a public officer is directed by a statute to perform a duty within a specified time, the provision as to time are only directory. This general principle, however, does not apply where the phraseology of the provision, or the nature of the act to be performed, or the consequence of performing or failing to perform it within the prescribed timeframe is such that the prescription of timeframe is actually a limitation on the power of the public functionary. Or where a public functionary is empowered to create liability against a citizen only within the prescribed time, the performance of such a duty within the specified timeframe is mandatory.9 Where a public official can impose liability on a retired employee if the power is exercised within a certain statutory timeframe and there is a delay in the exercise of such power on the part of a public official, no such liability can be imposed after the lapse of the statutory period.

. At a more granular level, the effect of a qualifying proviso, according to the ordinary rules of construction, is to qualify something enacted in the preceding portion of the enactment.10 The word shall, used in the proviso, is commonly construed as mandatory. The phrase not later than two years in the proviso passes for a negative phrase and gives an imperative effect. Such negative phrases or words are prohibitive in essence, and are ordinarily used as a legislative device to make a provision in a statute mandatory. Therefore, negative words used in a provision that prescribes some statutory requirement makes, as a general rule, that requirement mandatory even if no penalty is prescribed for non-compliance of that requirement.11

8. The Guidebook12 for conducting inquiry, issued under the Act is to eliminate, as far as possible, chances of delay by removing bottlenecks in inquiry proceedings. According to the Guidebook the following points should be kept in mind while conducting proceeding under the Act;

(4) Points to be considered for proceeding under the PEEDA Act, 2006

(i) (xviii)

(xix) Inquiry against retired employees

(a) As per section 21 of the PEEDA Act, 2006, a retired employee can be proceeded under PEEDA Act, 2006 within one year of his retirement, provided that inquiry has already been initiated during his service under PEEDA Act 2006 and it should be finalized within two years of his retirement.

(b) ..

(c) on completion of two years from the date of retirement, the proceedings under the PEEDA Act, 2006 abate and no penalty can be imposed under PEEDA Act, 2006.

(emphasis supplied)

9. It is also important to highlight that closure of departmental proceedings after retirement of an employee under the Act is not a new concept and finds historical support and reference in Fundamental Rules (FR), the Civil Service Regulations (CSR), Punjab Civil Service Pension Rules, 1955 and Civil Establishment Code (ESTA CODE) in the following manner:

FR 54-A states:

54A. If a Government servant, who has been suspended pending inquiry into his conduct attains the age of superannuation before the completion of inquiry, the disciplinary proceedings against

him shall abate and such government servant shall retire with full pensionary benefits and the period of suspension shall be treated as period spend on duty.

This Court in Muhammed Zaheer Khan13 held that the plain reading of F.R.54-A is clear that the disciplinary proceedings against an officer abate if the latter attains the age of superannuation. The Rule entitles such officer to retire with full pensionary benefits and period of suspension is bound to be treated as period spent on duty. It was held that the fundamental principle laid down in FR.54-A postulates that the case of the appellant cannot be remanded to the authority for holding de novo proceedings, after eleven years of his superannuation. In Muhammed Anwar Bajwa14, it was held that Rule 54-A shows that if a disciplinary action is initiated against the Government servant and the said action remains inconclusive during the course of his service and he retires on attaining the age of superannuation in the meanwhile, not only the un-concluded disciplinary action shall abate against such a Government servant but that he shall also be entitled to full pensionary benefits. In Munir Hussain Shah15, this Court held that time limit has also been fixed for such departmental proceedings inasmuch as no such inquiry can be held after one year of the retirement of a pensioner. Similarly, in Muhammed Akhtar,16 it was held that the disciplinary inquiry could not have been initiated after a lapse of one year of the retirement of the respondent.

10. The Civil Service Regulations (CSR) provide as under:-

351-A. The President reserves to himself the right to order the recovery from the pension of an officer who entered service on or after 23rd February, 1939 of any amount on account of losses found in judicial or departmental proceedings to have been caused to Government by the negligence or fraud of such officer during his service:

Provided that

(1) such departmental proceedings, if not instituted while the officer was on duty,-

(i) shall not be instituted save with sanction of the President;

(ii) shall be instituted before the officer's retirement from service or within a year from the date on which he was last on duty whichever is later;

(iii) shall be in respect of an event which took place not more than one year before the date on which the officer was last on duty and:

(iv) shall be conducted by such authority and in such places whether in Pakistan or elsewhere, as the President may direct;

(2) all such departmental proceedings shall be conducted, if the officer concerned so requests, in accordance with procedure applicable to departmental proceedings on which an order of dismissal from service may be made; and

(3) such judicial proceedings, if not instituted while the officer was on duty, shall have been instituted in accordance with sub-clauses (ii) and (iii) of clause (1).

351-B The Government may, within one year from the date of issue of Pension Payment Order, recover any of its dues from the pension granted to a civil servant, subject to the condition that no recovery shall be made from the pension without the personal order of the Head of the Ministry or Division or Head of the Department, declared as such under S.R.2(10) and included in Appendix No.14, Vol. II of the Compilation of the Fundamental Rules and Supplementary Rules, as the case may be.

417-A. If an officer, who has been suspended pending inquiry into his conduct, attains the age of superannuation before completion of the inquiry, the disciplinary proceedings against him shall abate and such officer shall retire with full pensionary benefits and the period of suspension shall be treated as period spent on duty.

(emphasis supplied)

11. Under Rule 1.8 (b) of the Punjab Civil Services Pension Rules, 1955, Government reserves the right of recovery from the pension of Government pensioner on account of losses found in judicial or

departmental proceedings to have been caused to Government by the negligence, or fraud of such Government pensioner during his service, provided that such departmental proceedings shall not be instituted after more than a year from the date of retirement of the Government pensioner. In Muhammed Said Khan17, the reason for the limitation of one year in clause (b) of Rule 1.8 of the Civil Services Pension Rules was that the Government reserved to itself the right to recover from the pension any sum which it had suffered by way of loss while the pensioner remained in service. It was held that this right could not have been available to the Government for all times to come. After the judgment in Muhammed Said Khan the following letter was issued by the Government:

No.SOR-I(S&GAD) 4-38/97

Dated the 10th January, 1998

Subject: WITHHOLDING / WITHDRAWAL OF PENSIONER ANY PART OF IT, FOR GRAVE MISCONDUCT DURING SERVICE

I am directed to refer to this Department s letter No.SORI(S&GAD)7-1/72 dated 23rd October, 1973, on the subject noted above and to say that in pursuance of Supreme Court s pronouncement in their decision of Government appeal titled the Government of N.W.F.P. versus Mr. Muhammad Saeed Khan and another vide PLD 1973-SC-514, though interpretation of rule 1.8 of Punjab Civil Services Pension Rules was issued vide circular letter referred to above, yet the departments are seeking interpretation time and again. The important provisions of the instructions under reference are reproduced below for facility of reference:

(a) Each of the clauses (a) and (b) of this rule is a self-contained and independent provision designed to cater for two different situations. Under clause (a), maintenance of Good Conduct is made an inseparable condition for the grant or continuance of pension to a government servant and the Govt. reserves to itself the plenary power to with-hold or withdraw a pension or any part thereof if the pensioner is convicted for serious crime or is found guilty of grave misconduct whether during or after completion of his service. However, clause (b) cannot be used to effect a penal recovery if there be a case of fraud or negligence during the service thought it may be made a ground for a finding that the service has not been thoroughly satisfactory.

(b) Clause (b) ibid empowers the Government to order recovery from the pension, of the whole or part of any pecuniary loss, caused to the Government if the pensioner is found in departmental or judicial proceedings, to have been guilty of grave misconduct or negligence during his service. Under clause (b) the Government reserves to itself the right to recover from the pension the amount of any pecuniary loss which it has suffered while the pensioner was in service. It is, however, to be noted that this power cannot be resorted to after efflux of one year from the date of retirement of the pensioner.

c) On general principles as also on the wording of rule 1.8(a), the Executive has the exclusive power to determine whether on the facts of the case the officer/official concerned was guilty of gross misconduct and this applies equally to the serving officers as well as to those who have retired but whose pensionary claims are yet to be settled.

(d) Except as a result of the inquiry contemplated under clause (a) the Government has no power under the rules to suspend the payment of whole or any part of the pension of a Government servant otherwise admissible, pending inquiry against him. It follows

> that any order in that behalf in anticipation of the result of the inquiry, will be without any valid basis.
>
> 2. The above interpretation of rule 1.8 of the Pension Rules by the Supreme Court in PLD 1973 SC 514, may kindly be brought to the notices of all concerned for information and guidance so as to avoid unnecessary correspondence in the matter. (emphasis supplied)

12. Under the Civil Establishment Code (ESTACODE),18 the following instructions have been issued for quick disposal of disciplinary proceedings pending against Government Servants who are about to superannuate:

Sl. No. 31.619

It has come to the notice of government that inquiry proceedings against civil servants under the Government Servants (Efficiency and Discipline) Rules, 1973 (Sl.No.23) tend to be unduly protracted for various avoidable reasons causing hardships to the affected government servants on the one hand and defeating the purpose of speedy disposal of cases in others. This is obviously against dictates of justice.

2. The disposal of disciplinary proceeding assumes vital importance especially in cases against government servants who are about to attain the age of superannuation. It goes without saying that delay in disposal of such cases not only causes hardships to the affected persons but also puts the administration to unnecessary criticism.

3. It is, therefore, requested that disciplinary proceedings against government servants nearing the age of superannuation in future should be disposed of before they superannuate. All the agencies working under the administrative control of the Ministry concerned should be advised accordingly.

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Sl. No. 31.720

Reference Estt. Division's O.M.No.12/2/88-R.3, dated the 3rd October, 1988 (Sl No.31.6) on the subject mentioned above, wherein all the Ministries/Divisions were requested that disciplinary proceedings against Government Servant nearing the age of superannuation should in future be disposed of before they superannuate. Despite this, instances have come to the notice of this Division wherein the disciplinary cases have been delayed to such an extent that these stood abated due to non-finalization thereof before the age of superannuation of the accused civil servants, which is not a happy state of affairs.

2. In order to guard against recurrence of such instances, it is once again requested that the instructions (Sl. No. 143) may please be brought to the notice of all concerned for strict compliance to ensure that the State's interests are fully protected and the civil servants really guilty of misdemeanor of any sort do not go unpunished due to the inefficiency and/or connivance of the departmental personnel in finalizing the Efficiency and Discipline cases before the accused's superannuation.

(emphasis supplied)

13. The legislative intent and the purposive interpretation of the Act read with the supportive material discussed above, it is clear that the finalization of the departmental proceedings not later than two years of the retirement of the employee under the proviso to section 21 of the Act is a mandatory provision and any proceedings after the said statutory period shall stand abated and any orders passed after the efflux of the above time period are void and have no legal effect.

14. In the instant cases, the departmental proceedings against the respondent have been finalized after a period of two years of his retirement, the departmental proceedings, therefore, have no legal consequence and the subsequent departmental orders are void and have no legal effect. For this reason we take no exception to the impugned judgments and are of the view that they do not warrant any

interference. Leave is, therefore, declined and these petitions are dismissed. For future, the Government must ensure that cases of retired employees are fast tracked so that they are concluded within the aforesaid statutory timeframe allowing the retired employees to enjoy their retired life and the Government to save unnecessary expense and time in pursing matters against retired employees.

C.Ps. Nos. 1565-L, 1569-L, 1571-L, 1572-L and 1573-L of 2020

15. The abovementioned proviso does not apply in these cases, as the departmental proceedings were finalized within a period of two years from the date of retirement. Office shall separate these petitions and fix them for hearing in the next session to be decided on merit.

MWA/P-7/SC Order accordingly.

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[1] *Collector of Sales Tax v. Super Asia 2017 SCMR 1427; State v. Imam Baksh 2018 SCMR 2039*

[2] *Crawford, Statutory Construction, p. 515-516.*

[3] *N S Bindra s Interpretation of Statutes. 12th edition. p.435*

[4] ibid. p. 454

[5] [section 2(h)]

[6] section 2(a)

[7] *Crawford in Maxwell s, Interpretation of Statutes, 11th edition, pp. 369, 380.*

[8] *Sutherland, Statutory Construction, p. 107, Vol.-III (3rd Edition).*

[9] *See Nagina Silk Mill v. Income-Tax Officer, PLD 1963 SC 322; CBR/Sales Tax Department v. Pace International, PTCL 2005 CL. 841* maintaining decision of the Justice (R) Saleem Akhtar, the FTO, delivered in *Pace International v. CBR/Sales Tax Department, 2005 PTD 340; Dandot Cement Company v. Secretary, Revenue Division, 2008 PTD 609,* per Justice (R) Munir A. Sheikh; *Super Asia v. Collector of Sales Tax, 2008 PTD 60* maintained in *Collector of Sales Tax v. Super Asia, 2017 SCMR 1427.*

[10] Craies on Statute Law, p.218, (7th edition).

[11] N S Bindra s, Interpretation of Statutes, pp. 996-998, (10th edition), and Shujat Hussain v. State 1995 SCMR 1249; Atta Muhammad v. Settlement Commissioner, PLD 1971 SC 61

[12] Notification No.SORI(S&GAD)1-30/2003(P-II) dated 17.08.2015

[13] *Muhammad Zaheer Khan v. Government of Pakistan 2010 SCMR 1554.*

[14] *Muhammad Anwar Bajwa, Executive Director, Agricultural Development Bank of Pakistan v. Chairman, Agricultural Development Bank of Pakistan 2001 PLC (C.S.) 336.*

[15] *Province of the Punjab v. Munir Hussain Shah 1998 SCMR 1326.*

[16] *Secretary, Education (Schools), Government of the Punjab, Lahore v. Muhammad Akhtar, Ex-Headmaster 2006 SCMR 600.*

[17] *Government of NWFP v. Mohammad Said Khan, PLD 1973 SC 514.*

[18] Estacode Vol-II, 2018 Ed. These provisions from the Code existed in the same manner in earlier editions under a different number i.e., Sl. Nos. 131 and 132.

[19] Authority.-Estt. Division O.M. No.12/2/88-R.3, dated 3-10-1988.

[20] Authority.-Estt. Division O.M. No.6/14/94-D.I, dated 19-12-1994.

**2021 S C M R 451**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik, Mazhar Alam Khan Miankhel and Syed Mansoor Ali Shah, JJ**

**Mst. SAKINA RAMZAN---Petitioner**

**Versus**

**The STATE---Respondent**

Criminal Appeal No. 184 of 2020, decided on 6th January, 2021.

(On appeal from the judgment of High Court of Sindh, Karachi, dated 01.6.2018, passed in Crl. A. No. D-98/2016)

**(a) Control of Narcotic Substances Act (XXV of 1997)---**

----S. 9(c)---Possession and transportation of 45 kilograms of charas---Reappraisal of evidence---Safe custody and transmission of samples of the narcotic from the warehouse to the chemical examiner not established---Held, that the letter of the Superintendent Preventive Service written to the Chemical Examiner stated that 43 sealed samples were being forwarded to the chemical examiner---Author of said letter was not produced as a witness---In the absence of the statement of the warehouse in-charge and the statement on behalf of the complainant (the official who recovered the narcotics),regarding the delivery of the samples of the narcotic drugs to the office of the chemical examiner, it could not be ascertained whether the narcotic drugs and the representative samples were deposited in the warehouse by the complainant; when and who collected the representative samples from the warehouse; and who delivered them by hand to the office of the Chemical Examiner---Such facts revealed that the chain of custody had been compromised and was no more safe and secure, therefore, reliance could not be placed on the Report of the Chemical Examiner to support conviction of the accused---Conviction and sentence recorded against the accused-lady were set aside in circumstances and she was acquitted of the charge---Appeal was allowed.

Imam Bakhsh's case 2018 SCMR 2039 and Ikramullah's case 2015 SCMR 1002 ref.

**(b) Control of Narcotic Substances (Government Analysts) Rules, 2001---**

----Rr. 4, 5 & 6---Control of Narcotic Substances Act (XXV of 1997), S. 9(c)---Possession of narcotics---Report of Chemical Examiner---Safe custody and transmission of samples of the narcotic from the police to the chemical examiner---Scope---Chain of custody or safe custody and safe transmission of narcotic drug began with seizure of the narcotic drug by the law enforcement officer, followed by separation of the representative samples of the seized narcotic drug, storage of the representative samples and the narcotic drug with the law enforcement agency and then dispatch of the representative samples of the narcotic drugs to the office of the chemical examiner for examination and testing---Such chain of custody must be safe and secure, because, the Report of the Chemical Examiner enjoyed critical importance under the Control of Narcotic Substances Act, 1997 and the chain of custody ensured that correct representative samples reached the office of the Chemical Examiner---Any break or gap in the chain of custody i.e., in the safe custody or safe transmission of the narcotic drug or its representative samples made the Report of the Chemical Examiner unsafe and unreliable for justifying conviction of the accused---Prosecution, therefore, had to establish that the chain of custody had been unbroken and was safe, secure and indisputable in order to be able to place reliance on the Report of the Chemical Examiner.

Syed Rifaqat Hussain Shah, Advocate-on-Record and Hassan Mahmood Mandviwala, Advocate High Court for Petitioner.

Moulvi Ijaz-ul-Haq, DAG for the State.

Date of hearing: 6th January, 2021.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**During snap checking on 26.11.2014, Customs officers stopped a vehicle on the RCD Highway, Karachi loaded with three LCD TVs, two room heaters and one washing machine. The driver of the vehicle was Abdul Ghaffar (since acquitted) and the appellant was the only passenger in the vehicle. Upon thorough examination of the body frames of the three LCD TVs, two room heaters and one washing machine, 45 Kgs (gross) of charas was recovered hidden in the body frames of these items. The appellant along with co-accused were booked in FIR No.150 dated 27.11.2014, for an offence under section 9(c) of the Control of Narcotic Substances Act, 1997 ("CNSA").

2. After regular trial, the appellant was convicted under section 9(c), CNSA and sentenced to imprisonment for life and to pay fine of Rupees One million or in default thereof to suffer simple imprisonment for five years, while benefit of section 382-B, Cr.P.C was also extended to the appellant. The co-accused Abdul Ghaffar was acquitted of the charge by the trial court being a taxi driver having no involvement in the matter. The appellant challenged her conviction and sentence before the Sindh High Court, where her appeal was dismissed and the conviction and sentence of the trial court was maintained. Leave was granted by this Court vide order dated 04.3.2020 for reappraisal of the entire evidence so as to ensure safe administration of criminal justice.

3. We have gone through the record of the case with the assistance of learned counsel for the parties. We have noticed that according to the statement of the complainant Muhammad Younus Sabir (PW-1), SPO, Customs Preventive, he recovered the narcotic drugs from the items mentioned above on 26.11.2014 and prepared the memo of recovery along with inventory (Ex-9/A & Ex-9/A-1) and deposited the same in the warehouse. Zulfiqar Ali (PW-3), PO, Customs Preventive, stated that SO Khalid was Incharge of the warehouse, however, the said incharge was not produced by the prosecution to confirm the safe custody of the narcotic drugs after its recovery on 26.11.2014. The Report of the Director Laboratories and Chemical Examiner (Ex-11A/1) reveals that the narcotic drugs were received by hand in the office on 28.11.2014 through ASO Muhammad Younas Sabir. No "ASO" Muhammad Younas Sabir was produced before the court. Considering it to be SPO Muhammed Younas Sabir, wrongly mentioned as ASO in the Report, even SPO Muhammed Younas Sabir, while appearing as PW-1 never stated that he delivered by-hand the narcotic drugs at the office of the Director Laboratories and Chemical Examiner. Infact he stated that:

> "we had sent 43 samples sent (sic) for chemical examiner with the letter of superintendent of customs."

The letter of the Superintendent Preventive Service dated 27-11-2014 (Ex 9/B) written to the Chemical Examiner states that 43 sealed samples are being forwarded to the chemical examiner. The author of this letter was not produced as a witness. In the absence of the statement of the warehouse in-charge and the statement on behalf of Muhammed Younas Sabir (PW-1) regarding the delivery of the samples of the narcotic drugs to the office of the chemical examiner, it cannot be ascertained whether the narcotic drugs and the representative samples were deposited in the warehouse by PW-1; when and who collected the representative samples from the warehouse; and who delivered them by hand to the office of the Chemical Examiner. The chain of custody or safe custody and safe transmission of narcotic drug begins with seizure of the narcotic drug by the law enforcement officer, followed by separation of the representative samples of the seized narcotic drug, storage of the representative samples and the narcotic drug with the law enforcement agency and then dispatch of the representative samples of the narcotic drugs to the office of the chemical examiner for examination and testing. This chain of custody must be safe and secure. This is because, the Report of the Chemical Examiner enjoys critical importance under CNSA and the chain of custody ensures that correct representative samples reach the office of the Chemical Examiner. Any break or gap in the chain of custody i.e., in the safe custody or safe transmission of the narcotic drug or its representative samples makes the Report of the Chemical Examiner unsafe and unreliable for justifying conviction of the accused. The prosecution, therefore,

has to establish that the chain of custody has been unbroken and is safe, secure and indisputable in order to be able to place reliance on the Report of the Chemical Examiner.

4. The facts of the present case reveal that the chain of custody has been compromised and is no more safe and secure, therefore, reliance cannot be placed on the Report of the Chemical Examiner to support conviction of the appellant. See Imam Bakhsh1 and Ikramullah.2 For the above reasons we allow this appeal and set aside the conviction and sentence of the appellant. The appellant is directed to be released forthwith, if not required in any other case.

5. Foregoing are the reasons for the short order dated 06.1.2021, which is reproduced hereunder for convenience:-

> "For reasons to be recorded later, the instant criminal appeal is allowed. The conviction and sentence of appellant Mst. Sakina Ramzan is set aside. She is acquitted of the charge framed against her. She is behind the bars and is ordered to be released forthwith, if not required to be detained in any other case."

6. Before parting with the judgment we wish to place our appreciation on record for the pro bono assistance rendered by Mr. Hassan Mahmood Mandivala, Advocate representing the appellant on behalf of Legal Aid Committee for the Welfare of the Prisoners.

MWA/S-4/SC Appeal allowed.

**2021 S C M R 590**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ**

**PROVINCE OF PUNJAB through Secretary Primary and Secondary Healthcare, Punjab, Lahore and others---Petitioners**

**Versus**

**Messrs BLOOM PHARMACEUTICALS (PVT.) LIMITED and others---Respondents**

C. P. 1692-L/2020, C. P. 1792-L/2020 and C.P. 5-L of 2021, decided on 28th January, 2021.

(Against the orders of Lahore High Court, Lahore dated 08.09.2020, passed in W.P. No.40067/2020, dated 15.09.2020 passed in W.P. No.415/2020, dated 17.11.2020 passed in W.P. No.32377/2020)

**Drugs Act (XXXI of 1976)---**

----Ss. 22(4) & 22(5)---Reports of Government Analysts---Provincial Quality Control Board ---Discretion to allow or reject a request for re-testing---Scope---Question as to whether the Provincial Quality Control Board ("Board"), etc. enjoyed the "discretion" under S. 22(5) of the Drugs Act, 1976 ('the 1976 Act') to either allow or reject the request of the accused or the complainant for re-testing of the drug---Held, that other than the suo motu power enjoyed by the Board, etc. to send the drug for retesting, the Board, etc. also enjoyed the discretion to allow or disallow the request for re-testing by the accused or the complainant---Board, etc. enjoyed independent discretion to allow or disallow the request of the accused or the complainant for re-testing after considering the grounds against the Report and by passing a speaking order in such regard.

Perusal of sections 22(4) and 22(5) of the Drugs Act, 1976 ('the 1976 Act') showed that once the Report was received by the person, from whom the sample was taken (referred to as an accused in subsection (5), he could within ten days file, in writing, before the Inspector, or the Board, etc. where his case was pending, his intention to adduce evidence in contravention of the Report. This intention of adducing evidence in contravention of the Report actually was in the nature of a complaint against the Report specifying the grounds of contravention of the Report, on the basis of which, the person proposed to adduce evidence later on. Unless, subsection (5) was invoked, the complaint against the Report took its lawful course and the matter was finally concluded by the Board, etc. which had received such a complaint.

However, before the matter regarding the Report was concluded under subsection (4), subsection (5) of section 22 of the 1976 Act provided yet another avenue to the accused, as well as, the complainant. Once the complaint was filed against the Report by the accused within ten days as required by section 22(4), the Board or any other authority, before whom such a complaint against the Report was pending, could on its own motion or in its discretion on the request of the accused or the complainant may allow re-testing of the drug from the Federal Drug Laboratory, etc. Other than the suo motu power enjoyed by the Board, etc. to send the drug for retesting, the Board, etc. also enjoyed the discretion to allow or disallow the request for re-testing by the accused or the complainant. The request would be examined on the basis of the grounds already raised by the accused against the Report filed within ten days under section 22(4) of the 1976 Act. The said request, did not stand alone and must be preceded with a complaint under section 22(4) of the 1976 Act. There was no timeframe under the law for filing such a request but according to the scheme of the law such a request was to be made prior to the decision of the complaint filed by the accused against the Report under section 22(4). On the whole, the Board, etc. enjoyed independent discretion to allow or disallow the request of the accused or the complainant for re-testing after considering the grounds against the Report and by passing a speaking order in such regard.

Rana Shamshad Khan, Additional A.G. along with Shaheen Iqbal, Secretary, Aleem Akhtar Cheema, Law Officer and M. Farooq Bashir Butt, Director for Petitioners (in all cases).

Rana Maqsood Afzal, Advocate Supreme Court for Respondents (in C.P. 1692-L of 2020).

Haroon Dugal, Advocate Supreme Court for Respondents (in C.P. 5-L of 2021)

Nemo for Respondents (in C.P. 1792-L of 2020).

Date of hearing: 28th January, 2021.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**The question that requires determination by us revolves around the interpretation of section 22 subsections (4) and (5) of the Drugs Act, 1976 ("Act"). The question is whether the Provincial Quality Control Board ("Board"), etc. enjoys the "discretion" under section 22(5) of the Act to either allow or reject the request of the accused or the complainant for re-testing of the drug. The occasion of re-testing arises only when the drug has already been tested and the Report of the Government Analyst has been challenged within ten days1 before the Board, etc. by the person from whom the sample has been taken or the warrantor of the drug.

2. Learned Additional A.G. representing the petitioners submits that it is the discretion of the Board, etc. to allow or disallow such a request as has been clearly provided under section 22(5) of the Act. While on the other hand, learned counsel for the respondent companies argues that if the Report of the Government Analyst ("Report") is challenged by the accused or his warrantor within 10 days of the receipt of the said Report in terms of section 22(4) of the Act, the subsequent request by the accused for retesting of the drug from the Federal Drug Laboratory, etc. is a mere mechanical requirement and the Board, etc. has no discretion to disallow such a request for re-testing.

3. We have heard the arguments of the learned counsel for the parties and have examined section 22 subsections (4) and (5) of the Drugs Act, 1976 (Punjab Amendment), which are reproduced hereunder for ready reference:-

> "Section 22. Reports of Government Analysts.---(1) The Government Analyst to whom a sample of any drug has been submitted for test and analysis under subsection (3) of section 19 shall deliver to the Inspector submitting it a signed report in quadruplicate in the prescribed form and forward one copy thereof to the authority as may be prescribed.
>
> (2)
>
> (3)
>
> (4) Notwithstanding anything contained in any other law for the time being in force, any document purporting to be a report signed by a Government Analyst [or the Notified Drugs Laboratory] shall be admissible as evidence of the facts stated therein without formal proof and such evidence shall be conclusive unless the person from whom the sample was taken or the said warrantor has, within [ten days] of the receipt of a copy of the report notified in writing to the Inspector or [Provincial Quality Control Board or, as the case may be, the Central Licensing Board or the Registration Board or the Drug Court] before which any proceedings in respect of the sample are pending that he intends to adduce evidence in contravention of the report.
>
> (5) Where a person has, under subsection (4), notified his intention of adducing evidence in contravention of a [report of Government Analyst or of Notified Drugs Laboratory] [Provincial Quality Control Board or, as the case may be, the Central Licensing Board or the Registration Board or the Drug Court] may, of its own motion or in its discretion at the request either of the complainant or the accused, cause the sample of the drug lying with the Board concerned under sub-section (3) of section 19 to be sent for test or analysis to the Federal Drug Laboratory or any other laboratory specified for the purpose by the Federal Government [or the Provincial Government] which shall make the test or analysis and report in writing signed by, or under the authority of, the person for the time being Incharge of the Federal Drug Laboratory, or, as the case may be, such other laboratory, the result thereof and such report shall be conclusive evidence of the facts stated therein."

Perusal of the above provision shows that once the Report is received by the person, from whom the sample was taken (referred to as an accused in subsection (5), he can within ten days file, in writing,

before the Inspector, or the Board, etc. where his case is pending, his intention to adduce evidence in contravention of the Report. This intention of adducing evidence in contravention of the Report actually is in the nature of a complaint against the Report specifying the grounds of contravention of the Report, on the basis of which, the person proposes to adduce evidence later on. Unless, subsection (5) is invoked, the complaint against the Report takes its lawful course and the matter is finally concluded by the Board, etc. which has received such a complaint.

4. However, before the matter regarding the Report is concluded under subsection (4), subsection (5) of section 22 provides yet another avenue to the accused, as well as, the complainant. Once the complaint is filed against the Report by the accused within ten days as required by section 22(4), the Board or any other authority, before whom such a complaint against the Report is pending, can on its own motion or in its discretion on the request of the accused or the complainant may allow re-testing of the drug from the Federal Drug Laboratory, etc. Other than the suo motu power enjoyed by the Board, etc. to send the drug for retesting, the Board, etc. also enjoys the discretion to allow or disallow the request for re-testing by the accused or the complainant. The request will be examined on the basis of the grounds already raised by the accused against the Report filed within ten days under section 22(4) of the Act. The said request, does not stand alone and must be preceded with a complaint under section 22(4) of the Act as discussed above. There is no timeframe under the law for filing such a request but according to the scheme of the law such a request is to be made prior to the decision of the complaint filed by the accused against the Report under section 22(4). On the whole, we are of the view that the Board, etc. enjoys independent discretion to allow or disallow the request of the accused or the complainant for re-testing after considering the grounds against the Report and by passing a speaking order in this regard.

5. The view expressed by the High Court that the Board, etc. does no enjoy any such discretion in the matter of re-testing the drug is not correct. We, therefore, set aside the impugned judgments and direct the Board, etc. or (where ever the matter is pending) to decide the request of the respondent accused, in accordance with law and in the light of this judgment, by passing a speaking order within a month from the receipt of this order.

6. For the above reasons, the impugned orders passed by the High Court are set aside and these petitions are converted into appeals and allowed in the above terms.

MWA/P-4/SC Petition allowed.

**2021 S C M R 612**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik and Syed Mansoor Ali Shah, JJ**

**MUHAMMAD IDREES and another---Petitioners**

**Versus**

**The STATE and others---Respondents**

Criminal Petition 742-L of 2019 and Criminal Petition 629-L of 2019, decided on 21st January, 2021. (Against the judgment of Lahore High Court, Multan Bench, dated 13.03.2019, passed in Crl. A. No.908/2017)

**(a) Criminal Procedure Code (V of 1898)---**

----Ss. 172(1) & 172(2)---Police diary, contents of---Purpose and admissibility.

Section 172(1), Cr.P.C. mandates every Police Officer making investigation of a case to maintain a diary (commonly known as 'police dairy' or 'case dairy') of proceedings conducted by him in the course of that investigation, by requiring him to enter in that dairy: (i) the time at which any information relating to the offence under investigation reaches him on a particular day; (ii) the time at which he begins and closes his investigation on a particular day; (iii) the place or places visited by him on a particular day, concerning the investigation of the case; and (iv) a statement of the circumstances ascertained on a particular day through his investigation. The object to require recording of the said details in the police dairy appears to be to enable the courts to check the method and manner of investigation undertaken by the investigating officer. Until the honesty, the capacity, the discretion and the judgment of the Police can be thoroughly trusted, it is necessary for the protection of the public against criminals, for the vindication of the law, and for the protection of those who are charged with having committed a criminal offence that the Magistrate or Judge before whom the case is for inquiry or for trial should have the means of ascertaining what was the information (true, false, or misleading) which was obtained from day to day by the Police Officer who was investigating the case, and what were the lines of investigation upon which such Police Officer acted. A properly kept police diary would afford such information, and such information would enable the Magistrate or Judge to determine whether persons referred to in the police diary, but not sent up as witnesses by the Police, should be summoned to give evidence in the interests of the prosecution or of the accused. It is the duty of the Magistrate or of the Judge before whom a criminal case is, to ascertain the truth and to decide accordingly. It is axiomatic that a Police Officer who is investigating a criminal case, receives all sorts of information: true, false or misleading. The formulation of opinion on the basis of investigation by the Police Officer can also range from correct and fair opinion to a premature, biased, influenced or incorrect opinion. It is to check these infirmities that may creep into police investigation that it is essential that the Magistrate or the Judge, who is to hold the scales of justice evenly between the State and the accused, should have some means of ascertaining the quality of information obtained by the Police Officer during the course of investigation every day.

Queen v. Mannu, (1897) ILR 19 All 390 ref.

Section 172(2), Cr.P.C. empowers a Criminal Court to send for the police diaries of a case under inquiry or trial in that Court and permits use of such diaries to aid it in such inquiry or trial, but the provisions thereof expressly prohibit the use of such dairies as evidence in the case. The expression "to aid it in such inquiry or trial" indicates that it can be used by the Court for the purpose of enabling itself to have a better understanding of the evidence brought on the record of the case by the prosecution. Inspection of the police diaries can reveal sources of further inquiry, viz, the pointation of some important witnesses that the court can summon, or how the evidence produced was collected to better understand the links between the evidence on the record. The Court can thus use the police dairies in the course of inquiry or trial for resolving obscurities in evidence through questioning the relevant witnesses or for bringing relevant facts on record to secure the ends of justice through legally

admissible evidence, e.g., by summoning as witness those persons who are though referred to in the police diary but not sent up as witnesses by the investigating officer and whose testimony appears to be relevant in the inquiry or trial, or by calling production of some document that appears to be relevant to the matter under inquiry or trial. The Court, however, cannot take the facts and statements recorded in police dairies as material or evidence for reaching a finding of fact: these diaries by themselves cannot be used either as substantive or corroborative evidence. The police diary is itself not the evidence and therefore inadmissible for having no evidentiary value; it is, however, just a source to help understand the undiscovered or misunderstood aspects of the evidence existing on the record, if any, and introduce new dimensions to the case, leading to discovery and production of new evidence, if required to meet the ends of justice. Whatever the court infers from a police diary must translate into admissible evidence in accordance with law, and the court cannot simply rely on, and adjudicate upon the charge on the basis of, statements made in the police dairy.

Queen v. Mannu, (1897) ILR 19 All 390; Dal Singh v. Emperor, AIR 1917 PC 25; Mohammad v. Emperor, AIR 1926 Lah. 54; Emperor v. Dharam Vir, AIR 1933 Lah 498; Habeeb Mohammad v. State of Hyderabad, AIR 1954 SC 51; Imam Bux v. Crown PLD 1956 Sind 262; Subhanuddin v. State 1976 SCMR 506; Allah Yar v. State 1984 PCr.LJ 2934; Tordi Khan v. State, 2005 PCr.LJ 1970 and Fazal-Ur-Rehman v. Federation PLD 2014 FSC 15 ref.

**(b) Criminal Procedure Code (V of 1898)---**

----Ss. 4(1)(l), 169, 170, 173(3), 204(1) & Chapt. XIV---Qanun-e-Shahadat (10 of 1984), Art. 59---Investigating Officer, opinion of---Admissibility in evidence.

The opinion of a Police Officer who has investigated the case as to the guilt or innocence of an accused person is not a relevant fact, and is therefore not admissible, under the Qanun-e-Shahadat, 1984; as he is not an "expert" within the meaning of that term as used in Article 59 of the Qanun-e-Shahadat, 1984. Even the Criminal Procedure Code (Cr.P.C.) does not authorize him to form such an opinion. To determine guilt or innocence of an accused person alleged to be involved in the commission of an offence is a judicial function that can only be performed by a court of law. This judicial function cannot be delegated to the Police Officer investigating the case. The Police Officers are empowered under the provisions of Chapter XIV of the Cr.P.C., only to investigate the non-cognizable offence with the order of a Magistrate and the cognizable offence without such order. This power of investigation, in no way, includes the power to determine guilt or innocence of the accused persons. An investigation, as defined in section 4(1)(l) of the Cr.P.C., includes all proceedings under the Cr.P.C. for the collection of evidence conducted by a Police Officer or by any other person authorized by a Magistrate. This definition makes it clear that the assignment of a Police Officer conducting an investigation is limited to the collection of evidence, and the evidence when collected has to be placed by him before the competent court of law. Only the court has the power and duty to form an opinion about the guilt or innocence of an accused person and to adjudicate accordingly on the basis of evidence produced before it. An opinion formed by the investigating officer as to the non-existence or existence of sufficient evidence or reasonable ground of suspicion to justify the forwarding of an accused person to a Magistrate under sections 169 and 170 of the Cr.P.C. does not tantamount to opinion as to the guilt or innocence of the accused person. And despite such opinion of the investigating officer, the final determination even as to the existence or non-existence of sufficient ground for further proceeding against the accused person is to be made by the Magistrate under sections 173(3) and 204(1) of the Cr.P.C. on examining the material available on record, and not on the basis of that opinion of the investigating officer.

Muhammad Ahmed v. State PLD 2006 SC 316; Muhammad Ahmad v. State 2010 SCMR 660 and Muhammad Arshad v. State PLD 2011 SC 350 ref.

**(c) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Reappraisal of evidence---Statement of doctor, who was an independent witness, regarding shifting of deceased from one hospital to another, which was also confirmed by the post-mortem report, was in contradiction to the statements given by the two purported eye-witnesses---Such contradiction shook credibility of the two eyewitnesses leading to the conclusion that they were not present at the scene of the crime---Ocular account of the two eye-witnesses had been rightly disbelieved by the High Court, against the acquitted co-accused, who was alleged to have played a similar role in the occurrence---In such circumstances the same evidence could not be relied upon to convict the accused, unless there was an independent corroboration of it to the extent of his involvement in commission of the offence---Recovery being inconsequential there was no corroborative evidence to distinguish the case of the accused from that of the acquitted co-accused---Ocular account and the contents of the crime report were also inconsistent with the medical evidence on the record with respect to number of fire shots received on the thighs of the deceased---Prosecution had failed to establish its case against the accused beyond reasonable doubt---Petition for leave to appeal was converted into appeal and allowed, the conviction and sentence of the accused was set aside and he was acquitted of the charge.

Mazhar Iqbal Sidhu, Advocate Supreme Court for Petitioners (in Criminal Petition No. 742-L of 2019).

Umar Hayat Bhatti, Advocate Supreme Court for Petitioners (in Criminal Petition No. 629-L of 2019).

Umar Hayat Bhatti, Advocate Supreme Court for the Complainant (in Criminal Petition No. 742-L of 2019).

M. Amjad Rafiq, Additional P.G. for the State.

Date of hearing: 21st January, 2021.

**JUDGMENT**

Criminal Petition No.742-L of 2019:-

**SYED MANSOOR ALI SHAH, J.---**Three alleged assailants, Muhammad Asif, Muhammad Idrees and Muhammad Saleem, were booked in FIR No.263/2015 dated 12.08.2015 for committing the murder of Saif Ullah, under sections 302, 109 and 34, P.P.C. Later on, the name of Rasheed Ahmed was also added as having abetted the crime, hence these four accused were sent up for trial. Rasheed Ahmed was acquitted by the trial court, Muhammad Asif was declared a proclaimed offender (PO); however, Muhammad Saleem and Muhammad Idrees were convicted under section 302(b), P.P.C. and sentenced to imprisonment for life and directed to pay compensation of Rs.100,000/- each under section 544-A, Cr.P.C. to the legal heirs of deceased and in case of default to undergo six months simple imprisonment. The benefit of section 382-B, Cr.P.C. was also extended to the accused. On appeal before the High Court by Muhammad Saleem and Muhammad Idrees, the High Court vide impugned judgment dated 13.03.2019 acquitted Muhammad Saleem and maintained the conviction and sentence of Muhammad Idrees (Petitioner in Crl. P. No.742-L of 2019).

2. We have heard the learned counsel for the parties and have examined the record of the case with their able assistance. While going through the impugned judgment of the Lahore High Court we have noticed that it has placed reliance on the contents of the police diary and the opinion of the investigating Police Officer while deciding upon the guilt of the accused. The relevant portions of the High Court judgment are reproduced hereunder:

> Para 13:---I have gone through the police file for my moral satisfaction in order to sift the grain from the chaff, have reached the conclusion of the case and found that the appellant Muhammed Saleem has been implicated in this case falsely due to a trend in our society of implicating all the near and dear of the actual culprit. (emphasis supplied)
>
> Para 15.---He [Muhammed Idress] was found guilty by the investigating officer to be fully connected with the commission of offence. Although the opinion of the police is inadmissible

> in evidence, however, under Police Rules, it is duty of the police to found [sic] out the truth while investigate the matter, therefore, the conclusion of the investigating officer cannot be discarded slightly [sic] because he is the person who while discharging his official obligations, has the opportunity of inquiring having the first visual touch not only with the place of the occurrence but also had an opportunity of inquiring/questioning the persons available to him during the course of investigation for drawing his inference from their statements, their body language and his own observations which are made by him on the strength of his efforts for tracing the criminals.

Therefore, before examining the merits of the case, it would be useful to discuss the scope and extent of section 172, Cr.P.C, especially, the meaning of phrase, "and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial."

Police diary, its purpose and admissibility

3. Section 172(1), Cr.P.C. mandates every Police Officer making investigation of a case to maintain a diary (commonly known as 'police dairy' or 'case dairy') of proceedings conducted by him in the course of that investigation, by requiring him to enter in that dairy: (i) the time at which any information relating to the offence under investigation reaches him on a particular day; (ii) the time at which he begins and closes his investigation on a particular day; (iii) the place or places visited by him on a particular day, concerning the investigation of the case; and (iv) a statement of the circumstances ascertained on a particular day through his investigation. The object to require recording of the said details in the police dairy appears to be to enable the courts to check the method and manner of investigation undertaken by the investigating officer. Until the honesty, the capacity, the discretion and the judgment of the Police can be thoroughly trusted, it is necessary for the protection of the public against criminals, for the vindication of the law, and for the protection of those who are charged with having committed a criminal offence that the Magistrate or Judge before whom the case is for inquiry or for trial should have the means of ascertaining what was the information (true, false, or misleading) which was obtained from day to day by the Police Officer who was investigating the case, and what were the lines of investigation upon which such Police Officer acted. A properly kept police diary would afford such information, and such information would enable the Magistrate or Judge to determine whether persons referred to in the police diary, but not sent up as witnesses by the Police, should be summoned to give evidence in the interests of the prosecution or of the accused. It is important to remember that it is the duty of the Magistrate or of the Judge before whom a criminal case is, to ascertain the truth and to decide accordingly. It is axiomatic that a Police Officer who is investigating a criminal case, receives all sorts of information: true, false or misleading. The formulation of opinion on the basis of investigation by the Police Officer can also range from correct and fair opinion to a premature, biased, influenced or incorrect opinion. It is to check these infirmities that may creep into police investigation that it is essential that the Magistrate or the Judge, who is to hold the scales of justice evenly between the State and the accused, should have some means of ascertaining the quality of information obtained by the Police Officer during the course of investigation every day.[1]

4. Section 172(2), Cr.P.C. empowers a Criminal Court to send for the police diaries of a case under inquiry or trial in that Court and permits use of such diaries to aid it in such inquiry or trial, but the provisions thereof expressly prohibit the use of such dairies as evidence in the case. The expression "to aid it in such inquiry or trial" indicates that it can be used by the Court for the purpose of enabling itself to have a better understanding of the evidence brought on the record of the case by the prosecution. Inspection of the police diaries can reveal sources of further inquiry, viz, the pointation of some important witnesses that the court can summon, or how the evidence produced was collected to better understand the links between the evidence on the record. The Court can thus use the police dairies in the course of inquiry or trial for resolving obscurities in evidence through questioning the

relevant witnesses or for bringing relevant facts on record to secure the ends of justice through legally admissible evidence, e.g., by summoning as witness those persons who are though referred to in the police diary but not sent up as witnesses by the investigating officer and whose testimony appears to be relevant in the inquiry or trial, or by calling production of some document that appears to be relevant to the matter under inquiry or trial. The Court, however, cannot take the facts and statements recorded in police dairies as material or evidence for reaching a finding of fact: these diaries by themselves cannot be used either as substantive or corroborative evidence.[2] It is important to underline that the police diary is itself not the evidence and therefore inadmissible for having no evidentiary value; it is, however, just a source to help understand the undiscovered or misunderstood aspects of the evidence existing on the record, if any, and introduce new dimensions to the case, leading to discovery and production of new evidence, if required to meet the ends of justice. Whatever the court infers from a police diary must translate into admissible evidence in accordance with law, and the court cannot simply rely on, and adjudicate upon the charge on the basis of, statements made in the police dairy. Therefore, reference by the High Court to the police file for reaching the conclusion that the accused Muhammed Saleem has been implicated in this case falsely was legally invalid and uncalled for.

Opinion of the investigating officer - not admissible

5. The opinion of a Police Officer who has investigated the case as to the guilt or innocence of an accused person is not a relevant fact, and is therefore not admissible, under the Qanun-e-Shahadat Order, 1984; as he is not an "expert" within the meaning of that term as used in Article 59 of the Qanun-e-Shahadat Order, 1984. Even the Criminal Procedure Code (Cr.P.C) does not authorize him to form such an opinion. To determine guilt or innocence of an accused person alleged to be involved in the commission of an offence is a judicial function that can only be performed by a court of law. This judicial function cannot be delegated to the Police Officer investigating the case. The Police Officers are empowered under the provisions of Chapter XIV of the Cr.P.C, only to investigate the non-cognizable offence with the order of a Magistrate and the cognizable offence without such order. This power of investigation, in no way, includes the power to determine guilt or innocence of the accused persons. An investigation, as defined in section 4(1)(l) of the Cr.P.C., includes all proceedings under the Cr.P.C. for the collection of evidence conducted by a Police Officer or by any other person authorized by a Magistrate. This definition makes it clear that the assignment of a Police Officer conducting an investigation is limited to the collection of evidence, and the evidence when collected has to be placed by him before the competent court of law. Only the court has the power and duty to form an opinion about the guilt or innocence of an accused person and to adjudicate accordingly on the basis of evidence produced before it. An opinion formed by the investigating officer as to the non-existence or existence of sufficient evidence or reasonable ground of suspicion to justify the forwarding of an accused person to a Magistrate under sections 169 and 170 of the Cr.P.C does not tantamount to opinion as to the guilt or innocence of the accused person. And despite such opinion of the investigating officer, the final determination even as to the existence or non-existence of sufficient ground for further proceeding against the accused person is to be made by the Magistrate under sections 173(3) and 204(1) of the Cr.P.C. on examining the material available on record, and not on the basis of that opinion of the investigating officer.[3] Therefore, the reference to and reliance on the opinion of the investigating officer by the High Court in its judgment was also legally untenable.

Merits of the case

6. Coming back to the merits of the instant case, we have noticed that according to the crime report and the ocular account of eye-witnesses (PW-9) and (PW-10), the complainant party immediately took Saif Ullah (deceased), who was seriously injured to DHQ Layyah, where he passed away and later on his dead body was brought to the THQ Hospital, Fateh Pur. The statement of Dr. Umair Gul (DW-1), which states that immediately after the incident the deceased was brought to the THQ Hospital, Fatehpur and examined by him. He stated that while realizing the seriousness of the injuries, he was

referred to the DHQ Hospital Layyah and before reaching the said Hospital the deceased passed away around 06:30 p.m. The time given in the postmortem also confirms the statement of (DW-1). The statement of Doctor Umair Gul (DW-1), an independent witness, shakes the credibility of the two eye-witnesses (PW-9) and (PW-10) leading to the conclusion that they were not present at the scene of the crime. We further note that the ocular account of (PW-9) and (PW-10) has been disbelieved by the High Court, which we find was rightly disbelieved, against Muhammad Saleem who was alleged to have played a similar role in the occurrence, and he stands acquitted. Therefore, the same evidence cannot be relied upon to convict Muhammad Idrees, unless there is an independent corroboration of it to the extent of his involvement in commission of the offence. Recovery being inconsequential there is no corroborative evidence to distinguish the case of the petitioner from that of the acquitted accused. The ocular account and the contents of the crime report are inconsistent with the medical evidence on the record. According to the case set up by the prosecution through ocular account, six fire shots were made on the two thighs of the deceased, three on the left thigh and three on the right thigh; however, according to the medical evidence, the right thigh has three entry wounds and one exit wound, while the left thigh has only two fire wounds. In the above facts and circumstances of the case, we are of the view that the prosecution has failed to establish its case against the petitioner beyond reasonable doubt. Hence, this petition is converted into appeal and allowed. Resultantly, the conviction and sentence of the petitioner Muhammad Idrees is set aside. He is acquitted of the charge and shall be released forthwith unless required to be detained in some other case.

Criminal Petition No.629-L of 2019:-

7. Through this petition, the complainant has challenged the acquittal of Muhammad Saleem. For the reasons given above, the prosecution has failed to establish its case beyond reasonable doubt. Therefore, this petition is dismissed and leave refused.

MWA/M-18/SC Order accordingly.

**2021 S C M R 702**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ**

**REGIONAL OPERATION CHIEF, NATIONAL BANK OF PAKISTAN, HUMAN RESOURCE DEPARTMENT, REGIONAL OFFICE, SARGODHA and others---Petitioners**

**Versus**

**Mst. NUSRAT PERVEEN and others---Respondents**

C.P. No. 2717-L of 2015, decided on 23rd December, 2020.

(Against the order of Federal Service Tribunal dated 14.09.2015, passed in MP No. 23/2015 in Appeal No. 99(L)CE/2004)

**(a) Service Tribunals Act (LXX of 1973)---**

----S. 4---Constitution of Pakistan, Arts. 4, 10, 14, 23 & 24---Appeal filed by a civil servant in the Federal Service Tribunal ("Tribunal")---Question as to whether such an appeal would abate on death of civil servant or his legal heirs could pursue the same---Held, that abatement of proceedings on the death of a civil servant, in a case, where the cause of action carried a survivable interest would unduly deprive the deceased civil servant, as well as, his legal heirs of their constitutional rights to livelihood, property, dignity and fair trial---Other than pecuniary and pensionary benefits that inured to the benefit of the legal heirs (of a civil servant), the right to restore one's reputation was also a survivable right and flowed down to the legal heirs to pursue and take to its logical conclusion.

Service disputes were not always attached merely with the person of a civil servant as an individual but more often than not with some benefits which could potentially be enjoyed by the successors of the civil servant in accordance with law which were contingent on the adjudication of the controversy.

The question whether after the death of the civil servant proceedings would abate would primarily depend on the nature of cause of action and the relief claimed in the peculiar facts of each case. Service benefits may be enjoyed by the successors of the deceased civil servant. Some of those were inheritable which formed part of the estate of the deceased while others were grants to be distributed among his family members according to law. Such a claim did not extinguish with the death of civil servant. Letting the claim lapse on the basis of an ultra textualist interpretation of the Service Tribunals Act, 1973 would be denying the heirs the right to seek adjudication on merits.

Itrat Zahida v. President ABL 2006 SCMR 1287; Acebal v. United States 60 Fed. Cl. 551; Rendek v Sheriff of Bristol County 440 Mass. 1017; Harris (suing as personal representative of Andrews (deceased) v. Lewisham and Guy's Mental Health NHS Trust [2000] 3 All ER 769; McFeeley v. Jackson Street Entm't, LLC 2014 U.S. Dist. LEXIS 114767, 2014 WL 4182231; Gasior v. Mass. Gen. Hosp. 446 Mass. 645; Rameshwar Manjhi v. Management of Sangramgarh Colliery AIR 1994 SC 1176; Sudha Shrivastava v. Comptroller and Auditor General of India AIR 1996 SC 571; The Government of Pakistan v. General Public PLD 1991 SC 731; Zaheer Abbas v. Pir Asif 2011 CLC 1528; Dawa Khan v. The Government of Pakistan 2015 PLC (C.S.) 1255; Amtul Habib v. Musarrat Parveen PLD 1974 SC 185; Fred O. Smith, Jr., 'The Constitution After Death' (2020) 120 Colum. L. Rev. 1471, 1531; Kirsten Rabe Smolensky, 'Rights of the Dead' (2009) 37 Hofstra L. Rev. 763, 764; Bilanow v. United States 159 Ct. Cl. 93 and Law v. Canada (Minister of Employment and Immigration) [1999] 1 SCR 497 ref.

Under the constitutional scheme, abatement of proceedings on the death of a civil servant, in a case, where the cause of action carried a survivable interest would unduly deprive the decedent civil servant, as well as, his legal heirs of their constitutional rights to livelihood, property, dignity and fair trial. Fundamental right to life including right to livelihood ensured the security of the terms and conditions of service; fundamental right to property ensured security of the pecuniary and pensionary benefits attached to the service; fundamental right to dignity ensured that the reputation of the civil servant was not sullied or discredited through wrongful dismissal, termination or reversion etc; and fundamental

right to fair trial and due process, inter alia, safeguarded and protected the survivable interest and ensured continuity of the legal proceedings even after the death of the civil servant, equipping the legal heirs to purse the claim.

Other than pecuniary and pensionary benefits that inured to the benefit of the legal heirs, the right to restore one's reputation was also a survivable right and flowed down to the legal heirs to pursue and take to its logical conclusion. Any slur on the reputation of a civil servant impinged on his human dignity and weighed equally on the dignity and honour of his family.

**(b) Service Tribunals Act (LXX of 1973)---**

----S. 5---Civil Procedure Code (V of 1908), Preamble---Proceedings before the Service Tribunal---Civil Procedure Code, 1908, applicability of---Scope---Notwithstanding that C.P.C. was not as a whole strictly applicable to the proceedings before the Tribunal, the Tribunal was bound to follow the basic norms of justice---Provisions of C.P.C. may not stricto sensu apply in proceedings under a special law yet its equitable principles would always be applicable in order to do complete justice between the parties and meet the ends of justice.

Ali Khan Subanpoto v. Federation of Pakistan 1997 SCMR 1590 and Sheikh Saleem v. Shamim Atta Ullah Khan 2104 SCMR 1694 ref.

**(c) Constitution of Pakistan---**

----Pt. II, Chapt. 1---Fundamental Rights under the Constitution---Scope---Such rights did not only protect and safeguard a citizen but extended beyond his life and protected and safeguarded his survivable interests by being equally available to his legal heirs.

M. Qamar-uz-Zaman, Advocate Supreme Court for Petitioners.

Nemo for Respondents.

Hasan Riaz, Civil Judge cum Research Officer at SCRC[1] for Research Assistance.

Date of hearing: 23rd December, 2020.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**We consider in this petition whether the appeal filed by a civil servant in the Federal Service Tribunal ("Tribunal") would abate on his death or his legal heirs could pursue the same.

2. Brief facts of the case are that decedent predecessor of the respondents, Rana Ejaz Ahmad, while working as Officer Grade-III was departmentally proceeded against by the petitioners and was awarded major penalty of reduction to a lower stage of pay by three steps. The decedent challenged the imposition of penalty but died during the pendency of his appeal before the Tribunal. Rejecting the objection of the petitioners that the claim of the decedent did not survive after his death, the Tribunal allowed legal heirs of the decedent to be impleaded as party in the appeal pending before it. The petitioners have sought leave of this Court under Article 212(3) of the Constitution to appeal against the order of the Tribunal.

3. It has been contended by the learned counsel for the petitioners that an employment grievance does not survive the civil servant's death. No remedy, he argues, has been provided to the legal heirs of a civil servant under the Service Tribunals Act, 1973 ("Act") and, therefore, the respondents could not be permitted to pursue the claim initiated by the decedent. The learned counsel has resorted to two judgments of this Court i.e. Muhammad Nawaz v. Ministry of Finance (1991 SCMR 1192) and Muhammad Ashfaq v. Member (Revenue) Board of Revenue (PLD 2008 SC 703) to support his argument. Additionally, he submits that in view of the judgment delivered in Muhammad Tariq Badr v. National Bank of Pakistan (2013 SCMR 314), the Tribunal had limited jurisdiction as regards the terms and conditions of the employees of the petitioner bank which extinguished with the demise of the decedent.

4. We have heard the learned counsel for the petitioners at length and perused the judgments relied upon by him minutely. The matter in issue relates to the survival of the right to sue following the death

of a civil servant. The appeal of the decedent on a matter relating to some terms and conditions of service at the time of his death was undoubtedly pending before the Tribunal in accordance with the decision[2] of this Court. The only question begging determination is the survivability of the claim of the decedent. It is seen that the Act or the rules[3] framed thereunder do not contain any reference to the question of devolution of the right to sue in case a civil servant dies during the pendency of service appeal nor do they provide for abatement of appellate proceedings initiated by an aggrieved civil servant on his death. Adverting to the case law developed on this subject, it is apparently correct that the appeals filed by civil servants were held by this Court to have abated with their death in the cases of Muhammad Nawaz and Muhammad Ashfaq. However, these two judgments were distinguished subsequently by a three Member Bench of this Court in Chief Secretary Punjab v. Ch. Iftikhar Ahmad[4]. It was held therein that peculiar benefits to which the legal heirs would become entitled would not allow the lis to abate on the death of a civil servant. The writ petition of the husband of the deceased ad hoc civil servant was entertained and the right of late civil servant regarding the benefits of terms and conditions of service was considered to have devolved on her husband.

5. It is significant to observe that service disputes are not always attached merely with the person of a civil servant as an individual but more often than not with some benefits which could potentially be enjoyed by the successors of the civil servant in accordance with law which are contingent on the adjudication of the controversy. This consideration attracted the attention of this Court in Federation of Pakistan v. Syed Afzal Muhammad Farooq[5] where the civil servant whose grievance related to the issue of promotion had passed away during the pendency of appeal. It was observed that his legal heirs had no cause of action to the extent of promotion yet in the event of success of his claim, they would be entitled to enhanced pensionary benefits. The Court did not consider it appropriate to dilate upon the merits of the case in the absence of legal heirs. The Federation of Pakistan was directed to re-consider the case and if late civil servant was found to be entitled to promotion, enhanced pensionary benefits be extended to his legal heirs. Relying on the case of Syed Afzal Muhammad Farooq, this Court in the case of Mehar Muhammad Nawaz v. Managing Director, Small Business Finance Corporation[6] did not entertain the objection that the right to sue did not survive following the death of a civil servant. Legal representatives of the deceased civil servant were held entitled to the pensionary benefits admissible under the law.

6. In the case in hand also, the decedent in addition to assailing penalty imposed on him was seeking payment of wages which would have been due had he not been punished in departmental proceedings. And, if the departmental decision is overturned in appeal, the heirs of the decedent would at least inherit back benefits which their predecessor would have got, had he succeeded in appeal in his lifetime. It is noteworthy that the heirs' entitlement to service benefits may sometimes transcend usual gains like pension, gratuity etc. For instance, in the province of Punjab, the family of a civil servant who dies in service is entitled to salary which the deceased civil servant was drawing, along with annual increases, till the date of superannuation of the deceased civil servant after which family pension is allowed as per rules.[7] Imagining a hypothetical situation in this backdrop, if the claim of wrongful dismissal from service of a civil servant in Punjab is allowed to abate without adjudication on his death, legitimate expectancy of his family about substantial monetary benefits would be prejudiced without any adjudication.

7. Although the Court in this case is seized of a matter particularly governed by service law, the issue pertains to the larger question of the survival of a claim emanating from an employment dispute. This Court in Itrat Zahida v President ABL[8] has held that the writ petition of an employee who has assailed the decision of Labour Appellate Tribunal does not abate on his death and his legal heirs have a right to continue the proceedings for a decision on merit. Employment claims have been held to have survived the death of the employee in different foreign jurisdictions. It has been held that the cause of action in a claim for overtime pay survives the death of the employees when statutory law does not

specifically refer to the question of survival of actions[9]; a county employee's claim for back pay survives his death[10]; a claim for pecuniary compensation for discrimination brought before the employment tribunal could survive the death of the employee and it is immaterial that the discrimination Acts do not expressly confer rights on a personal representative to pursue a deceased's claim for compensation for discrimination, rather, the critical question is whether the discrimination Acts contain anything which takes away such rights[11]; a labour complaint will not extinguish as the causes of action i.e. violations of law survive the plaintiff's death[12]; a claim that an employee was wrongfully dismissed in violation of law survives the employee's death[13]; "[t]he death of the workman during pendency of the proceedings cannot deprive the heirs or the legal representatives of their right to continue the proceedings and claim the benefits as successors to the deceased workman. . . . ."[14]; and the right to get the benefits, which would have been due to the deceased civil servant, would devolve on his legal representative.[15]

8. The question whether after the death of the plaintiff or the petitioner proceedings would abate would primarily depend on the nature of cause of action[16] and the relief claimed in the peculiar facts of each case[17]. Service benefits may be enjoyed by the successors of the deceased civil servant. Some of those are inheritable which form part of the estate of the deceased while others are grants to be distributed among his family members according to law.[18] The respondents in the instant petition would receive some benefits in case they are able to vindicate their stand before the Tribunal. Such a claim does not extinguish with the death of civil servant. Letting the claim lapse on the basis of an ultra textualist interpretation of the Act would be denying the heirs the right to seek adjudication on merits. The Tribunal is deemed to be a civil court for the purpose of deciding an appeal and has the same powers as are vested in such court under the Code of Civil Procedure, 1908 ("C.P.C.").[19] Rule 33 of Order XLI of C.P.C. empowers a Court of Appeal to pass any decree and make any order which ought to have been passed or made and this power may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal. In addition, Rule 1 of Order XXII, C.P.C. provides that the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives. And, by virtue of Rule 11, provisions of Rule 1 of Order XXII, C.P.C. have been made applicable to appeals.

9. The object of establishing Service Tribunals was to take out the adjudication of disputes relating to the terms and conditions of service of civil servants from the hands of tradition bound civil courts and place it before specialized tribunals exclusively dealing with the issue without being hamstrung by intricate procedural rules of pleadings, trial, admissibility of the evidence and proof of facts.[20] In addition to reducing the burden of regular civil courts, a very important purpose was to provide to the civil servants expeditious adjudication in respect of their grievances.[21] Notwithstanding that C.P.C. is not as a whole strictly applicable to the proceedings before the Tribunal, the Tribunal is bound to follow the basic norms of justice.[22] It has been observed by this Court that the provisions of C.P.C. may not stricto sensu apply in proceedings under a special law yet its equitable principles will always be applicable in order to do complete justice between the parties and meet the ends of justice.[23]

10. Not all legal rights terminate on death.[24] A claim by a civil servant for his promotion or better terms and conditions or for reinstatement in service, is survivable claim and passes on in the shape of pecuniary and pensionary benefits to his legal heirs. Such a claim may arise under the service laws but also enjoys constitutional underpinning. "The right to employment and to earn a living free from undue molestation is a property right affecting the estate of plaintiff. Such right does not abate upon his death."[25] Abatement of appeal on the death of the decedent would impinge upon the property rights of the respondents. Also, shutting eyes to their potential property rights would hurt their right to dignity. "Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued. . . "[26]

11. Under our constitutional scheme, abatement of proceedings on the death of a civil servant, in a case, where the cause of action carries a survivable interest will unduly deprive the decedent civil

servant, as well as, his legal heirs of their constitutional rights to livelihood, property, dignity and fair trial. Fundamental right to life including right to livelihood ensures the security of the terms and conditions of service;[27] fundamental right to property ensures security of the pecuniary and pensionary benefits attached to the service;[28] fundamental right to dignity ensures that the reputation of the civil servant is not sullied or discredited through wrongful dismissal, termination or reversion etc;[29] and fundamental right to fair trial and due process, inter alia, safeguards and protects the survivable interest and ensures continuity of the legal proceedings even after the death of the civil servant, equipping the legal heirs to purse the claim[30]. Fundamental rights under the Constitution do not only protect and safeguard a citizen but extend beyond his life and protect and safeguard his survivable interests by being equally available to his legal heirs. It is reiterated that other than pecuniary and pensionary benefits that inure to the benefit of the legal heirs, the right to restore one's reputation is also a survivable right and flows down to the legal heirs to pursue and take to its logical conclusion. Any slur on the reputation of a civil servant impinges on his human dignity and weighs equally on the dignity and honour of his family.

12. For the foregoing reasons, we take no exception to the impugned order and are of the view that it does not warrant any interference. Leave is, therefore, declined and this petition is dismissed.

MWA/R-3/SC Petition dismissed.

**2021 S C M R 730**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik and Syed Mansoor Ali Shah, JJ**

**The PROVINCE OF PUNJAB through Secretary, Finance Department, Government of the Punjab, Lahore and others---Petitioners**

**Versus**

**KANWAL RASHID and others---Respondents**

C.P. 883-L of 2020 and C.P. 1791-L of 2020, decided on 9th February, 2021.

(Against the judgment of Lahore High Court, Lahore dated 27.01.2020, passed in I.C.A. No. 50253/2019 and order dated 07.09.2020 passed in W.P. No. 13125/2020)

**(a) Punjab Civil Servants Act (VIII of 1974)---**

----S. 18(2)---Punjab Civil Services Pension Rules, 1963, R. 4.10---Family pension, entitlement to---Unmarried daughter of deceased civil servant parents---Entitled to draw the pension of 'both' her parents simultaneously---However, such daughter would be disentitled from drawing pension, when she was married or acquired a regular source of income on her own, regardless of the family pension received by her.

**(b) Punjab Civil Servants Act (VIII of 1974)---**

----S. 18(2)---Punjab Civil Services Pension Rules, 1963, R. 4.10---Constitution of Pakistan, Art. 14(1)---Children of deceased civil servants---Family pension, entitlement to---Clarification notification issued by Provincial Finance department with regard to family pension---Legality---Provincial Finance Department had no authority under the law to clarify, interpret, abridge or extend the right of (family) pension provided under S. 18(2) of the Punjab Civil Servants Act, 1974 and further regulated by the Punjab Civil Services Pension Rules, 1963---Supreme Court observed that depriving the children of civil servants of their family pension on the basis of an unauthorized and unlawful clarification by the (Provincial) Finance Department, offended the right to dignity of the deceased civil servants who were assured under the law that they and their children would enjoy the security of pension upon retirement---Petitions for leave to appeal were dismissed and leave was refused.

**(c) Punjab Civil Servants Act (VIII of 1974)---**

----S. 18(2)---Punjab Civil Services Pension Rules, 1963, R. 4.10---Family pension, entitlement to---Unmarried daughter of deceased civil servant parents---Entitlement of unmarried daughter of deceased civil servants to pension till her marriage or till 'acquiring a regular source of income' [Rule 4.10 of the Punjab Civil Services Pension Rules, 1963]---'Acquiring a regular source of income'---Meaning---"Acquiring a regular source of income" under the Punjab Civil Services Pension Rules, 1963 meant that the unmarried daughter on her own, irrespective of the source of pension, had acquired a regular source of income---Acquire signified gain by one's own effort---Entitlement to family pension by virtue of the death of the parents did not constitute acquisition of a regular source of income; it was also not "regular" as the unmarried daughter was disentitled to receive family pension the minute she was married---Both said conditions must be met by her own self irrespective of the pension---Unmarried daughter must acquire a regular income of her own expertise and efforts---Disqualification (from receiving family pension) mentioned in Punjab Civil Services Pension Rules, 1963 must be independent of the family pension and pension itself could not constitute a ground for disqualification.

**(d) Punjab Civil Servants Act (VIII of 1974)---**

----S.18---Constitution of Pakistan, Art. 9---Pension, right of---Scope---Right to pension had a constitutional significance; it drew its strength from the right to life or the right to livelihood under Art. 9 of the Constitution.

M. Shan Gull, Additional A.G, Punjab, Rana Shamshad Khan, Additional A.G., Jawad Yaqoob, Additional A.G., Abdul Rauf, Deputy Secretary and Nasir Mahmood, Law Officer for Petitioners (in both cases).

Rana Asad Ullah Khan, Advocate Supreme Court for Respondents (in C.P. 883-L/2020).

Nemo for Respondents (in C.P. 1791-L/2020).

Date of hearing: 9th February, 2021.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The question of law before us is whether an unmarried daughter of deceased civil servant parents can draw the pension of both her parents simultaneously or instead, entitled to draw the pension of only one of her parents?

2. Brief facts of the case are that both the parents of the respondent were civil servants and entitled to pension under the law. On their passing away, pension of both the parents, formed part of the family pension and passed on to the respondent under the law. Being unmarried, the respondent was continuously drawing the family pension after the passing away of her parents till she was informed vide letter dated 10.08.2016 issued by the Accountant General, Punjab, that she could not draw the pension of both the parents simultaneously and could only draw the pension of one parent. Thereafter vide notice dated 11.11.2016, the respondent was asked to deposit a sum of Rs.1,941,631/- into the Government treasury on account of the pension unduly received by her of one of her parent. The background and the basis for the issuance of the aforesaid letter and notice to the respondent was the clarification issued by the Finance Department, Government of the Punjab dated 11.09.2015 whereby Punjab Civil Services Pension Rules, 1963[1] ("Rules") were clarified.

3. We have heard the learned counsel for the parties and have examined the record, the law on the subject and the impugned judgments of both the benches of the High Court in detail. The right to pension of a civil servant is recognized under section 18 of the Punjab Civil Servants Act, 1974 ("Act") which provides as follows:

> 18. Pension and gratuity.---(1) On retirement from service, a civil servant shall be entitled to receive such pension or gratuity as may be prescribed.
>
> (2) In the event of death of a civil servant, whether before or after retirement, his family shall be entitled to receive such pension, or gratuity, or both, as may be prescribed.

A civil servant after retirement and after his or her death, the family is entitled to receive his or her pension, as prescribed in the rules.[2] Under section 23, the Governor or any person authorized in this behalf shall make rules for carrying out the purposes of the Act. Rule 4.10 of the Punjab Civil Services Pension Rules, 1963 ("Rules")[3] deals with "Family Pension" and provides that family pension in case of widow's death will be admissible to the dependent sons until they attain the age of 24 years or till they are gainfully employed, which ever is earlier and to unmarried daughters till their marriage or they acquiring regular source of income which ever is earlier. Therefore, as per the Rule, an unmarried daughter is disentitled from drawing family pension after marriage or on acquiring a regular source of income. The entitlement under consideration is of Family Pension, which may comprise of pension from one parent or both the parents. The distinction between pension from one parent or both is not recognized under the Act or the Rules and is collectively referred to as Family Pension under the Rules. The son or the daughter of the deceased civil servants have a right to draw Family Pension unless they are disentitled due to the disqualification mentioned in the Rules. The disentitlement is based on the independent acts of the children or their age. Pension itself, however, cannot amount to be a disentitlement, as discussed and explained hereunder.

4. The Finance Department, Government of the Punjab interpreting the Rules issued a clarification dated 11.09.2015 to the effect if in case of two pensions (of both the parents) drawn by the unmarried daughter, one pension constitutes her regular income hence it disentitles her from drawing the other pension. As a result she is only entitled to one pension. The clarification issued by the Finance Department is as follows;

> No.FD-SR-III-4-471/2014
>
> GOVERNMENT OF THE PUNJAB

FINANCE DEPARTMENT

Dated Lahore the 11th September, 2015

Subject: LIBERALIZATION OF PENSION RULES-CLARIFICATION.

I am directed to refer to Para-1 of this Department's letter No.FD-SR-III-4-11/89 Dated 22nd July, 1989 and to state that a question has arisen as to whether an un-married daughter can draw family pension of her father and mother simultaneously. The matter has been examined and it is observed that a monthly family pension being received by a person is construed as regular source of income. Therefore, such person is not entitled to receive another family pension.

Sd/-

(M. NAWAZ KHALID ARBI)

DEPUTY SECRETARY (SR)

5. The above clarification suffers from multiple constitutional and legal defects as discussed hereunder:

(i) The Finance Department has no authority under the law to clarify, interpret, abridge or extend the right of pension provided under section 18(2) of the Punjab Civil Servants Act, 1974 and further regulated by the Punjab Civil Services Pension Rules, 1963 promulgated by the Governor. The impugned clarification issued by the Finance Department dated 11.09.2015 has usurped the rule making power of the Governor by interpreting, clarifying and modifying Rule 4.10. Finance Department has also encroached upon the legislative power under section 18 of the Act which entitles the family of the deceased civil servant to pension in the manner prescribed;

(ii) Without prejudice to the above, impugned clarification in the year 2015 cannot operate retrospectively and adversely affect the right to family pension that had accrued to the respondent on the death of her mother in the year 2006 and the family pension she has regularly drawn since then;

(iii) We have noticed that in case of a son, he can draw the family pension (comprising of both the parents) till he attains the age of 24 or is gainfully employed. Before the son attains the age of 24 he is entitled to draw the family pension (comprising of both the parents) as one of the pension does not amount to being "gainfully employed" in order to disentitle him of the second pension. So while the son can draw family pension of both the parents, the unmarried daughter is treated differently as one of the two pensions in her case is considered to be her regular source of income, disentitling her of the second pension. This is discriminatory and offensive to Article 25 of the Constitution and a gender insensitive act of the Finance Department;

(v) "Acquiring a regular source of income" under the Rules means that the unmarried daughter on her own, irrespective of the source of pension, has acquired a regular source of income. The word "acquire" under the Black's Law Dictionary[4], supplied by the learned AAG means: " to gain by any means, usually by one's own exertions; to obtain by search, endeavor, practice or purchase." Acquire signifies gain by one's own effort. Entitlement to family pension by virtue of the death of the parents does not constitute acquisition of a regular source of income. It is also not "regular" as the unmarried daughter is disentitled to receive family pension the minute she is married. Both these conditions must be met by her own self irrespective of the pension. She must acquire a regular income of her own expertise and efforts. The disqualification mentioned in the amendment brought about in the Rules, must be independent of the family pension and pension itself cannot constitute a ground for disqualification;

(vi) The right to pension has a constitutional significance. It draws its strength from the right to life or the right to livelihood under Article 9 of the Constitution. It is important to appreciate that both the parents of the respondent(s) gave the best years of their lives to government service with the expectation to receive pension upon retirement and to leave a family pension for their

children upon their death, subject to the lawful disentitlements under the Rules. Depriving the children of civil servants of their family pension on the basis of an unauthorized and unlawful clarification by the Finance Department, offends the right to dignity of the deceased civil servants who were assured under the law that they and their children will enjoy the security of pension upon retirement.

Reference to the Income Tax Ordinance, 2000 ("Ordinance") by the learned AAG is of little significance. Even if pension is considered to be an income under the Ordinance it is neither an income "acquired" by the respondent nor is it "regular" income as envisaged under the Rules.

6. In this background we see no reason to interfere in the well reasoned concurrent findings of the High Court. The pension of the respondent shall continue strictly in accordance with the Act and the Rules, while the impugned clarification dated 11.09.2015 is struck down as being illegal and unconstitutional. The respondent will, however, be disentitled from drawing pension, when she is married or acquires a regular source of income on her own, regardless of the family pension received by her.

7. Leave is, therefore, declined and these petitions are dismissed.

MWA/P-5/SC Petitions dismissed.

**2021 S C M R 760**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ**

**DEPUTY DIRECTOR FOOD FAISALABAD DIVISION, FAISALABAD and others---Petitioners**

**Versus**

**MUHAMMAD TAUQIR SHAH and others---Respondents**

C.P. No. 43-L/2021 to C.P.58-L/2021, decided on 10th March, 2021.

(Against the order of Punjab Service Tribunal, Lahore dated 26.10.2020, passed in Appeals Nos.321 to 336 of 2020)

**Punjab Regularization of Service Act (XV of 2018)---**

----Ss. 2(f), 3, 6(1)(a) & 6(1)(b)---Contract employees regularized in service under the Punjab Regularization of Service Act, 2018 ('the 2018 Act')---Whether regularization operated from the date of regularization of the service of the employee or from the date of initial appointment of the employee on contract basis---Held, that provisions of the 2018 Act were unambiguous and clearly mentioned that regularization shall be with immediate effect i.e., from the date of regularization---Regularization of contract employees under the 2018 Act shall be considered from the date of their regularization.

Rana Shamshad Khan, Additional A.G. for Petitioners (in all cases).

Hafiz Tariq Naseem, Advocate Supreme Court for Respondents (in all cases).

Date of hearing: 10th March, 2021.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The services of the respondents were admittedly regularized under The Punjab Regularization of Service Act, 2018 ("Act"), therefore, the sole question before us is the determination of the date of regularization i.e., whether it is from the date of regularization of the service of the employee or whether from the date of initial appointment of the employee on contract basis. The Punjab Service Tribunal through impugned consolidated order dated 26.10.2020 found that the regularization of the respondents shall be from the date of their initial appointment under the contract, but the impugned order has failed to discuss the provisions of the Act.

2. We have heard the learned counsel for the parties and have gone through the provisions of the aforesaid Act. The Act provides for appointment on regular basis of employees serving on contract.[1] The Act is applicable to persons employed in a department, who have completed three years continuous service before or after commencement of the Act.[2] "Regularization" under the Act means the appointment of an eligible contract employee on regular basis, with immediate effect, in accordance with the Act.[3] The Act further provides that the contract employees who have continuously been serving as such for a period not less than three years shall be eligible to be considered for appointment on regular basis if; (a) a regular vacancy allocated for initial recruitment is available for regularization; (b) he is qualified for the post; (c) he has not been appointed on a special pay package; (d) his performance during the period of contract has remained satisfactory; and (e) he does not opt to continue as contract employee.[4] The procedure for regularization provided under the Act is that the contract employee appointed on the recommendations of the Punjab Public Service Commission ("Commission") shall be submitted to the appointing authority for regularization without reference to the Commission or the Scrutiny Committee as constituted under Section 5 of the Act. However, if the post in question falls within the purview of the Commission and the contract employee is appointed otherwise than on the recommendations of the Commission, the case shall be referred to the Commission for recommendations[5] and if the post is outside the purview of the Commission, the case of a contract employee shall be placed before the Scrutiny Committee constituted under the Act for recommendations. The appointments made under Section 4 of the Act shall be with immediate

effect.[6] The service rendered by a contract employee shall not be counted for pensionary benefits or for any other purpose whatsoever.[7] Contract employee, who is not recommended for regularization by the Commission or, as the case may be, the Scrutiny Committee, shall be terminated forthwith.[8] A contract employee, who is regularized, shall be placed at the bottom of the seniority list of the respective cadre and shall rank junior to the other civil servants.[9] A contract employee, regularized under the Act, shall cease to be governed by the Contract Appointment Policy 2004 and the terms and conditions of the contract and shall be regulated under the Punjab Civil Servants Act, 1974 and the rules framed thereunder.[10]

3. The scheme of the Act clearly shows that the regularization of a contract is with immediate effect i.e., from the date of regularization. Learned counsel for the respondents has placed reliance on certain orders of this court in the matter of regularization.[11] We have perused the said orders and noticed that they did not discuss the Act or its provisions and the regularization in the said orders was on the basis of the Policy announced by the Government, therefore, they are not relevant for our purposes. The provisions of the Act are unambiguous and clearly mention that regularization shall be with immediate effect i.e., from the date of regularization.

4. In this view of the matter, the impugned consolidated order is set aside. The regularization of the respondents shall be considered from the date of their regularization. Resultantly, these petitions are converted into appeals and allowed in the above terms.

MWA/D-6/SC Petitions allowed.

**2021 S C M R 767**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ**

**PROVINCE OF PUNJAB through Secretary Livestock and Dairy Development Department, Government of the Punjab, Lahore and others---Petitioners**

**Versus**

**Dr. JAVED IQBAL and others---Respondents**

C.P. 2210-L/2020 to C.P. 2239-L/2020 and C.M.A. 489-L/2021, decided on 25th March, 2021.

(Against the consolidated order of Punjab Service Tribunal Dated 14.10.2020, passed in Appeals Nos.1347 of 2020, etc.)

**Punjab Regularization of Service Act (XV of 2018)---**

----S. 3(1)---Contract employee---Regularization in service---Date of regularization of contract employees was the date of their regularization under the relevant Regularization Policy.

Contractual employee was appointed under a scheme, which was totally different from that of regular appointment and a contractual appointee did not enjoy the right to be appointed on regular basis or to be readily shifted into the regime of regular appointment. It did not matter if the appointment on contract was through the same process of public advertisement and scrutiny through (Provincial) Public Service Commission, it was still a contractual appointment for a limited period of time and was different from a regular appointment by virtue of which a person attained the status of a civil servant.

In the present case, the Regularization Policy ["Appointment of Contractees in BS-16 and above on Regular Basis dated 10.11.2010"] provided for a special procedure whereby the cases of the contractual employees were considered for regularization on a case-to-case basis, keeping in view their performance and other qualifications. Regularization of a contract employee was, therefore, a fresh appointment into the stream of regular appointment. A contractual employee for the first time became a civil servant. Regularization Policy in question clearly provided that contractual employees enjoyed no vested right to regularization much less to be regularized from any particular date. The benefit of regularization extended to them under the Regularization Policy was prospective in nature and there was no legal justification to give it a retrospective application.

Consistent governmental policies on regularization had finally manifested themselves in the Punjab Regularization of Service Act, 2018 ("Act") which specifically provided for regularization from immediate effect. Therefore, there had been a consistent design behind the scheme of regularization and it has always been conceived from the date of regularization.

Judgment of a five member Bench of this Court dated 29.1.2018, passed in Civil Review Petition No.471/2015 ref.

Rana Shamshad Khan, Additional A.G., Ms. Irum Bukhari, Additional Chief Secretary, Ahmed Ali Kamboh, Secretary Regulations, Ms. Khadija Tul Kubra, Addl. Secy. Reg., Hafiz Arshad Mahmood, Law Officer and Anwaar Hussain, Advocate Supreme Court (C.M.A. 489-L/2021) for Petitioners (in all cases).

Mahmood Ahmed Qazi, Advocate Supreme Court for Respondents (in all cases).

Date of hearing: 25th March, 2021.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**The question before us is whether the date of regularization of contract employees is the date of their initial appointment on contract basis or the date of their regularization under the Regularization Policy dated 10.11.2010 ?

2. The background to the above question is that the respondents were appointed on contract basis as Veterinary Officers in Grade-17 in Livestock and Dairy Development Department, Government of the Punjab during the years 2004 to 2009. Their services were subsequently regularized by the

Government with immediate effect, vide order dated 15.2.2011. The grievance of the respondents was that they ought to have been regularized from the date of their initial appointment on contractual basis rather than on 15.2.2011 i.e., the date of regularization of their service. Their representation and departmental appeal were turned down on 21.07.2018 and 29.01.2020. However, on approaching the Punjab Service Tribunal ("Tribunal"), the appeals of the respondents were allowed vide impugned order dated 14.10.2020, allowing regularization of the services with effect from the date of their initial appointment on contract basis. The said order has been impugned before us by the Provincial Government.

3. Learned counsel submits that the respondents are not entitled to regularization from the date of their initial appointment for the reason that they have no vested right to regular appointment. There is no clause in their Letters of Appointment or the Contract Employment Policy dated 29.12.2004 ("Contract Policy") that confers such a right. The Policy regarding Appointment of Contractees in BS-16 and above on Regular Basis dated 10.11.2010 ("Regularization Policy") allows for regularization but does not permit its retrospective application. He submits that there is no legal justification whatsoever for giving effect to their regularization retrospectively and has placed reliance upon the judgment of a five member Bench of this Court dated 29.1.2018, passed in Civil Review Petition No.471/2015 and unreported judgments dated 13.03.2010 passed in C.Ps. Nos. 318-L to 330-L of 2018 and dated 21.07.2020 passed in C.Ps. Nos. 194-L/2020, etc.

4. Learned counsel for the respondents, on the other hand, referred to the Contract Policy and submitted that there are two streams of appointment in the Provincial Government; one is that of regular appointment and the other of contractual appointment. He submits that the mode and the manner of appointment in both the schemes is the same, therefore, at any stage if the Government decides to regularize the services of contractual employees, they are to be regularized from the date of their initial appointment, as there is no material difference between the two sets of appointments as far as the qualification and process of appointment is concerned.

5. In order to appreciate the contentions of the parties it is important to understand the scheme of contractual and regular appointment under the Provincial Government. The Contract Appointment Policy was conceived after the Government realized that regular mode of appointment is not suitable for most of the Government sector assignments due to administrative and financial factors[1]. The rationale behind the contractual mode of appointment is based on financial and economic reasons, as well as, administrative reasons. According to the Policy[2], the financial constraints of salary and pension under regular appointment had become unsustainable. Besides several administrative reasons associated with the regular employees also tilted the scales in favour of the contractual mode of appointment: large scale absenteeism of regular employees; poor performance leading to poor service delivery; cumbersome accountability mechanism systems; huge administrative costs of transfer and promotions, etc; no concept of performance based indicators; contract mode being more flexible to tap in the best human resource available in the market; latest management practices in the developed world also recommended contract mode of appointment. These reasons led to development of two separate schemes of appointment. Persons appointed on contract basis are not civil servants, therefore, their service matters are not governed by the rules framed under Civil Servants Act, 1974. Their appointment is strictly regulated by the terms and conditions of the contract[3]. Their period of contract is between 3 to 5 years[4] and extension is generally granted for a period of 3 to 5 years and not for an indefinite period.[5] On expiry of contract appointment, if no extension is granted, it is ensured that the contract employee is not allowed to continue in service[6]. Contract appointment is liable to be terminated on one month's notice or on one month's pay, in lieu thereof, on either side without assigning any reason[7]. The contract provides that the contract appointment shall not confer any right of regular appointment nor shall such appointment be regularized under any circumstances[8]. A contract employee shall, under no circumstances, claim conversion of his contract appointment into regular appointment[9].

6. On the other hand, employees appointed on regular basis are governed by the rules framed under the Punjab Civil Servants Act, 1974 such as the Punjab Civil Servants (Appointment and Conditions of Service) Rules, 1974, Service Rules of the post, Leave Rules, Pension Rules, etc.[10] The above shows that a contractual employee is appointed under a scheme, which is totally different from that of regular appointment and a contractual appointee does not enjoy the right to be appointed on regular basis or to be readily shifted into the regime of regular appointment. It does not matter if the appointment on contract is through the same process of public advertisement and scrutiny through Punjab Public Service Commission, it is still a contractual appointment for a limited period of time and is different from a regular appointment by virtue of which a person attains the status of a civil servant. This distinction between the two streams of services is important to address the question posed at the beginning of this judgment.

7. The scheme of regularization is unnecessary for a civil servant (a regular employee) and has been introduced only to induct the contractual employees into regular service. The Regularization Policy provides for a special procedure whereby the cases of the contractual employees are considered for regularization on a case-to-case basis, keeping in view their performance and other qualifications. Regularization of a contract employee is, therefore, a fresh appointment into the stream of regular appointment. A contractual employee for the first time becomes a civil servant. It is underlined that contractual employees enjoy no vested right to regularization (see Contract Appointment Policy) much less to be regularized from any particular date. The benefit of regularization extended to them under the Regularization Policy is prospective in nature and there is no legal justification to give it a retrospective application. Any such step would totally negate the purpose and significance of Contract Appointment Policy and leave no distinction between a contractual and a regular employee. This has been the tenor of the jurisprudence evolved by this court and reference can be made to judgment of a five member Bench of this Court dated 29.1.2018, passed in Civil Review Petition No.471/2015 and unreported judgments dated 13.03.2010 passed in C.Ps. Nos. 318-L to 330-L of 2018 and dated 21.07.2020 passed in C.Ps. Nos. 194-L/2020, etc. It is also important to underline that the consistent governmental policies on regularization have finally manifested themselves in the Punjab Regularization of Service Act, 2018 ("Act") which specifically provides for regularization from immediate effect. Therefore, there has been a consistent design behind the scheme of regularization and it has always been conceived from the date of regularization. We see no reason to upset this uniform governmental policy which has now received legislative support under the Act.

8. For the above reasons, we convert these petitions into appeals and allow the same; the impugned consolidated order of the Tribunal is set aside, and the respondents shall stand regularized w.e.f. 15.2.2011 i.e, the date of regularization.

C.M.A. 489-L/2021

9. As we have allowed the titled civil petitions, therefore, this CMA has lost its significance and become infructuous, hence disposed of accordingly.

MWA/P-6/SC Order accordingly.

**2021 S C M R 775**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ**

**Criminal Petition No. 713-L/2020**

**(Against the judgment of Lahore High Court dated 02.06.2020, passed in I.C.A. No.196 of 2019)**

**CHIEF EXECUTIVE OFFICER, MULTAN ELECTRIC POWER COMPANY LTD, KHANEWAL ROAD, MULTAN---Petitioner**

**Versus**

**MUHAMMAD ILYAS and others---Respondents**

Criminal Petition No. 714-L/2020

**(Against the judgment of Lahore High Court dated 02.06.2020, passed in I.C.A. No.201 of 2019)**

**D.G HR AND ADMIN MEPCO, MULTAN ELECTRIC POWER COMPANY LTD. KHANEWAL ROAD MULTAN---Petitioner**

**Versus**

**MUHAMMAD ILYAS and others---Respondents**

Criminal Petitions Nos. 713-L and 714-L of 2020, decided on 22nd March, 2021.

**(a) Civil service---**

----Appointment against vacancy---Directions for appointment issued by the High Court not complied with by the petitioner-company---Whether contempt of court---Judicial overreach---Scope---In the present case the entire recruitment process for the posts in question was cancelled---As a result not a single appointment was made to the said posts as per the public advertisement on the basis of which respondent-candidate had applied---Since the entire recruitment process for the posts was scrapped, respondent could not lay any claim to the said post---Consequently the contempt proceedings initiated (by the High Court) on the basis of order to issue appointment letter to the respondent also came to an end---Petitions for leave to appeal were converted into appeals and allowed, and the constitutional petition filed by the respondent before the High Court was dismissed with the observations that the (High Court) Judge in the present case, instead of deciding the case on merits, passed the final order of appointment of respondent without adjudicating the issue in hand and then executed the order by directing the petitioner-company that the appointment letter be issued by the next date of hearing; that by assuming the role of the Executive the judge disregarded his core function of adjudication, in accordance with law; that ignoring the constitutional boundaries of separation of powers could easily equip a judge with a false sense of power and authority, and that this was a dangerous tendency and must be guarded against to ensure that the judicial role continued to remain within its constitutional limits.

**(b) Constitution of Pakistan---**

----Art. 199---Judicial review---Scope---Judicial review was the power of the court to examine the actions of the legislative, executive, and administrative arms of the government and to determine whether such actions were consistent with the Constitution and the law---Actions judged inconsistent were declared unconstitutional or unlawful and, therefore, rendered null and void---Court entrusted with the power to judicially review an executive action could only declare it to be right or wrong but could not take over the functions that belonged to another organ of the State.

**(c) Administration of justice---**

----Judge must always stay within the four corners of the law and must not be swayed by emotions or his own understanding of justice, because in doing so he failed to decide the case in accordance with law.

**(d) Constitution of Pakistan---**

----Art. 199---Judicial overreach---Scope---When judiciary encroached upon the domain of the Executive, it was said to commit judicial overreach - which occurred when a court acted beyond its

jurisdiction and interfered in areas which fell within the Executive and/or the Legislature's mandate---Through such interference the court violated the doctrine of separation of powers by taking on the executive functions upon itself---Such judicial role imperiled the separation of powers, jeopardized the legitimacy of the judicial institution and undermined constitutional democracy---Thus, it was imperative that the courts did not derogate from their constitutionally mandated oversight function of judicial review.

R Suttner "The Question of 'Judicial Overreach'" Polity (22 May 2017) available at http://www.polity.org.za/article/the-question-of-judicial-overreach-2017-05-22 ref.

Mian Muhammad Javaid, Advocate Supreme Court along with Ikram ul Haq, CEO, MEPCO and Nasar Hayat, Director HR MEPCO for Petitioners (in both cases).

Respondents in person (in both cases).

Date of hearing: 22nd March, 2021.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**Brief facts of the case are that Respondent No.1 applied for the post of Assistant Line Man ("ALM") in pursuance to a public advertisement issued by Multan Electric Power Company ("MEPCO"). Respondent No.1 applied and sat the written test but was not called for the interview and as a result not selected for the post. Aggrieved, Respondent No.1 challenged MEPCO's failure to select and appoint him to the post. On merits the post of ALM was advertised and the last candidate who was selected for interview had a score of 66 marks in written examination, whereas Respondent No.1 had 50 marks. In this background the High Court passed the following order dated 14.11.2018:

> "Despite the fact that the petitioner obtained 50 marks in written test as per report submitted by learned counsel for the respondents and his name was placed at Sr. 269 of the successful candidates, the petitioner was not called for interview and on account of his non-participation in such process, he was not appointed.
>
> 2. Assistant Director appearing for MEPCO has confirmed that 1000 vacancies of ALM are still lying vacant. The petitioner who was qualified against the said post and is liable to be appointed as ALM in BS-7 has been deprived of his such right in an unauthorized and illegal manner.
>
> 3. Assistant Director, MEPCO, is directed to appear along with Appointment Letter duly signed and issued by the Competent Authority in favour of the petitioner as ALM before the Court on the next date of hearing.
>
> 4. Adjourned to 15.11.2018."
>
> (emphasis supplied)

2. As MEPCO failed to submit the Appointment Letter on the next date of hearing, respondent No.1 filed a contempt petition against the petitioner company and its officers. Vide order dated 31.05.2019 show cause notice for contempt was issued to the Chief Executive Officer and another officer of the petitioner company and they were also personally summoned. Both the orders dated 14.11.2018 and 31.05.2019 were challenged by MEPCO through an intra court appeal before a Division Bench in the High Court. The said appeal was dismissed vide impugned order dated 02.06.2020. Hence, this petition

3. It is important to underline that the entire recruitment process for the posts of ALM was cancelled, as the post of ALM was upgraded. As a result not a single appointment was made to the post of ALM as per the public advertisement on the basis of which Respondent No.1 applied. Faced with this situation Respondent No.1 referred to certain appointment letters and alleged that inspite of the cancellation of the entire recruitment process for the post of ALM, some persons were appointed as ALM through the backdoor. The Chief Executive Officer, MEPCO who has appeared before us today clarified that the said appointments were not in pursuance to the public advertisement, but instead were under a special quota of the deceased employees and has no nexus with the recruitment process under which Respondent No.1 had applied. Therefore, not only on merits, but even otherwise, as the entire

recruitment process for the post of ALM was scrapped, Respondent No.1 could not lay any claim to the said post. The interference by the High Court vide order dated 14.11.2018, which was subsequently upheld in the ICA vide impugned judgment dated 02.06.2020, was without any legal foundation and therefore, both the orders are set aside and the writ petition of Respondent No.1 stands dismissed. As a consequence the contempt proceedings initiated on the basis of order dated 14.11.2018 also comes to an end.

4. Vide order dated 14.11.2018 the learned judge of the High Court directed the Assistant Director MEPCO to produce the Appointment Letter of Respondent No.1, despite that Respondent No.1 did not qualify for the interview and therefore could not have been appointed under the recruitment policy of the authority. The High Court totally ignored the recruitment process, the policy of the executive and the merit settled by MEPCO and relied on an irrelevant fact that 1000 seats were still lying vacant at MEPCO. This order has left us somewhat disturbed.

5. It appears that the meaning and scope of "judicial review" has perhaps eluded the attention of the learned judge while exercising his power under Article 199 of the Constitution and in passing order dated 14.11.2018. Judicial review is the power of the court to examine the actions of the legislative, executive, and administrative arms of the government and to determine whether such actions are consistent with the Constitution and the law. Actions judged inconsistent are declared unconstitutional or unlawful and, therefore, rendered null and void. The court entrusted with the power to judicially review an executive action can only declare it to be right or wrong but cannot take over the functions that belong to another organ of the State. Under our Constitution, the Legislature, Executive, and Judiciary all have their own broad spheres of operation. It is not permissible for any one of these three organs to encroach upon the domain of another. A judge must always stay within the four corners of the law and must not be swayed by emotions or his own understanding of justice, because in doing so he fails to decide the case in accordance with law.

6. In the instant case, the judge instead of deciding the case on merits, passed the final order of appointment of respondent No.1 without adjudicating the issue in hand and then executed the order by directing the petitioner that the Appointment Letter be issued by the next date of hearing. By assuming the role of the Executive the judge disregarded his core function of adjudication, in accordance with law. Ignoring the constitutional boundaries of separation of powers can easily equip a judge with a false sense of power and authority. This is a dangerous tendency and must be guarded against to ensure that the judicial role continues to remain within its constitutional limits.

7. When judiciary encroaches upon the domain of the Executive, as in this case, where the learned judge disregarded the eligibility criteria and the recruitment policy of the Executive Authority and assumed the function of the Executive, it is said to commit judicial overreach - which occurs when a court acts beyond its jurisdiction and interferes in areas which fall within the Executive and/or the Legislature's mandate.[1] Through such interference the court violates the doctrine of separation of powers by taking on the executive functions upon itself. The instant case is a textbook case of judicial overreach, where a judge directs an authority to issue an Appointment Letter disregarding the recruitment process, merit and the employment policy of the executive authority. Such judicial role imperils the separation of powers, jeopardizes the legitimacy of the judicial institution and undermines constitutional democracy. It is imperative that the courts do not derogate from their constitutionally mandated oversight function of judicial review. Certain values in the Constitution have been designated as foundational to our democracy which means that, as corner-stones of our democracy, they must be scrupulously observed. It is a sure recipe for a constitutional crisis if these values are not observed and their precepts are not carried out conscientiously.

8. For the above reasons, the impugned judgment and order are set aside. These petitions are converted into appeals and allowed. The writ petition filed by Respondent No.1 is dismissed. A copy

of this order shall be dispatched to the learned Hon'ble Chief Justice of the Lahore High Court, Lahore who may place the same before the Hon'ble Judges of the Court for information.

MWA/C-5/SC Petition allowed.

**2021 S C M R 834**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malik andSyed Mansoor Ali Shah, JJ**

**D. G. KHAN CEMENT COMPANY LTD.---Petitioner**

**Versus**

**GOVERNMENT OF PUNJAB through Chief Secretary,Lahore and others--Respondents** C.P. 1290-L/2019, decided on 15th April, 2021.

(Against the Order of Lahore High Court, Lahore dated 31.01.2019, passed in W.P. No. 5898/2019)

**(a) Punjab Industries (Control on Establishment and Enlargement) Ordinance (IV of 1963)---**

----S. 3---Restrictions on establishment of industrial undertakings---Zoning and classification of land---Declaring an area as 'positive' or 'negative' area---Purpose and scope---Authority to regulate land use, introduce zones or negative or positive areas, was recognized as the police power of the state, asserted for public welfare---Zoning of the Province into positive and negative areas was a means towards achieving organized and planned industrial growth without impinging on the social, environmental, ecological, civic and economic interests of the locals---Zoning divided land into distinct geographical areas and imposed restrictions with respect to use of land in each area---Such regulatory controls allowed or disallowed use of land in a particular geographical zone, therefore, any application requesting permission to establish or enlarge an industrial undertaking under S. 3 of the Punjab Industries (Control on Establishment and Enlargement) Ordinance, 1963 ('the Ordinance') in an area that was already marked as a zone (negative or positive) was decided accordingly---Organization and planning under the Ordinance was, therefore, in effect, actualized on the basis of the parameters mentioned under S. 3(b) of the Ordinance.

Euclid v. Ambler Realty Co. 272 U.S. 365, 387 ref.

**(b) Punjab Industries (Control on Establishment and Enlargement) Ordinance (IV of 1963)---**

----S. 3(b)---Restrictions on establishment of industrial undertakings---Sustainable development---Scope---Terms 'prejudicial to national interest', 'injurious to health' and 'source of nuisance' used in S. 3(b) of the Punjab Industries (Control on Establishment and Enlargement) Ordinance, 1963 ('the Ordinance')---Interpretation---Organized and planned growth in the world today would undoubtedly mean "sustainable development" and the terms prejudicial to national interest, injurious to health and source of nuisance [mentioned in S. 3(b) of the Ordinance] would naturally encompass the pressing issues of the time i.e., climate change; environmental degradation; food and health safety; air pollution; water pollution; noise pollution; soil erosion; natural disasters; and desertification and flooding having an appreciable impact on public health, food safety, natural resource conservation, environmental protection, social equity, social choice, etc.

**(c) Punjab Industries (Control on Establishment and Enlargement) Ordinance (IV of 1963)---**

----S. 3---Restrictions on establishment of industrial undertakings---Zoning of area as 'positive' or 'negative' area---Scope---Zoning of areas for the purposes of the Punjab Industries (Control on Establishment and Enlargement) Ordinance, 1963 was not absolute but was subject to change provided such change was necessitated by new circumstances.

Zoning of areas into positive and negative was not absolute. Organization and planning of future growth could not be frozen in time and was never intended to be static. Zoning allowed the flexibility needed to respond to change. The choices that governed a particular territorial zoning may not hold good indefinitely. Land use patterns changed giving rise to opportunities to revise earlier standards as zoning measures were introduced in public interest. The value of zoning laid in the flexibility by which it was administered to react to new social and economic situations. Daniel R. Mandelker, 'Spot Zoning: New Ideas for an Old Problem' (2016) 48 Urb. Law. 737 and Keith H. Hirokawa, 'Making Sense of a "Misunderstanding of the Planning Process" ' (2012) 44 Urb. Law. 295 ref.

**(d) Punjab Industries (Control on Establishment and Enlargement) Ordinance (IV of 1963)---**

----S. 3---Punjab Local Government Act (XVIII of 2013), Ss. 4, 72(2)(a), 77(n), 81(1)(d) & 87(1)(g)---Restrictions on establishment of industrial undertakings---Zoning and classification of land---Whether mandate of Provincial Government or Local Government---By way of impugned notification establishment of new cement plants, and enlargement and expansion of existing cement plants was not allowed in the "Negative Area" falling within the Districts 'C' (Chakwal) and 'K' (Khushab)---Petitioner-company that owned and ran a cement manufacturing plant in District 'C' challenged the notification on the ground that the Provincial Government and its concerned department lacked jurisdiction to issue the impugned notification and only the Local Government under the Punjab Local Government Act, 2013 ("Act") could exercise jurisdiction over matters relating to zoning and classification of land, land use, environment control, water sources and ecological balances---Held, that the present matter involved a trans-district issue which could be dealt with by the Provincial Government exercising the authority conferred by the Punjab Industries (Control on Establishment and Enlargement) Ordinance, 1963 ('the Ordinance')---Even so, the functions of the local government could not mean to trump the executive authority of the Provincial Government---Ordinance of 1963 was a special law compared to the Act and therefore took preference---Furthermore, under S. 4 of the Act, local governments had to function within the provincial framework and were to faithfully observe the federal and provincial laws---In the performance of their functions, the local governments were not to impede or prejudice the exercise of the executive authority of the Provincial Government---Supreme Court upheld the impugned notification---Petition for leave to appeal was dismissed and leave was refused.

LDA v. Imrana Tiwana 2015 SCMR 1739 ref.

**(e) Punjab Industries (Control on Establishment and Enlargement) Ordinance (IV of 1963)---**

----S. 3---Constitution of Pakistan, Arts. 18 & 25---Restrictions on establishment of industrial undertakings---Zoning of area as 'negative' area---Whether discriminatory and infringement of right to trade and business---By way of impugned notification establishment of new cement plants, and enlargement and expansion of existing cement plants was not allowed in the "Negative Area" falling within the Districts 'C' (Chakwal) and 'K' (Khushab)---Petitioner-company that owned and ran a cement manufacturing plant in District 'C' challenged the notification on the ground that its right to freedom of trade, business and profession guaranteed under Art. 18 of the Constitution was infringed and the actions of the Provincial authorities unreasonably discriminated between the petitioner and other cement manufacturers---Held, that the rights granted under Art. 18 of the Constitution were "subject to such qualifications" that had been "prescribed by law"---Punjab Industries (Control on Establishment and Enlargement) Ordinance, 1963 ('the Ordinance') forbade the setting up of any industrial undertaking except by the prior written permission of the Government---Placing an embargo on establishment and expansion of cement plants in the Negative Area to provide for organized and planned growth of industries in the Province in line with the objectives of the Ordinance did not offend Art. 18 of the Constitution---Furthermore the decision to impose a ban on the establishment and expansion of cement plants was not taken to benefit or punish anyone but to ensure the organized and planned growth of industry in the Province in view of the findings of a multidisciplinary study which provided reasonable basis for zoning of project area without violating Art. 25 of the Constitution---Impugned notification was in accordance with the provisions of the Ordinance and negative area could be planned and designed banning industrial activity within its bounds---Petitioner-company was not allowed to enlarge or enhance the capacity of its existing cement plant till such time that the Negative Area subsisted---Petition for leave to appeal was dismissed and leave was refused.

Tariq Khan Mazari v. Government of Punjab PLD 2016 SC 778 ref.

**(f) Constitution of Pakistan---**

----Arts. 184(3) & 199---Scientific and technical data presented to court by Government functionaries---Judicial review---Scope---Courts while reviewing scientific and technical determinations generally

exhibited deference to institutional competence because of the specialized nature of the subject matter, as there was a risk that the courts would unravel layers of careful scientific work as a result of their combined ignorance and judicial second-guessing while reviewing science-based regulatory decisions---However, scientific complexity did not provide excuse to evade judicial scrutiny as it needed to be ensured that Government did not transgress its mandate or did not mangle scientific results to produce certain outcomes---Judicial oversight of specialized administrative decision-making was necessary to obviate the possibility of capture and incompetence.

Emily Hammond Meazell, 'Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science' (2011) 109 Mich. L. Rev. 733, 734; Elizabeth Fisher, Pasky Pascual and Wendy Wagner, 'Science Challenges for Law and Policy: Rethinking Judicial Review of Expert Agencies' (2015) 93 Tex. L. Rev. 1681, 1682; Laura Anzie Nelson, 'Delineating Deference To Agency Science: Doctrine or Political Ideology?' (2010) 40 Envtl. L. 1057, 1068 and Eduardo Jordao and Susan Rose-Ackerman, 'Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review' (2014) 66 Admin. L. Rev. 1, 68 ref.

**(g) Punjab Industries (Control on Establishment and Enlargement) Ordinance (IV of 1963)---**

----S. 3---Constitution of Pakistan, Arts. 9 & 14(1)---Restrictions on establishment of industrial undertakings---Zoning of area as 'negative' area---Precautionary principle of environmental law---Scope---In Dubio Pro Natura, principle of---Scope---By way of impugned notification establishment of new cement plants, and enlargement and expansion of existing cement plants was not allowed in the "Negative Area" falling within the Districts 'C' (Chakwal) and 'K' (Khushab)---Petitioner-company that owned and ran a cement manufacturing plant in District 'C' challenged the notification on the ground that it was not validly issued and it also infringed its various Fundamental rights under the Constitution---Held, that enlargement of an existing cement plant in a negative area attracted the well-established principle of international environmental law called the Precautionary Principle, reflected in Principle 10 of the Rio Declaration, 1992---Said principle provided that where there were threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation---Another emerging environmental principle declared as Principle 5 of the IUCN World Declaration on the Environmental Rule of Law (2016) was 'in dubio pro natura' i.e. in cases of doubt, all matters before courts, administrative agencies, and other decision-makers shall be resolved in a way most likely to favour the protection and conservation of the environment, with preference to be given to alternatives that were least harmful to the environment---Actions were not to be undertaken when their potential adverse impacts on the environment were disproportionate or excessive in relation to the benefits derived therefrom---In the facts of the present case, the Provincial Government was obliged to take a precautionary approach and act in-line with the principle of in dubio pro natura, till, inter alia, a detailed hydrogeological study assessing the potential of groundwater resources for industrial purposes of the project area was carried out---Such approach was also constitutionally compliant as the courts were to protect the fundamental rights of the public and in the present case right to life, sustainability and dignity of the community surrounding the project remained paramount till such time that the Government was of the view that the project of the petitioner-company had no adverse environmental effects---Also, the environment needed to be protected in its own right---Impugned notification was in accordance with the provisions of the Ordinance and negative area could be planned and designed banning industrial activity within its bounds---Petitioner-company was not allowed to enlarge or enhance the capacity of its existing cement plant till such time that the Negative Area subsisted---Petition for leave to appeal was dismissed and leave was refused.

**(h) Punjab Environmental Protection Act (XXXIV of 1997)---**

----Preamble---Environmental legal personhood---Concept and scope---Approach of personifying the environment in order to protect and preserve nature and its objects was one of the latest evolutions in

environmental law---Man and his environment each needed to compromise for the better of both and this peaceful co-existence required that the law treated environmental objects as holders of legal rights.

Mohd. Salim v. Uttarakhand 2017 (2) RCR (Civil) 636); Human Rights and Peace for Bangladesh v. Bangladesh (2019) W.P. No.13989 of 2016 (HCD) and Alexandre Lillo, 'Is Water Simply a Flow? Exploring an Alternative Mindset for Recognizing Water as a Legal Person' (2018) 19 Vt. J. Envtl. L. 164, 165 ref.

**(i) Punjab Environmental Protection Act (XXXIV of 1997)---**

----Preamble---Water justice---Precautionary principle---Scope---In Dubio Pro Natura, principle of---Scope---Approach to be adopted by courts when adjudicating water related disputes---Precautionary principle should be applied in the resolution of water-related disputes---Notwithstanding scientific uncertainty or complexity regarding the existence or extent of risks of serious or irreversible harm to water, human health or the environment, judges should uphold or order the taking of the necessary protective measures having regard to the best available scientific evidence---Consistent with the principle in dubio pro natura, in case of uncertainty, water and environmental controversies before the courts should be resolved, and the applicable laws interpreted, in a way most likely to protect and conserve water resources and related ecosystems---In adjudicating water and water-related cases, judges should be mindful of the essential and inseparable connection that water had with the environment and land uses, and should avoid adjudicating those cases in isolation or as merely a sectoral matter concerning only water---Water justice required appreciation that there were no easy, simple or singular solutions to the water crisis, and that water problems could not be resolved through technical solutions alone but required broader recognition that they were inherently ecological, political and social issues simultaneously.

Farhana Sultana, 'Water justice: why it matters and how to achieve it' (2018) 43 Water International 483; Principle 1 - Water as a Public Interest Good; Principle 2 - Water Justice, Land Use, and the Ecological Function of Property; Principle 5 - Water Justice and Precaution; Principle 6 - In Dubio Pro Aqua and Principle 9 - Water Justice and Environmental Integration ref.

**(j) Punjab Industries (Control on Establishment and Enlargement) Ordinance (IV of 1963)---**

----S. 3---Constitution of Pakistan, Art. 9---Restrictions on establishment of industrial undertakings---Zoning of area as 'negative' area-- Climate change---Significance---By way of impugned notification establishment of new cement plants, and enlargement and expansion of existing cement plants was not allowed in the "Negative Area" falling within the Districts 'C' (Chakwal) and 'K' (Khushab)---Petitioner-company that owned and ran a cement manufacturing plant in District 'C' challenged the notification on the ground that it was not validly issued and it also infringed its various Fundamental Rights under the Constitution---Held, that the fragility of the Negative Area needed to be examined in the larger context of climate change---Environmental issues initially brought to the courts were local geographical issues, be it air pollution, urban planning, water scarcity, deforestation or noise pollution, but now climate change had a bearing on these issues---Impugned notification, in the current facts of the case, was a climate resilient measure and in step with the National Climate Change Policy, 2012 (Pakistan) and the Constitution---Petition for leave to appeal was dismissed and leave was refused.

Shehla Zia's case PLD 1994 SC 693; Imrana Tiwana's case PLD 2015 Lah. 522 and Asghar Leghari's case PLD 2018 Lah. 255 ref.

**(k) Punjab Environmental Protection Act (XXXIV of 1997)---**

----Preamble---Constitution of Pakistan, Art. 9 & Preamble---Climate change---'Climate democracy' and 'intergenerational justice'---Concept and scope---Important dimension of climate change was intergenerational justice and the need for climate democracy---Courts had a role to play in reducing the effects of climate change for the present generation and for the generations to come---Through the pen and jurisprudential fiat, the courts needed to decolonize future generations from the wrath of climate change, by upholding climate justice at all times---Post climate change, democracies had to be

redesigned and restructured to become more climate resilient and the fundamental principle of rule of law had to recognize the urgent need to combat climate change---Robust democracies needed to be climate democracies in order to save the world and further generations from being colonized at the hands of climate change---Supreme Court observed that Premabular constitutional value of democracy under the Constitution (of Pakistan) was in effect climate democracy, if we were to actualize the Constitution and the fundamental rights guaranteed under the Constitution for ourselves and our future generations.

Salman Aslam Butt, Advocate Supreme Court for Petitioner.

Ms. Aliya Ejaz, Assistant A.G., Dr. Khurram Shahzad, D.G. EPA, M. Nawaz Manik, Director Law, EPA, M. Younas Zahid, Dy. Director, Fawad Ali, Dy. Director, EPA (Chakwal), Kashid Sajjan, Asstt. Legal, EPA and Rizwan Saqib Bajwa, Manager GTS for Respondents.

Hasan Riaz, Civil Judge-cum-Research Officer at SCRC[1] for Research Assistance.

Date of hearing: 11th February, 2021.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**The case stems from Notification dated 08.03.2018 ("Notification") issued by the Industries, Commerce and Investment Department, Government of the Punjab ("Government"), under sections 3 and 11 of the Punjab Industries (Control on Establishment and Enlargement) Ordinance, 1963 ("Ordinance"), introducing amendments in Notification dated 17.09.2002 to the effect that establishment of new cement plants, and enlargement and expansion of existing cement plants shall not be allowed in the "Negative Area" falling within the Districts Chakwal and Khushab.

2. The petitioner owns and runs a cement manufacturing plant in Kahoon Valley in the Salt Range at Khairpur, District Chakwal and feels wronged of the Notification for the reasons, viz. (i) the Provincial Government and its line Department lacked jurisdiction to issue the Notification and only Local Government under the Punjab Local Government Act, 2013 ("Act") could exercise jurisdiction over matters relating to zoning and classification of land, land use, environment control, water sources and ecological balances; (ii) the respondents without a detailed scientific study about underground water levels acted with undue haste in issuing the Notification; (iii) the petitioner was not given the opportunity of hearing under section 3 of the Ordinance read with Articles 4, 9, 10A, 18 and 25 of the Constitution of the Islamic Republic of Pakistan ("Constitution"); (iv) the petitioner's right to freedom of trade, business and profession under Article 18 of the Constitution was infringed; and (v) the actions of the respondents unreasonably discriminated between the petitioner and other cement manufacturers similarly placed on the basis of materials and information that could not be termed as reasonable or intelligible differentia thereby violating Article 25 of the Constitution.

3. We consider in this case if the Government's decision of issuing the Notification lacks statutory authority or if factual grounding of the Notification compromises its legal validity.

Legality of declaring an area as a "Negative Area" under the Ordinance

4. We first turn to the question whether the Provincial Government can declare an area to be a "Negative Area" under the Ordinance. "Negative Area" under the Notification is where no new cement plant can be set up and no enlargement or enhancement of an existing cement plant can be allowed. The preamble to the Ordinance provides for organized and planned growth of industries in the Province. Organized and planned industrial growth is unquestionably in the public interest and is effectively regulated through section 3 of the Ordinance. No person can establish an industrial undertaking or enlarge any existing industrial undertaking except with the prior permission of the Provincial Government. Generally, such permission can be granted or refused only after extending an opportunity to the applicant to show cause against it. The discretion of the Government to permit the setting up or enlargement of an industrial undertaking under section 3 is structured according to the conditions spelled out in section 3(b) of the Ordinance. Section 3(a) deals with the permission for

establishing or enlarging an industrial undertaking in an area as a greenfield project, which is being examined by the Government for the first time. However, section 3(b) refers to the area where the Government has already satisfied itself on the basis of the information available to it and after making such inquiry as to whether the industrial undertaking to be established or enlarged is prejudicial to national interest, or injurious to health of the residents of the local area in which the industrial undertaking is proposed to be set up or enlarged, or is a source of nuisance for the residents of the local area in which the industrial undertaking is proposed to be set up or enlarged and may declare such an area to be either positive or negative area or zone as the case may be. "Planning" is a comprehensive, coordinated and continuing process that involves identification of future goals, development of plans to achieve those goals, and devising of mechanism to give effect to those plans with a view to promoting the common good of the society.[2] Zoning of the Province into positive and negative areas is a means towards achieving organized and planned industrial growth without impinging on the social, environmental, ecological, civic and economic interests of the locals. Zoning divides land into distinct geographical areas and imposes restrictions with respect to use of land in each area. These regulatory controls allow or disallow use of land in a particular geographical zone. Therefore, any application requesting permission to establish or enlarge an industrial undertaking under section 3 of the Ordinance in an area that is already marked as a zone (negative or positive) is decided accordingly. The organization and planning under the Ordinance is, therefore, in effect, actualized on the basis of the parameters mentioned under section 3(b) of the Ordinance.

5. Further, the socioeconomic concerns critical for organized and planned development existing in the year 1963[3] have since multiplied and become more complex as the population has swelled from approximately 48 million in 1963 to more than 217 million in 2019.[4] Organized and planned growth in the world today would undoubtedly mean "sustainable development[5]" and the terms prejudicial to national interest, injurious to health and source of nuisance would naturally encompass the pressing issues of the time i.e., climate change; environmental degradation; food and health safety; air pollution; water pollution; noise pollution; soil erosion; natural disasters; and desertification and flooding having an appreciable impact on public health, food safety, natural resource conservation, environmental protection, social equity, social choice, etc. The authority to regulate land use, introduce zones or negative or positive areas, has been recognized as the police power of the state, asserted for public welfare.[6] The legislative policy of organized and planned growth, under the Ordinance, also synchronizes well with our constitutional values, set out in the preamble of the Constitution, as well as the Fundamental Rights and the Principles of Policy, in particular, the right to life and dignity,[7] promotion of social and economic wellbeing of the people[8] and safeguarding the legitimate interest of backward and depressed classes[9].

6. We deem it necessary to observe that zoning of areas into positive and negative is not absolute. The ban under the Notification is not etched in stone but may be lifted if the Government is of the view that the valley, in this specific case, stands recharged with water and nature has become resilient to allow sustainable development. Organization and planning of future growth cannot be frozen in time and is never intended to be static. Zoning allows the flexibility needed to respond to change. The choices that govern a particular territorial zoning may not hold good indefinitely. Land use patterns change giving rise to opportunities to revise earlier standards as zoning measures are introduced in public interest.[10] The value of zoning lies in the flexibility by which it is administered to react to new social and economic situations.[11] We, therefore, hold that zoning of areas for the purposes of the Ordinance is not absolute but is subject to change provided such change is necessitated by new circumstances. Hence, the prohibition under the Notification not to establish or enlarge an industrial undertaking in a negative area is not absolute.

7. Insofar as the objection of the petitioner that the mandate of zoning of land belongs to the local government is concerned, suffice it to say that the matter involved a trans-district issue which could be

dealt with by the Provincial Government exercising the authority conferred by the Ordinance. Even so, the functions of the local government could not mean to trump the executive authority of the Provincial Government.[12] The Ordinance is a special law compared to the Act and therefore takes preference. Furthermore, under section 4 of the Act, local governments have to function within the provincial framework and are to faithfully observe the federal and provincial laws. And in the performance of their functions, the local governments shall not impede or prejudice the exercise of the executive authority of the Provincial Government. Even otherwise, nothing has been brought on the record that shows that the concerned districts have taken a contrary position or are aggrieved of the Notification.

8. Also, the petitioner claimed that its right to freedom of trade, business and profession guaranteed under Article 18 of the Constitution was infringed and the actions of the respondents unreasonably discriminated between the petitioner and other cement manufacturers. We are, however, of the view that the rights granted under Article 18 of the Constitution are "subject to such qualifications" that have been "prescribed by law". The Ordinance forbids the setting up of any industrial undertaking except by the prior written permission of the Government. Placing an embargo on establishment and expansion of cement plants in the Negative Area to provide for organized and planned growth of industries in the Province in line with the objectives of the Ordinance does not offend Article 18 of the Constitution.[13] Moving on, the decision to impose a ban on the establishment and expansion of cement plants was not taken to benefit or punish anyone but to ensure the organized and planned growth of industry in the Province in view of the findings of a multidisciplinary study (discussed later) which provided reasonable basis for zoning of project area without violating Article 25 of the Constitution.[14]
Factual foundation of the "Negative Area"

9. The next question is whether the Notification was issued in public interest in line with the objectives of the Ordinance or not. In 2016, the Secretary, Mines and Minerals Department informed the Provincial Government that existing cement plants in the Salt Range were causing ecological harm to the area. In this backdrop, the Government decided to inquire into the matter and solicit expert advice. A study was commissioned for determining the suitability of the project area for cement plants comprising Districts of Chakwal, Jhelum, Khushab and Mianwali of Punjab. Messrs. NESPAK and Messrs Sogreah ("Consultants") were engaged for the purpose. The project team included foreign experts such as Cement Plant Expert, Environmental Chemist and Geologist having experience of working in a range of countries in different regions of the world.[15] The methodology of the study reflects that following determinants were identified to be the criteria for suggesting proposals concerning delineation of the negative and positive zones for the establishment of new and expansion of existing cement plants:

i. sufficiency of cement raw materials;
ii. sustainable water resources;
iii. environmental conditions of the project area;
iv. socio-economic conditions;
v. transportation infrastructure; and
vi. agriculture, forest, restricted and sensitive sites.

The Consultants undertook a fairly comprehensive exercise covering a range of factors likely to be impacted by the establishment or expansion of cement plants in the project area. They verified deposits, determined their quality and estimated their resource potential to decide the issue of sufficiency of cement raw materials; carried out water resource study by examining ground and surface water resources; and studied air emissions, ambient noise, and ground, surface and waste water. They also conducted surveys to examine socioeconomic conditions of the area and made estimation of the existing traffic volume through manual classified count surveys, capacity analysis of existing road network, estimation of generated traffic due to new facilities and traffic projections based on relevant socioeconomic indicators and past data. Technical audit of existing cement plants was conducted.

Forest, agricultural and wildlife reserve areas/sanctuaries were taken into consideration. Field visits were conducted and ecological features of the area were studied. A meeting of the Consultants with the representatives of the cement plants and the Government officials was also held.

10. The Consultants found that groundwater table had gone down at an average of 64 feet at various locations, shallow wells (open/dug wells) had been found dried up and, therefore, further installation of new cement plants/expansion of existing cement plants could cause further depletion of groundwater resulting in greater problems for the local people and especially for agriculture. They were of the view that four valleys i.e. Kahoon, Vinhaar, Pail and Padhrar having important scenic and touristic value needed to be protected. Additionally, these valleys contain forest areas, settlements and agriculture lands. It is underlined that total population of the area was recorded as 4.8 million in 2017 and around 1,23,753 in the Negative Area alone. The study showed that any new cement plant or expansion of any existing cement plant would require new road infrastructure or improvement in the capacity of the existing road infrastructure. A negative zone covering an area of 979 sq km (11% of the total area) with an embargo on establishment of new and expansion of existing cement plants was thus delineated out of a total of 8,872 sq km. It was also proposed that demarcation of negative zones be reviewed after every ten years on the basis of technical assessment.

11. The Provincial Cabinet in view of the said recommendations of the Consultants took a number of decisions including declaration of "Negative Area" comprising 979 sq km of land in the Salt Range out of a total area of 8,872 sq km where establishment of new and expansion of existing cement plants was completely banned. It is underlined that the Positive Area adjoins the Negative Area and can be accessed by the petitioner for future development subject to the regulatory approvals under the law. It was also decided that the existing cement plants falling within the Negative Area would be allowed to operate only if they were fully compliant with all legal, technical and environmental standards prescribed by the Government and after a final approval was given by the Government to this effect. The Notification was thus issued and establishment of new and expansion of existing cement plants was banned in the Negative Area. The Government concluded that permitting the establishment of new and expansion of existing cement plants would be prejudicial to public interest.

12. It is hardly a secret that water situation in the project area is far from satisfactory. In November 2017, this Court had taken notice of the reports of drying up of the fabled Katas Raj Temple Pond. Cement companies situated in the vicinity of the pond were found pumping huge quantities of water free of charge and without having any regard for the environmental impact of such unbridled extraction on the aquifer as well as surrounding areas.[16] This Court in Katas Raj case had observed that the issue of scarcity of water in the area was becoming acute adversely affecting the environment and lives of the people living nearby.[17] The cement companies were directed to switch to alternative sources of water and bring their dependence on groundwater to zero within six months.[18] The cement plants, subsequently, claimed to have brought the use of groundwater to zero though the feeding channels of Katas Raj Temple Pond could not become functional and, therefore, the Director General ("DG"), Environmental Protection Agency ("EPA") Punjab was directed to constitute a "Team of Experts" from all concerned departments for technical survey of the area to discover the reasons behind the issue.[19] The "Interim Report" dated 11.06.2020 submitted by the DG, EPA Punjab did not convey a satisfactory picture: "14 % (of groundwater in the valley) is abstracted by cement industry"; "Katas Raj Temple' (sic) pond is located downhill whereas the Bestway Cement Factory was installed at (sic) uphill 03 km away from the pond, thus the latter intervention may influence the groundwater flow path recharging holy pond"; and "over abstraction appears so far to be the main cause of drying out of pond." Here, we are reminded of the Consultants' recommendation that use of existing tube wells within the boundary of existing cement plants, even after shifting to alternative sustainable water sources, must be monitored to ensure that cement plants are not abstracting groundwater.

13. The Assistant Director (Environment) Chakwal during the pendency of this case carried out site inspection of the petitioner's cement plant on 09.02.2021. His report reveals that there are also other issues besides water. He reported that blasting and quarrying of raw materials caused dust pollution in the locality causing environmental damage; quarrying also threatened the local ecology of biodiversity rich area of Kallar Kahar; deforestation and erosion resulted from quarrying; heavy transport and machinery used for transporting raw material affected the locals of the area negatively; quarrying sites deteriorated the aesthetic appeal of the area; and air emissions from the cement industry was a cause of air pollution in the area.

14. The only objection raised by the petitioner to the report of the Consultants relates to the finding about underground water levels. However, the petitioner loses sight of the fact that sustainability of water resources was not the sole factor leading to designation of the Negative Area. Rather, the Consultants carried out a multidisciplinary study of the project area to determine suitability of land for establishment and expansion of cement plants. Fixated on the issue of groundwater levels, the petitioner engaged private consultants "to prepare a factual report on the status of ground water in and around the plant area." Without going into the qualification of the consultants hired by the petitioner and the scope of the inquiry undertaken by them, we believe, it is not our job to referee battles among experts.[20] The Government has discretion to rely on reasonable opinions of its own qualified experts in case of conflicting specialist views.[21] Another aspect is the integration of science in planning and regulation. The courts while reviewing scientific and technical determinations generally exhibit deference to institutional competence because of the specialized nature of the subject matter.[22] There is a risk that the courts will unravel layers of careful scientific work as a result of their combined ignorance and judicial second-guessing while reviewing science-based regulatory decisions.[23] However, scientific complexity does not provide excuse to evade judicial scrutiny as it needs to be ensured that Government does not transgress its mandate or does not mangle scientific results to produce certain outcomes.[24] Judicial oversight of specialized administrative decision-making is necessary to obviate the possibility of capture and incompetence.[25] Accordingly, we keep ourselves restricted to the rationality of the Government's decision.[26]

15. It was vehemently argued by the learned counsel for the petitioner, that the petitioner company proposes to expand the existing cement plant by installing a new "zero water" technology cement plant. However, there is no evidence brought on the record to establish the claim that the new cement plant technology is 'zero-water' or even the fact that the petitioner is currently manufacturing cement without any use of water. Even the consultants engaged by the petitioner did not say that cement plants could be run without using water. On the contrary, according to the position taken by the petitioner and confirmed by the DG, EPA, Punjab, the petitioner is currently using six rainwater harvesting ponds and two water tanks to save water for use in the cement plant. This act of building storage tanks and ponds shows that water is essential for the running of the cement plant, not to mention that development of the ponds and storage tanks further restricts the recharge and replenishment rate of the aquifer which is to sustain the local habitat including nature, population, subsistence agriculture and help in regaining water supply levels for Katas Raj Temple Pond. We also notice that building such ponds and storage tanks (a water management project) required an Initial Environmental Examination (IEE)/Environment Impact Assessment (EIA), which does not appear to have been done, casting doubts on legal sustainability of these ponds and storage tanks in the Negative Area. Recourse to alternative source of water by the petitioner company clearly establishes that use of water is an indispensible requirement for running a cement plant. Additionally, the petitioner claimed that it was not given the opportunity of hearing before the issuance of the Notification. We, however, see that the Consultants had arranged a Stakeholders Consultation Meeting with cement companies. Three officials of the petitioner participated in the said meeting and their names and signatures are visible in the report. Besides, we need to look beyond limestone, clay and other minerals to appreciate the value of the stretch of land,

called the Salt Range, whose charm has captivated pilgrims, travelers and emperors since olden days. The picturesque region rich in biodiversity, and historical and sociocultural heritage is a national asset of timeless magnificence.

Precautionary Principle, In Dubio Pro Natura and Environmental Legal Personhood

16. The facts of the case brought before us through various technical reports of the Government and its consultants (referred to above) show that there are serious threats to environment in the Negative Area, especially to the underground water aquifer that needs to be first recharged before any sustainable development in the area can take place. Negative area in other words means an environmentally fragile area, which is a vulnerable natural habitat and needs care and protection, till it recovers, if at all. Enlargement of an existing cement plant in a negative area attracts the well-established principle of international environmental law called the Precautionary Principle, reflected in Principle 10 of the Rio Declaration, 1992. The principle provides; "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." Another emerging environmental principle declared as Principle 5 of the IUCN World Declaration on the Environmental Rule of Law (2016) is in dubio pro natura i.e. "in cases of doubt, all matters before courts, administrative agencies, and other decision-makers shall be resolved in a way most likely to favour the protection and conservation of the environment, with preference to be given to alternatives that are least harmful to the environment. Actions shall not be undertaken when their potential adverse impacts on the environment are disproportionate or excessive in relation to the benefits derived therefrom." In the facts of the case, the Provincial Government was obliged to take a precautionary approach and act in-line with the principle of in dubio pro natura, till, inter alia, a detailed hydrogeological study assessing the potential of groundwater resources for industrial purposes of the project area is carried out. This approach is also constitutionally compliant as the courts are to protect the fundamental rights of the public and in this case right to life, sustainability and dignity of the community surrounding the project remains paramount till such time that the Government is of the view that the project has no adverse environmental effects. Also, the environment needs to be protected in its own right. There is more to protecting nature than a human centered rights regime. We see elements of personhood have now been ascribed to nature by legislatures and courts around the world.[27] The approach of personifying the environment in order to protect and preserve nature and its objects is one of the latest evolutions in environmental law.[28] Man and his environment each need to compromise for the better of both and this peaceful co-existence requires that the law treats environmental objects as holders of legal rights.[29]

Water Justice

17. According to our National Climate Change Policy, 2012 water resources are inextricably linked with climate; this is why the projected climate change has such serious implications for Pakistan's water resources. Freshwater resources in Pakistan are based on snow and glacier-melt and monsoon rains, both highly sensitive to climate change. This will further exacerbate the already difficult situation of a water-stressed country facing demand increases due to population growth and increasing economic activity. To address the impact of climate change on water resources and to enhance water security, the Government of Pakistan has proposed Integrated Water Resource Management to provide regulatory frameworks, water licensing, slow action dams, artificial recharge especially for threatened aquifers, adoption of integrated water resource management concepts, and ensuring rational ground water exploitation by avoiding excessive pumping. Agriculture is central to human survival and is probably the human enterprise most vulnerable to climate change. The hydrological cycle is similarly likely to be influenced by global warming, necessitating the agriculture and livestock sectors, particularly in rain-fed areas, to adapt to climate change. The World Water Forum, laying down the concept of water justice, declared[30] that the State should exercise stewardship over all water resources, and protect them, in conjunction with their associated ecological functions, for the benefit of current

and future generations, and the Earth community of life.[31] Because of the close interlinkages between land and water and the ecological functions of water resources, any person with a right or interest to use water resources or land has a duty to maintain the ecological functions and integrity of water resources and related ecosystems.[32] The precautionary principle should be applied in the resolution of water-related disputes. Notwithstanding scientific uncertainty or complexity regarding the existence or extent of risks of serious or irreversible harm to water, human health or the environment, judges should uphold or order the taking of the necessary protective measures having regard to the best available scientific evidence.[33] Consistent with the principle in dubio pro natura, in case of uncertainty, water and environmental controversies before the courts should be resolved, and the applicable laws interpreted, in a way most likely to protect and conserve water resources and related ecosystems.[34] In adjudicating water and water-related cases, judges should be mindful of the essential and inseparable connection that water has with the environment and land uses, and should avoid adjudicating those cases in isolation or as merely a sectoral matter concerning only water.[35] Water justice requires appreciation that there are no easy, simple or singular solutions to the water crisis, and that water problems cannot be resolved through technical solutions alone but require broader recognition that they are inherently ecological, political and social issues simultaneously.[36]

Climate Change and Climate Justice

18. The fragility of the Negative Area also needs to be examined in the larger context of climate change. The environmental issues initially brought to our courts were local geographical issues, be it air pollution, urban planning, water scarcity, deforestation or noise pollution. But now climate change has a bearing on these issues.[37] One of the serious climate change threats to Pakistan is the rising temperatures resulting in enhanced heat and water-stressed conditions, particularly in arid and semi-arid regions, leading to reduced agricultural productivity.[38] Notably, the Salt Range has an arid climate characterized by lack of water.[39] According to our National Climate Change Policy, 2012 for Pakistan to continue on a development path, the more immediate and pressing task is to prepare itself for adaptation to climate change. The country is bearing huge socioeconomic costs of environmental degradation, it is globally ranked in the top ten countries most affected by climate change in the past 20 years and has lost 0.53 percent per unit GDP, suffered economic losses worth US$ 3792.52 million and witnessed 152 extreme weather events from 1999 to 2018.[40] Only by devising and implementing appropriate adaptation measures will it be possible to ensure water, food and energy security for the country. The goal of the Policy is to ensure that climate change is mainstreamed in the economically and socially vulnerable sectors of the economy and to steer Pakistan towards climate resilient development. The Notification, in the current facts of the case, is a climate resilient measure and in step with the National Climate Change Policy and the Constitution.

19. Another important dimension of climate change is intergenerational justice and the need for climate democracy. The tragedy is that tomorrow's generations aren't here to challenge this pillaging of their inheritance. The great silent majority of future generations is rendered powerless and needs a voice. This Court should be mindful that its decisions also adjudicate upon the rights of the future generations of this country. It is important to question ourselves; how will the future generations look back on us and what legacy we leave for them?[41] This Court and the Courts around the globe have a role to play in reducing the effects of climate change for our generation and for the generations to come. Through our pen and jurisprudential fiat, we need to decolonize our future generations from the wrath of climate change, by upholding climate justice at all times. Democracy, anywhere in the world is pillared on the rule of law, which substantially means rights based rule of law rather than rule based; which guarantees fundamental values of morality, justice, and human rights, with a proper balance between these and other needs of the society.[42] Post climate change, democracies have to be redesigned and restructured to become more climate resilient and the fundamental principle of rule of law has to recognize the urgent need to combat climate change. Robust democracies need to be climate

democracies in order to save the world and our further generations from being colonized at the hands of climate change. The premabular constitutional value of democracy under our Constitution is in effect climate democracy, if we wish to actualize our Constitution and the fundamental rights guaranteed under the Constitution for ourselves and our future generations. Janine Benyus[43] suggests we learn from nature's 3.8 billion years of evolution. How is it that other species have learned to survive and thrive for 10,000 generations or more? Well, it's by taking care of the place that would take care of their offspring, by living within the ecosystem in which they are embedded, by knowing not to foul the nest. We must restore and repair and care for the planetary home that will take care of our offspring. For our children, and our children's children, and all those yet to come, we must love our rivers and mountains and reconnect with the long and life-giving cycles of nature.[44] To us there is no conflict between environmental protection and development because our answer would be sustainable development. Sustainable development means development that meets the needs of the present generation without compromising the ability of future generations to meet their needs[45] and it is in step with our constitutional values of social and economic justice.

20. As a result, all contentions raised by the petitioner are rejected. We hold that the Notification dated 08.03.2018 is in accordance with the provisions of the Ordinance and negative area can be planned and designed banning industrial activity within its bounds. The Petitioner company is not allowed to enlarge or enhance the capacity of its existing cement plant till such time that the Negative Area subsists. In these circumstances, we uphold the Notification. The High Court has rightly refrained from interfering into the matter. Consequently, the leave is refused and the petition is dismissed.

MWA/D-7/SC Petition dismisse

**2021 S C M R 962**

**[Supreme Court of Pakistan]**

**Present: Manzoor Ahmad Malikand Syed Mansoor Ali Shah, JJ**

**MUHAMMAD SHARIF and others---Petitioners**

**Versus**

**INSPECTOR GENERAL OF POLICE, PUNJAB,LAHORE and others---Respondents**

C.Ps. Nos. 517-L, 1019-L, 1062-L, 1232-L of 2016 and 1929-L of 2017, decided on 28th April, 2021.

(Against the judgment(s)/order(s) of Punjab Service Tribunal, Lahore dated 21.12.2015 passed in Appeal No. 494/2015 and 09.02.2016 passed in Appeal No. 3223/2015 and 01.03.2016 passed in Appeal No. 1025 of 2015)

**(a) Civil service---**

----Back benefits/back pay---Meaning.

10th Edition, Thomson Reuters, 2014, 166; Aguinaga v. United Food and Commercial Workers Int'l Union 993 F.2d 1463, 1473; Robinson v. Lorillard Corp. 444 F.2d 791, 804 and Smith v West 1999 U.S. App. Vet. Claims LEXIS 475, 6 ref.

**(b) Civil service---**

----Reinstate in service---Meaning and scope.

Black's Law Dictionary (10th Edition, Thomson Reuters, 2014) 1477; Black's Law Dictionary, (6th Edition, St. Paul, MINN., West Publishing Co., 1990) 1287 and Aiyar's Judicial Dictionary (10th Edition, 1988) 871 ref.

**(c) Punjab Civil Servants Act (VIII of 1974)---**

----S. 16, second proviso---Constitution of Pakistan, Arts. 4, 10A, 14 & 25---Fundamental Rules, R. 54--- Civil Service Rules (Punjab), R. 7.3---Civil servant---Reinstatement in service after order for removal or dismissal from service set-aside---Back benefits, entitlement to---Scope and principles---Civil servant on unconditional reinstatement in service was to be given all back benefits and the only exception justifying part withholding of back benefits could be that he accepted gainful employment/engaged in profitable business during the intervening period---In case, the dismissal/removal of a civil servant was declared illegal for a defect in disciplinary proceedings without attending to the merits of the case, the entitlement to back benefits may be put off till the inquiry was conducted in the matter finally determining the fault of the civil servant---In case, where there was some fault of the civil servant, including a situation where concession of reinstatement was extended to the civil servant while applying leniency or compassion or proportionality as standard and where penalty was modified but not wiped off in a way that the civil servant was restored to his position, he may be denied a portion of back benefits/back pay, while maintaining a proportion between the gravity of the fault of the civil servant and special/extenuating circumstances of the case.

A civil servant once exonerated from the charges would stand restored in service as if he were never out of it and would be entitled to back benefits. Chairman State Life v. Siddiq Akbar 2013 SCMR 752; Umer Said v. District Education Officer (Female) 2007 SCMR 296 and 2015 SCMR 77 = 2015 PLC (C.S.) 366 ref.

Civil servant, whose wrongful dismissal or removal had been set-aide goes back to his service as if he were never dismissed or removed from service. The restitution of employee, in this context, meant that there had been no discontinuance in his service and for all purposes he had never left his post. He was therefore entitled to arrears of pay for the period he was kept out of service for no fault of his own. No different was the position where an employee had been served with a penalty like reduction in rank or withholding of increment(s) or forfeiture of service, etc. and the penalty had been set-aside. The employee stood restored to his post with all his perks and benefits intact and would be entitled to arrears of pay as would have accrued to him had the penalty not been imposed on him. This general

principle of restitution fully met the constitutional requirements of fair trial and due process (Articles 4 & 10A of the Constitution) besides the right to life (Article 9) which included the right to livelihood ensuring all lawful economic benefits that came with the post. Reinstating an employee but not allowing him to enjoy the same terms and conditions of service as his colleagues was also discriminatory (Article 25). All this snowballed into offending the right to dignity (Article 14) of an employee for being treated as a lesser employee inspite of being reinstated or restored into service.

The "concept of reinstatement into service with original seniority and back benefits" was based on the established principle of jurisprudence that if an illegal action/wrong was struck down by the Court, as a consequence, it was also to be ensured that no undue harm was caused to any individual due to such illegality/wrong or as a result of delay in the redress of his grievance. If by virtue of a declaration given by the Court a civil servant is to be treated as being still in service, he should also be given the consequential relief of the back benefits (including salary) for the period he was kept out of service as if he were actually performing duties.

Federation of Pakistan v. Sindh High Court Bar Association PLD 2012 SC 1067; Pakistan v. Mrs. A. V. Issacs PLD 1970 SC 415; Muhammad Bashir v. Government of the Punjab 1994 SCMR 1801 and Inspector-General of Police, Punjab v. Tariq Mahmood 2015 SCMR 77 = 2015 PLC (C.S.) 366 ref.

Where the order of dismissal, removal or reduction in rank was set aside unconditionally, back benefits were to be paid necessarily. The grant of back benefits to an employee who had been illegally kept away from his employment was a rule and denial of service benefits to such reinstated employee was an exception. When a civil servant was reinstated in service and his dismissal from service was held to be illegal and for no fault of his, then his reinstatement in service would mean that he had always been in service and as a consequence be paid salary from the day he was illegally removed or dismissed from service. One of the exceptions of not granting full back benefits was that if the reinstated employee had accepted another employment or engaged in any profitable business during the intervening period; in such a case, the said amount would be set off against the salary. This concept was now available as an instruction under Sl. No. 155, Vol-II, Esta Code, 2007 edition.

Qadeer Ahmad v. Punjab Labour Appellate Tribunal PLD 1990 SC 787; General Manager v. Mehmood Ahmed Butt 2002 SCMR 1064; Muhammad Hussain v. E.D.O. (Education) 2007 SCMR 855; Umer Said v. District Education Officer (Female) 2007 SCMR 296; Sohail Ahmed Usmani v. DG CAA 2014 SCMR 1843; Chairman State Life v. Siddiq Akbar 2013 SCMR 752; Pakistan v. Mrs. A.V. Issacs PLD 1970 SC 415; Muhammad Bashir v. Government of the Punjab 1994 SCMR 1801 and Inspector General of Police, Punjab v. Tariq Mahmood 2015 SCMR 77 = 2015 PLC (C.S.) 366 ref.

The reinstatement or restoration of an employee to the post may be due to the following different reasons: (a) purely on merits; (b) on technical grounds without touching the actual merits of the case and (c) on the ground of leniency where the actual order was either converted into a lesser penalty or totally set-aside.

An employee on reinstatement on merits could not be deprived of back benefits. Any such deprivation would be against his constitutional rights guaranteed to an employee. Besides, Rule 7.3(a) of Civil Service Rule (Punjab) also pointed in this direction. In case of reinstatement or restoration to a post on merits, the employee was entitled to full back benefits and there was no discontinuity of service, thus the question of intervening period did not arise in such a case. The discretion (as to awarding arrears/back benefits) under the second proviso to section 16 of the Punjab Civil Servants Act, 1974 ('the 1974 Act') was to be exercised in favour of the employee by granting him all the back benefits. However, the said principle of grant of back benefits was qualified by a situation where the order of reinstatement was conditional; either civil servant's dismissal from service was declared illegal for a defect in disciplinary proceedings or the penalty was modified to be on the lower side with the result that the civil servant was reinstated. In the former situation, the merits of the case and the

determination of the fault of the employee went untouched, even though he stood reinstated. Here, an inquiry could still be made into the employee's conduct or his conduct may be considered such as to call for a departmental inquiry. The de novo proceedings could be initiated from the stage where the defect had crept in. In such a situation, the entitlement with regard to back benefits was put off till the final determination with regard to the civil servant's conduct. If he was found at fault, the competent authority could justifiably deny him part of the back benefits. And, in the latter situation, the civil servant was not declared blameless; rather, his penalty was reduced and, therefore, part of back benefits, as necessitated by the implications of reduced penalty, may justifiably be denied to him.

Muhammad Arif Khan v. Dy. Enc. E'in'C's Branch, GHQ 1991 SCMR 1904 and Qadeer Ahmad v. Punjab Labour Appellate Tribunal PLD 1990 SC 787 ref.

Appellate authorities, often, without saying a word about the charge, reinstated a civil servant taking a lenient view or on compassionate ground or on the ground of proportionality. In such a case the charge stood established yet the authority or the court, applying leniency or compassion or proportionality as standard, felt inclined to extend concession of reinstatement to the civil servant. Notably the civil servant in such a case was not reinstated unconditionally a nd, therefore, he may be denied a portion of pay - while maintaining a proportion between the gravity of the fault of the civil servant and special/ extenuating circumstances of the case - he would otherwise get on reinstatement. Such treatment would be in step with the second proviso to section 16 of the 1974 Act and would also be consistent with the spirit of Fundamental Rule 54 ("FR") and Civil Service Rules (Punjab) 7.3(b) ("CSR"). If an employee was reinstated in such an eventuality, the authority or the court needed to clearly state that though the charge ascribed to the employee stood proved, concession was being shown to him to avoid the rigors of major penalty, which would otherwise be unwarranted in view of peculiar circumstances of the case.

**(d) Civil service---**

----Period spent by a civil servant away from duty due to dismissal from service or absence from duty, etc.---"Leave without pay" or "leave of the kind due" granted to a civil servant---Purpose and meaning.

In case back benefits as of right were not awarded to the civil servant and he was served with any other penalty after reinstatement in service, the intervening period had to be counted for, otherwise the interruption in the service of a civil servant may entail forfeiture of his service, therefore, the intervening period had to be regularized by treating it as an extraordinary leave without pay or leave of the kind due or leave without pay, as the case may be. The regularization of the intervening period was a totally separate matter and had no bearing on the penalty imposed upon the civil servant. The competent authority may condone interruptions in service provided that the gaps were not due to any fault or willful act of the employee. The service gaps were usually regularized as extraordinary leave without pay or leave of the kind due. Terming absence period as extraordinary leave without pay was not a punishment, rather, a treatment given to regularize the period spent away from duty. Nor could a concession given to a civil servant that his absence from duty be treated as extraordinary leave without pay mean that major penalty imposed in the same order was wiped off. Nevertheless, the powers given to treat the period of absence as extraordinary leave without pay or leave of the kind due were to be exercised after due application of mind and considering the facts and circumstances of a case.

National Bank of Pakistan v. Zahoor Ahmed Mengal 2021 SCMR 144; NAB v. Muhammad Shafique 2020 SCMR 425; Federation of Pakistan v. Mamoon Ahmed Malik 2020 SCMR 1154 and DIG, NH & MP, Karachi v. Ghulam Mustafa Mahar 2019 SCMR 95 ref.

Khan Muhammad Vehniwal, Advocate Supreme Court for Petitioners (in C.P. No. 517-L of 2016).

Rana Shamshad Khan, Additional A.G., Ch. Zafar Hussain Ahmad, Additional A.G. along with Shaukat Ali, DSP, Munir Hussain, DSP, Naeem Cheema, Law Officer, Imran Ashraf, S.P., Muhammad Ijaz Khan, Lit. Officer and Muhammad Anwar Yasir, Lit. Officer for Petitioners (in C.Ps. Nos. 1019-L, 1062-L, 1232-L of 2016 and C.P. No. 1929-L of 2017).

Mahmood Ahmad Qazi, Advocate Supreme Court for Respondents (in C.P. No. 1929-L of 2017).

Hasan Riaz, Research Officer-Civil Judge, SCRC, Islamabad for Research Assistance.

Date of hearing: 11th February, 2021.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**We consider in these petitions the scope of entitlement of a civil servant to back benefits on his reinstatement in service after his wrongful removal or dismissal has been set-aside or on his being restored to his post after the penalty imposed on him has been set-aside. We also consider the treatment of the period spent by a civil servant away from duty (due to dismissal from service or absence from duty, etc.) and the purpose and meaning of the terms leave without pay or leave of the kind due granted to a civil servant.

Brief facts of the petitions

2. In C.P. 517-L of 2016, the petitioner, Muhammad Sharif, Sub-Inspector in Punjab Police, was compulsorily retired from service by the departmental authority. He preferred a departmental appeal and on expiry of the period stipulated for its decision, moved an appeal before the Punjab Service Tribunal ("Tribunal"). The Tribunal reinstated him in service though the period since the onset of compulsory retirement till reinstatement in service was directed to be treated as leave without pay. He now prays that this intervening period be treated with pay. The department has also called in question the order of reinstatement of Muhammad Sharif in CP 1062-L of 2016.

3. In C.P. 1019-L of 2016, the respondent, Roqyya Khushnood, Lady Traffic Warden, was dismissed from service by the Chief Traffic Officer, Lahore. The appellate authority taking a lenient view reinstated her in service but the period spent away from duty was treated as leave without pay. The Tribunal accepted her appeal and the period during which she remained out of service was adjudged to be considered as leave of the kind due. The department now prays that the Tribunal's interference with the departmental proceedings be overturned.

4. In C.P. 1232-L of 2016, the respondent, Riasat Ali, Constable, was dismissed from service by the departmental authority. The appellate authority taking a lenient view reinstated him in service. Nevertheless, minor penalty of censure was imposed and the period between dismissal and reinstatement was directed to be treated as leave without pay. The Tribunal accepted the civil servant's appeal and held that the period during which he was kept away from duty be treated as leave of the kind due. The penalty of censure was, however, maintained. The department now prays that the order of the Tribunal be reversed.

5. In C.P. 1929-L of 2017, the respondent, Dr. Muzaffar Nasrullah Chattha, Consultant Orthopedic Surgeon, was awarded major penalty of forfeiture of two years of service for absence which was reduced to forfeiture of one year in departmental appeal. The period of absence was to be treated as extraordinary leave without pay. The Tribunal accepted his appeal and decided that the period of absence be treated as earned leave.

6. The petitioners have sought leave of this Court under Article 212(3) of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution") to appeal against the decisions of the Tribunal.

**Back Benefits**

7. At the very outset, it is important to underline that the term back benefits has not been mentioned in the service laws of Punjab or Pakistan, however, the term has a wide usage in the sub-continental jurisprudence, including ours, for a longtime. According to Black's Law Dictionary[1], Back Pay is the salary that an employee should have received but did not because of an employer's unlawful action. Back Pay Award[2] is a judicial decision that an employee or ex-employee is entitled to an accrued but uncollected salary or benefits. The purpose of a back pay award is to make the employee whole i.e., restore the economic status quo that would have obtained but for the wrongdoing on the part of the employer.[3] Back pay is a compensation for the tangible economic loss resulting from an unlawful employment practice.[4] Back pay largely translates into back benefits under our jurisprudence. "Back

benefits" are, therefore, retroactive payments.[5] Even though the term back benefits is wider than back pay as it includes other benefits but for the purposes of this case we restrict the meaning of back benefits to arrears of pay or back pay.[6]

8. Reinstate in service means to place again in a former state or position[7] from which the person had been removed.[8] Reinstatement is effected from the date of dismissal with back pay from that date.[9] A reinstated employee is to be treated as if he had not been dismissed and is therefore entitled to recover any benefits (such as arrears of pay) that he has lost during his period of unemployment. However, pay in lieu of notice, ex gratia payments by the employer, or supplementary benefits, and other sums he has received because of his dismissal or any subsequent unemployment will be taken into account.[10]

9. An employee, i.e. civil servant in this case, whose wrongful dismissal or removal has been set-aide goes back to his service as if he were never dismissed or removed from service. The restitution of employee, in this context, means that there has been no discontinuance in his service and for all purposes he had never left his post. He is therefore entitled to arrears of pay for the period he was kept out of service for no fault of his own. No different is the position where an employee has been served with a penalty like reduction in rank or withholding of increment(s) or forfeiture of service, etc. and the penalty has been set-aside. The employee stands restored to his post with all his perks and benefits intact and will be entitled to arrears of pay as would have accrued to him had the penalty not been imposed on him. This general principle of restitution fully meets the constitutional requirements of fair trial and due process (Articles 4 and 10-A[11]) besides the right to life (Article 9[12]) which includes the right to livelihood ensuring all lawful economic benefits that come with the post. Reinstating an employee but not allowing him to enjoy the same terms and conditions of service as his colleagues is also discriminatory (Article 25[13]). All this snowballs into offending the right to dignity (Article 14[14]) of an employee for being treated as a lesser employee inspite of being reinstated or restored into service.

10. The "concept of reinstatement into service with original seniority and back benefits" is based on the established principle of jurisprudence that "if an illegal action/wrong is struck down by the Court, as a consequence, it is also to be ensured that no undue harm is caused to any individual due to such illegality/wrong or as a result of delay in the redress of his grievance."[15] If by virtue of a declaration given by the Court a civil servant is to be treated as being still in service, he should also be given the consequential relief of the back benefits (including salary) for the period he was kept out of service as if he were actually performing duties.[16] A civil servant once exonerated from the charges would stand restored in service as if he were never out of it and would be entitled to back benefits.[17] A five Member Bench of this Court in Inspector-General of Police, Punjab v. Tariq Mahmood[18] authoritatively reiterated:

> "[T]he grant of back benefits to an employee who was reinstated by a Court/Tribunal or the department is a rule and denial of such benefit is an exception on the proof of that such a person had remained gainfully employed during such period."

11. It follows that where the order of dismissal, removal or reduction in rank is set aside unconditionally, back benefits are to be paid necessarily.[19] The grant of back benefits to an employee who has been illegally kept away from his employment is a rule and denial of service benefits to such reinstated employee is an exception.[20] When a civil servant is reinstated in service and his dismissal from service is held to be illegal and for no fault of his, then his reinstatement in service would mean that he has always been in service and as a consequence be paid salary from the day he was illegally removed or dismissed from service. One of the exceptions of not granting full back benefits is that if the reinstated employee had accepted another employment or engaged in any profitable business during the intervening period; in such a case, the said amount would be set off against the salary.[21] This is now available as an instruction under Sl. No. 155, Vol-II, Esta Code, 2007 edition.

12. This principle of restitution and payment of back benefits also finds its presence under the second proviso to section 16 of the Punjab Civil Servants Act, 1974 ("Act") which deals with back benefits in the shape of arrears of pay in the event that the order of dismissal or removal or reduction in rank is set-aside in the following manner:-

> Provided further that where a civil servant has been dismissed or removed from service or reduced in rank, he shall, in the event of the order of dismissal, removal from service or reduction in rank being set aside, be entitled to such arrears of pay as the authority[22] setting aside the order may determine.

13. In the past, the concept of arrears of pay was dealt with by Fundamental Rule 54 ("FR") and Civil Service Rule (Punjab) 7.3 ("CSR") issued by the Federal Government and the Punjab Government, respectively. The said Rules provide as follows;

> F.R. 54.-Where a Government Servant has been dismissed or removed is reinstated, the revising or appellate authority may grant to him for the period of his absence from duty:-
>
> (a) if he is honourably acquitted, the full pay to which he would have been entitled if he had not been dismissed or removed and, by an order to be separately recorded, any allowance of which he was in receipt prior to his dismissal or removal; or
>
> (b) if otherwise, such portion of such pay and allowances as the revising or appellate authority may prescribe.
>
> In a case falling under clause (a), the period of absence from duty will be treated as a period spent on duty.
>
> In a case falling under clause (b), it will not be treated as a period spent on duty unless the revising or appellate authority so directs.
>
> Explanation:-In this rule, "revising authority" means the "authority" or "authorised Officer" as defined in the Government Servants (Efficiency and Discipline) Rules, 1973, who passes the final order on the case and not the authority who passes an order on appeal.
>
> CSR 7.3. When a Government Servant who was dismissed or removed from service, is reinstated, the revising or appellate authority may grant to him for the period of his absence from duty:
>
> a) If he is honourably acquitted, the full pay to which he would have been entitled if he had not be dismissed or removed and by an order to be separately recorded any allowances of which he was in receipt prior to his dismissal or removal; or
>
> b) If otherwise, such proportion of such pay and allowances as the revising or appellate authority may prescribed"
>
> In a case falling under clause (a) the period of absence from duty will be treated as a period spent on duty. In a case falling under clause (b) it will not be treated as period spent on duty unless the revising or appellate authority so directs.
>
> Note 1.--This rule is absolute and unconditional and so the question of lien does not arise in the case of Government Servant who is dismissed from service and reinstated on appeal when the period of unemployment between the date of dismissal and reinstatement is declared by the appellate authority as duty.
>
> Administrative Instruction.--Post vacated by a dismissed Government Servant may be filled substantively subject to the condition that the arrangements thus made will be reverse if the dismissed Government Servant is reinstated on appeal.
>
> Note 2.-The term 'revising authority' as used in this rule includes an authority revising its own orders.

14. FR and CSR predate the Constitution and the Act. After the promulgation of the Constitution in 1973, FR and CSR were given protection under Article 241 of the Constitution, albeit subject to their consistency with the Constitution and till such time that a law was made under Article 240 by the appropriate legislature. Further, section 23(2) of the Act[23] provided that any rules, orders or

instructions already in force before the commencement of the Act shall in so far as they were not inconsistent with the provisions of the Act, be deemed to be the Rules made under the Act. Thus, the position emerging post 1973 is that Fundamental Rules, Civil Service Rules (Punjab) and other orders or instructions in respect of terms and conditions of service shall remain subject to the Act and in case of any inconsistency, the provisions of the Act shall prevail. Therefore, for the purposes of back benefits, we give primacy to the proviso to section 16 of the Act and examine and interpret it keeping the spirit and wisdom of FR 54 and CSR 7.3 in view.

15. Coming back to the second proviso to section 16 of the Act, it is important to structure the discretion to be exercised by the authority or court in granting arrears of pay after the order of dismissal, removal or reduction in rank has been set-aside. This discretion is to be structured keeping in mind the constitutional provisions discussed above, the wisdom handed down by the jurisprudence evolved till date and the administrative and financial oversight envisaged under FR, CSR and the Esta Code. The reinstatement or restoration of an employee to the post may be due to the following different reasons: (a) purely on merits; (b) on technical grounds without touching the actual merits of the case and (c) on the ground of leniency where the actual order is either converted into a lesser penalty or totally set-aside.

16. An employee on reinstatement on merits cannot be deprived of back benefits. Any such deprivation would be against the constitutional rights (discussed above) guaranteed to an employee. Besides, CSR 7.3 (a) also points in this direction. In case of reinstatement or restoration to a post on merits, the employee is entitled to full back benefits and there is no discontinuity of service, thus the question of intervening period does not arise in such a case. The discretion under the second proviso to section 16 of the Act is to be exercised in favour of the employee by granting him all the back benefits.

17. However, the above principle of grant of back benefits is qualified by a situation where the order of reinstatement is conditional; either civil servant's dismissal from service is declared illegal for a defect in disciplinary proceedings or the penalty is modified to be on the lower side with the result that the civil servant is reinstated. In the former situation, the merits of the case and the determination of the fault of the employee go untouched, even though he stands reinstated. Here, an inquiry could still be made into the employee's conduct or his conduct may be considered such as to call for a departmental inquiry. The de novo proceedings could be initiated from the stage where the defect had crept in.[24] In such a situation, the entitlement with regard to back benefits is put off till the final determination with regard to the civil servant's conduct. If he is found at fault, the competent authority could justifiably deny him part of the back benefits.[25] And, in the latter situation, the civil servant is not declared blameless; rather, his penalty is reduced and, therefore, part of back benefits, as necessitated by the implications of reduced penalty, may justifiably be denied to him.

18. We also feel inclined to underscore that a civil servant cannot be burdened with the loss of service benefits without attributing any charge to him. Appellate authorities, without saying a word about the charge, often, as in two of these petitions, reinstate a civil servant taking a lenient view or on compassionate ground or on the ground of proportionality. This view usually becomes the ground to deny back benefits to the reinstated civil servant. It is underlined for the sake of clarity that the matter of 'leniency' or 'compassion' or 'proportionality' does not erode the charge rather it does not consider the award of penalty to be appropriate in the case. It may so happen that the charge stands established yet the authority or the court, applying leniency or compassion or proportionality as standard, feels inclined to extend concession of reinstatement to the civil servant. Notably the civil servant in such a case is not reinstated unconditionally and, therefore, he may be denied a portion of pay - while maintaining a proportion between the gravity of the fault of the civil servant and special/extenuating circumstances of the case - he would otherwise get on reinstatement. It would be in step with the second proviso to section 16 of the Act and would also be consistent with the spirit of

FR 54(b) and CSR 7.3(b). If an employee is reinstated in such an eventuality, the authority or the court needs to clearly state that though the charge ascribed to the employee stood proved, concession is being shown to him to avoid the rigors of major penalty, which would otherwise be unwarranted in view of peculiar circumstances of the case.

Leave without pay or leave of the kind due

19. In case back benefits as of right are not awarded to the civil servant and he is served with any other penalty after reinstatement in service, the intervening period has to be counted for, otherwise the interruption in the service of a civil servant may entail forfeiture of his service[26], therefore, the intervening period has to be regularized by treating it as an extra ordinary leave without pay or leave of the kind due or leave without pay, as the case may be. It is pointed out that the regularization of the intervening period is a totally separate matter and has no bearing on the penalty imposed upon the civil servant. The competent authority may condone interruptions in service provided that the gaps are not due to any fault or willful act of the employee.[27] The service gaps are usually regularized as extraordinary leave without pay or leave of the kind due. Terming absence period as extraordinary leave without pay is not a punishment, rather, a treatment given to regularize the period spent away from duty.[28] Nor could a concession given to a civil servant that his absence from duty be treated as extraordinary leave without pay mean that major penalty imposed in the same order is wiped off.[29] Nevertheless the powers given to treat the period of absence as extraordinary leave without pay or leave of the kind due are to be exercised after due application of mind and considering the facts and circumstances of a case.

20. We, therefore, hold that a civil servant on unconditional reinstatement in service is to be given all back benefits and the only exception justifying part withholding of back benefits could be that he accepted gainful employment/engaged in profitable business during the intervening period. In case, the dismissal/removal of a civil servant is declared illegal for a defect in disciplinary proceedings without attending to the merits of the case, the entitlement to back benefits may be put off till the inquiry is conducted in the matter finally determining the fault of the civil servant. In case, where there is some fault of the civil servant, including a situation where concession of reinstatement is extended to the civil servant while applying leniency or compassion or proportionality as standard and where penalty is modified but not wiped off in a way that the civil servant is restored to his position, the back benefits will be paid as determined by the authority/court in the manner discussed above in this judgment. We, however, reiterate that "gainful employment/ profitable business" creates an overarching exception that would cover all cases involving the question of back benefits.

21. Turning to the petitions in hand, it is seen that the petitioner in C.P. 517-L of 2016, who was compulsorily retired from service by the departmental authority, was reinstated by the Tribunal observing that no evidence had been produced against him during the departmental proceedings and that the departmental action was devoid of merit and justification. Even so, the Tribunal chose to strip the civil servant of service benefits for the period he was kept at bay by relying on "the dictum set by the apex Court in 2011 PLC (C.S.) 1003". It has been noticed by us that the judgment reported as 2011 PLC (C.S.) 1003 was not rendered by this Court but refers to a decision of the Balochistan Service Tribunal delivered in the case of Dr. Abdul Naseer v. Government of Balochistan where the civil servant who remained suspended from 31.10.2002 to 14.04.2007 was eventually dismissed. The Balochistan Service Tribunal observed that the civil servant was entitled to benefits for the period of suspension though he was not given benefits for the period he was out of service on the principle of no work, no pay. Strangely, the Balochistan Service Tribunal directed the civil servant "to be reinstated in service with all back benefits from the date of his suspension till date" i.e. the date of decision. The period spent away from duty also fell within that period. In any case, the reliance of the Tribunal on the judgment of the Balochistan Service Tribunal in view of law laid down by this Court is misplaced and not sustainable. When the Tribunal did not ascribe any guilt to the petitioner, he should have been

reinstated with all back benefits subject to the exception of not having remained gainfully employed during the intervening period. Therefore, C.P. 517-L of 2016 is converted into appeal and allowed and the intervening period between compulsory retirement and reinstatement be considered as if the petitioner were on duty. Consequently, C.P. 1062-L of 2016, preferred by the department against the same judgment of the Tribunal, is disposed of accordingly.

22. In C.P. 1019-L of 2016, the respondent was reinstated on compassionate grounds by the appellate departmental authority yet no responsibility was fixed on her and the Tribunal ordered that the period of her absence be treated as leave of the kind due. As the appellate authority accepted her explanation and did not impose any penalty on her, she could not be refused back benefits unless she remained gainfully employed during the period spent away from duty, which is not the case here. Therefore, C.P. 1019-L of 2016 is disposed of in the terms that the intervening period between dismissal and reinstatement be considered as if the respondent were on duty.

23. In C.P. 1232-L of 2016, the respondent was reinstated by the appellate departmental authority though minor penalty of censure was awarded to him which was maintained by the Tribunal. The absence which was treated as leave without pay was converted by the Tribunal into leave of the kind due. It is true that the respondent was not exonerated of his guilt. Only the penalty was reduced. The Tribunal while affirming the penalty of censure failed to discuss the question of arrears of pay that would have become due to the respondent under the second proviso to section 16 of the Act. In the peculiar facts and circumstances of this case, we do not find it appropriate to remand the matter to the Tribunal at this late stage and, therefore, considering the nature of the penalty of censure, we dispose of C.P. 1232-L of 2016 in the terms that the intervening period between dismissal and reinstatement be considered as if the respondent were on duty.

24. In C.P. 1929-L of 2017, the respondent was awarded major penalty of forfeiture of two years of service for absence which was reduced to forfeiture of one year in departmental appeal. The period of absence was to be treated as extraordinary leave without pay. The Tribunal accepted his appeal and decided that the period of absence be treated as earned leave. The absence of the respondent refers to the period for which he had sought leave on medical grounds, though his request remained undecided. On the other hand, disciplinary proceedings were initiated against him. The Tribunal accepted the respondent's appeal on merits with the end result that the absence be considered as earned leave. Here again, we find the decision of the Tribunal just and proper in the circumstances of the case and, therefore, the petition is dismissed and leave refused.

MWA/M-24/SC Order accordingly.

**2021 S C M R 1008**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shahand Yahya Afridi, JJ**

**DIVISIONAL SUPERINTENDENT PAKISTAN RAILWAYS, RAWALPINDI and others---Appellants/Petitioners**

**Versus**

**Syed USMAN ALI and others---Respondents**

Civil Appeals Nos. 864 to 872 of 2017 and Civil Appeals Nos. 1090 to 1116 and 1059 to 1075 of 2019 and Civil Petitions Nos. 324 to 334, 430 and 431 of 2019, 2853 of 2016 and C.M.A. No. 5767 of 2016 and Civil Petitions Nos. 2104 to 2109 and 2980 to 3006 of 2019 and C.M.As. Nos. 5918 to 5926 of 2016, decided on 8th October, 2019.

(On appeal against the judgment of Federal Service Tribunal, Islamabad, dated 10.05.2016, 18.10.2018, 06.08.2018, 28.11.2018, 23.05.2016, 27.03.2019 and 08.05.2019 passed in Appeals Nos. 68 to 76(R)CS of 2013 and 4322 to 4334, 4654 to 4658 and 4406 to 4414(R)CS of 2017 and 868 to 884(R)CS of 2016 and 1465 to 1467, 1469 to 1472, 1474 to 1477, 1468 and 1473(R)CS of 2016 and 1402(R)CS/2013 and 58 to 63(R)CS of 2017 and 4040 to 4060 and 4303 to 4308(R)CS of 2017)

**Civil service---**

----Temporary Labour Appointments/daily wagers in Pakistan Railways---Regularization in service---Whether date of regularization would operate from the date of initial appointment---Held, that respondents-employees were appointed as daily wagers/Temporary Labour Appointments (TLAs) in the year 2006/2007---Subsequently their services were regularized with immediate effect under the Regularization Policy, 2012---As the said Policy of 2012 was with immediate effect i.e. 20-02-2012, the respondents could not claim the regularization from the date of their initial appointment---Furthermore previous Regularization Policies of 1985 and 2000 were not applicable to the respondents---No illegality was found in the regularization of the respondents under Regularization Policy, 2012 from the date of regularization i.e., 20-02-2012---Appeals were allowed and impugned judgment of Service Tribunal was set aside.

Hafiz Hafiz ur Rehman, Advocate Supreme Court and M.A. Sheikh, Advocate-on-Record for Appellants (in C.As. Nos.864-872/2017, 1059-1075/2019 and 2853/2016).

Jawad Mahmood Pasha, Advocate Supreme Court for Appellants (in C.As. Nos. 1090-1116, 324-334, 430-431, 2104-2109 and 2980-3006 of 2019).

Ijaz Buriro, CEO/GM, Sufian Dogar, CPO and Salman Kazmi, Legal Directorate for Pakistan Railways (on Court's Notice).

Zulfiqar Ahmed Bhutta, Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Respondents (in C.As. Nos.864-872 of 2017).

Zulfiqar Khalid Malooka, Advocate Supreme Court for Respondents (in C.A. 2853 of 2016).

Nemo for Respondents (in C.As. Nos. 1091-1116, 1059 to 1075 of 2019 and C.Ps. Nos. 2104-2109, 325, 326, 329-331 of 2019).

Dates of hearing: 7th and 8th October, 2019.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**Respondents who were working as daily-wagers or on Temporary Labour Appointment ("TLA") for Pakistan Railways, were regularized in terms of Regularization Policy dated 20.02.2012, with immediate effect. The claim of the respondent employees is that they ought to have been regularized from the date of their initial appointment i.e., 2006/2007.

2. The question before this Court is to identify the Regularization Policy announced and adopted by Pakistan Railways which is applicable to the case of the respondents. It is an admitted position that the

respondents were appointed as daily wagers/TLAs in the year 2006/2007. The Chief Executive Officer of Pakistan Railways along with Human Resource Head tendered appearance and have filed all the Regularization Policies announced or approved by Pakistan Railways. It is important to reproduce these policies in a chronological order;

i. Regularization Policy, 1985 (dated 21.04.1985)

"PAKISTAN RAILWAYS, HEADQUARTERS OFFICE, LAHORE No:- 831-E/ 132-XIV(E.Policy) Dated: -21-4- 1985 All Divisional Superintendents, (including D.S"W" Moghalpura and Extra Divisional Offices, Pakistan Railways. REGULARIZATION OF SERVICES OF WORKERS APPOINTED ON AD HOC BASIS/ SUBSTITUTES. It has been decided that all the (Workers) who were appointed on adhoc basis or as substitutes against permanent posts and have been working for more than One year be absorbed on regular basis. 2. The services of such staff will be regularized from the dates they were originally appointed to the posts and one day breaks, if any, made after three months services, will be recouped by grant of leave due. 3. The formalities of placing requisitions through employment Exchange, advertisement etc are dispensed with. 4. Their services may be regularized through properly Constituted Selection Committee of the appropriate level. This issues with the approval of the competent authority. Sd/- for General Manager (Personnel)"

ii. Regularization Policy, 2000 (dated 08.05.2000)

"PAKISTAN RAILWAYS HEADQUARTERS OFFICE LAHORE No.831-E/ 132-XVI(E.Policy) Dated 08.05.2000 The Additional General Managers, IBU, PBU & FBU, Pakistan Railways, Headquarters Office, LAHORE. The Deputy General Managers, Pakistan Railways, Headquarters Office, LAHORE. All Divisional Superintendents, Including DS /W/ Moghalpura, Pakistan Railways. REGULARIZATION OF AD HOC / TEMPORARY EMPLOYEES Please refer to Joint Secretary/Tech:, Ministry of Railways, Islamabad's letter No.1(4)/2000(E.I) Dated 07.04.2000 addressed to all Divisional Superintendents with endorsement to the

General Manager (Operations) and Director Vigilance, P.R. HQ. Office, Lahore, on the above subject. The Ministry has observed that Divisional Superintendents have regularized the services of the TLA Staff against the instructions issued for regularization of the employees engaged after cut of date. In this context, attention is invited to this office letters No.831- E/ 132-XV(E.Policy) Dated 04.08.1999 and 28.08.1999 wherein it was categorically directed that services of ad hoc employees and substitutes appointed upto 26.12.1992 who meet the laid down conditions for regularization of ad hoc and substitute employees only on the Pakistan Railways be regularized through duly constituted selection committees no such instructions for regularization of the services of TLA staff have been issued by this office. The competent authority has, therefore, directed that regularization of such staff employed after cut off date may . be withdrawn. Ministry has also requested the Director/Vigilance for investigation of such cases where irregularity of regularization of ineligible staff was committed by the Divisions and submit report within one month. It is, therefore, requested to please furnish details of such irregularity, if committed, otherwise a certificate be given that no such irregularities have been made which may be furnished by 15th May, 2000 by return FAX. . Sd/- (ANJUM TALAT) For General Manager/Personnel"

iii. Regularization Policy, 2008 (dated 14.01.2008)

"PAKISTAN RAILWAYS HEADQUARTERS OFFICE ICE LAHORE From: G. M/DPC. To: The Managing Director/ Pakistan Railways Islamabad Quote Ref. No. 803-E/7-4-X/ 1 (APOIV) Dated 11/1/2008. Sub:- REGULARIZATION OF SERVICES OF FORMER CLASS-IV STAFF ENGAGED ON TLA-DIRECTIVES OF HONOURABLE FEDERAL MINISTER FOR RAILWAYS. Ref:- Your letter No.220-E/Regularization/TLA dated 17-12-07. The matter was examined by the competent authority and held that the target date for

regularization of temporary staff is 8-9-07 as such the staff who have completed 3 years TLA Service on that date will be considered for regularization w.e.f. 8-9-07 and not from the date of their initial appointment. Similarly the TLA former Class-IV staff selected as Trade Apprentice or appointed on regular basis will be considered regularized from their actual date of regularization instead of their initial appointment. Sd/- (MUHAMMAD ALAM) for General Manager/ Personnel

iv. Regularization Policy, 2012 (dated 20.02.2012)

"GOVERNMENT OF PAKISTAN MINISTRY OF RAILWAYS (RAILWAYS BOARD) No.14(8)/ 05-E-11(Vol.III) Islamabad, 20th February, 2012 1 General Manager/Operations, Pakistan Railways, Headquarters Office, Lahore. 2. General Manager/M&S, Pakistan Railways, Headquarters Office, Lahore. 3 General Manager/Development, Pakistan Railways, Headquarters Office, Lahore. 4. The Chief Personnel Officer, Pakistan Railways, Lahore. 5 M.D/Locomotive Factory Pakistan Railways, Risalpur. 6. Managing Director/ CSF, Pakistan Railways, Lahore. 7. The Inspector General Police, Pakistan Railways, Lahore. Subject: REGULARIZATION OF CONTRACTUAL AND DAILY WAGE WORKERS. I am directed to refer to this Ministry's letter of even number dated 18-01-2012 on the above subject under which following eligibility criteria as per direction of the Cabinet Committee on regularization of Contractual and Daily Wage Workers has been circulated. Accordingly, employees meeting the eligibility criteria should be regularized with immediate effect as per following procedure already notified on 18-01 2012. (reproduced below) 4) "Contractual Employees: All contractual employees who have completed at least one year of uninterrupted contractual appointment as on December 31, 2011 are to be regularized except the following: i. Contractual employees working against project posts; ii. Contractual employees working against posts that are to be

filled through the Federal Public Service Commission, and iii. Contractual employees who do not possess the prescribed qualifications and eligibility criteria for the posts they have been appointed against. B) Daily Wage Workers All daily wage workers who have completed three consecutive terms of appointment of 89 days each as on December 31, 2011 are to be regularized with immediate effect except the following: i. Employees working against project posts ii. Employees, if any, working against posts that are to be filled through the Federal Public Service Commission, and iii. Employees who do not possess the prescribed qualifications and eligibility criteria for the posts they have been appointed against. 2. Orders of the competent authority should first be obtained for creation of posts to absorb employees to be regularized. Necessary action should please be taken immediately and a compliance report be submitted to the Ministry within 14 days positively. 3. Details of all contractual or daily wage employees not meeting the yardstick for regularization should be conveyed to this Ministry on the enclosed proforma within three week positively. 4. Case of contractual/daily wage employees working against regular posts to be filled through the Federal Public Service Commission should be dispatched to the Ministry on case-to-case bases with complete justification for regularization. It must also be ensured that no contractual or daily-wage employee who has crossed the date of superannuation is regularized. 5. The preceding instructions apply to all posts in BS-1 to BS-17 only." 2, All previous instructions/guidelines issued by this Ministry on the subject issue may be treated as superseded. 3. It is reiterated that all cases of regularization of Contractual and Daily Wage Workers may be finalized on emergent basis and a final report in the matter must be furnished to this Ministry within one week, positively. 4. This issues with the approval of competent authority. Sd/-

(GULZAR MUHAMMAD) Director Establishment"

3. Perusal of the above policies reveals that in 1985 all the workers who were appointed on ad hoc basis or as substitutes against permanent posts for more than one year were absorbed on regular basis and their services were regularized from the date of their initial appointment to the posts. Thereafter, in the year 2000, it was reiterated that the applicability of Regularization Policy, 1985 was restricted to ad hoc employees and substitutes appointed up to 26.12.1992. As the respondents were admittedly appointed in the years 2006/2007, Regularization Policy, 1985 was not applicable to them.

4. Thereafter, a fresh Regularization Policy was introduced in the year 2008, which was for the first time applicable to temporary staff and required that the staff must have completed three years of service as TLA by 08.09.2007, when they were to be considered for regularization which would take effect from the date of the policy. This policy with a cut-off date of 08.09.2007 was not applicable to the respondents who were appointed in 2006/2007 and had not completed three years of service by 08.09.2007. Finally, Regularization Policy 2012, inter alia, provided for the regularization of daily-wage workers who had completed three consecutive terms of appointment of 89 days as on 31.12.2011 to be regularized with immediate effect. Pakistan Railways regularized the services of the daily-wagers/TLAs appointed in the years 2006/2007 under this policy with immediate effect. The said policy also provided in paragraph-2 that all previous instructions/ guidelines issued by the Ministry on the subject may be treated as having been superseded.

5. The respondents were time and again asked to identify the Regularization Policy under which they seek regularization from the date of initial appointment. Their response has been largely evasive and have unconvincingly pointed towards the Regularization Policy, 1985 in support of their claim. It appears that respondents were not fully aware that the Regularization Policy of the year 1985 was modified and the said policy was restricted to the appointments of adhoc employees and substitutes appointed upto 26.12.1992, as reaffirmed in Regularization Policy, 2000 (above). It is also important to point out that the said policy did not strictly provide for regularization of daily-wagers or TLAs. Thereafter, the Regularization Policy for the year 2008 is also not applicable to the current respondents as they were appointed in 2006/ 2007 and in order to avail the benefit of Regularization Policy, 2008 they had to complete three years of service by 08.09.2007 if they were to be considered for regularization under the policy. Therefore, the only policy available in the field which was applicable to the facts of the respondents was Regularization Policy, 2012 under which the respondents have already been regularized by the appellant. As the said policy is with immediate effect i.e., 20.02.2012, -the respondents cannot claim the regularization from the date of initial appointment.

6. Learned counsel for the respondents tried to refer to general case law on regularization but could not cite a precedent that has discussed the above Regularization Policies announced or approved by Pakistan Railways.

7. We, therefore, find no illegality in the regularization of the respondents under Regularization Policy, 2012 from the date of regularization i.e., 20.02.2012. The impugned judgment is not sustainable and is, therefore, set aside.

8. For the above reasons, the listed appeals are allowed, whereas the listed petitions are converted into appeals and allowed accordingly.

9. In the end we wish to point out that during the course of hearing, we have noticed that Pakistan Railways could have dealt with this matter more ably and it is only after summoning the Chief Executive Officer and the Human Resource Head of Pakistan Railways that we are able to understand the scheme of the Regularization Policies. We hope that, in future, the Chief Executive Officer will improve the quality of governance at Pakistan Railways so that such like litigation can be avoided or minimized.

MWA/D-8/SC Appeals allowed.

**2021 S C M R 1390**

**[Supreme Court of Pakistan]**

**Present: Sajjad Ali Shah and Syed Mansoor Ali Shah, JJ**

**CHIEF SECRETARY, GOVERNMENT OF PUNJAB, LAHORE and others---Petitioners**

**Versus**

**Ms. SHAMIM USMAN---Respondent**

Civil Petition No. 1097-L of 2020, decided on 1st July, 2021.

(Against the order of Lahore High Court, Lahore dated 19.02.2020, passed in W.P. No. 231042 of 2018)

**Constitution of Pakistan---**

----Arts. 212 & 199---Punjab Service Tribunals Act (IX of 1974), S. 4(1)(b)---Service matters---Terms and conditions of service of a civil servant---Bar of jurisdiction of the High Court---Scope---High Court had no jurisdiction to entertain any proceedings in respect of terms and conditions of service of a civil servant which could be adjudicated upon by the Service Tribunal under the Punjab Service Tribunals Act, 1974.

Non-obstante clauses of Articles 212(1) and (2) of the Constitution began with "notwithstanding anything hereinbefore contained," thus overriding, inter alia, the constitutional jurisdiction of the High Court under Article 199, which was already "subject to the Constitution".

The High Court had no jurisdiction to entertain any proceedings in respect of terms and conditions of service of a civil servant which could be adjudicated upon by the Service Tribunal under the Punjab Service Tribunals Act, 1974 ('the Act'). High Court as a constitutional court should always be mindful of the jurisdictional exclusion contained under Article 212 of the Constitution. Any transgression of such constitutional limitation would render the order of the High Court void and illegal.

National Assembly Secretariat through Secretary v. Mansoor Ahmed and others 2015 SCMR 253 and Ali Azhar Khan Baloch and others v. Province of Sindh and others 2015 SCMR 456 ref.

It was only under section 4(1)(b) of the Act that no appeal could lie to a Tribunal against an order or decision determining the "fitness" of a person to be appointed or promoted and fell outside the purview of the jurisdiction of the Tribunal. In order to fall in the exception envisaged under section 4(1)(b) of the Act, the order must determine "fitness" of a civil servant to an appointment or promotion. Therefore, unless the jurisdiction of the Tribunal was ousted under section 4(1)(b) of the Act, assumption of jurisdiction by the High Court in respect of matters of terms and conditions of a civil servant was unconstitutional and impermissible.

Muhammad Arif Raja, Additional A.G. Punjab for Petitioners.

Mian Muhammad Nawaz, Advocate Supreme Court and Ms. Tasnim Amin, Advocate-on-Record for Respondent.

Date of hearing: 1st July, 2021.

**ORDER**

**SYED MANSOOR ALI SHAH, J.**---Brief facts of the case are that on the recommendations of the Provincial Selection Board in its meeting held on 31.10.2012, the Chief Minister/Competent Authority was pleased to decline the case of proforma promotion of the respondent vide letter dated 19.11.2012 issued by the Services and General Administration Department, Government of the Punjab. The respondent instead of challenging the said order before the Punjab Service Tribunal ("Tribunal") constituted under the Punjab Service Tribunals Act, 1974 ("Act"), invoked the constitutional jurisdiction of the High Court wherein through the impugned order dated 19.02.2020 direction was issued to the petitioner department "to grant proforma promotion to the petitioner to Grade-20 " This has been challenged before us, primarily on the ground that the High Court had no jurisdiction to entertain the said matter in the light of the constitutional bar contained in Article 212 of the Constitution.

2. There is more to this case. Before challenging the rejection of her proforma promotion by the competent authority in the recent writ petition impugned before us, the respondent had earlier approached High Court through a constitutional petition[1] wherein she prayed that the petitioner-department "be directed to finalize the promotion case promotion be made effective from 26.05.2012 along with other service benefits." This petition was entertained and allowed. The High Court vide order dated 18.09.2012 directed the competent authority "to immediately place the case of the respondent for promotion from grade 19 to grade-20 before the authority for its consideration in accordance with law, rules and regulations. The said exercise shall be completed within the period of a month from the receipt of order under intimation to this Court through its Deputy Registrar (Judicial)." As no material steps were taken in this regard by the department, the respondent filed a contempt petition[2] before the High Court. The contempt petition was disposed of vide order dated 21.05.2018 when the decision of the competent authority rejecting the claim of the respondent to proforma promotion was placed before the Court. The Court left it open to the respondent to challenge the departmental order, if so advised. The respondent instead of challenging the order of the competent authority before the Tribunal under the Act, once again approached the High Court through a constitutional petition[3] which is subject matter of this case. The High Court vide impugned order dated 19.02.2020 was pleased to direct the petitioner-department to grant proforma promotion to the respondent in grade-20, hence this petition.

3. Learned Additional Advocate General, Punjab representing the petitioner-department at the very outset points out that the interference by the High Court in service matters is clearly barred under Article 212 of the Constitution and therefore the impugned order is without jurisdiction and thus not sustainable.

4. Learned counsel for the respondent, when asked how such direction could have been issued by the High Court in the light of bar contained in Article 212 of the Constitution, had no explanation to render and kept referring to the interference by the High Court in the matter in the earlier constitutional petition. It is regrettable that inspite of clear constitutional bar under Article 212 of the Constitution, the matter was not only earlier entertained by the High Court but then dealt through a contempt petition and finally when the petitioner-department declined the proforma promotion of the respondent, the High Court directed the department to promote the respondent. It is important to revisit the relevant portion of Article 212 of the Constitution, which states as follows:

> 212. Administrative Courts and Tribunals. (1) Notwith-standing anything hereinbefore contained, the appropriate Legislature may by Act provide for the establishment of one or more Administrative Courts or Tribunals to exercise exclusive jurisdiction in respect of-
>
> (a) matters relating to the terms and conditions of persons who are or have been in the service of Pakistan, including disciplinary matters;
>
> (b) matters relating to claims arising from tortious acts of Government, or any person in the service of Pakistan, or of any local or other authority empowered by law to levy any tax or cess and any servant of such authority acting in the discharge of his duties as such servant; or
>
> (c) matters relating to the acquisition, administration and disposal of any property which is deemed to be enemy property under any law.
>
> (2) Notwithstanding anything hereinbefore contained, where any Administrative Court or Tribunal is established under clause (1), no other court shall grant an injunction, make any order or entertain any proceedings in respect of any matter to which the jurisdiction of such Administrative Court or Tribunal extends and all proceedings in respect of any such matter which may be pending before such other court immediately before the establishment of the Administrative Court or Tribunal other than an appeal pending before the Supreme Court, shall abate on such establishment:

Provided that the provisions of this clause shall not apply to an Administrative Court or Tribunal established under an Act of a Provincial Assembly unless, at the request of that Assembly made in the form of a resolution, Majlis-e-Shoora (Parliament) by law extends the provisions to such a Court or Tribunal[4].

5. We cannot lose sight of the fact that non-obstante clauses of Articles 212(1) and (2) begin with "notwithstanding anything hereinbefore contained," thus overriding, inter alia, the constitutional jurisdiction of the High Court under Article 199, which is already "subject to the Constitution." Article 212(1)(a) provides that a Tribunal established under the law will enjoy exclusive jurisdiction in the matters relating to terms and conditions of persons who are or have been in the service of Pakistan, including disciplinary matters. The term "terms and conditions" is clearly spelt out in Chapter II of the Punjab Civil Servants Act, 1974 and the rules thereunder. Article 212(2) in unambiguous terms states that no other Court can grant injunction, make any order or entertain any proceedings in respect of any matter to which the jurisdiction of such Administrative Court or Tribunal extends. Scope of jurisdiction and powers of the Tribunal are provided in sections 4 and 5 of the Act. The High Court, therefore, has no jurisdiction to entertain any proceedings in respect of terms and conditions of service of a civil servant which can be adjudicated upon by the Tribunal under the Act. It is only under section 4(1)(b) of the Act that no appeal can lie to a Tribunal against an order or decision determining the "fitness" of a person to be appointed or promoted and falls outside the purview of the jurisdiction of the Tribunal. In order to fall in the exception envisaged under section 4(1)(b) of the Act, the order must determine "fitness" of a civil servant to an appointment or promotion. In the instant case, the order under challenge before the High Court pertained to the eligibility of the petitioner to be even considered for proforma promotion due to the seniority of a large number of officers awaiting promotion before her and in no manner determined the "fitness" of the respondent. High Court as a constitutional court should always be mindful of the jurisdictional exclusion contained under Article 212 of the Constitution. Any transgression of this constitutional limitation will render the order of the High Court void and illegal.[5] Therefore, unless the jurisdiction of the Tribunal is ousted under section 4(1)(b) of the Act, as described above, assumption of jurisdiction by the High Court in respect of matters of terms and conditions of a civil servant is unconstitutional and impermissible. Even the direction passed in the earlier constitutional petition, in this case, was impermissible under the Constitution.

6. For the above reasons, this petition is converted into appeal and allowed. The impugned order dated 10.02.2020 is, therefore, set aside and the constitutional petition of the respondent is dismissed. The respondent is free to challenge order dated 19.11.2012 before appropriate forum, in accordance with law, if so advised.

MWA/C-15/SC Appeal allowed.

**2021 S C M R 1492**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ**

**PROVINCE OF PUNJAB and others---Petitioners**

**Versus**

**Hafiz MUHAMMAD AHMAD---Respondent**

C.P. No. 1274-L of 2013, decided on 26th July, 2021.

(Against the order dated 31.05.2013 passed by the Lahore High Court, Lahore in W.P. No.11657 of 2013)

**Law reports---**

----Headnotes/Case notes of judgments published in law reports---Scope---Headnotes were not part of the judgment, therefore, it was neither safe nor desirable (for courts) to cite headnotes in their judgments.

The headnotes preceding the judgment of a court were not a part of that judgment but were the notes prepared by the editors of the law-reports, highlighting the key law points discussed in the judgment and were supplied just to facilitate the reader with a summarized version of the salient features of the case which helped in quickly scanning through the law reports.

Headnotes were at times misleading and contrary to the text of the judgment. Headnotes by the editors of the law-reports could not be taken as verbatim extracts of the judgment and relied upon as conclusive guide to the text of the judgment reported, hence they should not be cited as such. Therefore, it was neither safe nor desirable to cite a dictum by reference to the headnotes.

Salah-Ud-Din v. Zaheer-Ud-Din PLD 1988 SC 221; Nahar Industrial Enterprises Ltd. v. Hong Kong and Shanghai Banking Corporation AIR 2009 SC 6262 and Farhat Nasreen v. Muhammad Hussain PLD 1997 Kar. 204 ref.

Supreme Court observed that it was sanguine that in future the High Courts and the District Courts while referring to a precedent or case law in their judgments and orders would cite the actual text of the judgment rather than place reliance on the headnotes thereof.

Rana Shamshad Khan, Additional A.G. along with Abdul Majeed, Dy. Director ACE for Petitioners.

Nemo for Respondent.

Date of hearing: 26th July, 2021.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**We have heard the learned counsel for the petitioners at some length and have gone through the impugned order and the record of the case, with his able assistance. The learned counsel has not been able to point out any legal error in the impugned order passed by the High Court, which may justify grant of leave to appeal. The impugned order is well-reasoned and we are of the considered view that it does not warrant any interference by this Court. The petition is, therefore, dismissed, and leave declined.

2. We have, however, noted that the High Court has relied on a series of case law, referred to in the impugned order by reproducing the headnotes of the law reports. The headnotes preceding the judgment of a court are not a part of that judgment but are the notes prepared by the editors of the law-reports, highlighting the key law points discussed in the judgment and are supplied just to facilitate the reader with a summarized version of the salient features of the case which helps in quickly scanning through the law reports. It is a matter of common knowledge that the headnotes are at times misleading and contrary to the text of the judgment. Headnotes by the editors of the law-reports cannot be taken as verbatim extracts of the judgment and relied upon as conclusive guide to the text of the judgment reported, hence they should not be cited as such. Therefore, it is neither safe nor desirable to cite a dictum by reference to the headnotes.[1] We are sanguine that in future the High Courts and the District

Courts while referring to a precedent or case law in their judgments and orders will cite the actual text of the judgment rather than place reliance on the headnotes thereof.

MWA/P-12/SC Petition dismissed.

**2021 S C M R 1914**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Muhammad Ali Mazhar, JJ**

**MUHAMMAD RAMZAN---Petitioner**

**Versus**

**The STATE and others---Respondents**

Criminal Petition No. 952 of 2021, decided on 8th October, 2021.

(Against the order of Lahore High Court, Multan Bench dated 12.7.2021 passed in Cr. Misc. No.2824-B of 2021)

**(a) Criminal Procedure Code (V of 1898)---**

----Ss. 161 & 172---Examination of witnesses by the police---Statement of witness recorded in case diary (zimni) prepared under S. 172, Cr.P.C. instead of being recorded separately---Whether such statement constituted a witness statement under S. 161, Cr.P.C.---Held, that under S. 161(3), Cr.P.C. the police officer was to reduce in writing any statement made to him in the course of examination of any person supposed to be acquainted with the facts and circumstances of the case---Police officer was to make a separate record of the statement of each such person but in case the statement of such a person, recorded by the Investigating Officer (IO), was embodied in the case diary instead of being recorded separately, it was at best a procedural lapse on the part of the IO but the statement itself did not lose its character as a statement under S. 161, Cr.P.C.---Distinction between Ss. 161 & 172, Cr.P.C. was that while one dealt with the recording of the statement of witnesses / persons acquainted with the facts and circumstances of the case, the other was the information or opinion of the IO which he gathered and formed during the course of the investigation --- So if while recording his opinion in the case diary, the IO also recorded the statement of a witness, any such statement continued to pass for a statement under S. 161, Cr.P.C. and did not become a part of the case diary under S. 172, Cr.P.C.

Zulfikar Ali Bhutto v. State PLD 1979 SC 53; Nasrullah v. State 1980 PCr.LJ 5; Muhammad Akbar v. State 1985 PCr.LJ 338; Muhammad Tahir v. State 1986 PCr.LJ 3025; Khalid Pervez v. The State 1989 PCr.LJ 1824; Nazar Muhammad v. Mushtaq Ahmad PLD 1996 Lah. 277; Muhammad Riaz v. State PLD 2003 Lah. 290 and Muhktiar Hussain v. State and others - Criminal Miscellaneous No.7627-B/2020 and vide Order dated 29.03.2021 in Ghulam Murtaza v. State and others - Criminal Miscellaneous No. 659-B of 2021 ref.

**(b) Penal Code (XLV of 1860)---**

----Ss. 302, 148 & 149---Qatl-i-amd, rioting armed with deadly weapons, unlawful assembly---Pre-arrest bail, grant of---Further inquiry--- Investigating Officer (IO) categorically stated before the Court that on the basis of the statements of eight independent witnesses recorded by him, the accused, even though present at the site of the occurrence, was neither involved in the commission of the offence nor was he carrying any weapon---Two of the co-accused had a specific role in the crime report but were granted bail by the High Court on similar statement of the IO that they while present at the site of occurrence were not involved in the commission of the offence and were not armed with any weapon---In view of the statement of the IO supported by the statement of the witnesses there were sufficient grounds for further inquiry into the guilt of the accused---Petition for leave to appeal was converted into appeal and allowed, and accused was admitted to post-arrest bail.

James Joseph, Advocate Supreme Court for Petitioner.

Ch. Muhammad Sarwar Sandhu, Additional P.G., Farhat, SHO, Jalil and Ghulam Yasin, I.Os. for the State.

Date of hearing: 8th October, 2021.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**Petitioner seeks leave against the order dated 12.7.2021, wherein post arrest bail in case FIR No.325/2020, under sections 302, 148 and 149, P.P.C., Police Station Shah Jamal, district Muzaffargarh, was denied to the petitioner by the High Court.

2. We have heard the learned counsel for the petitioner, as well as, the learned Additional Prosecutor General and the Investigating Officer (IO). It has been categorically stated before us by the IO that on the basis of the statements of eight independent witnesses recorded by him, the petitioner, even though present at the site of the occurrence, was neither involved in the commission of the offence nor was he carrying any weapon. At this juncture, learned Additional Prosecutor General vehemently pointed out that the statement of witnesses referred to by the IO have been recorded in the case diary (zimni) prepared under section 172 of the Cr.P.C and do not constitute statement of a witness under section 161, Cr.P.C.

3. Under section 161(3), Cr.P.C. the Police officer is to reduce in writing any statement made to him in the course of examination of any person supposed to be acquainted with the facts and circumstances of the case. The Police Officer is to make a separate record of the statement of each such person but in case the statement of such a person, recorded by the IO, is embodied in the case diary instead of being recorded separately, it is at best a procedural lapse on the part of the IO but the statement itself does not lose its character as a statement under section 161, Cr.P.C. The distinction between sections 161 and 172, Cr.P.C is that while one deals with the recording of the statement of witnesses / persons acquainted with the facts and circumstances of the case, the other is the information or opinion of the IO which he gathers and forms during the course of the investigation. So if while recording his opinion in the case diary, the IO also records the statement of a witness, any such statement continues to pass for a statement under section 161, Cr.P.C. and does not become a part of the case diary under section 172, Cr.P.C.[1]

4. We have also noticed that two of the co-accused namely Mukhtiar Hussain and Ghulam Murtaza had a specific role in the crime report but were granted bail[2] by the High Court on similar statement of the Police that they while present at the site of occurrence were not involved in the commission of the offence and were not armed with any weapon.

5. In view of the statement of the investigation officer supported by the statement of the witnesses discussed above, we are of the view that there are sufficient grounds for further inquiry into the guilt of the petitioner. The petitioner (Muhammed Ramzan) is, therefore, admitted to post-arrest bail, subject to furnishing bail bond in the sum of Rs.100,000/- with one surety in the like amount to the satisfaction of the trial Court. This petition is converted into appeal and allowed accordingly.

MWA/M-62/SC Order accordingly.

**P L D 2021 Supreme Court 1**

**Present: Umar Ata Bandial, Maqbool Baqar, Manzoor Ahmad Malik, Faisal Arab, Mazhar Alam Khan Miankhel, Sajjad Ali Shah, Syed Mansoor Ali Shah, Munib Akhtar, Yahya Afridi and Qazi Muhammad Amin Ahmed, JJ**

**JUSTICE QAZI FAEZ ISA and others---Petitioners**

**versus**

**The PRESIDENT OF PAKISTAN and others---Respondents**

Constitution Petitions Nos. 17, 19 of 2019 and C.M.A. No.7417 of 2019 in Constitution Petition No. 19 of 2019 in Constitution Petitions Nos.20-30, 32 and 34 of 2019, decided on 19th June, 2020.

Per Umar Ata Bandial; Manzoor Ahmad Malik, Faisal Arab, Mazhar Alam Khan Miankhel, Sajjad Ali Shah, Munib Akhtar and Qazi Muhammad Amin Ahmed, JJ agreeing; Maqbool Baqar, Syed Mansoor Ali Shah and Yahya Afridi, JJ agreeing with regard to quashing of Presidential reference against the judge but dissenting by not joining the majority as to the directions given to the Federal Board of Revenue for initiating proceedings against the judge's wife and children, and for submitting a report of said proceedings to the Supreme Judicial Council. [Majority view]

**(a) Constitution of Pakistan---**

----Art. 184(3)---Constitutional jurisdiction of the Supreme Court under Art. 184(3) of the Constitution---Scope and pre-requisites---In order to invoke the original jurisdiction of the Supreme Court under Art. 184(3) of the Constitution, the impugned action must be shown to involve a matter of "public importance" arising from the breach of a fundamental right which affected the public at large.

Al-Jehad Trust and another v. Lahore High Court 2011 SCMR 1688 ref.

**(b) Constitution of Pakistan---**

----Arts. 4, 9, 10-A, 184(3) & 209(5)(b)---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner-judge before the Supreme Court calling into question the constitutionality and legality of the reference against him---Maintainability---Fundamental right of the general public which was claimed by the petitioner to be under threat was the derivative right of the independence of the judiciary---Said right was an essential prerequisite for the enjoyment of, inter alia, the principal fundamental right to access justice which was guaranteed to the people by Arts. 4, 9 & 10-A of the Constitution---In the absence of independence of the judiciary, all other facets of the right to access justice were essentially rendered null and void---Unlawful infringements of Art. 209 of the Constitution eroded the independence of the judiciary which was directly connected with the right to access justice---Present petition, therefore, satisfied the two-fold requirements of Art. 184(3) of the Constitution, and was accordingly maintainable.

Sh. Riaz-Ul-Haq v. Federation of Pakistan PLD 2013 SC 501 and Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan PLD 2010 SC 61 ref.

**(c) Constitution of Pakistan---**

----Arts. 209(5) & 209(6) & Preamble---'Independence of judiciary' and 'accountability of judges', concepts of---Complementary concepts---Independence of the judiciary was not primarily for the

benefit of the Judges, but existed instead to secure the interests, rights and benefits enjoyed by the whole of society---If one were to focus only on the protection of the judiciary from the depredations of the organs of the State (howsoever vitally important and crucial that may be), it would not be the independence of judiciary that would result but rather it would be the rule of Judges without any checks and balances---Accordingly, it was only fitting that judicial independence and accountability were treated as being complementary to each other.

**(d) Constitution of Pakistan---**

----Arts. 184(3), 209(5)(b) & 211---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Proceedings before Supreme Judicial Council ('the Council' )---Bar of jurisdiction of courts---Whether Art. 211 of the Constitution that barred jurisdiction of courts in respect of proceedings before the Council was applicable in the present case---Held, that in present proceedings under Art. 184(3) of the Constitution the Supreme Court was neither adjudicating upon the process of the Council nor quashed its notice issued to the petitioner-judge---In fact, in view of the findings recorded in the present judgment, the Supreme Court had simply abated the notice---Factual information underlying the reference did cast a smear on the petitioner's name and could not be ignored; however, without confronting the owners of the foreign properties the information was at present inchoate to form the basis of proceedings under Art. 209 of the Constitution---In such circumstances, the same must be verified to test the veracity of the inference drawn in the reference about the source of funds---Nevertheless, as the reference had been quashed, the notice issued by the Council had no foundation except for the preliminary factual information contained in the reference---In this situation, the notice had rightly been abated because it also lacked the factual and legal material on which the reference was based---Accordingly, Art. 211 of the Constitution had no application to the available facts of the present case---Constitutional petitions were disposed of.

**(e) Constitution of Pakistan---**

----Arts. 184(3), 209(5) & 209(6)---Presidential reference against a judge of the Superior Court before the Supreme Judicial Council ('the Council')---Pre-reference proceedings---Whether the Supreme Court could strike down pre-reference proceedings on judicial review grounds---Reasons for quashing the Presidential reference recorded.

Supreme Judicial Council ('the Council') was a unique (and the only) body which could examine the conduct of a Superior Court Judge and decide whether the said Judge was fit to complete his tenure. Reference, which was an executive action under the Constitution, forwarded to the Council should not be struck down on ordinary judicial review grounds such as unreasonableness and proportionality, as doing so would be belittling its status, ignoring its competence and pre-empting its decisions based on appreciation of the record. Giving the power of judicial review to the Supreme Court to set aside pre-reference proceedings would be tantamount to rejecting the capacity and jurisdiction of the Council to adjudicate upon any question of unreasonableness, proportionality or suitability raised in relation to the merits of the President's actions; it would also open the floodgates of litigation by Judges who were the subject of a reference. Such course of action prima facie appeared to be contrary to the meaning of Article 209 of the Constitution which entrusted all matters regarding the merits of a case to a high powered Constitutional domestic forum within the judiciary.

Khan Asfandyar Wali and others v. Federation of Pakistan PLD 2001 SC 607 and Sabir Iqbal v. Cantonment Board, Peshawar PLD 2019 SC 189 ref.

**(f) Constitution of Pakistan---**

----Arts. 209(5)(b) & 209(8)---Code of Conduct for Judges of the Supreme Court and High Courts (framed by the Supreme Judicial Council under Art. 209 (8) of the Constitution), Preamble---Supreme

Judicial Council Procedure of Enquiry 2005, R. 3(l)---Supreme Judicial Council ('the Council')---Reference against a judge of the Superior Court on grounds of 'misconduct'---Misconduct---Meaning, scope and standard of proof.

Any conduct of a judge which conflicted with the mandated norms in the Code of Conduct for Judges of the Supreme Court and High Courts (framed by the Supreme Judicial Council under Article 209 (8) of the Constitution) ['the Code'] could attract scrutiny for possible misconduct. The Code primarily provided guidance to Judges of Superior Courts on the exemplary qualities they must possess, and it expected that Judges would conduct themselves with integrity, propriety and dignity both in their public and private lives and would not engage in controversy. Therefore, conduct that diverged from these qualities would constitute misconduct.

Articles of the Code were non-legal in nature. A violation of any of these Articles would neither sustain a civil lawsuit nor a criminal prosecution. However, an infringement thereof may very well lead to disciplinary proceedings under Article 209(5) of the Constitution. The Code does not only expect impeccable behaviour from a Judge in the courtroom but it also expected him to maintain these high standards of integrity, propriety and dignity outside the Court. Such qualities and conduct were necessary to preserve not only the prestige and honour of the Judge but also the prestige and honour of the institution of the judiciary. [p. 98] $Q_1$ & $R_1$

Misconduct was any conduct of the Judge which damaged the public's perception about his ability to discharge his duties or which undermined public confidence in the institution of the judiciary regardless of whether such conduct occurred in the professional arena or in the private life of a Judge. [p. 100] $T_1$

The Supreme Judicial Council Procedure of Enquiry, 2005 ('the 2005 Rules') had been framed by the Supreme Judicial Council ('the Council') to implement its mandate and regulate its own proceedings, therefore, they carried special force and stood on a higher pedestal than ordinary laws. The 2005 Rules provided guidelines for the conduct of the Council proceedings and the exercise of its jurisdiction. The Council as the constitutionally empowered body had been utilising the criteria of misconduct noted in Rule 3(l) of the 2005 Rules and elaborated upon in the Code to assess the culpability of Superior Court Judges. Rule 3(l)(i) of the 2005 Rules succinctly encapsulated the normative standards of misconduct provided in the Code whilst Rule 3(l)(iii) included an objective criterion that related to a Judge's professional performance. Both criteria were consistent with the Code. [pp. 93, 94] $M_1$ & $N_1$

The threshold that constituted misconduct for the purposes of Judges of the Superior Courts should manifest the intent and spirit of Article 209 of the Constitution. Accordingly, the standard for the commission of misconduct must not be so high that it was impossible to allege thus rendering Judges unanswerable for their conduct. On the other hand, the threshold for misconduct must also not be so lenient so as to become a weapon in the hands of disgruntled litigants, interest groups or Executive against honest, competent and independent Judges. [p. 96] $O_1$

Misconduct recognised under Article 209(5) of the Constitution gave discretion to the Council to determine whether any alleged conduct of a Judge came under the purview of misconduct. It also laid down a high threshold of misconduct to ensure that trivial indiscretions or infractions of the law by Judges or any minor shortcomings in their personal lives did not render them liable to removal proceedings. At the same time it protected the integrity of the judicial institution by allowing for the removal of Judges whose conduct without constituting a violation of a prescribed law was so improper that it rendered such Judge unfit for holding judicial office. [p. 97] $P_1$

Interpretation of misconduct set out by the Supreme Court in the case of The State v. Mr. Justice Akhlaque Husain (PLD 1960 SC 26) reflected the intent and spirit of Article 209(5) of the Constitution, the Code and the 2005 Rules. [p. 98] $S_1$

The State v. Mr. Justice Akhlaque Husain PLD 1960 SC 26; Lawrence v. Attorney General of Grenada 2007 UKPC 18 at para-25; Clark v. Vanstone 2004 FCA 1105 and Privy Council in Hearing on the Report of the Chief Justice of Gibraltar 2009 UKPC 43 at para-202 ref.

**(g) Constitution of Pakistan---**

----Arts. 209(5)(b) & Fifth Sched., Cl. 4---Code of Conduct for Judges of the Supreme Court and High Courts (framed by the Supreme Judicial Council under Art. 209(8) of the Constitution), Art. II---Federal Service Medical Attendance Rules, 1990, R. 10---Supreme Court Judges (Travelling Allowance) Rules, 1958, Rr. 3(4)(i) & 4(i)---Supreme Court Judges (Leave, Pension and Privileges) Order, 1997, Rr. 20, 21 & 25---UN Economic and Social Council Resolution 2006/23: Strengthening Basic Principles of Judicial Conduct, Cl. 4.7---Family members of a Judge of the Superior Court---Financial affairs---Question as to whether a Judge of the Superior Court needed to be aware/have knowledge of the financial affairs of his independent spouse and adult children---Held, that family members of a Judge were required to be careful (financially, socially and politically), moderate and fair in their dealings and exchange with others so that no controversy arose which may embarrass the Judge---High standards of propriety were expected of a Judge and his family members---Judges were supposed to have knowledge of the financial interests of their family members, however, if they did not, then they were expected to make reasonable efforts to acquire such information, moreso when they were questioned by a competent forum to explain the financial interests of their family members---Accordingly, there was a continuing obligation on a Judge to keep himself informed about the financial interests of his family members.

Judges, like other public office holders, occupied a position of sacred trust. They held positions where they exercised power and authority under the law. Under the Constitution and the law, such a position carried certain benefits and privileges accompanied by obligations and responsibilities. A Judge of the Superior Court was entitled to these perks and benefits which were also enjoyed by his spouse and family. [p. 101] $V_1$

Generally, every adult individual was recognised in law as an independent entity. However, different principles applied in relation to family members of public office holders. This was because any irresponsible act on the part of a family member may reflect adversely on the Judge. [p. 103] $X_1$

Entitlements of the Judge which he shared with his family [his spouse and members of his family who were either dependent on him or with whom he had financial dealings ("family members")] also carried certain responsibilities and obligations. One such obligation was the duty to enjoy these privileges with dignity, probity and discretion. Apart from the material benefits enjoyed by a Judge's family members during and after his service, they also received an advantage from the respect and recognition extended, through association, by people who interacted with them. In these circumstances, the family members of a Judge were required to be careful (financially, socially and politically), moderate and fair in their dealings and exchange with others so that no controversy arose which may embarrass the Judge. Although these responsibilities were shared by family members of all public office holders, they applied with particular force to family members of Judges as the latter were expected to be the embodiment of a person who was 'God fearing, law-abiding, abstemious, truthful of tongue, wise in opinion, cautious and forbearing, blameless, and untouched by greed' [Article II of the Code of Conduct for Judges of the Supreme Court and High Courts (framed by the Supreme Judicial Council under Article 209 (8) of the Constitution]. Accordingly, high standards of propriety were expected of a Judge and his family members. [p. 102] $W_1$

Suo Motu Case No. 5 of 2012 PLD 2012 SC 664 ref.

A Judge was required to make reasonable efforts to be aware about the financial affairs of his family members. This precaution helped to forewarn him about extraneous influences or vested interests which could compromise not only his independence and credibility but also the purity and honour of the institution to which he belonged. To understand the rationale behind the obligation on Judges to

make reasonable efforts to be informed about or to watch over the financial affairs of their family members, one had to understand the nexus of this obligation with the nature of Judges work and the position they occupied in society. Judges exercised pre-eminent authority under the law. They adjudicated disputes between litigants, held parties appearing before them accountable and imposed liabilities and granted relief to such parties. With their authority came an even greater responsibility to decide cases fairly, independently and in accordance with law. In such a situation, it was imperative for a Judge that he should make reasonable efforts to be informed about the financial interests of his family members for the simple reason that if a case came before him which directly or indirectly involved the pecuniary, proprietary or other personal interests of any of his family members, he could recuse himself. [p. 104] $Y_1$ & $Z_1$

Government of N.W.F.P v. Dr. Hussain Ahmad Haroon 2003 SCMR 104 ref.

Another equally, if not more, important reason for requiring Judges to be aware of the financial interests of their family members was that the law's intent was to prevent a Judge's family from becoming a conduit to discreetly influence his opinions and views. This assured the Judge's independence and integrity apart from safeguarding the institution of the judiciary. [p. 105] $A_2$

Judges were supposed to have knowledge of the financial interests of their family members. However, if they did not, then they were expected to make reasonable efforts to acquire such information, moreso when they were questioned by a competent forum to explain the financial interests of their family members. What constituted 'reasonable effort' on the part of Judges would no doubt depend upon the circumstances of each case. However, a plea of lack of knowledge by a Judge in relation to the financial affairs of his family members was untenable in light of the general trend in international practice, the obligations imposed on a Judge under the Code of Conduct for Judges of the Supreme Court and High Courts [framed by the Supreme Judicial Council under Article 209(8) of the Constitution] and the law relating to public office holders including Judges. Accordingly, there was a continuing obligation on a Judge to keep himself informed about the financial interests of his family members. [p. 107] $B_2$

**(h) Mala fides---**

----Types of mala fides---'Mala fide in law' and 'malice in fact'---Distinction.

Traditionally, an action actuated with an ulterior purpose to harm another or benefit oneself was classified as an act that was malicious or malice in fact. However, in recent times, the Supreme Court had recognised another category of mala fides, namely, mala fide in law. Even though both were a species of mala fide, yet each had distinct ingredients and consequences. [p. 109] $C_2$

Said Zaman Khan v. Federation of Pakistan 2017 SCMR 1249 ref.

Apart from the generally recognised category of actions driven by a foul personal motive described as malice in fact, there was another category of reckless action in disregard of the law termed as mala fide in law. The first type of mala fide was attributed to a person whereas the second was levelled against the impugned action. While the former was concerned with a collateral purpose or an evil intention to hurt someone under the pretence of a legal action, the latter dealt with actions that were manifestly illegal or so anomalous that they lacked nexus with the law under which they were taken. Thus it was clear that malice in fact and mala fide in law had different ingredients, the former being comprised of factual elements with the latter being composed of legal features, that needed to be established as such for the respective consequences to ensue. Secondly, an accusation of mala fide in law involved more than errors of misreading the record or non-application of the law or lack of proportionality in the impugned action. Instead, this was a serious allegation of wanton abuse or disregard of the law. However, when an ulterior motive to cause harm was proved then the repercussions of malice in fact followed. It was for this reason that a mere allegation that an action had been taken wrongly could not be grounds to hold that such action suffered from mala fide in law or malice in fact. [p. 110] $D_2$

Imputing mala fide of either kind to a person or an action was a grave accusation. It should not be made lightly but could only be done when the facts or legal defects justified its use. [p. 110] $E_2$

**(i) Mala fides---**

----'Malice in fact'---Scope and standard of proof.

Plea of malice in fact required a high standard of proof. The rationale behind such an approach was that a plea of malice in fact frustrated the process of justice. After a complainant established malice in fact against a person, the entire proceeding by the latter was brought to an end. This resulted in the merits of the case being ignored. Moreover, the reputation of the person, against whom an allegation of malice in fact was made, became tarnished and if the said allegation was proved then his repute was forever ruined. He was made out to be avicious individual who harboured ill-intentions against others. Such were the negative consequences of this plea, if established. This reasoning applied with greater force if such an allegation was made against senior public functionaries of the State. [p. 110] $F_2$

Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan PLD 2010 SC 61 ref.

Federation of Pakistan v. Saeed Ahmed Khan and others PLD 1974 SC 151 ref.

An allegation of malice in fact was unlike any other ordinary allegation. It carried with it a stigma for the accused which could not easily be washed away. If a lower standard of proof for malice in fact was adopted, that would open the floodgates for recalcitrant litigants to make such allegations against their opposing side to derail the process of justice and to defame their opponents in Court. Therefore, to limit these allegations to only genuine claims of malice in fact, any person who wished to raise this plea must prove it to the satisfaction of the Court on the basis of positive and cogent evidence. [p. 111] $G_2$

Moreover, there was also an obligation on litigants to plead the particulars of malice in fact in detail. Vague allegations could not establish a plea of malice in fact. [p. 111] $H_2$

Federation of Pakistan v.. Saeed Ahmed Khan and others PLD 1974 SC 151 ref.

Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri PLD 1969 SC 14 ref.

Accordingly, to raise the plea of malice in fact, it was necessary for the relevant party to pinpoint the specific incidents/events/actions which demonstrated the malice in fact of the opposing side. [p. 112] $I_2$

Allegation of malice in fact would be defeated if it was proved that a complaint levelled against a person was true. [p. 118] $R_2$

**(j) Constitution of Pakistan---**

----Arts. 184(3) & 209(5)(b)---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner-judge before the Supreme Court calling into question the constitutionality and legality of the reference against him---Question as to whether the reference was filed with mala fides (malice in fact) due to a judgment the petitioner-judge had authored in the past [Suo Motu Case No. 7 of 2017 (PLD 2019 SC 318)], wherein he had criticized the ruling political party and one of its coalition partners, and against which judgment said two parties had filed a review petition containing certain adverse remarks against the petitioner---Reasons for quashing the Presidential reference recorded.

Recourse to a review petition was a lawful remedy granted to litigants by the Constitution itself. Reference in question was based on the ownership of petitioner's wife's undeclared foreign properties. With the blemish attached to the ownership of undeclared foreign properties, such ownership automatically attracted speculation about its status and source. Recourse to a lawful remedy under Article 209(5) of the Constitution could not be malicious unless for ill motives an information alleged wrong or distorted or exaggerated facts, or sought relief that was inordinate or extraneous to the

undisputed facts. Furthermore, the observations in the judgment [Suo Motu Case No. 7 of 2017 (PLD 2019 SC 318)], given by the petitioner-judge paled in comparison to the remarks passed by the Supreme Court in another judgment Air Marshal (Retd.) Muhammad Asghar Khan v. General (Retd.) Mirza Aslam Baig (PLD 2013 SC 1) in which far stronger observations about the country's politicians and political system failed to draw any adverse reaction from the Federal Government against any Judge. Consequently, no malice in fact was made out on such ground. Constitutional petitions were disposed of. [pp. 112, 113] $J_2$, $K_2$ & $L_2$

**(k) Constitution of Pakistan---**

----Arts. 184(3) & 209(5)(b)---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Reference based on information provided by a journalist---Plea of petitioner-judge that said journalist had a reputation of planting false stories---Question as to whether the reference had been filed against the petitioner-judge with mala fides (malice in fact)---Reasons for quashing the Presidential reference recorded.

When an information against a person (whether a public office holder or a private person) was to be evaluated, it was the substance, veracity and consequence of the information which mattered and not the credibility and credentials of the informant. Receipt of information from any source was cognizable by the Supreme Judicial Council under Article 209(5) of the Constitution and was sufficient to sustain an inquiry against a Judge of the Superior Courts. Word 'any' used in Article 209(5) of the Constitution meant that the antecedents of the informant were irrelevant unless the information was false, concocted, distorted, exaggerated or sought relief that was excessive in relation to the accepted facts. In the present case the underlying information in the reference to the extent of ownership of the foreign properties by the petitioner's wife and children was not disputed by the petitioner. In such circumstances the background of the informant became insignificant. As a result, the plea of malice in fact raised by the petitioner was repelled. [pp. 113, 114] $M_2$ & $N_2$

Pakistan Tobacco Company Ltd v. Federation of Pakistan 1999 SCMR 382 ref.

**(l) Constitution of Pakistan---**

----Arts. 184(3) & 209(5)(b)---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Confidentiality of a reference---Scope---Details of the reference leaked to the media---Plea of petitioner-judge that the government and its functionaries were behind such leaks---Whether mala fides of Government functionaries in leaking details of the reference---Reasons for quashing the Presidential reference recorded.

Reference filed against a Superior Court Judge had to be kept confidential. To hold any particular person/authority accountable for revealing the details of a reference, there needed to be at least some material on record that connected the leaks to one or more of such persons/authorities. From the chronology of events and case record of the present case it was not evident as to which event triggered the sudden disclosure of the reference. Although the allegation made against the respondents (Government and its functionaries) in the present case raised suspicion, it was still unsupported by any evidence. Consequently it could not suffice to conclusively hold that either one or more of the respondents leaked the reference to the media. On the basis of speculations and suspicions it could not be determined who leaked the reference, therefore no finding with respect to its disclosure and hence of malice in fact against any of the persons who were aware of its contents could be recorded. [pp. 114, 115, 116] $O_2$, $P_2$ & $Q_2$

Justice Shaukat Aziz Siddiqui and others v. Federation of Pakistan PLD 2018 SC 538 ref.

**(m) Constitution of Pakistan---**

----Arts. 4, 90, 184(3) & 209(5)(b)---Rules of Business, 1973, R. 2(1)(ii)---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Assets Recovery Unit, constitution of---Legality---Question as to whether the constitution of the Assets Recovery Unit, which coordinated the collection of evidence against the petitioner-judge was lawful---Reasons for quashing the Presidential reference recorded.

To determine the legality of Assets Recovery Unit's creation, one had to consider whether the requisite legal actions and procedures for its establishment had been adopted by the person(s) competent and authorised to do so under the law. [p. 120] $S_2$

The Assets Recovery Unit (ARU) was a coordinating agency which brought under one umbrella the competent statutory authorities to stem the menace of tax evasion, money laundering and corruption in the country. Accordingly, the ARU was essentially executing the policy of the State to curb financial crimes in the country. It was therefore an executive office, in particular an 'Attached Department' of the Cabinet Division, performing executive functions. Having such status, it did not need the backing of an Act to grant validity to its creation and actions as required by Article 4 of the Constitution. [p. 121] $T_2$

Perusal of Rule 2(1)(ii) of the Rules of Business, 1973 made it clear that for any 'Attached Department' to exist and function, it needed to have a direct relation with a Division and had to be declared by the Federal Government as an 'Attached Department.' The material on record showed that these two essential steps were taken in relation to the creation of ARU. The first of such documents, demonstrating the procedure followed for constituting the ARU as an 'Attached Department,' was the Summary for the Cabinet dated 11-09-2018, followed by a Notification dated 19-09-2018. Said two documents proved that the creation of the ARU as an 'Attached Department' of the Cabinet Division was approved by the Cabinet itself. Article 90 of the Constitution established that the Cabinet with the Prime Minister as its head was the Federal Government. Consequently, it became evident that the approval for the creation of the ARU was given by the Federal Government. As a result, the two-fold requirement listed in Rule 2(1)(ii) of the Rules of Business, 1973 for the constitution of ARU as an 'Attached Department' had been satisfied in the present case. [pp. 121, 122] $U_2$ & $V_2$

The ARU did not act directly but instead operated through its members who had been borrowed from various statutory bodies of the country including the Federal Investigation Agency ("FIA"); the National Accountability Bureau ("NAB"); the Federal Board of Revenue ("FBR"); and the State Bank of Pakistan ("SBP"). As a result, the ARU was manned primarily with individuals whose powers and jurisdiction were exercised under a statutory regime. Accordingly, the ARU was simply a coordinating office attached to the Cabinet Division with the main purpose of facilitating the collaborative efforts of the relevant statutory functionaries. It therefore could not be accused of adversely affecting the rights of any citizen without the backing of law. This was made clear by the composition of the ARU and its terms of reference ("TORs") which were also set out in a Notification dated 06-11-2018. Clause 3 of the said TORs confirmed that when it came to dealing with the assets of citizens of Pakistan, the ARU was only authorised to act through its designated officer/member from the relevant department/ agency. Since these designated officers/members were simultaneously serving in statutory agencies, they were vested not only with the powers granted by the relevant statute governing their agency but were also bound by the procedural safeguards and obligations laid down in such a statute. As a result, any action attributed to the ARU in relation to the assets of citizens of Pakistan was taken through

competent authorities strictly in accordance with the law. There was no defect in the creation of the Assets Recovery Unit. [pp. 122, 124] $W_2$ & $X_2$

**(n) Notification---**

----Non-publication of notification in Gazette---Effect---In ordinary circumstances, the non-publication of a Notification in the Gazette did not affect its validity except for in limited situations such as when a statute made publication in the Gazette mandatory or where the rights and liabilities of other persons were involved. [p. 125] $Y_2$

Saghir Ahmed v. Province of Punjab PLD 2004 SC 261 and Bahadur Khan v. Federation of Pakistan 2017 SCMR 2066 ref.

**(o) Constitution of Pakistan---**

----Arts. 184(3), 199(b)(ii), 209(5)(b) & 260---Rules of Business, 1973, R. 4(6) & Sched. V-A, Sr. No. 1A ---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Special Assistant to Prime Minister (SAPM) on Accountability appointed as Chairman of an Assets Recovery Unit (ARU), which received information about the foreign properties in the name of the petitioner-judge's wife---Question as to whether the appointment of SAPM on Accountability was lawful---Reasons for quashing the Presidential reference recorded.

Rule 4(6) and serial number 1A of Schedule V-A of the Rules of Business, 1973 gave the Prime Minister the power to appoint a Special Assistant with such status and functions as he desired. Office of Special Assistant to the Prime Minister (SAPM) was mentioned in Article 260 of the Constitution as one of the posts that was excluded from the definition of 'Service of Pakistan.' Therefore, at present the post of an SAPM was a political appointment. Accordingly, the said appointment was made in the discretion of the Prime Minister and was not regulated by statute. Court would interfere in such appointment if the Prime Minister exercised his discretionary power 'arbitrarily, unlawfully or in a fanciful manner,' or if the appointment of a person as SAPM suffered from 'cronyism, nepotism or political favour.' In such a situation the appointment would be struck down under Article 199(b)(ii) of the Constitution. As a result, there was a judicial check on the exercise of the Prime Minister's discretion. Nonetheless, such relief could not be claimed in collateral proceedings. [p. 126] $Z_2$ & $A_3$

Muhammad Adil Chattha v. Federation of Pakistan (Constitution Petition No. 63 of 2018) and Qazi Hussain Ahmad v. General Pervez Musharraf PLD 2002 SC 853 ref.

In the present case petitioner had neither challenged the appointment of SAPM on Accountability in separate proceedings under Article 199(b)(ii) of the Constitution nor had he placed any material on record which disqualified the incumbent SAPM on Accountability from being appointed to such office. Therefore, without proof of illegal or arbitrary exercise of discretion by the Prime Minister, the Court could not interfere with his decision on this matter. Accordingly, there was no unlawfulness in the appointment of the SAPM on Accountability. [p. 127] $B_3$

**(p) Constitution of Pakistan---**

----Arts. 14(1), 184(3) & 209(5)(b)---Right to privacy---Scope---Surveillance---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Tax and property records of the petitioner-judge and his family were accessed/searched to frame the reference against the petitioner---Question as to whether such searches were a breach of the petitioner's and his family's right to privacy enshrined in Art. 14(1) of the Constitution and thus amounted to covert surveillance---Reasons for quashing the Presidential reference recorded.

Surveillance primarily involved the monitoring or recording of a person's movements, conversations or other activities and communication. However, in the present case the petitioner-judge had not produced any evidence which demonstrated that either the petitioner or his family had been monitored or their communications had been intercepted. Only proof which the petitioner referred to was the admission by the respondents that the tax and property records of the petitioner and his family had been accessed from Government and public records. Indeed, there was no allegation that any information was obtained from the petitioner's personal or private records. [p. 128] $C_3$

Guarantee under Article 14(1) of the Constitution was for the privacy of home and that too subject to law. Such privacy did not extend to the tax and property records of either the petitioner or his family members. [p. 135] $J_3$

Mohatarma Benazir Bhutto v. President of Pakistan PLD 1998 SC 388 distinguished.

**(q) Constitution of Pakistan---**

----Art. 260---Service of Pakistan---Scope---Office of Judge of the Superior Court---Such office fell within the category of "Service of Pakistan". [p. 130] $D_4$

Air Marshal (Retd.) Muhammad Asghar Khan v. General (Retd.) Mirza Aslam Baig PLD 2013 SC 1 ref.

**(r) Public servant---**

----Person holding judicial office---Such person was a public servant. [p. 131] $E_3$

Salahuddin v. Frontier Sugar Mills and Distillery Ltd. PLD 1975 SC 244 ref.

**(s) Public office---**

----Public servant, office of---Main ingredients.

Following are the five main ingredients present in the office of a public servant:

(i) The office was a trust conferred for a public purpose;

(ii) The functions of the office were conferred by law;

(iii) The office involved the exercise of a portion of the sovereign functions of Government whether that be executive, legislative or judicial;

(iv) The term and tenure of the office were determined by law; and

(v) Remuneration was paid from public funds. [p. 132] $F_3$

**(t) Constitution of Pakistan---**

----Art. 176---"Public servant"---Scope---Judges of the Supreme Court were public servants. [p. 132] $G_3$

**(u) Constitution of Pakistan---**

----Arts. 184(3) & 209(5)(b)---Income Tax Ordinance (XLIX of 2001), S. 216(3)(p)---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Tax records of the petitioner-judge and his family disclosed by Federal Board of Revenue to the Assets Recovery Unit of the government---Question as to whether such disclosure was lawful, and whether the exception under S.216(3)(p) of the Income Tax Ordinance, 2001 applied to the petitioner-judge and his wife---Reasons for quashing the Presidential reference recorded.

Section 216(1) of the Income Tax Ordinance, 2001 ('the 2001 Ordinance') declared the tax records of taxpayers to be confidential. However, the same section also contained the exceptions to this general rule. For purposes of present case, the exception found in section 216(3)(p) of the 2001 Ordinance provided that disclosure of tax records was not precluded where the same may be required by any officer or department of the Federal Government or of a Provincial Government for the purpose of 'investigation' into the 'conduct and affairs' of any public servant. Judge of the Supreme Court was a public servant for the purposes of section 216(3)(p) of the 2001 Ordinance. In relation to the Judge of

a Superior Court, an 'investigation' into his 'conduct and affairs' could only mean an investigation for the purposes of Article 209 of the Constitution. However, it was critical (for the exception in section 216(3)(p) to be attracted) that the 'investigation' was duly sanctioned and was being carried out in accordance with law at the time that the clause was invoked. If this was not so then clause (p) of section 216(3) could have no application and the information could not be disclosed. In the present case there was no proper investigation for the purposes of Article 209 when the Assets Recovery Unit (ARU) of the government sought the tax information of the petitioner from the Federal Board of Revenue (FBR). Consequently, the exception in section 216(3)(p) of the 2001 Ordinance was not applicable to the facts of the present case. [p. 132] $G_3$ & $H_3$

As far as the petitioner's wife, the language of section 216(3)(p) of the 2001 Ordinance suggested that it was not limited only to information relating to the public servant. However, since the jurisdictional prerequisites for carrying out an investigation against the petitioner did not exist, it therefore followed that the request made by the ARU for the tax information and the release of such information by the tax authorities did not fall within the exception contained in section 216(3)(p) of the 2001 Ordinance. As a result, the disclosure by the FBR was contrary to law. Presidential reference against the petitioner was quashed and in consequence thereof the proceedings pending in the Supreme Judicial Council against the petitioner-judge, including the show-cause notice issued to him, stood abated. [pp. 133, 169, 170] $I_3$, $O_4$ & $P_4$

**(v) Constitution of Pakistan---**

----Art. 209(5)---Reference sent by the President to the Supreme Judicial Council against a Judge of the Superior Court---Standard of proof and care required for a Presidential reference stated.

Article 209(5) of the Constitution only required the President to form an opinion that a Superior Court Judge may have been guilty of misconduct. He did not need to be certain that a Judge was guilty of the conduct alleged. Nevertheless, his opinion must be based on positive and affirmative material and on the assurance that necessary legal and procedural safeguards had been observed in the preparation of the reference. Therefore, for the President to even form a prima facie opinion about a Judge's guilt, the President needed to verify that there had been compliance with the settled rules on authorisation; he needed to obtain proper advice on the contents of the reference from competent persons; and he needed to ascertain that there was sufficient material before him which satisfied the high thresholds of care and proof expected in the preparation of a reference. [p. 136] $K_3$

Complaint against a Superior Court Judge could be generated in one of three ways: a Presidential reference, a private complaint and the exercise of suo motu jurisdiction by Supreme Judicial Council. Since all three methods were distinct, therefore, the quality of their information/ complaint would also be different. Presidential reference was articulated on a different level compared to a private complaint. When the President, as the Head of State, sent a reference against a Judge, he had at his disposal State agencies and access to competent legal advice. He could utilise these to verify that valid authorization for investigation had been granted and that materials that were relevant and reliable were available to support the reference. However, stating that despite all the machinery of the Federal Government at his command, the President was only required/obliged to send a perfunctory reference which contained legal and factual defects, then nothing would be more harmful to the independence of the judiciary. Such a relaxation would give the Executive the room to send frivolous references with the expectation that if some nexus between the material and the object of Article 209 of the Constitution was demonstrated, the Supreme Judicial Council would itself find substance in the reference. Therefore, to protect and defend the independence of the judiciary, a reference sent by the President must contain authorised, serious, considered and verified information in both respects, legal and factual, in order to possess the gravity that should accompany a Presidential action. [p. 137] $L_3$ & $M_3$

**(w) Constitution of Pakistan---**

----Arts. 48, 90, 184(3) & 209(5)(b)---Rules of Business, R. 15-A, Sched. V-B, Entry No. 35---Procedure for filing a Presidential reference before the Supreme Judicial Council---Scope---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Federal Law Minister providing authorization for investigation conducted prior to the filing of the reference---Whether such authorization was unlawful and could only be provided by the President at his discretion---Reasons for quashing the Presidential reference recorded.

President could not authorise an investigation against a Judge in his own discretion. Sending of a reference was an executive act performed by the Federal Government. To declare that the President was to authorise investigations into Superior Court Judges in his discretion would amount to inviting the President to arrogate powers in complete contradiction of the Constitutional scheme. [p. 143] $N_3$ & $O_3$

Under the Constitutional process for performing the executive function of authorising an investigation into an information against a Superior Court Judge, the President should act on the advice of the Prime Minister or the Cabinet under Article 48(1) of the Constitution and not invoke his discretionary power under Article 48(2). [p. 143] $P_3$

Entire process of a Presidential reference fell under the advice of the Prime Minister according to the Rules of Business, 1973. It was he (i.e. the Prime Minister) who had to advise the President on the steps that needed to be taken in a matter that bore relation to Article 209(5) of the Constitution. As a result, the approval by the President of the advice of the Prime Minister was necessary for commencing an investigation into a complaint made against a Judge of the Superior Court. Initial authorisation by the President on the advice of the Prime Minister to commence an investigation against a Judge in a complaint falling under Article 209(5) was a legal requirement for sustaining the validity of a Presidential reference that was ultimately filed with the Supreme Judicial Council. Such oversight by the highest Constitutional functionaries protected Judges from whimsical and arbitrary interference by Executive authorities in their personal judicial independence and privacy. Without valid authorisation the foundation of the reference suffered from an initial illegality which amounted to a Constitutional violation. Consequently, such an infirmity was fatal to the superstructure that was erected on it. In the present case with regard to the reference there was no such authorisation on record for commencing an investigation against the petitioner-judge. Instead the record showed that the only authorisation sought, for probing the complaint against the petitioner, was from the Law Minister who under any interpretation of the Constitution had no jurisdiction in such behalf. The competent authorities, namely, the Prime Minister and the President were never approached by the Ministry of Law for the requisite authorization. As a result the present reference was defective and illegal. Presidential reference against the petitioner was quashed and in consequence thereof the proceedings pending in the Supreme Judicial Council against the petitioner-judge, including the show-cause notice issued to him, stood abated. [pp. 145, 146, 168, 169, 170] $R_3$, $S_3$, $T_3$, $J_4$, $O_4$ & $P_4$

Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan PLD 2010 SC 61 ref.

**(x) Constitution of Pakistan---**

----Arts. 99(2) & 99(3)---Rules of Business, 1973---Said Rules were constitutionally mandated rules and must be followed by the Government in carrying out its functions. [p. 144] $Q_3$

Messrs Mustafa Impex, Karachi v. The Government of Pakistan PLD 2016 SC 808 ref.

**(y) Constitution of Pakistan---**

----Arts. 4, 10A, 184(3) & 209(5)(b)---Income Tax Ordinance (XLIX of 2001), Ss. 116(1)(b) & 116(2)---Foreign Exchange Regulation Act (VII of 1947) S. 5---Anti-Money Laundering Act (VII of 2010),

Ss. 2(q), 2(s) & 3 & Sched., section XIIA---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Allegations in the reference, validity of---Whether there was any substance in the allegations contained within the reference---Reasons for quashing the Presidential reference recorded.

Counsel for the Government did not make any submissions on the petitioner's alleged violation of the provisions of Foreign Exchange Regulation Act, 1947. In fact, he did not even nominate the relevant provisions of the said law. There was also no material, before the Court, which supported the said bald allegation of a violation of the claimed foreign exchange regime under Foreign Exchange Regulation Act, 1947. Allegation of violating the provisions of the said Act was unsubstantiated assumption neither backed by evidence nor supported by the relevant provision that was allegedly breached. As such, it could not be sustained. [pp. 149, 169] $U_3$, $V_3$ & $M_4$

Next allegation levelled against the petitioner was that of money laundering. The primary legislation governing said subject matter was the Anti-Money Laundering Act, 2010 ('the 2010 Act'). Reading of sections 2 and 3 of the 2010 Act provided that a necessary element of the offence of money laundering was the commission of a predicate offence. The execution of this offence gave birth to the proceeds of crime, the movement of which attracted the criminal conduct of money laundering. Therefore, without the commission of a predicate offence there could be no offence of money laundering. In the present case, the main allegation against the petitioner was that he had failed to declare the foreign properties owned by his wife and children in his wealth statements. The contents of a wealth statement were provided in Section 116(1) of the Income Tax Ordinance, 2001 ('the 2001 Ordinance'). In order to attract the offence of money laundering the non-declaration of assets under Section 116 of the 2001 Ordinance must constitute a predicate offence. Only then may the allegation of money laundering be made against the petitioner. Perusal of section XIIA of Schedule to the 2010 Act revealed that the non-declaration of assets by a taxpayer under the 2001 Ordinance was not a predicate offence under 2010 Act. The reference had not alleged the commission of any specific predicate offence under the 2010 Act by any person. Therefore, prima facie no case of money laundering could be made out against the petitioner on such count. [pp. 150, 169] $W_3$ & $L_4$

Equally, it was relevant to note that the four sections of the 2001 Ordinance were only inserted in the Schedule to the 2010 Act as predicate offences on 20-05-2016 whereas the foreign properties were purchased by the petitioner's family in 2011 and 2013. Consequently, it was an established fact that before 2016, violations of the 2001 Ordinance could not form the basis of a money laundering allegation. [p. 151] $X_3$

There was no allegation or material on record suggesting that the petitioner or his wife transferred money to the foreign country via illegal means/methods. [p. 152] $Y_3$

Primary allegation in the reference against the petitioner was his failure to disclose the foreign properties of his wife and children in his wealth statement. In the reference it was alleged that this obligation was imposed on the petitioner by virtue of Section 116(1)(b) of the 2001 Ordinance. No notice was ever issued to the petitioner or his wife under section 116(1). Petitioner's wife did receive notices for the years 2015, 2017 and 2018 but those were issued under section 114(4) of the 2001 Ordinance for her failure to file her tax returns. Moreover, on a perusal of the reference it became evident that the entire case under section 116 of the 2001 Ordinance rested on the opinion of an Assistant Commissioner (Inland Revenue) who stated that the petitioner was liable to disclose the foreign properties of his wife and children. Such opinion and that of the respondent-Government was based on a literal reading of section 116(1)(b). Such interpretation of the section 116(1)(b) had never been tested judicially before. Indeed, counsel for the Government candidly acknowledged that there

was no case-law in our jurisprudence on the subject of declaration by a taxpayer of the assets of his spouse and children under section 116(1)(b).On an examination of the (several) instructions published by Federal Board of Revenue (FBR) for completing a wealth statement in tax years subsequent to 2013, it could be noticed that the FBR was itself unsure about the true interpretation of section 116(1)(b) of the Ordinance. Amongst all of the varying constructions of section 116(1)(b), there was also the overriding difficulty that the language of section 116(1)(b) was open to more than one interpretation. [pp. 154, 155, 156, 168] $A_4$, $B_4$, $C_4$ & $K_4$

Neither the Government nor the petitioner produced any case-law or other relevant material to support their respective interpretations of Section 116(1)(b). Even the FBR's own instructions on completing a wealth statement form were unclear and had wavered from year to year. Accordingly, the respondents' decision to charge the petitioner with a violation of section 116 of the 2001 Ordinance on the basis of an interpretation that was devoid of judicial consideration let alone approval, and which lacked any definitive and consistent departmental practice was conjectural. In such a situation, it would be better if this matter was determined in the first instance by the hierarchy of specialised fora specified in the 2001 Ordinance. [p. 157] $D_4$

To establish the source of funds for the acquisition of the foreign properties, the requirements of due process under Article 4 and Article 10A of the Constitution mandated that the first person concerned, namely, petitioner's wife ought to be given an opportunity through sending a notice to explain her sources of funding for the foreign properties and the reasons for not declaring such properties in her wealth statement. Without granting such opportunity/notice, the framing of the reference against the petitioner was premature, hypothetical, and impulsive. Presidential reference against the petitioner was quashed and in consequence thereof the proceedings pending in the Supreme Judicial Council against the petitioner-judge, including the show-cause notice issued to him, stood abated. [pp. 159, 169, 170] $E_4$, $O_4$ & $P_4$

**(z) Interpretation of statutes---**

----Special laws---Scope---When a special law regulated a particular subject area then another law enacted for a different special purpose could not affect the subject matter governed by the former special law---Statutes which were not pari materia could not govern each other's interpretation. [p. 152] $Z_3$

Ghulam Mustafa Jatoi v. Additional District and Sessions Judge 1994 SCMR 1299 and Halsbury's Laws of England (Volume 96, 2018) ref.

**(aa) Constitution of Pakistan---**

----Arts. 48(1), 184(3) & 209(5)(b)---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---President to form an opinion in terms of Art. 209(5) of the Constitution before sending the reference to the Supreme Judicial Council---Meaning and scope---Whether the President could seek advise from those involved in investigating or framing the reference---Reasons for quashing the Presidential reference recorded.

Sub-Article (5) of Article 209 of the Constitution provided that before directing the Supreme Judicial Council ('the Council') to hold an inquiry against a Supreme Court Judge, the President should have formed the opinion that the said Judge may be guilty of misconduct. However, the basis upon and the means by which the President needed to form his opinion was not readily discernible from Article 209(5) of the Constitution. Although it was not for the Court to specify a list of persons from whom legal advice may be sought by the President, however, there were certain persons who should not be approached by the President for legal advice on a reference under Article 209 of the Constitution. Fairness and objectivity dictated that those involved in the investigation and framing of the reference

may brief the President but could not advise him on whether it was maintainable and appropriate for inquiry by the Council. This was because there was a clear conflict of interest for the architects of the reference to opine on the weaknesses of their work. But this was precisely what happened in the present reference. The President discussed the reference and its legal aspects with the Attorney General and the Law Minister. As senior functionaries of the Federal Government, both said persons were admittedly involved in the framing of the reference against the petitioner. Under Article 209(5) of the Constitution, the opinion formed by the President was expected to be considered, fair and objective. President's power clearly granted him the jurisdiction to evaluate the worth of the advice tendered to him. If he was so inclined he may require the same to be reconsidered once by the Prime Minister. In order to be objective and fair the President should rely upon counsel and legal experts not linked with the framing of the reference or working for the Federal Government. President's opinion in the present reference was influenced by the inadmissible advice of individuals who were involved in the preparation of the reference. In these circumstances, it could not be said that the President formed an informed opinion in terms of Article 209(5) of the Constitution, therefore, the reference against the petitioner was defective. Presidential reference against the petitioner was quashed and in consequence thereof the proceedings pending in the Supreme Judicial Council against the petitioner-judge, including the show-cause notice issued to him, stood abated. Constitutional petitions were disposed of.

[pp. 161, 163, 169, 170] $F_4$, $G_4$, $N_4$, $O_4$ & $P_4$

Federation of Pakistan v. Haji Muhammad Saifullah Khan PLD 1989 SC 166 ref.

**(bb) Constitution of Pakistan---**

----Arts. 48(1) &209(5)---Rules of Business, 1973, Sched. V-B---Presidential reference against a judge of the Superior Court sent to the Supreme Judicial Council---Advice of Prime Minister received by the President---Scope---In the filing of a reference the President was bound to act on the advice of the Prime Minister and not the Cabinet---If the reference was substantive, cogent, coherent, rational and lawful, then the President simply had to record his assent, and there was no additional obligation on him to set out his separate reasons---However, if the reference was defective factually and/or legally then the President must state his reasons for disagreement and call for reconsideration of the matter by the Prime Minister in the light of those reasons---If the President subsequently disagreed even with the reconsidered advice, then he was bound by Art. 48(1) to endorse the said advice leaving it for the Supreme Judicial Council to analyse the merits of the reference sent by the President. [p. 167] $H_3$

**(cc) Constitution of Pakistan---**

----Art. 209(5)---Presidential reference sent to the Supreme Judicial Council against a Judge of the Superior Court---Pre-requisites---Federal Government must set out its reasons for preparing and sending a reference against a Judge of the Superior Court---In fact, the summary and statement of reference prepared by the Ministry of Law for the Prime Minister and the President were the documents which contained these reasons---Said documents contained the crux of the reference against a Superior Court Judge, therefore they needed to be factually and legally complete---Failure to comply with such requirement would render the reference unsustainable. [p. 168] $I_4$

**(dd) Constitution of Pakistan---**

----Arts. 184(3) & 209(5)(b)---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Supreme Court unanimously quashed the reference and declared that the same was of no legal effect whatsoever, and in consequence thereof the proceedings pending in the Supreme Judicial Council ("Council") against the petitioner-judge, including the show-cause notice issued to him, stood abated---Supreme Court (with a majority of 7 to 3) gave directions to the Commissioner, Inland Revenue and Federal Board of Revenue to inquire into and seek explanation

from the spouse and children of the petitioner as to the nature and source of the funds whereby the three subject properties in a foreign country were acquired in their names, and also send a report in such regard to the Supreme Judicial Council, which had the powers if it considered justified, to commence proceedings against the petitioner in exercise of its suo motu jurisdiction---Reasons for referring the matter to the Federal Board of Revenue notwithstanding the quashing of the Presidential reference.

[Note: The directions can be found in the short order of the present judgment reported as (Mr.) Justice Qazi Faez Isa and

14 others v. The President of Pakistan and others (PLD 2020 SC 346), headnote (b)]

Notwithstanding the quashing of the Presidential reference against the petitioner-judge, the decision to direct the Federal Board of Revenue (FBR) to commence tax proceedings against the petitioner's wife and children was primarily based on two grounds: to establish that Judges of the Superior Court were answerable for allegations casting aspersions not only on their personal integrity but also on the integrity of the institution; and to honour the petitioner's plea that his wife and children, who were independent taxpayers, should first be asked about their source of funds for the acquisition of the foreign properties. [pp. 170, 172] $Q_4$ & $T_4$

The illegalities in the present reference were a result of its careless and casual preparation. These errors or defects did not erase petitioner's wife's ownership of the foreign properties, the primary fact which formed the basis of the reference and which was not denied by the petitioner. Whilst the ownership of the foreign properties was not disputed, the source of funds for their purchase and the mode by which these funds were transferred abroad required explanation. Otherwise, an unexplained investment by the spouse of a Judge of the Superior Courts, who was a holder of public office, compromised the integrity of the Judge and ultimately the probity and credibility of the institution which he served. Rather than allowing the disturbing allegation against the petitioner and his family to circulate and attract innuendos thereby injuring the reputation and integrity of both the petitioner and the Supreme Court, the fair, impartial and transparent route was to allow petitioner's wife and her children to disclose the source of their funds to the relevant authorities, namely, the FBR. Such a transparent course of action was consistent with the Code of Conduct for Judges of the Supreme Court and High Courts, the maintenance of institutional integrity and the image of Judges as the neutral and independent arbiters of law and justice. [p. 171] $R_4$

By referring the issue of source of funding to the FBR for verification from petitioner's wife and his children, the Supreme Court had chosen the path which in the first place should have been taken by the Government and its functionaries but which was casually ignored by them. By sending the matter to the FBR the Court had assured the substantive and procedural rights of each party under the Income Tax Ordinance, 2001. These rights and the right of the petitioner's family to appeal against adverse orders had specifically been preserved. Additionally, it was directed that only appropriate proceedings for undeclared or unexplained assets be initiated against the petitioner's family which should be concluded within a reasonable timeline. Therefore, by such referral to the FBR the controversy surrounding the allegation in the reference would be settled. [p. 172] $S_4$ & $U_4$

Supreme Court had also directed the Chairman FBR to submit his report, regarding the proceedings before the Commissioner (Inland Revenue), to the Supreme Judicial Council ('the Council') for its consideration. This was done to give the Council a chance, if it so wished, to commence proceedings against the petitioner in exercise of its suo motu jurisdiction. However, the direction issued to the Chairman FBR in no way obliged the Council to take any action based on the report. The Council may do so of its own volition if it considered that the report justified any action against the petitioner. Consequently, the Chairman FBR's report was a piece of information to be evaluated by the Council in its suo motu jurisdiction. The Council may if so inclined in the exercise of its suo motu jurisdiction

conferred by the Constitution take into consideration any proceedings before the tax authorities or orders passed by them. [pp. 172, 173] $V_4$ & $W_4$

Per Faisal Arab, J; agreeing with the majority view regarding quashing of Presidential reference against the judge and the directions given to the Federal Board of Revenue for initiating proceedings against the judge's wife and children, but giving his own views on the interpretation of Article 48 of the Constitution, section 116(1)(b) of Income Tax Ordinance, 2001 and on the plea of mala fide raised by the petitioner.

**(ee) Constitution of Pakistan---**

----Art. 209(5)---Presidential reference against a judge of the Superior Court sent to the Supreme Judicial Council ('the Council')---Information against the judge---President and the Council had to judge whether such information was credible before initiating an inquiry---Had the Constitutional safeguard of formation of opinion on a particular information not been made a condition precedent, no judge would be able to work with the freedom and confidence required of him in discharge of the obligation of his or her office.

Use of the words 'from any source' appearing in Article 209(5) of the Constitution allowed information to come from a member of the general public or a government functionary or that which was based on a finding of fact of a judicial forum. No specific route from which information was to come had been laid down in the Constitution. While leaving the door wide open for the information to come in from any source, Article 209 (5) of the Constitution had also ensured that receipt of any and every information per se should not trigger inquiry against a Judge and only such information was to become actionable on which either the Supreme Judicial Council ('the Council') or the President had formed the opinion that the matter needed to be inquired into. The informant had no right to seek that the President or the Council must conduct inquiry on the information that had been placed by him before any of them. The Constitution had left such decision in its entirety in the hands of the Council and the President. Until either of them considered any information to be convincing enough to call for an inquiry only then the Council could embark upon the inquiry otherwise not. [p. 178] $X_4$

Had the Constitutional safeguard of formation of opinion on a particular information not been made a condition precedent, no judge would be able to work with the freedom and confidence required of him in discharge of the obligation of his or her office. On every kind of complaint made against them the Judges would remain unendingly entangled in putting up their defence in one inquiry after another and correspondingly the members of the Council would also be perpetually engaged in conducting inquiries upon whatever information was placed before them by any informant, crippling them from performing their normal judicial function. Apprehending such drawback, the Constitution had given primacy to the opinion that was formed on the information by either of the two opinion-makers (i.e. the President and the Council) described in Article 209 (5) of the Constitution. It was for this reason that when the Constitution admitted information from any source, it basically said that let there be search for the truth if in the opinion of any of the two opinion makers there was substance in the information regardless of the source. There was no independence of judiciary if there was no effective mechanism for its accountability. [p. 178] $Y_4$

**(ff) Constitution of Pakistan---**

----Art. 209(5)---Presidential reference against a judge of the Superior Court sent to the Supreme Judicial Council ('the Council')---Report submitted by the Council to the President---Discretion of President to accept or reject the report---Scope.

Once a matter was referred by the President to the Supreme Judicial Council ('the Council') to conduct an inquiry then it became a constitutional obligation of the Council to first conduct the inquiry and then submit its report to the President. Once that was done and in its report the Council returned its findings of guilt or otherwise, it was then for the President to either accept the report or reject it. He may not agree on removing a judge as Clause (6) of Article 209 of the Constitution used the word 'may',

which clothed the President with such discretion. Where the Council exonerated a judge of the charges framed against him, in that eventuality the matter ended there. The exoneration brought the whole proceedings to an end which no more remained open to challenge, not even by the President by seeking judicial review before the Supreme Court [p. 179] $Z_4$

**(gg) Constitution of Pakistan---**

----Arts. 184(3), 209(5) & 211 ---Presidential reference against a judge of the Superior Court sent to the Supreme Judicial Council ('the Council')---Bar of jurisdiction under Article 211 of the Constitution---Scope and purpose.

The Supreme Court on its judicial side could not examine the merits of the allegations contained in a reference on account of the constitutional bar contained in Article 211 of the Constitution, which though appeared to be a clog on judicial review but if such a bar was not implanted through a constitutional provision, it would have deprived the most important organ, the Supreme Judicial Council ('the Council'), of its vital powers in discharging its constitutional responsibility of inquiring into the conduct of Judges of the Superior Courts in an effective and efficient manner. In the face of the bar contained in Article 211, if any interference by the Supreme Court on the merits of the controversy gained currency, every Judge against whom the Council was to conduct inquiry would first come to the Supreme Court and seek examination of the credibility of the informant as well as of the merits of the information. If the Supreme Court was to first give its findings on the adequacy of the allegations or credibility of the informant and then decide whether to allow or restrain the Council from proceeding with the inquiry, it would be deviating from the scheme devised under the Constitution for the accountability of the judges of the Superior Judiciary. It would also set a very dangerous precedent for actions that may be taken under Article 209(5) of the Constitution in future. In every case the credentials of the informant and not the worth of the information disclosed against a judge would be examined first on the judicial side of the Supreme Court. Invasion of this Constitutional power by any Court would not only amount to demonstrating mistrust in the forum created exclusively for the accountability of judges but would also be in disregard of the Constitutional mandate contained in Article 211. Hence, where decision to conduct inquiry had been taken in terms of Article 209(5) of the Constitution, the allegations made against a sitting Judge could only be proved or disproved before the Council and not before a court through a judicial pronouncement. Any judicial interference that amounted to stifling the very function which the Constitution had assigned exclusively to the Council would be violative of Article 211 of the Constitution. [p. 179] $A_5$

**(hh) Civil Procedure Code (V of 1908)---**

----O. VI, R. 2---Pleadings---Scope---Pleadings were to be confined to a statement of material facts; it shall be presumed that reliance would be placed on such facts and what legal effects emerged from such facts need not be stated in the pleadings in order to seek the relief---Failure to state the legal effects, therefore, could not even be regarded as an omission in law much less fatal to any legal proceedings---In fact stating legal effects in the pleadings was regarded as lack of regard for the rules of pleadings. [p. 181] $B_5$

Budho v. Ghulam Shah PLD 1963 SC 553 ref.

**(ii) Income Tax Ordinance (XLIX of 2001)---**

----Ss. 116(1)(b)---Public office holder/tax payer---Wealth statement---Assets and liabilities of the tax payer's spouse, minor children, and other dependents, declaration of---Perusal of S.116(1)(b) of the Income Tax Ordinance, 2001 revealed that the wealth in the names of the taxpayer's spouse or minor children had to be declared on account of mere existence of such relationship with the taxpayer---Dependency of such relations on the taxpayers was not a condition precedent---Scope and purpose of S.116(1)(b) of the Income Tax Ordinance, 2001. [Minority view]

Apart from detecting tax evasions on undeclared incomes, the declarations made under section 116 of the Income Tax Ordinance, 2001 ('the 2001 Ordinance') could also be used by a forum that was

entrusted with the function to initiate disciplinary proceedings against a public office holder in order to ascertain whether his undeclared assets were acquired beyond his known sources of income. In that sense the declarations made under section 116(1)(b) became a 'relevant fact' in order to prove a 'fact in issue' which was possessing assets beyond means. So, the utility of the declaration made under section 116 was not restricted to detecting probable tax evasion only but it could be utilized by a forum, other than income tax authorities, to examine the legitimacy of the source from which an asset was acquired when it came to examining the conduct of a public office holder. [p. 182] $C_5$

The source of undeclared asset must reconcile with the legitimate source of income of the holder of high public office or of the member of his or her household, in whose name the asset stood. Unless it was so demonstrated, non-disclosure was likely to cast doubts on his or her integrity and honesty and could be taken as an act of concealment of an illegal source from which the undeclared asset was acquired. Thus, in the context of accountability of a public office holder, the declaration under section 116(1)(b) of the 2001 Ordinance by itself was not a 'fact in issue' but only a 'relevant fact' which could be used to seek explanation with regard to source of acquisition of undeclared assets that stood either in the name of the public office holder or his spouse or children or any other person dependent upon him. No claim of privacy or privilege could justify withholding of financial disclosure that was relevant in such accountability process. Thus, the declaration of assets and liabilities made under section 116(1)(b) could be used as a 'relevant fact' before both the forums i.e. income tax authorities and the forum that was empowered to take disciplinary action against a holder of public office, as the object and purpose of both the forums was distinct. [p. 183] $D_5$

Declaration under section 116(1)(b) of the 2001 Ordinance had nothing to do with the spouse's financial dependency or otherwise on the resident taxpayer. Income tax law was not concerned with whether the spouse of a resident taxpayer was dependent or was a person of means. All that it intended was that no tax evasion took place by hiding one's undeclared source of income in the names of taxpayer's loved ones. Husband and wife were both presumptive heirs of each other. Any property in the name of any of them was also inheritable by their children. Hence, wealth in the name of taxpayer's spouse, irrespective of his or her own means of income, had to be declared on account of mere existence of such relationship with the taxpayer. If dependency of spouse of a public office holder was made a criterion, it may give rise to scenarios where a resident taxpayer may purchase property in the name of his or her spouse who was financially well off and was living as a member of the taxpayer's household and a property in his or her name remained undeclared and when such a fact got disclosed, the public office holder in order to avoid disciplinary proceedings would take the plea that his or her spouse was a person of means and not dependent on him or her, therefore, information about the source of acquisition of undeclared asset was not required to be divulged by him or her under section 116 of the 2001 Ordinance. [p. 184] $E_5$ & $F_5$

What section 116(1) (b) intended to mean was that the wealth in the names of the taxpayer's spouse or minor children had to be declared on account of mere existence of such relationship with the taxpayer. The dependency of such relations on the taxpayers was not a condition precedent. A resident taxpayer even in an action taken under the 2001 Ordinance, could not take the stand that unless his or her spouse was shown to be dependent on him or her, there was no legal obligation to declare the assets that stood in their names under section 116(1)(b) of the 2001 Ordinance. [p. 185] $G_5$

**(jj) Constitution of Pakistan---**

----Arts. 184(3) & 209(5)(b)---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner-judge before the Supreme Court calling into question the constitutionality and legality of the reference against him---Plea of mala fides raised by the petitioner---Question as to whether the reference against the petitioner could be quashed by the Supreme Court

on grounds of mala fides based on the judgment reported as Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan (PLD 2010 SC 61 ref.)---Reasons for quashing the Presidential reference recorded. [Minority view]

As regards plea of mala fide, only on one occasion in the past the Supreme Court interfered with the proceedings of the Supreme Judicial Council ('the Council'). This happened in the case of Iftikhar Muhammad Chaudhry v. President of Pakistan (PLD 2010 Supreme Court 61). Even in that case the merits of allegations made in the Presidential reference against the then Chief Justice of the Supreme Court were not made basis for nullifying the proceedings but the Supreme Court noticed quite pronounced acts of mala fide on the part of the then President who under the then existing provisions of Article 209 (5) of the Constitution was the sole opinion-maker to initiate the inquiry. Presidential reference was not quashed by the Supreme Court on the basis of the allegations contained therein but because the Chief Justice's removal from his office was on account of his refusal to give assurance to the then President that his candidature in (military) uniform in the said elections would not be judicially invalidated. Hence, the unholy haste in first seeking resignation of the then Chief Justice under coercion followed by his mistreatment and forcible removal from office and then sudden convening of the meeting of the Supreme Judicial Council ('the Council') on one and the same day clearly demonstrated utter mala fide on the part of the then President who himself was the sole opinion-maker under Article 209(5) of the Constitution to refer the matter to the Council. That was the background that led to the quashment of the reference against the then Chief Justice by the Supreme Court. However in the present case the petitioner-judge had not alleged mala fide against the President but had raised such a plea only against the informant and the persons who processed the information forming basis of the reference. The present case was thus not even remotely close to what treatment was meted out to the then Chief Justice. [pp. 186, 187] $H_5$ & $I_5$

**(kk) Constitution of Pakistan---**

----Arts. 48(1), 48(2), 184(3) & 209(5)---Presidential reference before the Supreme Judicial Council---Scope---Discretion and independent opinion of the President---Scope---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Whether the President was bound to act on advice of the Prime Minister in terms of Art. 48(1) of the Constitution---Reasons for quashing the Presidential reference recorded. [Minority view]

From the contents of Article 209 (5) of the Constitution, it became clear that in forming his opinion the President was not dependent on the advice of the Prime Minister or the Cabinet. He could form opinion on any information that may have come to him from any other source. This was so as the Judiciary was separate and distinct from the Executive branch of the Government. It had to remain completely separate and uninfluenced by any decision of the Executive in the running of its affairs. So while examining the power of the President to call for inquiry under Clause (5) of Article 209 of the Constitution, it clearly indicated that the President had to act in his own discretion to which he was entitled to by virtue of Article 48(2) of the Constitution. All that the executive could do was to place information which it considered actionable before the President and then it was for him to either seek any further information or consider the information already provided sufficient enough to refer the matter to the Supreme Judicial Council for inquiry without being burdened with the constraints of Article 48 (1) of the Constitution. The Executive on its part could not compel the President by advising him on the strength of Article 48 (1) of the Constitution to send the reference proposed by it to the Supreme Judicial Council for inquiry against a judge of the superior judiciary. [p. 188] $J_5$ & $K_5$

In the present case the contents of the summary prepared for the Prime Minister in respect of reference against the petitioner showed that it was proposed to the Prime Minister to advice the

President to direct the Supreme Judicial Council to probe into the allegations in terms of Article 209(5) of the Constitution, and after such inquiry submit a report to the President under Article 209(6) of the Constitution. The summary was then endorsed by the Prime Minister and placed before the President. The President acted on such advice and signed the reference, which was then sent to the Supreme Judicial Council to conduct inquiry against the petitioner under Article 209(5) of the Constitution. Thus, nothing was left for the President to decide on his own in terms of Article 209(5) of the Constitution. From what transpired from the whole process, it became abundantly clear that the President acted on the summary in terms of Article 48(1) of the Constitution and signed the reference considering the advice to be binding on him. Thus, the decision of filing the Reference was not based on President's own independent opinion. The Reference not being based on President's own independent opinion, the same was submitted to the Supreme Judicial Council beyond the contemplation of the provisions of Article 209(5) of the Constitution and thus was not maintainable in law. [p. 189] L5

**(ll) Constitution of Pakistan---**

----Art. 209(5)---Reference before the Supreme Judicial Council against a judge of the Superior Courts---Information provided to the President or the Supreme Judicial Council by an informant---Credibility and motivation of the informant---Jurisdiction of the Supreme Judicial Council did not depend upon what motivated the informant to place the information on the desk of one of the two opinion makers (i.e the President or the Supreme Judicial Council) who found it to be credible enough to call for an inquiry---Function of the Supreme Judicial Council was to search for the credibility of the information rather than the credibility or motivation of the informant. [p. 191] $M_5$ & $O_5$

**(mm) Constitution of Pakistan---**

----Art. 209(5)---Reference before the Supreme Judicial Council against a judge of the Superior Courts---Filing of the Reference becoming public news---Such news becoming public would not be enough to vitiate the proceedings before the Supreme Judicial Council. [p. 191] $N_5$

Per Yahya Afridi, J; agreeing with the majority view to the extent of quashing of the Presidential reference against the judge but finding the Constitutional petition filed by the judge under Article 184(3) of the Constitution as not maintainable, and also disagreeing with the majority view regarding directions given to the Federal Board of Revenue for initiating proceedings against the judge's wife and children, and for submitting a report of said proceedings to the Supreme Judicial Council. [Minority view]

**(nn) Constitution of Pakistan---**

----Arts. 184(3) & 188---Original jurisdiction of the Supreme Court under Art. 184(3) of the Constitution---Scope---Order passed by the Supreme Court under Art. 184(3) of the Constitution was final and not appealable---Only medium of challenge available to a person aggrieved of such an order was the limited jurisdiction of the Supreme Court under review. [p. 193] $P_5$

**(oo) Constitution of Pakistan---**

----Art. 184(3)---Original jurisdiction of the Supreme Court under Article 184(3) of the Constitution---Pre-requisites -- Matter of public importance---Meaning and scope---Matter of public importance encompassed any issue affecting the legal rights or liabilities of the public or the community at large, and it was not restricted to an individual or a group of individuals, how so large the group might be. [p. 194] $Q_5$

Anwar Aziz v. Federation of Pakistan PLD 2001 SC 49; Abdul Wahab v. HBL 2013 SCMR 1383; Asad Ali v. Federation of Pakistan PLD 1998 SC 161; Miss Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416 and Pakistan Muslim League (N) through Khawaja Muhammad Asif, M.N.A. and others v. Federation of Pakistan through Secretary Ministry of Interior and others PLD 2007 SC 642 ref.

**(pp) Constitution of Pakistan---**

----Art. 184(3)---Original jurisdiction of the Supreme Court under Art. 184(3) of the Constitution---Pre-requisites---Matter of public importance---Scope---Independence of judiciary---Independence of the judiciary with all its legal, social and political implications was a matter of public importance. [p. 195] $R_5$

Asad Ali v. Federation of Pakistan PLD 1998 SC 161; Al-Jehad Trust v. Lahore High Court 2011 SCMR 1688; Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan through Secretary and others PLD 2010 SC 61 ref.

**(qq) Constitution of Pakistan---**

----Arts. 178, 184(3), 209(5)(b) & Third Sched.---Code of Conduct for Judges of the Supreme Court and High Courts (framed by the Supreme Judicial Council under Art. 209 (8) of the Constitution), Arts. II, III, V, VI & Preamble---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner-judge before the Supreme Court calling into question the constitutionality and legality of the reference against him---Maintainability---Whether present petition was maintainable, and whether it involved the enforcement of a Fundamental Right of the petitioner---Reasons for finding present Constitutional petition as not maintainable recorded. [Minority view]

Petitioner was a Judge of the Supreme Court and had assumed the office by taking an oath under the Constitution. The oath declared, inter alia, that the judge would abide by the Code of Conduct for Judges of the Supreme Court and High Courts [framed by the Supreme Judicial Council under Article 209 (8) of the Constitution] ('the Code'). On taking an oath, a Judge accepted to assume a constitutional position with all its trappings; be it the privileges and facilities attached therewith or the duties and obligations. Accordingly, where the declaration of his oath commanded him to avoid an act, the sitting Judge was constitutionally obligated under the oath to abstain therefrom. This act of self-restraint by the sitting Judge would not infringe or compromise his fundamental rights but only moderate the exercise of enforcing the same. And thus, once a person took an oath under the Constitution, he by his conduct subjected all rights and privileges available to him under the Constitution and the law, which may be contrary to or not in consonance with the behaviour expected of a sitting Judge, as prescribed under the Code. Consequently, the fundamental rights of a sitting Judge shall remain eclipsed, so far as their enforcement was not in consonance with the terms of his oath. [p. 196] $S_5$ & $T_5$

The Code demanded a Judge to be "cautious and forbearing"; "to keep his conduct in all things, official and private, free from impropriety"; to avoid publicity and "not engage in public controversy"; and most important and relevant to the present matter, "endeavour to avoid, as far as possible, either on his behalf or on behalf of others, in litigation". [p. 197] $U_5$

The subject matter of the present litigation, in pith and substance, revolved around allegations of impropriety. That being so, seeking to enforce the fundamental rights to challenge the very charges against him to be ultra vires, and that too without withstanding the prescribed enquiry would negate the very spirit of the oath taken by the petitioner-judge. [p. 198] $V_5$

Present petition was not maintainable. It starkly lacked one of the essential conditions - enforcement of fundamental rights - for the Supreme Court to invoke its original jurisdiction under Article 184(3) of the Constitution. Moreso, when the positive exercise of the said jurisdiction by the Supreme Court would in effect thaw the process of accountability of one holding a public office, be it a judge of the Supreme Court. Accordingly, the present petition being bereft of essential constitutional requirements was non-maintainable, and thus, must fail. [p. 198] $W_5$

**(rr) Constitution of Pakistan---**

----Arts. 10-A, 178, 184(3), 209(5)(b) & Preamble---Presidential reference against a judge of the Supreme Court pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the judge's tax returns---

Constitutional petitions filed by different Bar Councils, Bar Associations and lawyers ('the petitioners') before the Supreme Court calling into question the constitutionality and legality of the reference against the judge---Maintainability---Whether the petitions were maintainable---Reasons for finding the present petitions as maintainable recorded.

In essence, present petitions sought the enforcement of the fundamental rights i.e. access to justice and a fair and independent judiciary. These issues were matters of public importance.

For seeking matters of public importance relating to the enforcement of fundamental rights in the original constitutional jurisdiction of the Supreme Court, the general petitioner need not be an aggrieved person in the strict sense. And more importantly, the present petitioners, unlike a sitting Judge of the superior court, were not shackled by any legal restrain of a constitutional oath to invoke the original constitutional jurisdiction of the Supreme Court. Resultantly, the present petitioners fulfilled the two mandated condition precedents to invoke the constitutional court of the Supreme Court under Article 184(3) of the Constitution. Present petitions were held to be maintainable. [p. 199] $X_5$

Al-Jehad Trust v. President of Pakistan PLD 2000 SC 84; Suo Motu Action Regarding Eligibility of Chairman and Members of Sindh Public Service Commission 2017 PLC (C.S.) 984; Miss Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416 and Pakistan Muslim League (N) through Khawaja Muhammad Asif v. Federation of Pakistan PLD 2007 SC 642 ref.

**(ss) Constitution of Pakistan---**

----Arts. 48(1), 48(2), 184(3) & 209(5)---Presidential reference before the Supreme Judicial Council---Discretion and independent opinion of the President---Scope---Presidential reference against a judge of the Supreme Court pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the judge's tax returns---Constitutional petitions filed by different Bar Councils, Bar Associations and lawyers before the Supreme Court calling into question the constitutionality and legality of the reference against the judge---Whether the President was bound to act on advice of the Prime Minister in regard to the reference in terms of Art. 48(1) of the Constitution---Reasons for quashing the Presidential reference recorded. [Minority view]

Constitutional mandate of the President under Article 209(5) of the Constitution was to form an "opinion", whether misconduct was made out against the Judge, and if so, then a reference was to be sent for an enquiry to the Supreme Judicial Council ('the Council'). This decision or for that matter, the "opinion" was to be based on the "information" received from "any source". The "advice" of the Prime Minister when received by the President, would only be an "information" received from a "source", and thus lost its efficacy as an "advice", within the contemplation of clause (1) of Article 48 of the Constitution. In such circumstances, the "advice" of the Prime Minister would then fall within the exception to the general rule, as envisaged under clause (2) of Article 48 of the Constitution; where the President would have to apply his independent mind on the matter and then act accordingly. [p. 202] $A_6$

In the present case based on the complaint of a journalist, a summary was prepared and then moved by the Ministry of Law, and finally placed before the President, with the "advice" of the Prime Minister. The President signed and approved the summary with his handwritten note in terms that reflected, firstly, that the "advice" of the Prime Minister was unconditionally approved by the President; secondly, the approval so made by the President was without his independent application of mind on the "information" contained in the summary regarding the alleged misconduct against the judge; and finally, that, there was no formulation of an "opinion" by the President regarding the sufficiency of the "information" to constitute misconduct against the judge to file a reference. [pp. 200, 201] $Y_5$ & $Z_5$

The decision-making process leading to the President sending a reference to the Council under Article 209(5) deserved careful and thorough deliberation by the President. Given the facts relating to the opinion formed by the President in the present case, it demonstrated grossly negligent attitude

lacking any application of mind. Instead of applying his independent mind to the seriously important matter placed before him, the President blindly accepted and followed the "advice" of the Prime Minister to send the reference to the Council. The formation of the "opinion" by the President was muddied by the blatant and uncalled for obedience to the "advice" of the Prime Minister. [p. 203] $B_6$

The President had grossly failed to discharge his constitutional obligations as ordained under Article 209(5) of the Constitution. Since the very foundation of the "opinion" formed by the President was based on the non-exercise of lawful jurisdiction, therefore the 'superstructure' built thereon, the signing and sending of the reference to the Council would lack legal sanction and be without lawful authority, and thus ultra vires of the Constitution. Consequently, the proceedings before the Council in furtherance of the Presidential reference against the judge stood abated. [p. 203] $C_6$

**(tt) Constitution of Pakistan---**

----Arts. 48(1), 48(2), 184(3) & 209(5)---Presidential reference before the Supreme Judicial Council---Information against the judge obtained and disclosed unlawfully---Effect---Information, obtained and disclosed unlawfully, if admitted would fall within the mischief of "information from any source"---Thus, it would remain the discretion of the Supreme Judicial Council to decide whether based on the admitted information, it would suo motu proceed against a sitting Judge or otherwise. [p. 205] $D_6$

**(uu) Constitution of Pakistan---**

----Arts. 14(1), 184(3) & 209(5)(b)---Right to privacy---Scope---Surveillance---Presidential reference against a judge of the Supreme Court pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the judge's tax returns---Constitutional petitions filed by different Bar Councils, Bar Associations and lawyers ('the petitioners') before the Supreme Court calling into question the constitutionality and legality of the reference against the judge---Tax and property records of the judge and his family were accessed/ searched to frame the reference against him---Whether such searches amounted to unlawful surveillance---Reasons for quashing the Presidential reference recorded.

Had the information regarding the foreign properties owned by the family members of the judge not been freely and legally accessible, then it would have sufficed to establish the allegation of obtaining the said information through surveillance. The counsel for the Government was able to demonstrate that the information regarding any property in the foreign country (United Kingdom), including the one owned by the family members of the judge could be retrieved or accessed through internet searches. And further, placing on record, a copy of the title of the said foreign properties, pre-dating the complaint against the judge, and that too, from the relevant and competent authority under the laws of the foreign country (United Kingdom) confirmed that the requisite search under the laws of the foreign country (United Kingdom) had already been carried out. Hence, the stance of the petitioners regarding mala fide of the Federal Government did not cross the legal threshold to saddle it with the responsibility of unlawfully obtaining the said information by surveillance. [p. 205] $E_6$

**(vv) Constitution of Pakistan---**

----Arts. 184(3) & 209(5)(b)---Income Tax Ordinance (XLIX of 2001), Ss. 198, 199 & 216(3)(p)---Presidential reference against a judge of the Supreme Court pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the judge's tax returns---Constitutional petition filed by different Bar Councils, Bar Associations and lawyers before the Supreme Court calling into question the constitutionality and legality of the reference against the judge---Law Minister directed the Chairman, Assets Recovery Unit (ARU), to seek verification of the ownership of the foreign properties from the income tax returns of the judge or his wife---Accordingly Chairman ARU sought confidential information of the judge and his wife from the Federal Board of Revenue (FBR) of particulars of the income tax returns filed and maintained under Income Tax Ordinance, 2001 ("the 2001 Ordinance")---Said information was disclosed by the Chairman FBR to Chairman ARU; and finally, the said confidential information was

further passed on by Chairman ARU to the Law Minister and was then made the basis for the Presidential reference---Question as to whether disclosure of such confidential information was lawful, and whether the exception under S.216(3)(p) of the Income Tax Ordinance, 2001 applied to the judge and his wife---Reasons for quashing the Presidential reference recorded.

Income Tax Ordinance, 2001("the 2001 Ordinance") expressly provided for confidentiality of information recorded in the income tax returns of an assessee. The income tax officials, who were the custodian of the said information, were commanded under the law to jealously guard the same, and in case of any breach thereof, the offender was to face penal consequences under the Ordinance. However, this confidentiality of information would in no way prevent the competent income tax officials to seek from the assessee, the source of funds for the acquisition of any assets. In case, the competent income tax official was not satisfied with the explanation for the source of funds, he could departmentally proceed against the assessee for non-declaration and misdeclaration of assets under the enabling provisions of the 2001 Ordinance. [pp. 206, 207] $F_6$ & $G_6$

Law Minister and the Chairman ARU lacked the mandate to initiate an enquiry against a sitting Judge of the Supreme Court, as the legal domain to do so rested solely with the Supreme Judicial Council, and none other. Even otherwise, the information relating to income tax returns of the judge's wife would not fall within the scope of the purported enquiry of a "public servant" envisaged under section 216(3)(p) of the 2001 Ordinance. The particulars of the wife's income tax returns would remain immune from such permissible disclosures and thus retain its confidentiality. The legal position would have been otherwise, had the wife consented to allow such disclosure, which she did not or had the competent tax authorities initiated proceedings against her under the 2001 Ordinance, which they never did. [p. 209] $I_6$

In the present case, once the income tax officials had information regarding the alleged undeclared assets of the judge's wife, they despite having ample authority to legally proceed against her under the 2001 Ordinance, opted to proceed unlawfully by disclosing confidential information to unauthorized persons. Thus, prima facie, keeping in view the chain of directions emanating from the Law Minister leading to the unlawful disclosures of confidential information by the income tax officials, all persons at different rungs of the governmental hierarchy, who were part of this unlawful disclosure of confidential information, had exposed themselves to penal prosecution for commission of offences under section 198 read with section 199 and section 216 (1) of the Ordinance. The direction of the Law Minister and the Chairman ARU to solicit, obtain and receive, confidential information regarding the income tax returns of the judge and his wife, prima facia, exposed them to criminal prosecution for having committed an offence under section 199 read with sections 198 and 216(1) of the 2001 Ordinance. Similarly, the fact that the then Chairman FBR and the income tax officials having not refused the illegal directions of the Law Minister and Chairman ARU, and passing on confidential information to them, prima facie, exposed them not only to departmental action but also to penal consequences under section 198 read with section 216(1) of the 2001 Ordinance. Accordingly, the present Chairman, FBR should ensure that the entire record of the present case was placed before the FBR to proceed under the law, against the Law Minister, the Chairman ARU, the then Chairman, FBR and all the concerned income tax officers qua their role in ordering to inquire into, solicit, disclose and receive confidential information relating to the income tax returns of the judge and his wife. [Minority view] [pp. 207, 210] $H_6$ & $L_6$

Since the entire process leading to the filing of the Presidential reference was in violation of the law and the Constitution, the sending of the same to the Supreme Judicial Council lacked legal sanction and was without lawful authority, and thus ultra vires of the Constitution. Consequently, the proceedings before the Supreme Judicial Council in furtherance of the Presidential reference against the judge stood abated. [p. 211] $M_6$

Any directions by the Supreme Court to the tax authorities with specific time spans and setting the procedure for the income tax officials to proceed against the judge's wife, would amount to parallel legislation, when the 2001 Ordinance provided a framework for all such matters. More so, when such directions had been made against a person who was not a party to the present petitions. In the circumstances, any such directions of the Supreme Court would amount to prosecute her, and that too without providing her with an effective opportunity of hearing. [Minority view] [p. 209] $J_6$

**(ww) Constitution of Pakistan---**

----Art. 248---Constitutional office holders---Illegal acts---Immunity from prosecution----Scope---No protection was extended to holders of constitutional office from prosecution for their illegal acts. [p. 209] $K_6$

Ch. Zahur Ilahi's case PLD 1975 SC 383; Aman Ullah Khan's case PLD 1990 SC 1092; Nawabzada Muhammad Umar Khan's case 1992 SCMR 2450; Baz Muhammad Kakar v. Federation of Pakistan through Ministry of Law and Justice, Islamabad PLD 2012 SC 870 and Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan through Secretary and others PLD 2010 SC 61 ref.

Per Syed Mansoor Ali Shah, J; agreeing with the majority view to the extent of quashing of the Presidential reference against the judge but with his own views and also disagreeing with the majority view regarding directions given to the Federal Board of Revenue for initiating proceedings against the judge's wife and children, and for submitting a report of said proceedings to the Supreme Judicial Council. [Minority view]

**(xx) Constitution of Pakistan---**

----Arts. 184(3), 209(5) & 211---Presidential reference against a judge of the Superior Court sent to the Supreme Judicial Council ('the Council')---Bar of jurisdiction under Art. 211 of the Constitution---Scope and purpose.

A Presidential reference competently filed by the President against a constitutional court judge should not ordinarily be made subject to scrutiny in judicial review by any Constitutional Court including the Supreme Court, unless the extraordinary circumstances demanded such intervention in the interest of justice and fair play. [p. 218] $P_6$

Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan PLD 2010 SC 61 ref.

The proceedings before the Supreme Judicial Council ('the Council'), its report to the President and the removal of the judge by the President under Article 209 could not be called in question in any court of law under Article 211 of the Constitution, unless the removal of the judge was without jurisdiction, mala fide or coram non judice. A limited judicial review on said three grounds was not affected by Article 211, as no ouster clause could keep the actions taken without jurisdiction, mala fide or coram non judice, beyond the scrutiny of the constitutional courts. Article 211 of the Constitution gave immunity to proceedings before the Council till the removal of the judge by the President. However, proceedings and steps taken before the matter landed before the Council escape the immunity under Article 211. [p. 217] $N_6$

Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan PLD 2010 SC 61 ref.

All acts preceding the proceedings before the Council were not hit by the ouster clause of Article 211. They were, therefore, subject to standard judicial review like any other executive or administrative act, on the grounds of substantive illegality, procedural impropriety and decisional irrationality. [p. 218] $O_6$

Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan PLD 2010 SC 61 ref.

**(yy) Constitution of Pakistan---**

----Art. 209(5) ---Supreme Judicial Council ('the Council')---Complaint against judge of the Superior Courts---Council was the only constitutional forum available to inquire into the conduct or capacity of a constitutional court judge.

Only constitutional forum available to inquire into the conduct or capacity of a constitutional court judge was the Supreme Judicial Council ('the Council'). So the Government, its Ministries, Divisions, Departments or Attached Departments and their officers were not authorized to entertain any complaint against a constitutional court judge, let alone proceed and collect evidence to supplement the complaint. They could at best return the complaint to the complainant and guide him to approach the constitutional forums under Article 209 of the Constitution. [p. 218] $Q_6$

Where any Ministry, Division, Attached Department or Department of the Government, in the course of its normal business, discovered some adverse information against a constitutional court judge that may attract impeachable misconduct, in addition to the legal proceedings under the relevant law, the concerned Department etc., in such situation, should at first proceed against the constitutional court judge on the basis of the adverse information in accordance with the law under which it functioned. For example, if it was the Federal Board of Revenue (FBR) that discovered such an information, it could proceed against the judge under the tax laws and the judge would have a right to defend himself in accordance with law. Only when these proceedings came to a close after exhausting all the legal and judicial avenues and it was finally held that the judge had violated the law, the FBR may, in the interest of judicial accountability, send this information to the Federal Government through the Division with which it was attached under the Rules of Business, 1973 ("ROB") for information and necessary action. It would then finally rest with the Federal Government i.e., the Cabinet, to decide if the violation of law amounted to impeachable misconduct and whether the Federal Government should proceed against the constitutional court judge and place the "information" before the President. Such process found its justification from the foundational constitutional principles like independence of judiciary, rule of law and parliamentary democracy. [p. 219] $R_6$

**(zz) Constitution of Pakistan---**

----Arts. 184(3) & 209(5)(b)---Rules of Business, 1973, R. 14 ---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Assets Recovery Unit purportedly established vide a Cabinet notification coordinated the collection of evidence against the petitioner-judge---Question as to whether the ARU could have entertained and investigated the complaint against the petitioner-judge---Reasons for quashing the Presidential reference recorded. [Minority view]

The complainant could only have approached the constitutional forums provided under Article 209(5) of the Constitution and could not have filed the complaint before any other office or authority. Therefore, the very act of approaching the Assets Recovery Unit (ARU) was per se unconstitutional and illegal. It was to be noted with concern and suspicion that how did the complainant, a citizen of the country, planned on filing the complaint against a constitutional court judge before the ARU, which had no public interface or the legal mandate to deal with such a matter and had earlier never conducted any inquiry for the accountability of a constitutional court judge. There was surprisingly nothing on the record to show how the complainant found out about ARU. The ARU was not a Ministry or Division of any Ministry of the Federal Government, or an Attached Department, neither was it a statutory authority nor had the notification of its establishment been published in the official gazette for public information. The ARU, therefore, for all practical purposes did not legally exist for the world outside the Prime Minister's Office. However, the complainant instead of approaching the Supreme Judicial Council ('the Council'), which would have ordinarily come to the mind of a citizen, particularly in view

of the publicly known recent removal of a High Court Judge by the President on the recommendation of the Council, approached the ARU for the accountability of judges. This looked more odd especially when the complainant claimed to be a journalist. Such an unusual step by the complainant raised eyebrows about the credibility of the complaint and the bona fide of the complainant. [p. 219] $S_6$

The Chairman, ARU on receiving the complaint from the complainant acted with surprising agility and activated his team to collect evidence of the alleged foreign properties. The ARU, which was to work under the Cabinet Division as per decision of the Cabinet, did not make any formal request to the Law and Justice Division through the Secretary, Cabinet Division for consultation on the matter in accordance with Rule 14 of the Rules of Business, 1973 ('the ROB'), despite noting in minutes of its meeting held on 15-04-2019 that the matter was sensitive as it related to the Judges of the Superior Judiciary. The informal discussion and consultation made by the Chairman and Members of the ARU with the Law Minister on 16-04-2019, and the oral advice of the Law Minister in that discussion carried no value in the eyes of law. The Law Minister, who was a distinguished constitutional lawyer, also did not realize the importance of his advice, even oral, and gave a "go ahead" to the ARU for inquiring into the veracity of the allegations made in the complaint against judges of the constitutional courts. The Chairman, ARU who was also a Barrister-at-law, and not a layman, knew well that an oral advice of the Law Minister was nothing in the eyes of law and he should have ascertained his legal authority to inquire into the allegations made against Judges of Constitutional Courts, before initiating the inquiry into the allegations made in the complaint. But both of them paid no heed to the constitutional mandate of Article 209 of the Constitution, and initiated the process of inquiring into the allegations. The Presidential reference against the petitioner judge was quashed, and as a result the proceedings, including the show cause notice, before the Supreme Judicial Council stood abated. [p. 224] $Y_6$

**(aaa) Constitution of Pakistan---**

----Arts. 82(2), 84, 99(3), 184(3), 209(5)(b) & 240(a)---Rules of Business, 1973, Rr. 2(1)(ii), 4(4), 4(5), 16(1)(m) & Sched. III---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Assets Recovery Unit purportedly established vide a Cabinet notification coordinated the collection of evidence against the petitioner-judge---Question as to what was the legal and budgetary status of the Assets Recovery Unit and that of its Chairman---Reasons for quashing the Presidential reference recorded. [Minority view]

The Assets Recovery Unit (ARU) was purportedly established by the Cabinet vide notification dated 06-11-2018. The Federation had defended the establishment of the ARU by the Cabinet, by referring to the provisions of Rules 4(5) and 16(1)(m) of the Rules of Business, 1973 ('the ROB'). The Federation argued that Rule 4(5) empowered the Prime Minister to establish agencies and offices for conducting the business of the Federal Government, and under Rule (16)(1)(m) the Cabinet had power to decide any matter referred to it by the Prime Minister, and that the Prime Minister referred the matter of establishing the ARU to the Cabinet, and the Cabinet thus competently approved the establishment of the ARU. [p. 220] $T_6$

Bare reading of the provisions of Rule 4(5) of the ROB made it clear that the said Rule did not empower the Prime Minister to establish new agencies or offices; it simply authorized him to refer the business of the Government to already established agencies and offices under the law. The word "determine" had been used in the Rule in the context of allocation or entrustment of the business of Government and not for the power to establish a new agency or office. In the absence of any power to establish a new agency or office, reference of the matter to the Cabinet under Rule 16(1)(m) by the Prime Minister was inconsequential, as the Cabinet also did not enjoy any such power. The scope of the ROB could not extend to creation of agencies or offices to perform functions in relation to any

matter to which the executive authority of the Federation extended. Such agencies or offices could be established only by or under some law enacted by the Parliament on the subject over which it had the legislative power under the Constitution. The creation of the ARU by the Cabinet, could not be sustained treating it as an Attached Department of the Cabinet Division also. The Departments that had been declared as Attached Departments to particular Divisions were created by or under the law, and not by the Federal Government. The Federal Government, as per Rules 2(1)(ii) and 4(4) of ROB, could only declare them attached with a particular Division, but could not create them. [p. 220] $U_6$

The Terms of Reference (TORs) of the ARU defined its role and powers. The ARU did not pass as a coordinating agency or office under its TORs for the following reasons: first, as per its notification it was established as an entity separate from the Departments whose officials had been made its Members and also addressed as such in its TORs; second, there was no mention of its coordinating role in the TORs; third, the powers and functions had been prescribed in the TORs as that of the ARU, and not of its Members; and fourth, but most importantly, the ARU was conferred such wide and extensive powers which even its Members did not enjoy under the laws of their parent institutions, e.g., it was empowered to request any intelligence agency under the Government for assistance in obtaining any information on any subject within and outside the country, and authorized to seek assistance and information from law enforcement agencies and other Government departments, including the information relating to bank accounts, companies record, revenue record, travel record, NADRA record etc. With such intrusive investigative powers, the ARU could not be said to be an innocuous coordinating agency, office or unit. The establishment of the ARU was, therefore, absolutely without lawful authority. In the absence of any legal status of the ARU, its Chairman and Members also had no legal position or status. [p. 221] $V_6$

The appointment of the Chairman, ARU by the Cabinet was not backed by any law including any rule of the ROB. Even otherwise, the ROB made under Article 99(3) of the Constitution could not provide for creation of posts in connection with the affairs of the Federation. Such power must be conferred by some law enacted under Article 240(a) of the Constitution. Article 99(3) empowered the Federal Government to make rules only on two subjects: firstly, for the allocation of the business of the Federal Government to its different components, i.e., the Ministries; and secondly, for the transaction of that business. The Rules made under such power could regulate the procedural modalities of allocation and transaction of the business, i.e., by which Ministry or Division of a Ministry and how a matter was to be taken up and dealt with; such Rules could not grant substantive power to create posts in connection with the affairs of the Federation. The expression "allocation and transaction" of the business did not by any stretch of imagination imply such power. Thus, the appointment of the Chairman, ARU by the Cabinet was without lawful authority. [p. 222] $X_6$

Mustafa Impex v. Government of Pakistan PLD 2016 SC 808 ref.

Funds could be allocated for any Government activity only by the National Assembly in the Annual Budget Grants under Article 82(2) of the Constitution or supplementary and excess budget grants under Article 84 of the Constitution. The Annual Budget Statements for the relevant financial years 2018-19 and 2019-20 did not mention the allocation of any budget for the expenditure of ARU. The amounts as approved in the budget passed by the National Assembly could be utilized only for the purpose specified in the budget statement. Any re-appropriation of funds or their utilization for some other purpose was not justified under the Constitution; for this purpose, the supplementary budget statement had to be placed before the National Assembly following the procedure provided in Article 84 of the Constitution. Persons making the unauthorized expenditure from the Federal Consolidated Fund were personally responsible for that expenditure. The ARU, therefore, had no budgetary support and therefore did not pass for an executive authority. In such background, role of the ARU became more suspicious and raised the questions: who funded the investigation and the transnational surveillance of the petitioner judge; who paid for the law expert of the ARU; who paid for collecting information from

the land registry of the foreign country and websites, which only provided access to information after payment; and who was funding the entire operation. These unanswered questions cast doubts on the bona fides of the Government and the Prime Minister, who was the Chief Executive of the Federation. The Presidential reference against the petitioner judge was quashed, and as a result the proceedings, including the show cause notice, before the Supreme Judicial Council stood abated. [p. 222] $W_6$

Action Against Distribution of Development Funds PLD 2014 SC 131; Mustafa Impex v. Government of Pakistan PLD 2016 SC 808 and Ram Jawaya v. State of Punjab AIR 1955 SC 549 ref.

**(bbb) Constitution of Pakistan---**

----Arts. 9, 14(1), 184(3) & 209(5)(b)---National Database and Registration Authority Ordinance (VIII of 2000), S. 28---Income Tax Ordinance (XLIX of 2001), S. 216---Government Servants (Conduct) Rules, 1964, R. 18---Investigation for Fair Trial Act (I of 2013), S.35---Right to privacy---Scope---Surveillance---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Property records and information relating to the petitioner-judge and his family were accessed/searched by the Assets Recovery Unit using different sources, including websites, to frame the reference against the petitioner---Question as to whether the information obtained through such searches was breach of the petitioner's and his family's right to privacy, dignity and personal liberty enshrined in the Constitution and amounted to covert surveillance---Reasons for quashing the Presidential reference recorded. [Minority view]

Chairman and legal expert of the Assets Recovery Unit (ARU) asserted that the details of those residing in any immovable property in the foreign country (United Kingdom) could be accessed through open source websites; that once the address was located, the owner of that immovable property could be found through open source such as the land registry website. However, it was important to note that said websites were not free or open source websites. To access the information from the websites, an account with username and password needed to be created, payment was to be made by debit/credit card, the website acknowledged the payment of charges by email, and sent the requested information by email. The Federation in defence did not produce any record of the searches made on the said websites: What and how many addresses were found and under whose names? Who created the account? Who made the payment of charges? What were the payment or credit card details? Who received the acknowledgement of payment and the requested information and at whose email address? More importantly, there was no evidence of what information was received that was allegedly used for searching on the land registry website. A paid source, which required registration and payment before allowing access to information, was not an open source as claimed by the Federation. It showed that no such search was conducted for tracing the properties through those websites; rather the details of the properties were gathered through covert surveillance of the petitioner judge and his family. Covert surveillance and interception were offensively intrusive investigative tools only available to intelligence agencies in the country. [p. 227] $Z_6$

The omission of the Federation and of the Chairman and legal expert, ARU to produce the website record as to procuring the address of the foreign properties of the spouse and children of the petitioner judge gave rise to a presumption that the legal expert, ARU never searched the addresses of the properties through the website. Even otherwise, the Chairman and legal expert, ARU in their concise statement made a general statement that an immovable property could be located through open source websites, but they did not make any specific and categorical statement therein that the foreign properties of the family of the petitioner judge were located by that method. [p. 227] $A_7$

Surveillance was permitted in the limited area of anti-state or terrorist activities and that too under judicial and executive oversight. Outside such limited area, surveillance was constitutionally

prohibited. Intelligence agencies did not enjoy a free hand in conducting surveillance but are subject to strict rules of compliance and oversight by the court. The fact that the ARU did not possess the resources or the technical capacity to carry out surveillance of the petitioner and his family and the interception of their communications, gave credence to the stance of the petitioner that the surveillance was carried out in connivance and in collaboration with the intelligence agencies. The possibility of such happening, therefore, could not be ruled out in the absence of any other evidence furnished by ARU or the Law Minister. It was but obvious that in the present case the information about the addresses of properties were obtained through no other means but through covert surveillance and interception of the intelligence agencies which gathered the information from the private zone of privacy enjoyed by the petitioner judge and his family, without any authorization of law and by trampling over the constitutional guarantees of privacy, personal freedom and dignity. The issue of unlawful surveillance and invasion of privacy of the petitioner judge and his family was far more critical and graver than the information procured by the ARU. It was a naked threat to personal liberty, privacy and dignity guaranteed to the citizens under the Constitution. [pp. 228, 230, 233] $B_7$, $E_7$ & $J_7$

Employees of National Database and Registration Authority (NADRA), who were legally enjoined under section 28 of the National Database and Registration Authority Ordinance, 2000 not to communicate to any person any information acquired by them in the course of their employment, committed violation of that command of the law by making compliance with the command of the Chairman, ARU in communicating to the Chairman and other Members of the ARU the NADRA record relating to the petitioner and his family. Likewise, Member of the ARU from Federal Board of Revenue (FBR) committed violation of section 216 of the Income Tax Ordinance, 2001 by disclosing the tax records of the petitioner and his spouse to the Chairman and other Members of the ARU. While Member of the ARU from the Federal Investigation Agency (FIA) breached Rule 18 of the Government Servants (Conduct) Rules, 1964 by making unauthorized communication of the official documents and information as to the passport/visa record and travelling history of the petitioner and his family. The Chairman and Legal Expert, ARU procured the information regarding the foreign properties by offending the fundamental rights of personal liberty, privacy and dignity of the petitioner and his family by procuring personal information regarding the foreign properties without the sanction of any law through covert surveillance and interception, and also by violating the confidentiality provisions of the National Database and Registration Authority Ordinance, 2000 and the Income Tax Ordinance, 2001. These actions of the Chairman and legal expert of ARU also attracted criminal liability under section 35 of Investigation for Fair Trial Act, 2013. For these illegal actions, the authorities concerned must initiate criminal and disciplinary proceedings against the Chairman, legal expert and Members of the ARU, as well as, the defaulting officials of FBR and NADRA under their respective laws. [pp. 236, 237, 240] $M_7$, $N_7$, $O_7$ & $R_8$

The admission and reliance on the material (evidence) illegally collected by the ARU without any enabling law empowering it to do so, in flagrant violation of the fundamental rights of the petitioner and his family was inadmissible, therefore, the Law Minister and Prime Minister could not have relied and acted upon it, for making the "summary" and advising the President. [pp. 240, 241] $R_7$ & $S_7$

The complainant journalist also appeared before the Court but did not explain his source of information regarding the foreign properties belonging to the petitioner's family. The complainant appeared to be a proxy, who could not have discovered the addresses of the foreign properties. After putting together, the facts relating to the information given by the complainant it was easy to discern that the complainant was fed the information to generate the complaint. Whoever fed him the information were the real actors of the present case. The Presidential reference against the petitioner judge was quashed, and as a result the proceedings, including the show cause notice, before the Supreme Judicial Council stood abated. [p. 229] $C_7$ & $D_7$

**(ccc) Constitution of Pakistan---**

----Arts. 9, 14(1) & 25---Right to privacy---Scope---Illegal surveillance by State agencies, impact of---Privacy affirmed the agency and autonomy of the individual and the right of every person to have the freedom and liberty to live a life of dignity---Privacy required that all information about a person was fundamentally his own, only for him to communicate or retain for himself---Privacy attached to the person and not to the place where it was associated---Intrusion by the State into the sanctum of personal space, other than for a larger public purpose, was violative of the constitutional guarantees---Right to privacy was deeply intertwined with the right to life, right to personal liberty and right to dignity---Illegal and illegitimate surveillance, by both State and private actors, had the impact of intrusion into the private lives of citizens, not only violating their constitutional rights but also intruding on the very personhood, privacy and personal liberty of those surveilled---Surveillance had disparate impact, violating principles of non-discrimination and equality as enshrined in the Constitution---Illegally procured private information amassed by the agencies could be used to manipulate and blackmail people for promoting political agendas; this crippled human security and dismantled democracy, lowering it slowly into an abyss of totalitarianism---Concept of privacy and social impact of illegal surveillance explained.

[pp. 230, 231, 232, 235] $F_7$, $G_7$, $H_7$, $I_7$ & $K_7$

Michael C. James, A Comparative Analysis of the Right to Privacy in the United States, Canada and Europe, Connecticut Journal of International Law, p.261, Vol. 29, Issue 2, (Spring 2014); John Stuart Mill, On Liberty, Batoche Books, p.13, (1859); [5 Coke 91: 1 Sm LC (13th Edn.) 104 at p. 105]; Warren and Brandeis, The Right to Privacy, Harvard Law Review, p. 193, (1890), Vol. 4, No. 5; 277 U.S.438, 478 (1928); Lawrence Lessig, Code and Other Laws of Cyberspace, p.153-55 (1999); Artavia Murillo ET AL. ("In Vitro Fertilization") v. Costa Rica (2012), Inter-Am. Ct. H.R. (Ser.C) No.257; Benazir Bhutto v. President of Pakistan PLD 1998 SC 388 and Jeffrey Rosen, The Unwanted Gaze: The Destruction of Privacy in America (2000) ref.

**(ddd) Constitution of Pakistan---**

----Arts. 9 & 14(1)---Right to personal liberty and privacy---Scope---Duty of State institutions/authorities with respect to personal information of citizens.

Rights to personal liberty and privacy under Articles 9 and 14 of the Constitution imposed a constitutional obligation on State authorities to protect the privacy and personal freedom of the citizens unless the law expressly authorized them to do otherwise in exceptional circumstances. In the absence of any law to the contrary, the rights to privacy and personal freedom became absolute and stood to protect the privacy and personal freedom of the citizen. No Government institution was to disclose the personal information of any citizen unless the law authorized the institution to do so. In the absence of any specific law, the umbrella of constitutional guarantees would come to cover and protect the citizen.

[p. 236] $L_7$

**(eee) Qanun-e-Shahadat (10 of 1984)---**

----Preamble---Constitution of Pakistan, Art. 14(1)---Illegally collected evidence, admissibility of---Principles regarding the admission or exclusion of evidence obtained in violation of the constitutional rights. [Minority view]

The Irish Supreme Court in the case DPP v. JC [2015] IESC 31 laid down the following principles with regard to the admission or exclusion of the evidence obtained in violation of the constitutional rights, in order to balance the legitimate competing public interests: (i) The onus was on the prosecution to establish the admissibility of all evidence; (ii) If a claim was raised that evidence was obtained in breach of constitutional rights, the onus was on the prosecution to establish either that there was no unconstitutionality, or that despite any interference with constitutional rights the evidence should still be admitted; (iii) Where evidence was obtained in deliberate and conscious violation of constitutional rights, it should be excluded except in exceptional circumstances; (iv) Where evidence was taken in breach of constitutional rights, there was a presumption in favour of exclusion, which could be rebutted

by evidence that the breach of rights was either inadvertent or derived from subsequent legal developments; and (v) Whether or not a breach of constitutional rights was deliberate and conscious required analysis of the conduct or state of mind of the individual who actually gathered the evidence, as well as, any senior official or officials within the investigating or enforcement authority concerned who was involved either in that decision or in decisions of that type generally or in putting in place policies concerning evidence-gathering of the type concerned. [p. 239] $P_7$

Neil M. Richards, The Dangers of Surveillance, Harvard Law Review, p.1935, Vol.126, (2013); [2006] 2 AC 221; [1970] HCA 21; [1978] HCA 22; 116 U.S. 616 (1886); 367 US 643 (1961) and [2015] IESC 31 ref.

Above stated principles as to inadmissibility of the illegally collected evidence had developed mostly in the cases where there was a law that regulated a constitutional right, but that law was not followed or was violated in the process of collecting evidence. The courts have held such evidence to be generally inadmissible, with few exceptions, mainly with the reason that the admission of such evidence would compromise the integrity of the judicial process and bring the administration of justice into disrepute. There was no hindrance in adopting the said principles in our jurisdiction. [p. 240] $Q_7$

**(fff) Constitution of Pakistan---**

----Arts. 48(1), 48(2), 184(3) & 209(5)---Rules of Business, Sched. V-B, Entry No. 35---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Prime Minister placing information/advice before the President with regard to misconduct of a judge---Independent opinion of the President---Scope---Entry 35 in Sched. V-B to the Rules of Business, 1973---Ultra vires the Constitution---Whether under Art. 209(5) of the Constitution, the President was to form his personal "opinion" or to act on the "advice" of the Cabinet or the Prime Minister as envisaged under Article 48(1) of the Constitution---Reasons for quashing the Presidential reference recorded. [Minority view]

The President was to examine the "information" placed before him under Article 209(5) as Head of State, acting as an arbiter between the two branches of the State, discharging his function as a person representing the unity of the Republic. Personal opinion of the President under Article 209(5) actualized the non-partisan role of the President and provided a check on any partisan adventurism by the Government of the day against the judiciary. If the President was just a rubber stamp acting on the advice of the Cabinet, a hostile Government could, theoretically, file references against a number of judges of the constitutional courts, resulting in initiation of inquiries against all of them. The "information" placed before the President under Article 209(5) was to be processed into a reference only if the President formed an opinion that the information made out a case for inquiry against the judge. [p. 244] $T_7$ & $U_7$

While the Constitution vested the President with the power to form an "opinion", it was difficult to imagine that this power was to be exercised by him in a mindless and mechanical manner, thus reducing him to just a rubber-stamp, who upon receiving information was to simply direct the Council to inquire into the conduct of a constitutional court judge. [p. 245] $V_7$

Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan PLD 2010 SC 61, paras 107 and 196 ref.

Entry 35 in Schedule V-B to the Rules of Business, 1973 that provided that President was to act on advice of the Prime Minister for making a reference to the Supreme Judicial Council under Article 209(5) of the Constitution was, therefore, ultra vires the Constitution. [p. 246] $W_7$

In the present case, the President did not apply his mind and form his own opinion on the "information" received; he simply approved the advice of the Prime Minister and signed the draft

Reference submitted with that advice. The formation of opinion and the direction to the Supreme Judicial Council to hold an inquiry was, therefore, not that of the President; both these acts were made without jurisdiction and were coram non judice, and thus unconstitutional and of no legal effect. [p. 246] $X_7$

**(ggg) Constitution of Pakistan---**

----Arts.184(3) & 209(5)(b)---Income Tax Ordinance (XLIX of 2001), Ss. 111, 114, 116(1)(b), 116A & 120(3)---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns (wealth statement)---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Whether petitioner-judge was obliged under S.116(1)(b) of the Income Tax Ordinance, 2001 to declare the assets and liabilities of his spouse and children in his wealth statement---Reasons for quashing the Presidential reference recorded. [Minority view]

Section 116(1), of the Income Tax Ordinance, 2001 (the 2001 Ordinance') simply provided for issuance of notice to a taxpayer for filing the wealth tax statement or wealth reconciliation statement along with the income tax return and provided for particulars to be included in such a statement. In case a taxpayer had already filed the said statements along with his return, section 116(1) appeared to have no relevance. It was not the case of the Federation that the petitioner failed to file the wealth tax statement or wealth reconciliation statement. In case the said statements were deficient or incorrect, the tax department could issue notice to the taxpayer under section 120(3) and consider the case in the light of Section 111 of the 2001 Ordinance. No such notice or proceedings were initiated by the Federal Board of Revenue (FBR) against the petitioner. Directly leveling allegation of violation of section 116(1)(b) against the petitioner in such background was misconceived besides being premature. [p. 247] $Y_7$

One foreign property was purchased by the spouse of the petitioner in the year 2004, before his elevation to the Bench of the High Court in 2009; this property was therefore completely irrelevant for forming opinion of misconduct and making the reference against the petitioner. The other two foreign properties were acquired by the spouse and children of the petitioner in the year 2013, after his said elevation; they were, therefore, to be declared in the tax year 2013 by the petitioner if there was any legal obligation on him, at that time, to do so. The children of the petitioner were not minors in the year 2013; therefore, no question as to his obligation to declare their assets arose under section 116(1)(b). The current dispute related to his alleged obligation to declare the assets of his spouse only. Therefore, the question was whether the petitioner was under any legal obligation to declare the foreign assets of his spouse in his wealth statement along with his tax returns filed in the tax year 2013. The simple and straightforward answer as per FBR's own interpretation that was in vogue in 2013 was that he was not. The FBR, in the wealth statement form prescribed for the tax year 2013, required a taxpayer to declare the assets of his or her spouse if he or she had not filed income-tax return and wealth statement independently. It was an admitted fact that the spouse of the petitioner had filed her income-tax return and wealth statement independently, in the year 2013. It, therefore, appeared that there was no legal obligation on the petitioner to declare the assets of his spouse in his wealth statement as per the requirement of the FBR prevailing in the year 2013. [pp. 248, 249] $Z_7$ & $B_8$

PLD 2017 SC 265 ref.

The FBR's second interpretation expressed in the form prescribed for the tax year 2015 was that a taxpayer was required to declare only those assets of his or her spouse which had been acquired by funds provided by that taxpayer. There was neither any allegation in, nor was any material annexed with, the "summary" initiated for forming the opinion of misconduct against the petitioner that the funds for purchase of the foreign assets were provided by the petitioner to his spouse. No opinion of

misconduct against the petitioner, thus, could have been made on the basis of these two departmental interpretations of the provisions of section 116(1)(b) of the 2001 Ordinance. [p. 248] $A_8$

In terms of the scheme envisaged in the 2001 Ordinance, once an asset was claimed by a person to have been sourced by him or her and, more so, such asset was also declared in the statutory declaration/wealth statement by that person, then only that person could be questioned and required to explain the source of acquiring such asset by the tax authorities. In the event that person failed to properly explain the source, an addition could be made in his or her income and that added income was taxed accordingly. Under no circumstances, any other person could be made directly or indirectly part of such proceedings. Thus, no opinion of misconduct against the petitioner could have been formed on the basis of even such interpretation of the provisions of section 116(1)(b) of the 2001 Ordinance. [p. 250] $C_8$

Another interpretation of section 116(1) of the 2001 Ordinance suggested by the Federation was that every individual resident taxpayer was to mention the assets of his or her spouse in the wealth statement irrespective of the fact that the latter was or was not his or her "dependent". Section 114 of the 2001 Ordinance required that the tax return for any tax year had to be accompanied by the wealth statement required under section 116. In case a wealth statement was not filed or was deficient, the income tax return filed was not considered complete. In case of any deficiency, the Commissioner, FBR was empowered to issue a notice to the taxpayer under section 120(3), informing the deficiency and providing him time to rectify it. If it was cured during the given time, the tax return was considered complete and accepted. Therefore, if the Commissioner, FBR had been of the view, as per the interpretation suggested by the Federation, that the petitioner was under legal obligation to declare the assets acquired by his spouse in the year 2013, in his wealth statement filed with tax return of 2013, he should have issued notice to the petitioner specifying the defect and providing him time to rectify it. The petitioner, in that case, could have defended that notice on all legal grounds available to him including the interpretation proposed by him as well as the interpretations put to the provisions of section 116(1)(b) by the FBR itself in the forms prescribed for wealth statement. No such notice, however, was issued to the petitioner. [p. 250] $D_8$

It was also important to highlight that Section 116A of the 2001 Ordinance which required a resident individual taxpayer to furnish statement of foreign assets, was inserted in the 2001 Ordinance in the year 2018 by the Finance Act, 2018. This amendment made in the year 2018 prima facie showed that there was earlier no obligation on a resident individual taxpayer to furnish such statement of even his own foreign assets, much less the foreign assets of his spouse and children. The Presidential reference against the petitioner judge was quashed, and as a result the proceedings, including the show cause notice, before the Supreme Judicial Council stood abated. [p. 251] $E_8$

**(hhh)Constitution of Pakistan---**

----Arts. 12, 184(3) & 209(5)(b)---Anti-Money Laundering Act (VII of 2010), Sched., section XIIA---Income Tax Ordinance (XLIX of 2001), Ss. 192, 192A, 194 & 199---Foreign Exchange Regulation Act (VII of 1947) Ss. 4 & 5---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Whether the petitioner violated any provisions of Anti-Money Laundering Act, 2010 or the Foreign Exchange Regulation Act, 1947---Reasons for quashing the Presidential reference recorded. [Minority view]

The Federation argued that being a case of 'concealed income', the case against the petitioner-judge also fell under the Anti-Money Laundering Act, 2019 (AMLA) by referring to sections 192, 192A, 194 and 199 of Income Tax Ordinance, 2001 ('the 2001 Ordinance') mentioned in in section XIIA of the Schedule to the AMLA. The said sections in the Schedule of AMLA were inserted vide Notification

No. SRO 425(I)/2016 dated 14-05-2016 through which offences under sections 192, 192A, 194 and 199 of the 2001 Ordinance were listed as "predicate offences" for the purposes of invocation of the AMLA. In the present case, admittedly all three foreign properties were acquired prior to 14-05-2016; therefore, the AMLA was not applicable at all. Furthermore, principle of prohibiting retrospective punishment was a guaranteed fundamental right under Article 12 of the Constitution. Even otherwise, it was clear that the Legislature had put a precondition that 'tax sought to be evaded is ten million rupees or more' in all the four said sections of 2001 Ordinance mentioned in AMLA. Thus, for the invocation of the AMLA the law presupposed conclusion of proceedings under the relevant provisions of the 2001 Ordinance to determine the said threshold and that too in relation to tax liability for the period on or after 14-05-2016. No such determination had taken place in the present case; hence, there was no application of the AMLA. [p. 251] $F_8$

The Foreign Exchange Regulation Act, 1947 (FERA) provided for regulation of payments and dealings in foreign exchange and securities, and the import and export of currency and bullion. Sections 4 and 5 of the FERA provided that no one could deal in foreign exchange except through an authorized dealer and imposed restrictions on transfer of money outside Pakistan. There was no evidence on the record that established or even prima facie showed any violation of the FERA against the petitioner. The Federation pointed out no violation of the FERA, even during the arguments. The Presidential reference against the petitioner judge was quashed, and as a result the proceedings, including the show cause notice, before the Supreme Judicial Council stood abated. [p. 252] $G_8$

**(iii) Constitution of Pakistan---**

----Arts. 209(5)(b) & 209(8)---Code of Conduct for Judges of the Supreme Court and High Courts (framed by the Supreme Judicial Council under Article 209 (8) of the Constitution), Preamble---Reference against a judge of the Superior Court on grounds of 'misconduct'---Impeachable misconduct---Meaning. [Minority view]

Impeachable misconduct was when there was a violation of law or violation of the Code of Conduct for Judges of the Supreme Court and High Courts (framed by the Supreme Judicial Council under Article 209(8) of the Constitution) ['the Code'] that was so grave that it ruptured judicial integrity, tarnished public confidence and pulled down legitimacy of the judicial institution. Short of this, it might be misconduct but not impeachable misconduct. It was commonsensical that not every infraction led to removal of a constitutional court judge or constituted impeachable misconduct. The best test was to see if the judicial integrity of a judge had been undermined resulting in lowering the public confidence and trust in the judiciary, thus impairing impartiality and legitimacy of the judicial institution. [p. 254] $H_8$

**(jjj) Constitution of Pakistan---**

----Art. 209(8)---Code of Conduct for Judges of the Supreme Court and High Courts (framed by the Supreme Judicial Council under Art. 209(8) of the Constitution), Preamble---Standards under the said Code extended to the judge and judge alone---Said Code had no jurisdiction over or concern with the family, relatives and friends of the judge---Judge could not be made vicariously liable for the conduct of his family. [Minority view]

Judicial integrity and the Code of Conduct for Judges of the Supreme Court and High Courts (framed by the Supreme Judicial Council under Article 209(8) of the Constitution) ['the Code'] were judge specific, largely covering judicial conduct and partly his personal behavior. The standards under the Code extended to the judge and judge alone. The Code had no jurisdiction over or concern with the family, relatives and friends of the judge. [p. 254] $I_8$

The Code was a judge specific document and did not extend to family members and in no event, held a judge vicariously responsible for the conduct of his family - his spouse and children - who were independent, natural and legal persons in their own right and could do whatever they wanted. "Conduct" and "misconduct" were personal to a judge under the Code. Like any other citizen, a judge

could not be held accountable for the conduct of someone else, there was no such thing as vicarious responsibility of a judge, unless the law required it or there was evidence that the wrongdoings of the judge had been concealed behind the family facade. [p. 255] $J_8$

Judges were not to be taken as supporting or endorsing their spouse's or partner's conduct if they did not publicly dissociate themselves from it. The law should recognize that they were independent actors and that the deeds of one were not to be visited on the other. [p. 255] $K_8$

Hearing on the Report of the Chief Justice of Gibraltar, [2009] UKPC 43. (4-3 minority view) ref.

**(kkk) Constitution of Pakistan---**

----Arts. 184(3), 204(2)(b)& 209(5)(b)---Supreme Judicial Council Procedure of Enquiry 2005, R. 13---Contempt of Court Ordinance (V of 2003), Ss. 3 & 4---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Confidentiality of the reference---Details of proceedings of the reference publicized by the President and reported by the media---Proceedings by the President were to kept confidential---Reasons for quashing the Presidential reference recorded. [Minority view]

Paragraph 13 of the Supreme Judicial Council Procedure of Enquiry 2005 provided for the proceedings of the Supreme Judicial Council ('the Council') to be conducted in camera and also banned reporting the proceedings of the Council. There was an absolute restriction of confidentiality on the process of preliminary assessment of the allegations made against a constitutional court judge. Such restriction equally applied to publicizing the reference filed by the President and the allegations made therein. In the context of publicizing, proceedings of preliminary assessment of "information" conducted by the President was similar and equal to proceedings by the Supreme Judicial Council ('the Council'). Therefore, if the proceedings were to be conducted by the Council in camera, then so should be the proceedings by the President. [pp. 255, 256] $L_8$ & $M_8$

Under Article 204(2)(b) of the Constitution, the constitutional courts had power to punish any person who scandalized the Court or otherwise did anything which tended to bring the Court or a Judge of the Court into hatred, ridicule or contempt. Publicizing a complaint or reference and the allegations made therein, of which veracity was yet to be determined after inquiry by the Council, definitely tended to bring the Judge into hatred, ridicule and contempt, and thus attracted the provisions of Article 204 of the Constitution and the Contempt of Court Ordinance, 2003. In the present case, it was a matter of record that the reference was publicized even when it had not yet been placed before the Council for preliminary consideration, as the filing of the reference and the allegations made therein against the petitioner was published in several newspapers and later during the proceedings before the Council the matter was discussed in press conferences and TV talk shows by the Government Ministers and even by the President. The act of publicizing the filing of the reference against the petitioner and of the allegations made therein, was clearly unconstitutional and fell within the scope of the provisions of Article 204 of the Constitution and the Contempt of Court Ordinance, 2003. The fact as to who leaked and publicised the matter was disputed and could not be resolved in the present proceedings, but the matter could not be left unnoticed and allowed to go unchecked. Such omission would encourage repetition of the mischief in future. Thus, the present matter was to be left to the discretion of the Chief Justice who was pater familias of the judiciary and was to protect its prestige, honour, reputation and integrity, to initiate appropriate proceedings for a thorough inquiry of the matter so that the right to fair trial of the persons involved in publicizing the reference and the allegations made therein, may not be infringed.

[pp. 256, 257, 263] $N_8$, $O_8$ & $S_8$

**(lll) Mala fides---**

----Types of mala fides---'Mala fide of law' and 'mala fide of fact'---Distinction.

Mala fide of law was constituted when a person inflicted an injury upon another person in flagrant contravention of the law; he was not allowed to say that he did so with an innocent mind. He was taken to know the law and act within the law. He may, therefore, be guilty of mala fide of law, although so far as the state of mind was concerned, he acted ignorantly and in that sense innocently. Thus, action of an authority was tainted with mala fide of law when it took the action which was so unreasonable, improbable or blatantly illegal that it ceased to be an action contemplated by the law under which it was purportedly taken, or took the action by violating the mandatory procedural requirements or without satisfying the jurisdictional requirements, or took the action which no reasonable person could have taken on the basis of the available material. On the other hand, an unlawful action done designedly, willfully or wantonly and not accidently, thoughtlessly or negligently fell within the domain of mala fide of fact. In such case, the action was taken in bad faith either to hurt the person against whom the action was taken or to benefit oneself or another, or in colourable exercise of powers for collateral or ulterior purposes not authorized by the law under which the action was purportedly taken. If the act suffered from mala fide of law, the mischief was corrected by nullifying the act; mala fide of fact, however, further entailed the consequences of making the actor accountable also. [p. 257] $P_8$

West Pakistan v. Begum Shorish Kashmiri PLD 1969 SC 14; Sarwar v. Punjab 1990 SCMR 999; Said Zaman v. Federation 2017 SCMR 1249; Abdul Rauf v. Abdul Hamid PLD 1965 SC 671 and Federation v. Saeed Ahmad PLD 1974 SC 151 ref.

**(mmm) Qanun-e-Shahadat (10 of 1984)---**

----Art.129(e)---Presumption of correctness attached to an official act---Scope---Public functionary, mala fide of---Proof.

Mala fide was difficult to prove against a public functionary because there was a presumption of regularity with regard to all official acts under Article 129(e) of the Qanun-e-Shahadat, 1984.However, this presumption of regularity was available only to official acts done by a person or authority competent to do that. The presumption of regularity could not be attached to the acts done by the persons and authorities who had no legal authority to do those acts, rather a reverse presumption for lack of bona fide arose. In such a case, the onus to prove mala fide did not remain as high. Mala fide was inferential by construct. It could be drawn from direct or circumstantial evidence. The Court carefully took into consideration the surrounding circumstances of the action; the conduct of the persons involved; the object and purpose to be achieved; and the nature of the illegality. The court, in a way, reconstructed the whole act and its backdrop, and then evaluated the fides of the action and its actors. If mala fide on the part of the actors was apparent on the face of record, then the court of law seized with the matter was not supposed to shut its eyes from taking notice thereof. While full faith was given to public acts and record of the Government, this assumption was overturned if mala fide was borne out from the record. [p. 258] $Q_8$

Federation v. Saeed Ahmad PLD 1974 SC 151 ref.

**(nnn) Constitution of Pakistan---**

----Arts. 10A, 184(3) & 209(5)(b)---Income Tax Ordinance (XLIX of 2001), Ss. 116(1)(b) & 122---Code of Conduct for Judges of the Supreme Court and High Courts (framed by the Supreme Judicial Council under Art. 209(8) of the Constitution), Preamble---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns (wealth statement)---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Supreme Court unanimously quashed the reference and declared that the same was of no legal effect whatsoever, and in consequence thereof the proceedings pending in the Supreme Judicial Council

("Council") against the petitioner-judge, including the show-cause notice issued to him, stood abated---Supreme Court (with a majority of 7 to 3) gave directions to the Commissioner, Inland Revenue and Federal Board of Revenue to inquire into and seek explanation from the spouse and children of the petitioner as to the nature and source of the funds whereby the three subject properties in a foreign country were acquired in their names, and also send a report in such regard to the Supreme Judicial Council, which had the powers to, if it considered justified, to commence proceedings against the petitioner in exercise of its suo motu jurisdiction---His Lordship (Syed Mansoor Ali Shah, J) observed that after quashing of the Presidential reference against the petitioner, the case set out against him came to an end---Reasons given by His Lordship for not agreeing with the majority view as to the directions given to the Federal Board of Revenue after the reference had been quashed. [Minority view]

[Note: The directions can be found in the short order of the present judgment reported as (Mr. Justice Qazi Faez Isa and 14 others v The President of Pakistan and others (PLD 2020 SC 346), headnote (b)]

The spouse and children of the petitioner like all other citizens of the country were independent persons and enjoyed an inalienable right to the protection of law. As they were not party to the instant proceedings and were never summoned or made a party to the proceedings by the Court, any adverse order against them, would deprive them of their inalienable right to due process under the Constitution and the law, and would contravene the well-entrenched and deep-rooted principle of audi alteram partem. After the reference against the petitioner was unanimously quashed by the Court, the case set out against the petitioner came to an end. In the absence of any allegations of corruption against the petitioner or of his holding foreign properties in the names of his wife and children as a trustee or a benamidar, the Supreme Court, and for that matter the Supreme Judicial Council ('the Council'), had no concern with the assets and properties of the spouse and the children of the petitioner. [p. 263] $T_8$

The Federal Board of Revenue (FBR) did not require any direction from the Supreme Court for taking any proceedings against any individual (including a constitutional court judge or his spouse and children) for a tax violation under the Income Tax Ordinance, 2001 ('the 2001 Ordinance'), if any. Similarly, the Council was also free and independent to exercise its suo moto jurisdiction against any judge of the constitutional courts when so required. It was nobody's case that either the FBR or the Council were reluctant or unwilling to perform their functions under the law and the Constitution. [p. 264] $U_8$

Under Section 122 of the 2001 Ordinance an assessment order could not be reopened after a lapse of five years by the FBR. Also, the directions in the majority view regulating the Tax Commissioner to function and perform his duties within a prescribed time-line, which was not so provided under the 2001 Ordinance amounted to entering the realm of judicial legislation. [p. 264] $V_8$

The direction to the Chairman, FBR to send the report to the Council would make the Chairman, FBR a complainant and the report a new complaint. The FBR was an organ and instrumentality of the Federal Government and was not empowered to directly approach the President under Article 209 of the Constitution unless the Federal Government i.e., the Cabinet, approved to place such information before the Council through the President. [p. 264] $W_8$

The Supreme Court could not direct someone to file a complaint against a constitutional court judge before the Council and then make the Council consider the said complaint. This would have a far reaching effect as it would dismantle the independence and neutrality of the Council and the constitutional scheme under Article 209 that safeguarded a constitutional court judge. It also flouted the right to fair trial under Article 10A of the Constitution. [p. 265] $X_8$

The observation in the majority view that the right to appeal under the 2001 Ordinance would be available to the spouse and children of the petitioner while simultaneously, the Council may also commence proceedings - could lead to conflicting results and thereby, may render the appeal under the 2001 Ordinance otiose and futile. Besides, the Council did not enjoy any power to issue directions to

any judicial or a quasi-judicial forum to speed up pending matters against a constitutional court judge. [p. 265] $Y_8$

The proceedings initiated through the majority view after the quashment of the reference against the petitioner would mean that the Council must now consider if a judge could be made vicariously liable for misconduct for his family's affairs, a concept that was alien to the Code of Conduct for Judges of the Supreme Court and High Courts (framed by the Supreme Judicial Council under Article 209(8) of the Constitution) and had nothing to do with judicial integrity. [p. 265] $Z_8$

Per Maqbool Baqar, J; agreeing with the majority view to the extent of quashing of the Presidential reference against the judge but with his own views and also disagreeing with the majority view regarding directions given to the Federal Board of Revenue for initiating proceedings against the judge's wife and children, and for submitting a report of said proceedings to the Supreme Judicial Council. [Minority view]

**(ooo) Constitution of Pakistan---**

----Arts. 14(1), 90, 91, 184(3) & 209(5)(b)---Rules of Business, 1973, R. 20(6)---Income Tax Ordinance (XLIX of 2001), Ss. 116(1)(b), 198 & 216---National Database and Registration Authority Ordinance (VIII of 2000), Ss. 28 & 29---Government Servants (Conduct) Rules, 1964, R. 18---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council ('the Council') in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns---Constitutional petition filed by the petitioner-judge before the Supreme Court calling into question the constitutionality and legality of the reference against him---Held, that the purported reference was based on actual malice and ill-will harboured against the petitioner-judge by the concerned State functionaries on account of a judgment the petitioner-judge had authored in the past [Suo Motu Case No. 7 of 2017 (PLD 2019 SC 318)], wherein he had criticized the ruling political party and one of its coalition partners---Purported reference did not allege any dishonesty or corruption in the acquisition of the foreign properties and it was also not alleged that the petitioner did not have sufficient tax paid/white money to acquire the said properties, if he wanted to---Nothing was placed on the record to show that there had been any money laundering or that the petitioner failed to pay any tax due---Joint reading of Ss.114 & 116 of the Income Tax Ordinance 2001 ('the 2001 Ordinance') showed that the petitioner was not at all required to declare the assets of his non-dependent wife, and children, nor was there any other provision in the 2001 Ordinance creating any such obligation on the petitioner requiring him to disclose the assets of his non-dependent wife and children along with his income returns---Prime Minister bypassed the Cabinet altogether and sent his purported advice to the President for forwarding the purported reference to the Council, without the sanction of the Cabinet---President had not applied his independent mind while forwarding to the Council the purported reference---Assets Recovery Unit (ARU) and its Chairman were bereft of any legal status and had absolutely no power or authority to collect the material in connection with the purported reference---Information about the petitioner and his family available with the Federal Board of Revenue (FBR) and National Database and Registration Authority (NADRA) was freely accessed, obtained and shared by/with the ARU and the media in violation of the respective statutory provisions relating to confidentiality and statutory prohibition on sharing such information---Complainant-journalist who informed the Chairman ARU of the foreign properties belonging to the petitioner's family was merely a proxy who was set up by the Government itself---Whole account of "complaint" followed by an "investigation" was to cover up the fact that the information about the foreign properties was, in fact, obtained by government agencies through covert surveillance---Petitioner's image was systematically damaged through selected leaks and press conferences by members of the Cabinet in relation to the reference---All illegal acts leading upto the filing of the reference were collusive involving at the very least the President, Prime Minister, Law Minister, Chairman Assets Recovery Unit (ARU) and the Attorney General---Malice could be inferred from their

deeds and actions and the surrounding context---Law Minister, the Chairman ARU and officials of Federal Investigation Agency (FIA) were additionally liable under the relevant provisions of Income Tax Ordinance, 2001 ('the 2001 Ordinance') and the National Database and Registration Authority Ordinance, 2000 (NADRA Ordinance) for illegally obtaining/disclosing personal and confidential information of the petitioner and his family---Prime Minister himself was also liable under the 2001 Ordinance and NADRA Ordinance as it was on his orders and that of his team that the illegalities in relation to the reference were committed---Prime Minister was also liable for sending the purported advice to the President, which in the facts and circumstances of the case was infected with malice---Whereas, the then, Special Assistant to the Prime Minister on Information was liable for committing contempt of Court for the uncalled for and disrespectful comments she made in her press conference relating to the reference---Purported reference against the petitioner was quashed and the proceedings and the show cause notice in relation thereto stood abated---Illegalities and violations of the Constitution and relevant laws committed from the stage of pre-reference investigation/ proceedings to the filing of the Presidential reference before the Supreme Judicial Council stated in detail. [Minority view] [pp. 270, 271, 272, 276, 277, 278, 281, 286, 293, 294, 295, 298, 299, 300, 302, 303, 305, 306, 310] $A_9$, $B_9$, $C_9$, $D_9$, $E_9$, $F_9$, $G_9$, $H_9$, $K_9$, $N_9$, $Q_9$, $R_9$, $S_9$, $T_9$, $U_9$, $V_9$, $W_9$, $X_9$, $Y_9$, $Z_9$, $A_{10}$, $B_{10}$, $C_{10}$, $D_{10}$, $E_{10}$, $F_{10}$ & $K_{10}$

Messrs Mustafa Impex v. Government of Pakistan PLD 2016 SC 808; Mohtarma Benazir Bhutto's case PLD 1998 SC 388; Muhammad Yousuf v. Abdul Qayyum PLD 2016 SC 478, 483; State v. Ataullah Mengal PLD 1967 SC 78, 91; Shahbaz Khan's case PLD 2016 SC 1, 9; Aftab Ahmed Memon v. Chairman NAB 2019 YLR 1865, 1870; Khawaja Ahmed Hassan's case 2005 SCMR 186 and Jan e Alam v. State PLD 1965 SC 640 ref.

**(ppp) Income Tax Ordinance (XLIX of 2001)---**

----S. 116(1)(b)---Wealth statement---Assets in name of non-dependent spouse and children acquired by them through their own resources, disclosure of---Filer/taxpayer was certainly not required to disclose such assets of his independent spouse and children through the wealth statement that he/she was required to file along with his/her income return. [Minority view] [p. 282] $I_9$

**(qqq) Interpretation of statutes---**

----Notifications---Beneficial notifications, executive orders and instructions had retrospective effect. [p. 283] $J_9$

Messrs Army Welfare Sugar Mills Ltd. and others v. Federation of Pakistan and others 1992 SCMR 1652 and Elahi Cotton Mills Ltd. and others v. Federation through Secretary, Ministry of Finance, Islamabad and others PLD 1997 SC 582 ref.

**(rrr) Constitution of Pakistan---**

----Arts. 48(2) & 209(5)(b)---Presidential reference against a judge of the Superior Courts---President to form an 'opinion' in terms of Art. 209(5) of the Constitution before sending the reference to the Supreme Judicial Council---Meaning and scope---Whether the President could apply his independent mind or had to act on the advice of the Prime Minister---Held, that no concept of any "advice" was present in the constitutional scheme of initiating and maintaining any proceedings against a Judge---Article 209(5) of the Constitution, recognised the role of only two offices/entities, the President, and the Supreme Judicial Council ('the Council')---Prime Minister had absolutely no role or participation in the entire process---Term "advice" was alien to the proceedings under Article 209---Article 209(5) of the Constitution did not state that President had to form an opinion on the advice of the Prime Minister, thus, it was the exclusive domain and prerogative of the President to form an opinion, whether or not to send the matter to the Council for it to hold an inquiry---President must personally and independently apply his mind as to whether a Judge had committed misconduct and, if so, whether it justified the sending of reference against him. [Minority view] [pp. 287, 288] $L_9$ & $M_9$

**(sss) Constitution of Pakistan---**

----Arts. 4 & 14(1)---Right to privacy---Scope---Surveillance---Collection of evidence through surveillance---Scope and permissibility. [Minority view]

State functionary could only embark upon the investigation or collection of material about a citizen under (i) the authority of an enabling law, (ii) by a functionary designated under the law; and (iii) only for a justifiable cause or reason. [p. 291] $O_9$

The State had no business to pry upon or collect personal information about its citizen, unless there was a just cause and legitimate purpose for doing so. No State functionary could embark upon an investigation or collection of material without the sanction of an enabling law, and even where such sanction and authority was available, the power and mandate thereunder was well regulated; neither could such power be exercised whimsically, nor could it travel beyond certain specified limits, and was always designed to be invoked/exercised under certain specified circumstances, and only where grounds and reasons justifying such exercise occurred or existed, and in a just, fair and a reasonable manner. Non-compliance of such prescription shall render the investigation, or collection of material, violative of Articles 4 and 14 of the Constitution. [p. 291] $P_9$

**(ttt) Interpretation of statutes---**

----Similar words in two different statutes---Interpretation of a word or a phrase could not be transported from one statute to another---Comparing the language of one statute with that employed in another was unsafe, even though the subjects covered by the two may involve similarities. [p. 307] $G_{10}$

Ghulam Mustafa Jatoi v. Additional and Sessions Judge 1994 SCMR 1299 and Federation of Pakistan through Secretary, Ministry of Finance v. Haji Mohammad Sadiq and others 2007 PTD 67 ref.

**(uuu) Islamic law---**

----Husband and wife---Individual ownership of property---Doctrine of proximity---Applicability---Separation of entities of the spouses regarding the holding of separate properties by them individually was clearly ordained in the Holy Quran---Islam stipulated separate identities of the spouses particularly in relation to their entitlement for holding of their properties separately from one another---Doctrine of proximity did not apply to the properties of spouses. [pp. 308, 309] $H_{10}$ & $I_{10}$

Verse 7 of Surah An Nisa; Verses 11 and 12 of Surah An Nisa; Verse 32 of Surah An Nisa and Verse 176 of Surah An Nisa ref.

**(vvv) Constitution of Pakistan---**

----Arts. 184(3) & 209(5)(b)---Income Tax Ordinance (XLIX of 2001), Ss. 116(1)(b) & 122---Presidential reference against a judge of the Supreme Court ('the petitioner') pending before the Supreme Judicial Council in relation to properties bought by his spouse and children in a foreign country that were not declared in the petitioner's tax returns (wealth statement)---Constitutional petition filed by the petitioner before the Supreme Court calling into question the constitutionality and legality of the reference against him---Supreme Court unanimously quashed the reference and declared that the same was of no legal effect whatsoever, and in consequence thereof the proceedings pending in the Supreme Judicial Council ("Council") against the petitioner-judge, including the show-cause notice issued to him, stood abated---Supreme Court (with a majority of 7 to 3) gave directions to the Commissioner, Inland Revenue and Federal Board of Revenue (FBR) to inquire into and seek explanation from the spouse and children of the petitioner as to the nature and source of the funds whereby the three subject properties in a foreign country were acquired in their names, and also send a report in such regard to the Supreme Judicial Council, which had the powers to, if it considered justified, to commence proceedings against the petitioner in exercise of its suo motu jurisdiction---His Lordship observed that after quashing of the Presidential reference against the petitioner, there was absolutely no justification for the said directions to the FBR as they were beyond the scope of the petition---Reasons given by His Lordship (Maqbool Baqar, J) for not agreeing with the majority view

as to the directions given to the Federal Board of Revenue after the reference had been quashed. [Minority view]

[Note: The directions can be found in the short order of the present judgment reported as (Mr. Justice Qazi Faez Isa and 14 others v. The President of Pakistan and others (PLD 2020 SC 346), headnote (b)]

Upon quashment of the purported reference and abatement of the proceedings in relation thereto, and in view of the clear finding that the petitioner had not misconducted himself and had no concern, either with the foreign properties held by his spouse and children, or their tax affairs, if any, no question of public importance with reference to the fundamental right, amenable before the Supreme Court under Article 184(3) of the Constitution, remained to be decided, or dealt with. The directions given to the Federal Board of Revenue by the majority view after quashment of the reference were extraneous to the present proceedings. [pp. 283, 287, 309, 310] $J_{10}$ & $L_{10}$

The properties having been acquired by the wife and children of the petitioner in the tax years 2004 and 2013, and five years period of limitation prescribed by law for opening of the tax assessment with regard thereto having expired several years before, they could not be lawfully required to furnish the source of funds for acquiring the said properties, or any income information for the said years. The assessments that had attained finality with the afflux of time could not be ordered to be re-opened. The Federal Board of Revenue's (FBR's) reopening the same shall be in violation of the legal prohibition and disability. Such would also violate the vested rights of the petitioner's wife and children. The directions given by the majority view required the wife and children of the petitioner to do what the law did not oblige them to do. [p. 288, 291, 311] $M_{10}$ & $P_{10}$

The directions to FBR given in the majority view had been passed against the persons (the wife and children of the petitioner) who were neither before the Court nor were they put to notice. No opportunity was provided to them to submit as to why the FBR be not so directed. The wife and children being private citizens, their tax matters had no nexus with the essential pre-requisite for invoking and maintaining any proceedings under Article 184(3) of the Constitution, and were thus not amenable to the proceedings that were invoked thereunder. The role and jurisdiction of the Supreme Judicial Council ('the Council')was limited to the matters relating to the conduct and capability of the superior Court Judges; it was not mandated to delve into the affairs of someone who was not a judge of a superior Court. The directions in in the majority view tended to stretch the scope of the Council beyond its mandated jurisdiction, it rather vested in the Council the jurisdiction and authority not granted to it by the constitution. [p. 291] $N_{10}$ & $O_{10}$

The directions to FBR in the majority view tended to create an anomalous situation, for they provided that the proceedings before the Council as contemplated thereby, shall not be effected by the filing or pendency of any appeal under the Income Tax Ordinance, 2001 ('the 2001 Ordinance') against the order/report of the Commissioner, or against any order made or decision taken at any appellate stage, as in the event the Council, on the basis of the report submitted by the Commissioner, recommended removal of the petitioner, but subsequently the petitioner succeeded in his challenge to the order of the Commissioner, and the said report was found not sustainable, the time for the retrieval may have passed, as by then the petitioner may have reached the age of superannuation. Even otherwise the damage inflicted upon the petitioner, and suffered by the Supreme Court, would be irretrievable. In the reverse scenario where the Council may not agree with the findings of the Commissioner, but such findings were upheld by forums before which the Commissioner's finding may be amenable to correction, an anomalous and embarrassing situation may arise for the Council. [p. 312] $R_{10}$

**(www) Administration of justice---**

----Courts could not and should not create any right, liability or obligation that was not founded in law. [p. 312] $Q_{10}$

State v. Ziaur Rehman PLD 1973 SC 49 ref.

Munir A. Malik, Senior Advocate Supreme Court along with Justice Qazi Faez Isa (appeared in person on 17.06.2020), Mrs. Qazi Faez Isa (appeared through video link on 18.06.2020), Tariq Mehmood, Senior Advocate Supreme Court, Salahuddin Ahmed, Advocate Supreme Court, Ch. Atif Rafiq, Advocate Supreme Court assisted by: Barrister Kabir Hashmi and Barrister Rabi-bin-Tariq; Babar Sattar, Advocate Supreme Court, assisted by: Miss Shohan Karimi, Advocate, Syed Kazim Hassan, Advocate Supreme Court and Kassim Mir Jat, Advocate-on-Record for Petitioners (in Constitutional Petition No.17 of 2019).

Hamid Khan, Senior Advocate Supreme Court, assisted by: Naseebullah Tareen, Advocate Supreme Court, Munir Kakar, Advocate Supreme Court and Ajmal Ghaffar Toor, Advocate; Syed Qalb-e-Hassan, Advocate Supreme Court, Amanullah Kanarani, Advocate Supreme Court, Rasheed A. Rizvi, Senior Advocate Supreme Court assisted by: Abbas Rasheed Rizvi, Advocate and M.S. Khattak, Advocate-on-Record for Petitioners (in Constitutional Petition No. 19 of 2019).

Bilal Hassan Minto, Advocate Supreme Court and Ms. Hina Jillani, Advocate Supreme Court for Petitioner (in Constitutional Petition No. 20 of 2019).

Sardar Muhammad Aslam, Advocate Supreme Court, Syed Amjad Ali Shah, Advocate Supreme Court, Kamran Murtaza, Senior Advocate Supreme Court, Azam Nazeer Tarar, Advocate Supreme Court Abid Saqi, Advocate Supreme Court, Hafiz M. Idrees, Advocate Supreme Court, Salman Akram Raja, Advocate Supreme Court assisted by: Asad Ladha, Advocate, Malik Ghulam Sabir, Advocate and Syed Rifaqat Hussain Shah, Advocate-on-Record for Petitioners (in Constitutional Petition No. 21 of 2019).

Naseebullah Tareen, Advocate Supreme Court and Syed Amjad Ali Shah, Advocate Supreme Court for Petitioners (in Constitutional Petition No. 22 of 2019).

Hamid Khan, Senior Advocate Supreme Court, assisted by: Naseebullah Tareen, Advocate Supreme Court, Munir Kakar, Advocate Supreme Court, Ajmal Ghaffar Toor, Advocate, Asif Reki, Advocate, Sh. Ahsan-ud-Din, Advocate Supreme Court and Khushal Kansi, Advocate Supreme Court for Petitioners (in Constitutional Petition No. 23 of 2019).

Rasheed A. Rizvi, Senior Advocate Supreme Court, assisted by: Abbas Rasheed Rizvi, Advocate and M. Aqil, Advocate Supreme Court, Kassim Mir Jat, Advocate-on-Record for Petitioners (in Constitutional Petition No. 24 of 2019).

Hamid Khan, Senior Advocate Supreme Court, assisted by: Naseebullah Tareen, Advocate Supreme Court, Munir Kakar, Advocate Supreme Court and Ajmal Ghaffar Toor, Advocate, Rashid A. Rizvi, Senior Advocate Supreme Court, assisted by: Abbas Rasheed Rizvi, Advocate for Petitioners (in Constitutional Petition No. 25 of 2019).

Mian Raza Rabbani, Senior Advocate Supreme Court, assisted by: Zeshan Abdullah, Advocate and Saalim Salim Ansari, Advocate Supreme Court for Petitioners (in Constitutional Petition No. 26 of 2019).

Hafiz Abdul Rehman Ansari, Advocate Supreme Court, Taufiq Asif, Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Petitioners (in Constitutional Petition No. 27 of 2019).

Rasheed A. Rizvi, Senior Advocate Supreme Court, assisted by: Abbas Rasheed Rizvi, Advocate and Syed Haider Imam, Advocate Supreme Court for Petitioners (in Constitutional Petition No. 28 of 2019).

Syed Iftikhar Hussain Gillani, Senior Advocate Supreme Court, assisted by: Barrister Saad M. Buttar, Barrister Jibran Gillani and Miss Ramsha Hayat, Advocate, Abdul Latif Afridi, Advocate Supreme Court and Tariq Khan Hoti, Advocate Supreme Court for Petitioners (in Constitutional No. 29 of 2010).

Syed Iftikhar Hussain Gillani, Senior Advocate Supreme Court, assisted by: Barrister Saad M. Buttar, Barrister Jibran Gillani and Miss Ramsha Hayat, Advocate, Abdul Latif Afridi, Advocate

Supreme Court and Tariq Khan Hoti, Advocate Supreme Court for Petitioners (in Constitution Petition No. 30 of 2019).

Hamid Khan, Senior Advocate Supreme Court, assisted by: Naseebullah Tareen, Advocate Supreme Court, Munir Kakar, Advocate Supreme Court and Ajmal Ghaffar Toor, Advocate, M.S. Khattak, Advocate-on-Record for Petitioners (in Constitutional Petition No. 32 of 2019).

Rasheed A. Rizvi, Senior Advocate Supreme Court, assisted by: Abbas Rasheed Rizvi, Advocate for Petitioners (in Constitutional Petition No. 34 of 2019).

Dr. Farogh Naseem, Senior Advocate Supreme Court along with Ch. Ishtiaq Ahmed Khan, Addl. A.G., Sajeel Sheryar Swati, Advocate Supreme Court assisted by: Barrister Maleeka Ali Bukhari, Ch. Hassan Murtza Mann, Advocate and Shahid Naseem Gondal, Advocate for Respondents Nos. 2 and 8.

Sohail Mehmood, DAG. for Respondent No.1.

Aamir Rehman, Addl. AG. for Respondent No. 3.

Irfan Qadir, Advocate Supreme Court for Respondent No.4.

Dr. Khalid Ranjha, Senior Advocate Supreme Court along with Sajeel Sheryar Sawati, Advocate Supreme Court for Respondent No.9.

Respondent No.10 (in-person).

Respondent No.11 (in-person).

Arbab Arif, Secretary, SJC/Khawaja Daud Ahmad, Secretary SJC for Supreme Judicial Council.

Dates of hearing: 17th, 24th September, 8th, 14th, 15th, 21st, 28th, 29th, October, 4th, 5th, 6th, 11th, 12th, 13th 18th, 19th, 27th, 28th November; 2nd, 3rd, 4th, 16th, 17th 18th, 19th December, 2019; 20th 21st, 22nd, 27th, 28th, 29th January, 3rd, 17th, 18th, 19th, 24th February, 2nd, 3rd, 4th, 11th, 12th, 15th, 16th, 17th, 18th and 19th June, 2020.

**JUDGMENT**

**UMAR ATA BANDIAL, J.---**

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"Surah An Nisa, Verse 135: O YOU who have attained to faith! Be ever steadfast in upholding equity, bearing witness to the truth for the sake of God, even though it be against your own selves or your parents and kinsfolk. Whether the person concerned be rich or poor, God's claim takes precedence over [the claims of] either of them. Do not, then, follow your own desires, lest you swerve from justice: for if you distort [the truth], behold, God is indeed aware of all that you do."

Translation by Muhammad Asad

(emphasis supplied)

Justice is an article of faith in our religion, whether that may be against our kith and kin or against the rich or poor. However, justice is an abstract concept attainable only where the scales of justice are held by persons (the Judges) who balance these equitably without regard to their personal desires. Indeed, the latter is the duty of the Superior Judiciary by virtue of their Oath to dispense justice without any fear or favour, affection or ill-will (ref: Third Schedule to the Constitution, Oath for Judges of the Superior Courts). This serves as proof that Judges of the Superior Courts are bound to be impartial and are entitled to be independent in the dispensation of justice.

2. In fact, an impartial and independent judiciary is universally recognised as a core value of any civilised democracy. This is evidenced by the international conventions that protect this value as a fundamental right of the people (ref: United Nations Basic Principles on the Independence of Judiciary and The (Montreal) Universal Declaration on the Independence of Justice). The significance of an independent judiciary is also deeply embedded in Pakistan with the Constitution itself guaranteeing in its Preamble that:

"...the independence of the judiciary shall be fully secured;"

Even this Court in its pronouncements on the meaningful working of the Constitutional scheme of trichotomy of powers has many a times reaffirmed that the judiciary must enjoy the confidence of the litigants and the general public in its impartiality and commitment to dispense justice in accordance with law. A prerequisite for these attributes is the guarantee of the independence of the judiciary, a fact which this Court acknowledged in the case of Muhammad Aslam Awan v. Federation of Pakistan (2014 SCMR 1289). The relevant portion which can be found at para-2 is produced below:

> "2: Judicial independence both of the individual Judge and of the Judiciary as an institution is essential so that those who bring their causes/cases before the Judges and the public in general have confidence that their cases would be decided justly and in accordance with law. Judicial independence is one of the foundational values of the Constitution of Islamic Republic of Pakistan which is based on trichotomy of powers in which the functions of each organ of the State have been constitutionally delineated. The very Preamble of the Constitution pledges "wherein the independence of judiciary shall be fully secured". The Constitution makers conferred this independence because they wanted the Judges to "do right to all manner of people, according to law, without fear or favour, affection or ill-will" (Oath of office of Judges). The fundamental rights guaranteed under the Constitution cannot be secured unless Judiciary is independent because the enforcement of these rights has been left to Judiciary in terms of Articles 184(3) and 199 of the Constitution and the relevant law. Judiciary has not been made part of the Executive or the Legislature (Article 7). The separation of Judiciary from the Executive was made a Constitutional mandate (Article 175(3))."
>
> (emphasis supplied)

It is in this context that Justice Qazi Faez Isa ("the petitioner") submits that he has filed the present Constitution Petition No. 17 of 2019 ("petition") seeking to protect this basic fundamental right of the Pakistani people from unlawful interference by the Executive authorities. To our minds, the primary duty of the Bench in all matters, including the present petition, is to do justice impartially in accordance with law without compromising our independence.

FACTS

3. In the above background, we may now set out the events which led to the filing of this petition. The petitioner is a serving Judge of the Supreme Court. Prior to this he was appointed directly as Chief Justice of Balochistan High Court on 05.08.2009, following which he was elevated to the Supreme Court on 05.09.2014. The petitioner has thus been holding public office since the later part of 2009. On 10.04.2019, Respondent No. 4, Mirza Shahzad Akbar, Chairman Assets Recovery Unit ("ARU"), received a letter from a journalist, one Mr. Abdul Waheed Dogar ("Mr. Dogar") . The letter alleged that the petitioner had certain properties in the United Kingdom owned in the name of his wife, ("Mrs. Isa"), which he had not declared. Attached with this letter was a document detailing one of the properties, 40 Oakdale Road, London, E11 4DL. However, the respondents only produced this document once they commenced their arguments on 02.06.2020. Thereafter, the Chairman ARU met with the Law Minister on 16.04.2019 who authorised the ARU to investigate into the matter on the basis of the above mentioned information. This is recalled in the former's letter dated 10.05.2019 addressed to the Law Minister.

4. After the grant of the aforenoted authorisation on 16.04.2019, certain inquiries were made by ARU to confirm the veracity of the allegations levelled against the petitioner by Mr. Dogar: firstly, the legal expert of ARU, Barrister Zia Ul Mustafa Nasim, was asked to find out whether the petitioner owned any properties in the United Kingdom in the name of Mrs. Isa and secondly, the Chairman of Federal Board of Revenue ("FBR") was approached for examining the tax records of the petitioner and Mrs. Isa to determine whether any foreign properties had been declared in their wealth statements.

5. On 08.05.2019, the legal expert of ARU conveyed to the Chairman ARU that there were three properties in the United Kingdom belonging to Mrs. Isa and her children. Their details are as follows:

i. 50 Coniston Court which was originally leased to the petitioner's wife in 2004 for a sum of 236,000 and was later renewed in October 2011 with the daughter added as a co-lessee;

ii. 40 Oakdale Road which was purchased by the wife and daughter on 27.03.2013 for a sum of 245,000; and

iii. 90 Adelaide Road which was purchased by the wife and son on 28.06.2013 for a sum of 270,000 ("London Properties").

Subsequently, on 10.05.2019 the Assistant Commissioner (Inland Revenue) confirmed to the Commissioner (Inland Revenue) that neither the petitioner nor Mrs. Isa had declared these properties in their wealth statements. Additionally, he revealed that Mrs. Isa had stopped filing her tax returns from the tax year 2015 and onwards.

6. On receipt of this information, the Chairman of ARU wrote a memorandum to the Law Minister on 10.05.2019 apprising him about the recent findings. On the basis of this material, claimed to demonstrate the petitioner's ownership of undeclared foreign assets, the Ministry of Law and Justice on 17.05.2019 prepared a summary for the Prime Minister ("PM"). This summary recommended the PM to advise the President to file a Reference under Article 209(5) of the Constitution before the Supreme Judicial Council ("SJC") alleging misconduct against the petitioner. On 20.05.2019 the President approved and signed the Reference (this was later numbered as SJC Reference No. 1 of 2019) which was filed with Secretary SJC on 23.05.2019. The primary allegation in the Reference against the petitioner was that he had violated Section 116 of the Income Tax Ordinance, 2001 ("the Ordinance") by not declaring the London Properties of Mrs. Isa and his children in his wealth statements. The Reference also alleged that the source of funds for purchasing these properties was not accounted for which meant that the aspect of money laundering could not be ruled out.

7. Consequent to the Reference being filed, the SJC by a formal intimation dated 14.06.2019 directed the petitioner to respond to the three allegations contained in the Reference (ref: Const. P. No. 17 of 2019, Part II), particularly:

"Page 106: ...the factum of ownership of the relevant properties mentioned in the Reference, the source of funds utilized for their acquisition and the mode of transfer of such funds."

(emphasis supplied)

The petitioner filed his Preliminary Response on 28.06.2019 in which he admitted that the London Properties were owned by his wife, who he claimed was a financially independent taxpayer, and his adult children (ref: page 128, Const. P. No. 17 of 2019, Part II). However, no explanation was provided for the other two questions posed by the SJC. As a result, the SJC by its order dated 02.07.2019 asked the former learned Attorney General ("AG") to assist the Council on the next date of hearing on 12.07.2019. Consequently, the AG filed a Rejoinder before the SJC on 11.07.2019. After considering the Preliminary Response of the petitioner and the Rejoinder and documents filed by the AG, on 12.07.2019 the SJC ordered the issuance of a Show Cause Notice ("SCN") to the petitioner. The SCN was issued on 17.07.2019. In his Interim Reply to the SCN dated 31.07.2019, the petitioner categorically rejected being the owner, both actual and ostensible, of the London Properties and further denied all knowledge of their particulars. Thereafter, he filed the present petition bearing the number Const. P. 17 of 2019 under Article 184(3) of the Constitution on 07.08.2019 with the following prayer:

A. Declare that Reference No. 1 and Reference No. 427 are not maintainable and non-est dismiss the same;

B. Declare that Reference No. 1 and Reference No. 427 are mala fide, filed with malice aforethought, filed for ulterior motives and to achieve a collateral purpose and therefore are not maintainable and liable to be dismissed;

C. Declare that proceeding any further with Reference No. 1 and Reference No. 427 undermines the independence of the judiciary, which independence is secured under the Constitution;

D. Declare that as Reference No. 1 has been filed by proxy it is not maintainable and cannot be entertained;

E. Declare that as there is every likelihood for this petition succeeding the Hon'ble Supreme Judicial Council be restrained from proceeding in the matter of Reference No. 1 and Reference No. 427 till the disposal of this Petition;

F. Declare that in camera proceedings of the Hon'ble Council in the context of this case are without lawful authority and in breach of fundamental rights;

G. Grant any other, further or better relief to which the Petitioner may be entitled to and which this Hon'ble Court deems fit and proper to grant under Article 184 (3) of the Constitution.

8. The above noted prayer in the petition is preceded by fifty-four questions of law. The main contentions formulated by the learned counsel for the petitioner are as follows:

i. There was no legal obligation on the petitioner to disclose the London Properties of his wife and children;

ii. The alleged misconduct has no nexus with the office of the petitioner;

iii. The Reference is a mala fide and colourable exercise of power;

iv. The petitioner and his family were subjected to covert State surveillance;

v. The evidence against the petitioner was collected illegally;

vi. The ARU was constituted without any legal authority;

vii. There was no authorisation from the President to collect material in support of the complaint;

viii. The President did not form his opinion in terms of Article 209(5) of the Constitution;

ix. No approval of the Federal Cabinet was taken prior to the filing of the Reference before the SJC;

x. There is no substance to the allegations levelled against the petitioner in the Reference; and

xi. The members of the SJC harbour bias against the petitioner (however, learned counsel for the petitioner did not press this argument during oral submissions).

On the factual plane, learned counsel for the petitioner repeatedly contended that because the London Properties are held in the names of the petitioner's financially independent taxpayer wife and adult children, the tax authorities should question them about the source of funds and the mode of their transfer, instead of harassing the petitioner through a Presidential reference filed under Article 209 of the Constitution.

9. Subsequent to the filing of Const. P. No. 17 of 2019 before this Court, the following Constitution Petitions were also filed by the Bar Councils and Associations and concerned citizens of Pakistan to defend the integrity of the petitioner:

i. Supreme Court Bar Association v. President of Pakistan and others (Const. P. No. 19 of 2019);

ii. Abid Hassan Minto and another v. Supreme Judicial Council through its Secretary and others (Const. P. No. 20 of 2019);

iii. Pakistan Bar Council v. President of Pakistan (Const. P. No. 21 of 2019);

iv. Abdul Basit President High Court Bar Association Quetta v. President of Pakistan (Const. P. No. 22 of 2019);

v. Muhammad Asif Reki President Quetta Bar Association v. President of Pakistan (Const. P. No. 23 of 2019);

vi. Sindh High Court Bar Association v. President of Pakistan (Const. P. No. 24 of 2019);

vii. Balochistan Bar Council v. President of Pakistan (Const. P. No. 25 of 2019);

viii. Sindh Bar Council v. Supreme Judicial Council through its Secretary (Const. P. No. 26 of 2019);

ix. Hafiz Abdur Rehman Ansari v. President of Pakistan (Const. P. No. 27 of 2019);

x. Karachi Bar Association v. President of Pakistan (Const. P. No. 28 of 2019);

xi. KPK Bar Council v. President of Pakistan (Const. P. No. 29 of 2019);

xii. Peshawar High Court Bar Association v. President of Pakistan (Const. P. No. 30 of 2019);

xiii. Punjab Bar Council v. President of Pakistan (Const. P. No. 32 of 2019); and

xiv. Pakistan Federal Union of Journalists v. President of Pakistan (Const. P. No. 34 of 2019).

These connected petitions primarily raised similar contentions as those agitated by the petitioner, namely, the non-application of mind by the President, mala fides on the part of the respondents in the framing and preparation of the Reference, the precise nature and scope of Article 209(5) of the Constitution, the unlawful creation of the ARU and the necessity of protecting the independence of the judiciary. In the interests of justice, these petitions were clubbed together and were heard along with the main petition filed by the petitioner.

10. In rebuttal to the petitioner's pleas and without assailing his integrity, the respondents submitted the following objections and contentions:

i. The petition is not maintainable for failing to cross the bar under Article 211 of the Constitution both in respect of the pre-reference proceedings and the unchallenged SCN issued by the SJC;

ii. The term misconduct is an inclusive term which includes not only conduct which violates the law but also conduct which is unbecoming of an officer;

iii. The conduct of the petitioner has to be viewed in light of the obligations laid out in the Code of Conduct;

iv. There is no ulterior purpose behind the filing of the Reference;

v. There has been no covert surveillance of the petitioner or his family or any breach of their right to privacy;

vi. There has been no illegal collection of evidence;

vii. The ARU has been properly constituted;

viii. The President has formed his opinion in accordance with law; and

ix. There is merit in the allegations levelled against the petitioner in the Reference.

11. At the outset, we would like to mention that the first hearing for this petition commenced on 17.09.2019 in front of a seven member Bench. However, learned counsel for the petitioner filed an objection application against two learned Judges of the Bench, namely, Justice Sardar Tariq Masood and Justice Ijaz ul Ahsan. He submitted that an adverse outcome for the petitioner, i.e. removal from office, would benefit both the learned Judges in the following manner: Justice Sardar Tariq Masood would become Chief Justice for six months in the year 2023 while Justice Ijaz ul Ahsan would thereafter see his tenure as Chief Justice increase from ten months to seventeen months. Accordingly, he requested the two learned Judges to recuse themselves from hearing this petition. The remaining five members of the Bench unanimously disapproved of this application of the learned counsel in their order dated 17.09.2019 reported as Justice Qazi Faez Isa v. The President of Pakistan (2019 SCMR 1875):

> "5: ... The submissions made by the learned counsel, however, do not disclose such an interest. On the other hand, the suggestion is that a tangible interest may accrue four years later. It involves a contingent, prospective and speculative interest. No precedent to hold such a future contingency to be a disqualifying factor for a Judge has been cited by the learned counsel. His plea is accordingly laden with contingencies and possibly fails the test of a "real likelihood" of prejudice from any Member of this Bench [Asif Ali Zardari v. State (PLD 2001 SC 568 at p.592)]. As such the submissions made by learned counsel prima facie do not carry weight."
>
> (emphasis supplied)

However, Justice Sardar Tariq Masood, immediately, and Justice Ijaz ul Ahsan, with strong reservations, recused themselves from the Bench to maintain the purity, dignity and sanctity of this Court. For convenience, a portion from the note penned by Justice Ijaz ul Ahsan is reproduced below:

> "2: However, in view of the reservations, unfortunately expressed on behalf of the petitioner, who is a brother Judge of this Court, which are neither justified nor have any basis whatsoever in

fact, I do not consider it appropriate to hear these petitions, lest the petitioner entertain the remotest possibility of even a notional element of partiality or bias on my part."

(emphasis supplied)

It was in these circumstances that the file of this case was placed before the (then) Chief Justice to constitute a Full Court of eligible Judges who were neither members of the SJC nor were objected to by the petitioner.

12. As a result, a Bench comprising of ten learned Judges was formed which heard this petition for approximately 10 months, during which period learned counsel for the petitioner argued their case across 18 hearings, learned counsel in the connected petitions argued their cases across 10 hearings and learned counsel for the respondents argued his case across 13 hearings. Subsequently, this Court passed a short order on 19.06.2020 which is reproduced below for convenience:

"ORDER

For detailed reasons to be recorded later and subject to any orders made or directions given therein (if any), these petitions are allowed and disposed of in the following terms:

1. Subject to what is stated below, the Order of the Court is that Reference No. 1 of 2019 is declared to be of no legal effect whatsoever and stands quashed, and in consequence thereof the proceedings pending in the Supreme Judicial Council ("Council") against the Petitioner in C.P. 17/2019 (including the show-cause notice dated 17.07.2019 issued to him) stand abated.
2. Mr. Justice Yahya Afridi dismisses C.P. 17/2019 and disposes of the other petitions in terms as stated in para 1 herein above.
3. Mr. Justice Umar Ata Bandial, Mr. Justice Manzoor Ahmad Malik, Mr. Justice Faisal Arab, Mr. Justice Mazhar Alam Khan Miankhel, Mr. Justice Sajjad Ali Shah, Mr. Justice Munib Akhtar and Mr. Justice Qazi Muhammad Amin Ahmed make the following orders as the further Order of the Court (paras 4 to 11 herein below):
4. Within 7 days of this Order, the concerned Commissioner of Inland Revenue shall himself (and not some other officer exercising delegated powers) issue appropriate notices under the Income Tax Ordinance, 2001 ("2001 Ordinance") to the spouse and children of the Petitioner to offer an explanation regarding the nature and source of the funds (separately for each property) whereby the three properties in the United Kingdom (viz., No. 40, Oakdale Road, London E11 4DL; No. 90, Adelaide Road, London E10 5NW; and No. 50, Coniston Court, Kendal Street, London W2 2AN) that are in the names of the spouse and the children were acquired. For purposes of this Order the Commissioner Inland Revenue having jurisdiction over the spouse of the Petitioner (who must be a Commissioner exercising jurisdiction and performing functions at Islamabad) shall be deemed also to be the Commissioner having jurisdiction over the children. (The spouse and children are herein after referred to as "the respondents".) Any notices issued or proceedings taken (or proposed to be issued or taken) under the 2001 Ordinance in relation to any of the respondents in respect, or on account, of the properties aforesaid prior to the date of this Order stand terminated forthwith.
5. The notices shall be served at the official residence of the Petitioner at Islamabad through courier service and such other means as may be considered appropriate and shall be deemed served on the respondents when received at the said address.
6. The respondents shall furnish their replies to the notices along with such material and record as is deemed appropriate. In case any of them is outside the country, it shall be the responsibility of such person to timely file a response, and the proceedings before the Commissioner shall not be adjourned or delayed for the reason of non-availability in Pakistan of such person.
7. Upon receipt of the replies (and of such additional material/ record as may be filed in response to such clarification or explanation, if any, as the Commissioner may, in writing, have sought), the Commissioner shall give an opportunity of hearing to the respondents in person or through

an authorized representative/ counsel and shall thereupon make an order in accordance with the 2001 Ordinance.

8. The proceedings shall be concluded before the Commissioner within 60 days of the date of receipt of the notices as aforesaid, and the order shall be issued by him within 75 days of the said date of receipt, and no adjournment or extension in time whatsoever shall be given as affects or extends the aforesaid periods.

9. Within 7 days of the issuance of the order by the Commissioner, the Chairman, Federal Board of Revenue ("FBR") shall submit a report (to be personally signed by him) to the Council through its Secretary (i.e., the Registrar of the Supreme Court) regarding the proceedings as aforesaid, appending thereto the entire record of the said proceedings. The Secretary shall forthwith place such report before the Chairman of the Council (i.e., the Hon'ble Chief Justice of Pakistan) who shall, in such manner as is deemed appropriate, have the report laid before the Council for such perusal, consideration, action, order or proceedings, if any, in relation to the Petitioner as the Council may determine. The receipt of the report, the laying of it before the Council and the action/ proceedings, if any, or orders or directions, if any, as may be taken, made or given by the Council thereon shall be deemed, for purposes of Article 209 of the Constitution, to be in exercise of the suo motu jurisdiction as is conferred by that Article on the Council.

10. If, within 100 days from the date of this Order, no report as aforesaid is received by the Secretary from the Chairman, FBR, he shall inform the Chairman of the Council accordingly and shall, if so directed by him, write to the Chairman, FBR requiring an explanation as to why the report has not been received. If in reply the report is filed, then the matter shall proceed in terms of para 9 herein above. If a reply is received without the report or no reply is received, then the Secretary shall bring such fact to the attention of the Chairman of the Council who may direct that the matter be placed before the Council for such perusal, consideration, action, order or proceedings, if any, in relation to the Petitioner (or any other person as deemed appropriate) as the Council may determine. The action/ proceedings, if any, or orders or directions, if any, as may be taken, made or given by the Council shall be deemed, for purposes of Article 209 of the Constitution, to be in exercise of the suo motu jurisdiction as is conferred by that Article on the Council. Without prejudice to the foregoing, if at any stage the report is received from the Chairman, FBR, then the matter shall in any case proceed (or be deemed to proceed, as the case may be) in terms of para 9 herein above.

11. For the removal of any doubts, it is clarified that any of the proceedings under the 2001 Ordinance as herein contemplated on the one hand, and before the Council in terms of paras 9 or 10 herein above on the other, are distinct and separate from each other. Accordingly, nothing contained in this Order shall affect or prejudice the right(s) of appeal of any of the respondents under the 2001 Ordinance, if they feel aggrieved by the order made by the Commissioner or (as the case may be) any order made or decision taken at any appellate stage. Any such appeal(s) shall be decided on the merits, in accordance with the 2001 Ordinance. At the same time (and needless to say), the consideration by the Council of any matter placed before it under either paras 9 or 10 herein above shall not be affected by the filing or pendency of any appeal as aforesaid. But the Council may, if it deems appropriate, notice such appellate proceedings or orders/ decisions and may (for purposes only of the matter before it) make such orders or give such directions in relation thereto as it deems appropriate.

12. Mr. Justice Maqbool Baqar, Mr. Justice Mansoor Ali Shah and Mr. Justice Yahya Afridi join in the Order of the Court only to the extent of para 1 herein above, and also make their own order.

Order per Maqbool Baqar, Syed Mansoor Ali Shah and Yahya Afridi, JJ.

13. For the reasons to be recorded later and without limiting our jurisdiction in any manner to appropriately enlarge the scope of or make appropriate declarations and directions in the

detailed judgment, subject to para 15 hereunder, we hold the above petitions maintainable and allow the same. One of the outcomes of such declaration is that the Reference filed by the President of Pakistan against the Petitioner (Mr. Justice Qazi Faez Isa) is quashed, and as a result the proceedings along with the Show Cause Notice issued by Supreme Judicial Council stand abated.

14. One of our pivotal Constitutional values is that the independence of judiciary shall be fully secured. The same Constitution also ordains that to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen. Therefore, it is reiterated that in our constitutional democracy, neither the petitioner judge, nor any other judge, or any individual or any institution, is above the law. The doors of the constitutional forum i.e., Supreme Judicial Council are always open, either on its own motion or for anyone who has a genuine and a bonafide grievance, amenable to the jurisdiction of the Council against a Judge of the Constitutional Court. At the same time, it is equally important, that a Judge like any other citizen of Pakistan enjoys the inalienable constitutional right to be treated in accordance with law. These fundamental values are to be protected at all cost in order to uphold the majesty and supremacy of the Constitution and to honour the people of Pakistan who have adopted and given to themselves this Constitution.

15. Yahya Afridi, J. has however found Constitutional Petition No. 17/2019 as non-maintainable. Herein below are the detailed reasons for this short order.

MAINTAINABILITY

13. The first matter which requires our consideration is the issue of maintainability of this petition under Article 184(3) of the Constitution. Although no objection has been raised by the learned counsel for the respondents in this regard, it is still the bounden duty of this Court to establish the requisite jurisdictional facts under Article 184(3) regardless of whether the said point has been agitated or not. An examination of the jurisprudence of this Court makes it clear that in order to invoke its original jurisdiction under Article 184(3) of the Constitution, the impugned action must be shown to involve a matter of public importance arising from the breach of a fundamental right which affects the public at large. These Constitutional criteria have been reiterated in the case of Al-Jehad Trust and another v. Lahore High Court (2011 SCMR 1688) in which this Court held:

"11: ...unless the matter is of public importance relating to the enforcement of any of the fundamental rights conferred by Part II, Chapter 1 of the Constitution (Articles 8 to 28), the jurisdiction of the Court under Article 184(3) of the Constitution, cannot be invoked. The mere importance of a matter, without enforcement of any fundamental right or reference to a fundamental right without any public importance, will not attract the jurisdiction of this Court under Article 184(3) of the Constitution."

14. The fundamental right of the general public which is claimed by the petitioner to be under threat is the derivative right of the independence of the judiciary. This right is an essential prerequisite for the enjoyment of, inter alia, the principal fundamental right to access justice which is guaranteed to the people of Pakistan by Articles 4, 9 and 10-A of the Constitution. This Court in Sh. Riaz-Ul-Haq v. Federation of Pakistan (PLD 2013 SC 501) observed that:

"28: It is to be noted that the right of "access to justice to all" is a well recognized inviolable right enshrined in Article 9 of the Constitution and is equally found in the doctrine of "due process of law". It includes the right to be treated according to law, the right to have a fair and proper trial and a right to have an impartial court or tribunal."

15. It will be useful at this stage to consider in greater detail the independence of the judiciary, in the absence of which all other facets of the right to access justice are essentially rendered null and void. Indeed, the constitutional necessity of an independent judiciary for providing such access to justice to

the public has been elaborated succinctly in the case of Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan (PLD 2010 SC 61):

> "60: I would, therefore, conclude and hold that access to justice was a Fundamental Right which the Constitution had guaranteed to the people; that the existence of an independent and vibrant judiciary was indispensable and crucial for the enjoyment of the said constitutional assurance and in the absence thereof, this right would be a mere illusion; that without security to the Judges of the Superior Courts vis-a-vis, inter alia, their service and the tenure thereof, the independence of judiciary would be a mere delusion and a chimera;..."

Two crucial points emerge from the above quoted passage:

i. Firstly, it holds that any unlawful interference with Article 179 of the Constitution (which fixes the tenure of the Judges of the Supreme Court and sets the retiring age at 65 years), and any illegal bypass of the mechanism set out in Article 209 of the Constitution (which provides the procedure for the removal of Superior Court Judges) is an interference with the right to access justice. This is because such breaches erode the independence of the judiciary.

ii. Secondly, it affirms that although each individual Judge is guaranteed the right to be independent by the Constitution, it is in essence the judiciary as a whole whose independence has to be secured and protected.

Learned counsel for both the petitioner and the Bar Councils and Associations were at pains to stress this last point. It was emphasised by the latter that their principled stand was not just for the petitioner rather it was for the institution. It was the assault and targeting of the judiciary and the grave dangers which this posed to the right to access justice that compelled the Bar Councils and Associations to file the connected petitions.

16. However, in focusing on protecting Judges from the clutches of the Executive, learned counsel have failed to notice that the counterpoise of this fundamental right is judicial accountability. This necessarily follows from the indisputable fact that the independence of the judiciary is not primarily for the benefit of the Judges, but exists instead to secure the interests, rights and benefits enjoyed by the whole of society. Therefore, if one were to focus only on the protection of the judiciary from the depredations of the organs of the State (howsoever vitally important and crucial that may be), it will not be the independence of judiciary that will result but rather it would be the rule of Judges without any checks and balances. Accordingly, it is only fitting that judicial independence and accountability are treated as being complementary to each other. With that being said, it has to be kept in mind that the petitioner has alleged that there have been serious violations of Article 209(5) of the Constitution in the preparation of the Reference against him. As we have already observed, unlawful infringements of Article 209 erode the independence of the judiciary which is directly connected with the right to access justice. Therefore, the present petition satisfies the two-fold requirement of Article 184(3) of the Constitution.

17. Be that as it may, learned counsel for the respondents has objected to the maintainability of the petition on the ground that the SJC has taken cognizance of the Reference by issuing a SCN to the petitioner. This happened after SJC took into consideration the petitioner's Preliminary Response dated 28.06.2019 and Interim Reply dated 31.07.2019 on the merits of the Reference. However, as our short order dated 19.06.2020 has declared the Reference to be of no legal effect, this contention of the learned counsel is misplaced. The SCN issued by the SJC to the petitioner is premised on grounds given in the Reference. These have been held by us to suffer from serious illegalities. Notwithstanding the fact that the veracity and substance of the underlying factual information of ownership of the London Properties is not denied and remains intact, the SCN cannot survive on its own. This is for two reasons: firstly, although the factual matrix set out in the Reference attributes misconduct to the petitioner, the information contained in it without more is insufficient to sustain a reference for the removal of a Judge of the Superior Courts. Secondly, the allegations in the SCN that are derived from the Reference are

discredited by the same illegalities that invalidate the grounds of the Reference. Therefore, the SCN stands abated.

18. Learned counsel for the respondents has countered this line of reasoning by invoking the ouster clause contained in Article 211 of the Constitution. For ease of reference, this provision is produced below:

"211. Bar of Jurisdiction. The proceedings before the Council, its report to the President and the removal of a Judge under clause (6) of Article 209 shall not be called in question in any court."

He has submitted that Article 211 ibid mandates that proceedings before the SJC are to be accorded a high degree of respect. He urged that such deference was confirmed in the Chief Justice of Pakistan case (supra) which limited a challenge to the proceedings before the SJC to the following grounds:

"102: Having thus looked into the question of jurisdiction of this Court vis-a-vis the Supreme Judicial Council, I would conclude as under:--

(c) that the ouster clause of Article 211 of the Constitution would not protect acts which were mala fide or coram non judice or were acts taken without jurisdiction;"

19. He argued that because learned counsel for the petitioner did not press any of the three grounds mentioned in the Chief Justice of Pakistan case (supra), namely, coram non judice or actions that are mala fide or without jurisdiction, against the SJC during oral submissions, this Bench could not quash the SCN issued to the petitioner. While we are in complete agreement with the learned counsel's submission so far as it deals with the degree of respect to be afforded to the SJC and the sanctity attached to its proceedings, we cannot accept the conclusion that he has drawn from this argument. Such reasoning fails to grasp the crucial point that we have neither adjudicated upon the process of the SJC nor quashed its SCN issued to the petitioner. In fact, in view of the findings recorded in this judgment, we have simply abated the SCN. It is true that the factual information underlying the Reference casts a smear on the petitioner's name and cannot be ignored; however, without confronting the owners of the London Properties the information is at present inchoate to form the basis of proceedings under Article 209 of the Constitution. In these circumstances, we have agreed with the petitioner's plea that the same must be verified to test the veracity of the inference drawn in the Reference about the source of funds. Nevertheless, as the latter has been quashed, the SCN issued by the SJC has no foundation except for the preliminary factual information contained in the Reference. In this situation, the SCN has rightly been abated because it also lacks the factual and legal material on which the Reference was based. Accordingly, Article 211 has no application to the available facts of the present case.

20. Before parting with this area of discussion, we would like to clarify a very crucial aspect of this case that we believe has led to some confusion: namely, what standard of review ought to be applied by the Court for determining whether a reference filed before the SJC is legal or not. During oral submissions, learned counsel for the petitioner relied upon the Chief Justice of Pakistan case (supra) to argue that pre-reference proceedings can be struck down on judicial review grounds. The relevant portion from the judgment is produced below:

"70: Having thus examined all aspects of this question, I would conclude and would consequently declare:--

..

(d) that the said matters not hit by the mischief of Article 211 and mentioned above, would be subject to examination, scrutiny and judicial review like any other executive or administrative act."

(emphasis supplied)

21. However, learned counsel's reliance on the Chief Justice of Pakistan case (supra) for this point is of minor significance. In that case the Full Bench quashed the reference against the (then) Chief Justice on the ground of malice in fact. Nowhere does the judgment use any of the judicial review

grounds to set aside the reference. Nonetheless, out of respect for the Larger Bench hearing the Chief Justice of Pakistan case (supra), we can only convey our reservations and not our disagreement with the aforesaid observation.

22. Be that as it may, it is by now well-settled that SJC is a unique (and the only) body which can examine the conduct of a Superior Court Judge and decide whether the said Judge is fit to complete his tenure. Reliance in this regard is placed on the case of Khan Asfandyar Wali and others v. Federation of Pakistan (PLD 2001 SC 607):

> "Page 946: The Supreme Judicial Council is a unique institution, which comprises the senior most Judges in judicial hierarchy and entrusted with the onerous responsibility of deciding complaints that are referred to it through references by the President alone. It is an essential prerequisite of the independence of judiciary that there is put in place a system of accountability. It should, therefore, be the endeavour of the Judges of the Superior Courts to make the Code fully applicable and ensure that it is strictly adhered to. As held in the case of Zafar Ali Shah (supra), the Judges of the Superior Courts are not immune from accountability. They are accountable only in the manner laid down under Article 209 of the Constitution."
>
> (emphasis supplied)

It may be noticed from the above quoted passage that the sanctity and uniqueness of the SJC is enhanced by its composition. It is comprised of the three senior most Judges in the country and the two senior most Chief Justices of the High Courts (ref: Article 209(2) of the Constitution). Indeed, the significant impact of the SJC's composition on the removal process of Judges was acknowledged in The President v. Mr. Justice Shaukat Ali (PLD 1971 SC 585):

> "Page 602: ...The forum [SJC] consists of Judges of superior Courts who also belong to the same profession. To be tried by one's peers is a protection because they understand one's difficulties, problems and the situation in which one was."

This dictum was subsequently approved in the Chief Justice of Pakistan case (supra) at para-98. However, if we hold today that a reference, which is an executive action under the Constitution, forwarded to the SJC can be struck down on ordinary judicial review grounds such as unreasonableness and proportionality we will be belittling its status, ignoring its competence and pre-empting its decisions based on appreciation of the record. We should endeavour to avoid taking any such step which goes against the spirit and intent of the Constitution. But this is precisely the course of action we will be choosing if the standard of judicial review is adopted to examine the legality of pre-reference proceedings. To exemplify this standard reliance is placed on the decision in Sabir Iqbal v. Cantonment Board, Peshawar (PLD 2019 SC 189):

> "5: ... The court can examine and judicially review the executive discretion exercised by the authorized officer on the ground of proportionality. Alongside reasonableness, proportionality is now a central standard directing the action of the executive branch... Proportionality is a standard that examines the relationship between the objective the executive branch wishes to achieve, which has the potential of infringing upon a human right, and the means it has chosen in order to achieve that infringing objective. The fiduciary duty, from which the administrative duty of fairness and administrative reasonableness are derived, demands administrative proportionality as well... An administrative measure must not be more drastic than necessary or to sum up in a phrase - not taking a sledgehammer to crack a nut. According to De Smith's Judicial Review, the standards of proportionality and unreasonableness are inextricably intertwined. Unreasonableness contains two elements of proportionality when it requires the weight of relevant considerations to be fairly balanced and when it forbids unduly oppressive decisions. Under the first element, proportionality is a test requiring the decision- maker to maintain a fair balance. Under this category the courts evaluate whether manifestly disproportionate weight has been attached to one or other considerations relevant to the

decision. The second element is that the courts consider whether there has been a disproportionate interference with the claimants rights or interests. A more sophisticated version of proportionality provides for a structured test. Here the courts ask first whether the measure, which is being challenged, is suitable to attaining the identified ends (the test of suitability). Suitability here includes the notion of "rational connection" between the means and ends. The next step asks whether the measure is necessary and whether a less restrictive or onerous method could have been adopted (the test of necessity - requiring minimum impairment of the rights or interest in question)."

(emphasis supplied)

23. It may be noticed from the above quoted passage that the scope of judicial review is not only vast but may also be intertwined with the merits of a case. We have already observed that SJC is the only constitutional authority which can examine the conduct of a Judge of the Superior Courts. Therefore, giving the power of judicial review to this Court to set aside pre-reference proceedings will be tantamount to rejecting the capacity and jurisdiction of the SJC to adjudicate upon any question of unreasonableness, proportionality or suitability raised in relation to the merits of the President's actions. It will also open the floodgates of litigation by Judges who are the subject of a Reference. This prima facie appears to be contrary to the meaning of Article 209 of the Constitution which entrusts all matters regarding the merits of a case to a high powered Constitutional domestic forum within the judiciary. It is also pertinent to mention here that even learned counsel for the petitioner challenged the pre-Reference proceedings in the present case on the grounds of mala fides and not judicial review.

THE CASE AGAINST THE PETITIONER

24. Before examining the questions of law raised in this petition, it will be useful to consider the provisions of Article 209 of the Constitution under which the present Reference has been filed:

"209. Supreme Judicial Council.

(1) There shall be a Supreme Judicial Council of Pakistan, in this Chapter referred to as the Council.

(2) The Council shall consist of,

(a) the Chief Justice of Pakistan;

(b) the two next most senior Judges of the Supreme Court; and

(c) the two most senior Chief Justices of High Courts.

Explanation:- For the purpose of this clause, the inter se seniority of the Chief Justices of the High Courts shall be determined with reference to their dates of appointment as Chief Justice [otherwise than as acting Chief Justice], and in case the dates of such appointment are the same, with reference to their dates of appointment as Judges of any of the High Courts.

(3) If at any time the Council is inquiring into the capacity or conduct of a Judge who is a member of the Council, or a member of the Council is absent or is unable to act due to illness or any other cause, then

(a) if such member is a Judge of the Supreme Court, the Judge of the Supreme Court who is next in seniority below the Judges referred to in paragraph (b) of clause (2), and

(b) if such member is the Chief Justice of a High Court; the Chief Justice of another High Court who is next in seniority amongst the Chief Justices of the remaining High Courts, shall act as a member of the Council in his place.

(4) If, upon any matter inquired into by the Council, there is a difference of opinion amongst its members, the opinion of the majority shall prevail, and the report of the Council to the President shall be expressed in terms of the view of the majority.

(5) If, on information from any source, the Council or the President is of the opinion that a Judge of the Supreme Court or of a High Court-

(a) may be incapable of properly performing the duties of his office by reason of physical or mental incapacity; or

(b) may have been guilty of misconduct, the President shall direct the Council to, or the Council may, on its own motion, inquire into the matter."

(6) If, after inquiring into the matter, the Council reports to the President that it is of the opinion,

(a) that the Judge is incapable of performing the duties of his office or has been guilty of misconduct, and

(b) that he should be removed from office, the President may remove the Judge from office.

(7) A Judge of the Supreme Court or of a High Court shall not be removed from office except as provided by this Article.

(8) The Council shall issue a code of conduct to be observed by Judges of the Supreme Court and of the High Courts."

(emphasis supplied)

25. It may be noticed from the above quoted sub-Article 209(5) that proceedings by the SJC may be initiated on grounds of misconduct or physical or mental incapacity of a Superior Court Judge. In the present case, the Reference has alleged misconduct on the part of the petitioner to seek his removal from office. It is specifically alleged that the petitioner has committed a violation of Section 116 of the Ordinance. This has led to the question of source of funds, the violation of the money laundering regime and the provisions of Foreign Exchange Regulation Act, 1947 ("FERA").

26. Although seemingly straightforward, the word 'misconduct' has drawn extensive arguments from both sides. Moreover, despite the significance of this term, it has so far escaped a comprehensive definition. Article 209(5) of the Constitution, which is the primary provision dealing with the removal of Superior Court Judges, does not define it. Even the Code of Conduct ("CoC") issued under Article 209(8) of the Constitution to regulate the conduct of Superior Court Judges does not attribute any meaning to this term. However, it does prescribe the norms and standards of good judicial and personal behaviour expected of Judges. Therefore, any conduct which conflicts with the mandated norms in the CoC can attract scrutiny for possible misconduct. For instance, the CoC observes that the prime duty of a Judge of the Superior Courts 'is to present before the public an image of justice of the nation' (ref: Preamble of CoC). It also makes reference to the Oath of the Judges and their solemn duty to uphold and submit to the Constitution and the law (ref: Preamble of CoC). Therefore, simply put the CoC expects that Judges will conduct themselves with integrity, propriety and dignity both in their public and private lives and will not engage in controversy. It would be useful at this stage to set out what these generic terms actually entail:

"Chambers Dictionary

Page 471: Dignity: elevation of mind or character;

Page 869: Integrity: uprightness; honesty; purity.

Page 1376: Propriety: conformity with good manners; conformity with convention in language and conduct;"

It thus becomes clear that the CoC primarily provides guidance to Judges of Superior Courts on the exemplary qualities they must possess. Therefore, conduct that diverges from these qualities would constitute misconduct. However, ultimately the CoC is silent about the meaning of misconduct. Be that as it may, the Supreme Judicial Council Procedure of Enquiry, 2005 ("2005 Rules"), framed by the SJC, has drawn wisdom from case-law and the CoC to state certain general standards for Judges of the Superior Courts, namely:

"3. Definitions:

In the present Procedure, unless the context provides otherwise, the following expressions used in the Procedure will have the meaning as assigned to them hereunder;

.....

(l) "Misconduct", includes,

(i) conduct unbecoming of a Judge,

(ii) is in disregard of the Code of Conduct issued under Article 209(8) of the Constitution of Islamic Republic of Pakistan,

(iii) is found to be inefficient or has ceased to be efficient."

27. In practical terms, Rule 3(l)(i) succinctly encapsulates the normative standards of misconduct provided in the CoC whilst Rule 3(l) (iii) includes an objective criterion that relates to a Judge's professional performance. Both criteria are consistent with the CoC and are primarily explanatory rather than definitional. The sanctity of the 2005 Rules can be traced to their Constitutional origin as these have been framed by the SJC in the exercise of its implied power to facilitate its own proceedings. Such status of the 2005 Rules has been affirmed by this Court in Justice Shaukat Aziz Siddiqui v. Federation of Pakistan (PLD 2018 SC 538) at para-60 which is produced below:

"60: The aforesaid leaves no manner of doubt that where the Constitution creates a forum (SJC) vested with the jurisdiction of accountability of the Judges of the Superior Courts and holders of other high Offices as mentioned in the Constitution or the law, such forum (SJC) has implied and ancillary power to give effect to the mandate of the Constitution, more particularly, by devising its own procedure."

(emphasis supplied)

Since the 2005 Rules have been framed by the SJC to implement its mandate and regulate its own proceedings, these carry special force and thus stand on a higher pedestal than ordinary laws. These Rules provide guidelines for the conduct of SJC proceedings and the exercise of its jurisdiction. Indeed, the SJC as the constitutionally empowered body has been utilising the criteria of misconduct noted in Rule 3(l) of the 2005 Rules and elaborated upon in the CoC to assess the culpability of Superior Court Judges.

28. To assist us on this matter learned counsel for the petitioner, Mr. Babar Sattar, submitted that the CoC imposes two separate obligations on Superior Court Judges: duties that are peculiar to judicial conduct and responsibilities that are specific to personal conduct. It was his case that it is only conduct which is connected with the office of a Judge that can form the basis of a Reference against the petitioner under Article 209(5) of the Constitution. Any other wrong committed by the petitioner in his personal life which has no connection whatsoever with his office can only be visited upon by penalties provided for the wrong committed under the relevant law. He further argued that only such misconduct of the petitioner is cognizable by the SJC that is committed during the former's current service as a Supreme Court Judge. Any misconduct committed previously by the petitioner during his tenure as the Chief Justice of Baluchistan High Court stands absolved. Next, he canvassed the proposition that the petitioner is only responsible for his own personal conduct and not that of his independent wife and children. On this analysis, learned counsel concluded that none of the allegations contained in the Reference satisfied the test of misconduct propounded by him. The London Properties he stated were owned by the Mrs. Isa and her children. Therefore, any justification for an alleged violation of the relevant law in Section 116 of the Ordinance and any explanation for the source of funds had to be sought from the petitioner's family and not the petitioner himself. In so far as the allegations of money laundering or FERA were concerned, learned counsel stated that there was simply no material before the Law Minister, PM and President which justified the inclusion of these charges in the Reference against the petitioner.

29. On the converse, learned counsel for the respondents, relying on case-law from Pakistan and India, argued that the test for misconduct is not whether it violates any prescribed law or rules, rather the test is whether the conduct alleged is wrong, or improper or fails to conform with the standards and norms expected of a Judge. This he submitted would include not only the professional conduct of a Judge but also his conduct in private life (whether that be his own conduct or the conduct of his family members). Furthermore, he stated such a test is concerned only with the gravity of the alleged misconduct and not the era in which such misconduct is said to have been committed. Therefore, in his

opinion the factual matrix narrated in the Reference prima facie did disclose a case of misconduct against the petitioner. He stated that the London Properties were acquired in the names of the petitioner's family members at a time when the petitioner was the Chief Justice of Balochistan High Court i.e. he was a public office holder. Moreover, neither Mrs. Isa nor the petitioner had declared these properties in their wealth statements filed with the Inland Revenue authorities. Proof of this could be found in the Assistant Commissioner's (Inland Revenue) letter dated 10.05.2019. However, he argued the evidence which called for a Reference of misconduct to be filed were the tax returns of Mrs. Isa and the petitioner. The former's returns showed that she did not have sufficient funds for the purchase of these properties (the children have not filed any tax returns), while the latter's returns disclosed that he in fact did possess surplus funds. As a result, he submitted that such non-declaration of the London Properties on the part of the petitioner and Mrs. Isa coupled with their respective financial position, and the plain meaning of Section 116(1)(b) of the Ordinance supported the presumption that it was actually the petitioner who had financed these properties. Accordingly, an answer had to be provided by the petitioner about the source of funds to rule out any violation of Section 116 of the Ordinance and the money laundering regime. Such an answer could only be sought by the SJC which is why the Reference was filed against the petitioner.

30. In our considered view, to determine whether the facts of this case warranted the filing of a Reference alleging misconduct against the petitioner, the substance of the term 'misconduct' needs to be examined. Article 209(5) of the Constitution sets out misconduct as one of the two grounds of removal of a Superior Court Judge. Therefore, any meaning ascribed to misconduct should be consistent with the object of Article 209. Two decisions describe the purpose of Article 209 succinctly. The first is the case of Al-Jehad Trust v. Federation of Pakistan (PLD 1996 SC 324) in which Justice Manzoor Hussain Sial held that:

> "Page 537: Undoubtedly, Article 209 guarantees the tenure of office of a Judge and explicitly secures the independence of Judiciary, which is dominant intent of the Constitution..."

The second case is Syed Zafar Ali Shah v. General Pervaiz Musharraf (PLD 2000 SC 869) in which this Court observed:

> "Page 1211: Clearly, the Judges of the Superior Judiciary enjoy constitutional guarantee against arbitrary removal. They can be removed only by following the procedure laid down in Article 209 of the Constitution by filing an appropriate reference before the Supreme Judicial Council and not otherwise."

It thus becomes obvious that Article 209 serves two purposes:

i. It provides security of tenure to Superior Court Judges by allowing them to be judged by their own peers thus insulating the removal process from the clutches of the Executive; and

ii. It also holds Superior Court Judges accountable for their wrongdoings by providing a mechanism for their removal.

The aforenoted two purposes are evidenced by Article 209(7) of the Constitution which reads:

> "209. Supreme Judicial Council
>
> (7) A Judge of the Supreme Court or of a High Court shall not be removed from office except as provided by this Article."

In the above background, Article 209(5) limits the grounds of unfitness for the removal of Judges while Article 209(7) guarantees that honest, competent and independent Judges do not become the target of a hostile Government/ Executive. Therefore, the threshold that constitutes misconduct for the purposes of Judges of the Superior Courts should manifest this intent and spirit of Article 209 of the Constitution. Accordingly, the standard for the commission of misconduct must not be so high that it is impossible to allege thus rendering Judges unanswerable for their conduct. On the other hand, the threshold for misconduct must also not be so lenient so as to become a weapon in the hands of disgruntled litigants, interest groups or Executive against honest, competent and independent Judges.

31. Against this background, one can now examine the features of misconduct recognised under Article 209(5) of the Constitution. The starting point in this regard should be the seminal judgment of this Court in The State v. Mr. Justice Akhlaque Husain (PLD 1960 SC 26). The relevant portion is reproduced below:

> Page 32: "... the word "misbehaviour" must be understood in its ordinary sense, viz. as implying misconduct, that is to say, conduct which is unbecoming of a Judge or renders him unfit for the performance of the duties of his office, or is calculated to destroy public confidence in him... We cannot therefore accept the respondent's contention that it is only on proof of misconduct in respect of a judicial proceeding or in respect of office or on proof of conviction that a High Court Judge may be removed and that no other conduct, however infamous or scandalous, or whatever defect of character it might disclose, can ever be a ground for his removal."
>
> (emphasis supplied)

This dictum was followed and approved in the Shaukat Ali case (supra) at page 623. Since the formulation is non-exhaustive, it gives discretion to the SJC to determine whether any alleged conduct of a Judge comes under the purview of misconduct. It also lays down a high threshold of misconduct to ensure that trivial indiscretions or infractions of the law by Judges or any minor shortcomings in their personal lives do not render them liable to removal proceedings. At the same time it protects the integrity of the judicial institution by allowing for the removal of Judges whose conduct without constituting a violation of a prescribed law is so improper that it renders such Judge unfit for holding judicial office. In fact, the meaning of misconduct gathered from the CoC also exemplifies this construction. As noted above, although the CoC does not contain a definition of misconduct, it does contain norms, conventions and guidance (reflected in its Articles) on the standards to be met by Superior Court Judges in their professional and private lives. What is notable about such guidance is that it hardly incorporates any legal obligations in the Code. Instead the Articles primarily consist of ethical guidelines and traditional norms and standards expected of a Judge. For instance, the Preamble to the CoC reads as follows:

> "...To be a living embodiment of these powers, functions, and obligations calls for possession of the highest qualities of intellect and character. Equally, it imposes patterns of behavior, which are the hall-mark of distinction of a Judge among his fellow-men."

Likewise, Article III observes:

> "Article-III: To be above reproach, and for this purpose to keep his conduct in all things, official and private, free from impropriety is expected of a Judge."

Similarly, Article V states:

> "Article-V: Functioning as he does in full view of the public, a Judge gets thereby all the publicity that is good for him. He should not seek more. In particular, he should not engage in any public controversy, least of all on a political question, notwithstanding that it involves a question of law."

Lastly, we have Article VI which requires:

> "Article-VI: A Judge should endeavor to avoid, as far as possible, being involved, either on his own behalf or on behalf of others, in litigation or in matters which are liable to lead to litigation such as industry, trade or speculative transactions.
>
> To employ the influence of his position to gain undue advantage, whether immediate or future, is a grave fault.
>
> A Judge must avoid incurring financial or other obligations to private institutions or persons such as may embarrass him in the performance of his functions."
>
> (emphasis supplied)

32. It may be noticed that the above Articles of the CoC are non-legal in nature. A violation of any of these Articles would neither sustain a civil lawsuit nor a criminal prosecution. However, an

infringement thereof may very well lead to disciplinary proceedings under Article 209(5) of the Constitution. But, this is not the only remarkable feature of the CoC. For instance, on a careful examination of Article III, it can be observed that it expects Superior Court Judges to keep their conduct in all aspects of their lives, including private life, free from impropriety. Furthermore, Article VI calls upon Judges to avoid litigation and to be diligent in their financial affairs to minimise the chance of any embarrassment in the performance of their functions. This very clearly means that the CoC does not only expect impeccable behaviour from a Judge in the courtroom but it also expects him to maintain these high standards of integrity, propriety and dignity outside the Court. Such qualities and conduct are necessary to preserve not only the prestige and honour of the Judge but also the prestige and honour of the institution of the judiciary. Therefore, the contention of the learned counsel for the petitioner that the allegations against the petitioner pertain to his personal life and so cannot become the basis for a Reference has no force. Accordingly, there is no doubt in our minds that the interpretation of misconduct set out by this Court in the Justice Akhlaque Hussain case (supra) reflects the intent and spirit of Article 209(5) of the Constitution, the CoC and the 2005 Rules.

33. Additionally, the threshold of misconduct adopted by this Court and approved by the SJC is also similar to the tests used by Disciplinary Committees and Parliaments of foreign jurisdictions for the removal of Judges. For example, the requirement of upholding the confidence of the public is not unique to our Courts. In fact, it is a criterion which is applied across the world to enforce accountability of Judges and other public office holders. In Lawrence v. Attorney General of Grenada (2007 UKPC 18 at para-25) the Privy Council approved a passage from Clark v. Vanstone (2004 FCA 1105) in which the Federal Court of Australia held:

> "Para 85: ...For present purposes, the important proposition to be drawn from these expressions of opinion is that, in a case in which the term 'misbehaviour' is used with reference to the holder of an office, the content of its meaning is to be determined by reference to the effect of the conduct on the capacity of the person to continue to hold the office. In turn, the capacity to continue to hold an office has two aspects. The conduct of the person concerned might be such that it affects directly the person's ability to carry out the office. Alternatively, or in addition, it may affect the perceptions of others in relation to the office, so that any purported performance of the duties of the office will be perceived widely as corrupt, improper or inimical to the interests of the persons, or the organisation, for whose benefit the functions of the office are performed."
>
> (emphasis supplied)

This passage was cited again with approval by the majority of the Privy Council in Hearing on the Report of the Chief Justice of Gibraltar (2009 UKPC 43 at para-202). Even in the United States, where the process of impeachment of Judges is initiated by a Resolution of the House of Representatives ("House"), the Report dated 10.05.1989 accompanying the Resolution to Impeach United States District Judge Walter L. Nixon, Jr (ref: Report No. 101) stated:

> "Page 12: ...thus, from an historical perspective the question of what conduct by a Federal judge constitutes an impeachable offense has evolved to the position where the focus is now on public confidence in the integrity and impartiality of the judiciary. When a judge's conduct calls into questions his or her integrity or impartiality, Congress must consider whether impeachment and removal of the judge from office is necessary to protect the integrity of the judicial branch and uphold the public trust."
>
> (emphasis supplied)

Likewise in Australia, Sir George Bush sitting in the Parliamentary Commission inquiring into the alleged misconduct of Justice Lionel Keith Murphy, Judge High Court of Australia, held:

> "Page 8: If [judges] conduct, even in matters remote from their work, is such that it would be judged by the standards of the time to throw doubt on their own suitability to continue in office, or to

undermine their authority as judges or the standing of their courts, it may be appropriate to remove them."

(emphasis supplied)

Even in the Justice Shaukat Ali case (supra), the SJC observed that:

"Page 602: ...It [inquiry by SJC] is simply the conduct of a Judge which is to be properly reviewed in the interest of the purity and honour of the judiciary..."

This dictum was later cited with approval in the Chief Justice of Pakistan case (supra) at para-98. These tests, therefore, not only affirm this Court's interpretation of misconduct but also (again) dispel the contention of the learned counsel for the petitioner that only conduct which has a nexus with the petitioner's office can be the basis of an information under Article 209(5) of the Constitution. In fact, misconduct is any conduct of the Judge which damages the publics perception about his ability to discharge his duties or which undermines public confidence in the institution of the judiciary regardless of whether such conduct occurs in the professional arena or in the private life of a Judge.

34. As far the learned counsel's contention that the petitioner can only be removed for misconduct committed during his tenure as a Supreme Court Judge, it will suffice to reproduce what the House held in its report dated 08.07.1912 against Robert Wodrow Archbald, Judge of the United States Court of Appeal for the Third Circuit (Pennsylvania, New Jersey, Delaware and Virgin Islands) (ref: Report No. 946):

"Page 175: It is indeed anomalous if the Congress is powerless to remove a[n] ... unfit Federal judge from office because his... misdemeanor, however vicious or reprehensible, may have occurred during his tenure in some other judicial office under the Government of the United States prior to his appointment to the particular office from which he is sought to be ousted by impeachment, although he may have held a Federal judgeship continuously from the time of the commission of his offenses. Surely the House of Representatives will not recognize nor the Senate apply such a narrow and technical construction of the constitutional provisions relating to impeachments."

(emphasis supplied)

Similarly, the House in its report dated 04.03.2010 against G. Thomas Porteous, Jr., Judge of the United States District Court for the Eastern District of Louisiana (ref: Report 427) noted that the critical question which needs to be addressed by the House and Congress is whether the alleged misconduct demonstrates a lack of integrity and judgment in the Judge which makes him unsuitable to continue to perform the functions of his post. The timing of the misconduct is irrelevant to such a determination (page 19) . Indeed, by accepting the contention of the learned counsel for the petitioner that a time bar should be imported into the process of judicial accountability, we would be granting immunity to Judges who have committed serious misconduct in their previous posts. This would be contrary to the demand for transparency and fairness in the accountability of Judges, especially when it is self-evident that previous behaviour of a Judge is a reflection of his character, disposition and professional or private ethics. Therefore, the submission of the learned counsel that the alleged misconduct of the petitioner has become a past and closed transaction because it was committed during his time as a High Court Judge is incorrect.

35. Lastly, learned counsel for the petitioner also raised the argument that the petitioner was not accountable for the financial affairs of his independent wife and adult children. While there is no cavil to the proposition that "the days are long gone when a husband and wife were treated as one person in law and the husband was that person" (ref: Chief Justice of Gibraltar case (supra) at para-257), the fact of the matter is that when it comes to public office holders the situation is different. Judges, like other public office holders, occupy a position of sacred trust. They hold positions where they exercise power and authority under the law. Under the Constitution and the law, such a position carries certain benefits and privileges accompanied by obligations and responsibilities. A Judge of the Superior Court is

entitled to these perks and benefits which are also enjoyed by his spouse and family. Some of these benefits and privileges available to the spouse and family of a Judge of the Superior Courts are:

A. During Service

i. A medical allowance (ref: Rule 10 of The Federal Service Medical Attendance Rules, 1990);

ii. A travel allowance (ref: Rules 3(4)(i) and 4(i) of The Supreme Court Judges (Travelling Allowance) Rules, 1958); and

iii. The use of a Government maintained residence and an official car at the residence (Rules 20, and 21 of Supreme Court Judges (Leave, Pension and Privileges) Order, 1997) .

B. After Service

i. A pension to the spouse after the death of the Judge (ref: Clause 4 of the Fifth Schedule to the Constitution)

ii. A medical allowance (ref: Rule 10 of The Federal Service Medical Attendance Rules, 1990);

iii. The services of a driver and an orderly (ref: Rule 25 Supreme Court Judges (Leave, Pension and Privileges) Order, 1997); and

iv. 3000 free local telephone calls per month, 2000 units of electricity and 25HM3 of gas per month, free supply of water and 300 litres of petrol per month (ref: Rule 25 Supreme Court Judges (Leave, Pension and Privileges) Order, 1997).

36. As alluded above, these entitlements of the Judge which he shares with his family [his spouse and members of his family who are either dependent on him or with whom he has financial dealings ("family members")] also carry certain responsibilities and obligations. One such obligation is the duty to enjoy these privileges with dignity, probity and discretion. Apart from the material benefits enjoyed by a Judge's family members during and after his service, they also receive an advantage from the respect and recognition extended, through association, by people who interact with them. In these circumstances, the family members of a Judge are required to be careful (financially, socially and politically), moderate and fair in their dealings and exchange with others so that no controversy arises which may embarrass the Judge. Although these responsibilities are shared by family members of all public office holders, they apply with particular force to family members of Judges as the latter are expected to be the embodiment of a person who is 'God-fearing, law-abiding, abstemious, truthful of tongue, wise in opinion, cautious and forbearing, blameless, and untouched by greed' (ref: Article II of CoC). Accordingly, high standards of propriety are expected of a Judge and his family members. This is precisely why in a case of impropriety alleged against the son of a learned Judge, Justice Khilji Arif Hussain observed in Suo Motu Case No. 5 of 2012 (PLD 2012 SC 664) that:

"Page 679: Although family members of public functionaries are, properly speaking, not performing State functions, the alleged facts of this case highlight the necessity of extreme caution and discretion in their private and public dealings and conduct."

37. Generally, every adult individual is recognised in law as an independent entity. However, different principles apply in relation to family members of public office holders. This is because any irresponsible act on the part of a family member may reflect adversely on the Judge. This approach is recognised by the Judicial Codes of Conduct of various countries. The Guide to Judicial Conduct for Australian Judges states:

"Page 41: ...Issues involving a judge's relatives, especially close relatives, can give rise to particularly difficult questions... There are likely to be situations in which the activities or careers of relatives attract consideration of the principles identified in the Guide, because the situation presents an issue under the Guide which the judge must address... The response by a judge to such matters will depend on the particular circumstances. Matters affecting a spouse's or partner's career or appointment will, for example, call for consideration of public attitudes or perceptions, the kind of activity the partner engages in, the other persons present or participating... These are examples only. In the end, each situation must be resolved by the

judge applying the principles identified in the Guide. A central issue will always be whether and how the situation might reflect adversely on the judge or the judiciary or might diminish public confidence in them."

(emphasis supplied)

Taking the connection between a Judge and his family in financial matters a step closer are the Bangalore Principles of Judicial Conduct ("Principles") which were drafted in 2001 and endorsed in 2002 by the Judicial Group on Strengthening Judicial Integrity (a body consisting of senior Judges from various legal systems of the world). These principles were later endorsed by the United Nations Economic and Social Council on 27.07.2006 in its Resolution 2006/23:

"Resolution

2006/23

Strengthening basic principles of judicial conduct

..

1. Invites Member States, consistent with their domestic legal systems, to encourage their judiciaries to take into consideration the Bangalore Principles of Judicial Conduct, annexed to the present resolution, when reviewing or developing rules with respect to the professional and ethical conduct of members of the judiciary; ..."

Under the heading of propriety, Rule 4.7 of the Principles reads:

"Value 4: PROPRIETY

Principle: Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.

..

4.7: A judge shall inform himself or herself about the judge's personal and fiduciary financial interests and shall make reasonable efforts to be informed about the financial interests of members of the judge's family."

To remove any doubts about what constitutes the family of a Judge, the Principles define a Judge's family to include:

"DEFINITIONS

"Judge's family" includes a judge's spouse, son, daughter, son-in-law, daughter-in-law, and any other close relative or person who is a companion or employee of the judge and who lives in the judge's household."

An obligation similar to the one set out in Rule 4.7 is also present in Canon 3(C)(2) of the United States Code of Conduct for Federal Judges. In essence, the above obligations require a Judge to make reasonable efforts to be aware about the financial affairs of his family members. This precaution helps to forewarn him about extraneous influences or vested interests which can compromise not only his independence and credibility but also in the words of this Court in Justice Shaukat Ali's case (supra) the "purity and honour" of the institution to which he belongs.

38. At first glance an obligation to remain informed about the financial affairs of one's family members seems archaic because modern jurisprudence emphasises the protection of the rights of the individual against the State and society. However, to understand the rationale behind the obligation on Judges to make reasonable efforts to be informed about or to watch over the financial affairs of their family members, one has to understand the nexus of this obligation with the nature of Judges work and the position they occupy in society. As has been held above, Judges exercise pre-eminent authority under the law. They adjudicate disputes between litigants, hold parties appearing before them accountable and impose liabilities and grant relief to such parties. With their authority comes an even greater responsibility to decide cases fairly, independently and in accordance with law. In such a situation, it is imperative for a Judge that he should make reasonable efforts to be informed about the financial interests of his family members for the simple reason that if a case comes before him which

directly or indirectly involves the pecuniary, proprietary or other personal interests of any of his family members, he can recuse himself. Such recusal is a manifestation of the now well-established principle of law (ref: Government of N.W.F.P v. Dr. Hussain Ahmad Haroon 2003 SCMR 104):

> "Page 110: It is an age-old fundamental principle of law that justice should not only be done but manifestly and undoubtedly it should seen to have been done. To achieve this objective/goal it is of prime importance that a Judge/person equipped with the authority of decision should not be having any sort of personal interest in the outcome of the matter under issue before him."
>
> (emphasis supplied)

However, this is not the only object behind imposing such a burdensome obligation on Judges. Another equally, if not more, important reason for requiring Judges to be aware of the financial interests of their family members is that the law's intent is to prevent a Judge's family from becoming a conduit to discreetly influence his opinions and views. This assures the Judges independence and integrity apart from safeguarding the institution of the judiciary.

39. Likewise, the recently enacted Foreign Assets (Declaration and Repatriation) Act, 2018 ("the Act") also provides a rationale for imposing such an obligation on Judges of the Superior Courts. This piece of legislation provides an advantageous scheme to Pakistani citizens to disclose their undeclared foreign assets subject to payment of tax at a nominal rate set out in the Schedule to the Act. The object of the Act is to bring such assets on record in the documented tax economy. For obvious reasons, holders of public office are not eligible to avail this tax incentive. The significance of this Act for our purposes is that it treats the assets of the spouse and dependent children and the assets of the public office holder as identical. A Judge of the Superior Courts is included in the category of holder of public office. For ease of reference, the relevant Sections of the Act are produced below:

> "2. Definitions.---(1) In this Act, unless there is anything repugnant in the subject or context,-
>
> .
>
> (h) "holder of public office" means a person who is or has been, during the preceding ten years,-
>
> .
>
> (iv) the Chief Justice or, as the case may be, a Judge of the Supreme Court, Federal Shariat Court, a High Court or a Judicial Officer whether exercising judicial or other functions or Chairman or member of a Law Commission, Chairman or Member of the Council of Islamic Ideology;
>
> ..
>
> 4. Application.---(1) The provisions of this Act shall apply to-(a) all citizens of Pakistan wherever they may be, except holders of public office, their spouses and dependent children;"
>
> (emphasis supplied)

40. Accordingly, neither public office holders nor their spouses and dependent children can avail the benefit of this scheme. The purpose of such an exclusion is to ensure that public office holders do not use their family members as a conduit to whiten their undeclared wealth. There is no relief in tax amnesty schemes even if the spouse is independent. This is a legal incident or consequence of being a holder of public office and introduces an element of transparent accountability in the financial matters of such officers.

41. Indeed, the Reference alludes to this element of financial accountability by implying that the London Properties are benami owned. However, it cites no evidence to support this contention. Nevertheless, during the course of his submissions, learned counsel for the petitioner submitted, after inquiring from his client, that the latter did not gift any amount of money to his family members during the preceding tax years. In any case, the elements of benami (or the evidence in support of it) need not be discussed here because it is not for us to determine at present whether the petitioner's family is his benamidar. This is a factual determination that can only be made by the competent forum after examining all the evidence. Nonetheless, unless the source of funding for the London Properties is duly explained by the petitioner's family, it will allow the resulting public controversy to continue which is

neither beneficial for the petitioner in his personal capacity as a Judge nor for the institution of which he is a part.

42. Therefore, having seen that Judges are not as insulated from the conduct of their family members as are ordinary private citizens, we need to consider the extent of the obligation on Judges to be aware of the finan-cial interests of their family members. Both the UN Resolution 2006/23 (endorsing the Principles) and the United States Code of Conduct simply state that Judges need to make reasonable efforts to be informed about the financial interests of their family members. However, neither elaborate upon the scope of this obligation. Consequently, its ambit needs to be determined. To begin with, Oxford Dictionary has defined the term 'informed' in the following manner:

"Oxford Dictionary:

Informed: Having or showing knowledge of a subject or situation."

It, therefore, becomes clear that Judges are supposed to have knowledge of the financial interests of their family members. However, if they do not, then they are expected to make reasonable efforts to acquire such information, more so when they are questioned by a competent forum to explain the financial interests of their family members. What constitutes 'reasonable effort' on the part of Judges will no doubt depend upon the circumstances of each case. However, a plea of lack of knowledge by a Judge in relation to the financial affairs of his family members is untenable in light of the general trend in international practice, the obligations imposed on a Judge under the CoC and the law relating to public office holders including Judges. Accordingly, there is a continuing obligation on a Judge to keep himself informed about the financial interests of his family members. This view is consistent with the Preamble of the CoC which emphasises that Judges of the Superior Courts of the country are role models for their fellow men and women. Such an elevated standard of conduct is demanded from Judges so that the institution of the judiciary enjoys the trust and confidence of the nation for its integrity, probity, independence and transparency.

MALA FIDES

43. Having dealt with the preliminary matters arising out of this petition, we may now consider each plea of the petitioner in detail. This petition was primarily filed by the petitioner for the purposes of declaring the Reference null and void. Therefore, the bulk of the submissions of the learned counsel for the petitioner were centred around the contention that the filing of the Reference was a colourable and mala fide exercise of power. He submitted that the whole process was tainted with malice aforethought. He attributed this to the petitioner's judgment in Suo Motu Case No.7 of 2017 (PLD 2019 SC 318) ("Dharna Judgment") announced on 06.02.2019. In that case, the petitioner had passed adverse remarks against the two political parties that are presently the leading members of the ruling coalition in the Federal Government: Pakistan Tehreek-e-Insaf ("PTI") and Muttahida Qaumi Movement ("MQM"). Additionally, he had also made critical observations about the Army. The relevant extracts from this judgment are produced below:

"24: The leadership of TLP must have noted that despite the daylight slaughter of innocents on the streets of Karachi on 12th May, 2007 its principal conspirators and beneficiaries were not punished. They must also have noted that when PTI-PAT had camped in the Red Zone for several months they had achieved the setting up of a judicial inquiry commission. Though the findings of the Inquiry Commission had rebutted PTI's allegations no adverse consequences followed. PTI's leadership did not even tender an apology, let alone clean up the area or pay to clean and restore it. Instead PTI received a lot of free publicity.

53: For the reasons mentioned above this case is disposed of with the following declarations and directions:

..

(15) The Constitution emphatically prohibits members of the Armed Forces from engaging in any kind of political activity, which includes supporting a political party, faction or individual. The

Government of Pakistan through the Ministry of Defence and the respective Chiefs of the Army, the Navy and the Air Force are directed to initiate action against the personnel under their command who are found to have violated their oath."

44. Learned counsel argued that this judgment, and in particular these remarks, angered the ruling coalition. This could be gathered from the review petitions filed by PTI and MQM against the Dharna Judgment. Both review petitions demanded the petitioner's removal from office under Article 209(5) of the Constitution for committing misconduct. He asserted that these review petitions were a coordinated exercise by PTI and MQM to oust the petitioner since they contained almost verbatim language and were even filed in Court on the same date. In addition, learned counsel also cited various other events/actions which he argued highlighted the mala fides behind the Reference. Briefly these are:

i. The use of a proxy complainant, Mr. Dogar;

ii. The leaking of the Reference and its contents to the media;

iii. The derogatory statements made by Mrs. Firdous Ashiq Awan, Special Assistant to Prime Minister ("SAPM") on Information and Broadcasting, about the petitioner;

iv. The haste with which action was taken against the petitioner after the Dharna Judgment; and

v. The charged language used by the AG in his Rejoinder to the SJC.

45. From the opposing side, learned counsel for the respondents negated all claims of mala fides levelled by the petitioner. He submitted that the allegations in their present form were too vague to satisfy the high threshold of mala fide and that the petitioner had failed to discharge the burden of proof. He maintained throughout the course of oral arguments that the Reference was simply filed to ensure judicial accountability and that there was no ulterior motive of the Federal Government. He submitted that he had the highest respect for the petitioner whom he considered an elder brother.

46. We have carefully examined the record and the relevant case-law and have arrived at a conclusion. However, before we discuss the merits of our decision on this complex and fiercely debated issue, we would like to first set out what mala fides actually entail. There is an abundance of case-law on mala fides rendered by this Court in landmark judgments, such as the case of Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri (PLD 1969 SC 14) and Federation of Pakistan v. Saeed Ahmed Khan and others (PLD 1974 SC 151). However, there is still lack of uniformity in its definition and on the standard of proof that a party needs to satisfy in order to establish its claim of mala fide.

47. First and foremost, we shall examine the meaning of mala fide in the legal context. Traditionally, an action actuated with an ulterior purpose to harm another or benefit oneself is classified as an act that is malicious or malice in fact. However, in (relatively) recent times, this Court has recognised another category of mala fides, namely, mala fide in law. Even though both are a species of mala fide, yet each has distinct ingredients and consequences. A recent judgment of this Court in Said Zaman Khan v. Federation of Pakistan (2017 SCMR 1249) has studied not only the entire case-law on the subject but has also analysed the essential yet different ingredients of both mala fide in law and malice in fact. It would be useful at this stage to reproduce the relevant portions from the said judgment:

"82: ...where any action is taken or order passed not with the intention of fulfilling its mandate or to achieve its purpose but is inspired by a collateral purpose or instigated by a personal motive to wrongfully hurt somebody or benefit oneself or another, it is said to suffer from malice of facts. In such cases, the seat of the malice or bad faith is the evil mind of the person taking the action be it spite or personal bias or ulterior motive."

"83: ...where an action taken is so unreasonable, improbable or blatantly illegal that it ceases to be an action countenanced or contemplated by the law under which it is purportedly taken malice will be implied and [the] act would be deemed to suffer from malice in law or constructive malice. Strict proof of bad faith or collateral propose in such cases may not be required."

"90: ... The mere allegation that an action has been taken wrongly is not sufficient to establish mala fide of facts. Specific allegations of the collateral purpose or an ulterior motive must be made and proved to the satisfaction of the Court."

48. The crux of our analysis will be focused on malice in fact since the petitioner has primarily levelled allegations of ulterior motives against the respondents. However, to present a complete picture of mala fides, two general points of importance from the above quoted observations need to be stated. First, that apart from the generally recognised category of actions driven by a foul personal motive described here as malice in fact, there is another category of reckless action in disregard of the law termed as mala fide in law. The first type of mala fide is attributed to a person whereas the second is levelled against the impugned action. While the former is concerned with a collateral purpose or an evil intention to hurt someone under the pretence of a legal action, the latter deals with actions that are manifestly illegal or so anomalous that they lack nexus with the law under which they are taken. Thus it becomes clear that malice in fact and mala fide in law have different ingredients, the former being comprised of factual elements with the latter being composed of legal features, that need to be established as such for the respective consequences to ensue. Secondly, it is clarified that an accusation of mala fide in law involves more than errors of misreading the record or non-application of the law or lack of proportionality in the impugned action. Instead, this is a serious allegation of wanton abuse or disregard of the law. However, when an ulterior motive to cause harm is proved then the repercussions of malice in fact follow. It is for this reason that a mere allegation that an action has been taken wrongly cannot be grounds to hold that such action suffers from mala fide in law or malice in fact. This is also consistent with the view propounded in para-90 of the Said Zaman case (supra).

49. The aforementioned discussion confirms that imputing mala fide of either kind to a person or an action is a grave accusation. It should not be made lightly but can only be done when the facts or legal defects justify its use. In the present case, the petitioner has alleged bad faith and ulterior motives to the respondents personally. This amounts to a plea of malice in fact which requires a high standard of proof. The rationale behind such an approach is that a plea of malice in fact frustrates the process of justice. After a complainant establishes malice in fact against a person, the entire proceeding by the latter is brought to an end. This results in the merits of the case being ignored. Moreover, the reputation of the person, against whom an allegation of malice in fact is made, becomes tarnished and if the said allegation is proved then his repute is forever ruined. He is made out to be a vicious individual who harbours ill-intentions against others. Such are the negative consequences of this plea, if established. This reasoning applies with greater force if such an allegation is made against senior public functionaries of the State. Indeed, it was for this very reason that Justice Muhammad Nawaz Abbasi in his concurring note in the Chief Justice of Pakistan case (supra) held as follows:

"Page 216: ...In view thereof the mala fide of fact in the normal circumstances is required to be established through the positive evidence and not merely on the basis of allegations but the personal malice of a person in official position can be examined in the context as to whether the action in official capacity was extraneous and for collateral purpose which was taken in bad faith or such an action was in good faith."

(emphasis supplied)

Similarly, this Court in the Saeed Ahmed Khan case (supra) observed:

Page 170: male fides is one of the most difficult things to prove and the onus is entirely upon the person alleging mala fides to establish it, because, there is, to start with, a presumption of regularity with regard to all official acts, and until that presumption is rebutted, the action cannot be challenged merely upon a vague allegation of mal [ a] fides."

(emphasis supplied)

50. We are in complete agreement with the views expounded by the members of this Court in the above noted judgments. An allegation of malice in fact is unlike any other ordinary allegation. It carries

with it a stigma for the accused which cannot easily be washed away. If a lower standard of proof for malice in fact is adopted, that would open the floodgates for recalcitrant litigants to make such allegations against their opposing side to derail the process of justice and to defame their opponents in Court. Therefore, to limit these allegations to only genuine claims of malice in fact, we hold that any person who wishes to raise this plea must prove it to the satisfaction of the Court on the basis of positive and cogent evidence.

51. Moreover, there is also an obligation on litigants to plead the particulars of malice in fact in detail. This, has already been alluded to in the Saeed Ahmed Khan case (supra) wherein it was held that vague allegations cannot establish a plea of malice in fact. Such a duty was imposed more explicitly on parties by this Court in the Begum Agha Shorish Kashmiri case (supra). The relevant portion is reproduced below:

> "Page 35: mala fide must be pleaded with particularity and once one kind of mala fide is alleged, the detenu should not be allowed to adduce proof of any other kind of mala fide. Enquiries are not to be launched merely on the basis of vague and indefinite allegations."
>
> (emphasis supplied)

Accordingly, to raise this plea, it is necessary for the relevant party to pinpoint the specific incidents/ events/ actions which demonstrate the malice in fact of the opposing side.

52. With the foregoing background, we shall now consider each allegation raised by the petitioner to determine whether it crosses the threshold of malice in fact or not.

53. Firstly, an allegation has been made that this Reference is a direct consequence of the Dharna Judgment. The malice in fact is statedly evidenced by the review petitions filed by the coalition parties in the Federal Government before this Court. However, the recourse to a review petition is a lawful remedy granted to litigants by Article 188 of the Constitution. It, therefore, cannot be used as evidence for proving the malice in fact of the respondents. As far as the charged language used against the petitioner is concerned, it is noted that the review petition filed by PTI, which has been relied upon by the petitioner, was objected to by the office and was subsequently withdrawn. Its revision, as accepted by the learned counsel, does not contain any adverse averments against the petitioner. With respect to the review petition filed by MQM, undoubtedly it does contain the resentful remark that action needs be taken against the petitioner under Articles III, IV and V of the Code of Conduct. Such language has no place in any petition before this Court. However, the fact that the Dharna Judgment criticised the conduct of PTI and MQM without giving the two political parties a hearing may have disenchanted some members of the MQM party. Yet even such a feeling cannot justify the brazen accusations in the review petition.

54. Be that as it may, learned counsel for the petitioner contended that having availed the appropriate legal remedy of review, MQM, a minority member of the coalition government was so reviled by the Dharna Judgment that it influenced the Federal Government to file a Reference against the petitioner. This view seems implausible and does not demonstrate the plea of malice in fact urged by the petitioner. The Reference is based on Mrs. Isa's ownership of undeclared London Properties. With the blemish attached to the ownership of undeclared foreign properties, such ownership automatically attracts speculation about its status and source. In fact, in the year 2017 the SJC took cognizance of a similar information in the case of another learned Judge who resigned his office. Even the respondents' correspondence on the record shows that the SJC simultaneously received a Presidential reference on the same ground against another learned Judge of the High Court. In this perspective the filing of the present Reference cannot be held to suffer from malice in fact.

55. Indeed, recourse to a lawful remedy under Article 209(5) of the Constitution cannot be malicious unless for ill-motives an information alleges wrong or distorted or exaggerated facts, or seeks relief that is inordinate or extraneous to the undisputed facts. Furthermore, the observations in the Dharna Judgment pale in comparison to the remarks passed by this Court in Air Marshal (Retd.) Muhammad

Asghar Khan v. General (Retd.) Mirza Aslam Baig (PLD 2013 SC 1) in which far stronger observations about our politicians and political system failed to draw any adverse reaction from the Federal Government against any Judge. Consequently, no malice in fact is made out on this ground.

56. The learned counsel for the petitioner next attacked the initiation of the Reference for being tainted with malice in fact as the complaint against the petitioner was filed by Mr. Dogar who has a reputation of planting false stories. He stated that the respondents did not make even the slightest effort to check the credibility of Mr. Dogar and instead accepted his complaint at face value. He submitted that considering the sensitivity of the matter and the fact that the complaint was against a sitting Judge of the Supreme Court, the respondents should at the bare minimum have scrutinised the antecedents of Mr. Dogar.

57. However, such an argument ignores the general law of the land that when an information against a person (whether a public office holder or a private person) is to be evaluated, it is the substance, veracity and consequence of the information which matters and not the credibility and credentials of the informant. Reference in this regard can be made to the decision in Pakistan Tobacco Company Ltd v. Federation of Pakistan (1999 SCMR 382) in which this Court observed:

> "10: We are inclined to hold that the question whether a particular Constitution petition filed under Article 184(3) of the Constitution directly in this Court is maintainable is to be examined not on the basis as to who has filed the same, but the above question is to be determined with reference to the controversy raised in the Constitution petition, and if the controversy involves a question of public importance with reference to the enforcement of any of the Fundamental Rights the same will be sustainable."

58. In the present case, the information supplied by Mr. Dogar is not denied by the petitioner to the extent of ownership of the London Properties by Mrs. Isa and her children. This adds weight to the Court's observation in the above cited case. Although in the Pakistan Tobacco case (supra) this Court was mainly concerned with the maintainability of a petition filed under Article 184(3) of the Constitution, we consider that the same principles also apply to an information filed before the SJC under Article 209(5). The reason is that the receipt of information from any source is cognizable by the SJC under Article 209(5) of the Constitution and is sufficient to sustain an inquiry against a Judge of the Superior Courts. The word 'any' means that the antecedents of the informant are irrelevant unless the information is false, concocted, distorted, exaggerated or seeks relief that is excessive in relation to the accepted facts. As previously noted, the underlying information in the Reference to the extent of ownership of the London Properties by Mrs. Isa and her children is not disputed by the petitioner. Therefore, in such circumstances the background of the informant becomes insignificant. As a result, even this ground does not support the plea of malice in fact raised by the petitioner.

59. The next objection of the learned counsel for the petitioner was about the leaking of the Reference and its contents to the media. He urged that the disclosure was engineered by the respondents which constituted a violation of Rule 13 of the 2005 Rules. This provision is reproduced below:

> "13. Proceedings of the Council not to be reported:--
>
> (1) Proceedings of the Council shall be conducted in camera and shall not be open to public.
>
> (2) Only the findings of the proceedings shall be allowed to be reported.
>
> (3) Proceedings of the meetings of the Council or any other steps that Council may take shall not be reported, unless directed otherwise."

There is no cavil with the proposition that a reference filed against a Superior Court Judge has to be kept confidential. The rationale for adopting such a course of action has been provided in this Court's judgment in Justice Shaukat Aziz Siddiqui and others v. Federation of Pakistan (PLD 2018 SC 538). For convenience, the relevant portion is reproduced below:

> "80: ...Thus, we must attempt to discover the purpose and true intent of paragraph 13 of the SJC Procedure of Enquiry 2005, which alone would hold the key to its proper contextualized

> interpretation. Various countries of the world have chosen either of two paths with regard to the process of accountability of Superior Court Judges. Broadly speaking, one path is through an open process including through a proceeding before a forum outside the judiciary e.g. Parliament in the full gaze of the public eye while the other path is of an insulated process of being dealt with by one's own peers. Our Constitutional Dispensation in principle has adopted the latter course of action. The framers of the Constitution of 1973 appear to have made a value judgment that such a course of action is best suited to our societal and cultural ethos, where allegations are routinely made against all and sundry without any qualms about the truthfulness or otherwise of such allegations. Perhaps the framers of the Constitution may have been inspired, in this behalf, by the mystical saint of Kasur who said that we live in the "Age of Suspicion", where people immediately believe the worst about others. It is said that the Judges like Caesar's wives ought to be above suspicion. An allegation no matter how baseless, if permitted to be made public, such Judge and his capacity to dispense justice would be irreparably prejudiced."

(emphasis supplied)

60. The reasoning in the Shaukat Aziz case (supra) has also been echoed by the learned counsel for the petitioner who has lamented the loss of reputation suffered by the petitioner and the harassment which he and his family have had to endure. One can appreciate the ordeal that the petitioner and his family may have lived through from the speculative media coverage on the Reference. Nevertheless, to hold any particular respondent accountable for revealing the details of the Reference, there needs to be at least some material on record that connects the leaks to one or more of the respondents. The chronology of events reveal that the Reference was signed on 20.05.2019 by the President; and it was filed by the Secretary Law with the SJC on Thursday, 23.05.2019. However, it was only on Tuesday, 28.05.2019 that news of the Reference broke out on social media, and by 29.05.2019 most news channels and papers in the country had reported on it. It was also on 28.05.2019 that the petitioner wrote the first of his letters to the President, inter alia, requesting a copy of the Reference. This letter too was leaked the next day on the media (as was the second letter written by the petitioner on 03.06.2019) . In this chain of events, another occurrence came to light as disclosed in paragraph 43 of the petition. Shortly after the filing of the Reference, a meeting took place between the petitioner and the (then) Chairman of SJC (former Chief Justice of Pakistan). The petitioner's application CMA No 7931/19 quotes in its paragraph 20 an order by the SJC dated 19.08.2019 passed in another proceedings against the petitioner:

> "Pages 20-21: The above mentioned meeting of the respondent-Judge with the Chief Justice of Pakistan shows that the respondent-Judge not only knew about filing of the Reference against him by the President but also about the actual contents thereof and the allegations levelled therein before he had started writing successive letters to the President on the subject professing his ignorance about the same."

61. The petitioner has not disputed the aforesaid meeting being held prior to 28.05.2019. As a result, it is clear that the petitioner had read the Reference and was aware of the allegations made against him. Therefore, before the Reference was leaked, probably on 28.05.2019, only a handful of individuals knew of its existence: the Law Minister, AG, President, PM, (then) Chairman SJC, (then) Secretary SJC and the petitioner himself. The date of the media report about the Reference is significant. Which fresh event triggered the sudden disclosure of the Reference is not evident from the record. Therefore, although the allegation made against the respondents raises suspicion, it is still unsupported by any evidence. Consequently it cannot suffice to conclusively hold that either one or more of the respondents leaked the Reference to the media. Since we cannot on the basis of speculations and suspicions determine who leaked the Reference, therefore no finding with respect to its disclosure and hence of malice in fact against any of the persons who were aware of its contents can be recorded. Be that as it

may, learned counsel for the petitioner also raised issue with Mrs. Firdous Ashiq Awan's press conference on 30.05.2019. He criticised the derogatory manner in which she discussed the Reference against the petitioner and argued that this was irrefutable proof of the respondents' ill-will against the petitioner. We are in agreement with learned counsel that the press conference was in bad taste. Even though, by 30.05.2019 the news about the Reference was already in the public domain, Mrs. Awan used the information for political point scoring. It is not the petitioner's case that she had any role in preparing or framing the Reference. Therefore, her press conference cannot have any consequences vis a vis the Reference. However, even if the poor choice of words used by Mrs. Awan cannot on their own amount to malice in fact, their hostile and scandalous content during the press conference prima facie shows that she was deriding the petitioner (or was at least attempting to). By such conduct she violated not only Rule 13 of the 2005 Rules but also prima facie breached Article 204 of the Constitution by committing contempt against a sitting Judge of the Supreme Court. Consequently, she should be made answerable for her conduct under Article 204(2)(b) of the Constitution through independent proceedings.

62. Learned counsel for the petitioner next objected to the unusual despatch with which the respondents investigated, prepared and filed the Reference against the petitioner. He submitted that the complaint dated 10.04.2019 was received by Chairman ARU on 12.04.2019. Within four days of its receipt, Chairman ARU met the Law Minister who authorised the investigation against the petitioner. In about a month the entire investigation was completed, with 10.05.2019 being the busiest day. Thereafter, in ten days, on 20.05.2019 the President had signed the Reference. Learned counsel submitted that the completion of the investigation and the preparation of the Reference against the petitioner in such a short period of time strongly indicated ulterior motives on the part of the respondents. With respect to the learned counsel, we are unclear as to how this timeline conveys any ill-motives of the respondents in the matter. The information received by Chairman ARU in the PM's Secretariat was not any routine complaint. It was against a sitting Judge of the Supreme Court and thus received prompt attention from the ARU and the concerned officers of the Federal Government. It must also be said that in such sensitive matters, expeditious action is to be preferred so that if the information is baseless it can be filed without delay. Allowing the affair to linger may expose the process to untoward manipulation and may prejudice the institution and the learned Judge under complaint. But even if we disregard the foregoing view, the crucial question is how does departmental alacrity in the finalisation of the Reference demonstrate malice in fact of the respondents. There is no evidence of falsity of the material collected or of misrepresented facts being alleged by the respondents. Their expedition has no doubt resulted in legal errors (which are discussed below). However, this is still no ground for imputing malice in fact against the respondents. Therefore, this allegation of the petitioner is also without merit.

63. Finally, learned counsel for the petitioner took strong objection to the language used by the AG in his written Rejoinder to the petitioner's Preliminary Response filed before the SJC. He stated that this was clear evidence of the AG's hatred for the petitioner. He read out portions from the Rejoinder in Court, some of which are quoted in the petitioner's pleadings. A few of these are reproduced below:

> "It seems that the Respondent has two mental issues. Firstly, he has a self-persecution phobia; and secondly he considers himself a legend in his own mind, fully bestowed with honesty, integrity and competence and considers the rest of the world as dishonest and incompetent."
>
> "the Respondent craves for self-praise and cheap publicity."
>
> "the Respondent appears to be drenched in self-praise."

We would like to record our disapproval of the language used by the AG for a Judge of the Supreme Court. That being said, the brazen language is not used in the Reference but in the Rejoinder which answers the objections of the petitioner to the Reference. These objections include criticism of the AG's competence which can be found in the Preliminary Response. The AG may have made his harsh

remarks about the petitioner in retaliation to the prickly comments made about him. Be that as it may, since the remarks, notwithstanding their indiscretion, were made in the Rejoinder as opposed to in the Reference, these did not form part of the record before the President. As a result, they did not influence the decision of the President to forward the Reference to the SJC for an inquiry. Therefore, being subsequent to the preparation of the Reference and its summary, the AG's remarks cannot be said to reveal malice in fact in the filing of the Reference.

64. Our conclusion about the absence of malice in fact in the filing of the Reference is reaffirmed by the petitioner's admission that the London properties are indeed owned by his wife and children. This is because it is now well-established in other areas of the law that an allegation of malice in fact gets defeated if it is proved that a complaint levelled against a person is true. Accordingly, we hold that the allegations of malice in fact levelled by the petitioner against the respondents fail.

CONSTITUTION OF ASSETS RECOVERY UNIT

65. Learned counsel for the petitioner next criticised the collection of evidence coordinated by the ARU for being unknown to the laws of Pakistan. He stated that the ARU finds no mention in the Constitution, any Act of Parliament or even the Rules of Business, 1973 ("ROB"). Instead, he submitted the ARU was created by the issuance of a Notification dated 06.11.2018 which the Government has not published in the Gazette. He contended that the entire functioning/working of the ARU was shrouded in a cloak of secrecy, notwithstanding that it seemed to be vested with unlimited powers that infringed upon the fundamental rights of the people of Pakistan.

66. Conversely, learned counsel for the respondents submitted that the ARU has been legally constituted. To support his contention he relied on two judgments of this Court reported as 2018 SCMR 574 and PLD 2018 SC 686 ("Foreign Currency Accounts Cases"), which he argued provided the impetus for creating the ARU to act as a coordinating agency between the different finance related institutions of the country to exercise oversight on economic matters of public importance. The purpose and object of the ARU, he urged, was to recover unlawful assets abroad which may have been created via funds obtained through money laundering, corruption or tax evasion. He relied on Rule 16(1)(m) of ROB read with the Notifications issued by the Cabinet Division to demonstrate that ARU had been created with the approval of the Federal Government in accordance with law.

67. In our considered view, the Foreign Currency Accounts Cases provide a backdrop for examining the legality of the ARU. These judgments noticed that a staggering amount of US$ 15.23 billion was transferred overseas, in the financial year 2016-2017, from private bank accounts without obtaining any explanation or proof that the remitted funds had been lawfully earned and taxed. Such transfers were in addition to the funds that may have been sent through covert hundi and hawala instruments. The detrimental effect on the national economy of such transfers cannot be exaggerated. These negative effects were also recognised by this Court in the Foreign Currency Accounts Case reported as PLD 2018 SC 686:

> "5: ...Clearly, both types of outflows have a huge impact on the stability of the foreign exchange reserves of the country and adversely affect the exchange rates of the Pakistani Rupee. Also as a result, the national economy can become vulnerable to pressure due to foreign currency obligations of the State; can suffer undue and disruptive inflation and can drain the exchequer of substantial amounts of tax on account of escaped income and wealth."

However, it must be observed here that the judgments in these cases did not specifically state the need for a body like the ARU to be created. The relevant extract from the judgment reported as PLD 2018 SC 686 is produced below:

> "11: Having said that, it is observed that any measures taken by the Federal Government in the public interest to protect the foreign exchange reserves of the country and to bring the hitherto undeclared foreign assets within the tax net are welcomed by the Court. Nevertheless, there are other deficiencies of the current tax laws and in the regulatory framework for the holding and

transfer of foreign exchange that promote the accumulation of undeclared foreign assets and corresponding income. These have been highlighted by the Committee but remain unaddressed by the Federal Government. They require careful attention and deliberation by the concerned authorities. Let the Federal Government, FBR and the State Bank of Pakistan state their respective positions about these matters pointed out by the Committee and indicate if any reform is proposed to correct or remedy the same."

(emphasis supplied)

68. It can thus be observed that the Foreign Currency Accounts Cases did not consider or decide the legality of the status of the ARU established vide Notification dated 06.11.2018. At best, these judgments support reform in the tax and regulatory mechanism of foreign currency accounts and enhanced monitoring of foreign exchange transfers from Pakistan. Therefore, to determine the legality of ARU's creation, one has to consider whether the requisite legal actions and procedures for its establishment have been adopted by the person(s) competent and authorised to do so under the law.

69. In this context, learned counsel for the petitioner's primary grievance against the ARU was that no Act of Parliament had created it or conferred powers on it therefore it was void ab initio. However, this argument of the learned counsel appears to misconstrue the scope of Executive power under the Constitution. The nature and ambit of such power has been considered by the Indian Supreme Court in the case of Rai Sahib Ram Jawaya Kapur and others v. The State of Punjab (AIR 1955 SC 549):

"14: It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away.

15: The executive function comprises both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State."

(emphasis supplied)

Para-14 of the above noted judgment was approved by this Court in Messrs Mustafa Impex, Karachi v. The Government of Pakistan (PLD 2016 SC 808 at para-69).

70. It can be noticed from these rulings that ordinarily executive functions involve the execution of law and policy and the supervision of the general administration of the State. As already stated above, the ARU is a coordinating agency which brings under one umbrella the competent statutory authorities to stem the menace of tax evasion, money laundering and corruption in our country. Accordingly, the ARU is essentially executing the policy of the State to curb financial crimes in the country. It is therefore an executive office, in particular an 'Attached Department' of the Cabinet Division, performing executive functions. Having such status, it does not need the backing of an Act to grant validity to its creation and actions as required by Article 4 of the Constitution. Evidence for this can be found in the ROB:

"2. Definitions.---(1) In these rules, unless there is anything repugnant in the subject or context:

..

(ii) "Attached Department" means a Department which has direct relation with a Division and has been declared as such by the Federal Government;"

71. A perusal of Rule 2(1)(ii) makes it clear that for any 'Attached Department' to exist and function, it needs to have a direct relation with a Division and has to be declared by the Federal Government as an 'Attached Department.' The material on record shows that these two essential steps were taken in relation to the creation of ARU. The first of such documents, demonstrating the procedure followed for constituting the ARU as an 'Attached Department,' is the Summary for the Cabinet dated 11.09.2018:

"CABINET DIVISION

SUBJECT: ASSETS RECOVERY UNIT (ARU)

..

3. In view of the above, and in pursuance of earlier decision of the Cabinet [05.09.2018], the following is submitted for consideration and approval of the Cabinet:

..

c. Placement of ARU, under Cabinet Division, to be housed in the Prime Minister's House;"

This was followed by the Notification dated 19.09.2018:

"CABINET SECRETARIAT

CABINET DIVISION

..

No. 643(S)/2018-Cab. The Cabinet, in its meetings held on 5th and 13th September, 2018, vide cases No. 546/35/2018 and No. 556/36/2018, decided to establish the Assets Recovery Unit (ARU) under Cabinet Division, to be housed in the Prime Minister's Office, Islamabad."

The above Notifications prove that the creation of the ARU as an 'Attached Department' of the Cabinet Division was approved by the Cabinet itself. Article 90 of the Constitution establishes that the Cabinet with the PM as its head is the Federal Government. It reads as follows:

"90. The Federal Government:

(1) Subject to the Constitution, the executive authority of the Federation shall be exercised in the name of the President by the Federal Government, consisting of the Prime Minister and the Federal Ministers, which shall act through the Prime Minister, who shall be the chief executive of the Federation."

(emphasis supplied)

Consequently, it becomes evident that the approval for the creation of the ARU was given by the Federal Government. As a result, the two-fold requirement listed in Rule 2 (1) (ii) of the ROB for the constitution of ARU as an 'Attached Department' has been satisfied in the present case.

72. Be that as it may, learned counsel's main objection against the ARU was its alleged interference with the rights and liabilities of individuals in the absence of any statute granting it such a power. However, the Notification dated 06.11.2018 issued by the Cabinet Division shows that the ARU does not act directly but instead operates through its members who have been borrowed from various statutory bodies of the country. These include:

i. The Federal Investigation Agency ("FIA");

ii. The National Accountability Bureau ("NAB");

iii. The FBR; and

iv. The State Bank of Pakistan ("SBP") .

As a result, the ARU is manned primarily with individuals whose powers and jurisdiction are exercised under a statutory regime. Accordingly, the ARU is simply a coordinating office attached to the Cabinet Division with the main purpose of facilitating the collaborative efforts of the relevant statutory functionaries. It therefore cannot be accused of adversely affecting the rights of any Pakistani citizen without the backing of law. This is made clear by the composition of the ARU and its terms of reference ("TORs") which are also set out in the above noted Notification dated 06.11.2018:

"CABINET DIVISION

..

NOTIFICATION

No. F.32/CM/2018-Cab. The Cabinet, in its meeting held on 5th September, 2018, vide case No.546/35/2018, approved the Establishment of Assets Recovery Unit for implementation of Recovery of Unlawful Assets Abroad.

2. The composition and terms of reference of Assets Recovery Unit shall be as follows:

A. Composition:

| | | |
|---|---|---|
| 1. | SAPM on Accountability. | Chairman |
| 2. | Senior Officer from Federal Investigation Agency (FIA). | Member |
| 3. | Senior Officer from National Accountability Bureau (NAB). | Member |
| 4. | Senior Officer from Federal Board of Revenue (FBR). | Member |
| 5. | Senior Officer from State Bank of Pakistan (SBP). | Member |
| 6. | 2/3 Experts from private sector with expertise in forensic accounting, anti-money laundering, international criminal laws and transactional legal systems. | Members |
| 7. | Any other officer/agency/ firm/ or individual if so required by the Unit on temporary or permanent basis may be co-opted by the Unit. | |

B. Terms of Reference:

..

3. Assets Recovery Unit designated officers from relevant organization/ department/ other law enforcement agencies like NAB, FIA or FBR shall with consultation/ support of relevant LEA, trace/detect and pursue repatriation of unlawful assets from abroad. For this purpose, ARU may seek help/assistance of foreign governments/firms/lawyers or individuals if so required."

TOR 3 confirms that when it comes to dealing with the assets of Pakistani citizens, the ARU is only authorised to act through its designated officer/member from the relevant department/ agency. Since these designated officers/ members are simultaneously serving in statutory agencies, they are vested not only with the powers granted by the relevant statute governing their agency but are also bound by the procedural safeguards and obligations laid down in such a statute. As a result, any action attributed to the ARU in relation to the assets of Pakistani citizens is taken through competent authorities strictly in accordance with the law.

73. As far as the issue of non-publication of the Notification dated 06.11.2018, setting out the composition and TORs of the ARU, is concerned, this Court in the case of Saghir Ahmed v. Province of Punjab (PLD 2004 SC 261) has observed:

"9: It depends on the language employed in a particular statute as to whether the provisions regarding publication of a statutory instrument or a notification in the Official Gazette are to be treated as mandatory or directory.

10. Even otherwise, the provisions of a statute for the publication or a notification in official Gazette are generally regarded by the Courts as directory and where their strict non-compliance does not provide any consequences. The legal certainty also requires that ordinarily a statutory instrument should not be treated as invalid because of a failure on the part of public functionaries to publish it in the official Gazette. There may be many things done on the basis of such an instrument. It would seem unfortunate were these things held to be invalid if it were at some stage discovered that there had been a failure by a public authority to go meticulously by the manner and mode of publication of an instrument or notification in the Official Gazette.

...

11. However, no hard and fast rule of universal application can be laid down on the legal effect of non-publication of a notification in the official Gazette. In certain cases, keeping in view the nature and object of a particular statute and to carry out the legislative intent, the provisions

for the publication of a notification in the official Gazette can be treated to be mandatory in nature where rights or liabilities of other persons are involved. ..."

(emphasis supplied)

The above quoted para-10 was subsequently affirmed by this Court in Bahadur Khan v. Federation of Pakistan (2017 SCMR 2066 at para-12). What can be noticed from the quoted passage is that in ordinary circumstances, the non-publication of a Notification in the gazette does not affect its validity except for in limited situations such as when a statute makes publication in the gazette mandatory or where the rights and liabilities of other persons are involved. In the present case before us there is no statute which makes publication of the Notification creating the ARU mandatory. Furthermore, wherever the rights and liabilities of citizens are affected, the existing statutory mechanisms are utilised to ensure actions taken are in accordance with the law. Even in the Reference against the petitioner, the material on record demonstrates that all intrusive actions were taken by officers belonging to the relevant statutory agencies. For example, the tax records of the petitioner were examined by the Assistant Commissioner (Inland Revenue), and the identification documents and travel records were accessed by Director FIA. Therefore, since none of the exceptions to non-publication apply to the facts of the present case, we find that there is no illegality that persuades us to hold that the publication of the Notifications dated 20.08.2018 and 06.11.2018 in the gazette was mandatory.

74. Next, learned counsel for the petitioner attacked the appointment of Mirza Shahzad Akbar as SAPM on Accountability. In response, learned counsel for the respondents relied on Rule 4(6) and serial number 1A of Schedule V-A of the ROB to defend the said appointment. For the sake of convenience, these are reproduced below:

"4. Organization of Divisions.

.

(6): There may be a Special Assistant or Special Assistants to the Prime Minister with such status and functions as may be determined by the Prime Minister.

.

Schedule V-A

[Rule 15(1)(g)(h)]

LIST OF CASES TO BE SUBMITTED TO THE PRIME MINISTER FOR HIS ORDERS

.

1A. Appointment, resignation and removal of Special Assistants to the Prime Minister and of persons holding the Minister's status without Cabinet rank, determination of their salaries, allowances and privileges."

It may be noticed from these provisions that they give the PM the power to appoint a Special Assistant with such status and functions as he desires. However, learned counsel for the petitioner disputed this assertion and questioned the appointment of Mirza Shahzad Akbar, Respondent No. 8, as SAPM by a simple Notification dated 20.08.2018, which reads as follows:

"No. 2-8/2018-Min-I.---In terms of rule 4(6) of the Rules of Business, 1973 read with serial number 1A of Schedule V-A of the said Rules, the Prime Minister has been pleased to appoint, with immediate effect, Mirza Shahzad Akbar as Special Assistant to the Prime Minister on Accountability, with the status of Minister of State."

He lamented that nothing was known about the educational qualifications or expertise of Mirza Shahzad Akbar. Even the process followed to select him from among other qualified persons as SAPM on Accountability was non-transparent. These questions of the learned counsel are addressed in this Court's judgment dated 26.12.2018 given in Muhammad Adil Chattha v. Federation of Pakistan (Constitution Petition No. 63 of 2018). The relevant portion at paragraph 14 is reproduced below:

"14: In view of the fact that the qualifications and antecedents for appointment of a Special Assistant to the Prime Minister are neither mentioned in the Constitution nor in the Rules of Business. It

appears to have been left at the discretion of the Prime Minister of Pakistan on the basis of his subjective assessment about the ability of a person to perform the functions that the Prime Minister requires him to perform for such appointment..."

75. The above noted observations were made in the context that no substantive provisions of the Constitution create the office of SAPM. However, the said office is mentioned in Article 260 of the Constitution as one of the posts that is excluded from the definition of 'Service of Pakistan.' Therefore, at present the post of an SAPM is a political appointment. Accordingly, the said appointment is made in the discretion of the PM and is not regulated by statute. This aspect is highlighted by Rule 4(6) and serial number 1A of Schedule V-A of the ROB. However, it was observed in the Adil Chattha case (supra) that the Court will interfere if the PM exercises his discretionary power 'arbitrarily, unlawfully or in a fanciful manner,' or if the appointment of a person as SAPM suffers from 'cronyism, nepotism or political favour.' In such a situation the appointment will be struck down under Article 199(b)(ii) of the Constitution. As a result, there is a judicial check on the exercise of the PM's discretion. Nonetheless, this relief cannot be claimed in collateral proceedings, a principle which has been affirmed many a times by this Court. For instance, in the case of Qazi Hussain Ahmad v. General Pervez Musharraf (PLD 2002 SC 853) it was observed:

"73: ... No challenge muchless effective was thrown to the assumption of office of President by him and even in these petitions the challenge has been made only peripherally and collaterally while challenging the Referendum Order. It is well-settled that a writ of quo warranto cannot be brought through collateral attack. Such a relief has to be claimed directly. We are fortified in this behalf by the judgment of this Court in Pir Sabir Shah's case (PLD 1994 SC 738). Not only in this case but also in other cases it was held that for orderly and good governance validity of the appointment of incumbent of public office cannot be impugned through collateral proceedings."

(emphasis supplied)

The learned counsel for the petitioner has neither challenged the appointment of Respondent No.8 as SAMP Accountability in separate proceedings under Article 199(b)(ii) of the Constitution nor has he placed any material on record which disqualifies Mirza Shahzad Akbar from being appointed to this office. Therefore, without proof of illegal or arbitrary exercise of discretion by the PM, we cannot interfere with his decision on this matter.

76. In the light of our discussion, we declare that there is neither any fatal defect in the creation of ARU nor is there any unlawfulness in the appointment of Mirza Shahzad Akbar as SAPM Accountability.

SURVEILLANCE AND ILLEGALLY COLLECTED EVIDENCE

77. The learned counsel for the petitioner also criticised the respondents' method of collection of evidence in the present case. He stated that the tax and property records of the petitioner and his family were accessed to frame the Reference against the petitioner, a fact admitted by the respondents. These searches he alleged were a breach of the petitioner's and his family's right to privacy enshrined in Article 14(1) of the Constitution and thus amounted to covert surveillance. He, therefore, urged this Court to hold that such evidence had become inadmissible in all related future proceedings. Conversely, learned counsel for the respondents, without prejudice to his denial that there had been any illegality in the collection of evidence in the instant case, cited case-law from Pakistan, United Kingdom and India to demonstrate that the method of collection of evidence, irrespective of whether it was secured lawfully or otherwise, was no bar to its admissibility. Specifically, he relied on the following cases: Messrs Bisvil Spinners (Pvt.) Ltd. v. Pakistan (PLD 1992 SC 96), Kuruma v. The Queen ([1955] AC 197) and R.M. Malkani v. State of Maharashtra (AIR 1973 SC 157).

78. At the very outset it becomes clear that this plea of the petitioner raises two distinct issues: surveillance and illegal collection of evidence. To have a coherent discussion of each aspect of the

petitioner's plea, the two issues are dealt with separately. Before arriving at any decision on the allegation of covert surveillance pressed by the petitioner, it needs to be understood what actions actually constitute surveillance. A comprehensive definition is not available in our laws but can be found in Section 48(2) of the UK's Regulation of Investigatory Powers Act, 2000:

"48 Interpretation of Part II

..

(2) Subject to subsection (3), in this Part "surveillance" includes-

(a) monitoring, observing or listening to persons, their movements, their conversations or their other activities or communications;

(b) recording anything monitored, observed or listened to in the course of surveillance; and

(c) surveillance by or with the assistance of a surveillance device."

It may be noticed from the above mentioned provision that surveillance primarily involves the monitoring or recording of a person's movements, conversations or other activities and communication. However, in the present case the learned counsel for the petitioner has not produced any evidence before us which demonstrates that either the petitioner or his family have been monitored or their communications have been intercepted in the above manner.

79. In fact, the only proof which learned counsel has referred to is the admission by the respondents that the tax and property records of the petitioner and his family have been accessed from Government and public records. Indeed, there is no allegation that any information was obtained from the petitioner's personal or private records. However, during arguments learned counsel for the petitioner denied that this distinction made any difference to his primary contention of invasion of privacy and unlawful surveillance because of what is now commonly known as the 'Marcel principle.' This principle has been aptly explained by the UK Supreme Court in Regina (Ingenious Media Holdings plc) v Revenue and Customs Commissioner ([2016] 1 WLR 4164):

"17: It is a well established principle of the law of confidentiality that where information of a personal or confidential nature is obtained or received in the exercise of a legal power or in furtherance of a public duty, the recipient will in general owe a duty to the person from whom it was received or to whom it relates not to use it for other purposes"

Nevertheless, it may also be noted that the 'Marcel Principle' is not absolute and can be deviated from. In fact, the House of Lords in Hamilton v Naviede ([ 1995] 2 AC 75) conceded this point when Lord Browne-Wilkinson speaking for the Court held:

"Page 102: In my view, where information has been obtained under statutory powers the duty of confidence owed on the Marcel principle cannot operate so as to prevent the person obtaining the information from disclosing it to those persons to whom the statutory provisions either require or authorise him to make disclosure."

The petitioner's case ignores the above mentioned qualification to the 'Marcel Principle.'

80. Starting first with Section 216(1) of the Ordinance: this provision declares the tax records of taxpayers to be confidential. However, the same Section also contains the exceptions to this general rule. For our purposes, the exception found in Section 216(3)(p) is most relevant. It is produced below for reference:

"216. Disclosure of information by a public servant

..

(3) Nothing contained in subsection (1) shall preclude the disclosure of any such particulars -

..

(p) as may be required by any officer or department of the Federal Government or of a Provincial Government for the purpose of investigation into the conduct and affairs of any public servant, or to a Court in connection with any prosecution of the public servant arising out of any such investigation;"

(emphasis supplied)

The learned counsel for the petitioner has strongly resisted the application of Section 216(3)(p) ibid to the facts of this case. He submitted that the petitioner is not a public servant for the purposes of the Ordinance. Therefore, his tax records could not be sought by an officer of the Federal Government for the purposes of an investigation. To fortify his submission, he stated that a Judge of the Supreme Court did not fall within the definition of "Service of Pakistan" laid down in Article 260 of the Constitution. For convenience, this provision is reproduced below:

"260 Definitions. (1) In the Constitution, unless the context otherwise requires, the following expressions have the meaning hereby respectively assigned to them, that is to say, "Service of Pakistan" means any service, post or office in connection with the affairs of the Federation or of a Province, and includes an All-Pakistan Service, service in the Armed Forces and any other service declared to be a service of Pakistan by or under Act of [Majlis-e-Shoora (Parliament)] or of a Provincial Assembly, but does not include service as Speaker, Deputy Speaker, Chairman, Deputy Chairman, Prime Minister, Federal Minister, Minister of State, Chief Minister, Provincial Minister [,Attorney-General, [Advocate-General,] Parliamentary Secretary] [, Chairman or member of a Law Commission, Chairman or member of the Council of Islamic Ideology, Special Assistant to the Prime Minister, Adviser to the Prime Minister, Special Assistant to Chief Minister, Adviser to a Chief Minister] or member of a House or a Provincial Assembly;"

(emphasis supplied)

81. It may be observed from Article 260 quoted above that Judges of the Superior Courts are not explicitly included in the 'Service of Pakistan.' However, the essential features of such service are provided in Article 260 ibid. These have been interpreted by this Court to include the office of Judges of Superior Courts within the category of 'Service of Pakistan.' Reliance is placed on the case of Asghar Khan (supra) wherein it was observed:

"78: Besides the office of the President, the Judges and Chief Justices of the superior courts are also included in the scope of service of Pakistan by failing to make reference to them among the exclusions from service of Pakistan in Article 260."

(emphasis supplied)

Accordingly, Judges of the Supreme Court are engaged in the 'Service of Pakistan.' However, the exception to the confidentiality of tax records under Section 216(3)(p) of the Ordinance is available only where disclosure is required for the purposes of an 'investigation into the conduct and affairs of any public servant by any officer or department of the Federal Government.' Therefore, it needs to be determined what the terms 'investigation' and 'public servant' mean. If we examine the expression 'public servant' first, it becomes clear on a perusal of the Ordinance that this word has not been defined in the said law. However, it does find mention in the tax statutes that preceded the Ordinance, namely, the Income Tax Act, 1922 and the Income Tax Ordinance, 1979 ("predecessor tax laws"). Section 2(13) of the former and Section 2(36) of the latter described the term 'public servant' to have the same meaning as that ascribed to it by the Pakistan Penal Code, 1860 ("P.P.C."). On a perusal of the P.P.C., it becomes clear that the predecessor tax laws are referring to Section 21 of the P.P.C. which reads:

""21. "Public Servant" The words "public servant" denotes a person falling under any of the descriptions herein after following, namely:-

First: [omitted]

Second: Every Commissioned Officer in the Military, Naval or Air Forces of Pakistan while serving under the Federal Government or any Provincial Government;

Third: Every Judge;"

82. A Judge is an appointee under law of a Court or a Tribunal. Such law may be enacted either by the Federation or the Province. Section 21 of P.P.C. declares every Judge in Pakistan to be a public

servant. Therefore, a person holding judicial office is a public servant. Since Judges of the Superior Courts are appointed under the Constitution, it is only logical that the definition of public servant in Section 21 of the P.P.C. includes such Judges. As a result, it follows from well-established rules of interpretation (which need not be set out here) that the expression 'public servant' continues to bear the same meaning in the Ordinance as it did in the predecessor tax laws. Nevertheless, while in ordinary circumstances this would be sufficient to settle the debate on the question of whether Judges are public servants, in light of the constitutional importance of this petition it is advisable if this question is answered conclusively by applying the features of public office, set out by this Court, to the office of a Judge of the Superior Courts. Reference is made to the judgment of this Court in Salahuddin v. Frontier Sugar Mills and Distillery Ltd. (PLD 1975 SC 244) which quotes the following passage from Ferris's Extraordinary Legal Remedies, 1925 Edn, page 145, with approval:

"Pages 258-259: "a public office is the right, authority and duty created and conferred by law, by which an individual is vested with some portion of the sovereign functions of the Government to be exercised by him for the benefit of the public, for the term and by the tenure prescribed by law. It implies a delegation of a portion of the sovereign power. It is a trust conferred by public authority for a public purpose, embracing the ideas of tenure, duration emolument and duties. A public officer is thus to be distinguished from a mere employment or agency resting on contract, to which such powers and functions are not attached . . . . . The determining factor, the test, is whether the office involves a delegation of some of the sovereign functions of Government, either executive, legislative or judicial, to be exercised by the holder for the public benefit. Unless his powers are of this nature, he is not a public officer.""

(emphasis supplied)

83. It becomes plain from the above cited dictum that there are five main ingredients present in the office of a public servant. These are:

a. The office is a trut conferred for a public purpose;

b. The functions of the office are conferred by law;

c. The office involves the exercise of a portion of the sovereign functions of Government whether that be executive, legislative or judicial;

d. The term and tenure of the office are determined by law; and

e. Remuneration is paid from public funds.

84. When the office of a Judge of the Supreme Court is scrutinised against these ingredients, it becomes obvious that Judges of this Court are indeed public servants. Their office is created by the Constitution and so are the jurisdiction and powers that they possess. They perform an essential governmental function: the administration of justice for the benefit of the public at large. They have a fixed tenure, prescribed by Article 179 of the Constitution and their emoluments are paid from the Federal Consolidated Fund under Article 81 of the Constitution. As a result, there is no doubt that a Judge of the Supreme Court is a public servant for the purposes of Section 216(3) (p) of the Ordinance. We then have the terms 'investigation' and 'officer or department of Federal Government.' In our view, these expressions are not intended to be used in a narrow, technical or pedantic manner. Instead, they are to be given a natural, though contextual, meaning. For instance, the term 'investigation' is not to be used only in the sense in which it is defined in Section 4(1)(l) of the Code of Criminal Procedure, 1898. In fact, in relation to the Judge of a Superior Court, an 'investigation' into his 'conduct and affairs' can only mean an investigation for the purposes of Article 209 of the Constitution. However, it is critical (for the exception in Section 216(3)(p) to be attracted) that the 'investigation' is duly sanctioned and is being carried out in accordance with law at the time that the clause is invoked. If this is not so then clause (p) can have no application and the information cannot be disclosed. As will become clear later on in the judgment, there was no proper investigation for the purposes of Article 209 when the ARU

sought the tax information of the petitioner from the FBR. Consequently, the exception in Section 216(3)(p) of the Ordinance is not applicable to the facts of the case.

85. As far as Mrs. Isa is concerned, the language of clause (p) suggests that it is not limited only to information relating to the public servant. Instead, provided that the other conditions laid down therein are met, this clause also applies to any other taxpayer as long as it can be shown that there is a real, direct and substantial connection/ nexus between the information sought in relation to the latter and the investigation underway into the conduct and affairs of the public servant. And, ipso facto, unless tax information is sought in respect of the public servant no such information of any taxpayer can be accessed. Hence, the exception under Section 216(3)(p) of the Ordinance also applies to Mrs. Isa. However, as already noted (and which will be discussed in detail later on) the jurisdictional prerequisites for carrying out an investigation against the petitioner did not exist. It therefore follows that the request made by the ARU for the tax information and the release of such information by the tax authorities did not fall within the exception contained in clause (p) . As a result, the disclosure was contrary to law.

86. Be that as it may, our conclusion that the petitioner or his spouse did not disclose the London Properties in their wealth statements is not based on the tax information unlawfully harvested by the respondents. Rather, in the case of the petitioner, we have relied on the stance taken by him in his pleadings that he has no connection whatsoever with the London Properties. It logically follows then that he did not declare these properties in his wealth statements. With respect to Mrs. Isa, we have based our decision on the oral statement she made in Court through video link on 18.06.2020 (elaborated more fully below) that prior to 2018 she had not declared the London Properties in her wealth statements. As a result, in these circumstances when we have not taken into consideration the tax information collected illegally by the respondents, we do not deem it necessary to pass any definitive finding on whether, and if so, in which circumstances and to what extent, such information is admissible in a court of law.

87. Finally, there is the property search carried out by the respondents in the United Kingdom. Although during the initial stage of oral arguments, learned counsel for the petitioner vehemently argued that these searches were a violation of the right to privacy, he later accepted that the property searches were in fact carried out from the public record. It would be useful at this stage to set out the procedure for such property searches. Essentially, the entire operation consists of a two-step process. In the first step, the name of the relevant person is searched on the open source website 192.com which gives a list of the addresses of the potential properties owned by the said person. Subsequently, these addresses are entered into the UK Land Registry website, on the payment of a fee ( 3 for each property search), which gives the details of not only the property but also the name of the owner. It is by now well-established that the UK Land Registry is an open source. This is corroborated by Section 66 of the Land Registration Act, 2002 which reads:

"66 Inspection of the registers etc

(1) Any person may inspect and make copies of, or of any part of-

(a) the register of title,

(b) any document kept by the registrar which is referred to in the register of title,

(c) any other document kept by the registrar which relates to an application to him, or

(d) the register of cautions against first registration."

(emphasis supplied)

Accordingly, the argument of the learned counsel for the petitioner that the property search was a violation of the right to privacy has become a moot point because it is now obvious that in searching these records the respondents have not violated any law. Indeed, there is no law to violate since property records are open to the public (and have been since 03.12.1990). Consequently, no confidentiality attaches to such records. Clearly then, the acts of the officers of ARU and the Federal

Government in accessing the property records of the petitioner and his family cannot be classified as either invasion of privacy or covert surveillance.

88. While reaching this decision, we have been conscious of Article 14(1) of the Constitution produced herein below:

"14 Inviolability of dignity of man, etc.

(1) The dignity of man and, subject to law, the privacy of home, shall be inviolable."

However, it is pertinent to mention here that the guarantee under Article 14(1) is for the privacy of home and that too subject to law. Such privacy does not extend to the tax and property records of either the petitioner or his family members. Moreover, learned counsel's reliance on the case of Mohatarma Benazir Bhutto v. President of Pakistan (PLD 1998 SC 388) to support his contention of covert surveillance and a violation of the right to privacy is misplaced. The facts of that case are distinguishable from the facts of the present case. In the former it was established that the homes, Chambers and telephones of Judges of the Superior Courts were tapped and bugged:

> "27: The list of persons whose telephones were tapped and were under surveillance consists of Judges of the superior Courts including the Chief Justice of Pakistan, Chief Justice of the Federal Shariat Court, Chief Justice of the High Court of Balochistan, Chief Justice and Judges of the High Courts of Lahore and Sindh, rest houses and Chambers of the Judges were all subjected to such illegal act which will make a respectable nation to hang its head in shame...
>
> 28. The tapping and eaves-dropping of the telephones of the Judges of the superior or the subordinate Courts interferes in the discharge of duties and decision of cases, which a Judge is bound to do under law and the Constitution. A bug was planted in the Chambers of the Hon'ble Chief Justice of Pakistan wherever he was, bugs were also planted in the Judges' rest houses, their privacy in home, Chambers or in the rest houses was all under surveillance by illegal intrusion. It is a matter of common knowledge that the Judges while hearing the cases in a Bench usually discuss the merits and demerits in chambers and in privacy. They also dictate their judgments in their Chambers where no intrusion or interference is allowed. By tapping and bugging the Chambers and homes of the Judges, interference is made in the proper discharge of duties which is wholly destructive of the independence of judiciary and its ability to function as a coordinate branch and pillar of the State."
>
> (emphasis supplied)

However, no similar allegation has been levelled by the petitioner against the respondents. Therefore, while it was correct to hold that there had been unlawful surveillance and a violation of Article 14(1) of the Constitution in the Benazir Bhutto case (supra), giving the same ruling on the facts of the instant case will be tantamount to stretching the ratio decidendi of that case beyond its ambit. Consequently, we find that learned counsel's invocation of Article 14(1) in the present circumstances is erroneous.

DEFECTS IN THE REFERENCE

89. A strong objection was also raised by learned counsel for the petitioner about the defects inherent in the preparation of the Reference. This submission covered three main aspects: lack of authorisation by the President for investigating the affairs of the petitioner, the complete bypass of the judicial tax hierarchy by the Government before making out a case under Section 116 of the Ordinance against the petitioner and the non-application of mind by the President in sending the Reference to the SJC. In addressing us on these points, learned counsel for the petitioner adopted the findings of this Court given in the CJP case (supra). He argued that all stages of a Presidential reference prior to the SJC proceedings could be struck down on ordinary judicial review grounds (albeit he only pressed the ground of mala fide when touching upon the validity of the pre-SJC proceedings). He submitted that the Reference suffered from serious violations of law and procedure which rendered it liable to be quashed.

90. On the other hand, learned counsel for the respondents began his submissions with the contention that a Presidential reference needed to satisfy only a very low threshold of correctness, and that merely a prima facie case needed to be established by the respondents on the accuracy of the contents of the Reference. He further submitted that this Court could not analyse in any detail the opinion formed by the President in deciding to send the Reference to the SJC; instead we were only limited to examining whether there was some material before the President which had nexus with the object of Article 209 of the Constitution. In simple terms, learned counsel stated that only the 'structural elements' of the Reference could be looked into by this Court and any errors, whether minor or major, could not invalidate the opinion of the President as long as there existed some material which showed that a Superior Court Judge may have been guilty of misconduct. However, learned counsel for the respondents did not address the Bench on the critical issue of authorisation of an investigation against a Judge.

91. Before giving our findings on the defects in the Reference, highlighted by learned counsel for the petitioner, we would like to address the submission of learned counsel for the respondents that a Presidential reference needs to satisfy only a very low threshold of factual and legal correctness with regard to its contents. In our considered view, learned counsel has conflated a low burden of proof with a low standard of care. It is true that Article 209(5) of the Constitution only requires the President to form an opinion that a Superior Court Judge may have been guilty of misconduct. He does not need to be certain that a Judge is guilty of the conduct alleged. Nevertheless, his opinion must be based on positive and affirmative material and on the assurance that necessary legal and procedural safeguards have been observed in the preparation of the reference. Therefore, for the President to even form a prima facie opinion about a Judge's guilt, the President needs to verify that there has been compliance with the settled rules on authorisation; he needs to obtain proper advice on the contents of the reference from competent persons; and he needs to ascertain that there is sufficient material before him which satisfies the high thresholds of care and proof expected in the preparation of a reference.

92. At this stage it would be appropriate to consider why we have set out this requirement of a high standard of care and proof for the formulation of a reference. It needs to be kept in mind that a complaint against a Superior Court Judge can be generated in one of three ways: a Presidential reference, a private complaint and the exercise of suo motu jurisdiction by SJC. Since all three methods are distinct, therefore, the quality of their information/ complaint will also be different. Take for instance a complaint by an ordinary citizen. It is a certainty that when an individual files a complaint against a Judge, he will only be able to provide primitive or half-baked information. This is because an individual only has limited resources at his disposal. He cannot be expected to unearth all the necessary information needed to fully document his complaint. However, a Presidential reference is articulated on a different level compared to a private complaint. When the President, as the Head of State, sends a reference against a Judge, he has at his disposal State agencies and access to competent legal advice. He can utilise these to verify that valid authorisation for investigation has been granted and that materials that are relevant and reliable under the test laid down in Bisvil Spinners (supra) are available to support the reference. However, if this Court were to lay down that despite all the machinery of the Federal Government at his command, the President is only required/ obliged to send a perfunctory reference which contains legal and factual defects, then nothing will be more harmful to the independence of the judiciary. Such a relaxation will give the Executive the room to send frivolous references with the expectation that if some nexus between the material and the object of Article 209 of the Constitution is demonstrated, the SJC will itself find substance in the reference. Therefore, to protect and defend the independence of the judiciary, we hold that a reference sent by the President must contain authorised, serious, considered and verified information in both respects, legal and factual, in order to possess the gravity that should accompany a Presidential action.

AUTHORISATION FOR INVESTIGATION

93. Having determined that a reference needs to be thorough, it now needs to be decided whether the Reference against the petitioner satisfies this test. One of the basic objections to the validity of the Reference is the lack of authorisation for investigation conducted prior to the Reference's filing. Learned counsel for the petitioner submitted that the Chief Justice of Pakistan case (supra) is authority for the proposition that authorisation for investigating the affairs of the petitioner (or for that matter any other Superior Court Judge) could only have come from the President himself. The relevant portion from the judgment is produced below:

"64: A perusal of the above-quoted provisions of Article 209 would reveal that... clauses (5) and (6) of the said Article 209 tell us of various steps of the exercise leading to the removal of a Superior Court Judge... Reverting back to the various steps mentioned above, I would summarize the same as under:

(i) receipt of information by the President, from any source, about the mental or physical incapacity of a Judge or of his being guilty of misconduct;

(ii) collection of material in support of the said information;

(iii) formation of opinion by the President that such a Judge may well be incapable as above-mentioned or may have committed misconduct;

(iv) the consequent direction (generally called the Reference) by the President to the Council to inquire into the matter;"

(emphasis supplied)

94. Learned counsel argued that the above passage confirms that the only purpose for ensuring that information against a Judge is received by the President is to obtain his permission to proceed with the investigation to collect material in support of the said information. However, as the record shows this was not done. Instead, when the complaint of Mr.Dogar was received, the Chairman of ARU obtained the authorisation of the Law Minister on 16.04.2019 to commence an investigation against the petitioner. This is evident from the letter of the Chairman ARU dated 10.05.2019. However, such authorisation is against the law enunciated in the Chief Justice of Pakistan case (supra), and therefore cannot stand. The only reasoning advanced by learned counsel for the respondents to defend the act of the Law Minister authorising the investigation against the petitioner was item 21(10) of Schedule II of ROB which reads:

"Schedule II

[Rule 3(3)]

DISTRIBUTION OF BUSINESS AMONG THE DIVISIONS

..

21. Law and Justice Division

..

(10) Federal Government functions in regard to the... Supreme Judicial Council..."

However, this is a very widely worded provision which deals with the allocation of business and not the vesting of power in the Law Minister to authorise investigations against Superior Court Judges. Indeed, the ROB do not at all deal with the matter of investigations against Judges of the Superior Courts. Consequently, this issue has to be resolved by interpreting the relevant Constitutional provisions. While the Chief Justice of Pakistan case (supra) does not make an explicit statement to the effect that authorisation for investigation must be granted by the President, the sequence of steps given in para-64 (reproduced above) of that judgment interpret Article 209(5) of the Constitution as granting the President such a power. However, logic dictates that the President cannot personally assess accusatory information against a Judge and instead requires assistance and advice in the matter. In this respect, there is no law that lays down the procedure for obtaining such support for the President. Therefore, in such a situation the Constitutional principles become relevant. To gather the Constitutional intent as to who is the competent authority for authorising an investigation against a

Superior Court Judge, Article 209(5) of the Constitution should be the starting point of the discussion. For convenience, this sub-Article is reproduced below:

"209. Supreme Judicial Council.

..

(5) If, on information from any source, the Council or the President is of the opinion that a Judge of the Supreme Court or of a High Court-

(a) may be incapable of properly performing the duties of his office by reason of physical or mental incapacity; or

(b) may have been guilty of misconduct, the President shall direct the Council to, or the Council may, on its own motion, inquire into the matter."

95. It can be noticed that Article 209 involves only two Constitutional authorities in the initiation and consideration of a reference against a Superior Court Judge: the SJC and the President. The SJC only becomes involved in the proceedings once the reference is forwarded to it by the President. The observation in the Chief Justice of Pakistan case (supra) about the collection of material in support of the information against a Judge has been referred above. Although the case was decided on the ground of mala fide of facts, however, the observation about collection of material against a Judge provides useful guidance. Under the Constitutional scheme the President cannot personally be responsible for authorising an investigation into an allegation against a Judge. He does not exercise his official functions as he desires but instead acts on the advice of the PM or the Cabinet under Article 48(1) except for in situations where the Constitution has directed him to act in his discretion under Article 48(2). However, the sequence of steps noted in para-64 of the CJP judgment (supra) does not deal with the constitutional mechanism under which the President may authorise collection of material against a Judge of the Superior Courts. At present there are three methods under Article 48 of the Constitution by which the President may possibly authorise such an investigation. To dilate further on this matter, it would be appropriate to read Article 48:

"48. President to act on advice, etc. (1) In the exercise of his functions, the President shall act on and in accordance with the advice of the Cabinet or the Prime Minister:

Provided that [after fifteen days] the President may require the Cabinet or as the case may be, the Prime Minister to reconsider such advice, either generally or otherwise, and the President shall, within ten days, act in accordance with the advice tendered after such reconsideration.

(2) Notwithstanding anything contained in clause (1), the President shall act in his discretion in respect of any matter in respect of which he is empowered by the Constitution to do so and the validity of anything done by the President in his discretion shall not be called in question on any ground whatsoever."

96. It may be noticed that the President may be required by the Constitution to act on the advice of the PM or Cabinet under sub-Article (1) of Article 48 or to act in his own discretion under sub-Article (2) of the said Article. It is an appealing hypothesis that the President should act in his discretion when authorising an investigation against a Superior Court Judge. Indeed, there is force in the proposition that the removal process of Judges must be as isolated from the Executive as possible. However, this conclusion conflicts with the Constitutional scheme. Security of tenure of Judges and independence of the judiciary are most certainly assured by our Constitution. However, these can be enforced in accordance with the Constitutional scheme for the functioning of the Federal Government which has significantly been altered by the 18th Amendment passed in the year 2010. A salient feature of this Constitutional Amendment is that it resets the balance of powers and functions between the President and the PM. Before this Amendment, several provisions in the Constitution allowed the President to carry out functions in his discretion. Some provisions are quoted to illustrate the point:

"48. President to act on advice, etc.

..

(6) If, at any time, the President, in his discretion, or on the advice of the Prime Minister, considers that it is desirable that any matter of national importance should be referred to a referendum, the President may cause the matter to be referred to a referendum in the form of a question that is capable of being answered either by "Yes" or "No".

58. Dissolution of the National Assembly

..

(2) Notwithstanding anything contained in clause (2) of Article 48, the President may also dissolve the National Assembly in his discretion where, in his opinion,:-

(a) a vote of no-confidence having been passed against the Prime Minister, no other member of the National Assembly is likely to command the confidence of the majority of the members of the National Assembly in accordance with the provisions of the Constitution as ascertained in a session of the National Assembly summoned for the purpose; or

(b) a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary.

91. Cabinet

..

(2) The President shall in his discretion appoint from amongst the members of the National Assembly a Prime Minister who, in his opinion, is most likely to command the confidence of the majority of the members of the National Assembly."

(emphasis supplied)

After the 18th Amendment, almost all of the discretionary powers of the President have either been omitted or have been made exercisable on the advice of the PM or the Cabinet. The above mentioned provisions stand amended as follows:

"48. President to act on advice, etc.

..

(6) If at any time the Prime Minister considers it necessary to hold a referendum on any matter of national importance, he may refer the matter to a joint sitting of the Majlis-e-Shoora (Parliament) and if it is approved in a joint sitting, the Prime Minister may cause such matter to be referred to a referendum in the form of a question that is capable of being answered by either "Yes" or "No".

58. Dissolution of National Assembly

..

(2) Notwithstanding anything contained in clause (2) or Article 48, the President may dissolve the National Assembly in his discretion where, a vote of no-confidence having been passed against the Prime Minister, no other member of the National Assembly commands the confidence of the majority of the members of the National Assembly in accordance with the provisions of the Constitution, as ascertained in a session of the National Assembly summoned for the purpose.

91. Cabinet

..

(4) The Prime Minister shall be elected by the votes of the majority of the total membership of the National Assembly..."

(emphasis supplied)

97. The only exception to this change, brought about by the 18th Amendment, is Article 58(2) which read with Article 91(7) of the Constitution still allows the President to dissolve the National Assembly in his discretion if a vote of no-confidence has been passed against the sitting PM and no other member of National Assembly commands the confidence of the majority. As a result, while the substance of Article 48(2) has remained the same, the subject matters governed by this Constitutional provision have been substantially curtailed. Therefore, to hold that the President can authorise an investigation

against a Judge in his own discretion will be doing violence to the language of the Constitution. It is our considered view that Article 48(2) only applies where the President is specifically authorised by the Constitution to act in his discretion. No such command is given to the President in Article 209(5) of the Constitution which governs the removal of Judges.

98. Moreover, the sending of a reference is an executive act performed by the Federal Government. To declare that the President is to authorise investigations into Superior Court Judges in his discretion would amount to inviting the President to arrogate powers in complete contradiction of the Constitutional scheme. The 18th Amendment has shifted the Government's decision making in the working of the State. Evidence of this shift can be found in Article 90 of the Constitution which prior to the 18th Amendment read as follows:

"90. Exercise of executive authority of the Federation.

(1) The executive authority of the Federation shall vest in the President and shall be exercised by him, either directly or through officers subordinate to him, in accordance with the Constitution"

However, after the 18th Amendment, this provision has been significantly modified. For ease of reference, it is produced below:

"90. The Federal Government:

(1) Subject to the Constitution, the executive authority of the Federation shall be exercised in the name of the President by the Federal Government, consisting of the Prime Minister and the Federal Ministers, which shall act through the Prime Minister, who shall be the chief executive of the Federation.

(2) In the performance of his functions under the Constitution, the Prime Minister may act either directly or through the Federal Ministers."

99. It may be noticed that Article 90 no longer vests the executive authority of the Federation in the President nor is it exercised by him. Instead, executive authority is now exercisable by the Federal Government, consisting of the PM and the Federal Ministers, in the President's name. Therefore, the President has been replaced as the central figure of the State by the PM. As a result, under the Constitutional process for performing the executive function of authorising an investigation into an information against a Superior Court Judge, the President should act on the advice of the PM or the Cabinet under Article 48(1) of the Constitution and not invoke his discretionary power under Article 48(2).

100. Nevertheless, upon whose advice is the President to act under Article 48(1) of the Constitution. That Article simply states that the President is to act on the advice of either the Cabinet or the PM. Even Article 91(1) simply reiterates the two advising authorities nominated in Article 48(1). Article 90(1) clarifies that the Federal Government shall act through the PM unless the latter requires, under Article 90(2), his functions to be performed through the Federal Ministers. As a result, the Constitution omits to provide any guidelines or criteria to distinguish the executive functions that are to be performed under the advice of the Cabinet and those which are to be performed under the advice of the PM. It leaves that business to be determined by the Federal Government according to its requirements and exigencies from time to time.

101. Accordingly, Article 99(3) of the Constitution empowers the Federal Government to make rules for the allocation and transaction of its business. In exercise of such power, the Federal Government has framed the ROB that serve as a source of guidance on the instant subject. The ROB are constitutionally mandated rules and must be followed by the Government in carrying out its functions. The mandatory status of the ROB was affirmed by this Court in the case of Mustafa Impex (supra):

"50: The Constitution confers vast powers on the Government for the transaction of executive business. There is no reason to suppose, or believe, that the framers of the Constitution intended, in disregard of the explicit language employed, that the Federal Government could,

in its discretion, either follow, or not follow, the provisions of the Rules of Business. The framer of rules [Federal Government] is as much bound by the content thereof as anyone else is subject thereto. These are basic precepts of constitutional interpretation. To allow the Executive to depart from the language of the Rules, in its discretion, would be to permit, and legitimize, unconstitutional executive actions. Quite independently of the above, there is ample case law stressing the importance of a structured exercise of discretionary power. In this case the discretionary executive powers have already been fettered by the Constitution. The framing of rules for this purpose is inextricably linked to the guided exercise of official power. The following of the Rules of Business is a salutary exercise intended to enhance, and amplify, concepts of good governance. We have no doubt that it is mandatory and binding on the Government, and so hold."

(emphasis supplied)

Consequently, Rule 15-A of the ROB specifies the procedure to be followed for functions that are required by the Constitution to be performed by the President. For sake of convenience, it is reproduced below:

"15-A. Reference to the President.---(1) Notwithstanding the provisions made in these rules, where in terms of any provision of the Constitution any function is to be performed or any orders have to be issued by the President or his specific approval is required, the Division concerned shall incorporate a paragraph to this effect in the summary entitled as "Summary for the Prime Minister". The Prime Minister shall render his advice and submit the case to the President. After the President has seen and approved the case, it shall be returned to the Prime Minister. The cases to which this sub-rule applies are enumerated in Schedule V-B.

(2) Notwithstanding the provisions made in these rules, where in terms of any provisions of the Constitution, any function is to be performed or any orders have to be issued by the President in his discretion, the Division concerned shall submit the case to the President through the Prime Minister in the form of a self-contained, concise and objective summary entitled as "Summary for the President" stating the relevant facts and points for decision prepared on the same lines as prescribed in these rules for a Summary for the Cabinet, except that only one copy will be required which may not be printed. This procedure will not, however, be applicable where the President has conveyed the decision to the Prime Minster for issuing orders in respect of cases in his discretion. The cases to which this sub-rule applies are enumerated in Schedule VI."

(emphasis supplied)

102. It may be noticed that Rule 15-A(1) deals with cases that require the orders or approval of the President on the advice of the PM. Accordingly, the same Rule refers to Schedule V-B which sets out the list of cases in which the PM's advice is to be tendered. Serial number 35 of Schedule V-B reads: "Reference to Supreme Judicial Council." It is thus patent that the entire process of a Presidential reference falls under the advice of the PM according to the ROB. It is he who has to advise the President on the steps that need to be taken in a matter that bears relation to Article 209(5) of the Constitution. As a result, the approval by the President of the advice of the PM is necessary for commencing an investigation into a complaint made against a Judge of the Superior Court.

103. However, in the present Reference before us there is no such authorisation on record for commencing an investigation against the petitioner. Instead the record shows that the only authorisation sought, for probing the complaint against the petitioner, was from the Law Minister who under any interpretation of the Constitution had no jurisdiction in this behalf. The competent authorities, namely, the PM and the President were never approached by the Ministry of Law for the requisite authorisation envisaged by the CJP (supra) judgment. Both constitutional authorities got involved in the process after all the material had already been collected. The initial authorisation by

the President on the advice of the PM to commence an investigation against a Judge in a complaint falling under Article 209(5) is a legal requirement for sustaining the validity of a Presidential reference that is ultimately filed with the SJC. Such oversight by the highest Constitutional functionaries protects Judges from whimsical and arbitrary interference by Executive authorities in their personal judicial independence and privacy. Without valid authorisation the foundation of the Reference suffers from an initial illegality which amounts to a Constitutional violation. Consequently, such an infirmity is fatal to the superstructure that is erected on it. As a result, this Reference is illegal and falls to the ground.

VALIDITY OF ALLEGATIONS IN THE REFERENCE

104. It is now important to consider the substance of the allegations made in the Reference filed against the petitioner. It would be appropriate at this stage to produce the relevant portions from this Reference:

> "9. Mr. Justice Qazi Faez Isa was elevated as the Chief Justice of the Baluchistan High Court on 5 August 2009 (see PLD 2010 Journal 1 at p.3). One of the aforementioned properties has been acquired in the year 2011, while two have been acquired in the year 2013. Since 2011 till date Justice Qazi Faez Isa has filed wealth statements, along with his tax returns, intentionally and deliberately concealing the above three properties, notwithstanding that all along under section 116(1)(b) of the 2001 Ordinance he was under a direct legal and juridical obligation to have declared the said properties. His wife also filed a wealth statement for the tax year 2014, and failed to declare the said properties.
>
> ..
>
> 11. Apart from the fact that the failure of Justice Qazi Faez Isa to declare the aforementioned foreign properties of his wife in his successive wealth statements violates section 116(1)(b) of the 2001 Ordinance, the same also gives rise to the following issues:-
>
> (a) the source to acquire the afore-stated expensive properties is not accounted for;
>
> (b) whether the properties as afore-stated were acquired through money laundering, is an aspect which cannot be ruled out.
>
> 12. By not declaring the afore-stated properties and accounting for them, the respective wealth conciliation statements filed by Justice Qazi Faez Isa are also totally incorrect and tainted with concealments. Hence, a clear violation of Section 116(2) and other penal provisions of the 2001 Ordinance are also made out.
>
> ..
>
> 16. A Judge of the Superior Court who omits to intentionally declare three expensive London properties jointly owned by his spouse and children, violates Section 116 of the 2001 Ordinance. The tax records of the learned Judge and his spouse are absolutely silent about the source through which the said properties had been acquired and how and from where the funds were made available to purchase the said properties, without violating the money laundering regime and the Foreign Exchange Regulation Act, 1947..."
>
> (emphasis supplied)

From a perusal of the above quoted excerpts it becomes clear that the Reference (repeatedly) emphasises that the petitioner has violated Section 116 of the Ordinance, the money laundering regime and FERA. These in turn raise questions about the source of funds used for acquiring the London Properties.

105. Similarly, the SCN issued by the SJC has also levelled corresponding allegations against the petitioner; and while we cannot examine the validity of the SCN issued by the SJC unless the bar under Article 211 is crossed, however, to appreciate the scope of the allegations in the Reference we are reproducing the said allegations in the SCN:

"(g) That allegedly the failure of your lordship to declare the afore-mentioned foreign properties of your wife in your lordship's successive wealth statements violates section 116(1)(b) of the 2001 Ordinance, and gives rise to the following issues:-

(a) the source to acquire the afore-stated expensive properties is not accounted for;

(b) whether the properties as afore-stated were acquired through money laundering, is an aspect which cannot be ruled out.

..

(i) Thus there is nothing on record to suggest that your lordship's wife and children had independent sources of income and that such funds were validly available with them to purchase the three foreign properties;

..

(k) That from the aforesaid it appears that at the relevant point of time of the purchase of the three properties your lordship's wife and the children were your dependents or at least were not possessed of known sources of income or pecuniary resources sufficient for acquisition of the properties in question. It appears that the said properties were concealed from the Income Tax Authorities in Pakistan. Furthermore, your lordship's worthy wife and children, in the context of the matter, are sufficiently connected to you, so as to put you, as a Judge of the superior Court of Pakistan, under a direct obligation to give a money trail of the three properties so as to establish that the source of funds and transfer thereof was not in violation of law.

..

o) That allegedly the tax records of your

lordship and your lordship's spouse are absolutely silent about the source through which the said foreign properties had been acquired and how and from where the funds were made available to purchase the said properties, without violating the money laundering regime and the Foreign Exchange Regulation Act, 1947."

(emphasis supplied)

An examination of these extracts reveal that the main purpose of the SJC for initiating an inquiry against the petitioner was to establish the source of funding of the allegedly concealed London Properties. This is therefore further evidence that the removal proceedings against the petitioner were aimed not at alleged tax default but at determining where the funds for the London Properties came from.

106. Taking up the other grounds of action against the petitioner first, we would like to make it clear that learned counsel for the respondents did not make any submissions on the petitioner's alleged violation of the provisions of FERA. In fact, he did not even nominate the relevant provisions of the said law. There is also no material, before us, which supports the said bald allegation of a violation of the claimed foreign exchange regime under FERA. As a result, we have no doubt that this particular charge is completely without merit. It is, therefore, surprising that the Law Minister, the PM and the President all failed to notice the non-existent case made out against the petitioner for allegedly violating the provisions of FERA. The filing of a Presidential reference under Article 209(5) is a solemn matter. It has grave consequences for the Judge against whom such a reference is prepared. It prima facie constitutes an interference with the security of tenure guaranteed to Judges of the Supreme Court under Article 179 of the Constitution. Therefore, the allegation levelled in a reference should be based on cogent evidence and sound legal analysis. A Presidential reference cannot be filed on assumptions. However, in the present case, the allegation of violating the provisions of FERA against the petitioner is exactly that: an unsubstantiated assumption neither backed by evidence nor supported by the relevant rule that was allegedly breached. As such, it cannot be sustained.

107. In this context, the next allegation levelled against the petitioner is that of money laundering. The primary legislation governing this subject matter is the Anti-Money Laundering Act, 2010

("AMLA") . Section 2(q), (s) and Section 3 of this Act define the offence of money laundering. These are produced below:

"2 Definitions.---In this Act, unless there is anything repugnant in the subject or context,-

..

(q) "proceeds of crime" means any property derived or obtained directly or indirectly by any person from the commission of a predicate offence or a foreign serious offence;

(s) "predicate offence" means an offence specified in the Schedule to this Act;

3 Offence of money laundering.---A person shall be guilty of offence of money laundering, if the person:-

(a) acquires, converts, possesses, uses or transfers property, knowing or having reason to believe that such property is proceeds of crime;

(b) conceals or disguises the true nature, origin, location, disposition, movement or ownership of property, knowing or having reason to believe that such property is proceeds of crime;

(c) holds or possesses on behalf of any other person any property knowing or having reason to believe that such property is proceeds of crime; or

(d) participates in, associates, conspires to commit, attempts to commit, aids, abets, facilitates, or counsels the commission of the acts specified in clauses (a), (b) and (c).

..

Explanation II.- For the purposes of proving an offence under this section, the conviction of an accused for the respective predicate offence shall not be required."

It may be noticed from a reading of both Sections 2 and 3 that a necessary element of the offence of money laundering is the commission of a predicate offence. The execution of this offence gives birth to the proceeds of crime, the movement of which attracts the criminal conduct of money laundering. Therefore, without the commission of a predicate offence there can be no offence of money laundering. However, not every statutory violation is a predicate offence; AMLA recognises this by setting out in its Schedule a list of statutory offences that constitute a predicate offence for the purposes of money laundering. In the present case, the main allegation against the petitioner is that he has failed to declare the London Properties owned by his wife and children in his wealth statements. The contents of a wealth statement are provided in Section 116(1) of the Ordinance. For the moment, ignoring our view that the said provision is vague about a taxpayer's obligation to disclose the assets of a financially independent spouse, it is clear that in order to attract the offence of money laundering the non-declaration of assets under Section 116 ibid must constitute a predicate offence. Only then may the allegation of money laundering be made against the petitioner. In this regard, the offences incorporated from the Ordinance to the Schedule to AMLA have to be examined. The gist of these offences is reproduced below:

""THE SCHEDULE"

..

Section XIIA The Income Tax Ordinance, 2001

192 Prosecution for false statement in verification- where tax sought to be evaded is ten million rupees or more[;]

192A Prosecution for concealment of Income-where tax sought to be evaded is ten million rupees or more[;]

Note: for the purposes of this Section, concealment of income includes any act referred to in subsection (1) of section 111 (unexplained income or assets)

194 Prosecution for improper use of National Tax Number [Certificate}- where tax sought to be evaded is ten million rupees or more[;]

199 Prosecution for abetment - where tax sought to be evaded is ten million rupees or more."

A perusal of the Schedule reveals that the non-declaration of assets by a taxpayer under the Ordinance is not a predicate offence under AMLA. Therefore, prima facie no case of money laundering can be made out against the petitioner on this count.

108. Be that as it may, it is a matter of record that the Reference has not alleged the commission of any specific predicate offence under AMLA by any person. Nevertheless, assuming for the sake of argument that the petitioner is under an obligation to list the assets of his wife in his wealth statement, the only predicate offence that appears remotely relevant to the case against him is under Section 192 of the Ordinance. Nonetheless, even though Section 3 of AMLA specifies that the commission of the offence of money laundering is not dependent upon the conviction of the petitioner for a predicate offence, it at least requires that a specific predicate offence be alleged. However, no predicate offence has been alleged against the petitioner in the Reference. Nor has any evidence been placed on record which may prima facie support the allegation of money laundering. In the above factual scenario, an allegation of money laundering against the petitioner is entirely fictional at this stage. The said allegation is therefore without merit.

109. Equally, it is relevant to note that the four sections of the Ordinance were only insertecd in the Schedule to AMLA as predicate offences on 20.05.2016 whereas the London Properties were purchased by the petitioner's family in 2011 and 2013. Consequently, it is an established fact that before 2016, violations of the Ordinance could not form the basis of a money laundering allegation. This proposition is backed by Article 12 of the Constitution:

"12. Protection against retrospective punishment

(1) No law shall authorize the punishment of a person:-

(a) for an act or omission that was not punishable by law at the time of the act or omission;"

110. The Constitution itself grants protection to individuals from retrospective punishment. Therefore, reliance by learned counsel for the respondents on an amendment made in 2016 to seek removal of the petitioner for acts committed in 2011 and 2013 appears to be improper. This will continue to be so unless the application of Section 192 is interpreted otherwise by the competent forum under the Ordinance.

111. Possibly, for the above mentioned reasons, learned counsel for the respondents submitted that the Reference does not allege that the petitioner has violated the provisions of AMLA. Instead, he argued the Reference simply refers to a violation of the money laundering regime in general. To support his contention he relied on certain Circulars and Notifications issued by SBP under FERA, some of which are produced below:

"Notification No. F.E. 2/98-SB

Dated the 21st July, 1998

In exercise of the powers conferred by subsection (2) of Section 8 of the Foreign Exchange Regulation Act, 1947 (Act No. VII of 1947), and in supersession of State Bank of Pakistan Notification No. F.E. 1/91-SB dated 26th February, 1991, the State Bank of Pakistan is pleased to permit:-

..

b. Any person maintaining an account expressed in a foreign currency, and held under any permission, general or otherwise, granted by the State Bank of Pakistan to take or send out of Pakistan, cheques or drafts drawn on such account.

F.E. Circular No. 17

..

No transfer of funds abroad shall be made through illegal channels such "Hundi system". All transfer of funds shall take place through banking channels, following the instructions given to the banks from time to time for the purpose."

After examining the above noted Circulars and Notifications, it is unclear how these help the respondents prove the charge of money laundering against the petitioner. There is no allegation or material on record suggesting that the petitioner or Mrs. Isa transferred money to the United Kingdom via illegal means/methods. Therefore, this novel argument is theoretical and speculative in content. The contention also lacks force for the simple reason that the offence of money laundering is governed by a special law, AMLA, since 2010. It is by now well-established that when a special law regulates a particular subject area then another law enacted for a different special purpose cannot affect the subject matter governed by the former special law. This is a principle of construction recognised by our Superior Courts. For instance, in the case of Ghulam Mustafa Jatoi v. Additional District and Sessions Judge (1994 SCMR 1299) this Court approved the principle that statutes which are not pari materia cannot govern each other's interpretation:

> "11: In this regard, it may be pertinent to refer to the case of Mahbub Ahmad v. First Additional District Judge and another (PLD 1976 Karachi 978)... It may be advantageous to reproduce the relevant portion which contains in para. 8 thereof and which reads as follows:--
>
> 8. "... It may also be pointed out that unless the provision is 'pari materia', it is not correct to construe a provision with reference to another provision in a different Act, for it is the language of the provision which is the determining factor."
>
> 12. Reference may also be made to the case of Mrs. M. Waterfield v. C.E. Lee Anan and another (PLD 1957 (W.P.) Lahore 882) and the case of Salah Muhammad v. Muhammad Roz and others (PLD 1962 (W.P.) Lahore 68). In both the cases, it has been held by Division Benches of the Lahore High Court that a statute cannot be interpreted in the light of language used in another statute except when the language which has to be interpreted is, in the context, open to more meanings than one.
>
> 13. We may also refer to the case of Hari Khemu Gawali v. The Deputy Commissioner of Police, Bombay and another (PLD 1957 SC (India) 90), in which the Indian Supreme Court has inter alia held that it is not safe to pronounce judgment on the provision of one Act with reference to decision dealing with the other Acts which are not pari materia."
>
> (emphasis supplied)

Even Halsbury's Laws of England (Volume 96, 2018) has affirmed this viewpoint:

> "809: Comparison between Acts not in pari materia or the decisions on them affords no reliable guide to their construction, since the same words used in different statutory codes may have different meanings in each code, according to the intentions of the Acts and the mischiefs they are designed to prevent."

112. It is, therefore, only logical that Circulars and Notifications (which are only subordinate legislation) issued under FERA cannot control the subject of money laundering defined and governed by AMLA. However, learned counsel for the respondents also relied upon the Anti-Money Laundering Regulations, 2008 ("2008 Regulations") to argue that the charge of money laundering in the Reference was simply an allusion to the regime in general. But this reliance of learned counsel is flawed because these were framed under the Anti-Money Laundering Ordinances of 2007 and 2009 ("AML Ordinances"). These AML Ordinances did not recognise the conduct attributed to the petitioner as a predicate offence. Consequently, reference to the 2008 Regulations is of no assistance to the respondents in justifying their allegation of money laundering against the petitioner.

113. This brings us to the primary allegation in the Reference against the petitioner: his failure to disclose the London Properties of his wife and children in his wealth statement. In the Reference it is alleged that this obligation is imposed on the petitioner by virtue of Section 116(1)(b) of the Ordinance. However, learned counsel for the petitioner submitted that no such obligation could be imposed on the petitioner under Section 116(1)(b) because this provision only applies to the assets and liabilities of a dependent spouse and minor children of a declarant taxpayer. On the other hand, the petitioner's wife

is a financially independent taxpayer and their children are adults. They possessed these attributes even when the properties in question were acquired. Learned counsel also stated that no notice had been received either by the petitioner or Mrs. Isa under Section 116(1) of the Ordinance, therefore, it was not legally possible to level a charge of non-declaration of assets against the petitioner.

114. We have examined the record which reveals that indeed no notice was ever issued to Mrs. Isa or the petitioner under Section 116(1). Mrs. Isa did receive notices for the years 2015, 2017 and 2018 but those were issued under Section 114(4) of the Ordinance for her failure to file her tax returns. Moreover, on a perusal of the Reference it became evident that the entire case under Section 116 of the Ordinance rested on the opinion of an Assistant Commissioner (Inland Revenue) who thought that the petitioner was liable to disclose the London Properties of his wife and children. This is evidenced from para-7 of the Reference:

"7. The precise observations recorded by the learned Assistant Commissioner (IR) in his letter bearing No. 112 dated 10th May, 2019 (see Attachment VIII and IX) addressed to the Commissioner (IR), AEOI/International Taxes Zone, Large Taxpayers' Unit, Islamabad as follows:-

"(e) Offshore Properties

The properties' documents in respect of which are attached with the complaint are as under:-

| # | Owners | Property | Value | Purchase date |
|---|---|---|---|---|
| 1 | Ms. Sehar Isa Khoso and Ms. Zarina Montserrat Khoso Carrera | 90 Adelaide Road London E10 5NW | GBP 270,000 | 28.06.2013 (transferred 08.07.2013) |
| 2 | Ms. Zarina Montserrat Khoso Carrera and Arslan Isa Khoso | 40 Oakdale Road London E11 4DL | GBP 245,000 | 27.03.2013 |
| 3 | Ms. Zarina Montserrat and Ms. Sehar Isa Khoso | 50 Coniston Court, Kendal Street, London W2 2AN | | 20.10.2011 |

(B) Findings:--

(i) That, Mr. Justice Qazi Faez Isa did not declare the above offshore properties owned by his wife (and children).

(ii) That, Mrs. Sarina Isa Khoso is wife of Mr. Justice Qazi Isa as per CINC 42301- 9722154-2, who also file her tax return for Tax year 2014.

(iii) That, Mr. Justice Qazi was liable to declare the above offshore properties as per provisions of Section 116(1)(b) which mandate every taxpayer to file the Wealth Statement in the prescribed format declaring therein "the total assets and liabilities of the persons and his spouse, minor children, and other dependents."

(iv) That, Mrs. Sarina M. Isa (wife), Sehar Isa Khoso (daughter), and Arslan Isa Khoso (son) also did not declare the above properties since they did not file their tax declarations for the Tax Year 2014-2018.""

115. It appears from this extract that the mainstay of the respondents' allegation against the petitioner under Section 116 of the Ordinance is based on a literal reading of Section 116(1)(b) ibid. The respondents' interpretation of the said provision has never been tested judicially before. Indeed, during arguments learned counsel for the respondents candidly acknowledged that there was no case-law in our jurisprudence on the subject of declaration by a taxpayer of the assets of his spouse and children under Section 116(1)(b). However, learned counsel did provide us with the wealth statement form issued by the tax authorities under the Income Tax Rules, 2002 for the tax year 2013. What is notable about this form is that it only required a taxpayer to declare the assets of his spouse who had not filed a return of income along with a wealth statement independently. Moreover, only the assets of

minor children had to be disclosed. It is an admitted fact that Mrs. Isa filed a return and wealth statement in the tax year 2013. As such, it seems that in the tax year 2013 the petitioner was under no obligation to declare the London Properties in his wealth statement. However, this is only the tip of the ice-berg. On an examination of the (several) instructions published by FBR for completing a wealth statement in subsequent tax years, we have noticed that the FBR is itself unsure about the true interpretation of Section 116(1)(b) of the Ordinance. At this stage, it would be appropriate to reproduce this provision:

> "116. Wealth Statement.---(1) [The] Commissioner may, by notice in writing, require any person [being an individual] to furnish, on the date specified in the notice, a statement (hereinafter referred to as the "wealth statement") in the prescribed form and verified in the prescribed manner giving particulars of -
>
> .
>
> (b) the total assets and liabilities of the person's spouse, minor children, and other dependents as on the date or dates specified in such notice"

116. As already mentioned above, in the tax year 2013 the FBR expected taxpayers to only declare assets of a spouse who had not filed a return and wealth statement. However, in the tax year 2015, FBR altered the scope of this duty. It asked taxpayers to declare only those assets of their spouse and minor children which had been created by funds provided by the taxpayer. In 2016, FBR again changed its interpretation of Section 116(1)(b). Now a taxpayer had to declare the assets of his spouse and minor children, whether in Pakistan or abroad, if they had been created by funds provided by the taxpayer. It is this last interpretation which has continued till date. Amongst all of these varying constructions of Section 116(1)(b), there is also the overriding difficulty that the language of Section 116(1)(b) is open to more than one interpretation. In fact, it is perhaps for this reason that both the parties before us have come up with completely divergent analyses of Section 116(1)(b). The respondents have opted for the literal interpretation under which no condition of dependency is attached to the term "spouse" because each and every word in Section 116(1)(b) is given its ordinary and natural meaning. This would indicate that taxpayers are obligated to give particulars of the total assets and liabilities of their spouses, irrespective of whether the said spouses are independent or dependent. However, learned counsel for the petitioner chose a different route. He applied the principle of statutory interpretation called noscitur a sociis. This Court in Ghulam Rasool v. Muhammad Hayat (PLD 1984 Supreme Court 385) defined the aforementioned principle as follows:

> "Page 390: ...Nevertheless, there is a rule of interpretation well-understood and recognised in law and it is of noscitur ex soci[i]s. Maxwell on Interpretation Statutes (12th Edn., page 289) explains it as follows :- "Where two or more words which are susceptible of analogous meaning are coupled together noscitur ex soci[i]s they are understood to be used in their cognate sense. They take as it were the colour from each other the meaning of the more general being restricted to a sense analogous to that of less general."
>
> Crawford on Statutory Construction (p. 325) comments on this rule of interpretation as follows- "In order to ascertain the meaning of any word or phrase that is ambiguous or susceptible to more than one meaning the Court may properly resort to the other words with which the ambiguous word is associated in the statute. Accordingly, if several words are connected by a copulative conjunction a presumption arises that they are of the same class unless of course a contrary intention is indicated. On the other hand, the maxim noscitur ex soc[i]is is not to be applied where the meaning of a word is clear and unambiguous. Nor is it to be used so as to render general words useless. Like all other principles of construction it is to be used only as an instrumentality for determining the intent of the Legislature where it is in doubt.""
>
> (emphasis supplied)

Under the above noted construction, the petitioner would only be obligated to give particulars of the total assets and liabilities of his dependent spouse because the term spouse would draw its characteristics from the other words used in Section 116(1)(b), namely, the terms 'minor children' and 'other dependents.' Nonetheless, as is evident from the above quoted passage, even this method of interpretation is not absolute.

117. Be that as it may, we are not inclined to decide this issue on the basis of either the respondents' present interpretation of Section 116(1)(b) or on the basis of the petitioner's interpretation of the said provision. Neither have produced any case-law or other relevant material to support their respective versions of Section 116(1)(b). Even the FBR's own instructions on completing a wealth statement form are unclear and have wavered from year to year. In such a situation, we consider that it would be better if this matter is determined in the first instance by the hierarchy of specialised fora specified in the Ordinance.

118. However, it has become plain that the respondents have framed the Reference against the petitioner on the untested opinion of an Assistant Commissioner (Inland Revenue) without giving much weight to the fact that their interpretation of the law in this area is unsupported by authority. Accordingly, the respondents' decision to charge the petitioner with a violation of Section 116 of the Ordinance on the basis of an interpretation that is devoid of judicial consideration let alone approval, and which lacks any definitive and consistent departmental practice is conjectural. When confronted, learned counsel for the respondents submitted that the Reference was not based solely on an alleged violation of Section 116 of the Ordinance. Instead, he argued that Section 116 was just a reference point in presenting the respondents reservations about the alleged conduct of the petitioner. He stated that the real case against the petitioner rested on violations of Articles II and III of the Code of Conduct. That the respondents concern was not the discharge of tax liability by the family of the petitioner but the source that had funded the purchase of the London Properties. With all due respect to learned counsel, this argument prematurely assumes both the lack of funds with Mrs. Isa and the commission of misconduct by the petitioner. According to our understanding of the duties of a Judge under the CoC, noted and discussed earlier in this judgment, a Judge may be made answerable for the financial affairs of his family members. However, we do not consider that such liability accrues in respect of speculative allegations. As the following narrative will confirm, this is precisely what the respondents attempted to achieve by preparing the present Reference.

119. On 17.06.2020, the petitioner of his own volition appeared in Court during the course of submissions by learned counsel for the respondents. He sought permission for Mrs. Isa to orally apprise the Court through video link about the improprieties committed by the respondents in preparing the complaint against her as she could not file an application or affidavit or provide documents to explain her position because she did not have a lawyer. Being personally affected by our proceedings, she sought to make a statement without oath through video link from her home. The Bench briefly conferred on the said request and in exercise of its jurisdiction under Article 187 of the Constitution to do complete justice granted her permission to address the Court on 18.06.2020. In her address to the Court, Mrs. Isa complained that neither she nor her authorised representative (AR) had been served with notices by the tax authorities under Section 114 of the Ordinance. These were apparently mailed to her outdated address at Patel Court, Bath Island, even though her new address, Phase II DHA was on the record of the tax authorities. She stated that the required amount of foreign currency was transferred through banking channels, a fact which was in the knowledge of the SBP, and that the tax authorities were aware that apart from her income from taxable sources she also had a stream of non-taxable agricultural income from agricultural land situated in Jacobabad, Sindh and Nasirabad, Baluchistan. We informed her that we could not hear or decide upon the merits which was an issue that could only be determined by the SJC. However, it became clear to us that Mrs. Isa was prima facie willing to offer an explanation for the source of funds used to purchase the London Properties. But

such explanation had not been called for or considered by the tax authorities. As a result, the Reference was prepared against the petitioner in the absence of any determination by the tax authorities on the liability of either the petitioner or Mrs. Isa.

120. Consequently, the plea of the respondents that the case against the petitioner rests on his alleged violations of the CoC and not his infringements of Section 116 of the Ordinance subtly improves their original stance. However, to establish the source of funds for the acquisition of the London Properties, the requirements of due process under Article 4 and Article 10A of the Constitution mandate that the first person concerned, namely, Mrs. Isa ought to be given an opportunity to explain her sources of funding for the London Properties and the reasons for not declaring such properties in her wealth statement. Without granting such opportunity, the framing of the Reference against the petitioner was premature, hypothetical and impulsive. Accordingly, even this allegation against the petitioner is entirely presumptive.

APPLICATION OF MIND BY THE PRESIDENT

121. Another flaw in the Reference highlighted by the learned counsel for the petitioner is the President's failure to form an opinion in terms of Article 209(5) of the Constitution. For convenience, this provision is again reproduced:

"209. Supreme Judicial Council.

..

(5) If, on information from any source, the Council or the President is of the opinion that a Judge of the Supreme Court or of a High Court-

(a) may be incapable of properly performing the duties of his office by reason of physical or mental incapacity; or

(b) may have been guilty of misconduct,

the President shall direct the Council to, or the Council may, on its own motion, inquire into the matter."

(emphasis supplied)

Sub-Article (5) of Article 209 of the Constitution makes it plain that before directing the SJC to hold an inquiry against a Supreme Court Judge, the President should have formed the opinion that the said Judge may be guilty of misconduct. However, the basis upon and the means by which the President needs to form his opinion is not readily discernible from Article 209(5). To comprehend the meaning and object of this function of the President, one needs to consider the nature of powers and functions that the President possesses under the Constitution. In the first instance, an analysis of the President's responsibility to form an opinion rendered in the additional note by Justice Chaudhry Ijaz Ahmed in the Chief Justice of Pakistan case (supra) indicates one point of view:

"Page 247: Sub-Article (5) of Article 209 casts duty upon the President of Pakistan to form his opinion after receiving information qua the judges of the superior courts with regard to physical or mental incapacity to perform duties of his office or has been guilty of misconduct. The President of Pakistan has to form his opinion after application of mind reasonably, objectively with cogent reasons based on relevant material in good faith after application of mind."

(emphasis supplied)

Based on the facts and needs of that case, the said learned Judge concluded that the President's failure to perform his Constitutional duty had fatal consequences:

"Page 246: The perusal of record shows that neither the President nor the Prime Minister under the mandatory provisions of the Constitution has deliberated upon the matter and formed opinion by applying their independent mind. Hence, non-application of mind and non- formation of opinion is fatal and render the subsequent proceedings void."

122. It may be noted at the outset that the above noted view is not shared by the majority judgment in the Chief Justice of Pakistan case (supra) which is silent about the substance of the President's

opinion and the procedure for arriving at such an opinion under Article 209(5). However, during oral submissions, learned counsel for the petitioner argued that unlike the above quoted view the President had simply followed the PM's advice for sending the Reference to the SJC. In doing so he had not formed an opinion as required by Article 209(5) of the Constitution. Accordingly, the Reference framed against the petitioner lacked an essential Constitutional ingredient under Article 209(5), namely, the application of mind by the President. It was therefore seriously deficient. To support his contention, he relied on paragraph 18 of the Reference (ref: Const. P. No. 17 of 2019, Part II) which reads as under:

> "Page 80: As per the advice of the Prime Minister I have formed an opinion that Mr. Justice Qazi Faez Isa may have been guilty of misconduct; hence I hereby direct the Supreme Judicial Council to inquire into the matter..."

123. On the other hand, learned counsel for the respondents argued that the President had correctly formed his opinion as envisaged by Article 209(5) of the Constitution. He submitted that the President was provided with a comprehensive summary from the Ministry of Law and Justice along with all the relevant attachments and the PM's advice. He stated in Court that the President discussed the Reference with the Law Minister, a statement which he elaborated upon in his written arguments. It seems that after the Reference was sent to the President he not only reviewed it with the PM but also with the Law Secretary, the AG and the Law Minister. Input was also sought from Secretary to the President.

124. The Reference as it was sent to the President contained multiple allegations against the petitioner. These allegations involved both pure questions of law and mixed questions of law and fact. One such question was: whether the petitioner Judge (or for that matter any other citizen of Pakistan) is obligated under Section 116 of the Ordinance to declare the assets of his independent spouse? Another issue that arose was: whether the funds employed by Mrs. Isa to purchase the London Properties comprised proceeds of crime in order to involve the commission of the offence of money laundering under AMLA? To ponder over these matters or indeed to form an opinion on them required legal knowledge which the President admittedly himself does not possess. In such a situation, it became incumbent upon him to seek legal advice from persons who were well-versed in tax and financial matters.

125. Although it is not for this Court to specify a list of persons from whom legal advice may be sought by the President, however, we can set out the persons who should not be approached by the President for legal advice on a reference under Article 209 of the Constitution. Fairness and objectivity dictate that those involved in the investigation and framing of the reference may brief the President but cannot advise him on whether it is maintainable and appropriate for inquiry by the SJC. This is because there is a clear conflict of interest for the architects of the reference to opine on the weaknesses of their work. But this is precisely what happened in the present Reference. The President discussed the Reference and its legal aspects with the AG and the Law Minister. As senior functionaries of the Federal Government, both gentlemen were admittedly involved in the framing of the Reference against the petitioner. Under Article 209(5) of the Constitution, the opinion formed by the President is expected to be considered, fair and objective. This is because under Article 48(1) ibid the President has the power to return the advice by the PM or the Cabinet for reconsideration. In order to be objective and fair he should rely upon counsel and legal experts not linked with the framing of the reference or working for the Federal Government. Irrespective of whether such qualities, which have to form part of the President's opinion, are present in the officers of the Federal Government, their consultation becomes questionable on grounds of conflict of interest. The fact that the President also received legal input from his Secretary is unhelpful because the respondents do not claim his legal advice to have been rendered in writing. The President's failure to note under Article 48(1) a defect of gross illegality in the Reference, namely, an assumed view of Section 116 of the Ordinance and AMLA, suggests that the legal basis of the allegations made therein were not tested. We reckon that this happened because the President's opinion was influenced by the inadmissible advice of individuals who were involved in

the preparation of the Reference. In these circumstances, it cannot be said that the President formed an informed opinion in terms of Article 209(5) of the Constitution.

126. Under the Constitutional scheme, one needs to understand the reason for the President's responsibility to apply his mind to form an opinion under Article 209(5). The starting point for such an examination should be this Constitutional provision itself. What is of significance for us is that after the 18th Amendment, Article 209(5) is the only provision in the Constitution which requires the President to form his opinion. However, prior to the 18th Amendment, Article 58(2) (reproduced under the heading 'Authorisation for Investigation') of the Constitution also imposed the same obligation on the President.

127. On a careful perusal of these Articles, it becomes clear that there is a distinction between the "opinion" to be formed by the President under the two provisions. Article 209(5) of the Constitution simply requires the President to form an opinion whereas Article 58(2) ibid required the President to form his opinion in the exercise of his discretion. Consequently, the President's opinion under Article 209(5) is directed by sub-Article (1) of Article 48 whereas his opinion under Article 58(2) was controlled by sub-Article (2) of Article 48. To understand why the application of mind is inherent in the formation of opinion under Article 209(5), we need to appreciate the meaning assigned to the President's opinion formed under a discretionary power as specified in Article 58(2). In this regard, reliance is placed on the case of Federation of Pakistan v. Haji Muhammad Saifullah Khan (PLD 1989 SC 166) wherein the Court settled the debate on this matter:

> "Pages 189-190: The discretion conferred by Article 58(2)(b) of the Constitution on the President cannot, therefore, be regarded to be an absolute but is to be deemed to be a qualified one, in the sense that it is circumscribed by the object of the law that confers it. It must further be noted that the reading of the provisions of Articles 48(2) and 58(2) shows that the President has to first form his opinion, objectively and then, it is open to him to exercise his discretion one way or the other, i.e. either to dissolve the Assembly or to decline to dissolve it... An obligation is cast on the President by the aforesaid Constitutional provision that before exercising his discretion he has to form his 'opinion' that a situation of the kind envisaged in Article 58(2)(b) has arisen which necessitates the grave step of dissolving the National Assembly... Thus, though the President can make his own assessment of the situation as to the course of action to be followed but his opinion must be founded on some material."
>
> (emphasis supplied)

The above quoted excerpt establishes that notwithstanding the element of discretion which was available to the President under Article 58(2), his opinion had to be based on some material and had to be objective. There is no reason why the President's opinion under Article 209(5) (which is not accompanied by any discretion) should not be governed by the same stringent principles. When the President is performing his function under Article 209(5) he is ultimately bound by the advice of the PM or the Cabinet as the case may be under sub-Article (1) of Article 48. However, the proviso to Article 48(1) ibid authorises the President to return, within fifteen days, the advice for reconsideration. Therefore, the President's power clearly grants him the jurisdiction to evaluate the worth of the advice tendered to him. If he is so inclined he may require the same to be reconsidered once by the PM or the Cabinet. Consequently, even Article 48(1) envisages that the President when performing his functions under this provision will apply his mind to the information before him. Otherwise the purpose of inserting a proviso, which permits the President to return the advice, becomes redundant if the President only has to mechanically agree with the PM or Cabinet.

128. Moreover, it has been noted above that the object of Article 209(5) is to protect the security of tenure of Superior Court Judges. Therefore, this Constitutional provision is intrinsically connected with the independence of judiciary. We have already observed that an independent judiciary is critical to the survival of a just democracy. By requiring the President, as the highest Constitutional authority in

the country, to apply his mind and form an objective opinion in the exercise of his jurisdiction under the proviso to Article 48(1) of the Constitution before sending a reference to the SJC for inquiry, it is ensured that this fundamental right of the people is protected from arbitrary interference by the Executive.

129. Be that as it may, learned counsel's submission that the President had not formed an opinion in terms of Article 209(5) of the Constitution was focused on the fact that the President had solely based his opinion on the advice of the PM. Since his initial contention, that the President's opinion under Article 209(5) ought to be formed in the exercise of Presidential discretion under Article 48(2), conflicted with the 18th Amendment to the Constitution, learned counsel for the petitioner argued that the public importance of a reference under Article 209(5) was such that it required advice to the President to be tendered by the Cabinet rather than the PM. However, the short and simple answer to the said objection of learned counsel can be found in the ROB which provides in its Schedule V-B, serial number 35 that matters relating to 'Reference to Supreme Judicial Council' be approved by the President on the advice of the PM. The rationale for this rule becomes evident when the list of cases requiring Cabinet approval is examined. This list is contained in Rule 16(1) of the ROB:

16. Cases to be brought before the Cabinet.---(1) The following cases shall be brought before the Cabinet:-

(a) proposals for legislation, official or non-official, including money bills;

(b) promulgation and revocation of Ordinances;

(c) the budgetary position and proposals before the presentation of an Annual Budget Statement and a Supplementary Budget Statement or an Excess Budget Statement under Articles 80 and 84;

(d) proposals for levy, abolition, remission, alteration or regulation of any tax and floatation of loans;

(e) a reference to the Supreme Court for advice on a question of law under clause (1) of Article 186;

(f) generation of electricity and laying of interprovincial transmission lines;

(g) omitted vide S.R.O 368(1)/2010 dated 1st June 1, 2010

(h) proposals for signing of negotiated instruments with foreign countries and approval for ratification of the instruments:

(i) important reports and documents required to be laid before the Assembly or Senate;

(j) cases involving vital political, economic and administrative policies;

Note.- Cases of this nature shall first be brought to the notice of the Prime Minister by the Minister-in-Charge. The Prime Minister will decide whether any such case should be brought before the Cabinet.

(k) case which the Minister-in-Charge considers important enough for discussion in the Cabinet;

(l) other cases required to be referred to the Cabinet under the provisions of these rules; and

(m) any case desired by the Prime Minister to be referred to the Cabinet.

(emphasis supplied)

A perusal of this provision reveals that the matters which are placed before the Cabinet for approval mainly consist of proposals for legislation and issues pertaining to the economy such as fiscal, budgetary and monetary proposals including proposals for levy or abolition of taxes. Issues involving vital political, economic and administrative policies, international treaties and agreements and any case so desired by the Minister-in-Charge or the PM are also referred to the Cabinet. Accordingly, generally matters that affect a large section of the public or relations between the Federation and the Provinces in the political, economic and administrative area fall within the scope of Cabinet advice.

130. A similar mandate for Cabinet decisions also exists in foreign democratic jurisdictions. In Australia the Cabinet Handbook (13th Edn) sets out the following issues which require the Cabinet's deliberation:

"SECTION 4

CABINET BUSINESS

Matters for Cabinet Consideration

..

72: The following is an indication of the kind of issues that would normally require consideration by the Cabinet:

a. Proposals relating to the delivery of the Government's priorities

b. Significant or controversial policy issues

c. Proposals affecting the Government's financial position, or important financial commitments

d. Proposals that are challenging to implement due to their complexity or timeline for delivery

e. Significant matters affecting state and territory government relations

f. The most significant international business, including international treaties and agreements

g. National emergencies, including any decision to take military action

h. Proposals that affect Australia's constitutional arrangements

i. Proposals requiring significant new or amendments to legislation or regulations

j. Any significant or controversial exercise of a minister's statutory power

k. Significant Government appointments"

(emphasis supplied)

131. A comparable list of subject matters is also found in other foreign jurisdictions such as Canada, United Kingdom and New Zealand. What is significant for our purposes is that these lists demonstrate a consistent international practice that only issues that have a wholesale and widespread effect on the State, its society and political economy belong to the category of cases that need consideration by the Cabinet. The other spheres of State functions which lack the above features may be performed on the advice of the PM with the involvement of Cabinet not being necessary. Advice in relation to the filing of a reference is a function of the President which falls in the latter category. It is neither a legislative measure nor a political, economic or administrative proposal. It is also not a policy decision. As such it lacks the features that qualify for consideration from and debate by the Cabinet. In fact, if one examines in detail Schedule V-B of the ROB, it becomes plain that not only matters pertaining to the Supreme Judicial Council for the removal of Judges of the Superior Courts but also the removal of persons holding other key Constitutional Posts are decided on the advice of the PM:

"SCHEDULE V-B

[Rule 15-A(1)]

LIST OF CASES REQUIRING ORDERS OF
THE PRESIDENT ON THE ADVICE OF THE
PRIME MINISTER

..

2D. Appointment, resignation and removal of Provincial Governors, determination of their salaries, allowances and privileges

..

19. Auditor General of Pakistan:

(i) Appointment, removal, term of office and terms and conditions of service;

33. Federal Shariat Court: number of Judges, their appointments, transfer, resignation, removal, allowances and privileges.

..

35. Reference to Supreme Judicial Council.

36D. Council of Islamic Ideology:

(i) Appointment, resignation and removal of members and Chairman,"

(emphasis supplied)

132. Consequently, keeping in view the nature of cases which are deliberated upon by the Cabinet and the fact that the PM is consistently the single Constitutional authority who advises the President with regards to the removal of persons in Constitutional Posts, we hold that in the filing of a reference the President is bound to act on the advice of the PM and not the Cabinet. Therefore, it is only logical that in deciding whether to send the Reference against the petitioner to the SJC the President relied on the advice of the PM.

133. Furthermore, if the reference is substantive, cogent, coherent, rational and lawful, then the President simply has to record his assent. There is no additional obligation on him to set out his separate reasons. However, if the reference is defective factually and/or legally then the President must state his reasons for disagreement and call for reconsideration of the matter by the PM in the light of those reasons. If the President subsequently disagrees even with the reconsidered advice, then he is bound by Article 48(1) to endorse the said advice leaving it for the SJC to analyse the merits of the reference sent by the President.

134. It is pertinent to state here that the above discussion means that the Federal Government must set out its reasons for preparing and sending a reference against a Judge of the Superior Court. In fact, the summary and statement of reference prepared by the Ministry of Law for the PM and the President are the documents which contain these reasons. It is these documents which contain the crux of the reference against a Superior Court Judge, and therefore they need to be factually and legally complete. Failure to comply with this requirement will render the reference unsustainable.

135. Be that as it may, the crucial question remains whether in light of what has been discussed above, it can be said that the President applied his mind to the facts alleged in the Reference against the petitioner. As noted previously in this section, the President in forming his opinion sought the advice of the Law Minister and AG, both of whom were involved in the preparation of the Reference and therefore had a conflict of interest. Additionally, we have held under the heading 'Validity of the Allegations in the Reference' that the accusations against the petitioner have been made prematurely in the absence of statutory notice to Mrs. Isa to explain her sources of funds. Likewise, there was no evidence to support the allegations made under FERA and AMLA. Both these facts went unnoticed by the President. Consequently, keeping in view these circumstances, we find that the independent application of mind by the President is lacking in the present case. Instead he has followed the advice tendered to him without ascertaining its correctness. This is contrary to the requirements of both Article 209(5) and Article 48(1) of the Constitution and therefore renders the Reference defective.

CONCLUSION FOR DEFECTS IN THE REFERENCE

136. In the light of our discussion, noted above, it has become clear that there are multiple defects in the Reference. Briefly, these are:

i. No authorisation for investigating the affairs of the petitioner was given by the President and PM. Instead the authorisation of the Law Minister was obtained;

ii. No notice was issued to Mrs. Isa as required under Section 116(1) of the Ordinance prior to the filing of the Reference;

iii. The petitioner was presumed to be under the obligation to declare the assets of his independent wife and adult children on the basis of an unsettled and disputed interpretation of Section 116(1)(b) of the Ordinance;

iv. There was neither any evidence nor the nomination of a predicate offence in the Reference to support the allegation of money laundering against the petitioner;

v. Likewise, there was no evidence that the petitioner had violated the regime under FERA and even the relevant provisions from the said law were not specified in the Reference;

vi. The President received inadmissible advice from the AG and Law Minister, the chief architects of the Reference, on the strengths and weaknesses of the Reference;

vii. The President did not get considered, fair and objective advice from a third party on the questions of law noted in the Reference;

viii. The President failed to notice the various legal and procedural defects in the Reference;

ix. The President did not form a considered opinion under Article 209(5) of the Constitution;

x. As there was no valid authorisation for the investigation (noted in i above), the respondents illegally accessed the tax records of the petitioner and Mrs. Isa; and

xi. Mrs. Awan made contemptuous remarks about the petitioner in public.

These illegal acts of the respondents depict their utter disregard of the law. Filing a reference under Article 209 of the Constitution that is signed by the President and which presents a charge sheet against a Judge of the Superior Courts is a matter requiring utmost prudence and caution by its framers. However, in the present case the actions of the respondents have violated not only the express provisions of the Constitution, the ROB, the Ordinance and AMLA but have also ignored the law laid down in the Chief Justice of Pakistan case (supra) which specifically set out certain safeguards to protect Superior Court Judges from arbitrary actions of the Executive. Therefore in essence, the respondents have paid scant attention to the mandate of the relevant laws governing the field of Presidential references. In these circumstances, the errors committed by them in the preparation and framing of the Reference cannot be termed as mere illegalities. Instead, in the context of Article 209 their errors amount to a wanton disregard of the law. Being arbitrary and illegal these act have ceased to be actions contemplated by any of the applicable laws such as the Constitution and the Ordinance (amongst others). As a result, although the preparation and framing of the Reference against the petitioner is not patently motivated with malice in fact, the scale and degree of the illegalities are such that the Reference is deemed to be tainted with mala fide in law. For this reason, the Reference is hereby quashed.

SHOW CAUSE NOTICE ISSUED BY THE SUPREME JUDICIAL COUNCIL

137. We have already observed in this judgment that the SCN dated 17.07.2019 issued by the SJC is almost entirely based upon the information given and the resulting allegations made in the Reference. In the preceding paragraphs we have struck down and quashed the Reference for being legally defective. The SCN issued by the SJC derives its substance from this quashed Reference. Therefore, except for the underlying factual information of Mrs. Isa's ownership of the undeclared London Properties, the remaining contents of the said Reference are without foundation. Accordingly, the narrative in the notice alleging misconduct against the petitioner and the subsequent direction to file a response have lost force and cannot be sustained. Even the not denied/admitted underlying information about ownership of the London Properties by Mrs. Isa and her children requires further probe by the respondents on the point of absence of declared lawful sources for the purchase of such properties to maintain a Reference against the petitioner. As a result, the notice dated 17.07.2019 cannot survive in limbo and must abate. Indeed, without the Reference the SCN is just a "blank piece of paper" (ref: R (on the application of Miller) v. The Prime Minister [2019 UKSC 41 at para-69]) which cannot become the basis for any subsequent inquiry against the petitioner. Consequently, the ongoing proceedings against the petitioner in the SJC also stand abated.

REFERRAL TO FEDERAL BOARD OF REVENUE

138. It would now be appropriate to elaborate upon our reasons for directing the FBR to commence tax proceedings against Mrs. Isa and her children, notwithstanding our order to quash the Reference against the petitioner. Our decision to take such a step was primarily based on two grounds: to establish that Judges of the Superior Court are answerable for allegations casting aspersions not only on their personal integrity but also on the integrity of the institution; and to honour the petitioner's plea that the allegation of absence of source of funds and money laundering must be first put to Mrs. Isa who is an independent taxpayer.

139. Since the start of these proceedings all the learned counsel in the present and connected petitions have termed their case a struggle for the independence of the judiciary. Learned counsel for the petitioner repeatedly urged before this Court that unless the Reference against the petitioner was quashed, it would undermine the independence of the judiciary. However, what has escaped the attention of learned counsel during this intense discourse is another equally important fundamental principle of the Constitution, namely, the accountability of the Judges of the Superior Courts. An independent judiciary is certainly a necessity for any civilised society governed by laws to prosper and thrive. But in utmost good faith neither Judges nor the institution can retain the public trust when serious stigmas are cast on their integrity. Recalling the quotation from the Holy Quran at the start of this judgment, the institution cannot be perceived to be ignoring an unpleasant allegation of undeclared foreign assets of a family member of a Judge.

140. In this regard, it may be mentioned that the Chief Justice of Pakistan case (supra) is distinguishable from the facts and circumstances of the present case. In the Chief Justice of Pakistan case (supra) this Court quashed the reference against the (then) Chief Justice Iftikhar Muhammad Chaudhry and brought the matter to an end without further action on the information contained in the reference against him. It is not at all difficult to understand why the Larger Bench in that case adopted such a course of action. It is because the reference filed against the (then) Chief Justice was established on record to be so manifestly motivated by the malice in fact of the military ruler at the time that the allegations against the former were rendered insignificant.

141. However, in the present case no finding of malice in fact has been given. It is true that the Reference suffers from grave legal defects. But the consequences of illegality of an impugned action are different from those following a finding of malice in fact. The illegalities in the present Reference are a result of its careless and casual preparation. These errors or defects do not erase Mrs. Isa's ownership of the London Properties, the primary fact which forms the basis of the Reference and which is not denied by the petitioner. Whilst the ownership of the London Properties is not disputed, the source of funds for their purchase and the mode by which these funds were transferred abroad require explanation. Otherwise, an unexplained investment by the spouse of a Judge of the Superior Courts, who is a holder of public office, compromises the integrity of the learned Judge and ultimately the probity and credibility of the institution which he serves.

142. Rather than allowing the disturbing allegation against the petitioner and his family to circulate and attract innuendos thereby injuring the reputation and integrity of both the petitioner and this Court, we adopted the fair, impartial and transparent route of allowing Mrs. Isa and her children to disclose the source of their funds to the relevant authorities, namely, the FBR. Such a transparent course of action is consistent with the CoC, the maintenance of institutional integrity and the image of Judges as the neutral and independent arbiters of law and justice. The matter of undeclared and unexplained foreign wealth of public office holders bears a stigma in Pakistan that these assets have been acquired unlawfully (a stigma which applies with even greater force since the PANAMA leaks on 03.04.2016). Therefore, every public office holder including Judges of the Superior Courts, officers of the armed forces, elected representatives and public servants are accountable under the law. Indeed, neither the institution of the judiciary nor the other institutions of Pakistan can tolerate a contrary perception. Consequently, all public office holders remain accountable under their applicable legislation on misconduct. By referring the issue of source of funding to the FBR for verification from Mrs. Isa and her children, we have chosen the path which in the first place should have been taken by the respondents but which was casually ignored by them. Therefore, by this referral the controversy surrounding the allegation in the Reference will be settled.

143. It may be mentioned here that our decision to refer the matter for verification to the FBR grants the petitioner's plea from the very start of the proceedings that his wife and children should be asked about their source of funds for the acquisition of the London Properties. This was reiterated by learned

counsel for the petitioner during arguments. He submitted that a determination by the tax authorities was essential to ensure that the due process rights of the petitioner and his family under Article 10A of the Constitution were not violated. Mrs. Isa also adopted a similar stance in her statement, given through video link, on 18.06.2020 to the Court. To our minds the FBR being the premier tax authority in Pakistan is the most well equipped to deal with questions of a financial nature. It not only maintains the complete tax records of taxpayers, including those of Mrs. Isa's, but also employs personnel who are well-versed in comprehending and analysing financial and tax records.

144. Moreover, as our short order bears out, by sending the matter to the FBR we have assured the substantive and procedural rights of each party under the Ordinance. These rights and the right of the petitioner's family to appeal against adverse orders have specifically been preserved. Additionally, we have ordered that only appropriate proceedings for undeclared or unexplained assets be initiated against the petitioner's family which should be concluded within a reasonable timeline.

SUO MOTU JURISDICTION OF SUPREME JUDICIAL COUNCIL

145. Next, we in our short order also directed the Chairman FBR to submit his report, regarding the proceedings before the Commissioner (Inland Revenue), to the SJC for its consideration. This was done to give SJC the chance, if it so wished, to commence proceedings against the petitioner in exercise of its suo motu jurisdiction. However, it is reiterated that our short order dated 19.06.2020 merely issues a direction to the Chairman FBR and in no way obliges the SJC to take any action based on the report. The SJC may do so of its own volition if it considers that the report justifies any action against the petitioner. But it may also file the report if it finds that the same contains no substance/ merit. The SJC is the only constitutional body which can examine the conduct of a Superior Court Judge. Therefore our direction for the disclosure of the findings and the record of the verification proceedings by the FBR to the SJC acknowledges the latter's exclusive jurisdiction in this matter. Consequently, the Chairman FBR's report is a piece of information to be evaluated by the SJC in its suo motu jurisdiction.

146. At the same time our short order has preserved the rights of the affected taxpayers, Mrs. Isa and her children, under the Ordinance. This includes the right to appeal against the decision of the Commissioner or against any other adverse order passed at the appellate stage. To our minds, the two directions, namely, the filing of the report by the Chairman FBR before the SJC and the protection of the affected persons right to appeal, issued by us were necessary in the interests of justice. The jurisdiction of the FBR is concerned with taxing income whereas the jurisdiction of the SJC is related only with the misconduct of a Judge. Therefore, the proceedings and/or the outcome before one forum do not affect those of the other forum. However, the SJC may if so inclined in the exercise of its suo motu jurisdiction conferred by the Constitution take into consideration any proceedings before the tax authorities or orders passed by them.

CONCLUSION

147. These then are the detailed reasons for our findings recorded in the short order dated 19.06.2020.

148. Before parting with our judgment, we would like to thank learned counsel for the petitioner in Const. P. No. 17 of 2019 and the connected petitions as well as learned counsel for the respondents, whose names are recorded in the title of the judgment, for their invaluable assistance to the Court. We also express our appreciation to all the learned counsel who appeared before us for presenting their well-reasoned arguments with grace and respect and for giving a patient ear to the questions posed by the Hon'ble members of the Bench.

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## DISSENT NOTE

Syed Mansoor Ali Shah, J.-

*Introduction*

While it appears that this case is about the independence and accountability of a judge, it is truly about the independence and accountability of our institutions. It raises the questions: Are we governed by the Constitution and the Rule of Law or can the Government of the day conveniently get off the constitutional rails to suit its ends and come prying into the private lives of its citizens in disregard of their constitutional rights? Can a Special Assistant[1] to the Prime Minister, acting as Chairman, ARU,[2] assume a role larger than the statutory institutions of the State and spearhead investigation and surveillance into the life and conduct of a judge of the highest constitutional court, sidestepping the prescribed constitutional process? Can the Special Assistant wield power over statutory institutions like FBR, NADRA and FIA without any sanction of law? Can a Law Minister, ignore the law, the Constitution and the statutory institutions of the State and permit ARU to entertain, investigate and collect evidence on a private complaint against a constitutional court judge? Is the Law Minister justified to place a Summary based upon the evidence so collected, before the Prime Minister for approval? Is there a level of responsibility expected of the Prime Minister, who is the Chief Executive of the Federation and Head of the Cabinet, in approving

Summaries placed before him? In a matter no less serious than the removal of a judge of the highest court in the land, was the Prime Minister required to inquire how the "information" placed before him was collected and whether the information collected actually made out a case of "misconduct" against the Petitioner Judge or is the Prime Minister to impetuously approve Summaries without any application of mind? Can Government in a constitutional democracy be driven by personal bias, malice, intolerance and bigotry or should an institutional process run it with collegiality, transparency, fairness, openness, diversity and inclusiveness as its hallmarks? Are we to expand our frontiers of freedom as we mature into a democracy and strengthen our constitutional guarantees

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[1] The substantive legal post of Chairman, ARU, is that of a Special Assistant to the Prime Minister.

[2] Asset Recovery Unit ( discussed in detail later)

with renewed confidence and enthusiasm or regress into darkness by permitting unconstitutional acts that allow muffling of a critical judicial voice in the name of judicial accountability? This case makes us think, whether we want our future generations to descend into a dystopia or grow up into a vibrant democracy with an understanding and conviction that "in a democracy, the State is neither with us nor against us. It is us."[3]

2. I concurred with the conclusion of the Majority recorded in the Short Order dated 19.6.2020, whereby the Reference filed against Justice Qazi Faez Isa was quashed and the subsequent proceedings before the Supreme Judicial Council stood abated. I have gone through the Majority Judgment and, with respect, hold a different view of the Constitution, the law and the facts of the case and have been unable to subscribe to the logic and reasoning of the Majority view. I have, therefore, penned my own reasons for quashing the Reference. I am also unable to agree with the directions[4] issued by the Majority in the Short Order and have given reasons for my dissent later in the judgment.

*Judicial Independence and Judicial Accountability*

3. "I have always thought…that the greatest scourge of angry heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt or a dependent judiciary," said John Marshall.[5] Judicial independence and judicial accountability are two sides of the same coin and one cannot co-exist without the other. Therefore, to compromise on judicial accountability is to compromise on our freedoms guaranteed under the Constitution; the Rule of Law; Independence of Judiciary; and Democracy itself. We all know that the court cannot buy support for its decisions by spending money or use force to coerce obedience of its decrees. The court's power lies in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the judiciary as fit to determine what the law means and to declare what it demands. The court's concern with legitimacy is not for the sake of the court but for the sake of the nation to which it is

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[3] Jonathan Sumption, Trials of the State: Law and the Decline of Politics (2019).

[4] Paragraphs 4-11 of the Short Order dated 19.06.2020.

[5] Fourth Chief Justice of the United States Supreme Court (1801-1835) - see Fazal Karim, Judicial Review of Public Actions, p.282, Vol-1 (2nd ed.).

responsible.[6] Foundations of judicial institution stand on public confidence and public trust that lend it legitimacy and public acceptance. Institutional legitimacy of the judiciary, in turn, is grounded in judicial integrity of the judges. According to John Marshall, ignorance, corruption and dependence of a judge are the evils that tarnish judicial integrity; Our Constitution also lays down the measure of judicial integrity of a judge. While taking oath a constitutional court judge makes a solemn promise before God that he will discharge his duties and perform his functions honestly and faithfully in accordance with the Constitution and the law; that he will not allow his personal interest to influence his official conduct or decisions; that he will abide by the code of conduct issued by the Supreme Judicial Council; and that he will always preserve, protect and defend the Constitution. This is the constitutional requirement of judicial integrity. A judge is to always tread the path of the Constitution and the law, must possess strength of character to never give in to external influence for personal benefit, and must be bold and courageous to always stand for the Constitution and to preserve, protect and defend it. Any compromise on this sacred promise with God, is to comprise judicial integrity.

4. While judicial accountability is critical for upholding the legitimacy of the judicial institution, equally important is the right of a Judge to enjoy the protection of law and to be treated in accordance with law. Judicial accountability, like any other accountability, must be according to the standards of due process guaranteed under Article 4 of the Constitution. We must remember that public confidence and public trust in the legitimacy of the judicial institution can only be attained when judges decide without fear or favour, in accordance with law, even while sitting in judgment over the affairs of their own colleague. While dealing with judicial accountability we are not to project a forced image of self- accountability to win accolades of the public or make extra effort to win over public confidence. We are to simply decide in accordance with the Constitution and the law – come what may.

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[6] see: Planned Parenthood v. Casey, 505 U.S. 833 (1992)

*Brief Facts*

5. Justice Qazi Faez Isa ("Petitioner Judge") being part of a two Member Bench of this Court authored judgment in Suo Motu Case No.7 of 2017, known as *Faizabad Dharna* case,[7] decided on **February 6, 2019**, and made certain observations therein as to the 2014 *Dharna* of the current main ruling political party (PTI), the role of the coalition ruling party (MQM) at the time of Karachi incident of 2007, and the interference by the Military Intelligence Agencies in politics and freedom of Media. It was also directed in the judgment that proceedings should be taken against military officers who had violated their oath of office by engaging in political activity. Several review petitions were filed against that judgment, including the petitions by the PTI, MQM, and Ministry of Defense, Government of Pakistan, in **March, 2019**. The Ministry's petition sought for expunction of the observations and directions made regarding the Military Intelligence Agencies and its officers. The PTI and MQM (the political parties currently in Government), in their review petitions, asserted that the Petitioner Judge by making the objectionable observations in the judgment had violated his Oath of Office and Code of Conduct for Judges and was liable to be removed from office under Article 209 of the Constitution. This assertion of removal was made only against the Petitioner Judge, and not against the other learned Member of the Bench.

6. Soon thereafter, one Abdul Waheed Dogar ("Complainant") made a complaint titled "Accountability of Judges" to the Asset Recovery Unit ("ARU"), housed in the Prime Minister's Office, on **April 10, 2019**, against the Petitioner Judge and two other judges of the constitutional courts. The complainant alleged that these judges owned offshore properties. A meeting of the ARU was held on **April 15, 2019** to discuss the complaint at the residence of the Chairman, ARU in the Minister's Colony, Islamabad, and it was decided in that meeting that since the matter pertained to the Judges of Superior Judiciary the opinion of the Law Minister should be sought. The Chairman and certain Members of the ARU met the Law Minister in his office on **April 16, 2019** who advised orally that before taking any further action, the ARU should check

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[7] PLD 2019 SC 318.

the veracity of the allegations contained in the complaint. No formal correspondence took place between the ARU and the Law Ministry, in this regard. The Chairman, ARU, after that meeting, tasked Barrister Zia Naseem, Legal Expert of the ARU, to verify the property details attached with the complaint, and further conduct a wider property search in the names of persons mentioned in the complaint and of their family members. He also tasked Mr. Muhammad Rizwan, Member of the ARU from FIA, to obtain identification documents of persons mentioned in the complaint, copies of their CNICs and passports, all visas, if any, family tree and travel history. On the suggestion of Mr. Muhammad Ashfaq Ahmad, Member of the ARU from FBR, the Chairman decided to forward the complaint through a formal letter to the Chairman, FBR for assessment and analysis into declaration of assets of persons mentioned in the complaint. The Legal Expert of ARU submitted his report about UK properties in the name of the spouse and children of the Petitioner Judge, on **May 8, 2019**. The Member of ARU from FIA submitted his report on **May 10, 2019**. Assistant Commissioner (IR), Commissioner (IR), and DG, (International Taxes)/Member of ARU from FBR, all three, submitted their reports on **May 10, 2019**. The Chairman, ARU then made his final Report on **May 10, 2019** after examining all the reports and record submitted to him by the Legal Expert and Members of the ARU, and dispatched it to the Law Minister on the very same day, i.e., **May 10, 2019**. The Report also mentioned a meeting of the Chairman, ARU with the complainant held to inquire into the allegations made in the complaint.

7. The Chairman, ARU thus investigated the complaint; located properties in the UK, and obtained reports regarding record of the Petitioner Judge and his family from the FBR, NADRA and FIA. He found that there were three properties in the names of the spouse and children of the Petitioner Judge in UK having been purchased in the years 2004 and 2013 and that those properties had not been declared by the Petitioner Judge and his family in their tax returns. One property was initially reported to have been purchased in 2011, but later on after filing of the Reference it was reported to have been purchased in the year 2004. The Chairman, ARU did not consider it fit to inquire into the alleged properties of

one other judge mentioned in the complaint after noting in the minutes of meeting held on April 16, 2019 that the said judge had already resigned.

8. The Chairman, ARU, as mentioned earlier, submitted his report of the said investigation conducted on the complaint to the Law Minister on **May 10, 2019**. The Law Ministry, made a "Summary for the Prime Minister", on **May 17, 2019**, proposing to the Prime Minister to advise the President, under Article 48(1) of the Constitution, to form an opinion that the Petitioner Judge may be guilty of misconduct and direct the Council under Article 209(5) of the Constitution to inquire into the matter. The basis for the proposal was stated in the Summary as under:

> "A judge of the Superior Court who omits to intentionally declare three expensive London properties jointly owned by his spouse and children, violates Section 116 of the 2001 Ordinance. The tax records of the learned Judge and his spouse are absolutely silent about the sources through which the said properties had been acquired and how and from where the funds were made available to purchase the said properties, without violating the money laundering regime and the Foreign Exchange Regulation Act, 1947. The said mis-declaration seems glaring. Thus, the said Judge i.e. Justice Qazi Faez Isa appears to have committed gross misconduct and is liable to be removed upon the recommendations of the Supreme Judicial Council in terms of Article 209 of Constitution."

The draft Reference was also annexed with the Summary. On the same day, i.e., **May 17, 2019** the Prime Minister, accordingly, advised the President to form his opinion, direct the Council and sign the draft Reference. The President approved the Prime Minister's advice and signed the Reference on **May 20, 2019**. The Secretary, Ministry of Law and Justice forwarded the Reference to the Supreme Judicial Council ("Council") on **May 23, 2019**. The Secretary, Council placed the Reference before the Chairman, Council, on **May 29, 2019**, and the Chairman, Council made an order to convene the meeting of the Council for **June 14, 2019** to consider the matter. Even though the matter had not yet been taken up in the meeting of the Council for preliminary consideration, several newspapers published the filing of the Reference and the allegations made therein against the Petitioner Judge on May 28, 29, 30, 31, and June 1 and 3, 2019. Later during the proceedings before the Council the matter was

discussed in press conferences and TV talk shows by the Government Ministers and even by the President of Pakistan.

*Issues*

9. The constitutional and legal issues I would address are as follows:

i. Could the Asset Recovery Unit (ARU) entertain and investigate a complaint against the conduct of a constitutional court judge under the law and Constitution?

ii. Was the ARU established with lawful authority under the law and Constitution? And what was the legal status of its Chairman?

iii. Did the ARU collect evidence in support of the allegations made in the complaint against the Petitioner Judge in accordance with the law and Constitution?

iv. If the answer to the above question is in the negative, could the Law Minister and the Prime Minister rely and act upon such evidence?

v. Was the President to form his independent personal "opinion", or to form the "opinion" on and in accordance with the advice of the Prime Minister, under Article 209(5) of the Constitution, on the "information" placed before him?

vi. Could an opinion as to the commission of misconduct be reasonably made against the Petitioner Judge, on the "information" given in the "Summary" and material annexed therewith?

vii. Does publicizing the act of sending the Reference against the Petitioner Judge and of the contents thereof attract proceedings under Article 204 of the Constitution and Contempt of Court Ordinance, 2003?

viii. Were the acts of entertaining the complaint, inquiring into and collecting evidence on the allegations, and making and filing of the Reference against the Petitioner Judge, *malafide*?

I endeavour to deal with these issues as per my humble understanding of the law and Constitution.

*Constitutional Process for Removal of a Constitutional Court Judge*

10. Article 209 of the Constitution provides the process for the removal of a constitutional court judge. A special constitutional forum - Supreme Judicial Council - has been vested with the exclusive jurisdiction under the Constitution to inquire into the capacity and conduct of a constitutional court judge, and

recommend his removal. The Council is a collegium of judges headed by the Chief Justice of Pakistan and consisting of two next most senior judges of the Supreme Court and two most senior Chief Justices of High Courts. The process of the Council is set in motion when "information from any source" against a constitutional court judge reaches the President or the Council. Either of the two gatekeepers, as the case may be, principally verifies and assesses the gravity of the allegations and forms an "opinion" whether the matter calls for "inquiry" into the capacity or conduct of the judge by the Council.

11. The proceedings before the Council, its report to the President and the removal of the judge by the President under Article 209 cannot be called in question in any court of law under Article 211, unless the removal of the judge is without jurisdiction, *malafide* or *coram non judice*. A limited judicial review on these three grounds is not affected by Article 211, as no ouster clause can keep the actions taken without jurisdiction, *malafide* or *coram non judice*, beyond the scrutiny of the constitutional courts.[8] Article 211 gives immunity to proceedings before the Council till the removal of the judge by the President. However, proceedings and steps taken before the matter lands before the Council escape the immunity under Article 211. In the present case, there were several steps that preceded the proceedings before the Council: the filing of complaint ('information') by the complainant before the ARU; the entertainment of the complaint by the ARU; the mode and manner of dealing with the complaint by the ARU and Law Ministry; the investigation and collection of evidence to supplement and document the complaint by the ARU; the preparation of "Summary" for making the Reference by the Law Ministry; the advice of the Prime Minister on the Summary; and the approval of that advice by the President. All these acts preceded the proceedings before the Council and are not hit by the ouster clause of Article 211. They are, therefore, subject to standard judicial review like any other executive or administrative act, on the grounds of substantive illegality, procedural impropriety and

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[8] see CJP Iftikhar Chaudhry v. President of Pakistan, PLD 2010 SC 61, per Khalil-ur-Rehman Ramday, J, paras 78, 80, 83 and 85.

decisional irrationality.[9] In a democracy governed by the rule of law, where arbitrariness in any form is eschewed, no Government or authority has the right to do whatever it pleases; where the rule of law prevails, there is nothing like unfettered discretion or unaccountable action.[10] It is, however, underlined that a Reference competently filed by the President against a constitutional court judge should not ordinarily be made subject to scrutiny in judicial review by any Constitutional Court including this Court, unless the extraordinary circumstances demand such intervention in the interest of justice and fair play.[11]

12. While a citizen (a private person) can always directly approach these forums by placing the information before them, it is important to understand how the Government (Federal, Provincial or Local) or its Ministries, Divisions, Departments and officials place such "information" or complaint against a judge of a constitutional court before the President. Can any Ministry, Division, Attached Department or Department of the Government on receiving any information against a constitutional court judge, entertain it and proceed with it, or start collecting evidence or verify the contents of the complaint? The answer to this is in the negative in the light of Article 209(7) of the Constitution, which mandates that the only constitutional forum available to inquire into the conduct or capacity of a constitutional court judge is the Council. So the Governments, its Ministries, Divisions, Departments or Attached Departments and their officers are not authorized to entertain any complaint against a constitutional court judge, let alone proceed and collect evidence to supplement the complaint. They can at best return the complaint to the complainant and guide him to approach the constitutional forums under Article 209 of the Constitution.

13. Let us take a situation where any Ministry, Division, Attached Department or Department of the Government, in the course of its normal business, discovers some adverse information against a constitutional court judge that may attract impeachable misconduct, in addition to the legal proceedings under the relevant

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[9] See Ibid, para 70.

[10] see State of W.B v. Debasish Mukherjee, (2011) 14 SCC 187.

[11] See CJP Iftikhar Chauhdry case (supra), Per Muhammad Nawaz Abbasi, J. p.215.

law. The concerned Department etc., in such situation, should at first proceed against the constitutional court judge on the basis of the adverse information in accordance with the law under which it functions. For example, if it is the FBR that discovers such an information, it can proceed against the judge under the tax laws and the judge will have a right to defend himself in accordance with law. Only when these proceedings come to a close after exhausting all the legal and judicial avenues and it is finally held that the judge has violated the law, the FBR may, in the interest of judicial accountability, send this information to the Federal Government through the Division with which it is attached under the Rules of Business, 1973 ("ROB") for information and necessary action. It will then finally rest with the Federal Government i.e., the Cabinet, to decide if the violation of law amounts to impeachable misconduct and whether the Federal Government should proceed against the constitutional court judge and place the "information" before the President. Such process finds its justification from the foundational constitutional principles like independence of judiciary, rule of law and parliamentary democracy.

*Entertainment of Complaint by ARU*

14. First and foremost, the complainant could only have approached the constitutional forums provided under Article 209(5) of the Constitution and could not have filed the complaint before any other office or authority. Therefore, the very act of approaching the ARU was *per se* unconstitutional and illegal. It is noted with concern and suspicion that how did the complainant, a citizen of this country, plan on filing the complaint against a constitutional court judge before the ARU, which had no public interface or the legal mandate to deal with such a matter and had earlier never conducted any inquiry for the accountability of a constitutional court judge. There is surprisingly nothing on the record to show how the complainant found out about ARU. The ARU was not a Ministry or Division of any Ministry of the Federal Government, or an Attached Department, neither was it a statutory authority nor had the notification of its establishment been published in the official gazette for public information. The ARU, therefore, for all practical purposes did not legally exist for the world outside the Prime Minister's Office. However, the

complainant instead of approaching the Council, which would have ordinarily come to the mind of a citizen, particularly in view of the publically known recent removal of a High Court Judge by the President on the recommendation of the Council,[12] approached the ARU for the accountability of judges. This looks more odd especially when the complainant claims to be a journalist. Such an unusual step by the complainant raises eyebrows about the credibility of the complaint and the *bonafide* of the complainant.

*Legal Status of ARU*

15. The ARU was established by the Cabinet vide Notification dated 06.11.2018. The Federation has defended the establishment of the ARU by the Cabinet, by referring to the provisions of Rules 4(5) and 16(1)(m) of the ROB. The submission made on behalf of the Federation was that Rule 4(5) empowers the Prime Minister to establish agencies and offices for conducting the business of the Federal Government, and under Rule (16)(1)(m) the Cabinet has power to decide any matter referred to it by the Prime Minister. The Prime Minister referred the matter of establishing the ARU to the Cabinet, and the Cabinet thus competently approved the establishment of the ARU. Rules 4(5) and 16(1)(m) of ROB are reproduced here for ready reference:

> **4. Organization of Divisions.**
>
> .....
> .....
>
> (5) The business of Government, other than the business done in the Federal Secretariat or the Attached Departments, shall be conducted through such agencies and offices as the Prime Minister may determine from time to time.
>
> **16. Cases to be brought before the Cabinet.**--(1) The following cases shall be brought before the Cabinet:-
> .....
> .....
>
> .....
>
> (m) any case desired by the Prime Minister to be referred to the Cabinet.

Bare reading of the provisions of Rule 4(5) makes it clear that the said Rule does not empower the Prime Minister to establish new agencies or offices; it simply authorizes him to refer the business of the Government to already established agencies and offices under the law. The word "determine" has been used in the Rule in the context of allocation or entrustment of the business of Government and not for the power to establish a new agency

or office. In the

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[12] Justice Shaukat Siddiqui's case, Report of the Council dated 11.10.2018.

absence of any power to establish a new agency or office, reference of the matter to the Cabinet under Rule 16(1)(m) by the Prime Minister is inconsequential, as the Cabinet also does not enjoy any such power. The scope of the ROB made under Article 99(3) of the Constitution cannot extend to creation of agencies or offices to perform functions in relation to any matter to which the executive authority of the Federation extends. Such agencies or offices can be established only by or under some law enacted by the Parliament on the subject over which it has the legislative power under the Constitution. The creation of the ARU by the Cabinet, cannot be sustained treating it as an Attached Department of the Cabinet Division also. The Departments that have been declared as Attached Departments to particular Divisions are created by or under the law, and not by the Federal Government.[13] The Federal Government, as per Rules 2(1)(ii) and 4(4) of ROB, can only declare them attached with a particular Division, but cannot create them. The Terms of Reference (TORs) of the ARU define its role and powers. The ARU does not pass as a coordinating agency or office under the TORs for the following reasons: first, as per its Notification it was established as an entity separate from the Departments whose officials have been made its Members and also addressed as such in its TORs; second, there is no mention of its coordinating role in the TORs; third, the powers and functions have been prescribed in the TORs as that of the ARU, and not of its Members; and fourth, but most importantly, the ARU was conferred such wide and extensive powers which even its Members did not enjoy under the laws of their parent institutions, e.g., it was empowered to request any intelligence agency under the Government of Pakistan for assistance in obtaining any information on any subject within and outside the country,[14] and authorized to seek assistance and information from Law Enforcement Agencies and other Government Departments, including the information relating to bank accounts, companies record, revenue record, travel record, NADRA record etc.[15] With such intrusive investigative powers, the ARU cannot be said to be an innocuous coordinating agency, office or unit. The

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[13] See ROB, Schedule III.

[14] TOR No. 7.

[15] TOR No.8.

establishment of the ARU was, therefore, absolutely without lawful authority, and is hereby so declared. In the absence of any legal status of the ARU, its Chairman and Members also have no legal position or status.

*Budgetary Status of ARU*

16. It is important to see how the ARU was being funded. Were the funds allocated for the functioning of ARU duly reflected in the Annual Budget? Funds can be allocated for any Government activity only by the National Assembly in the Annual Budget Grants under Article 82(2) or supplementary and excess budget grants under Article 84 of the Constitution. The Annual Budget Statements for the financial years 2018-19 and 2019-20 do not mention the allocation of any budget for the expenditure of ARU. The power of the Federal Government, i.e., the Cabinet, under Article 82(3) is only recommendatory, and provisional under Article 84, both are subject to the assent by the National Assembly. The amounts as approved in the budget passed by the National Assembly can be utilized only for the purpose specified in the budget statement. Any re-appropriation of funds or their utilization for some other purpose is not justified under the Constitution; for this purpose, the supplementary budget statement has to be placed before the National Assembly following the procedure provided in Article 84 of the Constitution. Persons making the unauthorized expenditure from the Federal Consolidated Fund are personally responsible for that expenditure.[16] The ARU, therefore, had no budgetary support and therefore does not pass for an executive authority. In this background, role of the ARU becomes more suspicious and raises the questions: who funded the investigation and the transnational surveillance of the Petitioner Judge; who paid for the Law Expert of the ARU; who paid for collecting information from the UK HM Land Registry or *192.com,* which are not open source, as one has to pay and register to access information; who was funding the entire operation. These unanswered questions cast doubts on the *bonafides* of the

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[16] See Case of Action against Distribution of Development Funds, PLD 2014 SC 131; Mustafa Impex v. Govt. of Pakistan, PLD 2016 SC 808 and Ram Jawaya v. State of Punjab, AIR 1955 SC 549.

Government and the Prime Minister, the Chief Executive of the Federation.

*Legal Status of the Chairman, ARU*

17. The appointment of the Chairman, ARU by the Cabinet is not backed by any law including any rule of the ROB. Even otherwise, the ROB made under Article 99(3) of the Constitution cannot provide for creation of posts in connection with the affairs of the Federation. Such power must be conferred by some law enacted under Article 240(a) of the Constitution. Article 99(3) empowers the Federal Government to make rules only on two subjects: firstly, for the allocation of the business of the Federal Government to its different components, i.e., the Ministries; and secondly, for the transaction of that business. The Rules made under this power can regulate the procedural modalities of allocation and transaction of the business, i.e., by which Ministry or Division of a Ministry and how a matter is to be taken up and dealt with; such Rules cannot grant substantive power to create posts in connection with the affairs of the Federation.[17] The expression "allocation and transaction" of the business does not by any stretch of imagination imply such power. Thus, the appointment of the Chairman, ARU by the Cabinet was without lawful authority, and is so declared.

18. The prior appointment of the Chairman, ARU as Special Assistant to the Prime Minister on Accountability with the status of Minister of State, under Rule 4(6) of the ROB also appears to be questionable. The Constitution has prescribed a limitation for the total number of the Federal Ministers and Ministers of State: second proviso to Article 93 mandates that the total strength of the Cabinet, including Ministers of State, shall not exceed eleven percent of the total membership of Majlis-e-Shoora (Parliament). This command of the Constitution cannot be circumvented and made redundant by doing a thing indirectly that cannot be done directly. The Constitution has envisaged the Federal Government consisting of the Prime Minister and the Federal Ministers to exercise the executive authority of the Federation,[18] and has allowed assistance in exercise of that authority by appointment of

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[17] See Mustafa Impex v. Govt. of Pakistan, PLD 2016 SC 808.

[18] The Constitution of the Islamic Republic of Pakistan, 1973, Article 90(1).

the Ministers of State[19] and the Advisers.[20] The Constitution does not provide for appointment of any Special Assistant to the Prime Minister. The scope of the Rules of Business made under Article 99(3), as above explained, is restricted only to the "allocation and transaction" of the business of the Government. The vires of Rule 4(6) of the ROB that empowers the Prime Minister to appoint Special Assistant, therefore, needs serious examination. This matter, however, is not directly in issue in the present case; therefore, it is left to be decided in an appropriate case some other time.

19. The ARU was, as aforesaid, neither supported by any law nor recognized by the ROB as a functional part of the Federal Government. It was at best an internal part of the Prime Minister's Office and possessed no legal status more than that of the status of its Chairman, i.e., the Special Assistant to the Prime Minster. Such an internal unit or wing or cell under the Cabinet Division and in the Prime Minister's Office had no power to deal with or pry into the affairs of a third party and more so of a citizen who at all times enjoys an inalienable right to the protection of law and the constitutional guarantee of fundamental rights. Without the backing of an enabling law, the ARU or the Chairman, ARU had no power or jurisdiction to deal or interact with any third party. There is no power inherent in the Executive; the Constitution and the law are the only source of its powers and duties.[21] No office or authority of the Executive can take any action detrimental to the life, liberty, body, reputation or property of any person except in accordance with law as mandated by Article 4 of the Constitution. Inspite of no legal standing, the ARU and its Chairman had arrogated to themselves the role of avatars of accountability, drawing their legal authority and power from the Terms of Reference (TORs) approved by the Cabinet. The TORs of the ARU, which set out various inquisitorial and investigative functions regarding the life, liberty, reputation and property of the citizens of Pakistan, have absolutely no legal value. The ARU, it is stated as a matter of example, was not even entitled to proceed against a peon at the Prime Minister's Office. However, audacity of the Chairman,

[19] Ibid., Article 92(1).

[20] Ibid., Article 93(1).

[21] See Muslim League v. Federation, PLD 2007 SC 642.

ARU had no bounds and he, on a vague complaint, without any authorization from any constitutional or legal source, started investigation into the affairs of a judge of the highest constitutional court of the land. A Special Assistant, a contractual employee, serving at the pleasure of the Prime Minister had no authority or power to embark upon this inquisition. It is not reasonable to accept that the Special Assistant to the Prime Minister or the Law Minister could have performed all these acts without any kind of tacit authorization from the Prime Minister. This misplaced overzealousness besides being illegal and without jurisdiction is also speaking, and speaks loudly, that there was more to it than meets the eye.

*Investigation of the Complaint by the ARU*

20. The Chairman, ARU on receiving the complaint from the complainant acted with surprising agility and unleashed his team to collect evidence of the alleged foreign properties. The ARU, which was to work under the Cabinet Division as per decision of the Cabinet, did not make any formal request to the Law and Justice Division through the Secretary, Cabinet Division for consultation on the matter in accordance with Rule 14 of the ROB, despite noting in minutes of its meeting held on April 15, 2019 that the matter was sensitive as it related to the Judges of the Superior Judiciary. The informal discussion and consultation made by the Chairman and Members of the ARU with the Law Minister on April 16, 2019, and the oral advice of the Law Minister in that discussion carries no value in the eyes of law. The Law Minister, who was a distinguished constitutional lawyer, also did not realize the importance of his advice, even oral, and gave a "go ahead" to the ARU for inquiring into the veracity of the allegations made in the complaint against judges of the constitutional courts. The Chairman, ARU who was also a Barrister-at-law, and not a layman, knew well that an oral advice of the Law Minister was nothing in the eyes of law and he should have ascertained his legal authority to inquire into the allegations made against Judges of Constitutional Courts, before initiating the inquiry into the allegations made in the complaint. But both of them paid no heed to the constitutional mandate of Article 209 of the Constitution, and initiated the process of inquiring into the allegations made in

the complaint in such a manner which even the Council could not have done if the complaint had been made to it. This cannot be taken to be an innocent mistake by persons of such a legal caliber and standing.

21. The Chairman ARU, after the discussion with the Law Minister, on his own initiated the inquiry against the alleged properties of the judges of the constitutional courts and their family members. He tasked his team to procure the family records of the Petitioner Judge from NADRA and also their travelling history and the tax record from FIA and FBR, respectively. This fact is evident from the minutes of the meeting held on April 16, 2019 by the Chairman and Members of ARU with the Law Minister; there is no mention of discussion among the Members of the ARU on how to proceed further in the matter, or making of the decision by consensus or majority view of the Members. The Chairman, ARU did not obtain the opinion of or consult with the other Members of ARU. However, the other Members of ARU supplied information on the Petitioner Judge and his family without the authorization of law. It is clear from the minutes of the meeting that ARU was being run by the Chairman, ARU, and the other Members of ARU, even though representing statutory authorities, acted illegally and with alarming servitude.

22. Astonishingly, the Chairman, ARU on the oral advice of the Law Minister, decided not to inquire into the alleged foreign properties of another judge[22] mentioned in the complaint on the ground that the said judge had already resigned. This selective treatment unveils the true objective of the proceedings conducted by the Chairman, ARU and the Law Minister: to conduct a judicial witch-hunt rather than to recover alleged unlawful foreign assets and properties. Had the Chairman, ARU been acting for recovery of the alleged illegally acquired foreign assets of the Judges as per the so-called mandate of the ARU, the fact that a judge had resigned could have made no difference for taking legal proceedings for the recovery of his alleged illegally acquired foreign properties.

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[22] Justice Farrukh Irfan Khan of the Lahore High Court.

*Searching and Locating the Foreign Properties by the Legal Expert, ARU*

23. This is the most sensitive, disturbing and scary part of the case for any law-abiding citizen and for a country governed by the rule of law. It is an admitted fact between the parties that ownership of an immovable property in UK can be traced through UK HM Land Registry's official website, only by giving its address (property number) and not by simply citing the name of the owner. This information was not supplied by the complainant and was not available on the record of FBR or any other office or authority in Pakistan. The critical question that requires explanation is, how did the complainant or the ARU find out the addresses of the UK properties, so that they could access UK HM Land Registry? Answer to this question will answer whether we have a Government of law or Government of men.

24. The Petitioner Judge asserted in his constitutional petition that the information forming the basis of the Reference was gathered through covert surveillance in stark violation of his and his family's fundamental rights of privacy and dignity. The response of the Federation in its concise statement was a simple denial to this assertion of the Petitioner Judge; no details were mentioned as to how the UK properties in the name of the spouse and children of the Petitioner Judge were located. The report dated May 8, 2019 of the Legal Expert, ARU annexed with the concise statement only stated that after an asset search the properties had been found registered in names of the persons mentioned in that report. This report was also silent as to how that property search was conducted. Who carried out the search? How was the search carried out? Who paid for it and when, especially when ARU has not sanctioned budget? What was discovered in the search? No evidence to this effect has been placed before us. These are questions that go unanswered and are deeply worrying in a State that is governed by the Rule of Law.

25. It was much after the counsel of the Petitioner Judge had completed his arguments that on June 1, 2020 the Chairman, ARU and the Legal Expert, ARU filed their concise statement, and in that statement they asserted that the details of those residing in

any immovable property in the UK can be accessed through open source websites such as *192.com* and *ukphonebook.com*; that once the address is located, the owner of that immovable property can be found through open source such as the UK HM Land Registry. They further stated that there had been no covert surveillance of the Petitioner Judge or his family. The Petitioner Judge filed a CMA in response to the said concise statement of the Chairman and Legal Expert, ARU. He stated therein that *192.com*, *ukphonebook.com*, and UK HM Land registry websites are not free or open source websites. He elaborated that to access the information from the website *192.com*, an account with username and password need to be created, payment is to be made by debit/credit card, the website acknowledges the payment of charges by email, and sends the requested information by email, and likewise is the procedure of accessing information from the UK HM Land Registry website. The Federation in defence did not produce any record of the searches made on those websites: What and how many addresses were found and under whose names? Who created the account? Who made the payment of charges? What were the payment or credit card details? Who received the acknowledgement of payment and the requested information and at whose email address? More importantly, there is no evidence of what information was received that was allegedly carried to UK HM Land Registry. The Federation has papered over the gaps by referring to *192.com,* which is not sufficient, unless details are furnished regarding the information retrieved from the said site. It is underlined that a paid source, which requires registration and payment before allowing access to information, is not an open source as claimed by the Federation. It shows that no such search was conducted for tracing the properties through those websites; rather the details of the properties were gathered through covert surveillance of the Petitioner Judge and his family. Covert surveillance and interception are offensively intrusive investigative tools only available to intelligence agencies in the country.[23]

26. Article 129(g) of the Qanun-e-Shahadat Order, 1984 allows the Court to presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who

[23] *See* Investigation For Fair Trial Act, 2013

withholds it. When a party withholds best evidence available with him without any sufficient cause, an adverse presumption is drawn against that party, irrespective of who bears the onus of proof,[24] that the evidence withheld must have been against his version.[25] Thus, the omission of the Federation and of the Chairman and Legal Expert, ARU to produce the said record as to procuring the address of the UK properties of the spouse and children of the Petitioner Judge through the *192.com* website gives rise to a presumption that the Legal Expert, ARU never searched the addresses of the properties through the *192.com* website. Even otherwise, the Chairman and Legal Expert, ARU in their concise statement made a general statement that an immovable property can be located through open source websites, but they did not make any specific and categorical statement therein that the UK properties of the family of the Petitioner Judge were located by that method. The ARU was not equipped to carry out surveillance or interception without the assistance of the intelligence agencies, for which it had been authorized in the TORs by the Cabinet without any lawful authority as discussed above. It is underlined that intelligence agencies were also aggrieved of the *Faizabad Dharna* judgment as it carried adverse observations regarding their role and activity. That is why the review petitions were filed by the Ministry of Defense on behalf of the intelligence agencies. Further, it is evident from the report dated June 26, 2019 of the Legal Expert, ARU that he hired a Tracing Agent firm to trace the residents of the properties over the years, and not to trace the addresses of the properties.

27. While regular inquiry and investigation is limited to reaching out to lawful and visible evidence existing at the time, covert surveillance and interception are modern intrusive investigative tools for discovering and creating evidence against a person by encroaching upon his privacy and personal liberty. While investigation is the collection of the available record and mostly after notice to the person under investigation, surveillance is far more secretive and clandestine operation which is designed to intrude into the private recesses of one's life, the confidential zone

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[24] *See* Murugesam Pillai v. Manickavasaka Desika, (1917) I.L.R. 40.

[25] Rameshwar Singh v. Rajit Lal, AIR 1929 PC 95; Hiralal v. Badkulal, AIR 1953 SC 225; and, Muhammad Zubair v. State, 2007 SCMR 437.

that stands protected under the constitutional guarantees of the right to privacy and personal liberty. It is for this reason that surveillance is permitted in the limited area of anti-state or terrorist activities and that too under judicial and executive oversight. Outside this limited area, surveillance is constitutionally prohibited. Intelligence agencies do not enjoy a free hand in conducting surveillance but are subject to strict rules of compliance and oversight by the court. In the absence of any other evidence furnished by ARU or the Law Minister, it is but obvious that in this case the information about the addresses of properties were obtained through no other means but through covert surveillance and interception of the intelligence agencies which gathered the information from the private zone of privacy enjoyed by the Petitioner Judge and his family, without any authorization of law and by brutally trampling over the constitutional guarantees of privacy, personal freedom and dignity. To trivialize the right to privacy by saying that the judge has nothing to hide is "no different than saying you don't care about free speech because you have nothing to say."[26] The mode and manner of procurement of information regarding the three UK properties cannot be lightly dismissed; in it lays the destiny of our people and the future course of our country.

28. The complainant is a party to these proceedings. He also appeared before us, but did not explain his source of information or cleared the allegations leveled against him. The complainant appears to be a proxy, who could not have discovered the addresses of the three foreign properties. This inference is further supported from the following facts. The complaint allegedly annexed the copy of title record of one foreign property of the spouse of the Petitioner Judge, with his complaint. That copy of the title record was tendered by the Federation in Court, with the concise statement of the Chairman and Legal Expert, ARU on June 1, 2020 belatedly as mentioned above. The notable aspect of this copy of the title record is that it bears the Spanish name of the spouse of the Petitioner Judge, which as per stance of the Federation came to surface when the Member of ARU from FIA obtained her NADRA record, passport record and travelling history

[26] Edward Snowden, Permanent Record.

record. It is alarming to imagine how the complainant had come to know of the Spanish name of the spouse of the Petitioner Judge and how on earth he got the access to the address of that property. When the complaint does not mention either. The Chairman, ARU stated in his report that he met the complainant but did not mention in that report how the complainant had known the Spanish name of the spouse of the Petitioner Judge and got the address of that property. To cover up these gaping omissions, the Federation took the stance during arguments that the complainant was a journalist and no journalist tells, or can be compelled to tell, the source of his information. The stance is misconceived; it has been taken without appreciating the fact that the complainant had not got published an investigative story in any newspaper, he had rather made a complaint for action against the judges of constitutional courts for their alleged misconduct. His status was that of a complainant, and not of a journalist, in making the complaint. It is no rocket science to put the facts together to discern that the complainant was fed the information to generate the complaint. Whoever fed him the information are the real actors of this saga. The credentials of the complainant give further credence to this story; he was an unknown journalist with rather dubious reputation. Report of the Chairman ARU dated May 10, 2019 compiled after thorough investigation of the allegations made in the complaint and submitted to the Law Minister goes silent as to why the complainant wanted to file the complaint, what was his source of information, what newspapers he worked for, and did his complaint qualify to hide behind the code of ethics of journalists.

29. This aspect of the case as to the unlawful procurement of the information through unlawful surveillance of the Petitioner Judge and his family is deeply worrying and shakes the foundations of a democratic society based on the rule of law. The issue of unlawful surveillance and invasion of privacy of the Petitioner Judge and his family is far more critical and grave than the information procured by the ARU. It is a naked threat to personal liberty, privacy and dignity guaranteed to the citizens under the Constitution. In order to appreciate the gravity of the constitutional violation committed by the ARU or its Chairman, it is important to understand the concept of privacy and personal freedom in a constitutional

democracy that protects our private lives, our friendships, our relationships, our thoughts and our very sense of being, which no State has the power to touch or encroach.

*Concept of Privacy*

30. The Greek philosopher Aristotle spoke of a division between the public sphere of political affairs (which he termed the *polis*) and the personal sphere of human life (termed *oikos*).[27] This dichotomy may provide an early recognition of "a confidential zone on behalf of the citizen."[28] Activities in the private realm are more appropriately reserved for "private reflection, familial relations and self-determination."[29] John Stuart Mill in his essay, 'On Liberty' (1859) gave expression to the private zone in one's life; "The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign."[30] Sir Edward Coke, perhaps the most influential English jurist of all time, famously declared in *Semayne case*[31] "that the house of everyone is to him as his Castle and Fortress as well for his defence against injury and violence, as for his repose." Justice Stephen Breyer in his book writes that "by privacy, I mean a person's power to control what others can come to know about him or her."[32] In the most famous essay on privacy ever written, published in the *Harvard Law Review* in 1890, Louis Brandeis and Samuel D Warren referred to the principle of the right to an "inviolate personality," and said that it was a part of the more general "right to be let alone."[33] Later Justice Louis Brandeis expressed the right to privacy in his dissent in *Olmstead v. United States*[34] in the terms that a core of freedom and liberty from which the human being had to be free from intrusion. The right to be let alone is a reflection of the inviolable nature of the human personality. "Privacy

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[27] *Justice K.S. Puttaswamy (Retd) v. Union of India,* AIR 2017 SC 4161.

[28] Michael C. James, A Comparative Analysis of the Right to Privacy in the United States, Canada and Europe, *Connecticut Journal of International Law, p.261, Vol.29, Issue 2,* (Spring 2014)

[29] Ibid, at page 262

[30] John Stuart Mill, *On Liberty*, Batoche Books, p.13, (1859).

[31] [5 Coke 91: 1 Sm LC (13th Edn.) 104 at p. 105]

[32] Justice Stephen Breyer (Associate Judge of the United States Supreme Court) in *Active Liberty*

p.66

[33] Warren and Brandeis, The Right to Privacy, *Harvard Law Review, p.193,* (1890), Vol. 4, No. 5.

[34] 277 U.S.438, 478 (1928)

is…essential to democratic government because it fosters and encourages the moral autonomy of the citizen, a central requirement of a democracy."[35] Privacy therefore affirms the agency and autonomy of the individual and the right of every person to have the freedom and liberty to live a life of dignity. Privacy requires that all information about a person is fundamentally his own, only for him to communicate or retain for himself. The concept of private life includes the right to personal autonomy, personal development and the right to establish and develop relationships with other human beings and with the outside world.[36] "The freedom of a country can only be measured by its respect for the rights of its citizens, and … these rights are in fact limitations of state power that define exactly where and when a government may not infringe into that domain of personal or individual freedoms that during the American Revolution was called "liberty" and during the Internet Revolution is called "privacy."[37]

31. Recognizing and protecting the zone of privacy is the freedom and liberty our Constitution holds dear. Privacy attaches to the person and not to the place where it is associated. Home under Article 14 of the Constitution is not only the physical house but the entire treasure of personal life of a human being.[38] The intrusion by the State into the sanctum of personal space, other than for a larger public purpose, is violative of the constitutional guarantees. Right to privacy is deeply intertwined with the right to life, right to personal liberty and right to dignity. "Arguing that you don't care about the right to privacy because you have nothing to hide is no different than saying you don't care about free speech because you have nothing to say."[39] This is a cherished constitutional value, and it is important that human beings be allowed domains of freedom that are free of public scrutiny and protected against "unwanted gaze,"[40] unless they act in an unlawful manner.

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[35] Lawrence Lessig, Code and Other Laws of Cyberspace, p.153–55 (1999).

[36] Artavia Murillo ET AL. ("In Vitro Fertilization") v. Costa Rica (2012), Inter-Am. Ct. H.R. (Ser.C) No.257

[37] Edward Snowden, Permanent Record.

[38] see Benazir Bhutto v. President of Pakistan, PLD 1998 SC 388.

[39] Edward Snowden, Permanent Record.

[40] Jeffrey Rosen, The Unwanted Gaze: The Destruction of Privacy in America (2000).

*Social Impact of Violation of Privacy.*

32. Illegal and illegitimate surveillance, by both State and private actors, has the impact of intrusion into the private lives of citizens, not only violating their constitutional rights but also intruding on the very personhood, privacy and personal liberty of those surveilled. Surveillance has disparate impact, violating principles of non-discrimination and equality as enshrined in our Constitution. Writing for the Harvard Law Review in 2013, Neil Richards stated that surveillance has a chilling effect on the exercise of our civil liberties.[41] Furthermore, surveillance is often exercised as a power by the watcher over the watched, as a form of control. "This disparity creates the risk of a variety of harms, such as discrimination, coercion, and the threat of selective enforcement, where critics of the government can be prosecuted or blackmailed for wrongdoing unrelated to the purpose of the surveillance."[42] Surveillance and illegitimate intrusions into privacy impact the essential work that journalists, academics and activists do. Undue surveillance can lead to a chilling effect on those critical of State institutions and societal norms. Undue interference with individual's privacy can both directly and indirectly limit the free development and exchange of ideas.[43]

33. In fledgling democracies, where institutional development is still finding its feet and the concept of rule of law has not firmly taken ground, special care is required to ensure that law enforcement and intelligence agencies fully comply with the law dealing with surveillance and interception. Any laxity or concession given to these agencies to step outside the law and collect evidence, can be a serious threat to constitutional guarantees of the people, in particular, and to democracy, in general. International experience[44] tells us that unconstitutional and illegally procured private information amassed by the agencies can be used to manipulate and blackmail people for promoting political agendas.

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[41] Neil M. Richards, The Dangers of Surveillance, Harvard Law Review, p.1935, vol.126, (2013).

[42] Ibid

[43] *see* Digital Rights Foundation (DRF), Impact and Legality of Surveillance, A Policy Brief (2020). https://digitalrightsfoundation.pk/wp-content/uploads/2020/10/Impact-and-Legality-of- Surveillance-Final-Document-14.10.2020-1.pdf

[44] *See* Bolo Bhi, Surveillance, Interception and Evidence Gathering: Local Law and International Precedents, A Research Paper (2020). https://bolobhi.org/surveillance-interception-and-evidence- gathering-local-law-and-international-precedents/

This cripples human security and dismantles democracy, lowering it slowly into an abyss of totalitarianism. Any unconstitutional intrusion and unlawful collection of reels of unauthorized private data can make any law enforcement or intelligence agency become a Frankenstein – indestructible and uncontrollable. Infringing the foundational principle of separation of powers. In a parliamentary democracy with inbuilt checks and balances the question of who will guard the guards does not arise and should not arise.

34. Intercepted material through "surveillance" includes data, information or material in any documented form, whether written or recorded, through audio visual device, CCTV, still photography, observation or any other mode or technique. And, "interception" on communication medium includes: emails, SMS, IPDR (internet protocol detail record) or CDR (Call detail record) and any form of computer based or call phone based communication using wired or wireless or IP (internet protocol) based media or gadgetry.[45] The fact that the ARU did not possess the resources or the technical capacity to carry out surveillance of the Petitioner Judge and his family and the interception of their communications, gives credence to the stance of the Petitioner Judge that the surveillance was carried out in connivance and in collaboration with the intelligence agencies. The possibility of such happening, therefore, cannot be ruled out in the absence of any other evidence to the contrary, on the record.

*Investigation for Fair Trial Act, 2013*

35. The only law referred to us during arguments that allows surveillance of persons by the Law Enforcement and Intelligence Agencies is the Investigation for Fair Trial Act, 2013 ("IFTA"). The Legislature in the preamble provides that "being mindful that the existing laws neither comprehensively provide for nor specifically regulate, advance and modern, investigative techniques such as covert surveillance and human intelligence, property interference, wiretapping and communication interception that are used extensively in other jurisdictions to successfully prevent the offences and as an indispensable aid to the law enforcement and

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[45] The Investigation for Fair Trial Act, 2013, section 3(g).

administration of justice."[46] It further provides that "in order to neutralize and prevent the threat or any attempt to carry out scheduled offences it is necessary that the law enforcement and other agencies be given certain authorizations to obtain evidence in time and only in accordance with law[47]." Regarding the evidence so collected the preamble provides that "it is also in order to declare the admissibility and use of the material obtained during lawful investigation under the present law, in the judicial proceedings and all other legal proceedings or process to ensure fair trial.[48]" The IFTA requires a notified officer to make an application under the Act, if there is reason to believe that a person may be associated with or is likely to act in a manner that constitutes a scheduled offence. However, the officer is required to obtain a warrant from court for surveillance or interception. Prior to obtaining a warrant, the officer is required to prepare a report with supporting material, present it to the Minister (Federal Minister for Interior) for permission and then move the application before a judge for issuance of the warrant. A warrant under the Act is to be issued by a judge of the High Court in chamber. Section 8 of IFTA lists the requirements the officer must meet when seeking permission for surveillance or interception, whereas Section 10 pertains to what is to be considered by the judge when issuing a warrant. The duration of the warrant under Section 14 of the IFTA is 60 days. It may be re-issued for another 60 days after a fresh application is made and reasons presented by the officer, for why the earlier time period was insufficient. If the request by the applicant is deemed arbitrary by the judge, under Section 15 of the law, departmental action can be recommended against the officer. Under Section 22 of the Act, the authorized officer is required to certify that the evidence collected is strictly in accordance with the warrant and has not been tampered with or altered, before turning it over to the investigating officer.

36. The IFTA, thus, provides that intelligence agencies can carry out surveillance and interception of a suspect to gather information regarding anti-state or terrorist activities and that too after obtaining a warrant from a Judge of the High Court

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[46] Ibid, preamble.

[47] Ibid.

[48] ibid

concerned. Intelligence agencies therefore do not have a *carte blanche* to probe into the lives of ordinary men and women of this country. These agencies are regulated by law and are subject to law. In 2013, a coalition of civil society organizations developed *"International Principles on the Application of Human Rights to Communications Surveillance"* highlighting a human rights approach to surveillance. These principles, though not adopted by any State party, the principles highlight the ways in which international human rights law applies to surveillance practices. The principles are 1) legality: "any imitation to the right to privacy must be prescribed by law"; 2) legitimate aim: "laws should only permit communications surveillance by specified State authorities to achieve a legitimate aim that corresponds to a predominantly important legal interest that is necessary in a democratic society. Any measure must not be applied in a manner which discriminates on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;" 3) necessity: "strictly and demonstrably necessary to achieve a legitimate aim"; 4) adequacy: "must be appropriate to fulfill the specific legitimate aim identified;" 5) proportionality: "should be regarded as a highly intrusive act that interferes with the rights to privacy and freedom of opinion and expression, threatening the foundations of a democratic society"; 6) competent judicial authority: "determinations related to communications surveillance must be made by a competent judicial authority that is impartial and independent"; 7) due process: "that lawful procedures that govern any interference with human rights are properly enumerated in law, consistently practiced, and available to the general public"; 8) user notification: "individuals should be notified of a decision authorizing communications surveillance with enough time and information to enable them to appeal the decision"; 9) transparency: "about the use and scope of communications surveillance techniques and powers"; 10) public oversight: "establish independent oversight mechanisms to ensure transparency and accountability of communications surveillance";

11) integrity of communications and systems: "States should not compel service providers or hardware or software vendors to build surveillance or monitoring capability into their systems, or to

collect or retain particular information purely for State surveillance purposes"; 12) safeguards for international cooperation: "States may not use mutual legal assistance processes and foreign requests for protected information to circumvent domestic legal restrictions on communications surveillance"; 13) safeguards against illegitimate access: "enact legislation criminalizing illegal communications surveillance by public or private actors."[49]

37. Any covert surveillance or interception of the citizens of Pakistan other than under IFTA is starkly offensive to their fundamental rights of privacy and personal liberty. There is no law in the country that authorizes any law enforcement or intelligence agency to pry into the privacy of home to dig out private family information through targeted surveillance, and to use it against them to achieve various ends. Any such surveillance into the inviolate private core of human life seriously threatens normal human existence as it clogs their freedoms and distorts the meaning of our constitutional democracy founded on the rule of law promised by our founding fathers. Such intrusion and encroachment into the private life of a citizen by the State actors totally demolishes the scheme of fundamental rights under the Constitution. Fundamental rights of privacy, personal liberty and dignity provide a bar against intrusion into the private life of a citizen through surveillance; which aims to continuously fish for something adverse against a citizen and then to use it against him when required. These are tricks of a totalitarian State and not the ways of an elected Government of a constitutional democracy which must rest its governance on the rule of law and supremacy of the Constitution.

*Information Procured from NADRA, FBR & FIA by the ARU*

38. The Member of the ARU from FIA, Assistant Commissioner (Inland Revenue), Commissioner (Inland Revenue), and DG (International Taxes)/Member of ARU from FBR, all four, submitted their reports on May 10, 2019. Rights to personal liberty

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[49] Electronic Frontier Foundation, Necessary & Proportionate: International Principles on the Application of Human Rights Law to Communications Surveillance, (2014). Also see: Bolo Bhi, Surveillance, Interception and Evidence Gathering: Local Law and International Precedents, A Research Paper (2020)

and privacy under Articles 9 and 14 of the Constitution impose a constitutional obligation on State authorities to protect the privacy and personal freedom of the citizens unless the law expressly authorizes them to do otherwise in exceptional circumstances. In the absence of any law to the contrary, the rights to privacy and personal freedom become absolute and stand to protect the privacy and personal freedom of the citizen. No Government institution is to disclose the personal information of any citizen unless the law authorizes the institution to do so. In the absence of any specific law, the umbrella of constitutional guarantees will come to cover and protect the citizen. Employees of NADRA, who were legally enjoined under section 28 of the NADRA Ordinance, 2000 not to communicate to any person any information acquired by them in the course of their employment, committed violation of that command of the law by making compliance with the command of the Chairman, ARU in communicating to the Chairman and other Members of the ARU the NADRA record relating to the Petitioner Judge and his family. Likewise, Member of the ARU from FBR committed violation of section 216 of the ITO, 2000 by disclosing the tax records of the Petitioner Judge and his spouse to the Chairman and other Members of the ARU. While Member of the ARU from the FIA breached Rule 18 of the Government Servants (Conduct) Rules, 1964 by making unauthorized communication of the official documents and information as to the passport/visa record and travelling history of the Petitioner Judge and his family. It is astonishing that information which even the Prime Minister, any Federal Minister or the Cabinet could not solicit under the law was being made available to the Chairman, ARU by the officials of NADRA, FBR and FIA. At the cost of repetition, the Chairman, ARU examined all the reports and record submitted to him on May 10, 2019, made his final Report on May 10, 2019 and submitted it to the Law Minister on the very same day, i.e., May 10, 2019. All proceedings stand concluded in one day. This hurried exercise being against the normal course of business also points towards lack of *bonafide* in the whole process and proceedings.

39. The Chairman and Legal Expert, ARU procured the information regarding the UK Properties by offending the fundamental rights of personal liberty, privacy and dignity of the

Petitioner Judge and his family by procuring personal information regarding the UK Properties without the sanction of any law through covert surveillance and interception, and also by violating the confidentiality provisions of the NADRA Ordinance and the ITO. These actions of the Chairman and Legal Expert of ARU also attract criminal liability under section 35 of IFTA. The ARU thus did not collect the evidence in support of the allegations made in the complaint against the Petitioner Judge, in accordance with the law and Constitution. Additionally, when the very establishment of the ARU and appointment of its Chairman were without any lawful authority, all the acts done by the Chairman, Legal Expert and Members of the ARU as to the investigation and collection of evidence in support of the allegations made in the complaint were also without lawful authority and are so declared. For these illegal actions, the authorities concerned must initiate criminal and disciplinary proceedings against the Chairman, Legal Expert and Members of the ARU, as well as, the deafulting officials of FBR and NADRA under the IFTA, ITO and NADRA Ordinance, 2000.

*Reliance on the Illegally Collected Evidence by the Law Minister and Prime Minister*

40. The Law Minister, a distinguished lawyer, did not raise any objection to the investigation and surveillance conducted by the ARU for accountability of a constitutional court judge, on receiving the report of the Chairman, ARU. He rather relied upon the evidence illegally collected in that inquiry for making the "Summary for the Prime Minister", and proposing to the Prime Minister to advise the President to form an opinion that the Petitioner Judge may be guilty of misconduct and direct the Council to inquire into the matter under Article 209 of the Constitution. Likewise, the Prime Minister also without asking the Law Minister or the Chairman ARU as to under what authority of law the ARU conducted inquiry into and collected evidence on the allegations made in a complaint against a constitutional court judge, advised the President on the basis of that illegally collected evidence to form the opinion, direct the Council and sign the draft Reference. It is important to assess whether the evidence/material collected by the ARU, passed on to the Law Minster and further put up before the Prime Minister was legally admissible.

*Exclusionary Rule- Admissibility of Illegally Collected Evidence*

41. Under the classic common law, the test of admissibility of evidence was whether it is relevant to the matter in issue. If it is, it is admissible, and the Court is not concerned with how it was obtained.[50] The law of evidence, i.e., the Evidence Act, 1872 (now Qanun-e-Shahdat Order, 1984) did not deal with the possibility of procurement of evidence through illegal and unconstitutional surveillance offending the fundamental rights of privacy, personal liberty and dignity. It also did not envisage that the right to a fair trial would be guaranteed as a fundamental right under the Constitution. There has, however, been a great shift in application of the said rule in major common law jurisdictions, with recognition of the importance of civil rights and liberties of the citizens in a State governed by the Rule of Law.

42. In United Kingdom, the mother of common law, Lord Hoffman has observed in *A v. Secretary of State*[51] that "the courts will not shut their eyes to the way the accused was brought before the court or the evidence of the guilt was obtained. Those methods may be such that it would compromise the integrity of the judicial process, dishonor the administration of justice, if the proceedings were to be entertained or the evidence admitted. In such a case the proceedings may be stayed or the evidence rejected on the ground that there would otherwise be an abuse of process of the court".

43. In Australia, Barwick CJ speaking for the Court in *R v. Ireland,*[52] held that when evidence is procured by unlawful or unfair acts, the judge has a discretion to reject the evidence. In the exercise of that discretion, the learned Chief Justice said, "the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion". This statement of

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[50] See Kuruma v. Queen, 1955 AC 197; Pooran Mal v. Director of Inspection, AIR 1974 SC 348; and, Bisvil Spinners v Pakistan, PLD 1992 SC 96.

[51] [2006] 2 AC 221.

[52] [1970] HCA 21.

law was reaffirmed by the High Court of Australia in *Bunning v Cross*.[53]

44. In United States, the Fourth Amendment to the US Constitution guarantees the privacy rights by declaring that "[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized". A right to be free from unreasonable searches and seizures is though declared by the Fourth Amendment, but how one is to translate the guarantee into concrete terms is not specified. Several possible methods of enforcement were considered by the US Courts over time; however, the US Supreme Court has settled the one as an effective means to make real the right, which is called the Exclusionary Rule. Under this Rule, the evidence seized in violation of the Fourth Amendment rights is excluded by the US Courts. Exclusion of evidence as a remedy for Fourth Amendment right violation was founded in *Boyd v. United States*,[54] and was developed in later cases. In *Mapp v Ohio*,[55] the US Supreme Court held that to admit evidence obtained in violation of the right would be, in effect, to "grant the right but in reality to withhold its privilege and enjoyment", and explained that the exclusionary rule is designed "to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it".

45. In Canada, the principle governing the exclusion of evidence obtained in violation of the charter rights and freedoms has been codified. Section 24(2) of the Canadian Charter of Rights and Freedoms declares that where a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

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[53] [1978] HCA 22.

[54] 116 U.S. 616 (1886).

[55] 367 US 643 (1961).

46. The Irish Supreme Court has in *DPP v. JC*[56] laid down the following principles with regard to the admission or exclusion of the evidence obtained in violation of the constitutional rights, in order to balance the legitimate competing public interests: (i) The onus is on the prosecution to establish the admissibility of all evidence; (ii) If a claim is raised that evidence was obtained in breach of constitutional rights, the onus is on the prosecution to establish either (a) that there was no unconstitutionality, or (b) that despite any interference with constitutional rights the evidence should still be admitted; (iii) Where evidence is obtained in deliberate and conscious violation of constitutional rights, it should be excluded except in exceptional circumstances; (iv) Where evidence was taken in breach of constitutional rights, there is a presumption in favour of exclusion, which can be rebutted by evidence that the breach of rights was either (a) inadvertent or (b) derived from subsequent legal developments; and (v) Whether or not a breach of constitutional rights was deliberate and conscious requires analysis of the conduct or state of mind of the individual who actually gathered the evidence, as well as, any senior official or officials within the investigating or enforcement authority concerned who was involved either in that decision or in decisions of that type generally or in putting in place policies concerning evidence-gathering of the type concerned.

47. The above-stated principle as to inadmissibility of the illegally collected evidence has developed mostly in the cases where there was a law that regulated a constitutional right, but that law was not followed or was violated in the process of collecting evidence. The courts have held such evidence to be generally inadmissible, with few exceptions, mainly with the reason that the admission of such evidence would compromise the integrity of the judicial process and bring the administration of justice into disrepute. I concur in the principle, and see no hindrance in adopting it in our jurisdiction. The admission and reliance on the material (evidence) illegally collected by the ARU without any enabling law empowering it to do so, in flagrant violation of the fundamental rights of privacy, liberty, dignity and freedom of movement of the Petitioner Judge and his family, would

[56] [2015] IESC 31.

compromise the integrity of the judicial process and bring the justice system into disrepute. Therefore, such material (evidence) was inadmissible even in view of the above-stated principle established in other common law jurisdictions and did not fall within the exceptions thereto, as the illegal acts done for collecting the material (evidence) were not inadvertent, rather were deliberate and conscious.

*Surveillance, where there is no Law*

48. The present case, however, poses different questions: What would be the effect of violation of a constitutionally guaranteed fundamental right, which is absolute as it is not regulated by any law? Would the prohibition on admissibility of evidence collected by infringing such right be absolute or be subject to exceptions? While the fundamental right to personal liberty and privacy guaranteed by Articles 9 and 14 of the Constitution are subject to law, there is no law in our country that authorizes any law enforcement or intelligence agency to pry into the privacy of any person through surveillance and interception, except the IFTA. The scope of the IFTA, as discussed above, is also restricted to the surveillance and interception of a person who is suspected to be involved in any terrorist or anti-state activity. Besides this limited scope under the IFTA, no other law regulates the fundamental right of privacy of citizens and allows probe into their lives through surveillance and interception. Thus, in the remaining sphere the right to privacy is absolute, until law is enacted to regulate it. The violation of this sphere of the absolute privacy right makes the inadmissibility of evidence collected in violation thereof also absolute. Absolute right entails absolute prohibition on its violation. The ARU collected evidence by violating the sphere of absolute privacy right of the Petitioner Judge and his family through surveillance, and without backing of any law for its authority to do so. Therefore, such evidence/material was liable to be excluded from consideration without any exception, and the Law Minister and Prime Minister could not have relied and acted upon it, for making the "Summary" and advising the President respectively.

49. The Law Minister opined in the Summary put up before the Prime Minister that the Petitioner Judge appeared to have committed "grave misconduct" by not declaring three London properties owned by his spouse and children and by not explaining the source of their purchase in his tax record, without appreciating, rather ignoring altogether, the fact that no office or authority in Pakistan, under the relevant law, had ever asked the spouse and children of the Petitioner Judge to explain their sources to purchase the said properties and their failure to declare the same in their tax record, if there was any obligation for such declaration under the law.

50. The Prime Minister being the Chief Executive of the Federation, failed to verify and examine the information placed in the Summary before him. Advising the President to proceed against a judge of the highest court of the land required the Prime Minister to exercise due diligence and careful consideration of the contents of the Summary placed before him. It was not just any business he was attending to, he was approving initiation of inquiry against a Supreme Court judge, but he took no pains to see that the ARU, besides being a non-entity had no authority under the law to investigate and collect evidence on a complaint that could not have been entertained by the ARU. He also failed to verify how the addresses of the three foreign properties were discovered and who authorized the ARU to carry out transnational investigation and surveillance and whether any office or authority had asked the spouse and children of the Petitioner Judge to explain the sources of purchase of those properties. Without attending to the above material objections against the information placed before him and without taking due care, he advised the President on the basis of the evidence illegally collected by the Chairman, ARU on the oral advice of the Law Minister, to direct the Council to hold an inquiry against the Petitioner Judge.

*Opinion of the President under Article 209 (5) of the Constitution*

51. The President also did not question under what authority of law the ARU conducted inquiry into the allegations made in a complaint against a constitutional court judge and whether any office or authority had asked the spouse and children of the

Petitioner Judge to explain the sources of purchase of those properties, and approved the Prime Minister's advice and signed the draft Reference annexed with the Summary without applying his independent mind, exercising his discretion and forming his own opinion. The constitutional question that arises for determination is: whether under Article 209(5) of the Constitution, the President is to form his personal "opinion" or to act on the "advice" of the Cabinet or the Prime Minister as envisaged under Article 48(1) of the Constitution. In order to answer this question, the unique nature of the role of the President under Article 209 (5) needs to be seen and purposively interpreted in the confluence of foundational constitutional principles: parliamentary democracy; separation of powers; independence of judiciary; the rule of law; and neutrality of the office of the President being Head of State and representing unity of the Republic.

52. In a parliamentary democracy, the President is largely a non-executive symbolic leader of the State who does not exercise executive or policymaking power. However, in the same parliamentary democracy a non-executive President may, nevertheless, possess and exercise powers of extraordinary political intervention as a constitutional arbiter or guarantor. This is premised on the principle that underscores that a non-executive President separates the representative embodiment of the permanent institutions of the State from the leader of the incumbent Government. The separation of offices between Head of Government and Head of State, a non-executive President, helps maintain a symbolic separation between the incumbent Government, which is party-political, and the permanent institutions of the State as such, which are supposed to be politically neutral and universal. The President symbolically ensures that the ruling party or the coalition is separate from a non-partisan embodiment of the whole.[57] President is a neutral and an impartial arbiter who while forming his "opinion" under Article 209(5) is to weigh both: the sanctity of a non-partisan judicial institution and the grievance of the political government against the judge in order to give true expression to judicial

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[57] See Elliot Bulmer, Direct Democracy: International IDEA Constitution-Building Primer 3, International Institute for Democracy and Electoral Assistance, (2nd ed. 2017)

independence and judicial accountability. Only someone with the stature and position of a President can perform this challenging role.

53. The existence of judicial independence depends on the existence of legal arrangements that guarantee it. Judicial independence is composed of two foundations: independence of the individual judge and the independence of the judicial branch. The independence of the individual judge means that the judge is subject to no authority other than the law[58]. A judge will have "nothing to influence or control him but God and his conscience."[59] On matters of adjudication, the judge is alone. Second limb of judicial independence is the institutional environment in which the judge operates. It is a protective institutional wall around the individual judge that will guard him against the possibility of any inside or outside influence. A partisan Government or other specialized State institutions, at times, in order to achieve their political ends may try to influence or pressurize judges and invoke the removal process to penalize or intimidate judges. The real aim of proceedings may be to remove a judge whose judgments are considered troublesome by those in authority.[60] At this junction, the protective institutional design that guards the judge against external onslaughts becomes critical. The constitutional scheme of independence of judiciary is not to shut its eyes and ears to the complaints against the judge but to ensure that the judge gets to enjoy his constitutional protections till the last.

54. Separation of powers is the backbone of our democracy. The purpose of separation of powers is to strengthen freedom and prevent the concentration of power in the hands of one government actor in a manner likely to harm the freedom of the individual and other institutions. The principle requires that each branch of the State has a function that is its major function and the other branch should not impinge upon its nucleus. The institutions of the State have to walk the tightrope of checks and balances while

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[58] Aharon Barak, The Judge in a Democracy, Princeton University Press (2006).

[59] Evans v. Gore, 253 U.S. 245, 250 (1919) (quoting John Marshall, *cited at* Debates, Va. Conv. 1829-1831, 616, 619).

[60] See J. van Zyl Smit, The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice (Report of Research Undertaken by Bingham Centre for the Rule of Law), 79-81.

operating in their designated spheres outlined clearly in the Constitution. One branch of the State should not be able to destabilize or weaken the other branch. Constitutional design protects this through the principle of separation of powers and President's role under Article 209(5) actualizes this balance. This is a constitutional principle. It may not be written in the Constitution but it is written within the lines. The courts in a democracy have to give expression to this principle when interpreting the Constitution.

55. One of the basic principles of democracy is the Rule of Law. From the standpoint of democracy, the most important of the meanings is the substantive rule of law. The substantive rule of law is the rule of proper law, which balances the needs of society and the individual and strikes a balance between society's need for political, economic and judicial independence, on the one hand, and the right to personal liberty, and human dignity on the other.[61]

56. Constitution is philosophy, politics, society, and law all rolled into one.[62] Judiciary is the guardian of the Constitution. In interpreting a Constitution, other than the express language of the Constitution, its implied language conveys a meaning between the lines, which is otherwise invisible in words - it is derived from the structure of the Constitution. Any interpretation of the Constitution must be grounded in these foundational principles. Role of the President when considered in the background of these fundamental principles, best assumes the role of an "arbiter" and a "buffer" between a partisan government and a permanent neutral branch of the State, the judiciary. The President is to examine the "information" placed before him under Article 209(5) as Head of State, acting as an arbiter between the two branches of the State, discharging his function as a person representing the unity of the Republic. This unique function of the President is co-equal with the role of the Council under the same clause of Article 209 of the Constitution. Both have to form an "opinion;" both have to perform a somewhat quasi-judicial function; both have to take a decision

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[61] Aharon Barak, The Judge in a Democracy, Princeton University Press (2006).

[62] ibid

on the basis of the information before them. Personal opinion of the President under Article 209(5) actualizes the non-partisan role of the President and provides a check on any partisan adventurism by the Government of the day against the judiciary. If the President is just a rubber stamp acting on the advice of the Cabinet, a hostile Government can, theoretically, file references against a number of judges of the constitutional courts, resulting in initiation of inquiries against all of them. Mere initiation of inquiry against the conduct of the constitutional court judges is enough to tarnish the image of judiciary, and weaken public confidence and public trust the nation reposes in the judicial institution.

57. At a textual level, "information" is placed before the President under Article 209(5). This information is then processed into a Reference only if the President forms an opinion that the information makes out a case for inquiry against the judge. If information is actually an "advice," the words "President is of the opinion" become redundant. Second, it is absurd to conclude that under the same provision, the Council is empowered to form its own "opinion" but the President is not. Under Article 48(2), where the Constitution vests the President with a more personalized task of exercising his "discretion," he performs the same himself and not on the advice of the Cabinet or the Prime Minister. Quite similar is the function of forming an "opinion" which can only be done by the President himself.

58. As a Head of the State, the President is the best person to review the "information" placed against a constitutional court judge by a constituent of the State, be it Federal, Provincial or Local Government. The executive function of the Government is till the placement of "information" before the President. Beyond that, the formation of "opinion" by the President falls outside the realm of the executive function and becomes a more quasi-judicial function in nature. Parallel needs to be drawn between the two streams: the President and the Council. While the Council actualizes this quasi-judicial function through the Supreme Judicial Council Procedure, 2005, the President does no different without such procedure. This leaves no margin for a mechanical act by the President on the advice of the Cabinet.

59. While the Constitution vests the President with the power to form an "opinion", it is difficult to imagine that this power is to be exercised by him in a mindless and mechanical manner, thus reducing him to just a rubber-stamp, who upon receiving information is to simply direct the Council to inquire into the conduct of a constitutional court judge. His role under Article 209(5) is not to execute an executive function, but act as an arbiter on a conflict between two State institutions. Failure of the President to form his "opinion" in this case has resulted in the President rubber stamping unconstitutional and illegal "information" into a Reference by directing the Council to inquire into the matter of the Petitioner Judge. This has compromised the neutrality of the office of the President and besmirched his exalted office. If expression is to be given to the constitutional scheme and foundational principles discussed above, the constitutional role of the President is best actualized as an independent arbiter under Article 209 when he is to form his personal opinion. To this conclusion, I also find support from the majority judgment of a 13- Member Full Court Bench of this Court in C*JP Iftikhar Chaudhry case*.[63] The allegations of *malafide* in that case were made against the President, and the Court accepting those allegations quashed the Reference impugned therein. If the President had to act, in the opinion of the Court, on and in accordance with the advice of the Prime Minister, the proof of *malafide* against the President would not have entailed the result of quashment of the Reference. Further, in summarizing the various steps in the process of making a Reference by the President, the Court mentioned, amongst other steps, receipt of information by the President, formation of opinion by the President and direction (Reference) by the President; no step regarding advice of the Prime Minister was mentioned.[64] Entry 35 in Schedule V-B to the ROB that provides that President is to act on advice of the Prime Minister for making Reference to the Council under Article 209(5) is, therefore, *ultra vires* the Constitution and is so declared.

60. In the present case, the President did not apply his mind and form his own opinion on the "information" received; he simply

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[63] See CJP Iftikhar Chaudhry case (supra) , per Khalil-ur-Rehman Ramday, J, paras 107, 196.

[64] See Ibid., paras 64, 65.

approved the advice of the Prime Minister and signed the draft Reference submitted with that advice. The formation of opinion and the direction to the Council to hold an inquiry was, therefore, not that of the President; both these acts are declared to have been made without jurisdiction and *coram non judice,* and thus unconstitutional and of no legal effect.

*"Information" does not constitute Misconduct*

61. Without prejudice to the findings and declarations given above that the information (evidence) collected against the Petitioner Judge by the ARU with the blessing of the Law Minister was legally inadmissible, it is underlined that the said information even if considered, does not constitute misconduct. The allegations against the Petitioner Judge in the "information" put up as a "Summary for the Prime Minister" that ultimately took the form of the Reference relate to the alleged violation of the Income Tax Ordinance, 2001 ("ITO"), Anti-Money Laundering Act, 2010 ("AMLA") and the Foreign Exchange Regulation Act, 1947 ("FERA"). There is no charge of corruption or acquisition of the foreign properties by the Petitioner Judge in names of his spouse and children as ostensible owners (*benamidar*). The stance of the Petitioner Judge is that no violation of the said laws is made out against him and no misconduct on his part can be spelt out from the assertions and allegations made in the Reference.

*Income Tax Ordinance, 2001*

62. The alleged violation of Section 116(1)(b) of the ITO is the mainstay of the Reference filed against the Petitioner Judge. Provisions of the said Section are equivocal, and attract different constructions. There has not yet been any judicial interpretation of it. The parties have, therefore, proposed different interpretations on it. It would be advantageous to cite the provisions of Section 116(1)(b) of the ITO before embarking on discussion on the proposed interpretations, for ready reference:

> **116. Wealth statement**.— (1) The Commissioner may, by notice in writing, require any person being an individual to furnish, on the date specified in the notice, a statement (hereinafter referred to as the "wealth statement") in the prescribed form and verified in the prescribed manner giving particulars of —
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> .....
> .....

> (b) the total assets and liabilities of the person's spouse, minor children, and other dependents as on the date or dates specified in such notice;
>
> (2) Every resident taxpayer being an individual filing a return of income for any tax year shall furnish a wealth statement and wealth reconciliation statement for that year along with such return.

At the outset, it is pointed out that Section 116(1), ITO simply provides for issuance of notice to a taxpayer for filing the wealth tax statement or wealth reconciliation statement alongwith the income tax return and provides for particulars to be included in such a statement. In case a taxpayer has already filed the above statements alongwith his return, Section 116(1) appears to have no relevance. It is not the case of the Federation that the Petitioner Judge failed to file the wealth tax statement or wealth reconciliation statement. In case the said statements are deficient or incorrect, the tax department can issue notice to the taxpayer under Section 120(3) and consider the case in the light of Section 111 of the ITO. No such notice or proceedings were initiated by the FBR against the Petitioner Judge. Directly leveling allegation of violation of Section 116(1)(b) against the Petitioner Judge in this background is misconceived besides being premature.

63. It was argued on behalf of the Petitioner Judge, by referring to the principle of *noscitur a sociis* (known by its associates), that the meaning of the word "spouse" should be determined by considering the words "minor children, and other dependents" with which the former word is associated in clause (b) of Section 116(1). Therefore, an individual resident taxpayer, as per his version, is to mention the assets of his or her spouse in the wealth statement only if the latter is his or her "dependent". The stance of the Federation, on the other hand, was that the word "spouse" should be given its literal meaning. The Legislature has not used the word "dependant" with the word "spouse". Every individual resident taxpayer, as per its stance, is to mention the assets of his or her spouse in the wealth statement irrespective of the fact that the latter is or is not his or her "dependent". The possible interpretations do not end here. Rather, two other interpretations were also put to these provisions by the FBR while prescribing the forms of wealth statement. In the form prescribed for the tax year

2013, a taxpayer was required to declare the assets of his or her spouse if he or she had not filed income-tax return and wealth statement independently; while, in the form prescribed for the tax year 2015, a taxpayer was required to declare only those assets of his or her spouse which had been acquired by funds provided by that taxpayer. There are, as such, at least four possible interpretations of the provisions of Section 116(1)(b) of the ITO.

64. The matter of alleged tax violation has not reached this Court in its usual legal course routing through the tax authorities, tax tribunal and the High Court. I would therefore not give any definite finding on the said, or any other, possible interpretations of Sections 116(1)(b) of the ITO. I would rather examine the reasonability of forming the opinion of commission of misconduct against the Petitioner Judge on the basis of alleged violation of the provisions of Section 116(1)(b), and in doing so would test the formation of opinion on all the said four canvassed interpretations.

65. One foreign property was purchased by the spouse of the Petitioner Judge in the year 2004, before his elevation to the Bench of the Balochistan High Court in 2009; this property was therefore completely irrelevant for forming opinion of misconduct and making the Reference against the Petitioner Judge. The other two foreign properties were acquired by the spouse and children of the Petitioner Judge in the year 2013, after his said elevation; they were, therefore, to be declared in the tax year 2013 by the Petitioner Judge if there was any legal obligation on him, at that time, to do so. The children of the Petitioner Judge were not minors in the year 2013; therefore, no question as to his obligation to declare their assets arises under Section 116(1)(b) of the ITO. The current dispute relates to his alleged obligation to declare the assets of his spouse only. Therefore, the question is whether the Petitioner Judge was under any legal obligation to declare the foreign assets of his spouse in his wealth statement along with his tax returns filed in the tax year 2013. The simple and straightforward answer as per its own interpretation of the FBR that was in vogue in 2013 is that he was not. As afore-mentioned the FBR, in the wealth statement form prescribed for the tax year 2013, required a taxpayer to declare the assets of his or her spouse

if he or she had not filed income-tax return and wealth statement independently. It is an admitted fact that the spouse of the Petitioner Judge had filed her income-tax return and wealth statement independently, in the year 2013. It, therefore, appears that there was no legal obligation on the Petitioner Judge to declare the assets of his spouse in his wealth statement as per the requirement of the FBR prevailing in the year 2013. The departmental second interpretation expressed in the form prescribed for the tax year 2015 is that a taxpayer is required to declare only those assets of his or her spouse which had been acquired by funds provided by that taxpayer. There was neither any allegation in, nor was any material annexed with, the "Summary" initiated for forming the opinion of misconduct against the Petitioner Judge that the funds for purchase of the foreign assets were provided by the Petitioner Judge to his spouse. No opinion of misconduct against the Petitioner Judge, thus, could have been made on the basis of these two departmental interpretations of the provisions of Section 116(1)(b), ITO. It may be pertinent to mention here that though the courts of law are not bound by departmental interpretations and constructions of the laws yet they give due weight and consideration to such interpretations and constructions, and do not disregard them without cogent reasons. Such constructions have their basis in the necessary practice of executive and administrative officers construing statutes to execute and apply them, in advance of the judicial construction. These officers are usually expert on the subject dealt with by the law, and their practical construction of the law provides a sound basis for judicial interpretation.[65]

66. The interpretation offered by the Petitioner Judge is that an individual resident taxpayer is to mention the assets of his or her spouse in the wealth statement if the latter is his or her "dependent". For examining this interpretation, it would be useful to refer that during the hearing, the spouse of the Petitioner Judge requested the Court for allowing her to appear before the Court through video-link and make a statement. Her request was allowed. She then made her statement and referred to certain documents, copies of which were subsequently submitted in

[65] NS Bindra's Interpretation of Statutes, p.859-861 (10th Ed. 2007).

separate sealed envelopes to all Judges sitting in this Full Court Bench the next day. The documents submitted were: (i) copies of income tax returns and wealth statements for Tax Years 2018 and 2019; (ii) title documents in respect of agricultural land owned by her; (iii) evidence of liquid investment with National Savings Centre together with income derived therefrom; and (iv) certificate from a scheduled bank confirming movement of funds in her private foreign currency account etc. The wealth statements submitted by her include the foreign properties owned by her, the non-disclosure whereof in his wealth statements by the Petitioner Judge is the main basis for filing of the Reference against him. The FBR, in response to her statement, also submitted her available tax record. These documents include her income tax returns and wealth statements for various tax years including the Tax Years 2018 and 2019, and statutory notices requiring filing of tax returns for certain years when these were not voluntarily filed. The said documents and record amplify the version of the Petitioner Judge that his spouse is a separate and independent taxpayer/assesse in the records of the FBR, who has been separately and independently filing tax declarations in relation to income derived by her from her own sources. The tax record furnished by the FBR does not rebut this assertion, rather supports the same. In the background of this admitted position, the spouse of the Petitioner Judge cannot be said to be his dependent. Thus, the FBR could not have asked the Petitioner Judge to declare her assets in his wealth statement filed with the tax return in the tax year 2013, and sought explanation from him regarding the sources of purchase of the assets by his spouse. In arriving the conclusion that the spouse of the Petitioner Judge was not his dependent in the year 2013, I am supported by the following observations made in the case of *Imran Khan v. Nawaz Sharif*:[66]

> 126. As far as the issue regarding respondent No.6 namely Mariam Safdar allegedly being a 'dependent' of her father namely Mian Muhammad Nawaz Sharif is concerned I have found that the material produced before us sufficiently established that respondent No.6 was a married lady having grown up children, she was a part of a joint family living in different houses situated in the same compound, she contributed towards some of the expenses incurred by the joint family, she submitted her independent tax returns, she owned sizeable and valuable property in her own name, she was capable of surviving on her

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[66] PLD 2017 SC 265.

> own and, thus, she could not be termed or treated as a 'dependent' of her father merely because she periodically received gifts from her father and brothers. In this view of the matter nothing turned on respondent No.1 not mentioning respondent No.6 as his dependent in the nomination papers filed by him for election to NA-120 before the general elections held in the country in the year 2013. *(emphasis supplied)*

67. In terms of the scheme envisaged in the ITO, once an asset is claimed by a person to have been sourced by him or her and, more so, such asset is also declared in the statutory declaration/wealth statement by that person, then only that person could be questioned and required to explain the source of acquiring such asset by the tax authorities. In the event that person fails to properly explain the source, an addition could be made in his or her income and that added income is taxed accordingly. Under no circumstances, any other person could be made directly or indirectly part of such proceedings. Thus, no opinion of misconduct against the Petitioner Judge could have been formed on the basis of this interpretation of the provisions of Section 116(1)(b), ITO.

68. The interpretation suggested by the Federation is that every individual resident taxpayer is to mention the assets of his or her spouse in the wealth statement irrespective of the fact that the latter is or is not his or her "dependent". Section 114 of the ITO requires that the tax return for any tax year has to be accompanied by the wealth statement required under Section 116. In case a wealth statement is not filed or is deficient, the income tax return filed is not considered complete. In case of any deficiency, the Commissioner, FBR is empowered to issue a notice to the taxpayer under Section 120(3) of the ITO, informing the deficiency and providing him time to rectify it. If it is cured during the given time, the tax return is considered complete and accepted. Therefore, if the Commissioner, FBR had been of the view, as per the interpretation suggested by the Federation, that the Petitioner Judge was under legal obligation to declare the assets acquired by his spouse in the year 2013, in his wealth statement filed with tax return of 2013, he should have issued notice to the Petitioner Judge specifying the defect and providing him time to rectify it. The Petitioner Judge, in that case, could have defended that notice on all legal grounds available to him including the interpretation

proposed by him as well as the interpretations put to the provisions of Section 116(1)(b) by the FBR itself in the forms prescribed for wealth statement. No such notice, however, was issued to the Petitioner Judge. Further, if the Commissioner, FBR on the basis of some "definite information" had been satisfied that that the tax return and wealth statement filed by the Petitioner Judge in the year 2013 were not accurate and some income chargeable to tax had escaped taxation, he could have issued an amended assessment order under Section 122(5) of the ITO, after hearing the Petitioner Judge, within a period of five years prescribed in Section 122(2) of the ITO. No such legal exercise was done. Therefore, without any determination of, or even initiation of legal proceedings on, the alleged violation of Section 116(1)(b) by the Commissioner, FBR either under Section 120 or under Section 122 against the Petitioner Judge, no opinion of misconduct against the Petitioner Judge could have been formed on the basis of the interpretation suggested by the Federation also.

69. In the last on the current head of discussion, I consider it important to highlight that Section 116A which requires a resident individual taxpayer to furnish statement of foreign assets, was inserted in the ITO in the year 2018 by the Finance Act, 2018. This amendment made in the year 2018 *prima facie* shows that there was earlier no obligation on a resident individual taxpayer to furnish such statement of even his own foreign assets, much less the foreign assets of his spouse and children.

*Anti-Money Laundering Act, 2010*

70. The Federation argued that being a case of 'concealed income', the matter also falls under the AMLA by referring to following entries in the Schedule to the AMLA:

> **Section XIIA The Income Tax Ordinance, 2001**
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> 192. Prosecution for false statement in verification-where tax sought to be evaded is ten million rupees or more
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> 192A. Prosecution for concealment of Income-where tax sought to be evaded is ten million rupees or more
>
> 194. Prosecution for improper use of National Tax Number Certificate – where tax sought to be evaded is ten million rupees or more

> 199. Prosecution for abetment – where tax sought to be evaded is ten million rupees or more.

The argument is hopelessly misconceived and misdirected. The aforesaid entries in the Schedule were inserted vide Notification No. SRO 425(I)/2016 dated May 14, 2016[67] through which offences under Sections 192, 192A, 194 and 199 of the ITO were listed as "predicate offences" for the purposes of invocation of the AMLA. In the present case, admittedly all three foreign properties were acquired prior to May 14, 2016; therefore, the AMLA is not applicable at all. Needless to mention, that the principle of prohibiting retrospective punishment is a guaranteed fundamental right under Article 12 of the Constitution. Even otherwise, it is manifestly clear that the Legislature has put a precondition that 'tax sought to be evaded is ten million rupees or more' in all the four entries mentioned above. Thus, for the invocation of the AMLA the law presupposes conclusion of proceedings under the relevant provisions of the ITO to determine the said threshold and that too in relation to tax liability for the period on or after May 14, 2016. No such determination has taken place; hence, there is no application of the AMLA to the present case.

*Foreign Exchange Regulations Act, 1947*

71. The FERA provides for regulation of payments and dealings in foreign exchange and securities, and the import and export of currency and bullion. Sections 4 and 5 of the FERA provide that no one can deal in foreign exchange[68] except through an authorized dealer and imposes restrictions on transfer of money outside Pakistan. There is no evidence on the record that establishes or even *prima facie* shows any violation of the FERA against the Petitioner Judge. The Federation pointed out no violation of the FERA, even during the arguments.

72. In view of the above analysis of the relevant provisions of the ITO, AMLA and FERA, no violation of any provision of those laws is made out against the Petitioner Judge on the basis of the assertions and allegations made in the "information" given in the "Summary for the Prime Minister" that ultimately took the form of

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[67] Published in Official Gazette on May 20, 2016.

[68] Defined in section 2(d) of FERA to mean foreign currency , etc.

the Reference; therefore, no opinion as to the *prima facie* commission of any misconduct by the Petitioner Judge could have reasonably been made on the basis of that "information."

*Code of Conduct and Vicarious Responsibility of a Judge*

73. A constitutional court judge can be removed from office if he or she commits "misconduct" as provided under Article 209 of the Constitution. "Misconduct" is a constitutional term and must draw its spirit and meaning from the Constitution. It is important that the meaning of constitutional "misconduct," the scheme of the Code of Conduct and the scope of the impeachable misconduct of a constitutional court judge must flow from the standard of judicial integrity set out by the Constitution. The constitutional standard of judicial integrity lies in the oath of a constitutional court judge, as discussed earlier; falling short of it would amount to impeachable misconduct. Under Article 209(8) of the Constitution, the Council issues a Code of Conduct, which is to be observed by the judges of the constitutional courts. This Code of Conduct for the Judges of the Supreme Court and High Courts[69] ("Code") carries additional standards and etiquettes for Judges to follow in order to uphold the prestige and honour of the judicial institution. The Code formulated by the Supreme Judicial Council cannot control the constitutional meaning of the term "misconduct" but provides a helpful guideline. The Code is a basket of judicial obligations, etiquettes, and courtesies of varying degrees and effect, covering both judicial character and judicial behavior of a Judge.[70] While some Articles of the Code directly impinge on judicial integrity, others simply pass as mere guidelines of good behavior, civility and mannerism in conducting the court. It cannot be said that every deviation of the Code, how insignificant it may be, would constitute impeachable misconduct. For example, a judge's failure to decline to act in a case involving his own interest[71] may constitute an impeachable misconduct, while in case a judge who gets a speeding ticket for driving fast and offends the requirement of being law-abiding may not be liable for an impeachable

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[69] Framed under the Constitution of 1962 and amended from time to time. Final version to date is till the last amendment made in the year 2009.

[70] See the preamble to the Code.

[71] Article III of the Code.

misconduct. Similarly, a judge who is not punctilious enough in sitting and rising in court, cannot be removed on this pretext, unless ofcourse, these violations are so frequent and regular that they weigh heavily on the public confidence and legitimacy of the judicial institution. So each case has to be seen in its own peculiar facts after examining the nature of the violation. It is underlined that the Code largely lays down judicial obligations and etiquettes for the Judge in his official capacity. Only Article II of the Code provides generalized yet more personal standards like "a Judge must be God-fearing, law-abiding, abstemious, truthful of tongue, wise in opinion, cautious and forbearing, blameless and untouched by greed." These saintly qualities are personal to the Judge. We must also remember that judges are humans at the end of the day, no matter how glorified and hallowed their office and the Code may make them appear. Chief Justice McLachlin[72] said: "Judges are not living Oracles. They are human beings, trained in the law, who struggle to understand the situations before them and to resolve them in accordance with the law and their conscience."[73] Impeachable misconduct is when there is a violation of law or violation of the Code that is so grave that it ruptures judicial integrity, tarnishes public confidence and pulls down legitimacy of the judicial institution. Short of this, it might be misconduct but not impeachable misconduct. Like under the service laws, gravity of misconduct determines the penalty, which ranges from mere censure all the way to dismissal from service. It is commonsensical that not every infraction leads to removal of a constitutional court judge or constitutes impeachable misconduct. The best test is to see if the judicial integrity of a judge has been undermined resulting in lowering the public confidence and trust in the judiciary, thus impairing impartiality and legitimacy of the judicial institution.

74. Judicial integrity and the Code are judge specific, largely covering judicial conduct and partly his personal behavior. The standards under the Code extend to the judge and judge alone. The Code has no jurisdiction over the family, relatives and friends of the judge. It is certainly ideal but it would be unfair to expect

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[72] Chief Justice of Canada (2000-2017).

[73] Judging in a Democratic State: Remarks of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada.

that the spouse and children of the Judge must be equally "God- fearing, law-abiding, abstemious, truthful of tongue, wise in opinion, cautious and forbearing, blameless and untouched by greed." The Code has no concern with the family or friends of the judge. Infact, it is totally impractical to think otherwise. Let us assume that the spouse or the family of a judge were remiss in managing their financial and tax affairs. In the absence of any charge or evidence of corruption against the judge, if the judge had time and again asked his spouse and family to be more careful and responsible in their tax matters, but they for some reason did not do so, what is the judge supposed to do in such a situation? Should the judge abandon his spouse and the family? Does the Code provide an answer? Does the Code expect and require that families of the judges must be exemplary and ideal members of the society? And if they do not come up to the expectation or if there is even the slightest of infraction on their part, the judge is liable for their misconduct? Is this responsibility part and parcel of the terms and conditions of service of a constitutional court judge? I think not. The Code is judge specific document and does not extend to family members and in no event, holds a judge vicariously responsible for the conduct of his family - his spouse and children - who are independent, natural and legal persons in their own right and can do whatever they want. "Conduct" and "misconduct" are personal to a judge under the Code. Like any other citizen, a judge cannot be held accountable for the conduct of someone else, there is no such thing as vicarious responsibility of a judge, unless the law requires it or there is evidence that the wrongdoings of the judge have been concealed behind the family façade. In the case of Chief Justice of Gibraltar,[74] Lord Hope (with whom Lord Rodger and Lady Hale agreed) while answering the question that to what extent, and in what circumstances, is a judge to be held accountable for the actions of his or her spouse or other close relatives, observed: "The days are long gone when a husband and wife were treated as one person in law and the husband was that person. It is not unknown for senior figures in public life to have spouses or partners who pursue their own careers and interests, in the course of which they may say or do

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[74] Hearing on the Report of the Chief Justice of Gibraltar, [2009] UKPC 43. (4-3 minority view)

things that, are controversial and embarrassing. Any difficulties that this may give rise to should be resolved between themselves, if they can be resolved at all, in private. Judges are not to be taken as supporting or endorsing their spouse's or partner's conduct if they do not publicly dissociate themselves from it. The law should recognize that they are independent actors and that the deeds of the one are not to be visited on the other." I fully subscribe to his views. Unless the personal or official conduct of the judge threatens public confidence in the judicial institution or the legitimacy of the judicial institution, the question of impeachable misconduct does not begin to arise.

*Publicizing the Reference*

75. The matter of leaking and publicizing the filing of the Reference against the Petitioner Judge and of the allegations made therein is also of great concern and requires serious consideration. The Council has structured its discretion to process any "information" received in the form of a complaint, to make the preliminary assessment thereof and to conduct the "inquiry" by its Procedure of Inquiry, 2005. Paragraph 13 of the Procedure of Inquiry, 2005 provides for the proceedings of the Council to be conducted *in camera* and also bans reporting the proceedings of the Council. Validity of the Procedure of Inquiry, 2005 particularly of its Paragraph 13 was challenged in *Justice Siddiqui Case*,[75] but was upheld by this Court. Purpose of Paragraph 13 was stated to protect both the Judge whose conduct and capacity is to be inquired into and the institution of the judiciary. The Court held that the necessity of *in camera* proceedings prevails over the right to information provided by Article 19A of the Constitution, and observed that due to an open trial the name of a Judge facing inquiry could be maligned even though the allegations may eventually be rejected by the Council. The Court directed in clear terms that "the process of determination whether any *prima facie* case has been made for proceedings under Article 209 of the Constitution in any event should be held *in camera*". The Court thus put an absolute restriction of confidentiality on the process of preliminary assessment of the allegations made against a

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[75] Shaukat Aziz Siddiqui v. Federation of Pakistan, PLD 2018 SC 538.

constitutional court judge. This restriction, therefore, equally applies to publicizing the Reference filed by the President and the allegations made therein. In the context of publicizing, proceedings of preliminary assessment of "information" conducted by the President is similar and equal to proceedings by the Council. Therefore, if the proceedings are to be conducted by the Council *in camera*, then so should be the proceedings by the President.

76. Under Article 204(2)(b) of the Constitution, the constitutional courts have power to punish any person who scandalizes the Court or otherwise does anything which tends to bring the Court or a Judge of the Court into hatred, ridicule or contempt. Publicizing a complaint or Reference and the allegations made therein, of which veracity is yet to be determined after inquiry by the Council, definitely tends to bring the Judge into hatred, ridicule and contempt, and thus attracts the provisions of Article 204 of the Constitution and the Contempt of Court Ordinance, 2003. Needless to say that hostile publicity of a matter through modern media can orchestrate an unprecedented level of hostility towards a particular individual, and even an institution.[76] The restriction of confidentiality is to achieve a certain objective, i.e., preserving the integrity and honour of the judicial institution by maintaining public confidence. Publicizing a complaint or Reference undermines public confidence in the judiciary and lowers the esteem of the individual judge. The prestige and integrity of the judiciary is thus undermined without any concrete findings of misconduct against a Judge. The restriction is also to preserve, protect and safeguard the authority and dignity of the Judge who continues performing his functions on the Bench during the inquiry against him, as there is no provision in the Constitution to suspend his judicial powers during the inquiry proceedings.[77]

77. In the present case, it is a matter of record that the Reference was publicized even when it had not yet been placed before the Council for preliminary consideration, as the filing of the Reference and the allegations made therein against the Petitioner Judge was

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[76] See David Corker and David Young, Abuse of Process and Fairness in Criminal Proceedings, Butterworths Law (2000).

[77] See Hlophe v. Constitutional Court of South Africa, (2008) ZAGPHC 289; and, Justice Paul Uuter Dery v. Tiger Eye P.I., 2016 SC (J1/29/2015), Ghana Supreme Court.

published in several newspapers on May 28, 29, 30 and 31, and June 1 and 3, 2019 and later during the proceedings before the Council the matter was discussed in press conferences and TV talk shows by the Government Ministers and even by the President of Pakistan. The act of publicizing the filing of the Reference against the Petitioner Judge and of the allegations made therein, is clearly unconstitutional and falls within the scope of the provisions of Article 204 of the Constitution and the Contempt of Court Ordinance, 2003. The fact as to who leaked and publicised this matter is disputed and cannot be resolved in the present proceedings, but the matter cannot be left unnoticed and allowed to go unchecked. Such omission would encourage repetition of the mischief in future. Thus, I would leave the matter to the discretion of the Hon'ble Chief Justice of Pakistan who is *pater familias* of the judiciary and is to protect its prestige, honour, reputation and integrity, to initiate appropriate proceedings for a thorough inquiry of the matter so that the right to fair trial of the persons involved in publicizing the Reference and the allegations made therein, may not be infringed.

*Is the Reference Malafide?*

78. An administrative authority must act in a *bonafide* manner and should never act for an improper motive or ulterior purpose or contrary to the requirement of the statute or improperly exercise discretion to achieve some ulterior purpose. The determination of the plea of *malafide* involves two questions, namely – (i) whether the administrative action is contrary to the object and requirements of law, and (ii) whether there is a personal bias or an oblique motive. *Malafide* of law is constituted when a person inflicts an injury upon another person in flagrant contravention of the law; he is not allowed to say that he did so with an innocent mind. He is taken to know the law and act within the law. He may, therefore, be guilty of *malafide* of law, although so far as the state of mind is concerned, he acts ignorantly and in that sense innocently. Thus, action of an authority is tainted with *malafide* of law when it takes the action which is so unreasonable, improbable or blatantly illegal that it ceases to be an action contemplated by the law under which it is purportedly taken, or takes the action by

violating the mandatory procedural requirements or without satisfying the jurisdictional requirements, or takes the action which no reasonable person could have taken on the basis of the available material.[78] On the other hand, an unlawful action done designedly, willfully or wantonly and not accidently, thoughtlessly or negligently falls within the domain of *malafide* of fact. In such case, the action is taken in bad faith either to hurt the person against whom the action is taken or to benefit oneself or another, or in colourable exercise of powers for collateral or ulterior purposes not authorized by the law under which the action is purportedly taken.[79] If the act suffers from *malafide* of law, the mischief is corrected by nullifying the act; *malafide* of fact, however, further entails the consequences of making the actor accountable also.

79. It is true that *malafide* is difficult to prove against a public functionary because there is a presumption of regularity with regard to all official acts under Article 129(e) of the Qanun-e- Shahdat Order, 1984.[80] However, this presumption of regularity is available only to official acts done by a person or authority competent to do that. The presumption of regularity cannot be attached to the acts done by the persons and authorities who have no legal authority to do those acts, rather a reverse presumption for lack of *bonafide* arises. In such a case, the onus to prove *malafide* does not remain as high. *Malafide* is inferential by construct. It can be drawn from direct or circumstantial evidence.[81] The Court carefully takes into consideration the surrounding circumstances of the action; the conduct of the persons involved; the object and purpose to be achieved; and the nature of the illegality. The court, in a way, reconstructs the whole act and its backdrop, and then evaluates the *fides* of the action and its actors. If *malafide* on the part of the actors is apparent on the face of record, then the court of law seized with the matter is

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[78] See West Pakistan v. Begum Shorish Kashmiri, PLD 1969 SC 14, 32 (5-MB), per Hamoodur Rahman, J; Sarwar v. Punjab, 1990 SCMR 999, 1001, per Shafiur Rahman, J.; and, Said Zaman v. Federation, 2017 SCMR 1249, 1279-80 (5-MB), per Sh. Azmat Saeed, J.

[79] See Abdul Rauf v. Abdul Hamid, PLD 1965 SC 671, 675 (5-MB), per B. Z. Kaikaus, J.; Federation v. Saeed Ahmad, PLD 1974 SC 151, 170 (4-MB), per Hamoodur Rahman, C. J.,; Said Zaman v. Federation, 2017 SCMR 1249, 1279-80 (5-MB), per Sh. Azmat Saeed, J.

[80] Federation v. Saeed Ahmad, PLD 1974 SC 151.

[81] See CJP Iftikhar Chauhdry case (supra) p.215, Per Muhammad Nawaz Abbasi, J.

not supposed to shut its eyes from taking notice thereof.[82] While full faith is given to public acts and record of the Government, this assumption is overturned if *malafide* is borne out from the record.

80. If we start reading the events after the *Faizabad Dharna* judgment, one is compelled to conclude that the Petitioner Judge was deliberately targeted for his observations and directions made in that judgment, which perhaps were considered hostile and troublesome by those in power. This fact is floating on the record of the review petitions. The vengeance and resentment against the Petitioner Judge is more than visible from the strange and unprecedented assertions made for his removal on the ground of misconduct in the review petitions; soon it took shape of a vague complaint filed before an incompetent authority (ARU) housed in the office of the Prime Minister. The vengeance and resentment continued with the entertainment of the bogus complaint, unauthorized investigation and collection of evidence through the surveillance of the Petitioner Judge and his family, illegally seeking information from statutory institutions and using the illegally collected evidence for making advice to the President to send the Reference against the Petitioner Judge. These extraordinary facts and circumstances in the process of conducting the so-called accountability of the Petitioner Judge may be summarized in sequence, as under:

i. The current ruling parties (PTI and MQM) aggrieved of some observations made by the Petitioner Judge in the *Faizabad Dharna* judgement make an unprecedented and astonishing assertion in their review petitions filed against that judgment that the Petitioner Judge has violated his Oath of Office and Code of Conduct for Judges, and is liable to be removed from office under Article 209 of the Constitution.

ii. The complainant makes the complaint for "Accountability of Judges" to the ARU, housed in the Prime Minister's Office, and not to the Council, in the very next month of filing of those review petitions.

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[82] Hazara Improvement Trust v. Qaisra Elahi, 2005 SCMR 678, p.698.

iii. The Chairman, ARU (substantive post - Special Assistant to the Prime Minister) discusses the matter with the Law Minister informally, without making any formal consultation through the Cabinet Division (under whom the ARU was to function as per decision of the Cabinet) with the Law and Justice Division in accordance with Rule 14 of the ROB.

iv. The Law Minister gives a "go ahead" to the ARU in an informal discussion, without realizing the importance of his advice, even oral, for inquiring into the veracity of the allegations made in the complaint against Judges of the Constitutional Courts.

v. The Chairman, ARU who is a Barrister-at-law, and not a layman, knowing well that an oral advice of the Law Minister has no value in the eye of law and without looking for his own legal authority to inquire into the allegations made against Judges of Constitutional Courts, initiates the inquiry into the allegations made in the complaint.

vi. The Chairman, ARU makes the decision alone to initiate the process of inquiring into the allegations made in the complaint, and does not obtain the opinion of or consults with the Members of the ARU as to whether the institutions they represent can inquire into the allegations made in a complaint against a constitutional court judge.

vii. The Chairman, ARU decides to proceed for accountability of the judges of constitutional courts, and not for recovery of their alleged foreign assets as per the so-called mandate of the ARU, for he decides not to inquire about the alleged properties of another judge named in the same complaint, while noting that the said judge has already resigned.

viii. The Members of the ARU make compliance of the directions of the Chairman, ARU and share with him the confidential information available in the record of their Departments, by violating the provisions of the law under which those Departments function.

ix. The Legal Expert, ARU, who is also a Barrister-at-law, in compliance with the directions of the Chairman, ARU causes surveillance of the Petitioner Judge and his family for locating the properties in London, in violation of their fundamental rights of liberty, privacy, dignity and freedom of movement, and in derogation of the provisions of IFTA.

x. The Member of the ARU from FIA, Assistant Commissioner (Inland Revenue), Commissioner (Inland Revenue), and DG (International Taxes), all four, submit their reports on May 10, 2019. The Chairman, ARU then examines all the reports and record submitted to him on May 10, 2019, makes his final report on May 10, 2019 and submit it to the Law Minister on the very same day, i.e., May 10, 2019. All proceedings stand concluded in one day, with admirable alacrity.

xi. The Law Minister (a distinguished lawyer) does not raise any objection to the inquiry conducted by the ARU for accountability of a constitutional court judge, on receiving the report of the Chairman, ARU. He rather, relying upon the illegally collected evidence in that inquiry, makes a "Summary for the Prime Minister" proposing to the Prime Minister to advise the President to form an opinion that the Petitioner Judge may be guilty of misconduct and direct the Council to inquire into the matter under Article 209 of the Constitution.

xii. The Law Minister opines that the Petitioner Judge appears to have committed "grave misconduct" by not declaring three London properties owned by his spouse and children and by not explaining the source of their purchase in his tax record, without appreciating, rather ignoring, the fact that no office or authority in Pakistan, under the relevant law, has ever asked the spouse and children of the Petitioner Judge to explain their sources to purchase the said properties and their failure to declare the same in their tax record, if there was any obligation to declare the foreign assets under the ITO.

xiii. The Prime Minister remains unaware of the actions of his Special Assistant, the Chairman, ARU working right under his nose at the Prime Minister's Office. Further, the Prime Minister without asking the Law Minister or the Chairman, ARU about their unconstitutional and illegal investigation and evidence collection against a constitutional court judge and without inquiring whether any office or authority had asked the spouse and children of the Petitioner Judge to explain the sources of purchase of those properties and whether the properties owned by the spouse and children of the Petitioner Judge attract any liability of the Petitioner Judge, goes ahead, without any application of mind, to advise the President to form the opinion and direct the Council, and to sign the draft Reference.

xiv. The President also does not ask the said questions and approves the Prime Minister's advice and signs the draft

> Reference annexed with the Summary without applying his independent mind, exercising his discretion and forming his own opinion.

Such blatant violations of the law and Constitution by the Chairman, and Legal Expert of the ARU, the officers of FBR, FIA and NADRA, the Law Minister and the Prime Minister; undue haste in processing the matter; dubious credentials and ring of anonymity around Mr. Dogar (the complainant); oddity of approaching ARU instead of the Council; failure on the part of ARU to convincingly show how they located the addresses of the three UK properties of the family of the Petitioner Judge; afterthought of referring to *192.com* and again failing to show how *192.com* helped; failure of the ARU to show who searched through *192.com* and the UK HM Land Registry, who registered with them and who paid for it; keeping names of those persons in secret; resultant necessary inference of having done the covetous transnational surveillance of the Petitioner Judge and his family to dig out the addresses of the three properties with support of the intelligence agencies; and rushed and mechanical approval of the Summary by the Prime Minister, all these facts and circumstances when read in the background of the assertions made by the current ruling political parties (PTI and MQM) in their review petitions filed against the *Faizabad Dharna* judgment, lead to a clear and a convincing finding that the whole process initiated under the garb of accountability of the Petitioner Judge suffers from more than mere *malafide* of law and jumps up into the realm of *malafide* of fact also. In the present case, other than the legal and constitutional violations, extraneous considerations, as mentioned above, have come to surface, which reflect vindictiveness and ulterior motive. Knowing well that there was no determination of tax violation of the Petitioner Judge and no explanation of the spouse and children of the Petitioner Judge was ever sought, the matter was still pushed ahead with the collateral purpose of defiling the honour of the Petitioner Judge and with the design to pressurize him into resignation or lead to his removal. These facts go beyond *malafide* of law and fall within the ambit of *malafide* of fact as they show bad faith and colourable exercise of powers for collateral or ulterior purposes not authorized by the law under which the actions were purportedly taken. Therefore, the actions of entertainment of the complaint, the investigation and surveillance for the collection of

evidence, the putting up of Summary before the Prime Minister by the Law Minister and finally the approval of the Summary by the Prime Minister and placing the "information" before the President under Article 209(5) of the Constitution for removal of the Petitioner Judge from office are found to be tainted with both *malafide* of law and *malafide* of fact. All the Government actors mentioned above are held responsible. As the buck stops with the Prime Minister in a constitutional parliamentary democracy, the major burden of these malicious actions fall on his shoulders who also happens to be the leader of a political party that had filed the review petition with an astonishingly unique prayer seeking ouster of the Petitioner Judge for expressing an independent view.

*Held*

81. In view of the above findings, all the acts and steps from the entertainment of the complaint till the sanction of the "Summary" for placement of the "information" before the President by the Prime Minister are declared illegal, without jurisdiction, *malafide* of law and fact, and thus unconstitutional and of no legal effect. While, the acts of the President approving the advice of the Prime Minister, and signing and sending the Reference against the Petitioner Judge are declared without jurisdiction and *coram non judice,* and thus unconstitutional and of no legal effect. The outcome of the said declarations is that:

(i) the Reference against the Petitioner Judge is quashed, and as a result the proceedings, including the Show Cause Notice, before the Council stand abated;

(ii) the authorities concerned are directed to initiate criminal and disciplinary proceedings against the Chairman, Legal Expert and Members of the ARU, as well as, against the other defaulting officials of FBR and NADRA for their illegal acts, under the IFTA, ITO and NADRA Ordinance, 2000; and,

(iii) the Registrar of this Court is directed to place the matter before the Hon'ble Chief Justice of Pakistan for considering to initiate appropriate proceedings for a thorough inquiry of the matter of leaking and publicizing the Reference and the allegations made therein, and for taking legal action against the persons found involved therein.

I allow all the constitutional petitions in these terms.

*Reasons for my Disagreement with the Short Order*[83]

82. Justice Ruth Bader Ginsburg[84] once commented, "Judges disagree without being disagreeable." While this is largely true for us judges, history is not as forgiving. Through Short Order dated 19.06.2020 the Reference against the Petitioner Judge was quashed by unanimous opinion of all the members of this Full Court Bench. However, the Majority added certain directions to the FBR and the Council whereby the Commissioner, FBR was directed to issue notices under ITO to the spouse and children of the Petitioner Judge regarding the acquisition of the three foreign properties. He was also directed to decide the notices and the Chairman FBR was directed to submit a report of the decision to the Council. While the Council was asked to consider the matter by invoking its *suo moto* powers with or without there being a report filed by the Chairman, FBR. All these directions were to be actualized within a specified time-line provided in the Short Order. With respect, I could not persuade myself to concur with these directions. Here under are my reasons for the disagreement.

83. The spouse and children of the Petitioner Judge like all other citizens of Pakistan are independent persons and enjoy an inalienable right to the protection of law. As they were not party to the instant proceedings and were never summoned or made a party to the proceedings by the Court, any adverse order against them, will deprive them of their inalienable right to due process under the Constitution and the law, and will contravene the well- entrenched and deep rooted principle of *audi alteram partem*. The Court cannot go against the grain, values and scheme of our Constitution and the established principles of law. After the Reference against the Petitioner Judge was unanimously quashed by this Full Court Bench, the case set out against the Petitioner Judge came to an end. In the absence of any allegations of corruption against the Petitioner Judge or of his holding foreign properties in the names of his wife and children as a trustee or a *benamidar*, this Court, and for that matter the Council, have no

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[83] Paragraphs 4-11, thereof.

[84] Former Associate Justice of the Supreme Court of the United States (1933-2020)

concern with the assets and properties of the spouse and the children of the Petitioner Judge.

84. The FBR does not require any direction from this Court for taking any proceedings against any individual (including a constitutional court judge or his spouse and children) for a tax violation under the Income Tax Ordinance, 2001, if any. Similarly, the Council is also free and independent to exercise its *suo moto* jurisdiction against any judge of the constitutional courts when so required. It is nobody's case that either the FBR or the Council were reluctant or unwilling to perform their functions under the law and the Constitution.

85. The principle is more than settled that if an Authority has no jurisdiction in the matter under the law, the jurisdiction cannot be conferred on that Authority by an order of the Court.[85] Under Section 122 of ITO an assessment order cannot be reopened after a lapse of five years by the FBR. Also, regulating the Tax Commissioner to function and perform his duties within a prescribed time-line, which is not so provided under the ITO amounts to entering the realm of judicial legislation.

86. With respect, direction to the Chairman, FBR to send the Report to the Council would make the Chairman, FBR a complainant and the Report a new complaint. The FBR is an organ and instrumentality of the Federal Government and is not empowered to directly approach the President under Article 209 of the Constitution unless the Federal Government i.e., the Cabinet, approves to place such information before the Council through the President. The Federal Government of any of its Departments cannot make a complaint or report in relation to the conduct of a judge directly to the Council, and it has to place such a complaint or report in the form of "information" before the President to form his "opinion" and make direction (Reference) in accordance with the provisions of Article 209 (5) of the Constitution. Clear letter of the Constitution cannot be bypassed. A thing required by law to be

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[85] See Badshah Begum v. Additional Commissioner, 2003 SCMR 629.

done in a certain manner must be done in the manner as prescribed by law or not to be done at all.[86]

87. This Court cannot, it is submitted with respect, direct someone to file a complaint against a constitutional court judge before the Council and then make the Council consider the said complaint. This would have a far reaching effect as it would dismantle the independence and neutrality of the Council and the constitutional scheme under Article 209 that safeguards a constitutional court judge. It also flouts the right to fair trial under Article 10A of the Constitution. The Council is a constitutional body which enjoys *suo moto* powers to inquire into the conduct and capacity of a judge. Acting on its own motion (*suo moto*) and being asked to act on its own motion (*suo moto*) are two inconsistent and irreconcilable concepts. The Council is structured under the Constitution to exercise its *suo motu* powers independent of any extraneous influence. I am fortified by the observations of Ajmal Mian, C.J. made in *Ikram* case.[87] The learned Chief Justice while declining the prayer, in that case, for issuing direction to the President to make Reference against some constitutional court judges under Article 209(5) of the Constitution observed that Article 209(5) "does not admit filing of a Constitutional petition for a direction to the Supreme Judicial Council or to the President to initiate proceedings of a judicial misconduct against a Judge of a superior Court. ... This Court or a High Court cannot take upon itself the exercise to record even a tentative finding that a particular Judge has committed misconduct warranting filing of a reference against him under Article 209 of the Constitution."

88. In my view, the observation that the right to appeal under the ITO would be available to the spouse and children of the Petitioner Judge while simultaneously, the Council may also commence proceedings - can lead to conflicting results and thereby, may render the appeal under the ITO otiose and futile. Besides, the Council does not enjoy any power to issue directions to any judicial or a quasi-judicial forum to speed up pending matters against a constitutional court judge.

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[86] See Assistant Collector v. Khyber Electric, 2001 SCMR 838; S.M.C. No. 18 of 2010, PLD 2011 SC 927; and, Zia Ur Rehman v. Ahmed Hussain, 2014 SCMR 1015.

[87] Ikram Chaudhry v. Federation, PLD 1998 SC 103, para 11.

89. The proceedings initiated through the short order after the quashment of the Reference against the Petitioner Judge would mean that the Council must now consider if a judge can be made vicariously liable for misconduct for his family's affairs, a concept that is alien to the Code of Conduct and has nothing to do with judicial integrity as discussed above.

*In the end*

90. In our constitutional democracy, it is essential that everyone enjoys his or her domain of freedom, free from Governmental intrusion - lest it aims to check an unlawful activity. Privacy, liberty, autonomy and agency are integral parts of dignity and life and are cherished constitutional values that determine the frontiers of a living constitutional democracy. There can be no compromise on either judicial independence or judicial accountability. These are essential pillars, which together uphold public confidence and legitimacy of the judicial institution. The real and enduring strength of the judiciary, however, is anchored in ruling according to the Constitution and the law without fear or favour, irrespective of public perception and irrespective of who is before the court, an ordinary litigant or a judge of the highest constitutional court of the land. An American poet once said:

*The perfect judge fears nothing*

*- he could go front to front before God;*
*Before the perfect judge all shall stand back*

*- life and death shall stand back*

*- heaven and hell shall stand back.*[88]

(Syed Mansoor Ali Shah)[89]
Judge

Islamabad,
the 04th November, 2020.
**Approved for Reporting.**
*Sadaqat*

[88] Walt Whitman, “Great are the Myths” in Leaves of Grass.

[89] Before parting I wish to appreciate and acknowledge the valuable assistance rendered by Mr. Zafar Iqbal Khokhar, Research Officer cum Civil Judge, Supreme Court Research Centre. (SCRC)

**P L D 2021 Supreme Court 327**

**Present: Mushir Alam, Faisal Arab and Syed Mansoor Ali Shah, JJ**

**Messrs CHERAT CEMENT CO. LTD., NOWSHERA and others---Petitioners/Applicants**

**Versus**

**FEDERATION OF PAKISTAN through Ministry of Petroleum and Natural Resources and others---Respondents**

Civil Review Petitions Nos. 421 to 454, 458 and 459 of 2020 and Civil Miscellaneous Applications Nos.6317 to 6353, 6355 to 6421, 6423 to 6427, 6735, 6736, 6839, 6841, 6843 and 6845 of 2020 in Civil Review Petitions Nos. Nil of 2020.

(On review of this Court's judgment dated 13.08.2020 passed in Civil Appeal No. Civil Appeals Nos.1113 to 1155 of 2017 and Civil Petitions Nos.3124, 387-P, 389-P, 392-P, 393-P, 394-P, 399-P, 400-P, 3027, 3028, 3029, 3030, 3138, 3241, 3259, 3260, 3327, 3411 of 2017 and 3385 of 2018 etc.).

Per Mushir Alam, J; Faisal Arab, J; agreeing; Syed Mansoor Ali Shah, J. dissenting [Majority view]

**(a) Gas Infrastructure Development Cess Act (IV of 2015)---**

----Ss. 3 & 4---Industrial and commercial consumers of natural gas---Gas Infrastructure Development Cess ( GIDC cess )---Gas Infrastructure Development Cess Act, 2015 ( GIDC Act, 2015'), vires of---[Per Mushir Alam, J: Supreme Court in the judgment under review had declared the GIDC Act, 2015 as intra vires the Constitution---When, the GIDC Act, 2015 had been declared to be intra vires by the Supreme Court then every provision of it, which either created an obligation or granted any relief was enforceable in law---None of the grounds urged by the petitioners called for reviewing the judgment under review---Review petitions were dismissed and the Gas Infrastructure Development Cess Act, 2015 (by a majority of 2:1, with Syed Mansoor Ali Shah, J dissenting) was held to be intra vires the Constitution.

Per Syed Mansoor Ali Shah, J. dissenting [Minority view]

**(b) Supreme Court Rules, 1980---**

----O.XXVI, R. 8---Civil Procedure Code (V of 1908), O. XLVII, R.1---Constitution of Pakistan, Art. 188---Review petition, hearing of---Constitution of Bench---Scope---Application/petition for review shall, as far as practicable, be posted before the "same Bench" that delivered the judgment or order sought to be reviewed---Judge who dissented from the majority judgment should be Member of the Bench that was to hear the review petition, as a judgment pronounced in terms of the majority opinion of a larger Bench could not be reviewed by a smaller Bench consisting of only the Judges holding the majority opinion---Jurisdiction and judicial power of the Judge who earlier dissented from the majority judgment of the Bench was similar and co-extensive with that of those Judges whose opinion became the majority judgment of the Bench, in hearing the review petition against that majority judgment. [Minority view]

Rule 8 of Order XXVI of the Supreme Court Rules, 1980 very clearly and firmly prescribed that the application for review shall, as far as practicable, be posted before the "same Bench" that delivered the judgment or order sought to be reviewed. The expression "same Bench" left little room to speculate the constitution of the Bench: the "same Bench" meant the same judges, as far as practicable, and the same number of judges, i.e. the same numeric strength of the Bench.

PLD 2013 SC 1024; PLD 1979 SC 741; PLD 1979 SC 53 and 1979 SCMR 427 ref.

The Judge who dissented from the majority judgment, if available, should be Member of the Bench that was to hear the review petition, as a judgment pronounced in terms of the majority opinion of a larger Bench could not be reviewed by a smaller Bench consisting of only the Judges holding the majority opinion. It was utmost necessary to maintain quorum of the Bench that delivered the judgment under review. It was because of such legal compulsion, that new Members were added to the Bench when any of its earlier Members retired or was not available for any other reason, to maintain the quorum of the Bench for hearing the review petition.

Gadoon Textiles Mills v. WAPDA 1997 SCMR 641; Gandaf Steel Industries v. Federation 1997 SCMR 1669; Benazir Bhutto v. President of Pakistan PLD 1998 SC 388; Benazir Bhutto v. President of Pakistan

PLD 2000 SC 77; Nawaz Sharif v. Imran Khan PLD 2018 SC 1; Sheonandan Paswan v. State of Bihar AIR 1987 SC 877 and Shyam Lal Sharma v. Union of India AIR 1987 SC 1137 ref.

Grounds of review which were, in fact, limitations on the power of review of the Supreme Court applied equally to the Judges whose opinion prevailed for being the majority view and to the Judge whose opinion remained inoperative for being the minority view. The Judge whose opinion remained the minority view in the main case could review the Judgment of the Bench that was pronounced in terms of the majority opinion, on any of the said grounds of review, as could a Judge who delivered the majority opinion.

PLD 1979 SC 741; PLD 1979 SC 53; AIR 1987 SC 877; Union of India v. Tulsiram Patel AIR 1985 SC 1416; Shyam Lal Sharma v. Union of India AIR 1987 SC 1137; [2011] 1 MLJ 25; Aamer Zaman v. Omar Ayub 2015 SCMR 890 and 2015 SCMR 1303 ref.

**(c) Supreme Court Rules, 1980---**

----O. X, R. 1---Judgment/order delivered by a Bench of the Supreme Court---Majority view/opinion---Scope---Judgment pronounced or Order made in terms of the majority opinion was the judgment or order of the Bench, and not of the Judges holding the majority opinion. [Minority view]

When a case was heard by a Bench of two or more Judges, the case was decided in accordance with the opinion of such Judges or of the majority of such Judges. Judgment or order of the Court was pronounced in terms of the majority opinion; such judgment or order was of the Bench that heard the case and, for that matter, of the Court, and not only of the Judges whose opinion prevailed as a majority opinion. Numeric strength of the whole Bench determined the judicial power of its Members, and not the numbers of the individual Judges in majority.

(2018) 11 SCC 305 ref.

**(d) Supreme Court Rules, 1980---**

----O. X, R. 1 & O.XI---Judgment of larger Bench of the Supreme Court---Scope---Such judgment was binding on the Benches of the Supreme Court consisting of Judges less than the larger Bench---Smaller Bench could not request for constitution of a larger Bench to revisit the opinion of a larger Bench on any question or principle of law; only a Bench of co-equal strength could make such request. [Minority view]

Muhammad Saleem v. Fazal Ahmad 1997 SCMR 315; Babar Shehzad v. Said Akbar 1999 SCMR 2518; All Pakistan Newspapers Society v. Federation PLD 2004 SC 600; Ata Ullah v. Surraya Parveen 2006 SCMR 1637; Azhar Siddiqui v. Federation PLD 2012 SC 774 and Central Board of Dawoodi Bohra Community v. State of Maharashtra AIR 2005 SC 752 ref.

**(e) Cess---**

----Scope---Visible co-relation must exist between the collection of Cess and its expenditure---In a case where the fee was to be utilized for service that was to be rendered in future, it was important to see how the moneys collected were being expended and whether there was a transparent and confidence inspiring co-relation between the two---Furthermore amount of Cess so collected was for a specified purpose and must be accounted for accordingly---Cess was not the collection of general revenue which could be utilized anywhere. [Minority view]

**(f) Gas Infrastructure Development Cess Act (IV of 2015)---**

----Ss. 3 & 4---Industrial and commercial consumers of natural gas---Gas Infrastructure Development Cess ( GIDC cess )---Whether there was any co-relation between the collection of the GIDC cess and expenditure therefrom---Held, that the data provided by the Government showed that it already had Rs.101.357 billion of GIDC cess in excess after factoring in the expenditure to be incurred on certain gas pipelines and gas storage projects ( the Projects ) unless another gas pipeline project was put into motion---Co-relation between the collection and expenditure of GIDC cess stood completely frozen since the year 2011 raising fingers on the credibility and transparency of the Projects and on the availability of service (supply of natural gas) against the fee charged, in the near future---Further collection of arrears (in terms of the majority view of the judgment under review) in the sum of Rs. 456.946 billion, leading to an excess of Rs. 355.589 billion unduly promoted unjust enrichment and seriously offended the right to property and business of the petitioners guaranteed under the Constitution---After a decade of charging GIDC cess from

gas consumers and after having collected Rs 295.40 billion to-date there was no sign of development of the gas pipeline projects in the country---Absence of the said projects and emphasis on the import of LNG suggested that the Government was either not willing to or was unable to complete the Projects and therefore the shortfall in gas supply was being increasingly plugged through imported LNG---Direction to recover arrears given by the majority in the judgment under review, was, therefore, not justified and legally sustainable and was liable to be recalled---Review petitions were allowed. [Minority view]

**(g) Gas Infrastructure Development Cess Act (IV of 2015)---**

----Ss. 3 & 4---Constitution of Pakistan, Arts 78(1) & 78(2)---Industrial and commercial consumers of natural gas---Gas Infrastructure Development Cess ( GIDC cess )---Whether GIDC cess was to be deposited in the Federal Consolidated Fund or the Public Account of the Federation---GIDC cess amount collected under the Gas Infrastructure Development Cess Act, 2015 (GIDC Act) was to be credited in the Public Account with an entity distinct from the other revenues credited to it, and must be earmarked for utilization for the purposes specified in the GIDC Act only---No disbursement could be made from the GIDC cess amount for general governmental expenditures or any other purpose---Observations (of the majority in the judgment under review) regarding deposit of the GIDC cess amount in the Federal Consolidated Fund without appreciating the difference between the Federal Consolidated Fund and the Public Account under Article 78 of the Constitution, were, therefore, liable to be recalled. [Minority view]

Article 78(1) of the Constitution provided that all revenues received by the Federal Government, all loans raised by that Government, and all moneys received by it in repayment of loans shall form part of consolidated fund, to be known as the Federal Consolidated Fund. While all other moneys received by or on behalf of the Federal Government, or received by or deposited with the Supreme Court or any other court established under the authority of the Federation were to be credited to the Public Account of the Federation as per Article 78(2) of the Constitution. The expression "all revenues" used in Article 78(1) covered the revenues (taxes, duties, etc) raised for Governmental purposes, and did not include the revenue that could not be used for any Governmental purpose, like the compensatory fee collected for rendering any service to the payers of that fee. Such compensatory fee fell within the expression "all other moneys" used in Article 78(2) and was to be credited to the Public Account, and not to the Federal Consolidated Fund.

AIR 1953 Bom. 242 ref.

The GIDC cess amount collected under the Gas Infrastructure Development Cess Act, 2015 (GIDC Act) was to be credited in the Public Account with an entity distinct from the other revenues credited to it, and must be earmarked for utilization for the purposes specified in the GIDC Act only. No disbursement could be made from the GIDC cess amount for general governmental expenditures or any other purpose. The Supreme Court was not assisted on said point at the time of the hearing of the judgment under review, and made the observations (in the majority view) regarding deposit of the GIDC cess amount in the Federal Consolidated Fund without appreciating the difference between the Federal Consolidated Fund and the Public Account under Article 78 of the Constitution. The said observations were, therefore, liable to be recalled in review.

In case the GIDC Act became in-operational on failure of the Federal Government to take steps to commence work on the laying of the North South Gas Pipeline within six months, the amount of the GIDC cess collected were liable to be returned and refunded to the payers. Review petitions were allowed.

**(h) Gas Infrastructure Development Cess Act (IV of 2015)---**

----Ss. 3 & 4 & Second Sched.---Constitution of Pakistan, Art. 25---Industrial and commercial consumers of natural gas---Gas Infrastructure Development Cess ( GIDC cess )---Different rates of GIDC cess for different industrial and commercial consumers---Discrimination---Judgment under review did not consider the rationale behind fixing different rates for GIDC cess within different sectors but instead discussed the question of discrimination between the industrial/commercial consumers and the domestic consumers, which was not the question agitated by the petitioners---No intelligible differentia seemed to exist amongst the different industrial and commercial gas consumers mentioned in the Schedule for the purposes of the

Gas Infrastructure Development Cess Act, 2015 ( the GIDC Act )---Discrimination in providing maximum limit of GIDC cess for different sectors was overlooked in the judgment under review, and thus provided a valid ground to review it---In terms of Art. 25 of the Constitution which ensured equality and equal treatment among equals, the Federal Government could not charge the GIDC cess at the rate more than Rs.100 per MMBTU from any category of gas consumers---Review petitions were allowed. [Minority view]

**(i) Gas Infrastructure Development Cess Act (IV of 2015)---**

---Ss. 3 & 4---Civil Procedure Code (V of 1908), S. 11---Industrial and commercial consumers of natural gas---Gas Infrastructure Development Cess ( GIDC cess )---Res judicata, principle of---Scope and applicability---Four-Member Bench of the Supreme Court in the case of Pir Bukhsh and others v. Chairman, Allotment Committee (PLD 1987 SC 145) ( the Pir Bukhsh case ) elaborately discussed the principle of res judicata and concluded that in a controversy raising a dispute inter parties, the matter adjudged was conclusive as between the parties both on question of fact and question of law---However, an exception to said principle was created in the judgment under review, heard by a three-member Bench, by holding that it would be difficult to apply such a principle in matters where a power or a right or an obligation solely depended upon the very legitimacy of the enactment that had come under challenge in a Court of law on the touchstone of the Constitution---It was, not appropriate for the Three-Member Bench hearing the judgment under review to deviate from principle of res judicata laid down by an earlier Four-Member Bench---Three-Member Bench had two options: first, to follow the law declared earlier by the Four-Member Bench; or second, to refer the matter to a Four-Member Bench to decide whether that opinion should be reconsidered by a larger Bench---As the majority in the judgment under review did not opt for the second option, the principle of res judicata as settled in the Pir Bukhsh case was fully applicable to the decree holders/petitioners in the suit decided by the (Sindh) High Court---Review petitions were allowed. [Minority view]

Pir Bukhsh and others v. Chairman. Allotment Committee PLD 1987 SC 145 ref.

**(j) Gas Infrastructure Development Cess Act (IV of 2015)---**

----Ss. 3 & 4---Constitution of Pakistan, Fourth Sched., Pt. I, Entry No. 51---Industrial and commercial consumers of natural gas---Gas Infrastructure Development Cess ( GIDC cess )---Tax imposed on natural gas through a Money Bill---Constitutionality---In the judgment under review while interpreting Entry No.51 of Part I of the Federal Legislative List contained in the Fourth Schedule to the Constitution, the majority took a view contrary to that of a Bench of co-equal strength expressed in Federation of Pakistan through Secretary Petroleum and Natural Resources v. Durrani Ceramic (2014 SCMR 1630 : PLD 2015 SC 354: 2014 PTD 2016) ( the Durrani Ceramic case ) by stating that "the National Assembly was fully competent to impose tax on natural gas through a Money Bill on the strength of Entry No. 51 of the Federal Legislative List. ---Said finding was against settled principles of the law of precedent and needed to be recalled---Review petitions were allowed. [Minority view]

Federation of Pakistan through Secretary Petroleum and Natural Resources v. Durrani Ceramic 2014 SCMR 1630 : PLD 2015 SC 354 and 2014 PTD 2016 ref.

**(k) Gas Infrastructure Development Cess Act (IV of 2015)---**

----Ss. 3 & 4---Constitution of Pakistan, Fourth Sched., Pt. I, Entry No. 27 & Pt.II, Entry Nos. 2 & 15---Industrial and commercial consumers of natural gas---Gas Infrastructure Development Cess ( GIDC cess )---Whether Entry No.27 of Part I of the Federal Legislative List justified the legislative power of the Federation to enact the Gas Infrastructure Development Cess Act, 2015 ( the GIDC Act )---Held, that Entry No. 27 of Part I of the Federal Legislative Listread that "Import and export across customs frontiers as defined by the Federal Government, inter-provincial trade and commerce, trade and commerce with foreign countries; standard of quality of goods to be exported out of Pakistan."---Said entry clearly related to trade with foreign countries (import and export), and inter-provincial trade and commerce, and in no way covered the subject of "natural gas"---Gas Infrastructure Development Cess Act had not taxed or charged fee on the foreign or inter-provincial trade and commerce; it had charged fee on use of natural gas---Entry No.27,

in no terms, justified the legislative power of the Federation to enact the GIDC Act---Gas Infrastructure Development Cess Act fells under Entry No. 2 read with Entry No.15 of Part II of the Federal Legislative List---Parties were not heard on said point at the time of original hearing of the case; which point, therefore, escaped notice of the Bench that heard the judgment under review---Such error appeared to be apparent on the face of the record and was liable to be recalled---Review petitions were allowed. [Minority view]

Makhdoom Ali Khan, Senior Advocate Supreme Court for Petitioners/Applicants (in C.R.Ps. Nos. 444 to 447, 453, 454 of 2020, C.M.As. Nos. 6326, 6330, 6332 and 6333 of 2020).

Muneer A. Malik, Senior Advocate Supreme Court for Petitioners/Applicants (in C.R.Ps. Nos. 451 of 2020 and C.M.A. 6418 of 2020).

Isaac Ali Qazi, Advocate Supreme Court for Petitioners/Applicants (in C.R.Ps. Nos. 421, 437, 438, 449, 452 and C.M.A. 6407 of 2020).

Syed Ali Zafar, Advocate Supreme Court for Applicants (in C.M.As. Nos. 6411 and 6412 of 2020).

Rashid Anwar, Advocate Supreme Court for Petitioners/ Applicants (in C.R.Ps. Nos. 426 to 428, C.M.As. Nos. 6342 to 6346, 6348 to 6353, 6355 to 6382, 6384 to 6406, 6413 to 6415 of 2020).

Naeem Bokhari, Advocate Supreme Court for Applicants (in C.M.A. No.6341 of 2020).

Salman Akram Raja, Advocate Supreme Court for Petitioners/ Applicants (in C.R.Ps. Nos.422, 423 and 450 of 2020 and C.M.As. Nos. 6320, 6323 to 6325, 6327 to 6329, 6334, 6339 and 6340 of 2020).

Sardar Muhammad Ghazi, Advocate Supreme Court for Petitioners (in C.R.Ps. Nos. 424, 425 and 426 of 2020).

Abid S. Zuberi, Advocate Supreme Court for Petitioners/ Applicants (in C.R.P. No. 427 and C.M.As. Nos. 6423 and 6424 of 2020).

Abdul Sattar Pirzada, Advocate Supreme Court for Applicants (in C.M.A. No. 6319 of 2020).

Qazi Ghulam Dastgir, Advocate Supreme Court for Petitioners (in C.R.Ps. Nos. 439 to 443 of 2020).

Mahmood A. Sheikh, Advocate-on-Record/Advocate Supreme Court for Petitioners/Applicants (in C.R.Ps. Nos. 448, 453, 424 to 426 of 2020 and C.M.As. Nos. 6317 to 6421 of 2020).

Tariq Aziz, Advocate Supreme Court/Advocate-on-Record for Applicants (in C.M.As. Nos. 6317 and 6318 of 2020).

Mian Mahmood Rashid, Advocate Supreme Court for Applicants (in C.M.As. Nos. 6321 to 6322 of 2020).

Shahzada Mazhar, Advocate Supreme Court for Applicants (in C.M.As. Nos. 6331 and 6335 of 2020).

Arshad Ali Chaudhry, Advocate-on-Record and Habib-ur-Rehman, Advocate for Applicants (in C.M.As. Nos. 6336 and 6408 of 2020).

Ahsan Mehmood, Advocate Supreme Court for Applicants (in C.M.A. No.6338 of 2020).

M. Anas Makhdoom, Advocate Supreme Court for Applicants (in C.M.A. No. 6383 of 2020).

Haider Waheed, Advocate Supreme Court for Applicants (in C.M.As. Nos. 6409 and 6410 of 2020).

Mrs. Tasneem Amin, Advocate Supreme Court/Advocate-on-Record for Petitioners/Applicants (in C.R.Ps. Nos. 458 of 2020 and C.M.A. No. 6416 of 2020).

Barrister M. Abdur Rahman, Advocate Supreme Court for Applicants (in C.M.As. 6417, 6419 and 6420 of 2020).

Kh. M. Saeed, Advocate Supreme Court for Petitioners (in C.R.P. No. 458 of 2020).

Mrs. Navin Salim Merchant, Advocate Supreme Court for Petitioners/Applicants (in C.R.P. No. 459 and C.M.A. 6736 of 2020).

Naeem Suleman, Advocate Supreme Court for Applicants (in C.M.As. 6425, 6426, 6839, 6841 and 6843 of 2020).

Abdul Qadir Khan, Advocate-on-Record/Advocate Supreme Court for Applicants (in C.M.As. Nos. 6425 to 6427 of 2020).

Khalid Javed, Advocate Supreme Court for Applicants (in C.M.A. No. 6735 of 2020).

Syed Rifaqat Hussain Shah, Advocate-on-Record/Advocate Supreme Court for Petitioners/Applicants (in C.R.Ps. Nos. 422, 423, 450, 428 to 436, 439 to 443, 450 of 2020 and C.M.As. Nos. 6320 to 6330, 6332 to 6334, 6337 to 6340, 6342 to 6353, 6365 to 6406, 6413 to 6415 of 2020).

K.A. Wahab, Advocate-on-Record for Petitioners/Applicants (in C.R.Ps. Nos. 427, 459 of 2020 and C.M.As. 6423, 6424, 6735, 6737 and 6846 of 2020).

M. Kasim Mirjat, Advocate-on-Record for Petitioners (in C.R.Ps. Nos. 444 to 447, 451, 453 and 454 of 2020).

Ch. Akhtar Ali, Advocate-on-Record for Applicants (in C.M.As. Nos. 6331 and 6335 of 2020).

Ch. Aamir Rehman, Additional Attorney General for Respondents.

Dr. Arshad Malik, EDG, Ministry of Energy.

Abdul Rasheed Jokhio, Director (Technical), Ministry of Energy.

Umar Farooq, AD (Legal), Ministry of Energy.

Muhammad Waqar Rana, Advocate Supreme Court, Barrister Mian Belal Ahmed, Advocate Supreme Court, Assisted by Abdul Malik Baig, Advocate (for SNGPL).

Dates of hearing: 27th to 29th October and 2nd November, 2020.

**JUDGMENT**

C.M.As. Nos.6341, 6409, 6410, 6417, 6419, 6420, 6418 and 6421/2020

**MUSHIR ALAM, J**.---Since the counsel in the main cases have been appointed as Federal Law Minister/Advocate General KPK, subject to all just exception, these applications are allowed, the respective ASCs are granted permission to argue. Let the review petitions be numbered, which shall be disposed of along with other review petitions.

2. Applications for joinder by parties who were either not party in earlier round and/or not heard in the main appeals, in view of the order proposed to be passed in main CRPs' all the applications stand disposed off.

All Review Petitions and C.M.As.

3. The Infrastructure Development Cess Act, 2015 (the GIDC, Act, 2015) became Act of the Parliament on 15.05.2015. Vires of the said Act was challenged. In the Sindh High Court suits were filed on its Original Side. The High Court declared the levy under the said Act to be unconstitutional vide its judgment dated 26.10.2016. Similar challenge was made in the Peshawar High Court by invoking its constitutional jurisdiction; which held the levy under the said Act to be intra vires the Constitution, vide its judgment dated 31.05.2017, Appeals from the judgment of the Peshawar High Court were preferred before this Court, whereas against the judgment of the Single Judge of the Sindh High Court only one High Court Appeal was filed in one suit though judgment dated 26.10.2016 was rendered in 377 suits.

4. On 22.10.2019 when this Court was hearing appeals arising from the decision of the Peshawar High Court it was pointed out to it that in so far as the decision of the Sindh High Court is concerned High Court Appeal No. 361 of 2016 is pending before Division bench of the High Court. On that date this Court passed an order that in all identical matters pending in all High Courts, opportunity be given to such litigants and their counsel to present their case before us on the merits of the controversy. This was done so that the challenge to the vires of the said Act be adjudicated upon once and for all at this Court's level. Pursuant to our order dated 22.10.2019 several miscellaneous applications for joining in these proceedings as party were filed by those who had challenged the vires of the GIDC Act, 2015 in various other High Courts. All of them were given opportunity to present their point of view on the merits of the controversy. Certain other petitions which were filed against the judgment of the Peshawar High Court and had not come up for hearing at the time of grant of leave to appeal were also taken up for hearing so that the same could be decided together with the appeals. This Court then finally vide its judgment dated 13.08.2020 declared that the Act in question is intra vires of

the Constitution. The petitioners in all these petitions fixed before us are seeking review of our judgment dated 13.08.2020.

5. This Court distinguished the principle of res judicata enunciated by this Court in the case of Pir Bukhsh and others v. Chairman Allotment Committee (PLD 1987 SC 145) in paragraphs 10 and 11 of the judgment under review. The contents of paragraphs 10 and 11 of the judgment for convenience sake are reproduced below:-

> 10. Any relief which a litigant seeks in a judicial proceeding with regard to any power or a right or an obligation connected with some property or an office which power or right or obligation is not dependent upon the legitimacy of a legislative enactment and stands or falls on its own strength then in such cases when the decision rendered by a court of competent jurisdiction attains finality, there is no difficulty in applying the principle of res judicata to such a decision. However, it would be difficult to apply such a principle in matters where a power or a right or an obligation solely depends upon the very legitimacy of the enactment that has come under challenge in a Court of law on the touchstone of the Constitution. In such a situation the existence of such power or right or obligation would solely depend on the final adjudication as to the legal validity of the enactment itself. This could be understood from a situation where a controversy as regards constitutional validity of an enactment has come under challenge before two High Courts, one declaring the enactment ultra vires the Constitution and the other intra vires. If the principle of res judicata is applied to the decision of the High Court that declared the law ultra vires as the same was not challenged any further by the Government then two conflicting declarations would stand side by side on the legitimacy of a legislative enactment, one party treating the law valid and the other invalid. This would lead to treating an Act of the parliament valid for some and invalid for others though both the set of persons are similarly placed. If the decision rendered by the High Court that declared the law intra vires the Constitution is only challenged before the Supreme Court and after examining the merits of the case the enactment is declared by this Court to be intra vires the Constitution, then in such peculiar situation when this Court finally validates the legislative enactment then the same has to be applied uniformly to every person falling within its ambit. Such final judicial determination on the legitimacy of a legislative enactment has to be treated as a judgment in rem regardless of the fact that the judgment of the High Court that invalidated the very same enactment was not challenged before this Court. Such a situation warrants departure from the doctrine of res judicata. Omission of a public functionary to file appeal cannot put fetters on the universal application of a legislative enactment declared by this Court to be constitutionally valid as it would amount to repealing the statute for some and treating it valid for others. Hence conflicting decisions on the vires of a legislative enactment of two High Courts, decision of one remains unchallenged in the hierarchy as no appeal was preferred and the other is challenged before this Court, then the verdict of the High Court that went unchallenged, which is in conflict with the final decision. of this Court has to be treated as outmoded and no longer executable.
>
> 11. In the case of Pir Bukhsh and others v. Chairman Allotment Committee (PLD 1987 SC 145), on which much reliance was placed by Mr. Muneer A. Malik, the learned counsel for one of the intervenors, the controversy was with regard to a right of allotment of land which did not depend on the constitutionality of a legislative enactment. In that case, the principle of res judicata clearly applied but this principle, as discussed above, cannot be applied in the same manner to a case where any power or a right or an obligation of a person solely depend upon the legitimacy of a legislative enactment without which such power or right or obligation has no existence of its own. Hence, when the power of the government to charge and the obligation of the persons to pay a tar a fee depends on the determination of vires of a legislative enactment then the final determination of this Court has to be uniformly applied on all those upon whom the law was intended to apply otherwise it would be applied in a discriminatingly manner to a section of persons belonging to one and the same class of persons. The final determination of this Court on the legitimacy of a law has to apply

even to those who had succeeded in obtaining a judgment from a Court lower in the hierarchy that the law is ultra vires the Constitution, they too would be bound by the judgment of this Court which being the final Court of the judicature has through a judicial pronouncement declared a legislative enactment to be valid. The power of the Federal Government to charge the Cess and the obligation of the payers to pay under GIDC Act, 2015 would depend upon such final determination by this Court. Such power or obligation arising from an enactment will not cease to exist for the reason that the High Court in some other proceedings has declared the said Act ultra vires the Constitution which remained unchallenged. We in our minds are therefore clear that where there are two conflicting adjudications with regard to the constitutionality of a legislative enactment, standing side by side, then the one that has the binding effect on the other has to become the law of the land on the subject without any distinction whatsoever as an Act of the Parliament in its application cannot be allowed to be regarded as intra vires the Constitution for one set of persons and ultra vires for another at the same time when both belong to the same class of persons. If this is allowed, it would result in discrimination as some would be bound to discharge the obligation arising from the Act of the Parliament thereby putting them in disadvantageous position against those who are discharged from the obligation on the principle of res judicata. Such a position cannot be allowed to be sustained.'

6. The other ground taken in the review petitions is about the non-utilization of the Cess-fee that had been so far collected. This Court dealt with the said question in paragraph 39 of the judgment in review. The findings arrived at were as follows:

39. The background of the legal history of the controversy in question can be traced back to 2011, when the levy under GIDC Act, 2011 was challenged before the Peshawar High Court which in 2013 declared the levy as ultra vires the Constitution and struck down the GIDC Act, 2011. The Islamabad High Court followed the same course in its judgment in 2014. As a result of these decisions, the matter came before this Court in the case which has come to be known as Durrani Ceramics case. This Court in its judgment refused to interfere with the decision rendered by the Peshawar High Court and declared the GIDC Act, 2011 as unconstitutional, holding that the levy in question was in fact a fee and not a tax, hence, it could not have been imposed through a Money Bill. The case came before this Court again in review, which was dismissed in 2015. Later, the Government enacted the GIDC Act, 2015 as a fee imposing enactment. The constitutional validity of the said Act was also challenged before the High Courts. The Sindh High Court declared the levy unconstitutional vide its judgment dated 26.10.2016 whereas the Peshawar High Court upheld the constitutionality of the new Act vide its judgment dated 31.05.2017. While several other similar matters awaited adjudication before other High Courts issue came before this Court for a second time, in which we vide order dated 22.10.2019 allowed the parties concerned to join the present proceedings as intervenors so that they can have a chance to assist us in the present proceedings and get an opportunity to present their version of the case before us. If we look at this matter in retrospect, there has been continuous litigation pertaining to the constitutional validity of the GIDC cess right from 2011 till July 2020 when we are finally deciding the controversy in these proceedings. Apart from continuous litigation on the issue, we were also told that due to international sanctions on Iran, the response to international tender for EPC contract was very poor as no contractor was willing to undertake the project. On TAPI it is stated that land acquisition proceedings is at an advance stage however work on laying of the pipeline could not start in Afghanistan on account of the insurgency in Afghanistan. It is also stated at the bar that now there are signs that work on laying the pipeline in Afghanistan may commence soon as the final draft of TAPI Project Land Management Law is on final review of the Government of Afghanistan. Hence the delay in the commencement of work on laying the pipelines on account of continuous proceedings in the High Courts as well as before this Court and the levy under both the enactments having been struck down as unconstitutional in the year 2013 and 2016, geopolitical situations in

the neighboring countries which are beyond the control of the Federal 'Government. This means that the projects have not been deliberately abandoned and there is also no material on record to doubt the intentions of Federal Government in this behalf. The Executive, therefore, cannot be blamed for not laying down the pipelines in question. In such a situation where work has not yet started on the laying of the pipelines and no contract has been awarded it would also be premature to ask for laying any report before the National Assembly.

7. An argument, which was extraneous to the scope of the review, was that the benefits granted under its Section 8(2) of the GIDC Act, 2015 are not being extended by the government. We in our decision have not held that the benefit granted under Section 8(2) ibid, which has been extended to a particular class of the consumers of gas on certain. conditions shall not be extended. When the G1DC Act, 2015 has been declared to be intra vires by this Court then every provision of it, which either creates an obligation or grants any relief is enforceable in law. We may further clarify that to seek the relief granted under Section 8(2) of the GIDC Act, 2015 to a particular class entitled to it under certain conditions the remedy lies elsewhere and not in review.

8. However, before parting with this order, we may add here that the learned Additional Attorney General, has stated that the government is agreeable to recover the arrears in 48 installments instead of 24 installments but, the government may also be granted one year's time instead of six months as provided in paragraph 46 of the judgment in review.

9. Several other grounds were also urged before us but one of the grounds in our considered view call for review, hence we dismiss all the review petitions, All the C.M.As. for joinder are also dismissed.

Sd/- JUDGE

Sd/- JUDGE

Sd/- JUDGE

**ORDER OF THE BENCH**

By majority of 2:1, all the review petitions are dismissed.

**SYED MANSOOR ALI SHAH, J.---**I have had the privilege to go through the judgment of my learned brother Mushir Alam, J., with which Faisal Arab, J. has concurred. I, with respect, have not been able to agree with the majority view for the reasons discussed hereunder. As matter of background I had recorded a dissenting view in the judgment under review. While I maintain my view I hear the present review petitions not as a judge carrying a dissenting view but as a member of the Bench that delivered the judgment under review.

Constitution of a Review Bench

2. It may be pertinent to state that initially a three member Bench was constituted to hear these review petitions of which I as a dissenting judge was not a member. Perhaps for the reason that Order XXVI, Rule 8 of the Supreme Court Rules, 1980, which requires that the same Bench to hear the review petition, was over-looked. Subsequently, the roster was revised and I was also made a member of the Bench, making it a four member Bench. The four-member Bench sat and unanimously decided to bring that aforesaid provisions of the Rules to the notice of the Hon'ble Chief Justice for re-constitution of the Bench, vide order dated 21.10.2020. The present Bench, which had earlier heard the case and delivered the impugned judgment, was thus constituted. This made me examine the office noting contained in the file. There seems to be lack of clarity regarding the meaning and scope of Order XXVI Rule 8 of the Supreme Court Rules, 1980. I, therefore, before going into the merits of the case wish to state the legal position in this regard.

3. Article 188 of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution") states that the Supreme Court shall have power, subject to the provisions of any Act of Majlis-e-Shoora (Parliament) and of any rules made by the Supreme Court, to review any judgment pronounced or any order made by it. The Parliament has not so far passed any Act under this Article; Order XXVI of the Supreme Court Rules,

1980, however, contains the rules that regulate the power of review of the Court. Rule 8 of that Order is relevant to the question under discussion. It is, therefore, reproduced hereunder for ease of reference:

8. As far as practicable the application for review shall be posted before the same Bench that delivered the judgment or order sought to be reviewed.

Rule 8 very clearly and firmly prescribes that the application for review shall, as far as practicable, be posted before the "same Bench" that delivered the judgment or order sought to be reviewed. The expression "same Bench" leaves little room to speculate the constitution of the Bench: the "same Bench" means the same judges, as far as practicable, and the same number of judges, i.e., the same numeric strength of the Bench. There is no ambiguity in this regard, in the said rule. Mian Saqib Nisar, J., in the review**1** of Judges' Pension case observed:

**1 PLD 2013 SC 1024**

There is great wisdom in law, that the review, generally and ordinarily, should be heard by the same Court and the Court in this context is an interchangeable term with the Judge.

4. A seven-Member Full Court Bench of this Court heard the review petition in Zulfikar Ali Bhutto's case.**2** The main appeal**3** in that case was decided by a majority of four to three Judges. All the Judges comprising majority and minority, both, were on the Bench hearing the review of the majority judgment. While deciding an application**4** made for adding two other Judges on the review Bench, Anwarul Haq, C.J., speaking for the Bench, held:

**2 PLD 1979 SC 741**

**3 PLD 1979 SC 53**

**4 1979 SCMR 427**

The position under the Supreme Court Rules is clear and unambiguous. Rule 6 of Order XXVI lays down that "as far as practicable the application for review shall be posted before the same Bench that delivered the judgment or order sought to be reviewed". Now, in the present case, the judgment under review was delivered by seven Judges of this Court, who are all available on the Bench for the disposal of the Review Petition. There is, accordingly, no justification for any departure or deviation from the relevant rule just mentioned.

(Emphasis added)

A question as to the inclusion of the three learned Judges who gave the dissenting judgment, in the Bench hearing the review petition also arose in that case, and it was held that as they were part of "the Bench that delivered the judgment sought to be reviewed" and were "available for the disposal of the review petition", their presence on the Bench was necessary. Muhammad Akram, J., mentioned the said decision of the Bench on this question, in his final order**5** made on the review petition, thus:

**5 PLD 1979 SC 741**

At a subsequent stage a question arose as to the position of the three learned Judges of this Court who had recorded dissenting opinions in regard to the disposal of the petitioner's appeal. Again, relying upon the aforesaid rule 6, we took the view that as they were part of the Bench that delivered the judgment sought to be reviewed, their presence on the Bench was necessary, as they were continuing as Judges of the Supreme Court and were available for the disposal of the review petition.

(Emphasis added)

The notable point in the phrases underlined in the above quoted observations of Anwarul Haq, C.J., and Muhammad Akram, J., are that they both mentioned that the judgment sought to be reviewed was delivered by the Bench comprising seven judges of the Court. They did not consider that judgment as the judgment delivered by only four Judges comprising the majority. These observations of their lordships are in line with the language of Rule 8, which contains the expression "same Bench that delivered the judgment or order sought to be reviewed", and not the majority Members of the Bench who delivered the majority judgment or order sought to be reviewed.

5.

It is well-established practice of this Court that when a case is heard by a Bench of two or more Judges, the case is decided in accordance with the opinion of such Judges or of the majority of such Judges. Judgment or order of the Court is pronounced in terms of the majority opinion; such judgment or order is of the Bench that heard the case and, for that matter, of the Court, and not only of the Judges whose opinion prevailed as a majority opinion. This is why a unanimous opinion of a five-Member Bench on a legal question can be overruled by a majority of four Judges while sitting in a seven-Member Bench. It is the numeric strength of the whole Bench that determines the judicial power of its Members, and not the numbers of the individual Judges in majority. Justice Nariman of the Indian Supreme Court has stated this position in Shanti Fragrances v. Union of India,**6** as under:

**6 (2018) 11 SCC 305.**

> Under the present practice, it is clear that the view of four learned Judges speaking for the majority in a 7 Judge Bench will prevail over a unanimous 5 Judge Bench decision, because they happen to speak for a 7 Judge bench.**7**

**7 He has though expressed his desire to review this principle.**

It is also a well-established principle of precedent that judgment of a larger Bench of this Court is binding on the Benches of this Court consisting of Judges less than that larger Bench.**8** A smaller Bench cannot request for constitution of a larger Bench to revisit the opinion of a larger Bench on any question or principle of law; only a Bench of co-equal strength can make such request.**9** This principle also necessitates that the Judge who dissented from the majority judgment should be Member of the Bench that is to hear the review petition, as a judgment pronounced in terms of the majority opinion of a larger Bench cannot be reviewed by a smaller Bench consisting of only the Judges holding the majority opinion. It is utmost necessary to maintain quorum of the Bench that delivered the judgment under review. It is because of this legal compulsion, that new Members are added to the Bench when any of its earlier Members retires or is not available for any other reason, to maintain the quorum of the Bench for hearing the review petition. Many instances may be cited in this regard: Gadoon Textiles Mills' case**10** was decided by a five-Member Bench with three-two majority. The review petitions**11** were filed against the majority judgment. The dissenting judges, Justices Saleem Akhtar and Fazal Karim, had retired by the time the review petitions were taken up for hearing; therefore, other Judges were added to the Bench to maintain the quorum of five Members, for hearing the review petitions. Benazir Bhutto case**12** was decided by a seven-Member Bench with six-one majority. The review petition**13** filed against the majority judgment of six Judges was heard by the Bench of seven Judges, not of six Judges. The quorum of the Bench was, thus, maintained for hearing the review petition. There are many other cases**14** of our jurisdiction as well as the Indian jurisdiction wherein the dissenting Judges were part of the Benches that heard the review petitions against the judgments of the Court pronounced in terms of the majority opinion. It can, therefore, be safely concluded that a judge who dissented from the majority judgment, if available, must be Member of the Bench for hearing the review petition filed against that majority judgment.

**8 See Muhammad Saleem v. Fazal Ahmad, 1997 SCMR 315; Babar Shehzad v. Said Akbar, 1999 SCMR 2518; All Pakistan Newspapers Society v. Federation, PLD 2004 SC 600; Ata Ullah v. Surraya Parveen, 2006 SCMR 1637; Azhar Siddiqui v. Federation, PLD 2012 SC 774, para 37.**

**9 See Central Board of Dawoodi Bohra Community v. State of Maharashtra, AIR 2005 SC 752**

**10 Gadoon Textiles Mills v. WAPDA, 1997 SCMR 641.**

**11 Gandaf Steel Industries v. Federation, 1997 SCMR 1669.**

**12 Benazir Bhutto v. President of Pakistan, PLD 1998 SC 388.**

**13 Benazir Bhutto v. President of Pakistan, PLD 2000 SC 77.**

**14 See Nawaz Sharif v. Imran Khan, PLD 2018 SC 1 (Justices Asif Saeed Khosa and Gulzar Ahmed, the dissenting Judges, were on the Bench); Sheonandan Paswan v. State of Bihar, AIR 1987 SC 877 (Justice Tulzapurkar, the dissenting Judge, was on the Bench that admitted the review for hearing); Shyam Lal Sharma v. Union of India, AIR 1987 SC 1137 (Justice Thakkar, the dissenting Judge, was on the Bench to which the review petition was presented for decision by circulation.**

6. So far as the scope of jurisdiction and judicial power of such Judge in hearing the review petition against the majority judgment is concerned, there is nothing in the Constitution or the Supreme Court Rules, 1980 that limits his jurisdiction and judicial power in a review in comparison with the Judges who delivered a majority judgment. He is a Member of the Bench with same jurisdiction and power like the other Members of that Bench. As afore-explained, the judgment pronounced or order made in terms of the majority opinion is the judgment or order of the Bench, and not of the Judges holding the majority opinion.

7. Rule 1 of Order XXVI of the Supreme Court Rules, 1980 provides that subject to the law and the practice of the Court, the Court may review its judgment or order in a Civil proceeding on grounds similar to those mentioned in Order XLVII, Rule 1 of the Code of Civil Procedure, 1908 and in a criminal proceeding on the ground of an error apparent on the face of the record. As per Order XLVII, Rule 1 of the Code of Civil Procedure, 1908, the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the applicant or could not be produced by him at the time when the judgment was pronounced or order made, some mistake or error apparent on the face of the record, and any other sufficient reason are the grounds for review of a judgment or order made in a civil proceeding. These grounds of review which are, in fact, limitations on the power of review of this Court applies equally to the Judges whose opinion prevails for being the majority view and to the Judge whose opinion remains inoperative for being the minority view. The Judge whose opinion remained the minority view in the main case can review the Judgment of the Bench that was pronounced in terms of the majority opinion, on any of the said grounds of review, as can a Judge who delivered the majority opinion.

8. In Zulfiqar Ali Bhutto review case,**15** review petition was dismissed unanimously by all the seven Judges who were divided into four-three in the judgment pronounced in the main appeal case.**16** Muhammad Akram, J. speaking for the majority dismissed the review petition with the observations that "the errors and omissions pointed out by [the petitioner's counsel]... have been found by us to be of inconsequential import, having no material bearing upon the fundamental and essential conclusions reached in the majority Judgment as to the guilt of the petitioner, on the various counts on which his convictions have been upheld, as well on the question of sentence." And Dorab Patel, J. speaking for the minority also held that the review petition had to be dismissed and further agreed with the view of Akram, J. that the question of sentence could not be raised in a review petition, and if they were to alter the sentence in this review, they would be unsettling the settled law. Similar is the legal position in Indian jurisdiction: In the case of Sheonandan Paswan v. State of Bihar,**17** Justice Tulzapurkar, the Judge who earlier dissented with the majority judgment, was on the review-Bench, and admitted the review against the majority judgment for hearing, along-with two other Judges, i.e., one Judge who was earlier party to the majority judgment and the other judge added due to non-availability of a Judge**18** in majority. Tulsiram

case[19] was decided by a five-Judge Bench of the Indian Supreme Court with four-one majority. Justice Thakkar delivered the dissenting opinion. The review petitions[20] filed against the majority judgment were dismissed in limine by the four Judges, but Justice Thakkar held that the issues raised in the review petitions needed examination and the Review Petitions deserved to be admitted for hearing.

**15 PLD 1979 SC 741**

**16 PLD 1979 SC 53**

**17 AIR 1987 SC 877**

**18 Justice Baharul Islam, who was by that time had resigned.**

**19 Union of India v. Tulsiram Patel, AIR 1985 SC 1416**

**20 Shyam Lal Sharma v. Union of India, AIR 1987 SC 1137**

9.

A judgment of the Federal Court of Malaysia delivered in the case of Terengganu Forest Products v. Cosco Container Lines[21] may also be referred to on this point. The Federal Court, in that case, did not accept the argument that a judge who dissents at leave granting stage should not sit on the Bench hearing appeal, with the reason that the issues, considerations and arguments at the leave stage are different from that of the appeal hearing stage. Likewise, the considerations and grounds at the hearing of the review petition are different from that of the original hearing of the case; therefore, the judge who dissented at the original hearing of the case can sit on the review-Bench, and examine the considerations and grounds of review while hearing the review petition. There is another aspect of the matter to look at, i.e., when a Member newly added in the review Bench due to non-availability of an earlier Member, who was not earlier even part of the Bench, can make review of judgment, then how can any restriction or limitation be imposed on the jurisdiction and judicial power of review of the Member who earlier dissented. There are several instances when Members newly added on the Bench had recalled or reversed the original judgment or order in review jurisdiction despite contrary view of the Member who had earlier authored the judgment of the Court.[22] It can, therefore, be said with certainty that the jurisdiction and judicial power of the Judge who earlier dissented from the majority judgment of the Bench is similar and co-extensive with that of those Judges whose opinion became the majority judgment of the Bench, in hearing the review petition against that majority judgment.

**21 [2011] 1 MLJ 25.**

**22 See Aamer Zaman v. Omar Ayub, 2015 SCMR 890 reviewed in 2015 SCMR 1303**

Grounds of Review

10. A number of grounds highlighting errors apparent on the face of the record were agitated seeking review of the impugned judgment. It was argued: (i) that the principle of co-relation between the collection and expenditure of the amount of Cess as settled in the judgment under review was applied to stop further recovery of Cess, but it was not extended to restrain the collection of arrears of Cess, inspite of the fact that no developmental expenditure has taken place since 2011 and the Government has already collected Cess in excess of what is required for the foreseeable Projects; (ii) that the Court ordered that in case no work is carried out on North-South Gas Pipeline within six months, the Gas Infrastructure Development Cess Act, 2015 ("GIDC Act") would become permanently in-operational and considered dead for all intents and purposes, but has not made any order regarding return of the Cess collected to their payers or how and for what purpose the Cess collected would then be expended; (iii) that the decision of the Sindh High Court in 377 suits declaring the GIDC Act to be ultra vires the Constitution, being res judicata, has attained finality between the parties to those suits as it went unchallenged by the Federal Government, hence arrears, as well as, recovery of Cess in future could not be demanded of the petitioners who are decree holders in those suits. It was urged that the view expressed by a four-member Bench of this Court in Pir Bakhsh[23] was not fully appreciated; (iv) that the Second Schedule of the Act giving different maximum rates of Cess for different sectors is discriminatory as it lacks reasonable classification, giving no intelligible differentia that has any rational nexus with the object sought to be achieved by the statute in question; (v) that while interpreting Entry 51 of Part I of the Federal Legislative List the impugned judgment has disagreed with,

rather overruled, the interpretation made in Durrani Ceramics. It was urged that this point was never pleaded before the Court by the parties and no arguments were heard on the point besides this Bench being of co-equal strength could not have so done as per the settled principles of precedent; (vi) that the GIDC Act does not fall within the scope of Entry No.27 of Part-I of the Federal Legislative List. It was submitted that the petitioners were not heard on this point before holding the said Entry applicable to the GIDC Act; (vii) that the petitioners have been wrongly deprived of the benefit of the first proviso to Section 8(2) of the GIDC Act by making order of recovering arrears of the Cess that are exempted under that proviso; and (viii) that the statement made in the impugned judgment that the Cess collected may form part of the Federal Consolidated Fund is not consistent with the Constitutional provisions.

**23 PLD 1987 SC 145**

11. My learned brothers have dealt with only two grounds: one, relating to res judicata and the other, regarding proviso to Section 8(2) of the GIDC Act. They have disposed of other grounds with the observation that "Several other grounds also urged before us but none of the grounds in our considered view call for review". I, thus, do not have the advantage to see the reasons that prevailed with their lordships in rejecting those grounds. My learned brothers have clarified that the impugned judgment has not held that "the benefit granted under Section 8(2) ibid, which has been extended to a particular class of the consumers of gas on certain conditions shall not be extended." I respectfully agree with this clarification. However, on the ground of res judicata I have a different view that I shall explain later herein.

Co-relation of collection and expenditure of Cess.

12. I now advert to the question whether there is any visible co-relation between the collection of Cess and expenditure therefrom. The impugned judgment held:

> 20. ..The other kind of a fee-levying legislation is where Cess is imposed as a compulsory exaction in the same manner where taxes are imposed with the distinction that it is imposed for achieving a specific purpose promised in the enactment itself which when realized would bring some advantage or benefit for the payers in future. It can be described as 'purpose specific' and in many judicial pronouncements have been termed as 'Cess-fee'. In such a form of levy, the specified purpose is pre-committed to the payers before the revenue is collected under the legislation. To quote a few examples, Cess is imposed to meet the extraordinary costs involved in providing infrastructure such as construction of dams or for importing oil or gas from abroad through pipelines or to build farm to mill roads in order to facilitate marketing of the agricultural produce or for conducting research and development in some specialized field. In such a form of levy the rule of quid pro quo does not exist in the same sense as it exists in a case where an existing service is rendered or a privilege is extended directly to the payer for a fee. What needs to be taken into consideration is whether the enactment has promised some benefit or advantage for the payers to be made available in future by utilizing the revenue, making it more akin to a fee then a pure revenue raising measure like taxes in general are imposed with no precondition attached for their spending.
>
> 25. When Cess as a fee is levied to meet an earmarked financial exigency spelt out in an enactment, it preserves the levy for such purpose only even with the change in the government setup. It cannot be levied as a general revenue collecting tool and the government would not be justified to collect it if the funds are diverted to some other expenditure .. The proceeds of Cess should be clearly identifiable in the accounts by using separate accounting codes so that its collection and utilization is reconcilable with the purposes stated in the enactment. A correlation between the revenue collected and the expenditure incurred for the promised specific purpose should always be maintained. In this manner the earmarked levy also provides information on the amount collected and spent. This also inculcates confidence in the payers as it contains the promise that the revenue would be utilized for the specific purpose only for which it was collected and they would have a claim to transparency and accountability of the utilization of the revenue so collected. They can claim that the revenue cannot be utilized for any other purpose other than for which they have been charged. When the revenue can only be utilized for the purpose promised in the fee-levying

enactment then in that sense the levy could also be regarded as a temporary levy. Once the purpose for which it was imposed stands served, the justification for its imposition also comes to an end. The collection of Cess therefore should be based on some calculation keeping in view the funding requirements and as and when the purpose is achieved, the government loses it right to collect Cess regardless of the fact that the enactment continues to remain in force.

The principle settled by this Court was that there must exist a visible co-relation between the collection of Cess and its expenditure. In a case where the fee is to be utilized for service that is to be rendered in future, it is important to see how the moneys collected are being expended and whether there is a transparent and confidence inspiring co-relation between the two. The other principle settled was that the amount of Cess so collected is for a specified purpose and must be accounted for accordingly. It is not the collection of general revenue which can be utilized anywhere. Relying on these principles settled in the impugned judgment, further collection of Cess was stopped in the following manner:

42 However, keeping in view the ground realities discussed in the preceding paragraph and the fact that around 295 billion rupees have already been collected towards Cess-revenue and together with the outstanding amount the total sum by the end of this month would be in the vicinity of seven hundred billion rupees, which is more than what is the estimated cost of the projects mentioned in Section 4 of the GIDC Act, 2015, we are constraint to issue following directions: -

(i) From the date of this judgment, we restrain the Federal Government from charging Cess which power of the Federal Government shall remain suspended until the Cess-revenue collected and that which is accrued so far but not yet collected is expanded on the projects listed in Section 4 of the GIDC Act, 2015.

According to the figures given by the Government the Cess collected as on 30.06.2019 was as under:

TOTAL COLLECTION OF GIDC

| Levy and Collection of GIDC | | | | Rs. In Million |
|---|---|---|---|---|
| Sr.# | Sector | GIDC Accrued | GIDC Collected | GIDC Outstanding |
| 1 | Fertilizer Feed (old) | 192,240.31 | 111,814.62 | 80,425.69 |
| 2 | Fertilizer Feed (New) | 68,281.71 | 1,142.89 | 67,138.82 |
| 3 | Fertilizer Fuel | 31,772.12 | 15,205.66 | 16,566.46 |
| 4 | General Industry | 70,729.64 | 24,402.27 | 46,327.37 |
| 5 | IPPs | 60,845.19 | 51,713.50 | 9,131.69 |
| 6 | KESC | 40,421.05 | 3,912.18 | 36,508.87 |
| 7 | GENCO/WAPDA | 67,317.33 | 44,753.78 | 22,563.55 |
| 8 | Captive Power | 119,247.65 | 17,522.73 | 101,724.92 |
| 9 | CNG Region-I | 53,420.68 | 11,765.63 | 41,655.05 |
| 10 | CNG Region-II | 48,073.10 | 13,169.51 | 34,903.59 |
| | Grand Total | 752,348.78 | 295,402.77 | 456,946.01 |

TOTAL EXPENDITURE OF GIDC

| Project | Iran Pakistan (IP) Gas Pipeline Project | TAPI Pipeline Project | North South Gas Pipeline Project | Underground Gas Storages | Total |
|---|---|---|---|---|---|
| All amounts in PKR | | | | | |
| Estimated Project Cost | 271 billion | 1,500 billion | 405 billion | 75 billion | 2,251 billion |

| | | | | | |
|---|---|---|---|---|---|
| Pakistan share | 271 billion | 31.353 billion | 20.25 billion | 75 billion | 397.6 billion |
| Development Phase expenditure already incurred funded through GIDC (received todate) | Nil | 0.483 billion | Nil | Nil | 0.483 billion |
| Development Phase expenditure- already incurred funded by GHPL | 3.3 billion | 0.756 billion | 0.135 billion | 0.040 billion | 4.2 billion |
| Total development and construction cost- to be funded through GIDC | 271 billion | 30.513 billion | 20.250 billion | 75 billion | 396.7 billion |

| | |
|---|---|
| TOTAL AMOUNT COLLECTED | Rs.295.403 |
| Expenditure required for (1) TAPI + | |
| North South Gas Pipeline (2) +Underground Gas Storage (3) | Rs. 125.763 |
| Balance after deducting (1 + 2 + 3) | Rs. 169.643 |
| Required for Iran Pak | |
| (IP) Gas Pipeline | Rs.271.000 |
| Balance available for IP | Rs. 169.643 |
| Excess- required if at all | |
| IP proceeds | Rs.101.357 |
| Collection Ordered | Rs.456.946 |
| Excess | Rs.355.589 |

The above working shows that the Government already has Rs. 101.357 in excess after factoring in the expenditure to be incurred on TAPI Gas Pipeline, North South Gas Pipeline and Underground Gas Storages unless the Iran Pak (IP) Project is put into motion. The co-relation between the collection and the expenditure stands completely frozen since 2011 raising fingers on the credibility and transparency of the Projects and on the availability of service (supply of natural gas) against the fee charged, in the near future. The direction for further collection of arrears in the sum of Rs. 456.946 billion leading to an excess of Rs. 355.589 billion unduly promotes unjust enrichment and seriously offends the right to property and business of the petitioners

guaranteed under the Constitution. The status of the Projects submitted before this Court during the hearing of these review petitions reveals that the Government plans to start the North South Gas Pipeline (NSGP) Project only. This Project will not generate natural gas but is a support infrastructural Project and will not redress the shortage of natural gas in the country. The Government without any further collection of fresh amount of Cess or the arrears has an excess amount in the sum of Rs.101 billion including the expenditure for TAPI which has not even begun as yet. The impugned judgment though stops further collection of Cess on the principle that there has been no expenditure and no development on the Projects mentioned in the Act yet at the same time allows recovery of arrears in the sum of Rs. 456.946 billion. Reference is made to Chapter 14 on "Energy" in the Pakistan Economic Survey 2019-2020 which states:

Pakistan is successfully overcoming energy crisis, which has direct and indirect impact on all sectors of the economy. Presently, Energy Sector is confronted with demand supply gap....in terms of energy-mix, Pakistan's reliance on thermal which includes imported coal, local coal and RLNG and natural gas has been decreasing over the last few years. Pakistan's dependence on natural gas in the overall energy mix is on decline and the reduction of its share in the energy mix may be attributed to declining natural gas reserves as well as to the introduction of LNG since 2015.

Gas Sector

Natural Gas is a clean, safe, efficient and environment friendly fuel. Its indigenous supplies contribute about 38 percent in total primary energy supply mix of the country. Pakistan produces around four (4) Billion Cubic Feet Per Day (Bcfd) of indigenous natural gas against an unconstrained demand of over six (6) Bcfd. To meet the shortfall, the GoP has initiated the import of LNG. (emphasis supplied)

Pakistan Economic Survey is silent regarding these Projects since 2015 and shows that the shortfall in natural gas is being successfully plugged through the import of LNG, which surprisingly, is not a GIDC funded Project. The above documents show that after a decade of charging GIDC from gas consumers and after having collected Rs 295.40 billion to-date there is no sign of development of the gas pipeline projects in Pakistan. Absence of the said projects and emphasis on the import of LNG in the latest Pakistan Economic Survey hazards a guess that the Government of Pakistan is either not willing to or is unable to complete these projects and therefore the shortfall in gas supply is being increasingly plugged through LNG imported from Qatar. There is a huge disconnect between the principle settled by the Court and its application leading to a material omission in assessing the correct ground and factual reality. The direction to recover arrears is, therefore, against the principle settled by this Court and is not justified and legally sustainable and is liable to be recalled.

Deposit of Cess (GIDC) in the Federal Consolidated Fund

13. The other principle established in the impugned judgment was:

25 .It cannot be levied as a general revenue collecting tool and the government would not be justified to collect it if the funds are diverted to some other expenditure . The proceeds of Cess should be clearly identifiable in the accounts by using separate accounting codes so that its collection and utilization is reconcilable with the purposes stated in the enactment. A correlation between the revenue collected and the expenditure incurred for the promised specific purpose should always be maintained.

38...it matters not if the revenue so collected forms part of the Federal Consolidated Fund as it is the mandate of Article 78 of the Constitution itself that all revenues of the Federal Government has to be made part of Federal Consolidated Fund.

The learned DAG was asked time and again during the hearing to provide the statement of GIDC account within the Federal Consolidated Fund but he failed to furnish the statement of account and instead furnished a general statement showing the amount so far collected to be Rs. 307.23 billion as on 30.07.2020. Initial reluctance and then the failure on the part of the Federal Government to place on record the statement of the account of GIDC gives rise to an adverse inference against the Federal Government under Article 129(g) of the Qanun-e-Shahadat Order, 1984. It shows that the collected amount of Rs. 307.23 billion is not physically present in the account and has already been expended elsewhere. This offends the principle settled by the Court. Additionally, it is also highlighted that even today the amount of GIDC has been shown as a Tax Revenue in the Annual Budget Statements for the years 2019-2020 and 2020-2021 as under:

FEDERAL BUDGET 2019-2020

ANNUAL BUDGET STATEMENT

REVENUE RECEIPTS

Tax Revenue

(Rs. in million)

| Object Code | Description | Budget Estimates 2018-19 | Revised Estimates 2018-19 | Budget Estimates 2019-20 |
|---|---|---|---|---|
| B. | Tax Revenue | | | |
| | a. FBR Taxes (i+ii) | 4,435,000 | 4,150,000 | 5,555,000 |
| B01 | I. Direct Taxes | 1,735,000 | 1,659,000 | 2,081,945 |
| B011 | Taxes on Income | 1,709,939 | 1,651,584 | 2,073,000 |
| B0 15 | Worker's Welfare Fund | 18,636 | 4,186 | 5,050 |
| B0 17-18 | Capital Value Tax (CVT) | 6,425 | 3,230 | 3,895 |
| B02 | ii. Indirect Taxes | 2,700,000 | 2,491,000 | 3,473,055 |
| B020-22 | Customs Duties | 735,000 | 735,000 | 1,000,500 |
| B023 | Sales Tax | 1,700,000 | 1,490,000 | 2,107,738 |
| B024-25 | Federal Excise | 265,000 | 266,000 | 364,817 |
| b. Other Taxes | | 453,645 | 243,876 | 267,160 |
| B026-30 | Other Indirect Taxes | 37,555 | 7,492 | 11,100 |
| B03064 | Airport Tax | 90 | 30 | 35 |
| B03083 | Gas Infrastructure Development Cess | 100,000 | 25,000 | 30,000 |
| B03084 | Natural Gas Develop-ment Surcharge | 16,000 | 8,000 | 10,000 |
| B03085 | Petroleum Levy | 300,000 | 203,354 | 216,025 |
| Total Tax Revenue (a+b) | | 4,888,645 | 4,393,876 | 5,822,160 |

FEDERAL BUDGET 2019-2020

ANNUAL BUDGET STATEMENT

REVENUE RECEIPTS

Tax Revenue

(Rs in million)

| Object Code | Description | Budges Estimates 2018-19 | Revised Estimates 2018-19 | Budges Estimates 2019-20 |
|---|---|---|---|---|
| B. | Tax Revenue | | | |
| | a. FBR Taxes (i+ii) | 4,435,000 | 4,150,000 | 5,555,000 |
| B01 | i. Direct Taxes | 1,735,000 | 1,659,000 | 2,081,945 |
| B011 | Taxes on Income | 1,709,939 | 1,651,584 | 2,073,000 |
| B0 15 | Worker's Welfare Fund | 18,636 | 4,186 | 5,050 |
| B0 17-18 | Capital Value Tax (CVT) | 6,425 | 3,230 | 3,895 |
| B02 | ii. Indirect Taxes | 2,700,000 | 2,491,000 | 3,473,055 |
| B020-22 | Customs Duties | 735,000 | 735,000 | 1,000,500 |
| B023 | Sales Tax | 1,700,000 | 1,490,000 | 2,107,738 |
| B024-25 | Federal Excise | 265,000 | 266,000 | 364,817 |
| b. Other Taxes | | 453,645 | 243,876 | 267,160 |
| B026-30 | Other Indirect Taxes | 37,555 | 7,492 | 11,100 |
| B03064 | Airport Tax | 90 | 30 | 35 |
| B03083 | Gas Infrastructure Development Cess | 100,000 | 25,000 | 30,000 |
| B03084 | Natural Gas Development Surcharge | 16,000 | 8,000 | 10,000 |
| B03085 | Petroleum Levy | 300,000 | 203,354 | 216,025 |
| Total Tax Revenue (a+b) | | 4,888,645 | 4,393,876 | 5,822,160 |

14. The above Annual Budget Statements for the year 2019-2020 and 2020-2021 show the said collection under the head "other tax revenue" as a part of Federal Consolidated Fund. Provinces are paid their respective shares under the National Finance Commission Award**24** from the Federal Consolidated Fund, and the possibility of the amount of GIDC being distributed amongst the Provinces cannot be ruled out. This Court, in the impugned judgment, held that "it matters not if the revenue so collected forms part of the Federal Consolidated Fund as it is the mandate of Article 78 of the Constitution itself that all revenues of the Federal Government has to made part of Federal Consolidated Fund."**25** The Court in the impugned judgment ordered that "in case no work is carried out on North-South Gas Pipeline within the prescribed time and for laying any of the two other major pipelines (IP and TAPI) though the political conditions become conducive, the purpose of levying Cess shall be deemed to have been frustrated and the GIDC Act, 2015 would become permanently in-operational and considered dead for all intents and purposes." In that eventuality, the amount of Fee already collected under the GIDC Act will have to be refunded to the payers of fee. It would not be possible for the Federal Government to refund the same, if the amount of GIDC is made part of the Federal Consolidated Fund and shown as an amount available for general expenditures of the Government in the Annual Budget Statement.

**24 Prescribed Share of all Provinces under the Distribution of Revenues and Grants-in-Aids Order, 2010**

**25 Para 38 of Impugned Judgment (Majority View)**

15. Article 78(1) of the Constitution provides that all revenues received by the Federal Government, all loans raised by that Government, and all moneys received by it in repayment of loans shall form part of

consolidated fund, to be known as the Federal Consolidated Fund. While all other moneys received by or on behalf of the Federal Government, or received by or deposited with the Supreme Court or any other court established under the authority of the Federation are to be credited to the Public Account of the Federation as per Article 78(2) of the Constitution. The expression "all revenues" used in Article 78(1) covers the revenues (taxes, duties, etc.) raised for Governmental purposes, and does not include the revenue that cannot be used for any Governmental purpose, like the compensatory fee collected for rendering any service to the payers of that fee. Such compensatory fee falls within the expression "all other moneys" used in Article 78(2) and is to be credited to the Public Account, and not to the Federal Consolidated Fund. This view is supported by Ratilal Gandhi v. State of Bombay,**26** wherein the provisions of Article 266 of the Indian Constitution that are similar to that of Article 78 were interpreted in the following manner:

**26 AIR 1953 Bom 242.**

> It is only taxes raised and revenues raised for Governmental purposes that form part of this fund. But when moneys are received as a result of fees imposed for a specific purpose and when the fund collected is earmarked and set apart, such a fund does not form part [of the Consolidated Fund contemplated under Article 266 of the Indian Constitution].

The Cess amount collected under the GIDC Act is to be credited in the Public Account with an entity distinct from the other revenues credited to it, and must be earmarked for utilization for the purposes specified in the GIDC Act only. No disbursement can be made from the Cess amount for general governmental expenditures or any other purpose. The Court was not assisted on this point at the time of the hearing of the main case, and made the observations regarding deposit of the Cess amount in the Federal Consolidated Fund in the impugned judgment without appreciating the difference between the Federal Consolidated Fund and the Public Account under Article 78 of the Constitution. The said observations are, therefore, liable to be recalled in review. Further it is clarified that in case the GIDC Act becomes in-operational on failure of the Federal Government to take steps to commence work on the laying of the North South Gas Pipeline within six months, the amount of the Cess collected are liable to be returned and refunded to the payers.

Discrimination

16. The Act provides for the following maximum rates of cess for different Sectors:

SECOND SCHEDULE OF THE ACT

| S.No. | Sector | Maximum Rate of Cess (Rs./MMBTU) |
|---|---|---|
| (1) | (2) | (3) |
| | Fertilizer-Feed (Old) | 300.00 |
| | Fertilizer-Feed (New) | 300.00 |
| | Fertilizer-Fuel | 150.00 |
| | Captive Power | 200.00 |
| | Industry | 100.00 |
| | KESC/GENCO | 100.00 |
| | IPPs | 100.00 |

On the question of discrimination, the impugned judgment, with respect, did not consider the rationale behind fixing different rates within different sectors but instead discussed the question of discrimination between the industrial/commercial consumers and the domestic consumers, which was not the question agitated by the petitioners. There appears to be no intelligible differentia amongst the different Industrial and Commercial gas consumers mentioned in the Schedule for the purposes of the GIDC Act. The upper limit of GIDC for the

Industry, KESC/GENCO and IPPs has been fixed as Rs.100 per MMBTU, while remaining categories of gas consumers have been allowed to be charged at the rate higher than that. This discrimination, with respect, was overlooked in the impugned judgment, and thus provides a valid ground to review it. As per Article 25 of the Constitution which ensure equality and equal treatment among equals, the Federal Government cannot charge the Cess at the rate more than Rs. 100 per MMBTU from any category of gas consumers.

Principle of Res-Judicata

17. On the ground of res judicata, the petitioners vehemently relied upon Pir Bukhsh. My learned brothers have distinguished that case in the impugned judgment by highlighting the difference of facts of that case and the facts of the present case, and have repelled the ground of review by quoting the observations made in paras 10 and 11 by them in the impugned judgment. I am afraid if this is the correct approach to distinguish a principle of law declared by a larger Bench of this Court, which is binding on this Bench. Pir Bukhsh was decided by a four-member Bench of this Court in 1987 almost 33 years ago and still holds the field. The Court, in that case, elaborately discussed and expounded the doctrine of res judicata and its application between the parties both on questions of law and fact. The Court, in that case, approvingly referred to a judgment of Full Bench of the Calcutta High Court delivered in Tarini Charan**27** wherein it was held:

**27 Tarini Charan v. Kedar Nuth (A I R 1928 Cal. 777)**

To say ... that the previous decision was wrong and that it was wrong on a point of fact, or on a pure point of law, and that therefore, it may be disregarded, is an indefensible form of reasoning. For this purpose, it is not true that a point of law is always open to a party.

Finally, this Court in Pir Bakhsh came to the conclusion that in a controversy raising a dispute inter parties, the matter adjudged is conclusive as between the parties both on question of fact and question of law. However, an exception to this principle declared by a larger Bench was created in the judgment under review by holding that it would be difficult to apply such a principle in matters where a power or a right or an obligation solely depends upon the very legitimacy of the enactment that has come under challenge in a Court of law on the touchstone of the Constitution. It was, with respect, not appropriate for a three-member Bench to deviate from principle of res judicata laid down by an earlier four-member Bench. This Bench had two options: first, to follow the law declared by that Bench; or second, to refer the matter to a four-member Bench to decide whether that opinion should be reconsidered by a larger Bench. As the majority did not opt for the second option, the principle of res judicata as settled in Pir Bukhsh is fully applicable to the decree holders in the suit decided by the Sindh High Court.

Interpretation of Entry No. 51 of Part 1 of the Federal Legislative List

18.

The Court, in the impugned judgment while interpreting Entry No.51 of Part I of the Federal Legislative List contained in the Fourth Schedule to the Constitution took a view**28** contrary to that of Bench of co-equal strength expressed in Durrani Ceramics**29** by stating that "the National Assembly was fully competent to impose tax on natural gas through a Money Bill on the strength of Entry No.51 of the Federal Legislative List." This finding, it is submitted with respect, is against settled principles of the law of precedent**30** and needs to be recalled.

**28 In *Durrani Ceramics* case all items contained in Entry No.51 were read conjunctively, meaning thereby that Federal Government can levy tax on natural gas and mineral oil only if these sources of energy can be used to generate nuclear energy. It appears that no proper assistance on scientific lines was rendered by the law officers to this Court during the hearing of the**

**Durrani Ceramics case hence the scientific fact that it was not possible to generate nuclear energy from mineral oil and natural gas, as these sources cannot be used as nuclear fuel was not taken into consideration. (Para 41 of the judgment under review)**

**29 *Federation of Pakistan through Secretary Petroleum and Natural Resources v. Durrani Ceramic* (2014 SCMR 1630 : PLD 2015 SC 354: 2014 PTD 2016)**

**30 The Province of East Pakistan v. Dr. Azizul Islam, PLD 1963 SC 296; the Province of East Pakistan v. Abdul Basher Cohwdhury, PLD 1966 SC 854; Multiline Associates v. Ardeshir Choasjee, PLD 1995 SC 423; Ardeshir Cowasjee v. Karachi Building Control Authority, 1999 SCMR 2883; Gulshan Ara v. The State, 2010 SCMR 1162; Zahid Rehman v. The State PLD 2015 Supreme Court 77; Messrs WAK Limited Multan Road v. Collector Central Excise and Sales Tax, 2018 SCMR 1474; Shafqat @ Shafaat v. The State PLD 2019 Supreme Court 43;**

Entry No.27 of Part-I of the Federal Legislative List

19. The Federation had defended its authority to legislate the GIDC Act on the basis of Entry No. 2 read with Entry No. 15 of Part II of the Federal Legislative List in the present case, and on Entry No. 51 of Part I of the Federal Legislative List in Durrani Ceramics. It was never the case of the Federation that it has competence to legislate a law relating to tax or fee on natural gas on the basis of Entry No. 27 of Part I of the Federal Legislative List. Entry No.27 reads as follows: "Import and export across customs frontiers as defined by the Federal Government, inter-provincial trade and commerce, trade and commerce with foreign countries; standard of quality of goods to be exported out of Pakistan." This entry clearly relates to trade with foreign countries (import and export), and inter-provincial trade and commerce, and in no way covers the subject of "natural gas". The GIDC Act has not taxed or charged fee on the foreign or inter-provincial trade and commerce. It has charged fee on use of natural gas. Entry No.27, in no terms, justify the legislative power of the Federation to enact the GIDC Act. The parties were not heard on this point at the time of original hearing of the case; this point, therefore, escaped notice of the Bench, and this error appears to be apparent of the face of the record and is liable to be recalled.

20. In view of the above errors that have been found apparent on the face of the record, the review petitions are allowed in the following terms:

(i) The benefit available under the provisos to section 8(2) of the GIDC Act shall not be affected by the judgment under review.

(ii) The direction to recover arrears of Cess is recalled.

(iii) In case the GIDC Act becomes in-operational on failure of the Federal Government to take steps to commence work on the laying of the North South Gas Pipeline within six months, the amount of the Cess collected shall be returned and refunded to the payers.

(iv) The principle of res judicata as settled in Pir Bukhsh, is fully applicable to the decree holders in the suits decided by the Sindh High Court.

(v) The Federal Government shall not charge the Cess at the rate more than Rs. 100 per MMBTU from any category of gas consumers in view of Article 25 of the Constitution.

(vi) The observation that "it matters not if the revenue so collected forms part of the Federal Consolidated Fund" is recalled and the amount of GIDC is to credited to the Public Account under Article 78(2) of the Constitution while maintaining a separate statement of account.

(vii) The finding on Entry No. 27 of Part I of the Federal Legislative List is recalled. The GIDC Act falls under Entry No. 2 read with Entry No. 15 of Part II of the Federal Legislative List.

(viii) The observations as to the interpretation of Entry No. 51 of Part I of the Federal Legislative List in the judgment under review being contrary to the judgment of co-equal Bench in Durrani Ceramics are recalled.

MWA/C-23/SC Order accordingly.

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[1] PLD 2013 SC 1024

[2] PLD 1979 SC 741

[3] PLD 1979 SC 53

[4] 1979 SCMR 427

[5] PLD 1979 SC 741

[6] (2018) 11 SCC 305.

[7] He has though expressed his desire to review this principle.

[8] See Muhammad Saleem v. Fazal Ahmad, 1997 SCMR 315; Babar Shehzad v. Said Akbar, 1999 SCMR 2518; All Pakistan Newspapers Society v. Federation, PLD 2004 SC 600; Ata Ullah v. Surraya Parveen, 2006 SCMR 1637; Azhar Siddiqui v. Federation, PLD 2012 SC 774, para 37.

[9] See Central Board of Dawoodi Bohra Community v. State of Maharashtra, AIR 2005 SC 752

[10] Gadoon Textiles Mills v. WAPDA, 1997 SCMR 641.

[11] Gandaf Steel Industries v. Federation, 1997 SCMR 1669.

[12] Benazir Bhutto v. President of Pakistan, PLD 1998 SC 388.

[13] Benazir Bhutto v. President of Pakistan, PLD 2000 SC 77.

[14] See Nawaz Sharif v. Imran Khan, PLD 2018 SC 1 (Justices Asif Saeed Khosa and Gulzar Ahmed, the dissenting Judges, were on the Bench); Sheonandan Paswan v. State of Bihar, AIR 1987 SC 877 (Justice Tulzapurkar, the dissenting Judge, was on the Bench that admitted the review for hearing); Shyam Lal Sharma v. Union of India, AIR 1987 SC 1137 (Justice Thakkar, the dissenting Judge, was on the Bench to which the review petition was presented for decision by circulation.

[15] PLD 1979 SC 741

[16] PLD 1979 SC 53

[17] AIR 1987 SC 877

[18] Justice Baharul Islam, who was by that time had resigned.

[19] Union of India v. Tulsiram Patel, AIR 1985 SC 1416

[20] Shyam Lal Sharma v. Union of India, AIR 1987 SC 1137

[21] [2011] 1 MLJ 25.

[22] See Aamer Zaman v. Omar Ayub, 2015 SCMR 890 reviewed in 2015 SCMR 1303

[23] PLD 1987 SC 145

[24] Prescribed Share of all Provinces under the Distribution of Revenues and Grants-in-Aids Order, 2010

[25] Para 38 of Impugned Judgment (Majority View)

[26] AIR 1953 Bom 242.

[27] Tarini Charan v. Kedar Nuth (A I R 1928 Cal. 777)

[28] In *Durrani Ceramics* case all items contained in Entry No.51 were read conjunctively, meaning thereby that Federal Government can levy tax on natural gas and mineral oil only if these sources of energy can be used to generate nuclear energy. It appears that no proper assistance on scientific lines was rendered by the law officers to this Court during the hearing of the Durrani Ceramics case hence the scientific fact that it was not possible to generate nuclear energy from mineral oil and natural gas, as these sources cannot be used as nuclear fuel was not taken into consideration. (Para 41 of the judgment under review)

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**P L D 2021 Supreme Court 362**

**Present: Manzoor Ahmad Malik, Mazhar Alam Khan Miankhel and Syed Mansoor Ali Shah, JJ**

**ALI HAIDER alias PAPU---Petitioner**

**Versus**

**JAMEEL HUSSAIN and others---Respondents**

Criminal Petition No. 513 of 2020, decided on 7th January, 2021.

(Against the judgment of Lahore High Court, Multan Bench, dated 11.02.2020, passed in Criminal Appeal No. 436 of 2017 and Capital Sentence Reference No.61 of 2017).

**(a) Qanun-e-Shahadat (10 of 1984)---**

----Art. 164---Importance of modern forensic techniques and science under the criminal justice system explained.

For the law to serve people in today's technologically complex society, courts needed to understand and be open to science and its principles, tools and techniques. Legal decisions of the courts must fall within the boundaries of scientifically sound knowledge. A judge and more so a trial judge, acted as a gatekeeper of the scientific evidence and must, therefore, enjoy a good sense and understanding of science. As science grows so will the forensic techniques, tools and devices; therefore, courts must be open to developments in forensic science and embrace new techniques and devices to resolve a dispute, provided the said technique and device was well established and widely accepted in the scientific community as a credible and reliable technique or device.

Third Edition, Federal Judicial Centre, National Research Council of the National Academies, Washington, DC ref.

Article 164 of the Qanun-e-Shahadat, 1984 was the gateway allowing modern forensic science to come into courtrooms. Article 164 provided that courts may allow to be produced any evidence that may have become available because of modern devices and techniques. Proviso to Article 164, provided that conviction on the basis of modern devices and techniques may be lawful. Article 164 read with Article 59, inter alia, allowed modern forensic science to enter courts through the credible and valued scientific opinions of experts as evidence, in order to arrive at the truth.

**(b) Penal Code (XLV of 1860)---**

----Ss. 302(b), 376, 377 & 377B---Qanun-e-Shahadat (10 of 1984), Arts. 53A, 59, 164, 164A & 164B---Qatl-i-amd, rape, unnatural offence, sexual abuse---Importance and admissibility of DNA evidence to establish the guilt or innocence of an accused.

The most significant advancement in criminal investigation since the advent of fingerprint identification is the use of DNA technology to help convict criminals or eliminate persons as suspects.

Deoxyribonucleic acid (DNA) technology was widely used in many jurisdictions by police, prosecutors, defense counsel, and courts. This scientific evidence was much speedier, specific, accurate and conclusive than any other human evidence and could stand the scrutiny of the court to determine the guilt or innocence of an accused. In criminal cases, like rape, murder, etc., timely medical examination and proper sampling of body fluids followed by quality forensic analysis could offer irrefutable evidence. Through the use of DNA evidence, prosecutors could establish the guilt of accused and at the same time, DNA aided the search for truth by exonerating the innocent.

Modi. A Textbook of Medical Jurisprudence and Toxicology, 26th Edition, LexisNexis. Pp 430- 453 and Studies in the Use of DNA Evidence to Establish Innocence After Trial by Edward Connors, Thomas Lundregan, Neal Miller, Tom McEwen, June 1996, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice ref.

DNA report like any other opinion of an expert under Article 59 of the Qanun-e-Shahadat, 1984 ('QSO') was relevant and thus admissible. Article 164 of the QSO further underlined the admissibility, reliability and weightage of modern scientific forensic evidence, including the DNA test, as the said Article provided that convictions may be based on modern techniques and devices.

**(c) Penal Code (XLV of 1860)---**

----Ss. 302(b), 376, 377 & 377B---Criminal Procedure Code (V of 1898), S. 510---Qanun-e-Shahadat (10 of 1984), Arts. 59 & 164---Punjab Forensic Science Agency Act (XIII of 2007), S. 9---Qatl-i-amd, rape, unnatural offence, sexual abuse---DNA evidence/report, Per-se admissibility---Meaning---Requirement of examining the expert who prepared the DNA report explained.

While the admissibility of expert opinion was already recognized under the Qanun-e-Shahadat, 1984 ('the QSO'), section 510, Cr.P.C. dealt with special rules of evidence and made the evidentiary procedure simple by providing that certain reports of the chemical examiner, etc. may be used in any trial without calling the Government Chemical Examiner, Serologist, finger print expert or fire-arm expert as a witness. Allowing admission of reports of the said Governmental experts in evidence without their author appearing as a witness had the objective of saving time and speeding up criminal trials. This simple procedure of admission of these reports in evidence, was referred to as per se admissible. However, the court may if it considered necessary, in the interest of justice, summon and examine the person by whom such a report had been made. Section 510, Cr.P.C. referred to reports of certain experts only but did not specifically mention the expert who conducted DNA analysis, hence the DNA test report was not per se admissible but it was certainly admissible if tendered in evidence by examining as witness the expert under whose hand it was prepared as per the QSO. Additionally, under section 9 of the Punjab Forensic Science Agency Act, 2007 an expert of the Punjab Forensic Science Agency (PFSA) was considered to be an expert in terms of section 510, Cr.P.C. Therefore, DNA test report prepared by an expert of the PFSA was per se admissible

Azeem Khan v. Mujahid Khan 2016 SCMR 274 ref.

Article 164 of QSO held immense importance and demanded that the scope of expert opinions under Article 59 of QSO and the special rule of evidence under section 510, Cr.P.C. be interpreted progressively to come to give more space and recognition to modern forensic science. Supreme Court observed that use of the word "Chemical Examiner" in section 510, Cr.P.C. was almost obsolete and had no established definition; and, that it was time for the Government to consider revision of section 510, Cr.P.C. allowing reports of all the Government forensic scientists (as opposed to the specified ones under section 510, Cr.P.C.) to be per se admissible, to speed up the wheels of dispensation of criminal justice. Supreme Court directed that copy of present judgment be dispatched to the Ministry of Law and Parliamentary Affairs, for consideration of the said recommendation.

**(d) Penal Code (XLV of 1860)---**

----Ss. 302(b), 376, 377 & 377B---Qanun-e-Shahadat (10 of 1984), Arts. 59 & 164,---Qatl-i-amd, rape, unnatural offence, sexual abuse---Concept of DNA evidence as the strongest corroborative piece of evidence explained.

DNA evidence was considered as a gold standard to establish the identity of an accused. DNA test due to its accuracy and conclusiveness was one of the strongest corroborative pieces of evidence. DNA test with scientific certainty and clarity pointed towards the perpetrator and was, therefore, considered one of the strongest corroborative evidence, especially in cases of rape. Supreme Court observed that usefulness of DNA analysis, however, depended mostly on the skill, ability and integrity shown by the investigating officers, who were the first to arrive at the scene of the crime; that unless the evidence was properly documented, collected, packaged and preserved, it would not meet the legal and scientific requirements for admissibility into a court of law.

Salman Akram Raja v. Government of Punjab 2013 SCMR 203; United States v. Yee 134 F.R.D 161 and Muhammad Shahid v. State PLD 2010 FSC 215 ref.

**(e) Penal Code (XLV of 1860)---**

----Ss. 302(b) & 376---Qatl-i-amd, rape---Reappraisal of evidence---DNA evidence---Strong circumstantial evidence---Incident was unseen, however, the most important piece of circumstantial evidence in the present case, was the DNA test report---Furthermore wajtakkar evidence, evidence of extra-judicial confession of accused, medical evidence and DNA test report, considered together, clearly connected the accused with the rape and murder of the deceased---Chain of circumstantial evidence was

firm and continuous, leaving no margin for the hypothesis of innocence of the accused---Convictions and sentences awarded to the accused by the trial court, including death sentence, were maintained.

Evidence of wajtakkar comprised of two witnesses, who were not chance witnesses, as they were residents of the locality and their presence near the place of occurrence, i.e., the field, was quite natural. They saw the accused coming out of that field while tightening the string of his shalwar at a time that was in line with the time of occurrence reported in the FIR and the approximate time of death of the deceased mentioned in the post-mortem report. The extra-judicial confession of accused though was a weak piece of evidence; but in the present case, it also inspired confidence when it was read in conjunction with other circumstantial evidence. The medical evidence, viz, the post mortem report and statement of the doctor who made the post-mortem examination of the deceased, supported the prosecution case. The fact established by the medical evidence that the deceased had suffered vaginal injury, as her hymen was found freshly torn with tear at 6 O'clock extending upto perineum with fresh bleeding, clearly supports the prosecution case that the deceased was raped before causing her death. The medical opinion of the doctor that the death of the deceased occurred due to throttling tallied with the DNA report regarding the swab obtained from the neck of the deceased: the DNA report stated matching of the DNA found in that swab with that of the accused.

According to the DNA test report the semen from vaginal swabs, as well as, the stain of the shalwar of the deceased matched the DNA of the accused. The DNA in the swab obtained from the neck of the deceased also matched the DNA of the accused.

The prosecution had thus proved its case against the accused beyond reasonable doubt. Convictions and sentences awarded to the accused by the trial court, including death sentence, were maintained. Petition for leave to appeal was dismissed and leave was refused.

Raja M. Shafat Khan, Advocate Supreme Court for Petitioner.

Mirza Abid Majeed, DPG for the State.

Research Assistance by Rana Shaheryar, Research Officer/Civil Judge, SCRC, Islamabad.

Date of hearing: 7th January, 2021.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**This is a troubling and a gut-wrenching case of rape, murder and capital punishment. Almost eight year old, Rimsha Bibi ("deceased") who left her house for summer tuition in the neighbourhood was raped in the loneliness of a jawar (millet) field and then silenced forever by being brutally murdered. First Information Report ("FIR") was registered by the father of the deceased against an unknown person for offences under sections 302 and 376(i) of the Pakistan Penal Code, 1860 ("P.P.C.") on 29.06.2016. In the supplementary statement recorded the next day, the complainant revealed that Jabbar Hussain (PW-6) and Tufail Shah (PW-7) had seen Ali Haider alias Pappu ("petitioner") coming out of the jawar field from where the dead body of the deceased was recovered at 4:00 p.m. on the fateful day, while tightening the string of his shalwar.

2. The petitioner was indicted and tried for the alleged offences. On conclusion of the trial, he was convicted by the trial Court under section 302(b) of P.P.C., and sentenced to death and directed to pay compensation of Rs.200,000/- to the legal heirs of the deceased and in default thereof to undergo further simple imprisonment for six months. He was also convicted under section 376 of P.P.C. and sentenced to imprisonment for life with fine of Rs.30,000/- to be paid to the legal heirs of the deceased and in default thereof to further undergo simple imprisonment for three months. On appeal to the High Court by the petitioner, which was heard along with the Murder Reference sent up by the trial court, the High Court maintained the convictions and sentences of the petitioner. The murder reference was answered in the affirmative and the death sentence was confirmed through the impugned judgment.

3. We have examined the record of the case with the able assistance of the learned counsel for the parties. The gruesome incident was unseen. The circumstantial evidence pieced together by the prosecution, to tie the petitioner with the rape and murder of the deceased comprises: (i) the evidence of waj takkar of Jabbar Hussain (PW-6) and Tufail Shah (PW-7) who had seen the petitioner coming out of

the place of occurrence, i.e., jawar field, at 04:00 p.m. tightening the string of his shalwar; (ii) the extra judicial confession of the petitioner, admitting commission of rape and murder of the deceased in the presence of the complainant (PW-1) and the said two witnesses of waj takkar evidence (iii) the medical evidence including the post-mortem report (Ex-PL) and the statement of Dr. Sunia (PW-11), WHO, DHQ Hospital Vehari, who had conducted the post-mortem examination of the deceased: and (iv) the DNA Test Report regarding the vaginal swabs of the deceased as well as the swab obtained from the neck of the deceased, which reported matching of the DNA found in those swabs with that of the petitioner.

Importance of modern forensic science and DNA

4. Before analyzing the circumstantial evidence, it might be useful to underline the role of science, modern forensic techniques and devices under our criminal justice system. For the law to serve people in this technologically complex society, courts need to understand and be open to science and its principles, tools and techniques. Legal decisions of the courts must fall within the boundaries of scientifically sound knowledge. A judge and more so a trial judge, acts as a gatekeeper of the scientific evidence and must, therefore, enjoy a good sense and understanding of science. As science grows so will the forensic techniques, tools and devices; therefore, courts must be open to developments in forensic science and embrace new techniques and devices to resolve a dispute, provided the said technique and device is well established and widely accepted in the scientific community as a credible and reliable technique or device.[1] Article 164 of the Qanun-e-Shahadat Order, 1984 (QSO) is our gateway allowing modern forensic science to come into our courtrooms. Article 164 provides that courts may allow to be produced any evidence that may have become available because of modern devices and techniques. Proviso[2] to Article 164, added in the year 2017, provides that conviction on the basis of modern devices and techniques may be lawful. Article 164 read with Article 59, inter alia, allows modern forensic science to enter courts through the credible and valued scientific opinions of experts as evidence, in order to arrive at the truth.

5. The most significant advancement in criminal investigation since the advent of fingerprint identification is the use of DNA technology to help convict criminals or eliminate persons as suspects. DNA as a scientific evidence means 'deoxyribonucleic acid.' DNA can be found in the human body and samples from semen, hair, blood, flesh can establish a DNA matching with the DNA of another human being. Each human being has a unique DNA pattern, which is acquired by inheriting it from the biological parents. DNA analyses on saliva, skin tissue, blood, hair, and semen can now be reliably used to link criminals to crimes. Increasingly accepted during the past 10 years, DNA technology is now widely used in many jurisdictions by police, prosecutors, defense counsel, and courts.[3] This scientific evidence is much speedier, specific, accurate and conclusive than any other human evidence and can stand the scrutiny of the court to determine the guilt or innocence of an accused. In criminal cases, like rape, murder, etc., timely medical examination and proper sampling of body fluids followed by quality forensic analysis can offer irrefutable evidence. Criminal justice system is in search for the truth. The development of DNA technology furthers the search for truth by helping police and prosecutors in the fight against violent crimes. Through the use of DNA evidence, prosecutors can establish the guilt of accused and at the same time, DNA aids the search for truth by exonerating the innocent.[4] An authoritative study on the forensic uses of DNA, conducted by the National Research Council of the National Academy of Sciences, USA has noted that:

> "...the reliability of DNA evidence will permit it to exonerate some people who would have been wrongfully accused or convicted without it. Therefore, DNA identification is not only a way of securing convictions; it is also a way of excluding suspects who might otherwise be falsely charged with and convicted of serious crimes."[5]

Admissibility of DNA Test

6. DNA Report like any other opinion of an expert under Article 59 is relevant and thus admissible. Article 164 of the QSO further underlines the admissibility, reliability and weightage of modern scientific forensic evidence, including the DNA test, as the said Article provides that convictions may be based on modern techniques and devices. Over the years DNA test has also come to be recognized by our statutory

criminal law. Section 164-A[6], Cr.P.C provides that where an offence of committing rape, unnatural offence or sexual abuse or an attempt to commit rape or unnatural offence or sexual abuse under section 376, section 377 or section 377B respectively of the P.P.C. is under investigation the victim shall be examined by a medical practitioner who shall examine the victim and prepare a report of examination giving, inter alia, the "description of material taken from body of the victim for DNA profiling" under section 164A(2)(c). Similarly, under section 53A[7] where a person is arrested on a charge of committing an offence of rape or unnatural offence or sexual abuse or an attempt to commit rape or unnatural offence or sexual abuse under section 376, section 377 or section 377B respectively of the P.P.C. and there are reasonable grounds for believing that an examination of the arrested person will afford evidence as to the commission of such offence it is lawful for the medical practitioner to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose. The medical practitioner conducting examination is to examine, without delay, such person and prepare a report of the examination giving, inter alia, the description of material taken from person of the accused for DNA profiling, under section 53A(2)(d). Under section 164-B[8] where an offence under sections 376, 377 or section 377B, P.P.C. is committed or attempted to have been committed or alleged to have been committed, DNA samples where practicable, are to be collected from the victim with his or her consent or with the consent of his or her natural or legal guardian as provided in section 164A and DNA samples of the accused under section 53A, both within optimal time period of receiving information relating to the commission of such offence. Under subsection (2) of section 164B, such DNA samples are to be sent, at the earliest, for investigation to a forensic laboratory where these are to be properly examined and preserved by observing confidentiality of such examination at all times. The above legislative framework underscores the relevancy and thus the admissibility of a DNA Test.

Admissible versus per se admissible

7. While the admissibility of expert opinion is already recognized under QSO, section 510, Cr.P.C. deals with special rules of evidence and makes the evidentiary procedure simple by providing that certain reports of the chemical examiner, etc. may be used in any trial without calling the Government Chemical Examiner, Serologist, finger print expert or fire-arm expert as a witness. Allowing admission of reports of the said Governmental experts in evidence without their author appearing as a witness has the objective of saving time and speeding up criminal trials. This simple procedure of admission of these reports in evidence, is referred to as per se admissible. However, the court may if it considers necessary, in the interest of justice, summon and examine the person by whom such a report has been made. Section 510, Cr.P.C refers to reports of certain experts only but does not specifically mention the expert who conducts DNA analysis, hence the DNA Test report is not per se admissible but it is certainly admissible if tendered in evidence by examining as witness the expert under whose hand it is prepared as per the QSO. Additionally, under section 9 of the Punjab Forensic Science Agency Act, 2007 an expert of the PFSA is considered to be an expert in terms of section 510 Cr.P.C. Therefore, DNA Test Report prepared by an expert of the PFSA is per se admissible.

8. This Court in Azeem Khan case[9] questioned the admissibility of the DNA Test Report on the touchstone of section 510, Cr.P.C. and left it open to be discussed in some other case. It is, therefore, important to address this question and clear the air regarding the admissibility of DNA Test Report. As explained above, per se admissibility is a procedural facility for tendering evidence extended to reports of certain experts but it does not affect or have any bearing on the admissibility of a document which is governed by the QSO, and any report or opinion of an expert in matters of science, etc., which is recognized to be relevant under Articles 59 and 164 QSO and is thus admissible under the law of evidence (QSO). Besides, much water has flown under the bridge, since Azeem Khan case. There has been new legislation giving DNA Test, statutory recognition and importance. Article 164 QSO holds immense importance especially after the insertion of the proviso through Act 4 of 2017 in the year 2017[10] and demands that the scope of expert opinions under Article 59 QSO and the special rule of evidence under section 510, Cr.P.C.

be interpreted progressively in the years to come to give more space and recognition to modern forensic science.

9. It is important to underline that the use of the word "Chemical Examiner" in section 510 Cr.P.C. is almost obsolete and has no established definition. Now, "forensic scientists" run and manage modern forensic laboratories. It is time for the Government to consider revision of section 510 Cr.P.C. allowing reports of all the Government forensic scientists (as opposed to the specified ones under section 510 Cr.P.C) to be per se admissible, to speed up the wheels of dispensation of criminal justice in the country. Needless to say that under the proviso to section 510 Cr.P.C the courts can always summon and examine the expert who has prepared and authored the report.

DNA, strongest corroborative piece of evidence today

10. DNA evidence is considered as a gold standard to establish the identity of an accused. As a sequel of above discussion, it can safely be concluded that DNA Test due to its accuracy and conclusiveness is one of the strongest corroborative pieces of evidence. In Salman Akram Raja case[11] this Court has held that DNA test help provides the courts the identity of the perpetrator with high degree of confidence, and by using of the DNA technology the courts are in a better position to reach at a just conclusion whereby convicting the real culprits and excluding the potential suspects, as well as, exonerating wrongfully involved accused. DNA test with scientific certainty and clarity points towards the perpetrator and is, therefore, considered one of the strongest corroborative evidence today, especially in cases of rape. The usefulness of DNA analysis, however, depends mostly on the skill, ability and integrity shown by the investigating officers, who are the first to arrive at the scene of the crime. Unless the evidence is properly documented, collected, packaged and preserved, it will not meet the legal and scientific requirements for admissibility into a court of law.

11. Coming back to the merits of the case, we find that Jabbar Hussain (PW-6) and Tufail Shah (PW-7) were not chance witnesses. They were residents of the locality and their presence near the place of occurrence, i.e., the jawar field, was quite natural. They saw the petitioner coming out of that field while tightening the string of his shalwar at a time that is in line with the time of occurrence reported in the FIR and the approximate time of death of the deceased mentioned in the post-mortem report. The extrajudicial confession though is a weak piece of evidence; but in the present case, it also inspires confidence when it is read in conjunction with other circumstantial evidence. The medical evidence, viz, the post mortem report (Ex-PL) and statement of Dr. Sunia (PW-11) who made the post-mortem examination of the deceased, supports the prosecution case. The fact established by the medical evidence that the deceased had suffered vaginal injury, as her hymen was found freshly torn with tear at 6 O'clock extending upto perineum with fresh bleeding, clearly supports the prosecution case that the deceased was raped before causing her death. The medical opinion of Dr. Sunia (PW-11) that the death of the deceased occurred due to throttling tallies with the DNA report regarding the swab obtained from the neck of the deceased: the DNA report states matching of the DNA found in that swab with that of the petitioner. The most important piece of circumstantial evidence in the present case, we find, is the DNA Test Report (Ex-PP) of the Punjab Forensic Science Agency ("PFSA"). Three vaginal swabs, one swab taken from the neck of the deceased and stained sections of the shalwar and shirt of the deceased along with buccal swab of the petitioner were sent to the PFSA for forensic examination. According to the DNA Test Report the semen from vaginal swabs, as well as, the stain of the shalwar of the deceased matched the DNA of the petitioner. The DNA in the swab obtained from the neck of the deceased also matched the DNA of the petitioner. The waj takkar evidence, evidence of extrajudicial confession, medical evidence and DNA Test Report, together and clearly connects the petitioner with the rape and murder of the deceased, Rimsha Bibi. The chain of circumstantial evidence is firm and continuous, leaving no margin for the hypothesis of innocence of the petitioner. The rope of circumstantial evidence, adduced by the prosecution, ties the dead body of the deceased with the neck of the petitioner. The prosecution has thus proved its case against the petitioner beyond reasonable doubt. Therefore, we are not persuaded to espouse a view different from that given by

the trial court and confirmed by the High Court as to the convictions and sentences of the petitioner. Accordingly, leave is refused and this petition is dismissed.

12. Foregoing are the reasons for the short order dated 07.01.2021, which for the sake of convenience and completion of record is reproduced hereunder:-

"For the reasons to be recorded later, this criminal petition is dismissed in toto."

13. Office shall dispatch a copy of this judgment to the Ministry of Law and Parliamentary Affairs, Government of Pakistan for consideration of the recommendation made in para 9 above.

MWA/A-8/SC Petition dismisse

**P L D 2021 Supreme Court 550**

**Present: Manzoor Ahmad Malik, Mazhar Alam Khan Miankhel and Syed Mansoor Ali Shah, JJ**

**ATIF ZAREEF and others---Appellants**

**Versus**

**The STATE---Respondent**

Criminal Appeal No.251 of 2020 and Criminal Petition No.667 of 2020, decided on 4th January, 2021.

(Against the judgment of Lahore High Court, Rawalpindi Bench, dated 09.06.2016, passed in Criminal Appeal No.393 of 2013, and Capital Sentence Reference No.14-T/2013 and against the Order dated 09.06.2020 of that Court declining suspension of sentence in Criminal Miscellaneous No. 822/M of 2020.)

**(a) Penal Code (XLV of 1860)---**

----S. 376(2)---Gang rape---Reappraisal of evidence---Complainant/ victim while appearing before the trial court deposed each and every detail of the gruesome act committed on her, and her testimony could not be shaken as to any material part of the occurrence stated by her---Suggestions in cross-examination relating to her alleged immoral character were strongly denied by her, and in any case, the questions targeting her character had no relevance to the matter on trial, i.e., the commission of rape on her---Complainant being an educated lady, had no reason to falsely implicate the accused persons, and that too with a such self-deprecating allegation that would tarnish her honour and dignity---Prosecution witness, with whom the complainant was travelling, at the time of the incident deposed how he and the complainant, were interrupted by the accused persons and how the complainant was taken away by them on the day of occurrence---Said statement, fully corroborated the version of the complainant as to her forcible taking away by the accused persons---Testimony of the complainant as to commission of rape on her on the day of occurrence was supported by the medical evidence, i.e., the medico-legal report and the statement of the doctor who examined the complainant---Potency test of the accused persons was also positive, and their involvement in commission of the offence was corroborated by the DNA test report---Prosecution had thus proved its case against the accused persons beyond reasonable doubt---Convictions recorded against the accused persons were upheld, and their sentences of imprisonment for life, as modified by the High Court, were also maintained---Appeal to the extent of accused persons was dismissed.

**(b) Penal Code (XLV of 1860)---**

----S. 376---Rape---Reappraisal of evidence---Testimony of victim---Sufficient for conviction---Rape was a crime that was usually committed in private, and there was hardly any witness to provide direct evidence of having seen the commission of crime by the accused person---Courts, therefore, did not insist upon producing direct evidence to corroborate the testimony of the victim if the same was found to be confidence inspiring in the overall particular facts and circumstances of a case, and considered such a testimony of the victim sufficient for conviction of the accused person---Rape victim stood on a higher pedestal than an injured witness, for an injured witness got the injury on the physical form while the rape victim suffered psychologically and emotionally.

State of U.P. v. Munshi AIR 2009 SC 370 ref.

**(c) Penal Code (XLV of 1860)---**

----S. 376---Rape---Reappraisal of evidence---DNA test report---Evidentiary value---DNA test report due to its scientific accuracy and conclusiveness, was considered as a gold standard to establish the identity of an accused and a very strong corroborative piece of evidence.

**(d) Penal Code (XLV of 1860)---**

----S. 376(2)---Gang rape---Reappraisal of evidence---Benefit of doubt---Possibility of mistaken identification---Accused was not nominated by the complainant/victim in the FIR, nor was there any explanation given in the supplementary statement of complainant, wherein he was nominated, as to how the complainant came to know that he was that unknown person who had committed rape on her with other persons---Such gap in the prosecution evidence cast a reasonable doubt about his involvement in the

occurrence especially when it was appreciated in view of his negative DNA test report---Possibility of mistaken identification of the unknown person, as being the accused, could not be ruled out---Prosecution thus could not prove its case against the accused beyond reasonable doubt---Appeal was accepted to the extent of accused, his conviction and sentence were set-aside, and he was acquitted of the charge by extending him the benefit of doubt.

**(e) Penal Code (XLV of 1860)---**

----S. 376---Constitution of Pakistan, Arts. 4(2)(a) & 14(1)---Rape---Sexual history/character of rape victim---Relevancy---"Two-finger test" (TFT) or "virginity test"---Constitutionality and legality---In rape cases sexual history/character of rape victim was not relevant and it could not be used to discredit the victim's credibility---Furthermore the two-finger test" (TFT) or "virginity test" had no scientific justification or evidentiary relevance to determine the commission of the sexual assault of rape---Reporting sexual history of a rape survivor amounted to discrediting her independence, identity, autonomy and free choice thereby degrading her human worth and offending her right to dignity guaranteed under Art. 14 of the Constitution---Principles relating to relevance of sexual history of rape victim and constitutionality of two-finger test" (TFT) or "virginity test" stated.

Modern forensic science showed that the two finger test must not be conducted for establishing rape-sexual violence, and the size of the vaginal introitus had no bearing on a case of sexual violence. The status of hymen was also irrelevant because hymen could be torn due to several reasons such as cycling, riding among other things. An intact hymen does not rule out sexual violence and a torn hymen does not prove previous sexual intercourse. Hymen must therefore be treated like any other part of the genitals while documenting examination findings in cases of sexual violence. Only those findings that were relevant to the episode of sexual assault, i.e., findings such as fresh tears, bleeding, oedema, etc., were to be documented. The medical officers instead of burdening themselves with reporting about the sexual history of the victim must ensure, in a case of sexual offence of rape to examine the external genital area for evidence of injury, seminal stains and stray pubic hair.

Modi's Textbook of Medical Jurisprudence and Toxicology, 26th Edition. Lexis Nexis publications. P.766. ref.

Due to a combination of lack of training, inexperience the medico-legal certificate's (MLC) casually report the two finger test, to show that the vagina could admit phallus-like fingers to conclude that the survivor was sexually active at the time of the assault or a "virgin" as perceived by the society. Neither of these tests had any basis in medical science. Medical language of 'MLC' was riddled with gender biases and immediately called into question the character of the rape survivor. It was used to support the assumption that a sexually active woman would easily consent for sexual activity with anyone. Examination of a rape victim by the medical practitioners and use of the medical evidence collected in such examination by the courts should be made only to determine the question whether or not the alleged victim was subjected to rape, and not to determine her virginity or chastity.

Dragging sexual history of the rape survivor into the case by making observations about her body including observations like "the vagina admits two fingers easily" or "old ruptured hymen" was an affront to the reputation and honour of the rape survivor and violated Article 4(2)(a) of the Constitution, which mandated that no action detrimental to the body and reputation of person shall be taken except in accordance with law. Similarly, Article 14 of the Constitution mandated that dignity shall be inviolable, therefore, reporting sexual history of a rape survivor amounts to discrediting her independence, identity, autonomy and free choice thereby degrading her human worth and offending her right to dignity guaranteed under Article 14 of the Constitution.

A woman, whatever her sexual character or reputation may be, was entitled to equal protection of law. No one had the license to invade her person or violate her privacy on the ground of her alleged immoral character. Even if the victim of rape was accustomed to sexual intercourse, it was not determinative in a rape case; the real fact-in-issue was whether or not the accused committed rape on her. If the victim had lost her virginity earlier, it did not give to anyone the right to rape her.

Shakeel v. State PLD 2010 SC 47; Shahzad v. State 2002 SCMR 1009 and State of U.P. v. Munshi AIR 2009 SC 370 ref.

Evidence relating to sexual history should not be admitted in order to draw inferences supporting the 'twin myths', namely, that by reason of that sexual history, it was more likely that the complainant may have consented or become less worthy of belief.

PLD 2009 FSC 65 ref.

**(f) Penal Code (XLV of 1860)---**

----S. 376---Constitution of Pakistan, Arts. 4(2)(a) & 14(1)---Rape cases---Use of expressions, like "habituated to sex", "woman of easy virtue", "woman of loose moral character", and "non-virgin", for alleged rape victims in court judgments---Supreme Court observed that such intrusive and inappropriate expressions should be discontinued by the courts, even if they found that the charge of rape was not proved against the accused, and that such expressions were unconstitutional and illegal. (g) Penal Code (XLV of 1860)---

----S. 376---Qanun-e-Shahadat (10 of 1984), Arts. 146 & 151(4)[since omitted]---Punjab Witness Protection Act (XXI of 2018), S. 12(3)---Constitution of Pakistan, Arts. 4(2)(a) & 14(1)---Rape---Prohibition on putting questions to a rape victim in cross-examination, and leading any other evidence, about her alleged "general immoral character" for the purpose of impeaching her credibility---Scope---Omission of Art.151(4) of the Qanun-e-Shahadat, 1984 ('the QSO') by the Legislature left no doubt in discovering and ascertaining the intention of the Legislature that in a rape case the accused could not be allowed to question the complainant about her alleged "general immoral character---However, the omission of Art. 151(4) of the Qanun-e-Shahadat, 1984, implied prohibition on questions put in cross-examination or the defence evidence led as to the reputation of the complainant to show her as of "generally immoral character", and not on the questions put or defence evidence led to prove that some other person, and not the accused, was perpetrator and source of semen or injury found on the body of the complainant; nor did that omission completely shun the admissibility of questions in cross-examination or defence evidence, on the previous sexual relation of the complainant with the accused when the accused took the defence, and intended to prove, that the complainant consented to the sexual activity that was an issue in the case---Section 12(3) of the Punjab Witness Protection Act, 2018 codified such position when it obligated the court to forbid a question to the victim of a sexual offence relating to any sexual behavior of the victim on any previous occasion with the accused or any other person, but also empowered the court to allow such a question if, in the court's opinion, it was a relevant fact in the case---To the same effect were the provisions of Art. 146 of the Qanun-e-Shahadat, 1984, under which the court may forbid such questions if it found that they were 'indecent' or 'scandalous', but could allow them if they related to facts-in-issue or to matters necessary to be known in order to determine whether or not the facts-in-issue existed---However, while allowing or disallowing such questions the court must be conscious of the possibility that the accused may have been falsely involved in the case, and should balance the right of the accused to make a full defence and the potential prejudice to the complainant's rights to dignity and privacy, to keep the scales of justice even for both.

Section 276(1) of the Canadian Criminal Code ref.

Sardar Abdul Raziq Khan, Advocate Supreme Court for Appellants/Petitioners (in both cases).

Mirza Abid Majeed, DPG for the State.

Date of hearing: 4th January, 2021.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**According to the crime report,[1] 20 year old Saadia Rani ("complainant") while travelling to Rawalpindi from Kotli Sattian with one Hameed Abbasi (PW-2) on 28.08.2012, was intercepted on the roadway by the appellants and others, taken off-road and raped. After the gruesome act, the complainant, straight from the place of alleged occurrence, went to the police station and reported the matter. She nominated (i) Sajjad Hussain alias Jajji, (ii) Sher Baz Khan alias Sheru, (iii) Atif Zareef and two unknown persons as perpetrators who, all five, allegedly committed rape on her, one

after the other. Later (iv) Nafees Ahmed and (v) Waqas Hameed were nominated by her as having committed rape on her in supplementary statement recorded the next day. Her statement under section 164 of the Code of Criminal Procedure, 1898 ("Cr.P.C") was also recorded by a learned Magistrate on 29.08.2012, wherein she reiterated her version of having been raped by the aforesaid five persons.

2. Sajjad Hussain alias Jajji and Waqas Hameed became proclaimed offenders, while Sher Baz Khan alias Sheru, Atif Zareef and Nafees Ahmed ("appellants") were sent up for trial and found guilty of having committed rape on the complainant (PW-1) . They were convicted under section 376(2) of the Pakistan Penal Code, 1860 ("P.P.C.") and sentenced to death with the direction to pay Rs.500,000/- as compensation to the complainant or in default thereof to undergo simple imprisonment for six months by the trial court. The appellants challenged their conviction and sentence in appeal before the High Court, and the trial court also sent the Capital Sentence Reference (CSR) to the High Court for confirmation of the death sentence or otherwise. The appeal and the CSR were heard together by the High Court. Vide the impugned judgment, the High Court maintained the conviction of the appellants, however, reduced their sentence to that of imprisonment for life and extended them benefit of section 382-B, Cr.P.C. also.

3. We have heard the learned counsel for the parties at length and examined the record of the case minutely with their able assistance. The prosecution evidence produced in the case to prove the charge against the appellants consists of: (i) the testimony of the complainant (PW-1) as to commission of rape on her by the appellants and others; (ii) the testimony of Hameed Abbasi (PW-2) as to taking away the complainant by the appellants and others; (iii) the medical evidence including the medico-legal report (Ex-PA) and the statement of Dr. Shehla Waqar (PW-5), confirming commission of sexual assault on the complainant; (iv) the Chemical Examiner's report (Ex-PR) that reported detection of semen in the vaginal swabs of the complainant; and (v) the DNA test report (Ex-PS) that reported matching of the DNA found in the vaginal swabs of the complainant with that of the appellant Sher Baz Khan alias Sheru and matching of the DNA found in the stained section of the Shalwar of the complainant with that of the appellant Atif Zareef.

4. We observe that the complainant while appearing as PW-1 deposed each and every detail of the gruesome act committed on her, and her testimony could not be shaken as to any material part of the occurrence stated by her. The suggestions in cross-examination relating to her alleged immoral character and her alleged illicit relation with Hameed Abbasi (PW-2) were strongly denied by her. In any case, the questions targeting her character had no relevance to the matter on trial, i.e., the commission of rape on her. The complainant being an educated lady, studying in B. Ed. after completing her B.A. degree at the time of this agonizing incident had no reason to falsely implicate the appellants, and that too with a such self-deprecating allegation that would tarnish her honour and dignity. The bald assertion of the appellants, without any supporting evidence, that they had seen her in a compromising position with Hameed Abbasi (PW-2) was even otherwise of little value to discredit the testimony of the complainant, which is found to be trustworthy and confidence inspiring.

5. Hameed Abbasi (PW-2) also deposed how he and the complainant, who were travelling to Rawalpindi from Kotli Sattian, were interrupted by the appellants and how the complainant was taken away by them on the day of occurrence. His statement, thus, fully corroborates the version of the complainant as to her forcible taking away by the appellants and some other persons. It is true that he admitted in cross-examination that he did not see the appellants committing rape with the complainant. Rape is a crime that is usually committed in private, and there is hardly any witness to provide direct evidence of having seen the commission of crime by the accused person. The courts, therefore, do not insist upon producing direct evidence to corroborate the testimony of the victim if the same is found to be confidence inspiring in the overall particular facts and circumstances of a case, and considers such a testimony of the victim sufficient for conviction of the accused person. A rape victim stands on a higher pedestal than an injured witness, for an injured witness gets the injury on the physical form while the rape victim suffers psychologically and emotionally.[2] In the present case, the testimony of the complainant as to commission of rape on her on the day of occurrence is supported by the medical evidence, i.e., the medico-legal report (Ex-PA) and the

statement of Dr. Shehla Waqar (PW-5). The potency test of the said appellants was also positive. The involvement of Sher Baz Khan alias Sheru and Atif Zareef in commission of this offence is corroborated by the DNA test report (Ex-PS), which is considered, due to its scientific accuracy and conclusiveness, as a gold standard to establish the identity of an accused and a very strong corroborative piece of evidence. The prosecution has thus proved its case against the appellants, Sher Baz Khan alias Sheru and Atif Zareef beyond reasonable doubt. We, therefore, uphold their conviction recorded by the trial court and confirmed by the High Court, and also maintain the sentence passed on them by the High Court. The appeal to their extent is dismissed.

6. So far as the case of the appellant Nafees Ahmad is concerned, we find it to be distinguishable from that of the other appellants. He was not nominated by the complainant in the FIR, nor was there any explanation given in the supplementary statement (Ex-DA), wherein he was nominated, as to how the complainant came to know that he was that unknown person who had committed rape on her with other persons. This gap in the prosecution evidence casts a reasonable doubt about his involvement in the occurrence especially when it is appreciated in view of his negative DNA test report. The possibility of mistaken identification of the unknown person, as being Nafees Ahmad, cannot be ruled out. The prosecution thus could not prove its case against the appellant, Nafees Ahmad, beyond reasonable doubt. The rule of giving benefit of doubt to accused person is essentially a rule of caution and prudence, and is deep rooted in our jurisprudence for safe administration of criminal justice. Releasing a guilty by mistake is better than punishing an innocent by mistake. We, therefore, accept this appeal to the extent of appellant Nafees Ahmad, set aside his conviction and sentence, and acquit him of the charge by extending him the benefit of doubt. He shall be released forthwith if not required to be detained in any other case.

7. It is important to observe that, while examining and reappraising the evidence available on record, we have noted that during the cross-examination of prosecution witnesses, particularly the complainant/ victim (PW-1), Gul Hameed Abbasi (PW-2) and Muhammad Latif, Investigating Officer (PW-10), the defence tried to build a case that Mst. Sadia Rani, the complainant/victim (PW-1), was a woman of immoral character for having illicit relations with Gul Hameed Abbasi (PW-2), and therefore her testimony was unreliable and untrustworthy. The lady Doctor Shehla Waqar, WMO (PW-5), who medically examined Mst. Sadia Rani (PW-1), the complainant/victim, and issued the MLR (Ex-PA) was also cross-examined on these lines. A portion of her cross-examination is relevant and being reproduced:

> "It is correct that there is nowhere mentioned in Ex-PA that hymen was freshly ruptured or old ruptured. It is correct that in Ex-PA there is nowhere mentioned whether the vagina was admitting one finger or two fingers. It is correct that by doing this it can be assessed that whether the victim was virgin or habitual."

In this background of the case, we find it important to examine whether recording sexual history of the victim by carrying out "two-finger test" (TFT) or the "virginity test" has any scientific justification or evidentiary relevance to determine the commission of the sexual assault of rape, and whether the myth that "unchaste", "impure" or "immoral" women are more likely to consent to sexual intercourse and are not worthy of reliance have any legal basis. This further begs the questions whether "sexual history", "sexual character" or the very "sexuality" of a rape survivor can be used to paint her as sexually active and unchaste and use this to discredit her credibility; and whether her promiscuous background can be made basis to assume that she must have consented to the act. These important questions require to be examined in the light of our Constitution, the law and modern forensic science as it stands today.

Modern forensic science - sexual history and virginity testing

8. Lynn Enright in her book "Vagina - a Re-education" [3] writes that we are taught from an early age that the hymen is associated with female purity. It is imagined as a sheath protecting the opening of the vagina. But this is false. The hymen has no biological function, it has been made into a symbol of virginity around the world. These inaccuracies are largely rooted in misogyny. Medical jurisprudence textbooks had previously prescribed certain tests of medical evaluation to determine prior virginity of an alleged rape victim, viz, assessment of the elasticity of her vaginal orifice by insertion of two fingers in her vagina and

examination of the state of her genitals particularly the hymen. These textbooks had a significant impact on the adjudication of rape cases in the British India, as well as, in Pakistan and India post-independence.[4] Our National Commission on the Status of Women (NCSW) has reported[5] that crime of rape is viewed in the patriarchal context of sexual conduct of the survivor. Rape is also seen as a crime of lust and passion rather than a crime of control. Since then, much water has flown under the bridge, and today modern forensic science shuns the virginity test as being totally irrelevant to the sexual assault. The latest edition of the Modi's Textbook of Medical Jurisprudence and Toxicology[6] states: "The pre-occupation of the medical community was to examine the hymenal status of the victim and determination of vaginal laxity to give opinion on past sexual history. It is time to get past the assessment of virginity and focus attention on appropriate medical care and psychological counseling. It will be illegal, irrelevant and wholly inappropriate to record a finding whether the victim was sexually active or not prior to and after the incident." The latest scientific research studies dispute accuracy of such virginity tests and opinions.[7] The World Health Organization (WHO), the Office of the High Commissioner of the United Nations and the United Nations Entity for Gender Equality and the Empowerment of Women have stated in "Eliminating Virginity Testing: An Interagency Statement"[8] that "virginity testing, also referred to as hymen, two-finger or pre vaginal examination... has no scientific merit or clinical indication" and "the appearance of a hymen is [also] not a reliable indication of intercourse and there is no known examination that can prove a history of vaginal intercourse." They have clarified that "like all human tissues, vaginal and hymnal tissue can be injured during trauma... [T]he purpose of the examination for sexual assault is to evaluate for and treat injuries ... not to assess virginity status."

9. Modern forensic science thus shows that the two finger test must not be conducted for establishing rape-sexual violence, and the size of the vaginal introitus[9] has no bearing on a case of sexual violence. The status of hymen is also irrelevant because hymen can be torn due to several reasons such as cycling, riding among other things. An intact hymen does not rule out sexual violence and a torn hymen does not prove previous sexual intercourse. Hymen must therefore be treated like any other part of the genitals while documenting examination findings in cases of sexual violence. Only those findings that are relevant to the episode of sexual assault, i.e., findings such as fresh tears, bleeding, oedema, etc., are to be documented. "Rape is a crime and not a medical diagnosis to be made by the medical officer treating the victim... [T]he only statement that can be made by the medical officer is whether there is evidence of recent sexual activity and about injuries noticed in and around the private parts. The duty of the medical officer extends principally to provide adequate healthcare and comfort to the victim and secondarily to assist the prosecution with appropriate medical evidence."[10] The medical officers instead of burdening themselves with reporting about the sexual history of the victim must ensure, according to Modi's Textbook of Medical Jurisprudence and Toxicology,[11] in a case of sexual offence of rape to examine the external genital area for evidence of injury, seminal stains and stray pubic hair.

10. Due to a combination of lack of training, inexperience the medico-legal certificate's (MLC) casually report the two finger test, to show that the vagina can admit phallus-like fingers to conclude that the survivor was sexually active at the time of the assault or a "virgin" as perceived by the society. Neither of these tests have any basis in medical science. Medical language of MLC is riddled with gender biases and immediately calls into question the character of the rape survivor. It is used to support the assumption that a sexually active woman would easily consent for sexual activity with anyone. The World Health Organization (WHO), the Office of the High Commissioner of the United Nations and the United Nations Entity for Gender Equality and the Empowerment of Women in "Eliminating Virginity Testing: An Interagency Statement" proclaim, "the practice is a violation of the victim's human rights and is associated with both immediate and longterm consequences that are detrimental to her physical, psychological and social well-being." In view of this firm and reliable Interagency Statement, examination of a rape victim by the medical practitioners and use of the medical evidence collected in such examination by the courts should be made only to determine the question whether or not the alleged victim was subjected to rape, and not to determine her virginity or chastity.

Constitutionality of "sexual history"

11. Dragging sexual history of the rape survivor into the case by making observations about her body including observations like "the vagina admits two fingers easily" or "old ruptured hymen" is an affront to the reputation and honour of the rape survivor and violates Article 4(2)(a) of the Constitution, which mandates that no action detrimental to the body and reputation of person shall be taken except in accordance with law. Similarly Article 14 of our Constitution mandates that dignity shall be inviolable, therefore, reporting sexual history of a rape survivor amounts to discrediting her independence, identity, autonomy and free choice thereby degrading her human worth and offending her right to dignity guaranteed under Article 14 of the Constitution which Right to dignity under Article 14 of the Constitution is an absolute right and not subject to law. Dignity means human worth: simply put, every person matters. No life is dispensable, disposable or demeanable. Every person has the right to live, and the right to live means right to live with dignity. A person should live as "person" and no less.[12] Human dignity hovers over our laws like a guardian angel; it underlies every norm of a just legal system and provides an ultimate justification for every legal rule.[13] Therefore, right to dignity is the crown of fundamental rights under our Constitution and stands at the top, drawing its strength from all the fundamental rights under our Constitution and yet standing alone and tall, making human worth and humanness of a person a far more fundamental a right than the others, a right that is absolutely non-negotiable.

12. A woman, whatever her sexual character or reputation may be, is entitled to equal protection of law. No one has the license to invade her person or violate her privacy on the ground of her alleged immoral character. Even if the victim of rape is accustomed to sexual intercourse, it is not determinative in a rape case; the real fact-in-issue is whether or not the accused committed rape on her. If the victim had lost her virginity earlier, it does not give to anyone the right to rape her.[14] In a criminal trial relating to rape, it is the accused who is on trial and not the victim. The courts should also discontinue the use of painfully intrusive and inappropriate expressions, like "habituated to sex", "woman of easy virtue", "woman of loose moral character", and "non-virgin", for the alleged rape victims even if they find that the charge of rape is not proved against the accused. Such expressions are unconstitutional and illegal.

13. It appears that the courts had been allowing opinion evidence of the medical experts as to the said tests to be brought on record in cases of rape in view of the provisions of Article 151(4) of the Qanun-e-Shahadat Order, 1984 ("QSO") [Section 155(4) of the erstwhile Evidence Act, 1872] which provided that "when a man is prosecuted for rape or an attempt to ravish, it may be shown that the victim was of generally immoral character to impeach her credibility." This has now become inadmissible in evidence after the omission of Article 151(4) of the QSO by the Criminal Law Amendment (Offences Relating to Rape) Act, 2016. Earlier, a Full Bench of the Federal Shariat Court of Pakistan had also declared the provisions of Article 151(4) of the QSO to be repugnant to the Injunctions of Islam, in Mukhtar Ahmad v. Govt. of Pakistan.[15]

14. While the omission of Article 151(4) of the QSO implies prohibition on putting questions to a rape victim in cross-examination, and leading any other evidence, about her alleged "general immoral character" for the purpose of impeaching her credibility. Section 12(3) of the Punjab Witness Protection Act, 2018 has specifically provided that "the court shall forbid a question to the victim of a sexual offence relating to any sexual behavior of the victim on any previous occasion with the accused or any other person, unless such a question, in the opinion of the court, is a relevant fact in the case". Therefore, evidence relating to sexual history should not be admitted in order to draw inferences supporting the 'twin myths', namely, that by reason of that sexual history, it is more likely that the complainant may have consented or become less worthy of belief.

15. Omission of Article 151(4) of the QSO by the Legislature leaves no doubt in discovering and ascertaining the intention of the Legislature that in a rape case the accused cannot be allowed to question the complainant about her alleged "general immoral character. Declaration of the Federal Shariat Court of Pakistan as to the provisions of Article 151(4) of the QSO, since omitted, also bars such questions. However, it may be important to underline that the omission of Article 151(4) of the QSO implies

prohibition on questions put in cross-examination or the defence evidence led as to the reputation of the complainant to show her as of "generally immoral character", and not on the questions put or defence evidence led to prove that some other person, and not the accused, is perpetrator and source of semen or injury found on the body of the complainant; nor does that omission completely shun the admissibility of questions in cross-examination or defence evidence, on the previous sexual relation of the complainant with the accused when the accused takes the defence, and intends to prove, that the complainant consented to the sexual activity that is an issue in the case. Section 12(3) of the Punjab Witness Protection Act, 2018 codifies this position when it obligates the court to forbid a question to the victim of a sexual offence relating to any sexual behavior of the victim on any previous occasion with the accused or any other person, but also empowers the court to allow such a question if, in the court's opinion, it is a relevant fact in the case. To the same effect are the provisions of Article 146 of the QSO, under which the court may forbid such questions if it finds that they are 'indecent' or 'scandalous', but can allow them if they relate to facts-in-issue or to matters necessary to be known in order to determine whether or not the facts-in-issue existed. However, while allowing or disallowing such questions the court must be conscious of the possibility that the accused may have been falsely involved in the case, and should balance the right of the accused to make a full defence and the potential prejudice to the complainant's rights to dignity and privacy, to keep the scales of justice even for both.[16]

16. Foregoing are the reasons for our short order dated 04.1.2021, whereby Criminal Appeal No.251/2020 was partly allowed in the above terms. For ease of reference and completion of record, the said short order is reproduced hereunder:-

> "For reasons to be recorded later, the instant criminal appeal is allowed to the extent of appellant No.3 Nafees Ahmad son of Muhammad Ashraf and his conviction and sentence is set aside. He is acquitted of the charge framed against him. He is behind the bars and is ordered to be released forthwith, if not required to be detained in any other case. The instant criminal appeal, however, is dismissed to the extent of appellant No.1 Atif Zareef and appellant No.2 Sher Baz Khan alias Sheru."

Criminal Petition No.667/2020:

17. Through this petition, the appellants have sought suspension of their sentences. Since the main appeal has been decided, this petition has become infructuous and is accordingly dismissed and leave refused.

Direction to I. G., Punjab Police

18. Before parting with the judgment, we consider it just and proper to highlight that two accused persons, Sajjad Hussain alias Jajji and Waqas Hameed (proclaimed offenders), allegedly involved in this case are still at large despite lapse of a period of about 8 years since the incident. It appears that the case file has been dumped under the dust of time. We, therefore, direct the office to send a copy of this judgment to the Inspector General of Police, Punjab who shall personally supervise the efforts of the District Police, Rawalpindi in bringing the proclaimed offenders to justice, in accordance with the law. The Inspector General of Police, Punjab shall submit the progress report in this regard within one month from the date of receipt of copy of this judgment, which shall be placed before us in Chambers for our perusal.

MWA/A-16/SC Order accordingly.

**P L D 2021 Supreme Court 571**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ**

**Mian IRFAN BASHIR---Petitioner**

**Versus**

**The DEPUTY COMMISSIONER (D.C.), LAHORE and others---Respondents**

C. P. No. 446-L of 2019, decided on 27th January, 2021.

(On appeal from the order of Lahore High Court, Lahore dated 24.01.2019, passed in I.C.A. No.4343 of 2019).

**(a) Constitution of Pakistan---**

----Art. 199---Constitutional jurisdiction of the High Court---Scope---High Court did not enjoy suo motu jurisdiction under Art. 199 of the Constitution.

There must exist a dispute before the High Court before it exercises judicial power. "On the application of an aggrieved party" was an essential pre-requisite to invoke the constitutional jurisdiction of the High Court under Article 199 of the Constitution. There must be an application and an applicant to invoke the jurisdiction of judicial review as the High Court did not enjoy suo motu jurisdiction under Article 199 of the Constitution.

Dr. Imran Khattak and another v. Ms. Sofia Waqar Khattak, PSO to Chief Justice and others 2014 SCMR 122 and Jehanzaib Malik v. Balochistan Public Procurement Regulatory Authority through Chairman Board of Directors and others 2018 SCMR 414 ref.

**(b) Provincial Motor Vehicles Ordinance (XIX of 1965)---**

----S. 89-A---Constitution of Pakistan, Arts. 9, 18 & 199---Constitutional jurisdiction of the High Court---Scope---Suo motu exercise of judicial power under Art. 199 of the Constitution was not available to the High Court---Where the High Court issued directions in its constitutional jurisdiction with respect to an issue or dispute that was not before the Court, it would amount to judicial overreach.

A Traders Association, approached the constitutional jurisdiction of the High Court to challenge a notice issued by the Zonal Officer (Regulation) Metropolitan Corporation for the removal of signboards and advertisements from their shops within 24 hours. Single Bench of the High Court while dealing with this issue thought it best to also discuss and pass directions on to a totally different issue, which was not even before the Court, regarding wearing of helmets by motorcyclists plying their bikes on the Mall Road. Without there being any dispute before it, the Court examined the compliance by the motorcyclists of wearing helmets when plying their bikes on the Mall Road. The High Court exercising suo motu powers, passed directions to the effect that the petrol pumps shall not fill in the petrol tanks of the motorcyclists who did not wear helmets and in case any owner of the filling station was found to provide petrol to such motorcyclist, the petrol pump would be sealed and heavy fine would be imposed. Intra Court Appeal filed before the Division Bench of the High Court was dismissed and Order of the Single Bench was upheld.

In the instant case, the direction against the motorcyclists (who did not wear helmets) and the petrol pump owners was a suo motu exercise of judicial power not available to the High Court under the Constitution. There was no such lis or dispute before the High Court. The grievance agitated before the High Court was regarding the signboards and advertisements put up by the traders on the Mall Road and this matter was not even remotely connected to the motorcyclists, helmets or the purchase of petrol by them.

The use of helmets was provided under section 89-A of the Provincial Motor Vehicle Ordinance, 1965 which provided that no person shall drive or ride the pillion seat of a two-wheeled motor vehicle without wearing a crash helmet. While the requirement of wearing helmets by the motorcycle riders and those on the pillion seat was provided under the law, there was no legal backing for the impugned direction issued by the High Court. There was no law or executive policy supporting such a ban on sale and purchase of petrol by the petrol pump owners to the motorcyclists not wearing helmets. The impugned direction was above the law and had no legal legitimacy or sanctity. Such exercise of judicial power by a judge passed

for judicial overreach i.e., exercise of judicial power without any backing of law and clearly interfering in and encroaching on the legislative and executive domain.

In the present case, the order passed by the single bench of the High Court had no law or executive policy behind it. It was a clear example of judicial legislation and thus judicial overreach. High Court was not vested with any such jurisdiction under the Constitution. Impugned direction by the High Court placing a ban on motorcyclists without a helmet to purchase petrol, lost sight of the fundamental rights guaranteed to the petrol pump owners and the motorcyclists under the Constitution. The impugned direction deprived the petrol pump owners of their business guaranteed under Article 18 of the Constitution and the motorcyclists of their right to mobility and right to livelihood guaranteed under Article 9 of the Constitution. The High Court, in its desire to make The Mall Road, an iconic thoroughfare, overstepped its jurisdiction, forgetting that a Judge was bound by the Constitution and the law.

Supreme Court set aside the impugned orders passed by the Single Bench as well as Division Bench of the High Court to the extent of the direction issued to the petrol pump owners of placing a ban on the sale of petrol to motorcyclists plying without a helmet, as the same were unconstitutional, illegal and without jurisdiction. Petition for leave to appeal was converted into appeal and allowed.

**(c) Constitution of Pakistan---**

----Arts. 184(3) & 199---'Judicial review', 'Judicial activism' and 'Judicial overreach'---Meaning and distinction.

Judicial review was the power of the courts to examine the actions of the legislative, executive, and administrative arms of the government and to determine whether such actions were consistent with the Constitution. Actions judged inconsistent were declared unconstitutional and, therefore, null and void. Judicial review was the genus and judicial activism or judicial restraint were its subspecies. While exercising judicial review, there came a point when the decision rested on judicial subjectivity; which was not the personal view of a judge but his judicial approach. One judge may accord greater significance to the need for change, while the other may accord greater significance to the need for certainty and status quo. Both types of judges acted within the zone of law; neither invalidated the decision of another branch of the Government unless it deviated from law and was unconstitutional.

Activist judges (or judicial activism) were less influenced by considerations of security, preserving the status quo, and the institutional constraints. On the other hand, self-restrained judges (or judicial restraint) gave significant weight to security, preserving the status quo and the institutional constraints. Both judicial activism and judicial self-restraint operated within the bounds of judicial legitimacy.

Aharon Barak, The Judge in a Democracy. Princeton. Chapter 15 ref.

It was one thing for a judge to progressively interpret the law because of human rights considerations about which he had substantial information. It was quite another to change or ignore the law for economic or social or political reasons based on polycentric considerations beyond the judge's expertise. Judicial power was never exercised for the purpose of giving effect to the will of the judge; but always for the purpose of giving effect to the will of the legislature; or in other words, to the will of the law. When courts exercised power outside the Constitution and the law and encroached upon the domain of the Legislature or the Executive, the courts committed judicial overreach.

Christopher Wolfe, 'The Rehnquist Court and "Conservative Judicial Activism"' in Christopher Wolfe (ed), That Eminent Tribunal: judicial supremacy and the constitution (Princeton 2004) ref.

Judicial overreach was when the judiciary started interfering with the proper functioning of the legislative or executive organs of the government. This was totally uncharacteristic of the role of the judiciary envisaged under the Constitution and was most undesirable in a constitutional democracy. Judicial overreach was transgressive as it transformed the judicial role of adjudication and interpretation of law into that of judicial legislation or judicial policy making, thus encroaching upon the other branches of the Government and disregarding the fine line of separation of powers, upon which was pillared the very construct of constitutional democracy. Such judicial leap in the dark was also known as "judicial adventurism" or "judicial imperialism." A judge was to remain within the confines of the dispute brought

before him and decide the matter by remaining within the confines of the law and the Constitution. The role of a constitutional judge was different from that of a King, who was free to exert power and pass orders of his choice over his subjects. Having taken an oath to preserve, protect and defend the Constitution, a constitutional judge could not be forgetful of the fact that he himself, was first and foremost subject to the Constitution and the law. When judges uncontrollably treaded the path of judicial overreach, they lowered the public image of the judiciary and weakened the public trust reposed in the judicial institution. In doing so they violated their oath and turned a blind eye to their constitutional role. Constitutional democracy leaned heavily on the rule of law, supremacy of the Constitution, independence of the judiciary and separation of powers. Judges by passing orders, which were not anchored in law and did not draw their legitimacy from the Constitution, unnerved the other branches of the Government and shook the very foundations of democracy.

Muqatadir Akhtar Shabbir, Advocate Supreme Court and Nasrullah Khan Babar, Advocate Supreme Court for Petitioner.

Ch. Zafar Hussain Ahmad, Addl. A.G. along with Mudassar Riaz Malik, D.C., Amir Shafiq, ADC (Headquarters), Hammad, CTO, Lahore and Sajid Sharif, Law Officer for Respondents.

Date of hearing: 27th January, 2021.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**As a matter of background, The Mall Road Traders Association, approached the constitutional jurisdiction of the High Court to challenge Notice dated 16.07.2018 issued by the Zonal Officer (Regulation) Metropolitan Corporation, Lahore for the removal of signboards and advertisements from their shops within 24 hours. Learned Single Bench of the High Court while dealing with this issue in Order dated 20.12.2018 thought it best to also discuss and pass directions on to a totally different issue, which was not even before the Court, regarding wearing of helmets by motorcyclists plying their bikes on the Mall Road. Without there being any dispute before it, the Court examined the compliance by the motorcyclists of wearing helmets when plying their bikes on the Mall Road. The Court was informed that 99% motorcyclists were now wearing helmets. As if this was not enough, the Court exercising suo motu powers, passed the following direction in paragraph 13 of order dated 20.12.2018:

> "13. ... Today, it is also ordered, that the petrol pumps shall not fill in the petrol tanks of the motorcyclists who have not worn the helmets and in case any owner of the filling station is found to provide the petrol to those motorcyclist, the petrol pump will be sealed and heavy fine will be imposed. It has also been reported that some of the petrol pumps are providing helmets for few minutes i.e. during pouring the petrol, just to flout the order of this Court, therefore, in case if any owner of petrol pump is found doing this, he will be dealt with iron hands of law." (emphasis supplied)

The petitioners assailed this part of the Order in appeal (ICA) before the learned Division Bench of the High Court, who vide impugned order dated 24.01.2019 dismissed the appeal and upheld the Order of the learned Single Bench in the following manner:-

> "3...It is not denied by the learned counsel that every person riding a motorbike is required by law to wear a helmet. If that is so, the direction given by learned Single Judge in Chambers is not unlawful rather it is in accordance with law. (emphasis supplied)

2. After hearing the learned counsel for the parties, we at the very outset wish to point out that there must exist a dispute before the High Court before it exercises judicial power. "On the application of an aggrieved party" is an essential pre-requisite to invoke the constitutional jurisdiction of the High Court under Article 199 of the Constitution. There must be an application and an applicant to invoke the jurisdiction of judicial review as the High Court does not enjoy suo motu jurisdiction under Article 199.[1]

3. In the instant case, the direction against the motorcyclists (who do not wear helmets) and the petrol pump owners is a suo motu exercise of judicial power not available to the High Court under the Constitution. There was no such lis or dispute before the High Court. The grievance agitated before the High Court was regarding the signboards and advertisements put up by the traders on the Mall Road and

this matter was not even remotely connected to the motorcyclists, helmets or the purchase of petrol by them.

4. The use of helmets is provided under section 89-A of the Provincial Motor Vehicle Ordinance,1965 which provides that no person shall drive or ride the pillion seat of a two-wheeled motor vehicle without wearing a crash helmet. While the requirement of wearing helmets by the motorcycle riders and those on the pillion seat is provided under the law, there is no legal backing for the impugned direction issued by the High Court. There is no law or executive policy supporting such a ban on sale and purchase of petrol by the petrol pump owners to the motorcyclists not wearing helmets. The impugned direction is above the law and has no legal legitimacy or sanctity. Such exercise of judicial power by a judge passes for judicial overreach i.e., exercise of judicial power without any backing of law and clearly interfering in and encroaching on the legislative and executive domain. At this junction it might be opportune to shed some light on the distinction between judicial review, judicial activism and judicial overreach. Judicial review is the power of the courts to examine the actions of the legislative, executive, and administrative arms of the government and to determine whether such actions are consistent with the Constitution. Actions judged inconsistent are declared unconstitutional and, therefore, null and void.[2] Judicial review is the genus and judicial activism or judicial restraint are its subspecies. While exercising judicial review, there comes a point when the decision rests on judicial subjectivity; which is not the personal view of a judge but his judicial approach. One judge may accord greater significance to the need for change, while the other may accord greater significance to the need for certainty and status quo. Both types of judges act within the zone of law; neither invalidates the decision of another branch of the Government unless it deviates from law and is unconstitutional. Activist judges (or judicial activism) are less influenced by considerations of security, preserving the status quo, and the institutional constraints. On the other hand, self-restrained judges (or judicial restraint) give significant weight to security, preserving the status quo and the institutional constraints. Both judicial activism and judicial self-restraint operate within the bounds of judicial legitimacy.[3]

5. It is one thing for a judge to progressively interpret the law because of human rights considerations about which he has substantial information. It is quite another to change or ignore the law for economic or social or political reasons based on polycentric considerations beyond the judge's expertise. According to Chief Justice John Marshall, judicial power is never exercised for the purpose of giving effect to the will of the judge; but always for the purpose of giving effect to the will of the legislature; or in other words, to the will of the law.[4] When courts exercise power outside the Constitution and the law and encroach upon the domain of the Legislature or the Executive, the courts commit judicial overreach.

6. Judicial overreach is when the judiciary starts interfering with the proper functioning of the legislative or executive organs of the government. This is totally uncharacteristic of the role of the judiciary envisaged under the Constitution and is most undesirable in a constitutional democracy. Judicial overreach is transgressive as it transforms the judicial role of adjudication and interpretation of law into that of judicial legislation or judicial policy making, thus encroaching upon the other branches of the Government and disregarding the fine line of separation of powers, upon which is pillared the very construct of constitutional democracy. Such judicial leap in the dark is also known as "judicial adventurism" or "judicial imperialism." A judge is to remain within the confines of the dispute brought before him and decide the matter by remaining within the confines of the law and the Constitution. The role of a constitutional judge is different from that of a King, who is free to exert power and pass orders of his choice over his subjects. Having taken an oath to preserve, protect and defend the Constitution, a constitutional judge cannot be forgetful of the fact that he himself, is first and foremost subject to the Constitution and the law. When judges uncontrollably tread the path of judicial overreach, they lower the public image of the judiciary and weaken the public trust reposed in the judicial institution. In doing so they violate their oath and turn a blind eye to their constitutional role. Constitutional democracy leans heavily on the rule of law, supremacy of the Constitution, independence of the judiciary and separation of powers. Judges by passing orders,

which are not anchored in law and do not draw their legitimacy from the Constitution, unnerve the other branches of the Government and shake the very foundations of our democracy.

7. In the present case, the order passed by the single bench of the Lahore High Court has no law or executive policy behind it. It is a clear example of judicial legislation and thus judicial overreach. High Court is not vested with any such jurisdiction under the Constitution. Needless to mention, that the impugned direction by the High Court placing a ban on motorcyclists without a helmet to purchase petrol, loses sight of the fundamental rights guaranteed to the petrol pump owners and the motorcyclists under the Constitution. The impugned direction deprives the petrol pump owners of their business guaranteed under Article 18 of the Constitution and the motorcyclists of their right to mobility and right to livelihood guaranteed under Article 9 of the Constitution. The High Court, in its desire to make The Mall Road, an iconic thoroughfare, overstepped its jurisdiction, forgetting that a Judge is bound by the Constitution and the law.

8. We, therefore, for the above reasons, set aside the impugned orders passed by the learned Single Bench dated 20.12.2018, as well as, learned Division Bench of the High Court dated 24.01.2019 to the extent of the direction issued to the petrol pump owners of placing a ban on the sale of petrol to motorcyclists plying without a helmet. The impugned direction is declared to be unconstitutional, illegal and without jurisdiction. Resultantly, this petition is converted into appeal and allowed.

MWA/I-2/SC Petition allowed.

**P L D 2021 Supreme Court 581**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ**

**Mst. SAMRANA NAWAZ and others---Appellants**

**Versus**

**M.C.B. BANK LTD. and others---Respondents**

C. A. No. 17-L of 2019, C.P. 2646-L of 2018 and C.A. 364-L of 2020, decided on 16th March, 2021.

(Against the judgment dated 20.11.2018 passed in E.F.A. No.17 of 2012, judgment dated 20.11.2018 passed in E.F.A. No.620 of 2011 and judgment dated 03.02.2020 passed in E.F.A No.231782 of 2018 respectively by the Lahore High Court, Lahore).

**(a) Civil Procedure Code (V of 1908)---**

----O.XXI, R. 90, Second Proviso---Second proviso to O.XXI R.90, C.P.C.---Interpretation and scope---Sale of mortgaged property---Judgment debtor objecting to sale---Question as to whether a 20% deposit of the auction price was obligatory for an objector without an order by the Banking Court requiring the same to be deposited in terms of second proviso to R. 90 of O.XXI, C.P.C.---Held, that the second proviso to O.XXI, R. 90, C.P.C. ('the second proviso') contemplated a prior direction of the court to deposit the sum or furnish the security for entailing penal consequences of dismissing the objection petition due to non-deposit of the amount or non-furnishing of the security, which was required to be deposited or furnished under the second proviso for entertaining the objection petition---Punitive action could be taken only when the applicant failed to comply with the direction of the court, and in absence of such direction the objection petition could not be dismissed for non-deposit of the 20% of the sum realised at sale---Expression "as the Court may direct" used in the second proviso left little room to speculate whether the applicant/objector was to deposit the 20% of the sale amount at the time of filing the objection petition or at a subsequent stage under direction of the court---Furthermore the expression "such amount not exceeding twenty percent" further strengthened the position that the amount required to be deposited by the applicant/objector was to be determined by the court which must not exceed twenty percent of the sale amount but could be less than that---Applicant could not anticipate what the direction of the court would be in such regard and, therefore, he cannot deposit the requisite amount at the time of filing the objection petition---Mandatory requirement of the second proviso appeared to become operative only once the court determined the "amount not exceeding twenty percent of the sum realised at the sale" and directed the applicant/objector to deposit the same---Supreme Court observed that said interpretation of the second proviso was, however, in contrast to the view expressed by a three-member Bench in the case of Habib and Company v. MCB (PLD 2020 SC 227), and according to established practice and procedure the present three member Bench was bound by the view in the said case; that since only a Bench larger than the present three member Bench could reconsider the question as to the interpretation of the second proviso, and revisit (if found necessary) the view expressed by the three member Bench in the case of Habib and Company v. MCB (PLD 2020 SC 227), therefore, office should place the matter before the Chief Justice for appropriate order.

Alhamdi Begum v. NBP PLD 1976 Kar. 723; Shafique Shah v. Irshad Begum 1981 CLC 369; Rukhsana v. Muhammad Ilyas 1993 CLC 1949; Ali Match Industries v. IDB 1999 MLD 2127; Niamat Ali v. Muhammad Imran PLD 2003 Lah. 42; Sultan Mahmood v. HBFC 2006 YLR 2776 and Khursheed v. Inam-Ur-Rehman PLD 2009 Lah. 552 and Hindusthan Commercial Bank v. Punnu Sahu AIR 1970 SC 1384 ref.

Wali Khan v. Manager, ADB PLD 2003 SC 500 distinguished.

Habib and Company v. MCB PLD 2020 SC 227 contrary to language of second proviso to O.XXI, R. 90, C.P.C, but binding upon the present Three Member Bench till it was revisited by a larger Bench.

**(b) Precedent---**

----Judgments of the Supreme Court---Binding precedent---Scope---Earlier judgment of a Bench of the Supreme Court was binding not only upon the Benches of smaller numeric strength but also upon the Benches of coequal strength; a Bench of co-equal strength could not deviate from the view held by an earlier Bench, and if a contrary view had to be taken, then the proper course was to request the Chief

Justice (of the Supreme Court) for constitution of a larger Bench to reconsider the earlier view---Smaller Bench cannot request for the constitution of a larger Bench to revisit the opinion of a larger Bench on any question or principle of law; only a Bench of co-equal strength can make such a request---As a judgment of a larger Bench was binding on the smaller Benches, judicial discipline and propriety demanded that a two member Bench should follow decision of a three member Bench, and if a two member Bench concluded that an earlier judgment of a three member Bench was so incorrect that in no circumstances could it be followed, the proper course for it was to set out the reasons why it could not agree with the judgment of the three member Bench and to refer the matter to the Chief Justice for constitution of a three member Bench---If the three member Bench also came to the conclusion that the earlier judgment of a three member Bench was not correct, then the reference of the matter to a five member larger Bench was justified---Two member Bench cannot jump over a three member Bench and directly ask for constitution of a Bench larger than three member Bench, to review the principle of law declared by that Bench.

Ardeshir Cowasjee v. KMCA 1999 SCMR 2883; Ameer Zeb v. State PLD 2012 SC 380; Muhammad Saleem v. Fazal Ahmad 1997 SCMR 315; Babar Shehzad v. Said Akbar 1999 SCMR 2518; All Pakistan Newspapers Society v. Federation PLD 2004 SC 600; Ata Ullah v. Surraya Parveen 2006 SCMR 1637; Azhar Siddiqui v. Federation PLD 2012 SC 774; Charat Cement Co. v. Federation PLD 2021 SC 327 and Pradip Chandra v. Pramod Chandra AIR 2002 SC 296 ref.

Shahid Ikram Siddiqui, Advocate Supreme Court for Appellants/ Petitioners.

Umar Farooq, Advocate Supreme Court, Ashar Elahi, Advocate Supreme Court and Hafeez Saeed Akhtar, Advocate Supreme Court for Respondents.

Date of hearing: 16th March, 2021.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The question before us requires interpretation of the second proviso to Rule 90 of Order XXI of the Code of Civil Procedure, 1908 ("C.P.C."), which is reproduced hereunder for ready reference:

> Provided further that no such application shall be entertained unless the applicant deposits such amount not exceeding twenty per cent of the sum realised at the sale, or furnishes such security, as the Court may direct.

In C.P. No.756-L of 2020 (now numbered as C.A. 364-L of 2020), a two-member Bench of this Court after citing several judgments of this Court, and observing that "there appears to be some ambiguity in the law laid down by this court", granted leave to appeal to consider the question:

> whether a 20% deposit of the auction price is obligatory for an objector without an order requiring the same being passed by the Banking Court in terms of second proviso to Rule 90 of Order XXI, C.P.C.

2. Learned counsel for the appellants/ petitioners has contended that the deposit of an amount not exceeding 20% of the sum realized at the sale, or the furnishing of security, by the applicant making an application under Order XXI, Rule 90 of the C.P.C. is to be directed by the court, and the said proviso does not come into action without such direction. He has further submitted that the maximum amount that can be directed to be deposited for the purpose of entertaining the said application, must not exceed 20% of the sum realized at the sale; however, the court can reduce the same or can order for furnishing any security instead of deposit of any sum. On the other hand, learned counsel for the respondents have maintained that the applicant making an application under Order XXI, Rule 90, of the C.P.C. has to deposit of 20% of the sum realised at the sale without waiting for direction of the court in this regard, and the said application is to be accompanied by deposit of such amount for being entertained by the court. They have, in this regard, placed reliance upon the judgments of this Court reported in Messrs Habib and Company and others v. Muslim Commercial Bank Limited and others (2019 SCMR 1453) and Messrs Habib and Company and others v. Muslim Commercial Bank Limited and others (PLD 2020 SC 227). The impugned judgments expressing the same view have relied upon the judgments of this Court reported in Messrs Nice 'N' Easy

Fashion (Pvt.) Ltd. and others v. Allied Bank of Pakistan and another (2014 SCMR 1662) and Zakaria Ghani and 4 others v. Muhammad Ikhlaq Memon and 8 others (PLD 2016 SC 229).

3. We have heard the learned counsel for the parties on the said question, and with their able assistance have noted that the following judgments of this Court, as well as, of our High Courts are relevant to be considered for answering the question. Some of these judgments have dealt with the question under consideration while the others have made only passing remarks as to the nature, scope and applicability of the provisions of second proviso to Rule 90 of Order XXI, C.P.C.

Judgments of this Court

1. Wali Khan v. Manager, ADB PLD 2003 SC 500
2. Nadia Malik v. Makki Chemical Industries 2011 SCMR 1675
3. Nice 'N' Easy Fashion v. ABL 2014 SCMR 1662
4. Zakaria Ghani v. Muhammad Ikhlaq PLD 2016 SC 229
5. Muhammad Ashraf v. UBL 2019 SCMR 1004
6. Habib and Company v. MCB 2019 SCMR 1453
7. Habib and Company v. MCB PLD 2020 SC 227

Judgments of the High Courts

1. Alhamdi Begum v. NBP PLD 1976 Kar. 723 (DB)
2. Shafique Shah v. Irshad Begum 1981 CLC 369
3. Rukhsana v. Muhammad Ilyas 1993 CLC 1949
4. Ali Match Industries v. IDB 1999 MLD 2127 Pesh. (DB)
5. Niamat Ali v. Muhammad Imran PLD 2003 Lah. 42
6. Sultan Mahmood v. HBFC 2006 YLR 2776
7. Khursheed v. Inam-Ur-Rehman PLD 2009 Lah. 552 (DB)

4. The second proviso, under consideration in the present case, was added to Rule 90 of Order XXI of the C.P.C. in the year 1972 by the Law Reforms Ordinance, 1972, and the study of the above-noted cases shows that the question of its interpretation arose for the first time in the year 1975 and was considered by a Division Bench of the Sindh High Court in the case of Alhamdi Begum.[1] The Bench was consisted of two distinguished Judges, namely, Justice Dorab Patel and Justice Zaffar Hussain Mirza, who both were later elevated to the bench of this Court. In the said case, Justice Zaffar Hussain Mirza, with whom Justice Dorab Patel agreed, answered the question thus:

> 7. .A bare reading of the proviso in question shows that the bar on entertainment of the application results from the failure of the applicant to "deposit such amount not exceeding twenty per cent of the sum realised at the sale", or on the failure of the applicant to furnish "such security, as the Court may direct". Therefore, the bar on entertainment of application can become effective only when the Court first determines the amount to be deposited or security to be furnished and no applicant can possibly anticipate what the order of the Court would be in this regard, so that he could be put to the duty of tendering the requisite amount or security.
>
> 9. .In my humble opinion, the Court had to pass an order either to direct the deposit of a sum up to twenty per cent of the auction amount or to direct furnishing of security as was deemed appropriate under the circumstances, and then give an opportunity to the appellant to comply with such order. It was only when the appellant had failed to comply with such an order that his application under rule 90 could be summarily dismissed.

This interpretation put by the Sindh High Court to the provisions of the second proviso to Rule 90 of Order XXI, C.P.C. was later-on adopted and followed by the Peshawar High Court in the case of Ali Match Industries[2] and by the Lahore High Court in the cases of Shafique Shah,[3] Rukhsana,[4] Niamat Ali,[5] Sultan Mahmood,[6] and Khursheed.[7] In Niamat Ali and Khursheed the High Court held as under:

Niamat Ali v. Muhammad Imran PLD 2003 Lahore 42

> 5. ..the said proviso is an enabling and directory provision, which empowers the Court either to direct for the deposit of the amount not exceeding 20% of the sum realized at the sale or for the furnishing

of the security. This has been left to the discretion of the Court, obviously to be exercised according to the judicial standard, but the direction of the Court in this behalf is sine qua non, as is clear from the following words of the proviso:

"as the Court may direct."

which controls and regulates the earlier part of the proviso. It is only, if the direction of the Court is not complied with, the objections can be dismissed for non-compliance thereof.

Khursheed v. Inam-Ur-Rehman PLD 2009 Lahore 552 (DB)

16. Mr. Kazmi is right in arguing that the order for the deposit of 20% should not have preceded, rather succeeded the objections. The logic and wisdom behind the proviso to Order XXI, Rule 90, C.P.C. obviously is to curtail and circumvent frivolous and baseless objection and it is only after examining the same, the Court could assess the quality and nature thereof and to decide whether a security should be required or the deposit and what should be the quantum, if the deposit is directed; obviously it is only after considering the worth and strength of the objections, the law has conferred a discretion upon the Court to pass appropriate order and not before that, but from the tenor of the above order, the Court virtually before even examining the objections has shunned and stultified the appellants' remedy of filing those and such order can aptly be termed as placing a horse before the cart, which is absolutely impermissible and against the spirit of law.

It was thus the considered and consistent view of the High Courts of the country, without a single dissent, that the proviso contemplates a prior direction of the court to deposit the sum or furnish the security for entailing penal consequences of dismissing the objection petition due to non-deposit of the amount or non-furnishing of the security, which is required to be deposited or furnished under the proviso for entertaining the objection petition: the punitive action can be taken only when the applicant fails to comply with the direction of the court, and in absence of such direction the objection petition cannot be dismissed for non-deposit of the 20% of the sum realised at sale. It may be pertinent to mention here that these judgments of the High Courts have not been considered, nor have they been specifically overruled, by this Court in any case.

5. Coming to the judgments of this Court, we have observed that in Wali Khan v. Manager, ADB (PLD 2003 SC 500) this Court set aside the order of the Banking Court, whereby that court had dismissed the objection petition of the judgment-debtors filed under Order XXI, Rule 90, C.P.C. mainly on the ground of non-deposit of the 20% of the auction-sale price, and remanded the matter to that court to decide the objection petition on merits. This Court made the said order with the following observation:

9. No doubt, the objectors had not deposited an amount up to twenty percent of the auction price in compliance with the orders passed by the Banking Court on 13-1-1998 and 4-3-1998 but the technical defect stood removed when a sum of Rs.2,50,000 was deposited by them before the target date fixed by the High Court. In the wake of the said deposit the matter ought to have been remanded to the Banking Court for decision on merits particularly when an application under section 148, C.P.C. was made at the lower forum by the objectors for enlargement of time for making the requisite deposit and appeal is a continuation of proceedings. The said deposit is envisaged by the second proviso to Rule 90, C.P.C. The rationale behind the proviso is to discourage frivolous objections. The deposit made by the appellants in the High Court, which far exceeds twenty percent of the auction price, certainly served the purpose for which the said proviso was incorporated in Rule 90 by means of an amendment through Law Reforms Ordinance, 1972.

It is evident that in this case the executing court had made direction for deposit of the 20% of the auction amount, which the judgment-debtors failed to comply with but they on appeal in the High Court made application for enlargement of the time for making the requisite deposit and also made the deposit within the time fixed by the High Court. Therefore, the question under consideration in the present case was neither raised nor decided in this case. In the case of Nadia Malik v. Makki Chemical Industries (2011 SCMR 1675), the executing court had not made any direction for deposit of the 20% of the auction amount nor had the objection petitioners made such deposit. The High Court on appeal of the objection petitioners

set aside the sale on finding illegalities in the process of auction proceedings. The argument regarding non-deposit of the 20% of the auction amount was raised before this Court; it was, however, not entertained by this Court with the following observations:

17. .The issue of non-deposit of amount of 20% by the private respondents in exceptional circumstances can be condoned when the auction has been conducted in deviation of the mandatory provisions of Order XXI; Rules 54(2), 69, 85 and 86, C.P.C. and the executing court, in law, has erroneously confirmed the sale. The object of deposit of 20% of amount by a person objecting to sale under Rule 90 of Order XXI is meant to ensure that the objections are made by bona fide person and the rule is not misused to frustrate the sale, however, it could not be applied to the advantage of the appellant to have premium over his default.

The reading of other cases, except the review case of Habib and Company v. MCB,[8] also show that only the passing remarks (obiter dicta) were made by this Court without having been raised therein and deciding the question that is under consideration in the present case. Relevant observations made in those cases are reproduced hereunder for convenience of reference:

Nice 'N' Easy Fashion v. ABL 2014 SCMR 1662

10. The appellants have filed objection petition apparently on the ground that auction proceedings were irregular and the Banking Court has failed to follow the procedure provided under Order XXI, C.P.C. The appellants themselves moved the Banking Court under section 19(7) of the Ordinance and have not made an application under Order XXI, Rule 89 or 90, C.P.C. Even if the objection petition of the appellants is treated as an Application under Order XXI, Rule 89 or 90, C.P.C., then the said Rules mandate that the objector should deposit the amounts mentioned therein along with the application. In absence of the deposit, as mandated by the Rules, the application and/or objections cannot be entertained by a Banking Court.

Zakaria Ghani v. Muhammad Ikhlaq PLD 2016 SC 229

4. There is a great deal of difference between these two provisions of law. Under Order XXI, Rule 89 a judgment debtor is not obligated to show any legal infirmity in the order of sale. He has an unqualified right to have the sale set aside provided he complies with the conditions laid down therein, namely, that he should deposit the full decretal amount in court plus 5% to be paid to the auction purchaser. The time period for making such an application is 30 days. Admittedly he failed to do so and accordingly, it follows, by necessary implication of law that a vested right accrued in favour of the auction purchaser. The second provision, namely, Order XXI, Rule 90, C.P.C., proceeds on a different basis. In order to succeed it is mandatory for the judgment debtor to satisfy the court, on the merits, that the sale should be set aside on the ground of a material irregularity, or fraud, in publishing or conducting it. Yet another condition is prescribed by means of the proviso thereto which stipulates that no sale shall be set aside on the ground of irregularity or fraud unless, upon the facts proved before the Court, it is established that the judgment debtor has sustained substantial injury by reason of such irregularity or fraud. Yet another condition is prescribed by the second proviso which states that no application shall be entertained in terms of this provision of law unless and until the judgment debtor deposits an amount equal to 20% of the sum realized at the sale or furnish such security as the court may direct. These are stringent conditions which make the policy of the law crystal clear. A mere allegation is not sufficient. It has to be established that not merely an irregularity but a material irregularity has taken place, or, in the alternative, that fraud has been perpetrated in the process of carrying out the sale. Then is super added the requirement that even if these conditions are complied with the judgment debtor must satisfy the court that he has sustained a substantial injury by reason thereof. Finally, in order to discourage frivolous applications intended to delay the execution of the decree it is mandatory on the judgment debtor to deposit 20% of the sale amount or furnish such security as the court may direct.

Muhammad Ashraf v. UBL 2019 SCMR 1004

8. The mainstay of the contentions of the learned counsel for the Respondent Bank and the auction purchaser is the alleged non-deposit of 20% of the decretal amount in terms of Order XXI, Rule 90, C.P.C. Such is also the primary basis of the impugned judgment dated 06.06.2016 of the learned High Court. Without dwelling further on this aspect of the matter, we are constrained to observe that there can be no escape from the fact that even in the absence of an Objection Petition, learned Executing Court is not required to automatically confirm an auction mechanically and without application of mind by not even, considering the law applicable.

Habib and Company v. MCB 2019 SCMR 1453

5. Having heard the learned counsel for the petitioners, we find that there was no material on record brought by the petitioners to show that the property had been sold at a throwaway price. Even otherwise, the objection petition filed by the petitioners was misconceived and not maintainable in view of the fact that the petitioners did not deposit 20% of the highest bid with their objection petition. The provisions of Order XXI, Rule 90, C.P.C. have come under discussion in various judgments pronounced by this Court in which it has conclusively been held that the statutory deposit of 20% by the judgment debtor is mandatory and that without such a deposit the objection application under Order XXI, Rule 90, C.P.C. is not maintainable.

6. It was only in the review case of Habib and Company v. MCB (PLD 2020 SC 227) that the question, under consideration in the present case, was specifically raised by the counsel for the petitioners and decided by this Court. The argument of the counsel for the petitioners and the decision of this Court are as follows:

4. Learned Counsel for the Petitioners has based his arguments mainly on the contention that there was no specific order passed by the court directing the Petitioner to deposit 20% of the auction price with the objection petition filed by the Petitioners under Order XXI, Rule 90 of the C.P.C. In the absence of such an order by the executing court, the learned counsel contends, the Petitioners' objection petition could not be dismissed by the executing court and that consequently both the High Court and this Court in the Impugned Order have erred in correctly applying the Law.

7. We have heard the learned Counsel for the Petitioners and have also perused the record with his assistance. As far as his first contention regarding the requirement of depositing 20% of the auction price with an objection petition under Order XXI, Rule 90 of the C.P.C. is concerned, we note that the requirement itself is derived from the second proviso of Order XXI, Rule 90 itself . ..

A bare reading of the second proviso to Order XXI, Rule 90 clearly shows that the deposit of a sum of 20% of the auction price is mandatory for the application to be entertained in the first place, i.e. an application will not be maintained unless such a sum is deposited. A closer reading of the provision also shows that the discretion provided to the court is not with respect to furnishing of the security at all, but rather the amount of the security to be deposited.

8. In our view, the correct reading of the second proviso to Order XXI, Rule 90 of the C.P.C. is that it mandates every application under the provision to be accompanied by 20% of the auction price in order to be entertained. If the argument of the learned counsel were to be accepted the entire legislative intent of adding the said, proviso to Order XXI, Rule 90 would clearly be defeated.

..

Hence, we reject the interpretation of the proviso advanced by the learned Counsel for the Petitioners.

10. It is also evident from the record and the same has also been admitted by learned Counsel for the Petitioners, that the Petitioners filed the objection petition under Order XXI, Rule 90 on 22.09.2003 and the cheques deposited by the Petitioners in support of this objection petition were submitted on 03.03.2004. As such, the objection petition was not maintainable from its inception and any later deposit of money cannot be used to argue otherwise, as was held by us in the Impugned Order.

(Emphasis added)

With utmost respect, we are constrained to observe that the second proviso to Rule 90, Order XXI, C.P.C. where an applicant is to "deposit such amount not exceeding twenty per cent of the sum realised at the

sale", or "furnish such security", as the Court may direct, went unnoticed. The expression "as the Court may direct" leaves little room to speculate whether the applicant is to deposit the 20% of the sale amount at the time of filing the objection petition or at a subsequent stage under direction of the court. The expression "such amount not exceeding twenty percent" further strengthens the position that the amount required to be deposited by the applicant is to be determined by the court which must not exceed twenty percent of the sale amount but can be less than that. An applicant cannot anticipate what the direction of the court would be in this regard and, therefore, he cannot deposit the requisite amount at the time of filing the objection petition. The mandatory requirement of the second proviso appears to become operative only once the court determines the "amount not exceeding twenty percent of the sum realised at the sale" and directs the applicant to deposit the same. The observations made by the learned Bench that second proviso to Order XXI, Rule 90 of the C.P.C. mandates every application under the provision to be accompanied by 20% of the auction price in order to be entertained and an objection petition which is not so accompanied by the deposit of 20% of the auction sale price is not maintainable from its inception, appears to be contrary to the language of the proviso. It appears that the learned Bench was influenced, in making these observations, by the expression "entertained" used in the proviso. The expression "entertain", as observed by the Sindh High Court in Alhamdi Begum case[9] and by the Indian Supreme Court in Punnu Sahu case[10] does not refer to the filing of the objection petition by the applicant, or receiving of the objection petition by the court. It means to "adjudicate upon" or "proceed to consider merits of" the objection petition; the barring clause of the proviso applies only to the consideration of the objection petition on merits for setting aside the sale, and does not prohibit the court from applying its judicial mind to the question as to determining the quantum of sum to be deposited or the nature of security to be furnished, instead of deposit of sum, by the applicant.

7. We are, however, bound by the judgment delivered by a Bench of co-equal strength, i.e., a three member Bench, in the said case and therefore cannot hold otherwise. It is now a well-established principle of practice and procedure of this Court that the earlier judgment of a Bench of this Court is binding not only upon the Benches of smaller numeric strength but also upon the Benches of coequal strength; a Bench of co-equal strength cannot deviate from the view held by an earlier Bench, and if a contrary view has to be taken, then the proper course is to request the Hon'ble Chief Justice for constitution of a larger Bench to reconsider the earlier view.[11] For, the law declared by this Court should be clear, certain and consistent, as it is binding on all other courts of the country, under Article 189 of the Constitution of Pakistan, 1973. The doctrine of binding precedent promotes certainty and consistency in judicial decisions, and ensures an organic and systematic development of the law.

8. It would be important to mention here that our learned brother, Justice Umar Ata Bandial, was a member of the three member Bench that decided the case of Habib and Company (supra) and was also the member, and author of the order, of the two member Bench that granted leave in C.P. No.756-L of 2020 (now numbered as C.A. 364-L of 2020) to consider the question under discussion. This shows that his lordship also doubted the correctness of the view expressed in the said case and deemed it proper to re-consider the same. The two-Member Bench that granted the leave, however, did not make a request to the Hon'ble Chief Justice for constitution of a larger Bench to reconsider the question, for a smaller Bench cannot request for the constitution of a larger Bench to revisit the opinion of a larger Bench on any question or principle of law; only a Bench of co-equal strength can make such a request. As a judgment of a larger Bench is binding on the smaller Benches,[12] judicial discipline and propriety demand that a two member Bench should follow decision of a three member Bench, and if a two member Bench concludes that an earlier judgment of a three member Bench is so incorrect that in no circumstances can it be followed, the proper course for it is to set out the reasons why it could not agree with the judgment of the three member Bench and to refer the matter to the Hon'ble Chief Justice for constitution of a three member Bench. If the three member Bench also comes to the conclusion that the earlier judgment of a three member Bench is not correct, then the reference of the matter to a five member larger Bench is justified. A two member

Bench cannot jump over a three member Bench and directly ask for constitution of a Bench larger than three member Bench, to review the principle of law declared by that Bench.[13]

9. In these circumstances, we are of the opinion that only a Bench larger than a three member Bench can reconsider the question as to the interpretation of the second proviso to Rule 90 of Order XXI of CPC, and revisit (if found necessary) the view expressed by a three member Bench in the case of Habib and Company v. MCB (PLD 2020 SC 227). We, therefore, direct the office to place the matter before the Hon'ble Chief Justice of Pakistan for appropriate order.

10. It is always considered necessary that execution of a decree should be made in the most expeditious manner. The present matter involves execution of the decrees. The office shall, therefore, take it as an urgent matter and place it before the Hon'ble Chief Justice, forthwith.

C.M.A. No.3753-L/2019 in C.A. 17-L of 2019,

C.M.A. No.3409-L/ 2014 in C.P. 2646-L of 2018

11. In the meanwhile, the status quo shall be maintained.

MWA/S-15/SC Order accordingly.

**P L D 2021 Supreme Court 600**

**Present: Manzoor Ahmad Malik, Mazhar Alam Khan Miankhel and Syed Mansoor Ali Shah, JJ**

**NAVEED ASGHAR and 2 others---Petitioners**

**Versus**

**The STATE---Respondent**

Jail Petition No. 147 of 2016, decided on 7th December, 2020.

(Against the judgment of the Lahore High Court, Rawalpindi Bench, Rawalpindi dated 12.02.2016 passed in Criminal Appeal No. 16-J of 2011, Criminal Revision No. 31 of 2011 and M.R. No. 25 of 2011).

**(a) Criminal Procedure Code (V of 1898)---**

----Ss. 374, 375, 376 & 423---Constitution of Pakistan, Arts. 9, 10A & 14---Murder reference sent by the Trial Court to the High Court for confirmation of death sentence---Scope---Duty cast on the High Court in deciding a murder reference under S.374, Cr.P.C. was a heavy one and could only be discharged once the entire evidence was reappraised to fully exhaust all the points having a bearing upon the guilt or innocence of the convicted person---High Court, in dealing with a murder reference, was not only to see whether the order passed by the Trial Court was correct, but to examine the case for itself and even direct a further enquiry or the taking of additional evidence if the Court considered it desirable in order to ascertain the guilt or the innocence of the convicted person---Scope of a murder reference and principles in relation thereto stated.

Normally, the High Courts hear and decide the appeal filed by the convicted person and the reference sent by the trial court for confirmation of the death sentence, together. While doing so the Judges of the High Courts some times remain content with examining and deciding only the arguments and contentions advanced in appeal, and do not by themselves scrutinize the whole material available on record of the case. Apart from deciding those arguments and contentions, it was incumbent upon the High Courts, in discharge of their statutory duty under sections 375 and 376 of the Code of Criminal Procedure, 1898 ("Cr.P.C."), to read and appraise each and every piece of evidence, and to examine also whether any evidence had been improperly admitted or excluded, or had been misread or non-read by the trial court.

Ordinarily, in a criminal appeal against conviction, the appellate Court, under section 423 of the Cr.P.C., could dismiss the appeal if the court was of the opinion that there was no sufficient ground for interference, after examining all the grounds urged before it for challenging the correctness of the decision given by the trial court. It was not necessary for the appellate court to examine the entire record for the purpose of arriving at an independent decision of its own whether the conviction of the appellant was fully justified. The position was, however, different where the appeal was by an accused who was sentenced to death, so that the High Court dealing with the appeal had before it, simultaneously with the appeal, a reference for confirmation of the capital sentence under section 374 of the Cr.P.C. On a reference for confirmation of sentence of death, the High Court was required to proceed in accordance with sections 375 and 376 of the Cr.P.C. and the provisions of these sections made it clear that the duty of the High Court, in dealing with the reference, was not only to see whether the order passed by the trial court was correct, but to examine the case for itself and even direct a further enquiry or the taking of additional evidence if the Court considered it desirable in order to ascertain the guilt or the innocence of the convicted person.

Bhupendra Singh v. State of Punjab AIR 1968 SC 1438 ref.

Section 374 of the Cr.P.C. provided that when the Court of Session passed sentence of death, the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it was confirmed by the High Court. As the death sentence passed by the trial court, i.e., the Court of Session, could not be executed without being it confirmed by the High Court, proceedings before the High Court on reference under section 374, Cr.P.C. was yet another tier of judicial assessment of the evidence to examine "any point bearing upon the guilt or innocence of the convicted person." The High Court had been given very wide powers to prevent any possible miscarriage of justice. The proceedings were a reappraisal and reassessment of the entire facts of the case and of the law applicable. This extensive power actually

cast an onerous duty on the High Court to ensure safe administration of criminal justice by considering in the reference proceedings all aspects of the case and coming to an independent conclusion, apart from the view expressed by the Court of Session. The High Court had to decide on reappraisal of the whole evidence whether the conviction was justified and, having regard to the circumstances of the case, whether the sentence of death was appropriate.

Jumman v. State of Punjab AIR 1957 SC 469; Ram Shankar v. State of West Bengal AIR 1962 SC 1239 and Masalti v. State of U.P. AIR 1965 SC 202 ref.

The worth and sanctity of human life were a test and mark of civilized societies, and were increasingly reflected in the criminal jurisprudence. The Legislature had provided in confirmation proceedings a final safeguard and had laid this duty upon the High Court. The duty of judgment was laid in the first instance upon the trial Judge. But equally and with all that weight, the High Court in confirmation proceedings must finally weigh for itself the whole evidence, and was to confirm the conviction and sentence or make any other order according to its own final conclusion on the guilt or innocence of the sentenced person in the discharge of the duty laid upon it by law. Right to life and liberty, right to fair trial and right to dignity were fundamental rights guaranteed under Articles 9, 10A and 14 of the Constitution. The importance of human life went to the heart of these fundamental rights, the rigorous two-tiered process of appraisal, assessment and examination under section 374, Cr.P.C. also met the test of these fundamental rights. The duty cast on the High Court in deciding a murder reference under section 374, Cr.P.C. was a heavy one and could only be discharged once the entire evidence was reappraised to fully exhaust all the points having a bearing upon the guilt or innocence of the convicted person.

AIR 1921 Sindh 84 ref.

**(b) Criminal trial---**

----Heinous nature of crime---Nature of the crime should not influence the mind of the judge---Duty of the court was to assess the probative value (weight) of every piece of evidence available on record in accordance with the settled principles of appreciation of evidence, in a dispassionate, systematic and structured manner without being influenced by the nature of the allegations.

The frightful nature of crime should not blur the eyes of justice, allowing emotions triggered by the horrifying nature of the offence to prejudge the accused. Cases were to be decided on the basis of evidence and evidence alone and not on the basis of sentiments and emotions. Gruesome, heinous or brutal nature of the offence may be relevant at the stage of awarding suitable punishment after conviction; but it was totally irrelevant at the stage of appraising or reappraising the evidence available on record to determine guilt of the accused person, as possibility of an innocent person having been wrongly involved in cases of such nature could not be ruled out.

Observations of the Courts recorded in judgments Muhammad Fazil v. State 1982 PCr.LJ 510; Abdul Ghaffar v. State 2005 PCr.LJ 887; Muhammad Arif v. State 2006 PCr.LJ 1827 and Kazim Hussain v. State 2008 PCr.LJ 971 in regard to deciding cases on basis of evidence alone and not on the basis of sentiments and emotions approved.

Azeem Khan v. Mujahid Khan 2016 SCMR 274 ref.

No matter how heinous the crime, the constitutional guarantee of fair trial (under Article 10A of the Constitution) could not be taken away from the accused. It was, therefore, duty of the court to assess the probative value (weight) of every piece of evidence available on record in accordance with the settled principles of appreciation of evidence, in a dispassionate, systematic and structured manner without being influenced by the nature of the allegations. Any tendency to strain or stretch or haphazardly appreciate evidence to reach a desired or popular decision in a case must be scrupulously avoided or else highly deleterious results seriously affecting proper administration of criminal justice would follow.

State v. Mushtaq Ahmad PLD 1973 SC 418 ref.

**(c) Criminal trial---**

----Presumption of innocence of accused---Scope---Accused person was presumed to be innocent till the time he was proven guilty beyond reasonable doubt, and this presumption of his innocence continued until

the prosecution succeeded in proving the charge against him beyond reasonable doubt on the basis of legally admissible, confidence inspiring, trustworthy and reliable evidence. [p. 617] F

**(d) Constitution of Pakistan---**

----Art. 10-A---Right to fair trial---Scope---Principles of fair trial, guaranteed as a Fundamental Right under Art. 10-A of the Constitution, were to be read as an integral part of every sub-constitutional legislative instrument that dealt with determination of civil rights and obligations of, or criminal charge against, any person.

**(e) Criminal trial---**

---Circumstantial evidence---Standard of care required for relying on circumstantial evidence stated.

Circumstantial evidence may some times be conclusive, but it must always be narrowly examined. In cases that rested entirely on circumstantial evidence, it was of the utmost importance that the circumstances should be ascertained with minute care and caution, before any conclusion or inference adverse to the accused person was drawn. The process of inference and deduction involved in such cases was of a delicate and perplexing character, liable to numerous causes of fallacy. This danger pointed the need for great caution in accepting proof of the facts and circumstances, before they were held to be established for the purpose of drawing inferences therefrom. A mere concurrence of circumstances, some or all of which were supported by defective or inadequate evidence, could create a specious appearance, leading to fallacious inferences. Hence, it was necessary that only such circumstances should be accepted as the basis of inferences that were, on careful examination of the evidence, found to be well-established. A high quality of evidence was, therefore, required to prove the facts and circumstances from which the inference of the guilt of the accused person was to be drawn.

Lejzor Teper v. Queen PLD 1952 PC 117; Fazal Elahi v. Crown PLD 1953 FC 214 and Saeed Ahmad v. Muhammad Irfan PLD 1986 SC 690 ref.

There were chances of fabricating evidence in cases that were based solely on circumstantial evidence; therefore, the court, in such cases, should take extra care and caution to examine the evidence with pure judicial approach on strict legal standards to satisfy itself about its proof, probative value and reliability. When there were apparent indications of possibility of fabricating evidence by the investigating officer in making the case, the court must be watchful against the trap, which may misled to drawing a false inference, and satisfy itself about the fair and genuine collection of such evidence. The failure of the court to observe such care and caution could adversely affect the proper and safe administration of criminal justice.

Hashim Qasim v. State 2017 SCMR 986 and Fayyaz Ahmad v. State 2017 SCMR 2026 ref.

**(f) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Circumstantial evidence---Approach to determine sufficiency of circumstantial evidence stated.

The settled approach to deal with the question as to sufficiency of circumstantial evidence for conviction of the accused person was that, if, on the facts and circumstances proved, no hypothesis consistent with the innocence of the accused person could be suggested, the case was fit for conviction of the accused person on such conclusion; however, if such facts and circumstances could be reconciled with any reasonable hypothesis compatible with the innocence of the appellant, the case was to be treated one of insufficient evidence, resulting in acquittal of the accused person. Circumstantial evidence, in a murder case, should be like a well-knit chain, one end of which touched the dead body of the deceased and the other the neck of the accused. No link in chain of the circumstances should be broken and the circumstances should be such as cannot be explained away on any reasonable hypothesis other than guilt of accused person. Chain of such facts and circumstances had to be completed to establish guilt of the accused person beyond reasonable doubt and to make the plea of his being innocent incompatible with the weight of evidence against him. Any link missing from the chain broke the whole chain and rendered the same unreliable; in that event, conviction could not be safely recorded, especially on a capital charge. Therefore, if the circumstantial evidence was found not of the said standard and quality, it would be highly unsafe to rely upon the same for conviction; rather, not to rely upon such evidence would a better and a safer course.

Siraj v. Crown PLD 1956 FC 123; Nazir Hossain v. State 1969 SCMR 388; Sairan v. State PLD 1970 SC 56; Karamat Hussain v. State 1972 SCMR 15; Saeed Ahmad v. Muhammad Irfan PLD 1986 SC 690; Barkat Ali v. Karam Elahi 1992 SCMR 1047; Ibrahim v. State 2009 SCMR 407; Muhammad Hussain v. State 2011 SCMR 1127; Imran v. State 2015 SCMR 155 and Azeem Khan v. Mujahid Khan 2016 SCMR 274 ref.

**(g) Criminal trial---**

----Chance witness, evidence of---Scope---Chance witness was witness who in view of his place of residence or occupation and in the ordinary course of events was not supposed to be present at the place of the occurrence but claimed to be there by chance---Testimony of such witness required cautious scrutiny and was not accepted unless he gave satisfactory explanation of his presence at or near the place of the occurrence at the relevant time.

Javed Ahmad v. State 1978 SCMR 114; Zafar Hayat v. State 1995 SCMR 896; Muhammad Rafique v. State 2004 SCMR 755; Muhammad Khalid v. Abdullah 2008 SCMR 158; Sughra Begum v. Qaiser Pervez 2015 SCMR 1142 and Ibrar Hussain v. State 2020 SCMR 1850 ref.

**(h) Penal Code (XLV of 1860)---**

----Ss. 302(b), 392, 452 & 34---Qatl-i-amd, robbery, house trespass, common intention---Reappraisal of evidence---Chance witness, evidence of---Explanation given by the chance witness, who saw the accused persons entering the house of the deceased, was that he happened to pass by in front of the house of the deceased, as he was going from his house to a nearby village for condolence on the death of the father of a person---However, said witness did not mention the name of the person on whose father's death he was going for condolence; nor could he tell the name of the late person on whose death he was going for condolence---Further, his assertion of going for condolence at such odd hours, i.e., about 08:30 p.m., on a winter-night of the month of January did not fit in the customary time of visiting people for condolence on death of someone, in rural areas: people usually made such visits during daytime---Explanation of chance witness of being present before the house of the deceased, at the relevant time was thus found far less than being satisfactory one, and therefore, his testimony could be discarded on such ground alone---Prosecution had failed to complete the chain of circumstances so as to establish conclusively the guilt of the accused persons in a manner that could rule out every hypothesis inconsistent with their innocence---Petition for leave to appeal was converted into appeal and allowed, and the accused persons were acquitted of the charges against them.

**(i) Criminal trial---**

----Witness---Material improvements made by a witness in his statement---Effect---Deliberate and dishonest improvements made by a witness in his statement to strengthen the prosecution case cast serious doubts on his veracity, and made him untrustworthy and unreliable---Relying on the testimony of such witness was quite unsafe, even on facts deposed by him other than those improvements unless it received corroboration from some other independent piece of reliable evidence.

Hadi Bakhsh v. State PLD 1963 (W. P.) Karachi 805; Shahzada v. Hamidullah 1968 PCr.LJ 176; Amir Zaman v. Mahboob 1985 SCMR 685; Saeed Muhammad v. State 1993 SCMR 550; Khalid Javed v. State 2003 SCMR 1419; Akhtar Ali v. State 2008 SCMR 6; Muhammad Rafique v. State 2010 SCMR 385; Muhammad Saleem v. Muhammad Azan 2011 SCMR 474; Sardar Bibi v. Munir Ahmed 2017 SCMR 344 and 1968 PCr.LJ 176 ref.

**(j) Penal Code (XLV of 1860)---**

----Ss. 302(b), 392, 452 & 34---Qatl-i-amd, robbery, house trespass, common intention---Reappraisal of evidence---Material improvements made by a witness in his statement---Effect---Witness who claimed to have seen the accused persons entering the house of the deceased stated to the investigation officer in his statement recorded under S.161, Cr.P.C. that due to darkness he could not recognize the accused persons when he saw them standing at the door of the house of the deceased; but in his statement in court he said that the accused persons were those whom he saw at the door of the deceased---Said witness also stated that there was light, not darkness, at the door of the house of the deceased at that time---Such improvement

made by the witness was very glaring and material---Said witness admitted in his cross-examination that he had not mentioned any identifying features, like age, height, colour of complexion etc., of the persons in his statement to the investigating officer---If the witness had really seen and recognized the persons standing at the door of the deceased, he would definitely have described their identifiable features to the investigating officer, and had he described such recognizable features of those persons, the investigating officer would have conducted the test identification of the accused persons on their arrest in the case---Such deliberate and dishonest improvement made by the witness made him unreliable---Prosecution had failed to complete the chain of circumstances so as to establish conclusively the guilt of the accused persons in a manner that could rule out every hypothesis inconsistent with their innocence---Petition for leave to appeal was converted into appeal and allowed, and the accused persons were acquitted of the charges against them.

**(k) Penal Code (XLV of 1860)---**

----Ss. 302(b), 392, 452 & 34---Qatl-i-amd, robbery, house trespass, common intention---Reappraisal of evidence---Recovery of motorcycle allegedly used for reaching the place of occurrence---No specification of the motorcycle, i.e., its make, colour, engine power, or registration number was mentioned in the FIR, therefore, it could not be said with certainty that it was the motorcycle that the chance witness saw with the persons outside the house of the deceased and was mentioned in the FIR---Statement of the investigating officer that the seat-cover of the recovered motorcycle was bloodstained and such fact suggested that it was the same motorcycle that was used in the crime was not found confidence inspiring; had the seat-cover of the motorcycle been really bloodstained, the investigating officer would have sent the same for examination by the Chemical Examiner for ascertaining whether the bloodstain was that of human blood and whether that bloodstain matched with the blood of any of the deceased persons or the accused persons---In absence of the reports of the Chemical Examiner and the Serologist on these facts, the assertion of the investigating officer as to use of the said motorcycle in commission of the crime carried no legal worth---Failure on part of the investigating officer to ascertain registration number and name of the registered owner of the motorcycle was also fatal to his assertion that the recovered motorcycle belonged to one of the accused persons---Non-preparation of the site-map of the place of recovery of motorcycle added further suspicion to the alleged recovery of the motorcycle from the house of one of the accused persons---Recovery of the motorcycle, in view of the said omissions made by the investigating officer, was found completely deficient as an incriminatory piece of circumstantial evidence to connect the accused persons with the commission of the offence---Prosecution had failed to complete the chain of circumstances so as to establish conclusively the guilt of the accused persons in a manner that could rule out every hypothesis inconsistent with their innocence---Petition for leave to appeal was converted into appeal and allowed, and the accused persons were acquitted of the charges against them.

**(l) Penal Code (XLV of 1860)---**

----Ss. 302(b), 392, 452 & 34---Qatl-i-amd, robbery, house trespass, common intention---Reappraisal of evidence---Recovery of stolen items on the alleged pointation of accused persons---Investigating officer deposed that during the inspection of the place of occurrence he found empty boxes of jewellery scattered there which indicated the commission of offence of robbery---Prosecution story of interrogation of the accused persons at the place of their arrest (a snooker club) and then leading of the accused persons from the very place of their arrest to the recoveries of the alleged stolen property appeared to be intrinsically doubtful: it did not even fit in with the ordinary human conduct---Accused persons who, as per the prosecution story, were enjoying play snooker in a snooker club, admitted the commission of offence that may entail death penalty forthwith on their arrest, and not only admitted the commission of offence but also cooperated well to lead to the recovery of the stolen property then and there---Such story was very hard to believe for a prudent person---Non-mentioning the alleged fact of finding any scattered jewellery boxes at the place of occurrence in the FIR shook the foundation of the prosecution story---Investigating officer also stated in his examination-in-chief that a crime scene expert was summoned at the spot, who took photographs of the dead bodies and the place of occurrence---All said photographs were available on

record but in none of them were there any scattered empty jewellery boxes---Said photographs, tendered in evidence by the prosecution itself, completely negated the alleged fact of finding scattered empty jewellery boxes at the place of occurrence---Prosecution had failed to complete the chain of circumstances so as to establish conclusively the guilt of the accused persons in a manner that could rule out every hypothesis inconsistent with their innocence---Petition for leave to appeal was converted into appeal and allowed, and the accused persons were acquitted of the charges against them.

**(m) Penal Code (XLV of 1860)---**

----S. 392---Robbery---Recovery of alleged stolen property in absence of prior description---Effect---In absence of any description of the stolen property given in the FIR, or in the supplementary statement of the complainant or any witness recorded under S.161, Cr.P.C., prior to the alleged recovery, it could not be said with certainty the recovered property was that which was allegedly stolen.

Observations of the Federal Shariat Court on the issue of recovery of alleged stolen property in absence of prior description made in judgments Noor Ullah v. State 2012 YLR 2618; Changez v. Shahid 2018 MLD 1136 and Tariq Hussain v. State 2018 MLD 1573 approved

**(n) Penal Code (XLV of 1860)---**

----Ss. 302(b), 392, 452 & 34---Qatl-i-amd , robbery, house trespass, common intention---Reappraisal of evidence---Recovery of stolen items on the alleged pointation of accused persons---Investigating officer neither got the allegedly stolen laptop and cameras identified from the surviving daughters of the deceased, nor got done forensic audit of these articles from the expert concerned who may have retrieved data therefrom indicating the persons who were in use of these cameras and laptop---Such failure on part of the investigating officer made the recovery of said articles, even if presumed to have been effected from the accused persons, useless for the purpose of crafting any link in the chain of circumstantial evidence against the accused persons to connect them with the commission of offences of robbery and murders---Prosecution had failed to complete the chain of circumstances so as to establish conclusively the guilt of the accused persons in a manner that could rule out every hypothesis inconsistent with their innocence---Petition for leave to appeal was converted into appeal and allowed, and the accused persons were acquitted of the charges against them.

**(o) Penal Code (XLV of 1860)---**

----Ss. 302(b), 392, 452 & 34---Qatl-i-amd, robbery, house trespass, common intention---Reappraisal of evidence---Recovery of mobile phones belonging to the deceased persons on the alleged pointation of accused persons---Clear contradiction existed in the oral stance of the investigation officer and the proceedings of recovery reduced into writing by him in the recovery memos, which made the recoveries of mobile phones doubtful---Furthermore it was also not consistent with the normal human conduct that the offenders would have taken the mobiles phones of some of the deceased persons, and had left the mobile phone of one of the deceased laying it on a conspicuous place, i.e., on a table beside the dead body of the said deceased---Non-mentioning the theft of the mobile phones of the deceased persons in the FIR or in the supplementary statement of the complainant, non-joining in investigation the brothers of the accused persons who had allegedly brought the mobile phones to the investigating officer, and not bringing on record their names and the details as to the place from where they got the said mobile phones, all these omissions, also made the alleged recoveries unreliable---Prosecution had failed to complete the chain of circumstances so as to establish conclusively the guilt of the accused persons in a manner that could rule out every hypothesis inconsistent with their innocence---Petition for leave to appeal was converted into appeal and allowed, and the accused persons were acquitted of the charges against them.

**(p) Penal Code (XLV of 1860)---**

----Ss. 302(b), 392, 452 & 34---Qatl-i-amd, robbery, house trespass, common intention---Reappraisal of evidence---Recovery of the bloodstained weapons of offence on the alleged pointation of accused persons---Both the witnesses associated during recovery proceedings were close relatives of the complainant and astonishingly they reached the police station at the time when the investigating officer planned to make a raid for arrest of the accused persons and also when the accused persons were ready to cooperate for making

recoveries during investigation---Prosecution story became further doubtful as particulars of said witnesses were written on the recovery-memos in handwriting patently different from all other writings thereon; it indicated that the particulars of the witnesses were added and their signatures obtained subsequently on the already prepared recovery memos---As per version of the investigating officer, there were 7/8 shops and two villages near the place of alleged recoveries, but no person from those nearby shops and villages was associated in the recovery-proceedings---Although it was a fact that the persons from the general public usually did not come forward to be witness to such police proceedings, but the assertion of the investigating officer that no person of the locality other than the said witnesses was there to see the proceedings that allegedly continued for about three hours of the day made the proceedings further doubtful---Story of wrapping up bloodstained knives, the alleged weapons of offence and gloves into polythene shopper bags and then burying them in the ground close to a water stream by the offenders, for a future recovery therefrom, instead of throwing them into that water stream or a nearby river also did not appeal to a prudent mind---Prosecution had failed to complete the chain of circumstances so as to establish conclusively the guilt of the accused persons in a manner that could rule out every hypothesis inconsistent with their innocence---Petition for leave to appeal was converted into appeal and allowed, and the accused persons were acquitted of the charges against them.

2017 SCMR 344 and 2017 SCMR 486 ref.

**(q) Criminal trial---**

----Recovery---Recovery of weapon of offence--- Corroborative evidence---Scope---Recovery of weapon of offence was only a corroborative piece of evidence; and in absence of substantive evidence, it was not considered sufficient to hold the accused person guilty of the offence charged---When substantive evidence failed to connect the accused person with the commission of offence or was disbelieved, corroborative evidence was of no help to the prosecution as the corroborative evidence could not by itself prove the prosecution case.

Saifullah v. State 1985 SCMR 410; Ali Muhammad v. Bashir Ahmed 2003 SCMR 868; Israr-ul-Haq v. Muhammad Fayyaz 2007 SCMR 1427; Hayatullah v. State 2018 SCMR 2092; PLD 1956 FC 123 and 1985 SCMR 410 ref.

**(r) Penal Code (XLV of 1860)---**

----Ss. 302(b), 392, 452 & 34---Qatl-i-amd, robbery, house trespass, common intention---Reappraisal of evidence---Recovery of the bloodstained knives (churri) on the alleged pointation of accused persons---Such recovery, without a positive forensic report matching the blood found thereon with that of the deceased, could not be considered as a substantive or corroborative piece of evidence against the accused persons to connect them with the commission of offence---Prosecution had failed to complete the chain of circumstances so as to establish conclusively the guilt of the accused persons---Petition for leave to appeal was converted into appeal and allowed, and the accused persons were acquitted of the charges against them.

2015 SCMR 840; 2003 SCMR 1419; 2011 SCMR 1233 and 2017 SCMR 486 ref.

**(s) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Medical evidence---Scope---Medical evidence was in the nature of supporting, confirmatory or explanatory of the direct or circumstantial evidence, and was not "corroborative evidence" in the sense the term was used in legal parlance for a piece of evidence that itself also had some probative force to connect the accused person with the commission of offence---Medical evidence by itself did not throw any light on the identity of the offender---Such evidence may confirm the available substantive evidence with regard to certain facts including seat of the injury, nature of the injury, cause of the death, kind of the weapon used in the occurrence, duration between the injuries and the death, and presence of an injured witness or the injured accused at the place of occurrence, but it did not connect the accused with the commission of the offence---Medical evidence could not constitute corroboration for proving involvement of the accused person in the commission of offence, as it did not establish the identity of the accused person.

Yaqoob Shah v. State PLD 1976 SC 53; Machia v. State PLD 1976 SC 695; Muhammad Iqbal v. Abid Hussain 1994 SCMR 1928; Mehmood Ahmad v. State 1995 SCMR 127; Muhammad Sharif v. State 1997 SCMR 866; Dildar Hussain v. Muhammad Afzaal PLD 2004 SC 663; Iftikhar Hussain v. State 2004 SCMR 1185; Sikandar v. State 2006 SCMR 1786; Ghulam Murtaza v. Muhammad Akram 2007 SCMR 1549; Altaf Hussain v. Fakhar Hussain 2008 SCMR 1103 and Hashim Qasim v. State 2017 SCMR 986 ref.

**(t) Criminal trial---**

----Conviction---Conjectures and probabilities---Not the substitute of proof---In criminal cases finding of guilt against an accused person could not be based merely on the high probabilities that may be inferred from evidence in a given case---Accused person could not be convicted on the basis of mere "suspicion" or "probability" unless and until the charge against him was "proved beyond reasonable doubt"---Finding as regards guilt should be rested surely and firmly on the evidence produced in the case and the plain inferences of guilt that may irresistibly be drawn from that evidence---Mere conjectures and probabilities could not take the place of proof---If a case was decided merely on high probabilities regarding the existence or nonexistence of a fact to prove the guilt of a person, the golden rule of giving "benefit of doubt" to an accused person, which was a dominant feature of the administration of criminal justice would be reduced to a naught.

Muhammad Luqman v. State PLD 1970 SC 10 ref.

**(u) Criminal trial---**

----Prosecution----Standard of proof--- Scope--- Benefit of doubt---Scope---Prosecution was under the obligation to prove its case against the accused person at the standard of proof required in criminal cases, namely, beyond reasonable doubt standard, and could not be said to have discharged this obligation by producing evidence that merely met the preponderance of probability standard applied in civil cases---If the prosecution failed to discharge its said obligation and there remained a reasonable doubt, not an imaginary or artificial doubt, as to the guilt of the accused person, the benefit of that doubt was to be given to the accused person as of right, not as of concession.

Tariq Pervez v. State 1995 SCMR 1345 ref.

Syed Rifaqat Hussain Shah, Advocate-on-Record for Petitioners.

Nemo for the Complainant.

Mirza Abid Majeed, D.P.G., Punjab for the State.

Date of hearing: 7th December, 2020.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**On January 21, 2010 Parvez Akhtar, a retired WAPDA employee, his wife Firdous Kausar, his daughters Ghazala and Bushra and his granddaughter Zarmina were mercilessly murdered in their house, their throats slit open by a sharp edged weapon. One Mirza Muhammad Umar told the complainant, Mobeen Akhtar, the brother of the deceased Pervaiz Akhtar, that a night before at about 08:30 p.m. he had seen three persons with a motorcycle outside the house of Pervaiz Akhtar. Mobeen Akhtar reported these facts to the Police and that apparently his deceased brother had no enmity with anyone. First information report (FIR)[1] of the tragic incident was recorded with these brief facts. Mirza Muhammad Umar, in his statement to the Police, narrated that he could not recognize those three persons as there was darkness in the street at that time. During investigation, the investigating officer suspected it to be a robbery that ended with five brutal murders.

2. On January 24, 2010 one Fazal Karim[2] told the Police that in the evening of January 20, 2010 he had seen Qadeer Ahmad, the son-in-law of the deceased Pervaiz Akhtar, along with two other boys going towards Dhok Tama (the locality where the house of the deceased Pervaiz Akhtar was situate) on a motorcycle. The Police arrested Qadeer Ahmad, Khurram Shahzad and Naveed Asghar ("petitioners") on January 31, 2010 and recovered two bloodstained knives (the alleged weapons of offence), a motorcycle (allegedly used by the accused persons for coming to the place of occurrence), mobile phones, a laptop, three cameras, an amount of cash amount, gold ornaments and some Defence Saving Certificates (the alleged looted property). An application was made for recording confessional statement of the accused,

Naveed Asghar, but it was turned down by the Magistrate with the observation that the accused appeared to be under pressure of the Police.

3. With the said incriminating material, the petitioners were sent up for trial. The learned trial court convicted them, vide its judgment dated 22.01.2011, for the offences of house trespass, robbery and murder, and sentenced each of them to three years rigorous imprisonment with fine of Rs.10,000/- under section 452, of the Pakistan Penal Code, 1860 ("P.P.C."); five years rigorous imprisonment with fine of Rs.10,000/- under section 392, P.P.C.; and death on five counts under section 302(b), P.P.C. read with section 34, P.P.C. Each of them was also directed to pay compensation of Rs.100,000/- to the legal heirs of the deceased persons, under section 544-A, Cr.P.C. The High Court dismissed the jail-appeal filed by the petitioners and confirmed the death sentence, vide its judgment dated 12.02.2016. Hence, this jail petition is filed by the petitioners for leave to appeal.

4. The main contentions of the learned counsel for the petitioners are that: the occurrence was unseen and the petitioners has falsely been involved in the case; the circumstantial evidence produced by the prosecution is totally insufficient to connect the petitioners with the commission of offences; the learned courts below have wrongly relied upon the incredible testimony of Muhammad Umar (PW-13) and fake recoveries of alleged weapons of offence and looted property; and, the High Court has not appreciated the prosecution-evidence in depth and has referred to the prosecution-evidence in a cursory and casual manner for confirmation of death sentence. Learned counsel for the State, on the other hand, has supported the judgments of the courts below, which according to him are well-reasoned and therefore do not merit interference.

5. Submissions of the counsel for the parties and examination of the record of the case with their able assistance give rise to the following points of law for our consideration: what is the nature, scope and extent of reappraisal of evidence by the High Court while hearing an appeal and a reference sent by the trial court for confirmation of the death sentence; whether it was necessary to complete the chain of the circumstantial evidence in order to connect the accused with the commission of the offence; whether reliance could be placed on a testimony of a witness who made improvements in his statement; whether recovery of the alleged stolen property without their prior identification or in absence of any proof that they were owned by the deceased persons could connect the accused with the commission of offence; whether recovery of the alleged weapons of offence, viz, bloodstained knives, without a positive forensic report as to matching the bloodstains found thereon with the blood of any of the deceased persons could connect the accused with the commission of offence; and, whether medical evidence, viz, postmortem reports etc., could corroborate the other prosecution evidence against the petitioners.

Reappraisal of evidence by the High Court in deciding the appeal and the reference for confirmation of death sentence

6. Normally, the High Courts hear and decide the appeal filed by the convicted person and the reference sent by the trial court for confirmation of the death sentence, together. It has been noticed that while doing so the learned Judges of the High Courts sometimes, as it appears to have done in the present case, remain content with examining and deciding only the arguments and contentions advanced in appeal, and do not by themselves scrutinize the whole material available on record of the case. Apart from deciding those arguments and contentions, it is incumbent upon the High Courts, in discharge of their statutory duty under sections 375 and 376 of the Code of Criminal Procedure, 1898 ("Cr.P.C."), to read and appraise each and every piece of evidence, and to examine also whether any evidence has been improperly admitted or excluded, or has been misread or non-read by the trial court. Even non-filing of appeal or withdrawal of appeal by the convicted person,[3] or any concessional statement by the state counsel[4] does not relieve the High Court from performing its duty of reappraising the whole evidence available on record. Ordinarily, in a criminal appeal against conviction, the appellate Court, under section 423 of the Cr.P.C., can dismiss the appeal if the court is of the opinion that there is no sufficient ground for interference, after examining all the grounds urged before it for challenging the correctness of the decision given by the trial court. It is not necessary for the appellate court to examine the entire record for the purpose of arriving at an

independent decision of its own whether the conviction of the appellant is fully justified. The position is, however, different where the appeal is by an accused who is sentenced to death, so that the High Court dealing with the appeal has before it, simultaneously with the appeal, a reference for confirmation of the capital sentence under section 374 of the Cr.P.C. On a reference for confirmation of sentence of death, the High Court is required to proceed in accordance with sections 375 and 376 of the Cr.P.C. and the provisions of these sections make it clear that the duty of the High Court, in dealing with the reference, is not only to see whether the order passed by the trial court is correct, but to examine the case for itself and even direct a further enquiry or the taking of additional evidence if the Court considers it desirable in order to ascertain the guilt or the innocence of the convicted person.[5]

7. Section 374 of the Cr.P.C. provides that when the Court of Session passes sentence of death, the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court. As the death sentence passed by the trial court, i.e., the Court of Session, cannot be executed without being it confirmed by the High Court, proceedings before the High Court on reference under section 374, Cr.P.C. is yet another tier of judicial assessment of the evidence to examine "any point bearing upon the guilt or innocence of the convicted person." The High Court has been given very wide powers to prevent any possible miscarriage of justice. The proceedings are a reappraisal and reassessment of the entire facts of the case and of the law applicable. This extensive power actually casts an onerous duty on the High Court to ensure safe administration of criminal justice by considering in the reference proceedings all aspects of the case and coming to an independent conclusion, apart from the view expressed by the Court of Session. The High Court has to decide on reappraisal of the whole evidence whether the conviction is justified and, having regard to the circumstances of the case, whether the sentence of death is appropriate.[6]

8. As back as in the year 1921, Madgaonkar, A.J.C., while exploring the scope of power of High Court in confirmation proceedings under section 374 in the case of Gul v. Empror,[7] observed that the worth and sanctity of human life are a test and mark of civilized societies, and are increasingly reflected in the criminal jurisprudence. The Legislature has provided, he noted, in confirmation proceedings a final safeguard and has laid this duty upon the High Court. The duty of judgment is laid in the first instance upon the trial Judge. But equally and with all that weight, the High Court in confirmation proceedings must finally weigh for itself the whole evidence, and is to confirm the conviction and sentence or make any other order according to its own final conclusion on the guilt or innocence of the sentenced person in the discharge of the duty laid upon it by law. These significant observations of the learned Judge become more nuanced when viewed in the constitutional context. Right to life and liberty, right to fair trial and right to dignity are fundamental rights guaranteed under Articles 9, 10A and 14 of the Constitution. The importance of human life goes to the heart of these fundamental rights, the rigorous two-tiered process of appraisal, assessment and examination under section 374, Cr.P.C. also meets the test of these fundamental rights. The duty cast on the High Court in deciding a murder reference under section 374, Cr.P.C. is a heavy one and can only be discharged once the entire evidence is reappraised to fully exhaust all the points having a bearing upon the guilt or innocence of the convicted person.

9. The High Court, in the present case, has made only a general and cursory reference to the prosecution evidence in its judgment, and has failed to reappraise it thoroughly. In such a situation, we would have ordinarily remanded the matter to the High Court to hear and decide the case afresh, but in the present case much water has flown under the bridge. Remand will entail further delay and hardship, besides, the points of law noted above also require a clear determination by this Court. We, therefore, decided to answer those points of law and to reappraise the prosecution evidence ourselves for safe administration of criminal justice.

Heinous nature of allegations and appraisal of evidence

10. The ruthless and ghastly murder of five persons is a crime of heinous nature; but the frightful nature of crime should not blur the eyes of justice, allowing emotions triggered by the horrifying nature of the offence to prejudge the accused. Cases are to be decided on the basis of evidence and evidence alone and

not on the basis of sentiments and emotions.[8] Gruesome, heinous or brutal nature of the offence may be relevant at the stage of awarding suitable punishment after conviction; but it is totally irrelevant at the stage of appraising or reappraising the evidence available on record to determine guilt of the accused person, as possibility of an innocent person having been wrongly involved in cases of such nature cannot be ruled out.[9] An accused person is presumed to be innocent till the time he is proven guilty beyond reasonable doubt, and this presumption of his innocence continues until the prosecution succeeds in proving the charge against him beyond reasonable doubt on the basis of legally admissible, confidence inspiring, trustworthy and reliable evidence. No matter how heinous the crime, the constitutional guarantee of fair trial under Article 10A cannot be taken away from the accused. It is, therefore, duty of the court to assess the probative value (weight) of every piece of evidence available on record in accordance with the settled principles of appreciation of evidence, in a dispassionate, systematic and structured manner without being influenced by the nature of the allegations. Any tendency to strain or stretch or haphazardly appreciate evidence to reach a desired or popular decision in a case must be scrupulously avoided or else highly deleterious results seriously affecting proper administration of criminal justice will follow.[10] It may be pertinent to underline here that the principles of fair trial have now been guaranteed as a Fundamental Right under Article 10-A of the Constitution and are to be read as an integral part of every sub-constitutional legislative instrument that deals with determination of civil rights and obligations of, or criminal charge against, any person.

Standard of care required for relying on circumstantial evidence

11. The occurrence in the present case is unseen one, and the case of the prosecution against the petitioners is wholly based on the following circumstantial evidence: (i) last seen evidence of Mirza Muhammad Umar (PW-13); (ii) recovery of a motorcycle allegedly used for reaching the place of occurrence; (iii) recovery of the alleged stolen property; (iv) recovery of the alleged bloodstained weapons of offence and gloves; and (v) medical evidence as to post-mortem examination of the deceased persons. Before examining the said circumstantial evidence, we think it necessary to state the standard of care required for relying on circumstantial evidence and the approach to determine sufficiency of such evidence for reaching the conclusion of guilt of an accused person.

12. Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined. In cases like the present one that rest entirely on circumstantial evidence, it is of the utmost importance that the circumstances should be ascertained with minute care and caution, before any conclusion or inference adverse to the accused person is drawn. The process of inference and deduction involved in such cases is of a delicate and perplexing character, liable to numerous causes of fallacy. This danger points the need for great caution in accepting proof of the facts and circumstances, before they are held to be established for the purpose of drawing inferences therefrom. A mere concurrence of circumstances, some or all of which are supported by defective or inadequate evidence, can create a specious appearance, leading to fallacious inferences. Hence, it is necessary that only such circumstances should be accepted as the basis of inferences that are, on careful examination of the evidence, found to be well-established. A high quality of evidence is, therefore, required to prove the facts and circumstances from which the inference of the guilt of the accused person is to be drawn.[11]

13. There are chances of fabricating evidence in cases that are based solely on circumstantial evidence; therefore, the court, in such cases, should take extra care and caution to examine the evidence with pure judicial approach on strict legal standards to satisfy itself about its proof, probative value and reliability. When there are apparent indications of possibility of fabricating evidence by the investigating officer in making the case, the court must be watchful against the trap, which may misled to drawing a false inference, and satisfy itself about the fair and genuine collection of such evidence. The failure of the court to observe such care and caution can adversely affect the proper and safe administration of criminal justice.[12]

Approach to determine sufficiency of circumstantial evidence

14. The settled approach to deal with the question as to sufficiency of circumstantial evidence for conviction of the accused person is this: If, on the facts and circumstances proved, no hypothesis consistent

with the innocence of the accused person can be suggested, the case is fit for conviction of the accused person on such conclusion; however, if such facts and circumstances can be reconciled with any reasonable hypothesis compatible with the innocence of the appellant, the case is to be treated one of insufficient evidence, resulting in acquittal of the accused person.[13] Circumstantial evidence, in a murder case, should be like a well-knit chain, one end of which touches the dead body of the deceased and the other the neck of the accused. No link in chain of the circumstances should be broken and the circumstances should be such as cannot be explained away on any reasonable hypothesis other than guilt of accused person. Chain of such facts and circumstances has to be completed to establish guilt of the accused person beyond reasonable doubt and to make the plea of his being innocent incompatible with the weight of evidence against him. Any link missing from the chain breaks the whole chain and renders the same unreliable; in that event, conviction cannot be safely recorded, especially on a capital charge.[14] Therefore, if the circumstantial evidence is found not of the said standard and quality, it will be highly unsafe to rely upon the same for conviction; rather, not to rely upon such evidence will a better and a safer course.[15]

Last seen evidence of Mirza Muhammad Umar (PW-13)

15. In the present case, the first link in the chain of circumstantial evidence relied upon by the prosecution is the last seen evidence of Mirza Muhammad Umar (PW-13). The said witness while appearing in the witness-box deposed that on 20.01.2010 at about 08:00 or 08:30 p.m. he was passing by in front of the house of the deceased, Pervaiz Akhtar. He saw three persons there who had worn shawls (Chaddar) over themselves. A motorcycle High Speed 70 was also parked there. The said three persons knocked the door of house of the deceased, Pervaiz Akhtar. The door was opened, and the said three persons went inside the house along with the motorcycle. He further stated that the three accused persons present in the court were the same persons. This was his statement made in examination-in-chief. He explained in cross-examination that on 20.01.2010 when he happened to pass by in front of the house of the deceased, Pervaiz Akhtar, he was going from his house to "Wattay di Dari" for condolence on the death of the father of some person known to him. He stated that he did not know the name of the person on whose death he went to condole. He denied the suggestion put to him that he did not know the name of that deceased person because no such death had taken place. He stated that the village "Wattay di Dari" was at a distance of about one kilometer from his house. On questioning about identification of the accused person, he explained that the accused person though had put on shawls (Chaddar) at that time but their faces were visible. There was light, not darkness, at that time in front of the house of the deceased, Pervaiz Akhtar. He had not mentioned the names of the accused persons in his statement to the police. He did not know the names of the accused person at that time. He had not mentioned the description, the age and colour of the complexion, of the accused person to the police. He was specifically asked, which he denied, that in his statement before the police he had mentioned that because of darkness he could not identify the accused persons. Then, he was duly confronted with his statement (Exh-DE) made to the investigating officer under section 161, Cr.P.C., and it was noted by the trial court that it was so recorded in that statement. Then, he denied the suggestion put to him that he had deposed about identification of the accused persons only on instruction of the prosecution.

16. Reading of the statement of Mirza Muhammad Umar (PW-13) shows that he is a chance witness: a witness who in view of his place of residence or occupation and in the ordinary course of events is not supposed to be present at the place of the occurrence but claims to be there by chance. Testimony of such witness requires cautious scrutiny and is not accepted unless he gives satisfactory explanation of his presence at or near the place of the occurrence at the relevant time.[16] The explanation of Mirza Muhammad Umar (PW-13) is that he happened to pass by in front of the house of the deceased, Pervaiz Akhtar, as he was going from his house to "Wattay di Dari" for condolence on the death of the father of some person known to him. He, however, did not mention the name of the person known to him on whose father's death he was going for condolence; nor could he tell the name of the late person on whose death he was going for condolence. Further, his assertion of going for condolence at such odd hours, i.e., about 08:30 p.m., on a winter-night of the month January does not fit in the customary time of visiting people for condolence

on death of someone, in rural areas: people usually make such visits during daytime. His explanation of being present before the house of the deceased, Pervaiz Akhtar, at the relevant time is thus found far less than being satisfactory one. His testimony may be discarded on this ground alone. But there is another solid reason also that makes him unreliable: a very material improvement made by him in his testimony as to recognizing the accused persons at the time of seeing them in the night of the occurrence and identifying them at the time of making his statement in court.

Effect of material improvements made by a witness

17. Deliberate and dishonest improvements made by a witness in his statement to strengthen the prosecution case cast serious doubts on his veracity, and makes him untrustworthy and unreliable. It is quite unsafe to rely on testimony of such witness, even on facts deposed by him other than those improvements unless it receives corroboration from some other independent piece of reliable evidence.[17] In the case of Shahzada v. Hamidullah,[18] a five-member Bench of this Court, on appraising the evidence of a witness, found that he had improved upon the version he had earlier given to the police while making statement in Court, and upon such finding held that the improvement had affected his veracity rendering it unsafe to rely upon his evidence. Hamoodur Rahman, J., speaking for the Bench observed: "[The witness] also tried to improve upon the version he earlier gave to the police by introducing the story of his having seen the [accused] respondent Hamidullah actually loading his gun in the middle of the bazar. In his police statement he had only stated that when he saw Hamidullah first he appeared to be proceeding to the shop of the deceased to purchase snuff. This definite attempt at embellishment clearly affected his veracity and rendered it unsafe to rely upon his evidence." In the case of Akhtar Ali v. State[19] the complaint initially made statement that four unknown persons had committed the offence and did not name any person therein, but subsequently nominated the accused persons in his supplementary statement despite the fact that one of the accused person was already known to him. A four-member Bench of this Court, which heard the case, noted with concern that improvement made by the complaint even during investigation and discarded his testimony making the observations that "when a witness improves his version to strengthen the prosecution case, his improved statement subsequently made cannot be relied upon as the witness has improved his statement dishonestly, therefore, his credibility becomes doubtful."

18. Mirza Muhammad Umar (PW-13) stated to the investigation officer in his statement (Ex-DE) recorded under section 161, Cr.P.C. that due to darkness he could not recognize the accused persons when he saw them standing at the door of the house of the deceased, Pervaiz Akhtar; but in his statement in court he said that the accused persons were those whom he saw at the door of the deceased, Pervaiz Akhtar. He stated also that there was light, not darkness, at the door of the house of the deceased, Pervaiz Akhtar at that time. This was a very glaring and material improvement made by the witness. He admitted in cross-examination that he had not mentioned any identifying features, like age, height, colour of their complexion etc., of those persons in his that statement. If he had really seen and recognized the persons standing at the door of the deceased, Pervaiz Akhtar, he would definitely have described their identifiable features to the investigating officer. And had he described such recognizable features of those persons, the investigating officer would have got conducted the test identification of the accused persons on their arrest in the case. This deliberate and dishonest improvement made by the witness makes him unreliable. The observation of the High Court that the value of his testimony is not diminished despite the said improvement is totally flawed and untenable.

Recovery of motorcycle allegedly used for reaching the place of occurrence

19. The second incriminatory circumstantial evidence relied upon by the prosecution is the recovery of a motorcycle, Speed Smart CD SR-70, that is alleged to have been used by the petitioners for reaching the place of occurrence. Sub-Inspector Fazal Hussain, the investigating officer, appeared in the witness-box as PW-16. About the said recovery, he stated that on 27.01.2010 he raided the house of the accused Qadeer at Langurpur Baily. The accused Qadeer was not found there. One Bashir, the brother of the accused Qadeer, met there and led to the recovery of the motorcycle from his house. Bloodstains were found present on the seat-cover of the motorcycle. He took the motorcycle into his possession vide recovery-memo (Exh-

PR), which was owned by the accused Khurram Shahzad. In cross-examination, he explained that the semi-washed bloodstains on the seat-cover of the motorcycle suggested use of the said motorcycle in the commission of crime. He admitted that he did not send the bloodstained part of the seat of the motorcycle for examination to the Chemical Examiner. He denied the suggestion that there were no bloodstains on the seat of the motorcycle. He stated that on 27.01.2010 he had no proof of ownership of the motorcycle; Bashir, brother of the accused Qadeer, told him that motorcycle was of the accused Khurram Shahzad. He admitted that throughout the investigation he did not collect any proof as to ownership of the motorcycle. He also admitted that he did not prepare the site-plan of the place from which the motorcycle was recovered. He denied the suggestion that the site-plan was not prepared as the motorcycle was not recovered from the house of the accused Qadeer in village Langarpur Baily. The recovery witness, Waheed Ahmad, 459/c (PW-9) made similar statement as to proceedings of the recovery of the motorcycle.

20. By close examination of the prosecution-evidence as to the recovery of that motorcycle as well as the assertion that the same was used in commission of the crime, we have noticed that no specification of the motorcycle, i.e., its make, colour, power-70, 100 or 125, or registration number was mentioned in the FIR. Therefore, it cannot be said with certainty that it is the motorcycle that Mirza Muhammad Umar (PW-13) saw with the persons outside the house of the deceased Pervaiz Akhtar and was mentioned in the FIR. The statement of the investigating officer (PW-16) that the seat-cover of the recovered motorcycle was bloodstained and this fact suggested that it was the same motorcycle that was used in the crime is not found confidence-inspiring; had the seat-cover of the motorcycle been really bloodstained, the investigating officer would have sent the same for examination by the Chemical Examiner for ascertaining whether the bloodstain is that of human blood and whether that bloodstain matches with the blood of any of the deceased persons or the accused persons. In absence of the reports of the Chemical Examiner and the Serologist on these facts, the assertion of the investigating officer as to use of the said motorcycle in commission of the crime carries no legal worth. The failure on part of the investigating officer to ascertain registration number and name of the registered owner of the motorcycle is also fatal to his assertion that the recovered motorcycle is of the accused Khurram Shahzad. He stated that Bashir brother of the accused Qadeer told him that the motorcycle was of the accused Khurram Shahzad; but neither the statement of the said Bashir to this effect was recorded in the course of investigation under section 161, Cr.P.C. nor was he examined as a witness during trial about the alleged ownership of the accused Khurram Shahzad as well as about the alleged recovery of the motorcycle on his pointation from the house of the accused Qadeer. The non-preparation of the site-map of the place of recovery of motorcycle adds further suspicion to the alleged recovery of the motorcycle from the house of the accused Qadeer. The recovery of the motorcycle, in view of the said omissions made by the investigating officer, is found completely deficient as an incriminatory piece of circumstantial evidence to connect the accused Qadeer or the accused Khurram Shahzad with the commission of the offence.

Recovery of gold ornaments etc alleged to be stolen property

21. Recovery of the alleged stolen or looted property is the third link that the prosecution tried to join in the chain of circumstantial evidence. Sub-Inspector Fazal Hussain, the Investigating Officer, (PW-16) deposed that during the inspection of the place of occurrence he found empty boxes of jewellery scattered there which indicated the commission of offence of robbery; therefore, he also added section 392, P.P.C. to the crime report. He arrested the accused persons, Khurram Shahzad, Qadeer and Naveed, on 31.01.2010, in a raid made at a snooker club in village Pakwal. On interrogation, the accused persons made disclosure that they could lead to recoveries. Firstly, the accused Qadeer led him to the recovery of gold bangles, gold rings, gold locket, five currency notes of Rs. 1000, four currency notes of Rs. 5000 and two Defence Saving Certificates of the deceased Pervaiz Akhtar, from his rented house situated in village Pakwal. Thereafter, the accused Khurram Shahzad led to the recovery of gold bangles, gold ring, gold ear ring, gold chain, fourteen currency notes of Rs.500, three Defence Saving Certificates, one laptop, one movie camera and two still cameras, from his house situated in village Aima Ilyas. Then the accused Naveed led to the recovery of gold ring, pair of ear rings, pair of ear topes, fourteen currency notes of

Rs.500, one Defence Saving Certificate, from his house situated in village Jandal. He took the said recovered things into his possession, and prepared their recovery-memos and site-plans of the places of recovery. In cross-examination, he admitted that the fact of finding scattered empty boxes of jewellery at the place of occurrence was not mentioned in the FIR, and he did not take any such empty box into his possession. About interrogation of the accused person and recoveries, he explained that he interrogated the accused persons outside the snooker club for about one hour. From the snooker club they first went to the house of the accused Qadeer. The accused Qadeer got key of the main gate of the house from an old lady and then opened the gate. He admitted that he did not mention this fact in the case dairy that the accused Qadeer opened the gate by obtaining key from an old lady. He denied the suggestion that the accused Qadeer had not hired any house, nor was any recovery made on his pointation. About the recovery made from the house of the accused Khurram Shahzad, he stated that nobody was present in the house of the accused Khurram Shahzad; however, one woman came there and opened the lock of the door. He admitted that he did not record statement of the said woman. As to the recovery from the house of the accused Naveed Asghar, he said that four or five women were there in the house of the accused Naveed Asghar when they reached there. He stated that he did not join any person from the locality in the recovery proceedings. He denied the suggestion that the whole recovery proceedings were recorded fictitiously by him while sitting in the police station, and that the accused persons were already in police custody and their arrest was fictitiously shown to have been made on 31.01.2010. The recovery-witness, Tahir Akhtar (PW-11) who is cousin of the complainant made statement supporting the due conduct of the recovery proceedings, in his examination-in-chief. He, however, could not tell the time when the recoveries were made from the houses of the accused persons, Qadeer, Khurram Shahzad and Naveed Asghar. He denied the suggestion that recoveries were planted on the accused persons and nothing was recovered from them.

22. It may be said straight away without any deep deliberation that the prosecution story of interrogation of the accused persons at the place of their arrest and then leading of the accused persons from the very place of their arrest to the recoveries of the alleged stolen property appears to be intrinsically doubtful: it does not even fit in with the ordinary human conduct. The accused persons who, as per the prosecution story, were enjoying play snooker in a snooker club, admitted the commission of offence that may entail death penalty forthwith on their arrest, and not only admitted the commission of offence but also cooperated well to lead to the recovery of the stolen property then and there. It is very hard for a prudent person to believe such story. Non-mentioning the alleged fact of finding any scattered jewellery boxes at the place of occurrence in the FIR shakes the foundation of the story. Fazal Hussain, SI (PW-16) also stated in his examination-in-chief that crime scene expert Masood Ahmad was summoned at the spot, who took photographs of the dead bodies and the place of occurrence. Masood Ahmad appeared in the witness-box as PW-7, and tendered the photographs of the deceased persons in evidence as Exh-P 1 to P5 and the photographs of the crime scene as Exh-P6 to P10. All these photographs are available on record of the case. In none of the photographs there are any scattered empty jewellery boxes. These photographs, tendered in evidence by the prosecution itself, completely negate the alleged fact of finding scattered empty jewellery boxes at the place of occurrence.

23. It was denied on behalf of the accused Qadeer by putting suggestion in cross-examination to the investigating officer (PW-16) in the terms that the accused Qadeer had not hired any house. The investigating officer did not join in investigation the landlord of that alleged rented house to bring on record the facts when the accused Qadeer had got the house on rent from him, especially when as per its own version of the prosecution the accused Qadeer was resident of the village, Langurpur Baily, from where the investigating officer recovered the motorcycle allegedly used for reaching the place of occurrence. Further, not associating the women in investigation, who brought the keys of the houses of the accused persons Qadeer and Khurram Shahzad, and even non-mentioning their names in the case dairy create dent in the story of recoveries.

Recovery of alleged stolen property in absence of prior description

24. Even otherwise, in absence of any description of the stolen property given in the FIR, or in the supplementary statement of the complainant or any witness recorded under section 161, Cr.P.C., prior to the alleged recovery, it cannot be said with certainty the recovered property is that which was allegedly stolen.[20] The recovered jewellery, the alleged stolen property, has been attempted to be identified and proved as the one belonging to the deceased Pervaiz Akhtar by the testimony of the goldsmith, Mehmood Ahmad (PW-12). The said witness (PW-12) stated in his examination-in-chief that he identified the gold ornaments produced before him by the investigating officer in the police station. The said gold ornaments were got prepared from him by the deceased Pervaiz Akhtar. On 07.08.2008, the deceased Pervaiz Akhtar got repaired the said gold ornaments from him, and he had issued the receipt (Exh-PPP) at the time of receiving the gold ornaments for repair. In cross-examination, he said that the receipt (Exh-PPP) was not produced by him to the investigating officer. Record of the case is silent from where the said receipt was found by the investigating officer, or who tendered it to him. The goldsmith, Mehmood Ahmad (PW-12), did not state the date when the deceased Pervaiz Akhtar had purchased the said gold ornaments from him. He did not produce any receipt book of his shop showing any entry of sale of gold ornaments to the deceased Pervaiz Akhtar, nor did he bring with him, at the time of his testimony in court, the receipt book containing the entry of receiving the gold ornaments from the deceased Pervaiz Akhtar for repair. His testimony is therefore of little value to prove that the gold ornaments allegedly recovered from the accused persons really belong to the deceased Pervaiz Akhtar. Tahir Akhtar (PW11), the witness to the alleged recoveries, who is the cousin of the complainant and of the deceased Pervaiz Akhtar said in his cross-examination that the deceased Pervaiz Akhtar had five daughters. Two daughters of the deceased Pervaiz were killed in the incident of the present case, but the remaining three daughters would have been the best persons to identify the gold ornaments. If these ornaments had really belonged to their deceased father Pervaiz Akhtar, they must have been in use of their deceased mother or their deceased sisters and they would definitely have seen those ornaments in their use. Similar is the position with the identification of laptop and cameras, the alleged stolen articles. The investigating officer neither got them identified from the daughters of the deceased Pervaiz Akhtar, nor got done forensic audit of these articles from the expert concerned who may have retrieved data therefrom indicating the person who were in use of these cameras and laptop. Such failure on part of the investigating officer makes the recovery of these articles, even if presumed to have been effected from the accused persons, useless for the purpose of crafting any link in the chain of circumstantial evidence against the petitioners to connect them with the commission of offences of robbery and murders.

Recovery of mobile phones and sims

25. As to the alleged recovery of the mobile phones of the deceased persons Bushra, Ghazal and Zarmina, Fazal Hussain, SI, (PW-16) deposed that on 02.02.2010 after making recoveries of the alleged weapon of offences at Manara Pulley the accused Naveed Asghar produced the mobile phone of the deceased Bushra by sending for the same from his house through his brother, and at the same place the accused person Khurram Shahzad also produced two mobile phones of the deceased persons, Zarmina and Ghazala by calling the same through his brother. He further stated that he took the said mobile phones into his possession vide recovery-memos, Exh-PLL and Exh-PNN. In cross-examination, he admitted that he did not mention the fact of calling the mobile phones by the accused persons at Manara Pulley from their houses through some third persons. He admitted that the persons through whom the accused persons had sent for the mobile phones were not associated in the investigation proceedings. He admitted it also that the names and particulars of those persons who had brought the mobile phones were not mentioned in the case dairy. He expressed his inability to tell the names of those persons. We have also read the recovery-memos, Exh-PLL and Exh-PNN. It is mentioned in the recovery-memo, Exh-PLL, that the accused Naveed Asghar has got recovered from his house the mobile phone that was in use of the deceased Bushra. Similarly, in recovery memo, Exh-PNN, it is mentioned that the accused Khurram Shahzad has got recovered from his house the two mobile phones that were in use of the deceased persons, Zarmina and Ghazala. The clear contradiction in the oral stance of the investigation officer (PW-16) and the proceedings

of recovery reduced into writing by him in the recovery memos (Exh-PLL and Exh-PNN) makes the recoveries doubtful. It is not understandable how did the accused persons who were in police custody call their brothers to bring the mobile phones at a place where they were making recoveries of the alleged weapons of offence, i.e., Manara Pulley, not in the police station, and why did they not get those mobile phones recovered on 31.01.2010 when, as per version of the prosecution, they got recovered the other stolen articles from their houses. It is also not consistent with the normal human conduct that the offenders would have taken the mobiles phones of some of the deceased persons, and had left the mobile phone of the deceased Pervaiz Akhtar laying it on a conspicuous place, i.e., on a table beside the dead body of the deceased Pervaiz Akhtar. Non-mentioning the theft of the mobile phones of the deceased persons in the FIR or in the supplementary statement of the complainant, non joining in investigation the brothers of the accused persons who had allegedly brought the mobile phones, and not bringing on record their names and the details as to the place from where they got the said mobile phones, all these omissions, also make these alleged recoveries unreliable.

26. The prosecution has also attempted to connect the accused Khurram Sahzad with the commission of offence with the assertions that mobile phone having sims numbers 0333-5841554 and 0332-5801685 was recovered from him on his arrest on 31.01.2010 as per recovery-memo, Exh-PEE, and that the sim bearing number 0332-5801685 was used from 27.01.2010 to 28.01.2010 in the phone set bearing IMEI No. 354176029652580 of the deceased Bushra, as per the calls data (Exh-PTT). These assertions has been made on behalf of the prosecution during arguments in the courts below as well as in this Court, and was not stated as facts by the complainant (PW-15) and the investigating officer (PW-16) in their statements while appearing in the witness-box; therefore, the accused persons could not get opportunity to test the veracity of the said facts in cross-examination. Nor was this fact with the said specification put to the accused Khurram Shahzad in his statement recorded under section 342 of the Cr.P.C., and he, therefore, could not explain his stance to the prosecution evidence on it against him. Although the said assertions of the prosecution, which appears to have greatly influenced the mind of the courts below against the accused persons, cannot be entertained on these grounds only, but the close scrutiny of the prosecution evidence relied upon for making the said assertions also shows several flaws in it to connect the accused Khuram Shahzad with the commission of offence. Firstly, the empty box of a mobile phone set bearing IMEI No.354176029652580 is alleged to have been tendered by the complainant to the investigating officers on 21.01.2010, the day on which the FIR was registered, the investigating officer (PW-16) made site inspection, and the crime scene expert (PW-7) took photographs of the place of occurrence. But the fact of finding the said empty box was not mentioned in the FIR, nor was it noticed by the investigating officer during site inspection, nor was it captured by the crime scene expert while taking the photographs of the place of occurrence. Had it really been there at the place of occurrence on 21.01.2010, the investigation officer himself, not waiting for its tendering by the complainant, would have taken it into his possession. Secondly, the complainant (PW-15) stated that the said empty box was of mobile phone Nokia which was owned by the deceased Zarmina Mehak but was in use of the deceased Bushra. However, he did not state how did he came to know about these facts on 21.01.2010 when the investigating officer had not yet even applied for obtaining the calls data of the sims of the deceased persons. Thirdly, as per the calls data (Exh-PTT), on 27.01.2010 two outgoing calls were made from a phone set bearing IMEI No.354176029652580 with sim number 0332-5801685 to some person having sim number 0345-5526628 and on 28.01.2010 two outgoing calls were made to some person having sim number 0303-5431302, one outgoing call to and one incoming call from some person having sim number 0301-5826884, and one outgoing call to some person having landline number 54-4656497. But none of the said persons were joined in investigation to bring on record who had made those calls to them from that phone, nor was the record as to registered owner of the sim number 0332- 5801685 obtained. Therefore, it cannot be said with certainty that the accused Khurram Shahzad used the mobile phone bearing IMEI No.354176029652580 and made calls to those persons with sim number 0332-5801685, on January 27 and 28, 2010. Lastly but very importantly a fact has been noted, which coupled with the said noted flaws makes the whole story of recording supplementary statement of

the complainant as to finding scattered jewellery boxes, his tendering the empty box of mobile phone and addition of the offence of robbery punishable under section 392, P.P.C. in the case by the investigating officer on 21.01.2010 untrustworthy and unreliable. It is this: Admittedly the investigating officer received the clothes of the deceased persons after their postmortem examination on 22.01.2010 and took the said clothes in his possession as a piece of evidence in the case vide recovery memos (Exh-PP, PQ, PT, PU and PV) dated 22.10.2010. In all these five recovery memos prepared on 22.01.2010 the offence of robbery punishable under section 392, P.P.C. is not mentioned; this fact clearly shows that the section relating to the offence of robbery, i.e., section 392, P.P.C. had not been added in the case till 22.01.2010. Then mentioning of section 392, P.P.C. on the recovery memo (Exh-PRR) purportedly prepared on 21.01.2010 as to recovery of empty box of a mobile phone bearing IMEI No.354176029652580 makes that recovery and the recovery proceedings entirely doubtful.

Recovery of the bloodstained weapons of offence and gloves

27. The fourth incriminatory circumstantial evidence relied upon by the prosecution is the recovery of the bloodstained weapons of offence, i.e., two knives (Churri), and gloves allegedly made on pointation of the accused persons during investigation. Statement of Fazal Hussain, SI (PW-16) about the said recovery is as follows. He stated that he arrested the accused persons, Khurram Shahzad, Qadeer and Naveed, on 31.01.2010 and obtained their physical remand on 01.02.2010 for five days. On 02.02.2010 during investigation, the accused persons disclosed that they could lead to recovery from underneath Manara Pulley. In pursuance to the disclosure of the accused persons he took them to Manara Pulley situated on Mangla Road. On reaching Manara Pulley, firstly the accused Naveed Asghar led him to the recovery of knife (Churri) from underneath Manara Pully by digging out the soil. Thereafter, the accused Khuram Shehzad got recovered a bloodstained knife (Churri) and a pair of gloves from underneath Manara Pulley by digging out the earth. And then the accused Qadeer led to the recovery of a pistol and a pair of gloves from underneath the Manara Pulley by digging out the earth. He also got exhibited the recovery memos of the said recoveries as Exh-PKK, Exh-PMM and Exh-POO respectively. In cross-examination, he stated that the witnesses to the recovery, Tahir Akhtar (PW-11) and Gul Awaiz, had reached the police station on their own. The said persons were the witnesses to all recoveries made on 27.01.2010, 31.01.2010 and 02.02.2010. There were about 7/8 shops beside the Manara Pulley, the place of alleged recoveries, but no person from amongst the shopkeepers was associated in the recovery proceedings. Village Ladhar was located at a distance of about 100/150 yards and village Shiekhupur at a distance of about 200/300 meters, from the place of recovery. No person from the localities of those villages was associated in the recovery proceedings. Manara Pulley was situated on the main road. Traffic was plying on that road round the clock. The recovery proceedings were not seen by any person from public other than the said witnesses to the recovery. The depth of Manara Pulley was about 5/6 feet from the road. Water flow area of the Manara Pulley was about 15/20 feet. The place of recovery was not inside the Manara Pulley. The accused persons dug out the earth beneath the pulley from outside. The knives (Churri) got recovered by the accused Naveed Asghar and Khurram Shahzad were wrapped in polythene shopper bags. The pistol got recovered by the accused Qadeer and the gloves got recovered by the accused Khurram Shahzad were also wrapped in polythene shopper bags. That shopper bags were not taken into possession. In the recovery memo, recovery of shopper bags was not mentioned. Tahir Akhtar (PW-11), one of the witnesses to the alleged recoveries made the similar statement. He, however, admitted in cross-examination that he was the cousin of the complainant and the other witness to the recovery proceedings, Gul Awaiz, was also his cousin, and on question stated that river Jehlum was at a distance of 100/ 150 yards form village Sheikhupur onwards.

28. It may be stated at the outset of the appraisal of the prosecution evidence as to the recoveries of the knives (Churri), the alleged weapons of offence, that it is quite astonishing that both Tahir Akhtar (PW-11) and Gul Awaiz were close relatives of the complainant reached the police station at the time when the investigating officer planned to make a raid for arrest of the accused persons and also when the accused persons were ready to cooperate for making recoveries during investigation, and thus become witnesses to all the recoveries made on 27.01.2010, 31.01.2010 and 02.02.2010. The story becomes further doubtful

when we notice that the particulars of these witnesses are written on the recovery-memos (Exh-PKK, Exh-PMM and Exh-POO) in handwriting patently different from all other writings thereon. It indicates that the particulars of the witnesses were added and their signatures obtained subsequently on the already prepared recovery memos. There were, as per version of the investigating officer, 7/8 shops and two villages near the place of alleged recoveries, but no person from those nearby shops and villages was associated in the recovery-proceedings. We are aware of the fact that the persons from the general public usually do not come forward to be witness to such police proceedings, but the assertion of the investigating officer that no person of the locality other than the said witnesses was there to see the proceedings that allegedly continued for about three hours of the day from about 02:15 to 5:00 p.m. makes the proceedings further doubtful. The story of wrapping up bloodstained knives, the alleged weapons of offence, and gloves into polythene shopper bags and then burying them in the ground close to a water stream by the offenders, for a future recovery therefrom, instead of throwing them into that water stream or a nearby river also does not appeal to a prudent mind. In the case of Sardar Bibi v. Munir Ahmed,[21] this Court disbelieved the alleged recovery of bloodstained weapon of offence, i.e. a chaff cutter (Toka), made after about one month of the occurrence, with the observations that "it is not expected from an accused person to keep such weapon (stained with blood) as souvenir because during the said period there was ample time to destroy or at least washout the said weapon." Similarly, in the case of Muhammad Asif v. State[22] this Court did not believe the alleged recovery of weapon of offence, i.e., a dagger, observing that it is "normal practice and conduct of culprits that when they select night time for commission of such crime, their first anxiety is to conceal their identity so that they may go scot-free unidentified and in that course they try their level best to conceal or destroy each piece of evidence incriminating in nature which, might be used against them in the future thus, human faculty of prudence would not accept the present story [of recovering the dagger from the shop of the appellant] rather, after committing crime with the dagger, the appellant could throw it away anywhere in any field, water canals, well or other place and no circumstances would have chosen to preserve it in his own shop if believed so because that was susceptible to recovery by the police." Recovery of weapon of offence, a corroborative evidence

29. Even otherwise, recovery of weapon of offence is only a corroborative piece of evidence; and in absence of substantive evidence, it is not considered sufficient to hold the accused person guilty of the offence charged. When substantive evidence fails to connect the accused person with the commission of offence or is disbelieved, corroborative evidence is of no help to the prosecution as the corroborative evidence cannot by itself prove the prosecution case.[23] A four-member Bench of the Federal Court of Pakistan[24] while reappraising the circumstantial evidence in Siraj v. Crown,[25] held that two out of three circumstances had not been proved while the third, namely, recovery of the blood stained handle of hatchet, that had been alleged to be weapon of offence, was insufficient to form the basis of a conviction. Muhammad Munir, C.J., speaking for the Bench said: "The circumstance that the appellant [accused] produced the handle of a hatchet, which had stains of human blood on it, is by itself plainly insufficient to prove that the, appellant [accused] committed the murder in question." Likewise, in Saifullah v. State[26] a four-member Bench of this Court held the recovery of a blood-stained knife, the alleged weapon of offence, insufficient for conviction on excluding the testimony of alleged eye-witness from consideration and finding the occurrence as an unseen one. The Court observed: "Considering all the facts on the record we are of the view that it was an unwitnessed occurrence... We have therefore no option but to exclude the testimony of the aforementioned two witnesses from consideration with the result that no evidence is left on the record to connect the accused with the crime in question, as the recovery of the blood-stained knife, even if believed, could only be used as evidence corroborating the testimony of the eye-witnesses, if any. But since evidence of the eye-witnesses in this case has been excluded this recovery is hardly of any use." Evidentiary value of a bloodstained alleged weapon of offence without a forensic report matching the blood found thereon with that of the deceased

30. The recovery of bloodstained knives and gloves if presumed to have been made from the petitioners, for the sake of argument, it cannot even then connect them with the commission of murders of the five

deceased persons in the present case. This Court observed in the case of Irfan Ali v. State[27] as to recovery of bloodstained alleged weapon of offence, i.e., dagger, that "when no grouping of the blood was made with the blood stained clothes of the deceased to create a nexus between the two, the same is of no help to the prosecution." Similarly in the case of Khalid Javed v. State,[28] this Court discarded the prosecution evidence of recovery of bloodstained alleged weapon of offence, i.e., the dagger and knife (Churri), and of bloodstained clothes of the accused persons in absence of matching report of the bloodstains with the blood group of deceased. In Hamid Nadeem v. State,[29] a five-member Shariat Appellate Bench of this Court rejected the recovery of bloodstained clothes of the accused as an incriminating piece of evidence while observing that the bloodstains on the recovered clothes were not got matched with the blood of the deceased. While, in the case of Muhammad Asif v. State,[30] this Court deemed it essential to point out that "mere sending the crime weapons, blood stained, to the chemical examiner and serologist would not serve the purpose of the prosecution nor it will provide any evidence to inter link different articles... unless the blood stained earth or cotton and blood stained clothes of the victim are not sent with the same for opinion of serologist to the effect that it was human blood on the crime weapons and was of the same group which was available on the clothes of the victim and the blood stained earth/cotton, such inconclusive opinion cannot be used as a piece of corroboratory evidence." The legal position may be summed up thus: As in absence of a positive report of Forensic Science Laboratory as to matching of crime empty with the allegedly recovered firearm from an accused person, the recovery of alleged weapon of offence cannot be considered as the corroborative piece of evidence against that accused person,[31] so is the legal position regarding recovery of a bloodstained alleged weapon of offence without a positive forensic report matching the blood found thereon with that of the deceased. It can also be not used as a substantive or corroborative piece of evidence against an accused person to connect him with the commission of offence. Therefore, the prosecution evidence as to recoveries of bloodstained knives (Churri) and gloves that are alleged to have been used for the commission of offence is also not found sufficient to connect the petitioners with the commission of the offences charged.

Medical evidence, not corroborative rather supporting evidence

31. The prosecution has attempted to complete the chain of circumstantial evidence by medical evidence relating to the post mortem examinations of the deceased persons. This evidence proves only the factum that death of the deceased persons was caused by cutting their throats through some sharp edge weapon; it does in no way indicate who had cut their throats and with what particular weapon. Medical evidence is in the nature of supporting, confirmatory or explanatory of the direct or circumstantial evidence, and is not "corroborative evidence" in the sense the term is used in legal parlance for a piece of evidence that itself also has some probative force to connect the accused person with the commission of offence. Medical evidence by itself does not throw any light on the identity of the offender. Such evidence may confirm the available substantive evidence with regard to certain facts including seat of the injury, nature of the injury, cause of the death, kind of the weapon used in the occurrence, duration between the injuries and the death, and presence of an injured witness or the injured accused at the place of occurrence, but it does not connect the accused with the commission of the offence. It cannot constitute corroboration for proving involvement of the accused person in the commission of offence, as it does not establish the identity of the accused person.[32] Therefore, the medical evidence is of little help to the prosecution for bringing home the guilt to the petitioners.

32. We have noted it also that although Mirza Muhammad Umar (PW-13) had stated in his statement recorded under section 161, Cr.P.C. on 21.01.2010 by the investigating officer during investigation that due to darkness he could not identify the persons standing at the door of the deceased Pervaiz Akhtar, but one Fazal Hussain is alleged to have stated in his statement recorded under section 161, Cr.P.C. on 24.01.2010 that in the evening of 20.01.2010 he had seen the petitioner, Qadeer (who was known to him) going towards the locality where the house of the deceased Pervaiz Akhtar was situated, on a motorcycle with two other persons who were not known to him. Therefore, it was necessary for the investigating officer to get conducted the test identification proceedings as to the identification of the petitioners, Khurram

Shahzad and Naveed Asghar, by the said Fazal Karim and to join him in investigation, on their arrest. As per record of the case, the said Fazal Karim was never joined again in investigation after his that alleged statement dated 24.01.2010. Non joining of Fazal Karim, purportedly the most important witness, in investigation after arrest of the petitioners in the case creates doubt even about his statement that is alleged to have been recorded on 24.01.2010. The said Fazal Karim died during trial of the case, and could not be examined as witness by the prosecution for proving the facts allegedly narrated by him in his statement dated 24.01.2010, nor was veracity of his that statement could be checked through cross-examination on behalf of the petitioners. Therefore, his alleged statement under section 161, Cr.P.C. dated 24.01.2010 could not be used for drawing any adverse inference against the petitioners. The omission of the investigating officer to get conducted the test identification proceedings of the petitioners, Khurram Shahzad and Naveed Asghar, was a serious failure in performance of his duty to conduct the investigation of the case diligently and efficiently. The way how the investigation of this very serious case involving gruesome murder of five persons of one family was conducted speaks loudly about lack of expertise and competency of the investigating officer to collect the legally admissible evidence and detect the real culprits in cases that solely rest upon circumstantial evidence. The investigating officer, in the present case, instead of collecting the evidence attempted to create it. Apart from the omissions and faults noted above in the course of appraising the prosecution evidence, the observation of the Magistrate made while declining application of the investigating officer for recording confessional statement of the petitioner, Naveed Asghar that "the accused appeared to be under pressure of the Police" also throws some light on the manner in which the investigation was conducted.

33. It is a well-established principle of administration of justice in criminal cases that finding of guilt against an accused person cannot be based merely on the high probabilities that may be inferred from evidence in a given case. The finding as regards his guilt should be rested surely and firmly on the evidence produced in the case and the plain inferences of guilt that may irresistibly be drawn from that evidence. Mere conjectures and probabilities cannot take the place of proof. If a case is decided merely on high probabilities regarding the existence or non-existence of a fact to prove the guilt of a person, the golden rule of giving "benefit of doubt" to an accused person, which has been a dominant feature of the administration of criminal justice in this country with the consistent approval of the Constitutional Courts, will be reduced to a naught.[33] The prosecution is under obligation to prove its case against the accused person at the standard of proof required in criminal cases, namely, beyond reasonable doubt standard, and cannot be said to have discharged this obligation by producing evidence that merely meets the preponderance of probability standard applied in civil cases. If the prosecution fails to discharge its said obligation and there remains a reasonable doubt, not an imaginary or artificial doubt, as to the guilt of the accused person, the benefit of that doubt is to be given to the accused person as of right, not as of concession.[34] The rule of giving benefit of doubt to accused person is essentially a rule of caution and prudence, and is deep rooted in our jurisprudence for safe administration of criminal justice. In common law, it is based on the maxim, "It is better that ten guilty persons be acquitted rather than one innocent person be convicted". While in Islamic criminal law it is based on the high authority of sayings of the Holy Prophet of Islam (peace be upon him): "Avert punishments [hudood] when there are doubts";[35] and" Drive off the ordained crimes from the Muslims as far as you can. If there is any place of refuge for him [accused], let him have his way, because the leader's mistake in pardon is better than his mistake in punishment".[36] A three-member Bench of this Court has quoted probably latter part of the last mentioned saying of the Holy Prophet (peace be upon him) in Ayub Masih v. State[37] in the English translation thus: "Mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent."

34. Keeping in view the said golden rule of giving benefit of doubt to an accused person for safe administration of criminal justice, we are firmly of the opinion that all the circumstantial evidence discussed above is completely unreliable and utterly deficient to prove the charge against the petitioners beyond reasonable doubt. The prosecution has miserably failed to complete the chain of circumstances so as to establish conclusively the guilt of the petitioners in a manner that can rule out every hypothesis

inconsistent with their innocence. The circumstantial evidence tendered by the prosecution is not found to be like a well-knit chain, one end of which can touch the dead body of the deceased persons and the other the neck of the petitioners. We find that the missing links have been liberally filled up by the courts below, apparently being influence by the heinous nature of the charges involved in the case, on the basis of surmises and conjectures, and this has resulted in grave injustice. The courts below have overlooked serious pitfalls and grave infirmities in the prosecution evidence by adopting a superficial and cursory approach, not befitting the seriousness of the crime charged in the present case. The concurrent verdict returned by the courts below (trial court and appellate court) is manifestly erroneous, having been arrived at without a complete and comprehensive appreciation of all the evidence and relevant aspects of the case. The petition is therefore converted into appeal and is allowed: the judgments of the courts below are set aside and the petitioners are acquitted of the charges. They shall be released forthwith, if they are not required to be detained in some other case.

35. Before parting with the judgment, we feel constrained to observe though at the cost of some repetition but for the sake of clarity that in a criminal trial an accused person cannot be convicted on the basis of mere "suspicion" or "probability" unless and until the charge against him is "proved beyond reasonable doubt", a standard of proof required in criminal cases in almost all common law jurisdictions. An accused person cannot be deprived of his constitutional right[38] to be dealt with in accordance with law, merely because he is alleged to have committed a gruesome and heinous offence. The zeal to punish an offender even in derogation or violation of the law would blur the distinction between arbitrary decisions and lawful judgments. No doubt, duty of the courts is to administer justice; but this duty is to be performed in accordance with the law and not otherwise. The mandatory requirements of law cannot be ignored by labelling them as technicalities in pursuit of the subjective administration of justice. One guilty person should not be taken to task at the sacrifice of the very basis of a democratic and civilised society, i.e., the rule of law. Tolerating acquittal of some guilty whose guilt is not proved under the law is the price which the society is to pay for the protection of their invaluable constitutional right to be treated in accordance with the law. Otherwise, every person will have to bear peril of being dealt with under the personal whims of the persons sitting in executive or judicial offices, which they in their own wisdom and subjective assessment consider good for the society.

36. Foregoing are the reasons for our short order dated 07.12.2020, which for ease of reference and completion of record is reproduced hereunder:-

> "For reasons to be recorded later, the instant jail petition is converted into an appeal and the same is hereby allowed. The convictions and sentences of appellants Naveed Asghar, Khurram Shehzad and Qadeer Ahmed alias Saqib are set aside. They are acquitted of the charge(s) framed against them. They are behind the bars and are ordered to be released forthwith, if not required to be detained in any other case."

MWA/N-2/SC Petition allowed.

**P L D 2021 Supreme Court 684**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ**

**Messrs LUNG FUNG CHINESE RESTAURANT, LAHORE and others---Petitioners**

**Versus**

**PUNJAB FOOD AUTHORITY and others---Respondents**

C.P. 1331-L of 2017, decided on 13th April, 2021.

(Against the judgment of Lahore High Court, Lahore dated 27.01.2017, passed in W.P. No.25124 of 2015).

**(a) Punjab Food Authority Act (XVI of 2011)---**

----Ss. 4, 7(3) & 9---International key principles integral to the architecture of food laws stated.

General Food Regulations of the European Commission-EC Regulation No. 178(2002); Principles of food safety legislation, J.L. Jouve, Food Control. Vol.9. No.2-3. pp.75-81, 1998 Elsevier Science Ltd. and The General Food Law Regulation by the European Food Safety Authority (EFSA) ref.

**(b) Punjab Food Authority Act (XVI of 2011)---**

----Ss. 13(1)(c), 18 & 31(2)---Constitution of Pakistan, Arts. 18, 23 & 25---Powers of Food Safety Officer to seal premises under S. 13(1)(c) of the Punjab Food Authority Act, 2011 ('the 2011 Act')---Constitutionality and legality---Power of sealing in the hands of the Food Safety Officer (FSO) could easily be applied arbitrarily which could not be permitted under the constitutional scheme, as any such act would offend fundamental rights under Arts. 18, 23 & 25 of the Constitution---Power of sealing of premises by the FSO, in its present form, was therefore ex facie discriminatory---Power of the FSO to "seal any premises" in S.13(1)(c) of the 2011 Act was declared to be unconstitutional and illegal, and it was further declared that any Rules, Regulations or SOPs promulgated under the 2011 Act dealing with "sealing of the premises" by the FSO in the absence of any sealing power under the Act were, ultra vires the 2011 Act and also illegal and without any legal effect.

The Punjab Food Authority Act, 2011 ('the 2011 Act') did not lay down any parameters or guidelines as to when the power of "sealing of premises" could be invoked by the Food Safety Officer (FSO) under section 13(1)(c) of the 2011 Act. No ground or any other legislative guideline had been given in section 13(1)(c) that permitted or empowered the FSO to exercise his discretion and invoke the power of sealing. Section 13(1)(c) simply stated that FSO could seal any premises where he believed any food was prepared, preserved, packaged, stored, conveyed, distributed or sold, examined any such food and examined anything that he believed was used, or capable of being used for such preparation, preservation, packaging, storing, conveying, distribution or sale. Nowhere did section 13(1)(c) provide when the sealing powers could be invoked. Further, the act of "sealing" was not supported by a remedial mechanism as in the case of seizure of food. Therefore, there was no legal remedy available to a food operator or food business after the premises had been sealed. There was also no provision for de- sealing under the Act. More importantly, a similar power had been actually vested in the FSO under section 18 of the Act for passing emergency prohibition orders whereby a food operator could be restrained from carrying on food business. The difference was that within twenty-four hours the aggrieved party could approach the Food Authority for its redressal against such order (Section 18(2)). The so-called sealing power under section 13(1)(c) amounted to frustrating section 18 and the scheme of the 2011 Act.

In the absence of any legislative policy or guideline clearly spelling out when the sealing could take place and there being no remedial process provided against sealing, the power of sealing in the hands of the FSO could easily be applied arbitrarily which could not be permitted under the constitutional scheme, as any such act would offend fundamental rights under Articles 18, 23 and 25 of the Constitution. The power of sealing of premises by the FSO, in its present form, was therefore ex facie discriminatory. Supreme Court declared that the power of the FSO to "seal any premises" in section 13(1)(c) was unconstitutional and illegal, hence, the power to seal the premises of a food operator or a food business by the FSO was struck down; that reference to "sealing" in section 31(2) was also to be accordingly struck down; that the rest of the provision [section 13(1)(c)] shall remain intact and continue to be enforceable;

that any Rules, Regulations or SOPs promulgated under the 2011 Act dealing with "sealing of the premises" by the FSO in the absence of any sealing power under the Act were, therefore, ultra vires the Act and also illegal and without any legal effect.

**(c) Punjab Food Authority Act (XVI of 2011)---**

----Ss. 13(1)(ca), 16, 18 & 39(1)(d)---Constitution of Pakistan, Art. 10A---Powers of Food Safety Officer (FSO) to impose fines, issue Improvement Notice or issue Emergency Prohibition Orders under the Punjab Food Authority Act, 2011 ('the 2011 Act')---Constitutionality---All said powers enjoyed by the FSO provided a supporting remedial forum for the aggrieved party---Said powers and their corresponding provisions in the 2011 Act not only met the requirement of Art.10A of the Constitution regarding fair trial and due process, but they also gave the FSO the choice to make risk analysis and then adopt a proper risk management strategy by either issuing a Notice of Improvement or imposing a fine or taking a more stern action by seizing the food item which contravened the provisions of the 2011 Act or if the risk to human health was imperative, to issue Emergency Prohibition Order and restrain the food operator from carrying on food business under S. 18 of the 2011 Act---The enforcement interventions by the FSO under the 2011 Act were laid out in a manner that highlighted the concept of proportionality and must be applied in such spirit on case to case basis.

**(d) Punjab Food Authority Act (XVI of 2011)---**

----Ss. 7, 13 & Preamble---Constitution of Pakistan, Arts. 18 & 24(1)---Powers of Food Authority and Food Safety Officers---Principles of 'scientific risk analysis' and 'proportionality'---Scope---Punjab Food Authority Act, 2011 ('the 2011 Act') could only be put to an effective use to achieve its goal of food safety and protection of human health if the key principles of scientific knowledge, risk analysis, proportionality and precautionary principle were kept in mind by the Food Safety Officer (FSO) and the Food Authority---Additionally, the FSO must be of the requisite qualification as provided under S.13 of the 2011 Act, he must be abreast with the latest food and health science to be able to make intelligent and smart risk analysis of the risk and danger to food and healthy safety in any given situation---Any drastic step by the Food Authority or its officers that was not based on scientific risk analysis or was not proportionate to the health hazard involved, could cause huge economic and financial loss to the food business by bringing the business of a food operator to a crushing halt, thereby offending the constitutional rights to business and property of a food operator or food business---If the contravention under the 2011 Act could be remedied through a less harsh mechanism provided under the law, taking of a more drastic step should be avoided; this was a balancing act the Food Authority had to undertake to meet the international food law principle of proportionality.

**(e) Punjab Food Authority Act (XVI of 2011)---**

----S. 38---Constitution of Pakistan, Art. 10A---Publication of names of convicts in newspapers---Constitutionality and scope---Section 38 of the Punjab Food Authority Act, 2011 ('the 2011 Act') dealt with publication in the newspapers and provided that after the conviction under the 2011 Act had attained finality, the Food Authority with the permission of the Special Court could publish the name of the food operator or food business in the newspapers or in any other mode for information---Section 38 clearly barred the Food Authority and its officers to publicize any proceedings taken against a food business or a food operator under the 2011 Act unless the conviction had attained finality and there was permission granted by the court for its publication----Food Authority and Food Safety Officers (FSOs), therefore, cannot release any information during the pendency of the proceedings under the 2011 Act---Section 38 of the 2011 Act was in line with the requirement of due process and fair trial---Any violation of S.38 would make the FSO or any other officer of the Food Authority liable to departmental action.

**(f) Punjab Food Authority Act (XVI of 2011)---**

----Ss. 7, 13 & Preamble---Powers of Food Authority and Food Safety Officers---'Precautionary principle'---Scope---Precautionary principle [Article 7 of EU Law Regulation (EC) No. 178/2002] referred to specific situations where: (i) there were reasonable grounds for concern that an unacceptable level of risk to health existed and (ii) the available supporting information and data were not sufficiently complete to enable a

comprehensive risk assessment to be made---When faced with these specific circumstances, decision makers or risk managers may take measures or other actions based on the precautionary principle, while seeking more complete scientific and other data---Such measures were provisional until the time when more comprehensive information concerning the risk could be gathered and analysed---Precautionary principle had no application where the food items inspected by the Food Safety Officer (FSO) were found to be adulterated, substandard or misbranded, unsafe or suffered from false advertisement or false labelling or were kept under unhygienic and unsanitary conditions---No scientific uncertainty existed about such contravention and could easily be checked on the spot or in a food laboratory---Precautionary principle was to be applied where the health and food safety risk attached to a food item was scientifically uncertain and created doubt of health risk, in such a case, till such time that there was scientific certainty, such a food item could be seized or recalled as the case may be.

M. Irfan Khan Ghaznavi, Advocate Supreme Court for Petitioners.

Iftikhar Ahmad Mian, Advocate Supreme Court, Ch. Sultan Mahmood, Advocate Supreme Court, Sheheryar Sultan, Secretary, Food Department, Government of the Punjab, Rafaqat Ali Niswana, D.G. Punjab Food Authority, Anum Gulraiz Mir, Addl. Director Legal and Usman Samad, Assistant Director, Legal for Respondents.

Ahmad Awais, A.G. Punjab and Rana Shamshad Khan, Addl. A.G. Punjab on Court's notice.

Date of hearing: 9th March, 2021.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**On 08.08.2015, Food Safety Officer ("FSO") of the Punjab Food Authority visited LUNG FUNG, Chinese restaurant in Lahore. After carrying out inspection of six freezers installed in the restaurant, the FSO sealed the said restaurant on the same day allegedly invoking his powers under section 13 (1) (c) of the Punjab Food Authority Act, 2011 ("Act")[1]. Later on the said restaurant was allegedly de-sealed on 17.08.2015 and the restaurant was served with an Improvement Notice under section 16 of the Act. The petitioner-restaurant and its proprietors challenged the act of sealing of the restaurant by FSO, the methodology of enforcement under the Act and the constitutionality and vires, inter alia, of the power of "sealing" exercised by the FSO under section 13(1)(c) of the Act.

2. We have heard the learned counsel for the parties at some length and have examined the provisions of the Act. Brief facts are that the FSO upon examining the freezers installed in the kitchen sealed the premises (restaurant) vide sealing order dated 08.08.2015, which is reproduced hereunder for convenience and reference:-

Form 18

ORDER OF SEALING

(Under section 13 (1) (c) (g) of the Punjab Food Authority Act, 2011)

The powers conferred under section 13 read with section 51 of the Punjab Food Authority Act, 2011, the undersigned has reason to believe that there are sufficient grounds for sealing of your premises. I being an authorized officer, hereby direct you to keep the following food stock sealed till such orders as may be issued subsequently in relation thereto:-

(Name of the Food Business Operator and address of the premises)

Lung Fund Chines Restaurant,

Kashmir Road, Near Governor House.

| Sr. No. | Name of the product | Batch No. | No. of Units | Qty. in KGs. |
|---|---|---|---|---|
| 1. | Freezers | | 6 | |

| | | | | |
|---|---|---|---|---|
| 2. | | | | |
| 3. | | | | |
| 4. | | | | |
| 5. | | | | |

> Fine was imposed last time;

> Workers were not wearing caps.

> Dirty washing area.

> Stagnant water on kitchen floor.

> Raw and cooked food stored together in freezer.

> Expired bread found of 24.07.2015;

> Poor premises hygiene.

> Flies found on uncovered food.

Even though the tenor of the above Order shows that only the food stock (i.e., in the six freezers) has been sealed but admittedly, on ground the entire restaurant was sealed. Later on the restaurant was allegedly de-sealed on 17.08.2015 and Improvement Notice under section 16 of the Act was served on the petitioner, which is reproduced hereunder:-

3. Learned counsel for the respondents was unable to explain, on what grounds and under whose authority were the premises of the food business sealed and then de-sealed, under the Act. The respondents, inspite of our repeated queries failed to produce the de-sealing order or refer to the relevant law in this regard. They also failed to explain whether the law provided for any grounds or reasons for "sealing of premises" under section 13(1)(c) of the Act.

4. In this factual background, before examining the relevant provisions of the Act, it would be useful to have an understanding of the international key principles that are integral to the architecture of food laws. Consideration of these principles is in line with section 7(3) of the Act which provides that the Food Authority shall exercise its functions, as far as possible, in accordance with the well established scientific principles and international best practices. According to well established General Food Regulations of the European Union,[2] modern food safety legislation must protect the interests and concerns of consumers[3] and the legitimate interests of food operators[4]. The constitution of the Food Authority under the Act (section 4) is therefore broad based and inclusive of all the competing interests: the Government, scientific experts, legislators, representatives of the food operators and of the consumers. Under international best practice, food safety legislation is required to be science based; reliant on risk analysis including: risk assessment and risk management; must maintain proportionality - finding solutions proportionate to health risks; achieve health protection on a preventive basis;[5] and apply the precautionary principle, where required. The measures to be taken to protect health and food safety must be underpinned by strong science. It is for this reason that a Scientific Panel has been constituted under the Act (section 9) to formulate recommendations for the Food Authority on food standards, procedures, processes and guidelines in relation to technical aspect of food. The European Commission[6] has been at the forefront of the development of risk analysis principles, including risk assessment and risk management, that must be undertaken in an independent, objective and transparent manner based on the best available science. Risk management is the process of weighing policy alternatives in the light of results of a risk assessment and selecting the appropriate actions necessary to prevent, reduce or eliminate the risk. In the risk management phase, the decision makers need to consider a range of other information in addition to the scientific risk assessment e.g., feasibility of controlling a risk; socio-economic effects; environmental impact[7] and other techniques of risk analysis, such as cost/benefit analysis. Proportionality is normally understood as the right balance between ends and means. Action taken must be proportionate to real health risks involved. Wherever possible, health protection and food safety should be achieved on a preventive basis. In case

where there is scientific uncertainty about the health risk attached to a food item, the use of precautionary principle has been imported from the world of environmental law into food laws to address such a situation. These principles are fully in line with our constitutional mandate and promote fundamental rights to fair trial (Article 10A), to business (Article 18) and to property (Article 23) of a food operator or a food business.

5. The objective of the Act is to establish the Punjab Food Authority to protect public health, provide safety and standards of food. There are three regulatory regimes under the Act that provide for food safety and public health: (i) powers enjoyed by Food Safety Officer; (ii) powers enjoyed by the Food Authority and (iii); powers of the Special Court. FSO, the field officer, who visits food businesses and food operators, enjoys the power to seize food, apparatus, etc. if it appears to him to be in contravention of the Act. Contraventions have been spelled out in the shape of offences e.g., selling adulterated food;[8] manufacturing, selling, storing, distributing, importing and exporting of substandard or misbranded food[9]; or unsafe food;[10] selling food using false advertisement[11]; or preparing and packing any food using false labeling[12] and keeping food under unhygienic and unsanitary conditions.[13] The powers of seizure are invoked if there is a contravention of the Act by the FSO and is elaborately dealt with in section 13(3), (4), and (5) providing detailed mechanism whereby an aggrieved person can within seven days approach the Special Court against the said seizure. As opposed to seizure, the Act does not lay down any parameters or guidelines as to when the power of "sealing of premises" can be invoked by the FSO under section 13(1)(c). The provision is reproduced hereunder for reference;--

> 13. Powers of Food Safety Officer.---(1) A Food Safety Officer may-
>
> (a) take sample of any food or any substance, which appears to him to be intended for sale, or has been sold as food;
>
> (b) seize any food, apparatus or utensil which appears to the Food Safety Officer to be in contravention of this Act, the rules or the regulations;
>
> (c) enter or seal any premises where he believes any food is prepared, preserved, packaged, stored, conveyed, distributed or sold, examine any such food and examine anything that he believes is used, or capable of being used for such preparation, preservation, packaging, storing, conveying, distribution or sale; (emphasis supplied)

No ground or any other legislative guideline has been given in section 13(1)(c) that permits or empowers the FSO to exercise his discretion and invoke the power of sealing. Section 13(1)(c) simply states that FSO can seal any premises where he believes any food is prepared, preserved, packaged, stored, conveyed, distributed or sold, examine any such food and examine anything that he believes is used, or capable of being used for such preparation, preservation, packaging, storing, conveying, distribution or sale. Nowhere does section 13(1)(c) provide when the sealing powers can be invoked. Further, the act of "sealing" is not supported by a remedial mechanism as in the case of seizure of food. Therefore, there is no legal remedy available to a food operator or food business[14] after the premises[15] have been sealed. There is also no provision for de-sealing under the Act. More importantly, a similar power has been actually vested in the FSO under section 18 of the Act for passing emergency prohibition orders whereby a food operator can be restrained from carrying on food business. The difference is that within twenty-four hours the aggrieved party can approach the Food Authority for its redressal against such order (Section 18(2)). The so-called sealing power under section 13(1)(c) amounts to frustrating section 18 and the scheme of the Act. In the absence of any legislative policy or guideline clearly spelling out when the sealing can take place and there being no remedial process provided against sealing, the power of sealing in the hands of the FSO can easily be applied arbitrarily which cannot be permitted under our constitutional scheme, as any such act would offend fundamental rights under Articles 18, 23 and 25 of the Constitution. The power of sealing of premises by the FSO, in its present form, is therefore ex facie discriminatory. We, therefore, declare that the power of the FSO to "seal any premises" in section 13(1)(c) to be unconstitutional and illegal. Hence, the power to seal the premises of a food operator or a food business by the FSO is struck down. Reference to "sealing" in section 31(2) is also accordingly struck down. The rest of the provision [section 13(1)(c)]

shall remain intact and continue to be enforceable. Any Rules, Regulations or SOPs promulgated under the Act dealing with "sealing of the premises" by the FSO in the absence of any sealing power under the Act are, therefore, ultra vires the Act and are also declared illegal and without any legal effect.

6. Other than the above, the FSO can also impose fines

(subject to delegation of powers under section 51), issue Improvement Notice or issue Emergency Prohibition Orders. The relevant provisions are:

13 Powers of Food Safety Officer.---(1) A Food Safety Officer may-

(a)

(b)

(c)

(ca) impose fine on a food operator if the Authority has delegated such power to him;

read with section 39((1)(d) where a Food Authority can impose fine on the food operator which may extend to one million rupees:

16 Improvement notice.---(1) If a Food Safety Officer has reasons to believe that any food operator has failed to comply with any provisions of this Act, the rules or the regulations, he may serve an improvement notice upon the food operator-

(a) stating the grounds for believing that the food operator has failed to comply with any provisions of the Act or the rules or the regulations;

(b) specifying the matters which constitute the food operator's failure so to comply; and

(c) intimating the measures which the food operator should take in order to secure compliance with the relevant provisions of the law.

(2) If the food operator fails to comply with the improvement notice within the prescribed time, the Food Authority may cancel or suspended his licence or take such other action as it deems appropriate.

18. Emergency prohibition orders.---(1) If the Food Safety Officer is satisfied that the health risk condition exists with respect to any food business, he may, after serving a notice on the food operator and for reasons to be recorded in writing, restrain him from carrying on the food business with or without specifying conditions or period of such restraint.

(2) The Food Safety Officer shall, within twenty four hours of the action taken under sub-section (1), report such action to the Food Authority which may, after serving a notice on the food operator and for reasons to be recorded in writing, confirm, modify or set aside the order of the Food Safety Officer.

All these powers enjoyed by the FSO provide a supporting remedial forum for the aggrieved party. These provisions not only meet the requirement of Article 10A of the Constitution regarding fair trial and due process, but they also give the FSO the choice to make risk analysis and then adopt a proper risk management strategy by either issuing a Notice of Improvement or imposing a fine or taking a more stern action by seizing the food item which contravenes the provisions of the Act or if the risk to human health is imperative, to issue Emergency Prohibition Order and restrain the food operator from carrying on food business under section 18. The enforcement interventions by the FSO under the Act are laid out in a manner that highlight the concept of proportionality and must be applied in this spirit on case to case basis.

7. The second regulatory regime is under the Food Authority itself. Section 7 lays down the powers and functions of the Food Authority, which are reproduced hereunder for reference:-

"S 7. Powers and functions of the Food Authority.---

(1) The Food Authority shall regulate and monitor the food business in order to ensure provision of safe food.

(2) Without prejudice to the provisions of sub-section (1), the Food Authority may-

(a) formulate standards, procedures, processes and guidelines in relation to any aspect of food including food business, food labelling, food additive, and specify appropriate enforcement systems;

(b) specify procedures and guidelines for setting up and accreditation of food laboratories;

(c) formulate method of sampling, analysis of samples and reporting of results;

(d) specify licensing, prohibition orders, recall procedures, improvement notices or prosecution;

(e) determine terms and conditions of service of its employees;

(f) provide scientific advice and technical support to the Government in matters relating to food;

(g) collect and analyze relevant scientific and technical data relating to food;

(h) establish a system of network of food operators and consumers to facilitate food safety and quality control;

(i) organize training programmes in food safety and standards;

(j) promote general awareness as to food safety and standards;

(k) levy fee for registration, licensing and other services;

(l) certify food for export;

(m) perform any other prescribed function; and

(n) do any other thing which is necessary for the discharge of its functions under this Act.

(3) The Food Authority shall exercise its functions, as far as possible, in accordance with the well-established scientific principles and international best practices."

(emphasis supplied)

The Food Authority issues licenses, imposes fines and also sits as an appellate authority over the Emergency Prohibition Orders passed by the FSO. Relevant provisions are as under:

15 Licensing of food business.---(1) A person shall not use any place for food business except under the prescribed registration or licence.

(2) The Food Authority may, in the prescribed manner, exempt a class of food operators from obtaining compulsory registration or licence under this section.

18. Emergency prohibition orders.---(1) If the Food Safety Officer is satisfied that the health risk condition exists with respect to any food business, he may, after serving a notice on the food operator and for reasons to be recorded in writing, restrain him from carrying on the food business with or without specifying conditions or period of such restraint.

(2) The Food Safety Officer shall, within twenty four hours of the action taken under subsection (1), report such action to the Food Authority which may, after serving a notice on the food operator and for reasons to be recorded in writing, confirm, modify or set aside the order of the Food Safety Officer.

39. Jurisdiction of the Food Authority---(1) On information received rom any source, the Food Authority may, for reasons to be recorded in writing-

(a)

(b)

(c) impose fine on the food operator which may extend to one million rupees.

Read with section 45: where these fines can be recovered as arrears of land revenue.

The Food Authority or its officers can also register criminal cases or file a criminal complaint for the contravention of the Act.

8. The third regulatory regime is under the Special Court. Offences and Penalties provided under Chapter IV including selling food against the law; or relating to substandard or misbranded food; unsafe food; false advertisement and false labeling; unhygienic or unsanitary conditions[16] or passing Prohibition Orders, are dealt with by the Special Court[17]:-

17 Prohibition orders.---If any food operator is convicted of an offence under this Act and the Court is satisfied that the health risk exists with respect to the food business, the Court, may impose the following prohibitions-

(a) a prohibition on the use of a process, treatment, premises or equipment for purposes of the food business; or

(b) a prohibition, with or without specifying period of prohibition, on the food operator to conduct or operate the food business.

9. On the whole, the Act can only be put to an effective use to achieve its goal of food safety and protection of human health if the key principles of scientific knowledge, risk analysis, proportionality and precautionary principle are kept in mind by the FSO and the Food Authority. Additionally, the FSO must be of the requisite qualification as provided under section 13 of the Act, he must be abreast with the latest food and health science to be able to make intelligent and smart risk analysis of the risk and danger to food and healthy safety in any given situation. For example in the present case, the food in the freezers of the petitioner restaurant could have been seized or fine imposed or an Improvement Notice issued. Any drastic step by the Food Authority or its officers that is not based on scientific risk analysis or is not proportionate to the health hazard involved, can cause huge economic and financial loss to the food business by bringing the business of a food operator to a crushing halt, thereby offending the constitutional rights to business and property of a food operator or food business. If the contravention under the Act can be remedied through a less harsh mechanism provided under the law, taking of a more drastic step should be avoided. This is a balancing act the Food Authority has to undertake to meet the international food law principle of proportionality.

10. Section 38 of the Act deals with publication in the newspapers and provides that after the conviction under the Act has attained finality, the Food Authority with the permission of the Special Court can publish the name of the food operator or food business in the newspapers or in any other mode for information. This clearly bars the Food Authority and its officers to publicize any proceedings taken against a food business or a food operator under the Act unless the conviction has attained finality and there is permission granted by the court for its publication. The Food Authority and FSOs, therefore, cannot release any information during the pendency of the proceedings under the Act. This is also in line with the requirement of due process and fair trial. Any violation of section 38 would make the FSO or any other officer of the Food Authority liable to departmental action. It is also noted with concern that the Act mandatorily provides for the inclusion of several females in the composition of the Food Authority under section 4. We asked the concerned Secretary, of the Government of the Punjab, if the requirement of gender balance has been complied with. The Secretary assured us that section 4 has been given full effect to and the composition of the Authority is complete in accordance with the law.

11. Reliance in the impugned judgment by the High Court on the precautionary principle to justify the sealing of the premises in the present circumstances is somewhat misplaced. The precautionary principle (Article 7 of the General Food Law) refers to specific situations where: (i) there are reasonable grounds for concern that an unacceptable level of risk to health exists and (ii) the available supporting information and data are not sufficiently complete to enable a comprehensive risk assessment to be made. When faced with these specific circumstances, decision makers or risk managers may take measures or other actions based on the precautionary principle, while seeking more complete scientific and other data. Such measures are provisional until the time when more comprehensive information concerning the risk can be gathered and analysed.[18] This principle has no application where the food items inspected by the FSO are found to be adulterated, substandard or misbranded, unsafe or suffer from false advertisement or false labelling or are kept under unhygienic and unsanitary conditions. There is no scientific uncertainty about such contravention and can easily be checked on the spot or in a food laboratory. Precautionary principle is to be applied where the health and food safety risk attached to a food item is scientifically uncertain and creates doubt of health risk, in such a case, till such time that there is scientific certainty, such a food item can be seized or recalled as the case may be. This is an important principle but has no application to the present case and has been incorrectly relied upon by the High Court in justifying an unconstitutional provision of law.

12. For all the above reasons we set aside the impugned judgment and declare the power to seal the petitioner restaurant by the Food Safety Officer under section 13(1)(c) vide Order dated 08.08.2015 to be unconstitutional and illegal. We, therefore, convert this petitions into an appeal and allow the same in the above terms.

MWA/L-4/SC Petitions allowed.

**P L D 2021 Supreme Court 708**

**Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ**

**Shahzada QAISER ARFAT alias QAISER---Petitioner**

**Versus**

**The STATE and another---Respondents**

Criminal Petition No. 801-L of 2020, decided on 3rd February, 2021.

(Against the order of the Lahore High Court, Lahore dated 03.03.2020, passed in Crl. Misc. No.7155-B of 2020).

**(a) Criminal Procedure Code (V of 1898)---**

----S. 498---Pre-arrest bail, grant of---Grounds---Mala fides of complainant---Scope---Mala fide being a state of mind could not always be proved through direct evidence, and it was often to be inferred from the facts and circumstances of the case.

Khalil Ahmed v. State PLD 2017 SC 730 ref.

**(b) Criminal Procedure Code (V of 1898)---**

----S. 54---Police Order [22 of 2002], Art. 4(1)(j)---Police Rules, 1934, R. 26.1---Power of police to arrest an accused---Scope---Ordinarily no person was to be arrested straightaway only because he had been nominated as an accused person in an FIR or in any other version of the incident brought to the notice of the investigating officer by any person until the investigating officer felt satisfied that sufficient justification existed for his arrest---Investigating officers should not mechanically make the arrest of a person accused of having committed a cognizable offence, rather they must exercise their discretion in making the arrest of such person judiciously by applying their mind to the particular facts and circumstances of the case and consciously considering the question: what purpose would be served and what object would be achieved by arrest of the accused person.

Sughran Bibi v. State PLD 2018 SC 595 ref.

**(c) Criminal Procedure Code (V of 1898)---**

----S. 498---Constitution of Pakistan, Arts. 9, 10-A & 14(1)---Pre-arrest bail---Constitutional grounds for pre-arrest bail stated.

The power of the High Courts and the Courts of Sessions to grant pre-arrest bail, first and foremost, must be examined in the constitutional context of liberty, dignity, due process and fair trial. Pre-arrest bail was in the nature of a check on the police power to arrest a person. The non-availability of incriminating material against the accused or non-existence of a sufficient ground including a valid purpose for making arrest of the accused person in a case by the investigating officer would as a corollary be a ground for admitting the accused to pre-arrest bail, and vice versa. Reluctance of the courts in admitting the accused persons to pre-arrest bail by treating such a relief as an extraordinary one without examining whether there was sufficient incriminating material available on record to connect the accused with the commission of the alleged offence and for what purpose his arrest and detention was required during investigation or trial of the case, and their insistence only on showing mala fide on part of the complainant or the police for granting pre-arrest bail did not appear to be correct, especially after recognition of the right to fair trial as a fundamental right under Article 10A of Constitution. Protection against arbitrary arrest and detention was part of the right to liberty and fair trial.

2014 SCMR 1349 and A Basic Guide to Legal Standards and Practice, published by Lawyers Committee for Human Rights USA (2000) ref.

**(d) Criminal Procedure Code (V of 1898)---**

----S. 498---Pre-arrest bail, grant of---Grounds---Mala fides of complainant---Scope and proof---In many cases, accused persons were granted pre-arrest bail after the court found that there were no reasonable grounds for believing their involvement in the commission of the alleged offences and the court did not require independent proof of mala fide on part of the police or the complainant before granting such relief---Despite non-availability of the incriminating material against the accused, his implication by the complainant and the insistence of the police to arrest him were the circumstances which by themselves

indicated the mala fide on the part of the complainant and the police, and the accused need not lead any other evidence to prove mala fide on their part.

Muhammad Fayyaz v. State 1976 SCMR 183; Zakaullah v. State 1987 SCMR 1720; Zakia Begum v. State 1991 SCMR 297; Bashir Ahmad v. State 1993 SCMR 919; Muhammad Gul v. State 1998 SCMR 576; Dildar Ali v. State 1999 SCMR 1316; Rizwan Iqbal v. State 2007 SCMR 1392; Meeran Bux v. State PLD 1989 SC 347; Muhammad Firdaus v. State 2005 SCMR 784; Darbar Ali v. State 2015 SCMR 879 and Aqsa Safdar v. State 2019 SCMR 1923 ref.

**(e) Penal Code (XLV of 1860)---**

----Ss. 109 & 120-B---Abetment and conspiracy---Proof---Court must base its conclusion as to involvement of an absentee accused as abettor or conspirator on some solid material collected during the course of investigation, and not on surmises or conjectures, either tentatively at bail stage or finally at judgment stage---Conspiracy to commit a crime by its very nature was usually secret, and could not be proved by direct evidence in most cases, however, it did not mean that the prosecution was absolved from its duty to prove the allegation of conspiracy, or that mere allegation of conspiracy was sufficient for holding the accused liable---In case of non-availability of direct evidence, the police must collect during investigation, and the prosecution must lead during trial, such circumstantial evidence from which a court could draw a legitimate inference of the existence of conspiracy and involvement of the accused in that conspiracy.

**(f) Criminal Procedure Code (V of 1898)---**

----S. 498---Penal Code (XLV of 1860), Ss. 302, 109, 148 & 149---Qatl-i-amd, abetment, rioting armed with deadly weapons, unlawful assembly---Pre-arrest bail, grant of---Material available as to the alleged involvement of the accused in hatching alleged conspiracy of committing murder of the deceased persons, so far as the FIR was concerned, was confined to mere allegation of conspiracy/abetment without disclosing any details of such conspiracy/abetment, such as place and time of the alleged conspiracy/abetment and names of the persons who heard such conspiracy/abetment---However, later on the police recorded statements of certain persons, under S.161, Cr.P.C. wherein they had stated that while passing through the Bazar outside the house of the accused persons, they overheard the accused persons say that they would take revenge of the murder of their brother---Prosecution had not claimed that the accused was present at the spot or that he had caused any injury to any deceased or anybody else---In such circumstances there was no chance of any recovery at the instance of the accused if he was arrested---All the incriminating material against the accused was already with the prosecution---Present case was a fit case for exercise of discretion to admit the accused to pre-arrest bail to save him from unjustified arrest, consequent humiliation and the curtailment of his right to liberty---Petition for leave to appeal was converted into appeal and allowed, and accused was granted pre-arrest bail.

M. Sohail Dar, Advocate Supreme Court for Petitioners along with petitioner in person.

Respondent No.2 in person.

Khurram Khan, Addl. P.G. for the State along with Humayun Rashid, SI.

Date of hearing: 3rd February, 2021.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**

Crl. M.A. No. 310/2020: This is an application for condonation of delay. For the reasons given therein, the same is allowed, and the delay in filing the main petition is condoned.

Crl. Petition No.801-L of 2020

2. On December 7, 2019 at about 12 a.m., three persons were shot dead on G.T. Road in Ferozewala, District Sheikhupura. Five brothers and three unknown persons were nominated in the first information report ("FIR")**1** to be the assailants; while their sixth brother, Qaisar ("petitioner") and their father were nominated as abettors, alleged to have instigated and conspired the murders. As Shabbir Hussain (one of the deceased) was involved in the murder of their seventh brother, Asim, the motive alleged was that they wanted to avenge the murder of their seventh brother. Accused Qaisar, the alleged abettor, is the petitioner

before us. The Court of Sessions and High Court have dismissed his petitions for pre-arrest bail. The order dated 03.03.2020 of the High Court has been impugned before us through the present petition.

3. Learned counsel for the petitioner has submitted that the Hon'ble High Court has failed to appreciate the mala fide of the complainant in nominating all the male family members of the accused persons, and the material prime facie showing non-involvement of the petitioner in the alleged offence, i.e., the entries in the passport of the petitioner according to which he was not in Pakistan on the day of occurrence. On the other hand, learned counsel for the State has opposed this petition.

4. We have heard the learned counsel for the parties and perused the record of the case. The High Court has declined the relief of pre-arrest bail to the petitioner making the observation that pre-arrest bail is an extra-ordinary relief and can only be extended to an innocent person who is implicated in the case on the basis of mala fide, but the petitioner has failed to point out to any mala fide. The learned High Court did not appreciate that the "mala fide" being a state of mind cannot always be proved through direct evidence, and it is often to be inferred from the facts and circumstances of the case.**2**

5. No doubt, a police officer has, under section 54 of the Cr.P.C., the power to arrest a person who has been involved in any cognizable offence or against whom a complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned. Having the power to arrest is one thing but the justification for the exercise of that power is quite another. A police officer that makes arrest of a person must be able to justify the exercise of that power in making the arrest apart from his having the power to do so. He cannot make arrest of a person, only because he has the power to do so. He must also show sufficient grounds for making the arrest. Article 4(1)(j) of the Police Order, 2002 states this legal position when it prescribes that it is the duty of every police officer to "apprehend all persons whom he is legally authorised to apprehend and for whose apprehension sufficient grounds exist". And Rule 26.1 of the Police Rules, 1934 explains this by providing that the authority given under Section 54 of the Cr.P.C. to the police to arrest without a warrant is permissive and not obligatory. As per the said Rule whenever escape from justice or inconvenient delay in completion of the investigation or commencement of the trial is likely to result from the police failing to arrest, they are bound to do so, but in no other cases. "Ordinarily no person is to be arrested straightaway only because he has been nominated as an accused person in an FIR or in any other version of the incident brought to the notice of the investigating officer by any person until the investigating officer feels satisfied that sufficient justification exists for his arrest."**3** The investigating officers should not mechanically make the arrest of a person accused of having committed a cognizable offence, rather they must exercise their discretion in making the arrest of such person judiciously by applying their mind to the particular facts and circumstances of the case and consciously considering the question: what purpose will be served and what object will be achieved by arrest of the accused person?

6. The power of the High Courts and the Courts of Sessions to grant pre-arrest bail, first and foremost, must be examined in the constitutional context of liberty, dignity, due process and fair trial. Pre-arrest bail is in the nature of a check on the police power to arrest a person. The non-availability of incriminating material against the accused or non-existence of a sufficient ground including a valid purpose**4** for making arrest of the accused person in a case by the investigating officer would as a corollary be a ground for admitting the accused to pre-arrest bail, and vice versa.**5** Reluctance of the courts in admitting the accused persons to pre-arrest bail by treating such a relief as an extraordinary one without examining whether there is sufficient incriminating material available on record to connect the accused with the commission of the alleged offence and for what purpose his arrest and detention is required during investigation or trial of the case, and their insistence only on showing mala fide on part of the complainant or the Police for granting pre-arrest bail does not appear to be correct, especially after recognition of the right to fair trial as a fundamental right under Article 10A of Constitution of Pakistan, 1973.**6** Protection against arbitrary arrest and detention is part of the right to liberty and fair trial.**7** This Court has, in many cases,**8** granted pre-arrest bail to accused persons after finding that there are no reasonable grounds for believing their involvement in the commission of the alleged offences and has not required independent proof of mala fide

on part of the Police or the complainant before granting such relief.**9** Despite non-availability of the incriminating material against the accused, his implication by the complainant and the insistence of the Police to arrest him are the circumstances which by themselves indicate the mala fide on the part of the complainant and the Police, and the accused need not lead any other evidence to prove mala fide on their part.

7. It is the case of the petitioner that he along with his father were in Saudi Arabia for performing Umra when the occurrence took place. No doubt, managing one's presence in a foreign country at the time of actual commission of an offence may be a tactic to escape criminal liability for being involved in the commission of that offence as abettor or conspirator; but the court must base its conclusion as to involvement of an absentee accused as abettor or conspirator on some solid material collected during the course of investigation, and not on surmises or conjectures, either tentatively at bail stage or finally at judgment stage. It is true that a conspiracy to commit a crime by its very nature is usually secret, and cannot be proved by direct evidence in most cases. It, however, does not mean that the prosecution is absolved from its duty to prove the allegation of conspiracy, or that mere allegation of conspiracy is sufficient for holding the accused liable. In case of non-availability of direct evidence, the police must collect during investigation, and the prosecution must lead during trial, such circumstantial evidence from which a court could draw a legitimate inference of the existence of conspiracy and involvement of the accused in that conspiracy.

8. The material available as to the alleged involvement of the present petitioner in hatching alleged conspiracy of committing murder of the deceased persons, so far as the FIR is concerned, is confined to mere allegation of conspiracy /abetment without disclosing any details of such conspiracy/abetment, such as place and time of the alleged conspiracy/abetment and names of the persons who heard such conspiracy/abetment. However, later on the Police recorded statements of certain persons, under section 161, Cr.P.C. wherein they have stated that while passing through the Bazar outside the house of the accused persons in the night of 18 and 25 November, 2019, they overheard the accused persons say that they would take revenge of the murder of their brother from Shabbir Hussain. It is not the case of the prosecution that the petitioner was present at the spot or he caused any injury to any deceased or anybody else and in such circumstances there is no chance of any recovery at the instance of the petitioner if he is arrested. All the incriminating material against the petitioner is already with the prosecution.

9. In the circumstances, we find it a fit case for exercise of discretion to admit the petitioner to pre-arrest bail to save him from unjustified arrest, consequent humiliation and the curtailment of his right to liberty. We, therefore, convert this petition into appeal and allow the same.

10. These are the reasons of our short order of even date, which is reproduced hereunder for ready reference:

> "For reasons to be recorded later, the instant criminal petition is converted into an appeal and the same is hereby allowed. Petitioner Shahzada Qaiser Arafat alias Qaiser is allowed pre-arrest bail subject to his furnishing bail bond in the sum of Rs.100,000/- (Rupees one hundred thousand) with one surety in the like amount, to the satisfaction of the trail Court/Illaqa Magistrate, within fifteen days."

MWA/S-18/SC Bail granted.

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1 FIR No. 1441/19, dated 07.12.2019, Police Station Ferozewala, District Sheikhupura, Offences under sections 302, 148, 149 and 109, P.P.C.

2 See Khalil Ahmed v. State PLD 2017 SC 730.

3 See Sughran Bibi v. State PLD 2018 SC 595. (7-MB)

4 Pre-trial detention should be the exception reserved only for situations where the likelihood exists that the accused would abscond, destroy evidence, influence witnesses, avoid investigation, flee from the jurisdiction of the state or is likely to repeat the crime due to his past record- *Bail* and *Liberty*-by Reema Omar, The Dawn, 22.06.2019.

5 Also see 2014 SCMR 1349.

6 "While incorporating Article 10A in the Constitution and making the right to a 'fair trial' a fundamental right the legislature did not define or describe the requisites of a 'fair trial'. By not defining the term the legislature, appears to have given to it the same meaning as is broadly universally recognized and also embedded in our own jurisprudence." (Suo Motu Case No.4 of 2010, PLD 2012 SC 553 (7-MB), per Nasir-ul-Mulk, J.)

7 See What Is A Fair Trial: A Basic Guide to Legal Standards and Practice, published by Lawyers Committee for Human Rights, USA (2000).

8 See Muhammad Fayyaz v. State 1976 SCMR 183; Zakaullah v. State 1987 SCMR 1720; Zakia Begum v. State 1991 SCMR 297; Bashir Ahmad v. State 1993 SCMR 919; Muhammad Gul v. State, 1998 SCMR 576; Dildar Ali v. State, 1999 SCMR 1316; Rizwan Iqbal v. State, 2007 SCMR 1392.

9 See also Meeran Bux v. State PLD 1989 SC 347; Muhammad Firdaus v. State 2005 SCMR 784, Darbar Ali v. State 2015 SCMR 879; Aqsa Safdar v. State 2019 SCMR 1923.

**P L D 2021 Supreme Court 738**

**Present: Syed Mansoor Ali Shah, Qazi Muhammad Amin Ahmed and Amin-ud-Din Khan, JJ**

**MUHAMMAD SARFRAZ ANSARI---Petitioner**

**Versus**

**The STATE and others---Respondents**

Criminal Petition No.435 of 2021, decided on 17th May, 2021.

(Against the order of Lahore High Court, Lahore dated 05.3.2021, passed in Crl. Misc. No.2378/B of 2020).

**(a) Criminal Procedure Code (V of 1898)---**

----S. 497---Qanun-e-Shahadat (10 of 1984), Art. 43---Bail---Accused implicated on basis of confessional statement of co-accused recorded under S. 164 of the Code of Criminal Procedure, 1898 (Cr.P.C)---Such confessional statement of a co-accused needed independent corroboration even at the bail stage.

Conviction of a co-accused could not be recorded solely on the basis of confessional statement of one accused unless there was also some other independent evidence corroborating such confessional statement. The principle ingrained in Article 43 of the Qanun-e-Shahadat was applied at the bail stage and the confessional statement of an accused could lead the court to form a tentative view about prima facie involvement of his co-accused in the commission of the alleged offence; but as in the trial, at the bail stage also, the prima facie involvement of the co-accused could not be determined merely on the basis of confessional statement of other accused without any other independent incriminating material corroborating the confessional statement.

Javed Masih v. State PLD 1994 SC 314; Faqir Ullah v. Khalil-uz-Zaman 1999 SCMR 2203; Mushtaq v. State 2012 SCMR 109; Naseem Malik v. State 2004 SCMR 283; Muhammad Irshad v. Muhammad Bashir 2006 SCMR 1292 and Ghulam Ahmed v. State 2013 SCMR 385 ref.

**(b) Criminal Procedure Code (V of 1898)---**

----S. 497---Bail---Appreciation of evidence---Scope---At bail stage the court was not to make deeper examination and appreciation of the evidence collected during investigation or to conduct anything in the nature of a preliminary trial to determine the accused's guilt or innocence---However, for deciding the prayer of an accused for bail, the question whether or not there existed reasonable grounds for believing that he had committed the alleged offence could not be decided in vacuum---Court, for answering the said question, had to look at the material available on record when the bail was applied for and be satisfied that there was, or was not, prima facie some tangible evidence which, if left unrebutted, may lead to the inference of the guilt of the accused.

Khalid Saigol v. State PLD 1962 SC 495 and Muhammad Hanif v. Manzoor 1982 SCMR 153 ref.

**(c) Criminal Procedure Code (V of 1898)---**

----S. 497(2)---Penal Code (XLV of 1860), Ss. 409, 420, 468, 471 & 109---Prevention of Corruption Act (II of 1947), S.5(2)---Criminal breach of trust by public servant, cheating and dishonestly inducing delivery of property, forgery for purpose of cheating, using as genuine a forged document, abetment, criminal misconduct---Bail, grant of---Further inquiry---Accused implicated on basis of confessional statement of co-accused---Co-accused stated in his confessional statement that the fake bills were prepared, and eighty percent of the withdrawn amount was taken by the accused---However, there was no sufficient material to corroborate the said statement---Recovered data from the mobile phone did not implicate the accused of the act besides it related to the sale tax invoices and contractor bills of a firm, which was different from the firms owned by the co-accused, in whose favour the alleged fake bills were encashed---Prosecution also failed to refer to any material to substantiate the finding recorded by the investigating officer that the accused , as a result of the fraud, had amassed wealth and purchased two apartments in a housing scheme---Accused being a former, and not a present, employee in the office of Controller Military Accounts prima facie had no control or influence on the matter of passing the alleged fake bills for encashment---Material currently available on record of the case was not sufficient to connect the accused with the commission of the alleged offences, and there were no reasonable grounds for believing that he had committed the alleged

offences; but there were sufficient grounds for further inquiry into his guilt in terms of S.497(2) of Cr.P.C.---Petition for leave to appeal was converted into appeal and allowed, and accused was extended the concession of bail.

**(d) Criminal Procedure Code (V of 1898)---**

----S. 497---Bail, grant of---Discretion of Supreme Court---Scope---Practice of the Supreme Court was not to intervene in bail matters ordinarily, leaving them to the discretion of the courts inquiring into the guilt of the accused persons---However, in cases where the discretion was found to have been exercised arbitrarily, perversely or contrary to the settled principles of law, the Supreme Court did not hesitate to interfere with that wrong exercise of discretion, in the interest of justice.

Haider Mehmood Mirza, Advocate Supreme Court for Petitioner.

Moulvi Ijaz ul Haq, D.A.G. or the State.

Date of hearing: 17th May, 2021.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**Through this petition, the petitioner has sought leave to appeal against the order dated 05.03.2021, passed by the Lahore High Court, whereby his application seeking post-arrest bail in case FIR No.35 dated 07.8.2020, registered at Police Station FIA Anti-Corruption Circle, Islamabad, for the offences punishable under Sections 420, 468, 471, 409 and 109 of the Pakistan Penal Code, 1860 read with Section 5(2) of the Prevention of Corruption Act, 1947, was dismissed.

2. Facts of the case, as alleged in the FIR, briefly are that one Waqas Aslam ("co-accused"), in connivance with the officers/ officials of the office of Controller Military Accounts (CMA) fraudulently withdrew an amount of Rs.52,254,074/- through thirty three fake bills of Central Ordinance Depot (COD), Rawalpindi, in favour of his four firms and deposited in five different bank accounts of those firms, operated by him. It was mentioned in the FIR that the role of the other persons involved in the said fraud would be thrashed out during investigation. The co-accused, Waqas Aslam, implicated the present petitioner, an ex-official of the CMA, during investigation in his confessional statement recorded under Section 164 of the Code of Criminal Procedure, 1898 (Cr.P.C.), for being his partner in, rather mastermind of, the whole fraud. One Muhammad Haider Altaf, an official of the CMA, was also found to have abetted in the commission of the alleged offences, and was arrested in the case, during investigation; he has, however, been admitted to post arrest bail by the High Court vide order dated 12.11.2020.

3. We have heard the learned counsel for the parties and have gone through the record of the case. We have noticed that the petitioner is not nominated in FIR; he has rather been implicated in the case by the co-accused Waqar Aslam, the prima facie beneficiary of the alleged fraud, in his confessional statement during investigation, which has been relied upon by the learned counsel for the State to oppose the prayer of the petitioner for bail. No doubt, as per Article 43 of the Qanun-e-Shahadat Order, 1984 when more persons than one are being jointly tried for the same offence and a confession made by one of such persons admitting that the offence was committed by them jointly, is proved, the court may take into consideration the confessional statement of that co-accused as circumstantial evidence against the other co-accused(s). However, this Court has, in several cases,**1** held that conviction of a co-accused cannot be recorded solely on the basis of confessional statement of one accused unless there is also some other independent evidence corroborating such confessional statement. The principle ingrained in Article 43 of the Qanun-e-Shahadat is applied at the bail stage and the confessional statement of an accused can lead the court to form a tentative view about prima facie involvement of his co-accused in the commission of the alleged offence;**2** but as in the trial, at the bail stage also, the prima facie involvement of the co-accused cannot be determined merely on the basis of confessional statement of other accused without any other independent incriminating material corroborating the confessional statement. Therefore, we have to examine whether there is any other tangible incriminating material available on the record that corroborates the confessional statement of the co-accused, by connecting the petitioner with the commission of the alleged offences.

4. We are fully cognizant of the well-settled principle that at the bail stage the court is not to make deeper examination and appreciation of the evidence collected during investigation or to conduct anything

in the nature of a preliminary trial to determine the accused's guilt or innocence. However, for deciding the prayer of an accused for bail, the question whether or not there exist reasonable grounds for believing that he has committed the alleged offence cannot be decided in vacuum. The court, for answering the said question, has to look at the material available on record when the bail is applied for and be satisfied that there is, or is not, prima facie some tangible evidence which, if left unrebutted, may lead to the inference of the guilt of the accused.[3]

5. The co-accused, Waqar Aslam, stated in his confessional statement that the fake bills were prepared, and eighty percent of the withdrawn amount was taken by the present petitioner. However, there is no sufficient material to corroborate the said statement. The recovered data from the mobile phone does not implicate the petitioner of the act besides it relates to the sale tax invoices and contractor bills of a Firm, namely, Ali Traders, and not to the Firms owned by the co-accused, Waqar Aslam, in whose favour the alleged fake bills were encashed. The learned counsel for the State also failed to refer to any material to substantiate the finding recorded by the investigating officer that the petitioner, as a result of the above fraud, has amassed wealth and purchased two apartments in top housing schemes in Rawalpindi. The petitioner being a former, and not a present, employee in the office of C.M.A. prima facie had no control or influence on the matter of passing the alleged fake bills for encashment. We, therefore, find that the material currently available on record of the case is not sufficient to connect the accused with the commission of the alleged offences, and there are no reasonable grounds for believing that he has committed the alleged offences; but there are sufficient grounds for further inquiry into his guilt in terms of section 497(2) of Cr.P.C.

6. No doubt, it is the practice of this Court not to intervene in bail matters ordinarily, leaving them to the discretion of the courts inquiring into the guilt of the accused persons. However, in cases where the discretion is found to have been exercised arbitrarily, perversely or contrary to the settled principles of law, this Court does not hesitate to interfere with that wrong exercise of discretion, in the interest of justice. In the present case, the trial court and the High Court have not exercised their discretion in accordance with the principles of law governing such discretion. We, therefore, convert this petition into appeal and allow the same, and extend the concession of bail to the petitioner subject to his furnishing bail bond in the sum of Rs.500,000/- with two sureties in the like amount to the satisfaction of the trial Court. Needless to say that the observations made in this order are tentative and will not influence the trial Court while concluding the said case.

MWA/M-31/SC Bail granted.

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1 See Javed Masih v. State PLD 1994 SC 314; Faqir Ullah v. Khalil-uz-Zaman 1999 SCMR 2203 and Mushtaq v. State 2012 SCMR 109.

2 See Naseem Malik v. State 2004 SCMR 283; Muhammad Irshad v. Muhammad Bashir 2006 SCMR 1292 and Ghulam Ahmed v. State 2013 SCMR 385.

3 See Khalid Saigol v. State PLD 1962 SC 495 and Muhammad Hanif v. Manzoor 1982 SCMR 153.

**P L D 2021 Supreme Court 799**

**Present: Umar Ata Bandial, Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed, JJ**

**IFTIKHAR AHMAD---Petitioner**

**Versus**

**The STATE---Respondent**

Criminal Petition No. 529 of 2021, decided on 14th July, 2021.

(Against the order of Lahore High Court, Lahore dated 19.04.2021, passed in Criminal Miscellaneous No. 5350-B of 2021).

**(a) Criminal Procedure Code (V of 1898)---**

----S. 497(1)---Bail, grant of---Offences not falling within prohibitory clause of S.497(1), Cr.P.C.---Grant of bail in such offences was a rule and refusal thereof an exception.

Tariq Bashir v. State PLD 1995 SC 34; Imtiaz Ahmad v. State PLD 1997 SC 545; Subhan Khan v. State 2002 SCMR 1797; Zafar Iqbal v. Muhammad Anwar 2009 SCMR 1488 and Muhammad Tanveer v. State PLD 2017 SC 733 ref.

**(b) Criminal Procedure Code (V of 1898)---**

----S. 497(1)---Post-arrest bail---Offences not falling within prohibitory clause of S.497(1), Cr.P.C.---Principles relating to post-arrest bail in offences not falling within prohibitory clause of S.497(1), Cr.P.C. stated.

The main purpose of keeping an under-trial accused in detention was to secure his attendance at the trial so that the trial was conducted and concluded expeditiously or to protect and safeguard the society, if there was an apprehension of repetition of offence or commission of any other untoward act by the accused. Therefore, in order to make the case of an accused person fall under the exception to the rule of grant of bail in offences not covered by the prohibitory clause of section 497(1) Cr.P.C., the prosecution had to essentially show from the material available on the record, such circumstances that may frustrate any of the said purposes, if the accused person was released on bail. Some of the circumstances or conduct of the accused person that may bring his case under the exceptions to the rule of granting bail included the likelihood of: (a) his abscondence to escape trial; (b) his tampering with the prosecution evidence or influencing the prosecution witnesses to obstruct the course of justice; or (c) his repeating the offence keeping in view his previous criminal record or the desperate manner in which he had prima facie acted in the commission of offence alleged. A court which dealt with an application for grant of bail in an offence not falling within the prohibitory clause of section 497(1), Cr.P.C. must apply its judicious mind to the facts and circumstances of the case and to the conduct of the accused person, and decline to exercise the discretion of granting bail to him in such offence only when it found any of the noted circumstances or some other striking circumstance that impinged on the proceedings of the trial or posed a threat or danger to the society, justifying his case within the exception to the rule, as the circumstances mentioned above were not exhaustive and the facts and circumstances of each case were to be evaluated for application of the said principle.

Tariq Bashir v. State PLD 1995 SC 34; Zafar Iqbal v. Muhammad Anwar 2009 SCMR 1488 and Muhammad Tanveer v. State PLD 2017 SC 733 ref.

**(c) Criminal Procedure Code (V of 1898)---**

----S. 497---Penal Code (XLV of 1860), Ss. 420, 468 & 471---Cheating and dishonestly inducing delivery of property, forgery for purpose of cheating, using as genuine a forged document---Bail, grant of---Offences not falling within prohibitory clause of S.497(1), Cr.P.C.---Courts below had not mentioned any circumstance that may bring the case of the accused under the exception of declining bail in offences not falling within the prohibitory clause of S.497(1), Cr.P.C. nor the counsel for State or complainant could show any such circumstance or conduct of the accused that would bring his case under exception to the rule of granting bail in such offences---Petition for leave to appeal was converted into appeal and allowed, and accused was granted bail.

Rana Muhammad Zahid, Advocate Supreme Court for Petitioner.

Mirza Usman, DPG for the State.

Syed Farhad Ali Shah, Advocate Supreme Court for the Complainant.

Date of hearing: 14th July, 2021.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**Petitioner seeks leave to appeal against the order dated 19.04.2021, passed by the Lahore High Court, whereby post arrest bail was denied to him in case FIR No.789 dated 22.6.2020, registered at Police Station Batapur, district Lahore, for offences under Sections 420, 468 and 471, P.P.C.

2. The case set out in the crime report (FIR), briefly stated, is that the complainant had rented out a property (a hospital building) to the petitioner, who while being a tenant prepared a forged sale deed of the property in his favour and started claiming to be the owner of the said property.

3. What concerns us, in the present case, is that the courts below have not exercised their discretion while declining bail to the petitioner, under subsection (1) of section 497, Cr.P.C., in accordance with the principle of law enunciated by this Court regarding grant of bail in offences not falling within the prohibitory clause of that subsection. They have viewed the case against the petitioner under subsection (2) of section 497, Cr.P.C. and simply relied, for declining bail, on the incriminating material available on the record to connect the petitioner with the commission of the offences alleged. All the offences alleged against the petitioner do not fall within the prohibitory clause of subsection (1) of section 497, Cr.P.C. and thus attract the principle that grant of bail in such offences is a rule and refusal an exception as authoritatively enunciated by this Court in several cases.**1**

4. The main purpose of keeping an under-trial accused in detention is to secure his attendance at the trial so that the trial is conducted and concluded expeditiously or to protect and safeguard the society, if there is an apprehension of repetition of offence or commission of any other untoward act by the accused. Therefore, in order to make the case of an accused person fall under the exception to the rule of grant of bail in offences not covered by the prohibitory clause of section 497(1), Cr.P.C., the prosecution has to essentially show from the material available on the record, such circumstances that may frustrate any of the said purposes, if the accused person is released on bail. This Court in the cases of Tariq Bashir,**2** Zafar Iqbal**3** and Muhammad Tanveer**4** has time and again illustrated such circumstances or such conduct of the accused person that may bring his case under the exceptions to the rule of granting bail.**5** They include the likelihood of: (a) his abscondence to escape trial; (b) his tampering with the prosecution evidence or influencing the prosecution witnesses to obstruct the course of justice; or (c) his repeating the offence keeping in view his previous criminal record or the desperate manner in which he has prima facie acted in the commission of offence alleged. A court which deals with an application for grant of bail in an offence not falling within the prohibitory clause of section 497(1), Cr.P.C. must apply its judicious mind to the facts and circumstances of the case and to the conduct of the accused person, and decline to exercise the discretion of granting bail to him in such offence only when it finds any of the above noted circumstances or some other striking circumstance that impinges on the proceedings of the trial or poses a threat or danger to the society, justifying his case within the exception to the rule, as the circumstances mentioned above are not exhaustive and the facts and circumstances of each case are to be evaluated for application of the said principle. This Court has already cautioned the courts below in Muhammad Tanveer case **6**, on not following the said principle, in the following terms:

> Once this Court has held in categorical terms that grant of bail in offences not falling within the prohibitory limb of section 497, Cr.P.C. shall be a rule and refusal shall be an exception, then the Courts of the country should follow this principle in its letter and spirit because principles of law enunciated by this Court are constitutionally binding [under Article 189] on all Courts throughout the country including the Special Tribunals and Special Courts.

5. In the present case, neither the courts below, including the learned High Court, have mentioned any circumstance that may bring the case of the petitioner under the exception of declining bail in offences not falling within the prohibitory clause of section 497(1), Cr.P.C. nor the learned counsel for the State and

the learned counsel for the complainant could show us any such circumstance or conduct of the petitioner that would bring the case of the petitioner under exception to the rule of granting bail in such offences. The courts below, including the learned High Court, have failed to adhere to the principle of law enunciated by this Court for exercise of discretion to grant bail in offences not falling within the prohibitory clause of section 497(1), Cr.P.C. The impugned order passed by the learned High Court is thus not sustainable under the law and calls for interference by this Court. The petition is, therefore, converted into appeal and allowed: the impugned order is set aside and the application of the petitioner for grant of post arrest bail is accepted. Resultantly, the petitioner is admitted to post-arrest bail subject to his furnishing bail bond in the sum of Rs.500,000/- with two sureties in the like amount to the satisfaction of the trial court.

6. Needless to say that the observations made in this order are of tentative nature and shall not influence the trial court while concluding the case. The learned trial court is to expeditiously proceed with the trial in accordance with law, and in case of abuse or misuse of the concession of bail by the petitioner, including causing delay in conclusion of the trial, the prosecution may approach the competent court for cancellation of bail under section 497(5), Cr.P.C.

MWA/I-8/SC Bail granted.

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1 See Tariq Bashir v. State PLD 1995 SC 34; Imtiaz Ahmad v. State PLD 1997 SC 545; Subhan Khan v. State 2002 SCMR 1797; Zafar Iqbal v. Muhammad Anwar 2009 SCMR 1488 and Muhammad Tanveer v. State PLD 2017 SC 733.

2 Tariq Bashir v. State PLD 1995 SC 34 (2-MB).

3 Zafar Iqbal v. Muhammad Anwar 2009 SCMR 1488 (4-MB).

4 Muhammad Tanveer v. State PLD 2017 SC 733 (3-MB).

5 See cases ibid.

6 Muhammad Tanveer v. State PLD 2017 SC 733.

**P L D 2021 Supreme Court 804**

**Present: Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ**

**MUHAMMAD RASHID---Petitioner**

**Versus**

**The STATE and others---Respondents**

Crl. P. 457-L of 2021, decided on 19th July, 2021.

**Supreme Court Rules, 1980---**

----O. IV, Rr. 2, 17 & O.VII, R.1---Criminal Procedure Code (V of 1898), Ss. 154 & 197---Advocate-on-Record, duty of---Better copy of FIR, omissions in---In the present case, the better copy of FIR appended with bail petition was missing certain (important) lines---Better copy of FIR placed in judicial file which carried the same omission, had been duly attested by the Advocate-on-Record ("AOR"), while the copy placed in the paper books before the Supreme Court did not carry the said attestation---Held, that such grave omission could totally misdirect the course of justice and result in injustice---Under O. VII, R. 1 of the Supreme Court Rules, 1980 ("Rules) copies of documents, if not forming part of the record of the Court appealed from, filed for the use of the Supreme Court, shall be certified to be true copies by the AOR for parties presenting the same---Under O. IV, R. 17 of the Rules the AOR undertook to abide by the Rules---Under O. IV, R. 2 an AOR could be adjudged guilty of professional misconduct or otherwise be considered unfit to be enrolled or allowed to remain as an advocate---In the present case, the better copy of the FIR attested by the AOR carried serious omissions---Supreme Court issued notice to the AOR to furnish his explanation for filing the incomplete better copy of the FIR in question and directed that Office shall ensure that only better copy duly attested by the AOR must be placed before the Court and to avoid any confusion, the actual copy of the FIR must accompany the better copy; that similarly, in the case of the Medico legal Certificate ("MLC"), if a better copy of the MLC was placed on the record, it must be duly attested by the AOR as per the Rules and the actual copy of the MLC must accompany the better copy---Case was adjourned for next date of hearing with the counsel for accused undertaking to place complete better copy of the FIR, as well as, the medical evidence before the Court.

Ch. Ahmad Khan Gondal, Advocate Supreme Court for Petitioner.

Khurram Khan, Addl. P.G. along with Riaz Ahmed, S.I. for the State.

Date of hearing: 19th July, 2021.

**ORDER**

The petitioner, Muhammad Rashid seeks post arrest bail in case FIR No.262/2020 dated 10.08.2020 registered at Police Station Shahkot, District Sahiwal for offences under sections 324, 337-F(ii), 337-A(i), 337-L(2), 337-A(ii), 148 and 149, P.P.C. The specific role of the petitioner, as mentioned in the impugned order dated 11.02.2021 is that he made a fire shot that hit the right thigh of one Muhammad Nasir. Upon perusal of the better copy of FIR No.262/2020 dated 10.08.2020 appended with the petition, it is noticed that there is no mention of the petitioner or of his making the fire shot thereby injuring Muhammad Nasir. Later, upon examination of the judicial file, it was discovered that the following lines were missing from the better copy of the FIR placed before this Court:-

It is also noticed that the better copy of the FIR placed in the judicial file which carries the same omission, has been duly attested by the Advocate on Record ("AOR") namely Shaukat Ali Mehr, while the copy placed in the paper books before us does not carry the said attestation. We are deeply disturbed by this. Such grave omission can totally misdirect the course of justice and result in injustice. Advocate-on-Record under the Supreme Court Rules, 1980 ("Rules) is to act and plead for a party in the Supreme Court.[1] Under Order VII, Rule 1 of the Rules copies of documents, if not forming part of the record of the Court appealed from, filed for the use of this Court, shall be certified to be true copies by the AOR for parties presenting the same. Under Order IV, Rule 17 of the Rules the AOR undertakes to abide by the Rules. Under Order IV, Rule 2 an AOR can be adjudged guilty of professional misconduct or otherwise be considered unfit to be enrolled or allowed to remain as an advocate.

2. In the present case, the better copy of the FIR attested by the AOR carries serious omissions mentioned above. We, therefore, issue notice to Shaukat Ali Mehr, AOR in the instant case to furnish his explanation for filing the incomplete better copy of the FIR in question. Office shall also for better dispensation of criminal justice system ensure that only better copy duly attested by the AOR must be placed before the Court and to avoid any confusion, the actual copy of the FIR must accompany the better copy. Similarly, in the case of the Medicolegal Certificate ("MLC" ), if a better copy of the MLC is placed on the record, it must be duly attested by the AOR as per the Rules and the actual copy of the MLC must accompany the better copy.

3. Learned ASC for the petitioner undertakes to place complete better copy of the FIR, as well as, the medical evidence in this case before the Court by the next date of hearing. The AOR shall also furnish his written explanation on the next date of hearing. To come up on 27.07.2021.

MWA/M-45/SC Order accordingly.

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[1] Order I, Rule 2(1) of the Rules.

**P L D 2021 Supreme Court 809**

**Present: Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ**

**MUHAMMAD NAWAZ---Petitioner**

**Versus**

**The STATE and others---Respondents**

Crl. P. 1050-L of 2020, decided on 26th July, 2021.

(Against the order dated 16.09.2020 passed by the Lahore High Court, Lahore in Crl. Misc. No.39205-B/2020)

**Criminal Procedure Code (V of 1898)---**

----Ss. 497 & 498---Constitution of Pakistan, Art. 185(3)---Bail---Jurisdiction of the Supreme Court and High Courts---Difference between the appellate jurisdiction of the Supreme Court under Art. 185(3) of the Constitution in bail matters and the original jurisdiction of the High Court under S.498, Cr.P.C. to grant bail highlighted.

Section 498, Cr.P.C. conferred original and concurrent jurisdiction on the High Court and Court of Session to grant bail, by stating that "the High Court or Court of Session may in any case direct that any person be admitted to bail". That was why when a trial court, for instance, a Court of Magistrate, declined to grant post arrest bail under section 497, Cr.P.C. to a person accused of having committed a non-bailable offence, the accused filed a fresh petition under section 498, Cr.P.C. in the Court of Session and, in case of failure to obtain the relief once again approached the High Court. The Court of Session and the High Court had original jurisdiction to grant bail and they made their own independent orders on the said petitions without commenting upon and setting aside the order of the trial court. The power of the High Court and the Court of Session, under section 498, Cr.P.C., to grant post arrest bail was thus co-extensive and concurrent with that of the trial court under section 497 Cr.P.C., while the power to grant pre-arrest bail under the said section was exclusive to them.

Muhammad Ayoob v. Muhammad Yakoob PLD 1966 SC 1003 ref.

The appellate jurisdiction of the Supreme Court, under Article 185(3) of the Constitution, in bail matters was quite distinct from the original jurisdiction of the High Court and Court of Session under section 498, Cr.P.C. The essential criterion of appellate jurisdiction was that it examined and if required corrected the errors, if any, of a lower forum. That being the nature of appellate jurisdiction, the Supreme Court examined the legality of the orders passed by the High Court in bail matters and corrected those orders in appellate jurisdiction under Article 185(3) of the Constitution only when it found that the High Court had exercised the discretion in granting or declining bail arbitrarily, perversely or contrary to the settled principles of law, regulating bail matters.

Haq Nawaz v. State 1969 SCMR 174 and Zaro v. State 1974 SCMR 11 ref.

Ms. Tasnim Ameen, Advocate-on-Record for Petitioner along with Petitioner.

Khurram Khan, Addl. P.G. along with Akmal, S.I. for the State.

Date of hearing: 26th Junly, 2021.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**This is a petition seeking leave to appeal, under Article 185(3) of the Constitution of the Islamic Republic of Pakistan 1973 ("Constitution"), against order dated 16.09.2020 passed by the High Court whereby pre-arrest bail petition filed by the petitioner, under sections 497/498 of the Code of Criminal Procedure, 1898 ("Cr.P.C."), has been dismissed as withdrawn with the following observation:

> "After arguing this case at full length, learned counsel for petitioner opts to withdraw this petition, which stands dismissed as such."

The High Court has dismissed the bail petition of the petitioner on the very statement of the learned counsel for petitioner, opting to withdraw the same. In the present petition no legal error has been pointed out in the said order of the High Court; it has simply been averred in the petition that the petitioner is entitled to

pre-arrest bail in the facts and circumstances of the case, and he may be admitted to bail. Same grounds, as agitated before the High Court, have been reiterated. In this backdrop, the learned counsel for the petitioner (Advocate-on-Record) at the very outset requested to withdraw the titled petition.

2. We have noted in our course of hearings that several petitions filed for leave to appeal against the orders of the High Court dismissing post or pre arrest bail petitions are argued as if they are fresh petitions for bail before this Court. Some learned counsel often plead the case for grant of bail, without identifying the legal error purportedly committed by the High Court in exercise of its discretion by declining the relief of bail. This present petition is a classic example of such misconception, wherein after full arguments the bail petition was withdrawn before the High Court yet relief of bail has been prayed for by the petitioner as if this Court has jurisdiction concurrent with the courts below to entertain bail petitions. We think it proper to clear the said confusion and clarify the difference between the appellate jurisdiction of this Court under Article 185(3) of the Constitution in bail matters and the original jurisdiction of the High Court to grant bail under section 498, Cr.P.C.

3. Section 498, Cr.P.C. confers original and concurrent jurisdiction on the High Court and Court of Session to grant bail, by stating that "the High Court or Court of Session may in any case ... direct that any person be admitted to bail". That is why when a trial court, for instance, a Court of Magistrate, declines to grant post arrest bail under section 497, Cr.P.C. to a person accused of having committed a non-bailable offence, the accused files a fresh petition under section 498, Cr.P.C. in the Court of Session and, in case of failure to obtain the relief once again approaches the High Court. The Court of Session and the High Court have original jurisdiction to grant bail and they make their own independent orders on the said petitions without commenting upon and setting aside the order of the trial court. The power of the High Court and the Court of Session, under section 498, Cr.P.C., to grant post arrest bail is thus co-extensive and concurrent with that of the trial court under section 497, Cr.P.C., while the power to grant pre-arrest bail under the said Section is exclusive to them.[1]

4. The appellate jurisdiction of this Court, under Article 185(3), in bail matters is quite distinct from the original jurisdiction of the High Court and Court of Session under section 498, Cr.P.C. The essential criterion of appellate jurisdiction is that it examines and if required corrects the errors, if any, of a lower forum. That being the nature of appellate jurisdiction, this Court examines the legality of the orders passed by the High Court in bail matters and corrects those orders in appellate jurisdiction under Article 185 (3) of the Constitution only when it finds that the High Court has exercised the discretion in granting or declining bail arbitrarily, perversely or contrary to the settled principles of law, regulating bail matters.[2]

5. In the present case, the bail petition filed in the High Court was withdrawn by the petitioner himself and the High Court accordingly dismissed the same as withdrawn. The grounds agitated in the petition do not point out any legal error in the order of the High Court and gives no justification for filing of the present petition, which is therefore utterly misconceived. Though the learned counsel for the petitioner (Advocate-on-Record) has requested to withdraw the present petition, we are of the view that the filing of such a vexatious petition has wasted the precious public time of the Court. Therefore, while allowing the petitioner to withdraw the present petition we dismiss the same as withdrawn, and also impose costs of Rs. 10,000/- on the petitioner, under Rule 3 of Order XXVIII of the Supreme Court Rules, 1980 ("Rules"). The said costs shall be deposited by the petitioner with any recognized charitable organization and receipt thereof be submitted with the office of the Deputy Registrar at Lahore Branch Registry of this Court, within 15 days from today. In case of failure by the petitioner to deposit the said costs, the Advocate-on-Record for the petitioner, shall be personally liable to deposit the said costs in terms of Rule 25 of Order IV of the Rules.

MWA/M-46/SC Petition dismissed.

**P L D 2021 Supreme Court 822**

**Present: Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ**

**AKASH MASIH---Petitioner**

**Versus**

**The STATE and others---Respondents**

Crl. P. No. 1079-L of 2020, decided on 30th July, 2021.

(Against the order dated 11.09.2020 passed by the Lahore High Court, Lahore in Crl. Misc. No.23063-B/2020).

**Supreme Court Rules, 1980---**

----O. IV, Rr.6, 15, 22 & 25 & Sixth Sched., Form 5---Advocate-on-Record---Duties of an Advocate-on-Record and importance of his/her role under the Supreme Court Rules, 1980 stated.

Role of an Advocate-on-Record (AOR) was pivotal in the dispensation of justice in the Supreme Court. Under Rule 6 of Order IV of the Supreme Court Rules, 1980 ( Rules ), no advocate other than an AOR could appear or plead in any matter unless he was instructed by an AOR. Under Rule 15 of Order IV of the Rules, no advocate other than an AOR was entitled to act for a party in any proceedings in the Court. Further, every AOR before acting on behalf of any person or party was to file in the Registry a power of attorney in the manner prescribed in Form 5 of the Sixth Schedule to the Rules. Under the terms of the prescribed power of attorney an AOR was, inter alia, authorized to appear and defend his or her client; to file and take back documents; to accept the processes of the Court; to appoint and instruct counsel; to represent his client in the matter and to do all things incidental to such acting for the client. Under Rule 25 of Order IV of the Rules, every AOR in the case was personally liable to the Court for due payment of all fees and charges payable to the Court. These provisions unambiguously showed the fundamental role played by an AOR in the life of a case filed before the Supreme Court.

Case and court management system at the Supreme Court was hugely dependent on the quality of professional services rendered by the AOR. Failure of the AOR to carry out his/her obligations as envisaged under the Rules or the terms of his/her Power of Attorney unnecessarily delayeda matter and seriously hampered the reduction of pendency of cases before the Supreme Court.

Mst. Tasneem Amin, Advocate-on-Record for Petitioner.

Rana Abdul Majeed, Addl. P.G. for the State.

Date of hearing: 30th July, 2021.

**ORDER**

**SYED MANSOOR ALI SHAH, J.----**This matter pertains to pre-arrest bail of the petitioner, but insipte of repeated calls the petitioner has not tendered appearance. Ms. Tasneem Ameen, Advocate on Record ("AOR") submits that she has no information regarding the whereabouts of the petitioner and submits that learned ASC for the petitioner has since passed away. Upon our asking, the learned AOR informed us that she does not even have the contact details of the petitioner.

2. It is important to highlight that the role of an AOR is pivotal in the dispensation of justice in this Court. Under Rule 6 of Order IV of the Supreme Court Rules, 1980 ("Rules"), no advocate other than an AOR can appear or plead in any matter unless he is instructed by an AOR. Under Rule 15 of Order IV of the Rules, no advocate other than an AOR is entitled to act for a party in any proceedings in the Court. Further, every AOR before acting on behalf of any person or party is to file in the Registry a power of attorney in the manner prescribed in Form 5 of the Sixth Schedule to the Rules.**1** Under the terms of the prescribed power of attorney an AOR is, inter alia, authorized to appear and defend his or her client; to file and take back documents; to accept the processes of the Court; to appoint and instruct counsel; to represent his client in the matter and to do all things incidental to such acting for the client. Under Rule 25 of Order IV of the Rules, every AOR in the case is personally liable to the Court for due payment of all fees and charges payable to the Court. These provisions unambiguously show the fundamental role played by an AOR in the life of a case filed before this Court. However, much to our regret, it is noticed in the instant case that the learned AOR has not been able to perform her responsibilities as envisaged under the Rules.

In the present case the AOR has no knowledge of the whereabouts of the petitioner or even has his contact details to verify the reason for his absence. It is underlined that the case and court management system at the Supreme Court is hugely dependent on the quality of professional services rendered by the learned AOR. Failure of the learned AOR to carry out her obligations as envisaged under the Rules or the terms of her Power of Attorney unnecessarily delays the matter and seriously hampers the reduction of pendency of cases before this Court. The Rules also point towards the removal of the name of the AOR from the Rolls for professional misconduct or for being unfit to be enrolled. However, for now, we are confident that the learned AOR has been sufficiently cautioned and we are sanguine that the learned AOR will perform her duties more onerously, vigilantly and responsibly in accordance with the Rules, from now on.

3. Since the petitioner is not present in Court in this pre-arrest bail matter, the learned AOR is not aware of his whereabouts, the petitioner has made no effort to contact the learned AOR, thus, in this background, we are of the view that this petition cannot proceed further in terms of section 498-A of the Code of Criminal Procedure, 1898 read with the second proviso to Rule 8 of the Order 23 of the Supreme Court Rules, 1980. Leave is therefore refused and this petition is dismissed.

MWA/A-33/SC Petition dismissed.

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1 Order IV Rule 22

**P L D 2021 Supreme Court 886**

**Present: Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ**

**SHAZAIB and others---Petitioners**

**Versus**

**The STATE---Respondent**

Crl. P. No. 1075-L of 2020, decided on 29th July, 2021.

(Against the order dated 28.09.2020 passed by the Lahore High Lahore in Crl. Misc. No.39004-B of 2020).Court,

**Criminal Procedure Code (V of 1898)---**

----S. 498-A---Pre-arrest bail petition---Accused not present before the Court at the time of hearing of his pre-arrest bail petition---Effect---In case the petitioner-accused was not personally present in Court, the Court was not authorized to grant him (pre-arrest) bail and the petition was to be dismissed for his lack of presence in Court---However, in case some explanation was furnished for his non-appearance, the Court may, if it found that explanation to be satisfactory, exempt his presence for that day and adjourn the hearing of the petition for a short period---Court could not, in the absence of the personal appearance of the petitioner, travel further into the case and examine the merits of the case---Abdul Rehman v. State 1981 PCr.LJ 61; Salima Bibi v. State 2000 PCr.LJ 138; Abdul Rashid v. State 2006 YLR 2058 and Tariq Hanif v. State 2021 PCr.LJ 250 not approved.

After the insertion of section 498-A of the Code of Criminal Procedure, 1898 ("Cr.P.C.") if the accused, seeking pre-arrest bail, was not present before the Court, the Court was not authorized to grant bail to such an accused and therefore, the (bail) petition was liable to be dismissed in the light of the said statutory provision.

Section 498-A, Cr.P.C. created a statutory fetter or a statutory precondition requiring the presence of the petitioner (accused) in person in Court for the exercise of jurisdiction by the court for granting pre-arrest bail. In case the petitioner was not personally present in Court, the Court was not authorized to grant him bail and the petition was to be dismissed for his lack of presence in Court. However, in case some explanation was furnished for his non-appearance, the Court may, if it found that explanation to be satisfactory, exempt his presence for that day and adjourn the hearing of the petition for a short period. The Court could not, in the absence of the personal appearance of the petitioner, travel further into the case and examine the merits of the case. In fact the examination of the merits of the case in the absence of the accused totally defeated the intent and purpose of the section 498-A, Cr.P.C. This was because once the Court proceeded to examine the merits of the case, then the Court had the option to either dismiss or allow the bail petition, while under section 498-A, Cr.P.C. the Court was not authorized to admit the accused to bail in his absence.

Abdul Rehman v. State 1981 PCr.LJ 61; Salima Bibi v. State 2000 PCr.LJ 138; Abdul Rashid v. State 2006 YLR 2058 and Tariq Hanif v. State 2021 PCr.LJ 250 not approved.

Umra Khan v. State PLD 1980 Pesh. 145; Shabbir Ahmad v. State PLD 1981 Lah. 599 (FB); Kalan Khan v. State 1982 PCr.LJ 149 and Zeeshan Kazmi v. State 1997 MLD 273 approved.

In case the petition was dismissed for non-appearance of the accused in a pre-arrest bail matter under section 498-A, Cr.P.C., the petitioner could file a fresh bail petition before the same Court provided that he furnished sufficient explanation for his non-appearance in the earlier bail petition and the Court was satisfied with his said explanation. But if he failed to furnish any satisfactory explanation, his second bail petition was liable to be dismissed on account of his conduct of misusing the process of Court disentitling him to the grant of discretionary relief of pre-arrest bail.

Mukhtar Ahmad v. State 2016 SCMR 2064 ref.

Ad interim bail granted in a pre-arrest application on the first hearing was to simply ensure that the petitioner was present on all the subsequent dates of hearing in the pre-arrest bail matter. Petitioner s presence was, therefore, required throughout the proceedings of the pre-arrest bail petition and the fact that he appeared on the first date when ad interim bail was granted did not in any manner lessen the rigours of

section 498-A, Cr.P.C. or absolve the responsibility of the accused from appearing in person before the court.

Syed Farhad Ali Shah, Advocate Supreme Court for Petitioner along with petitioners.

Humayoun Aslam, D.P.G. along with Muhammad Ashraf, S.I. for the State.

Raja Akhtar Nawaz, Advocate Supreme Court for Respondent No.2.

Date of hearing: 29th July, 2021.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**Petitioners seek leave to appeal against the order dated 28.09.2020 passed by the Lahore High Court in case FIR No.246 dated 25.04.2020 registered at Police Station Yousaf Wala, District Sahiwal for offences under sections 337-A(i)-F(i)(v)-L(2)-U(i), 148 and 149, P.P.C., whereby the pre-arrest bail petition of the petitioners has been dismissed for non-prosecution, as well as, on merits.

2. As the petitioners did not personally appear, in spite of the repeated calls, before the High Court, their bail petition before the High Court could not have proceeded further in terms of section 498-A, Cr.P.C. No reason has been given by the petitioners in the instant petition before us regarding their non-appearance before the High Court, and the petitioners have thus shown no legal defect in the impugned order, for dismissing their pre-arrest bail petition due to their non-appearance; this alone merits dismissal of the instant petition.

3. However, learned counsel for the petitioners submits that the petitioners have approached this Court because the High Court has also decided their petition on merits. In this backdrop, we deem it proper to underline the import of section 498-A, Cr.P.C. and explain how a pre-arrest petition is to be dealt with in case the accused-petitioner does not make himself present in Court at the time of hearing the petition.

4. After the insertion of section 498-A**1** of the Code of Criminal Procedure, 1898 ("Cr.P.C.") if the accused, seeking pre-arrest bail, is not present before the Court, the Court is not authorized to grant bail to such an accused and therefore, the petition is liable to be dismissed in the light of the said statutory provision. For convenience, section 498-A, Cr.P.C. is reproduced hereunder:-

> "498-A. No bail to be granted to a person not in custody, in Court or against whom no case is registered, etc.: Nothing in section 497, or Section 498 shall be deemed to require or authorize a Court to release on bail, or to direct to be admitted to bail, any person who is not in custody or is not present in Court or against whom no case stands registered for the time being and an order for the release of a person on bail, or a direction that a person be admitted to bail, shall be effective only in respect of the case that so stands registered against him and is specified in the order or direction."

Section 498-A, Cr.P.C. creates a statutory fetter or a statutory precondition requiring the presence of the petitioner in person in Court for the exercise of jurisdiction by the court for granting pre-arrest bail. In case the petitioner (accused) is not personally present in Court, the Court is not authorized to grant him bail and the petition is to be dismissed for his lack of presence in Court. However, in case some explanation is furnished for his nonappearance, the Court may, if it finds that explanation to be satisfactory, exempt his presence for that day and adjourn the hearing of the petition for a short period. The Court cannot, in the absence of the personal appearance of the petitioner, travel further into the case and examine the merits of the case. In fact the examination of the merits of the case in the absence of the accused totally defeats the intent and purpose of the aforementioned statutory provision. This is because once the Court proceeds to examine the merits of the case, then the Court has the option to either dismiss or allow the bail petition, while under section 498-A, Cr.P.C. the Court is not authorized to admit the accused to bail in his absence.

5. We are cognizant of the fact that before the addition of section 498-A in the Cr.P.C., the view of the High Courts was that once a petition for pre-arrest bail is admitted for hearing and notice is given to State, it has to be decided on merits notwithstanding the absence of the petitioner on the date fixed for hearing the petition.**2** However, after the addition of section 498-A in the Cr.P.C., there are divergent views of the High Courts, on this point: one set of judgments still retain to the said view,**3** while the other set of cases hold the view that the petition for pre-arrest bail is to be dismissed if the petitioner is not present in Court

on the date fixed for hearing the petition and it is not be decided on merits in his absence, unless the Court exempts his presence.[4] We approve the judgments of the High Courts noted above, which have considered the change in the legal position after addition of section 498-A in the Cr.P.C. and disapprove those that still retain the earlier view as they have not taken account of the true import and meaning of section 498-A, Cr.P.C.

6. We have noted that the Lahore High Court, in Tariq Hanif v. State,[5] has held that once a pre-arrest bail application is admitted and notice is given to the State it should be decided on merits even if the accused fails to put up appearance and has placed reliance on the judgment of this Court in Muhammad Saleem Akhtar v. State[6] for the said view. It is important to clarify that in the said judgment of this Court, it was not clear whether the Court was dealing with a matter involving pre-arrest or post-arrest bail; we, therefore called for the original file of that case. Perusal of the record available in the file, particularly the order of the High Court impugned therein, revealed that the petitioners before this Court had initially filed post arrest bail petitions in the High Court. During pendency of those petitions, the High Court admitted the petitioners to ad interim post arrest bail. Subsequently on a date fixed for hearing of those post arrest petitions the petitioners did not appear before the Court, and the High Court dismissed their post arrest bail petitions for non-prosecution. After that the petitioners filed pre arrest bail petitions in the High Court which the High Court dismissed with the observation that they failed to explain their absence in the previous post arrest bail petitions. It was in this context that this Court in Muhammad Saleem Akhtar's case observed:

> "If the High Court considered it appropriate or necessary for the accused to be present on each and every date of hearing, it was required to have given them clear directions to remain present at the fixed dates. This is evident from the record that it was not done-by the Court. This may be the reason for the confusion which happened for the accused to appear or not to appear before the Court on the relevant date. We are, therefore, not satisfied with the reasons of the High Court to reject the bail applications of the petitioners for non-prosecution. In this view of the matter, bail application of the petitioners would be deemed to be still pending adjudication on merits."

The High Court had dismissed the post arrest bail petitions of the petitioners for non-prosecution and not their pre arrest bail petitions. The said observations of this Court related to the ad interim bail granted in the post arrest bail petitions and dismissal of those post arrest bail petitions for non-prosecution, and not the pre arrest bail petitions. This aspect has not been fully brought out in the recent judgment of Tariq Hanif's case[7].

7. It is also clarified that in case the petition is dismissed for non-appearance of the accused in a pre-arrest bail matter under section 498-A, Cr.P.C., the petitioner can file a fresh bail petition before the same Court provided that he furnishes sufficient explanation for his non-appearance in the earlier bail petition and the Court is satisfied with his said explanation. But if he fails to furnish any satisfactory explanation, his second bail petition is liable to be dismissed on account of his conduct of misusing the process of Court disentitling him to the grant of discretionary relief of pre-arrest bail[8]. In the present case, the High Court could not have dismissed the petition on merits, in addition to dismissing the same for non-prosecution due to the personal absence of the petitioner under section 498-A, Cr.P.C.; therefore, the observations of the High Court regarding the merits of the case are not sustainable and hereby set aside. The petitioners are free to file a fresh bail petition, if so advised, before the High Court by giving explanation for their absence before the Court in their first bail petition and if the Court is satisfied with their explanation, it would decide their petition on merits.

8. It is also clarified that ad interim bail granted in a pre-arrest application on the first hearing is to simply ensure that the petitioner is present on all the subsequent dates of hearing in the pre-arrest bail matter. Petitioner's presence is, therefore, required throughout the proceedings of the pre-arrest bail petition and the fact that he appeared on the first date when ad interim bail was granted does not in any manner lessen the rigours of section 498-A, Cr.P.C. or absolve the responsibility of the accused from appearing in person before the court.

9. This petition is, therefore, converted into appeal and is partly allowed by setting aside the impugned order to the extent of observations on merits of the case, with the above observations.

MWA/S-41/SC Order accordingly.

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1 Inserted by the Code of Criminal Procedure (Amendment) Act (Act XIII of 1976), S.4 (w.e.f. 15.04.1976)

2 See Fateh Muhammad v. State PLD 1973 Lah. 874 and Ahmad Raza Qasuri v. State 1974 PCr.LJ 482.

3 See Abdul Rehman v. State 1981 PCr.LJ 61; Salima Bibi v. State 2000 PCr.LJ 138; Abdul Rashid v. State 2006 YLR 2058 and Tariq Hanif v. State 2021 PCr.LJ 250.

4 See Umra Khan v. State PLD 1980 Pesh. 145; Shabbir Ahmad v. State PLD 1981 Lah. 599 (FB); Kalan Khan v. State 1982 PCr.LJ 149 and Zeeshan Kazmi v. State 1997 MLD 273.

5 Tariq Hanif v. State 2021 PCr.LJ 250

6 Muhammad Saleem Akhtar v. State PLD 1996 SC 735

7 Supra

8 Mukhtar Ahmad v. State (2016 SCMR 2064)

**P L D 2021 Supreme Court 892**

**Present: Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ**

**INAM ULLAH---Petitioner**

**Versus**

**The STATE and others---Respondents**

Crl. P. No. 39-L of 2021, decided on 13th August, 2021.

(Against the order dated 22.12.2020 passed by the Lahore High Court, in Crl. Misc. No.67963-B of 2020).

**Criminal Procedure Code (V of 1898)---**

----S. 498---Constitution of Pakistan, Art. 185(3)---Pre-arrest bail---Second pre-arrest bail petition filed after withdrawal of the first pre-arrest bail petition without satisfactory explanation for withdrawing the earlier petition---Maintainability---In case the accused failed to give satisfactory explanation for his withdrawal of the earlier pre-arrest bail petition and the need for filing the fresh one, his second or successive pre-arrest bail petition shall not be maintainable.

Filing a pre-arrest bail petition, enjoying the concession of ad interim bail granted therein and then simply withdrawing the petition in order to file another one after sometime and availing the same benefit of ad interim bail once again, in the absence of any lawful explanation or justification, was a sheer abuse of the process of the court.

Muhammad Sadiq v. State 2015 SCMR 1394 ref.

While the accused could approach the same court with a fresh pre-arrest bail petition if the earlier one had been withdrawn without advancing arguments on merits, the court must be watchful that the successive petition was not readily entertained or the concession of ad interim bail granted to the accused, unless he furnished satisfactory explanation for withdrawal of the first petition and filing of the second one; otherwise, an unscrupulous accused could abuse the process of court for ulterior purposes. Therefore, the accused must be required by the court to furnish satisfactory explanation for withdrawing the first pre-arrest bail petition at the time of entertaining the second pre-arrest bail petition. Unless there was satisfactory explanation, the second bail petition should not be entertained, because otherwise the accused would have an unchecked license to abuse the concession of ad interim pre-arrest bail by misusing the court-process, and hoodwink the police to prolong the investigation.

While the accused had access to courts to seek pre-arrest bail, even successively for justifiable reasons, he could not be permitted to abuse the concession of ad interim bail to stall the investigation and play hide and seek with the criminal justice system. In case the accused failed to give satisfactory explanation for his withdrawal of the earlier pre-arrest bail petition and the need for filing the fresh one, his second or successive pre-arrest bail petition shall not be maintainable.

Mian Subah Sadiq Wattoo, Advocate Supreme Court for Petitioner along with Petitioner.

Jaffar Addl. P.G. for the State along with M. Akhtar, ASI.

Date of hearing: 13th August, 2021.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The petitioner filed a pre-arrest bail petition before the High Court in case FIR No.541 of 2020 dated 14.09.2020, registered at Police Station Yousaf Wala, District Sahiwal for offences punishable under sections 324, 148 and 149, P.P.C., which was withdrawn without arguments in merits on 03.12.2020 by the petitioner. Thereafter, the petitioner filed a second pre-arrest bail petition on 21.12.2020. The High Court dismissed the second pre-arrest bail petition vide impugned order dated 22.12.2020, with the observation that the petitioner was trying to play hide and seek with the court in order to deliberately prolong the matter and create hurdles in the way of the investigation; hence, the present petition for leave to appeal.

2. We observe, at the very outset, that filing a pre-arrest bail petition, enjoying the concession of ad interim bail granted therein and then simply withdrawing the petition in order to file another one after sometime and availing the same benefit of ad interim bail once again, in the absence of any lawful

explanation or justification, is a sheer abuse of the process of the court. This Court has already disapproved and deprecated such practice in Muhammad Sadiq v. State,[1] with the following observations:

> Filing of pre-arrest bail petitions again and again amounts to misuse of law and it also increases the backlog of the Courts and this growing trend should have to be stopped by the learned Courts below. When the second application was withdrawn by the learned counsel for the petitioners, the petitioners could not avail the said remedy even after the deletion of section 365, P.P.C. by the investigating officer as it had attained finality but the petitioners adopted the policy of hide and seek by moving a number of applications.

While the accused can approach the same court with a fresh pre-arrest bail petition if the earlier one has been withdrawn without advancing arguments on merits, the court must be watchful that the successive petition is not readily entertained or the concession of ad interim bail granted to the accused, unless he furnishes satisfactory explanation for withdrawal of the first petition and filing of the second one; otherwise, an unscrupulous accused can abuse the process of court for ulterior purposes. Therefore, the accused must be required by the court to furnish satisfactory explanation for withdrawing the first pre-arrest bail petition at the time of entertaining the second pre-arrest bail petition. Unless there is satisfactory explanation, the second bail petition should not be entertained, because otherwise the accused would have an unchecked license to abuse the concession of ad interim pre-arrest bail by misusing the court-process, and hoodwink the Police to prolong the investigation. Therefore, while the accused has access to courts to seek pre-arrest bail, even successively for justifiable reasons, he cannot be permitted to abuse the concession of ad interim bail to stall the investigation and play hide and seek with the criminal justice system. In case the accused fails to give satisfactory explanation for his withdrawal of the earlier pre-arrest bail petition and the need for filing the fresh one, his second or successive pre-arrest bail petition shall not be maintainable.

3. In the instant case, the petitioner has not furnished any explanation as to why the earlier pre-arrest bail petition was withdrawn by him and what has prompted him to file the second one. Therefore, we find that the High Court has rightly rejected his second petition, and the impugned order does not call for any interference. Leave to appeal is, therefore, declined and this petition is dismissed.

MWA/I-10/SC Petition dismissed.

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1 2015 SCMR 1394.

**P L D 2021 Supreme Court 894**

**Present: Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ**

**AZAM SALEEM and another---Petitioners**

**Versus**

**The STATE and others---Respondents**

Crl. Ps. Nos. 797-L and 799 of 2021, decided on 6th August, 2021.

(Against the consolidated order dated 25.05.2021 passed by the Lahore High Court, in Crl. Misc. No. 16835-B of 2021 and Crl. Misc. No. 10047-B of 2021).

**Criminal Procedure Code (V of 1898)---**

----S. 498-A---Constitution of Pakistan, Art. 185(3)---Pre-arrest bail---Maintainability---Second pre-arrest bail petition filed after dismissal of the first pre-arrest bail petition for non-appearance of the accused and lack of his satisfactory explanation for his non-appearance in the earlier pre-arrest bail petition---Such second pre-arrest bail petition was not maintainable.

Failure on the part of the accused to explain his absence in Court on the date fixed for hearing of his first pre-arrest bail petitions and his filing of second (bail) petition seeking the same relief amounted to playing hide and seek with the Court. Such conduct disentitled the accused from maintaining the second pre-arrest bail petition.

If a pre-arrest bail petition was dismissed for non-appearance of the accused under section 498-A, Cr.P.C, the second pre-arrest bail petition was maintainable only if the accused furnished satisfactory explanation for his absence in the first petition. Only if the explanation was found satisfactory could the Court proceed further and decide the second petition on merits. However, if the explanation was found to be unsatisfactory, the second petition was not maintainable and was liable to be dismissed without going into the merits of the case.

Shazaib v. State Crl. P. No. 1075-L of 2020, dated 29.07.2021 ref.

Muhammad Ijaz Janjua, Advocate Supreme Court for Petitioner (in Crl. P. No. 797-L of 2021).

Mian Ghulam Hussain, Advocate-on-Record along with Petitioner (in Crl. P. No. 799-L of 2021).

Khurram Khan, Addl. P.G. along with Abdul Ghafoor, S.I. Asghar Ali, S.I. for the State.

Ch. Abdul Razzaq Kamboh, Advocate Supreme Court for the Complainant.

Date of hearing: 6th August, 2021.

**ORDER**

**SYED MANSOOR ALI SHAH, J**.---Petitioners (Azam Saleem and Shan Ali) seek leave to appeal against the consolidated order dated 25.05.2021 passed by the Lahore High Court in case FIR No.1004/2020 dated 20.11.2020 registered at Police Station Mozang, District Lahore for offences under sections 420, 468, 471, P.P.C., whereby their second pre-arrest bail petitions have been dismissed. Their first pre-arrest bail petitions were dismissed by the High Court for non-prosecution vide orders dated 09.02.2021 and 04.03.2021 respectively. The first pre-arrest bail petition of the petitioner, Azam Saleem, was dismissed, in addition to non-prosecution, for his failure to furnish bail bonds for ad-interim bail.

2. The High Court took up both the second pre-arrest bail petitions of the petitioners together and without inquiring into the reasons for non-appearance of the petitioners in their first pre-arrest bail petitions and without inquiring from one of the petitioners (Azam Saleem) why bail bonds were not furnished in the earlier petition, proceeded to decide the petitions on merits vide the impugned order dated 25.05.2021.

3. We have recently held in Shazaib v. State[1] that in case a pre-arrest bail petition is dismissed due to non-appearance of the accused in Court, under section 498-A, Cr.P.C., a fresh pre-arrest bail petition can be entertained only if it furnishes explanation for the absence of the accused before the Court on the date of the dismissal of the first pre-arrest bail petition. Once the Court is satisfied with the explanation given for the absence of the accused can it travel into the merits of the case. The relevant portion of the order passed in Shazaib case is reproduced hereunder for ready reference:-

7. It is also clarified that in case the petition is dismissed for non-appearance of the accused in a pre-arrest bail matter under section 498-A, Cr.P.C., the petitioner can file a fresh bail petition before the same Court provided that he furnishes sufficient explanation for his non-appearance in the earlier bail petition and the Court is satisfied with his said explanation. But if he fails to furnish any satisfactory explanation, his second bail petition is liable to be dismissed on account of his conduct of misusing the process of Court disentitling him to the grant of discretionary relief of pre-arrest bail. In the present case, the High Court could not have dismissed the petition on merits, in addition to dismissing the same for non-prosecution due to the personal absence of the petitioner under section 498-A, Cr.P.C.; therefore, the observations of the High Court regarding the merits of the case are not sustainable and hereby set aside. The petitioners are free to file a fresh bail petition, if so advised, before the High Court by giving explanation for their absence before the Court in their first bail petition and if the Court is satisfied with their explanation, it would decide their petition on merits.

In order to examine the explanation given for the non-appearance of the petitioners in their second pre-arrest petitions, we called for the complete record of their second bail petitions from the High Court. In the petition of Azam Saleem the explanation furnished for the non-appearance of the petitioner in his first petition on 04.03.2021 was that his real sister had passed away. Perusal of the documents attached with the petition shows that the sister of the petitioner had passed away on 17.02.2021, whereas the bail petition was dismissed for non-prosecution on 04.03.2021. Additionally, no reason or justification was stated for non-furnishing of the bail bonds by the petitioner. In the petition of Shan Ali no explanation, at all, has been furnished in the second bail petition for his non-appearance before the Court on 09.02.2021, when his first pre-arrest bail petition was dismissed for non-prosecution due to his non-appearance.

4. While there is no explanation given by the petitioner, Shan Ali, the explanation given by the petitioner, Azam Saleem, for his non-appearance is unconvincing and unsatisfactory and there is no explanation for his not furnishing the bail bonds after the grant of ad interim bail. Failure on the part of the petitioners to explain their absence in Court on the date fixed for hearing of their first pre arrest bail petitions and their filing of second petitions seeking the same relief amounts to playing hide and seek with the Court, and is a sheer abuse of the concession of ad interim bail extended to them in the first petitions. Such conduct disentitles the petitioners from maintaining the second pre-arrest bail petitions, therefore, the said petitions should have failed before the High Court on this score alone. The second pre-arrest bail petitions being not maintainable for the said reason, there was no need for the High Court to discuss the merits of the case. The petitioners have not even agitated any ground in the present petitions before us that explains their absence before the High Court in their first pre-arrest bail petitions.

5. As we are of the view that the second pre arrest bail petitions of the petitioners were not maintainable before the High Court, due to lack of satisfactory explanation furnished by them for their non-appearance in their first petitions, we are not required to discuss the merits of this case. However, as the High Court has discussed the merits of the case, we have examined the findings of the High Court in the light of the material available on record, in the interest of justice, and have noticed that there is sufficient incriminating material to establish that the petitioner, Azam Saleem, had fraudulently transferred the vehicle in question, in favour of the petitioner, Shan Ali. The statement of Saadi Ahmad, the actual owner of the vehicle, confirms that he never transferred the vehicle in favour of the petitioner, Shan Ali. Besides, the complainant, Adil Javed, had never instructed the petitioner, Azam Saleem, to get the car transferred in favour of the petitioner, Shan Ali. In the presence of the said incriminating material which is sufficient to connect the petitioners with the commission of the alleged offences, even on merits no case for grant of pre-arrest bail to them is made out and thus we see no reason to interfere with the impugned order on this score also.

6. In the end we reiterate, for the sake of clarity, that if a pre-arrest bail petition is dismissed for non-appearance of the petitioner under section 498-A, Cr.P.C., the second pre-arrest bail petition is maintainable only if the petitioner furnishes satisfactory explanation for his absence in the first petition.

Only if the explanation is found satisfactory can the Court proceed further and decide the second petition on merits. However, if the explanation is found to be unsatisfactory, the second petition is not maintainable and is liable to be dismissed without going into the merits of the case.

7. For all that what has been discussed above, we are not inclined to interfere in the impugned consolidated order of the High Court. Leave to appeal is, therefore, declined and these petitions stand dismissed.

MWA/A-35/SC Petitions dismissed.

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1 Crl.P. No. 1075-L of 2020 decided vide order dated 29.07.2021.

**P L D 2021 Supreme Court 903**

**Present: Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ**

**MUHAMMAD IMRAN---Petitioner**

**Versus**

**The STATE and others---Respondents**

Crl. P. No. 860-L of 2021, decided on 5th August, 2021.

(Against the order dated 26.05.2021 passed by the Lahore High Court, Lahore in Crl. Misc. No. 31719-B of 2021).

**(a) Criminal Procedure Code (V of 1898)---**

----S.497---Post-arrest bail---Offences not falling within the prohibitory clause of S.497(1), Cr.P.C (Non-prohibitory offences)---Denial of post-arrest bail in non-prohibitory offences---Principles.

For an offence which did not fall within the prohibitory clause of section 497(1), Cr.P.C, bail was a rule and refusal an exception. The grounds for the case to fall within the exceptions meriting denial of bail included (i) the likelihood of the accused s abscondence to escape trial; (ii) his tampering with the prosecution evidence or influencing the prosecution witnesses to obstruct the course of justice; or (iii) his repeating the offence keeping in view his previous criminal record or the desperate manner in which he had prima facie acted in the commission of offence alleged. The prosecution had to show if the case of the accused fell within any of these exceptions on the basis of the material on the record.

Tariq Bashir v. State PLD 1995 SC 34; Zafar Iqbal v. Muhammad Anwar 2009 SCMR 1488 and Muhammad Tanveer v. State PLD 2017 SC 733 ref.

**(b) Criminal Procedure Code (V of 1898)---**

----S. 497---Penal Code (XLV of 1860), S. 489-F---Dishonestly issuing a cheque---Bail, refusal of---Accused prone to repeating the offence and absconding---Record showed that the accused had been booked in as much as eight criminal cases under the same offence (S.489-F, P.P.C.) with different complainants and involving sizable amounts of money---Said cases spanned over the years 2018 to 2020 and three cases had been registered after the registration of the present case---Even though the accused had obtained bail in those cases, it did, prima facie, establish that the accused was prone to repeating the offence---Accused having been declared an absconder in the present case for over one and a half year generated the apprehension that he may avoid standing trial and hence delay the prosecution of the case---Material on record made the case of the accused fall under the exceptions to the rule of grant of bail in non-prohibitory offences---Petition for leave to appeal was dismissed and leave was declined.

Tariq Bashir v. State PLD 1995 SC 34; Zafar Iqbal v. Muhammad Anwar 2009 SCMR 1488 and Muhammad Tanveer v. State PLD 2017 SC 733 ref.

Sheikh Abdul Raheem v. The State and others 2021 SCMR 822 distinguished.

Malik Matee Ullah, Advocate Supreme Court for Petitioner.

Khurram Khan, Addl. P.G. along with M. Anwar, ASI. for the State.

Respondent No.2: in person.

Date of hearing: 5th August, 2021

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**Post arrest bail was denied to the petitioner in case FIR No.458 dated 07.08.2019, registered at Police Station Larri Adda, Lahore, for offence under section 489-F, P.P.C. through order dated 26.05.2020, passed by the Lahore High Court. He seeks leave to appeal against the said order.

2. According to the crime report the petitioner had issued three cheques in favour of the business of the complainant in the sum of Rs. 2 million each, which were subsequently dishonoured. Learned counsel for the petitioner submits that for an offence not falling within the prohibitory clause grant of bail is a rule and refusal an exception. Relying on Sheikh Abdul Raheem v. The State and another (2021 SCMR 822) learned counsel submitted that previous criminal cases filed against the petitioner, in which he has obtained bail, do not affect his entitlement to the concession of bail. On the other hand learned APG pointed out that

eight other criminal cases have been registered against the petitioner by different parties under the same offence, involving sizable amounts. He adds that the FIR in this case was registered on 07.08.2019 but inspite of the best efforts of the Police the petitioner could not be arrested and was declared a proclaimed offender. Finally, the petitioner was arrested on 28.04.2021 after more than a year and a half.

3. We have heard the learned counsel and have examined the record of the case. We are cognizant of the fact that the offence under section 489-F, P.P.C. does not fall within the prohibitory clause of section 497(1), Cr.P.C. and bail in such a matter is a rule and refusal an exception. The grounds for the case to fall within the exceptions meriting denial of bail include (a) the likelihood of the petitioner's abscondence to escape trial; (b) his tampering with the prosecution evidence or influencing the prosecution witnesses to obstruct the course of justice; or (c) his repeating the offence keeping in view his previous criminal record or the desperate manner in which he has prima facie acted in the commission of offence alleged. The prosecution has to show if the case of the petitioner falls within any of these exceptions on the basis of the material on the record. See Tariq Bashir,**1** Zafar Iqbal**2**, Muhammad Tanveer**3** and order dated 14.07.2021 passed in Criminal Petition No.529 of 2021.

4. Record shows that the petitioner has been booked in as much as eight criminal cases under the same offence with different complainants and involving sizable amounts of money. These cases span over the years 2018 to 2020 and three cases have been registered after the registration of the instant case. Even though the petitioner has obtained bail in those cases, it does, prima facie, establish that the petitioner is prone to repeating the offence. Petitioner having been declared an absconder in this case for over one and a half year generates the apprehension that the petitioner may avoid standing trial and hence delay the prosecution of the case. The material on record makes the case of the petitioner fall under two exceptions to the rule of grant of bail as mentioned above.

5. Reliance of the petitioner on Sheikh Abdul Raheem case[4] hardly advances his case. First, the said bail order is based on its own peculiar facts besides it does not dislodge the principles settled in the above cited cases. The facts of the instant case involve eight (8) criminal cases registered against the petitioner for the same offence against different parties and some of them have even been registered after the instant case. Additionally, the petitioner has been a proclaimed offender. Therefore, the factual matrix of the instant case is very different from the one cited by the learned counsel.

6. For the above reasons we are not inclined to interfere in the well considered findings of the High Court. Leave is, therefore, declined and this petition is dismissed.

MWA/M-51/SC Bail refused.

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1 Tariq Bashir v. State PLD 1995 SC 34 (2-MB).

2 Zafar Iqbal v. Muhammad Anwar 2009 SCMR 1488 (4-MB).

3 Muhammad Tanveer v. State PLD 2017 SC 733 (3-MB).

4 Sheikh Abdul Raheem v. The State etc. 2021 SCMR 822 (3-MB).

**P L D 2021 Supreme Court 913**

**Present: Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ**

**Mrs. SAMINA MEHR-UN-NISA MAZARI---Appellant**

**Versus**

**PUBLIC AT LARGE and others---Respondents**

C.A. No. 184-L of 2010, decided on 3rd August, 2021.

(Against the order dated 02.04.2007 passed by the Lahore High Court, in C. R. No.716 of 2007).

**(a) Provincial Insolvency Act (V of 1920)---**

----S. 7 & Preamble---Provincial Insolvency Act, 1920 (the 1920 Act)---Scope and application---Said Act dealt with the insolvency of an individual, while corporate insolvency was dealt with separately under the company law---Therefore, insolvent companies were not amenable to the law of insolvency but underwent a separate process known as liquidation, or winding up, administered under separate law. (b) Provincial Insolvency Act (V of 1920)---

----Ss. 7 & 8---Insolvency petition---Exemption of corporation, etc., from insolvency proceedings---Scope---Appellant-lady filed an insolvency petition under S.7 of the Provincial Insolvency Act, 1920 ("the 1920 Act") to be declared insolvent; she arrayed all her institutional creditors as respondents in the petition---Petition was dismissed by the Trial Court on the basis of S.8 of the 1920 Act holding that no insolvency petition could be filed against any corporation or association or company registered under any enactment for the time being in force---Question as to whether S.8 of the 1920 Act barred an insolvency petition to be filed by the debtor seeking his own insolvency by arraying corporate banks as creditors to the petition---Held, that S.8 of the 1920 Act exempted corporations and companies from any insolvency proceedings against them, however, in the present case the insolvency petition filed by the appellant was not an insolvency petition filed against any corporate person but instead, was filed by the debtor (the appellant) to get herself adjudged as an insolvent---Arraying the creditor banks (corporations or companies) as respondents in the insolvency petition did not mean that an insolvency petition had been filed against corporate persons to seek their insolvency---Exemption contained in S.8 of the 1920 Act had no application to the present case---Orders of courts below were set-aside and Supreme Court directed that insolvency petition would be deemed to be pending before the Trial Court, which shall decide the same in accordance with law---Appeal was allowed.

Kazim Ali Shah v. United Bank Limited 1988 CLC 913 ref.

Muhammad Azeem Malik, Advocate Supreme Court for Appellant.

M. Naveed Sheikh, Advocate Supreme Court for Respondent No.2.

Ashar Elahi, Advocate Supreme Court for Respondent No.3.

Mian Azhar Saleem, AHC for Respondent No.7.

Shahnawaz Khan and Umer Qureshi Bank representatives for Respondent No.6.

Nemo for Respondents Nos. 4 and 8.

Date of hearing: 3rd August, 2021.

**ORDER**

**SYED MANSOOR ALI SHAH, J**.---Brief facts of the case are that the petitioner filed an insolvency petition under section 7 of the Provincial Insolvency Act, 1920**1** ("Act") to be declared insolvent. The petitioner arrayed all her institutional creditors as respondents in the petition. The petition was dismissed by the trial court on the basis of section 8 of the Act. According to the trial court no insolvency petition could be filed against any corporation or association or company registered under any enactment: for the time being in force. The appeal of the petitioner before the lower appellate court was also dismissed and the Civil Revision filed by the petitioner before the High Court also met the same fate vide impugned order dated 02.04.2007. The sole question before us is whether Section 8 of the Act bars an insolvency petition to be filed by the debtor (petitioner) seeking his own insolvency by arraying corporate banks as creditors to the petition? Leave was granted vide order dated 30.04.2010 to examine this question.

2. The essence of the concept of insolvency consists in debtor's ultimate inability to meet his financial commitments. The central character of the Act is the "debtor" who is an individual. Acts of insolvency" under the Act[2] refer to different acts of the debtor which constitute acts of insolvency. Under section 6(f), filing of an insolvency petition by the debtor to be adjudged as an insolvent, is an act of insolvency. A debtor can file an insolvency petition if he commits an act of insolvency and be adjudged as an insolvent by obtaining an "order of adjudication." It is important to distinguish that the Act deals with the insolvency of an individual, while corporate insolvency is dealt with separately under the company law. Therefore, insolvent companies are not amenable to the law of insolvency but undergo the separate process known as liquidation, or winding up, administered under separate law. Hence from the point of view of an unsatisfied creditor wishing to initiate insolvency proceedings, the question of whether his debtor is an individual or an incorporated company assumes vital significance.[3]

3. Section 8 of the Act provides as under;

> No insolvency petition shall be presented against any corporation or against any association or company registered under any enactment for the time being in force.

In the instant case, the courts below have concurrently held that section 8 exempts corporations and companies from any insolvency proceedings against them. This is the correct interpretation of law. The courts below have, however, failed to appreciate that the insolvency petition filed by the appellant was not an insolvency petition filed against any corporate person but instead was filed by the debtor (the appellant) to get herself adjudged as an insolvent. Arraying the creditor banks (corporations or companies) as respondents in the insolvency petition does not mean that an insolvency petition has been filed against corporate persons to seek their insolvency. The exemption contained in section 8 has no application to the present case. The courts below have missed out on this important aspect of the case. The opinion expressed by Lahore High Court in Kazim Ali Shah[4] (1988) is correct and is fully endorsed.

4. We, therefore, set aside the orders of the courts below. The insolvency petition will be deemed to be pending before the trial court with the direction to the trial court to decide the same, in accordance with law, preferably within a period of three months, from the receipt of this order. Resultantly this appeal is allowed in the above terms. Office shall dispatch a copy of this order to the respondents, as well as, the trial court concerned for information and necessary action.

MWA/S-45/SC Appeal allowed.

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1 Act V of 1920 dated 25.02.1920

2 See Section 6.

3 Ian F. Fletcher, The Law of Insolvency. 4th edition, Sweet and Maxwell.

4 Kazim Ali Shah v. United Bank Limited 1988 CLC 913. As per Abaid Ullah Khan, J.

**P L D 2021 Supreme Court 916**

**Present: Umar Ata Bandial, Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ**

**MUHAMMAD IQBAL KHAN NOORI and another---Petitioners**

**Versus**

**NATIONAL ACCOUNTABILITY BUREAU (NAB) and others---Respondents**

Civil Petitions Nos.3637 and 3638 of 2019, decided on 16th June, 2021.

(Against the order dated 26.6.2019 of the Islamabad High Court, passed in Writ Petitions Nos.2104 and 2105 of 2019)

**(a) National Accountability Ordinance (XVIII of 1999)---**

----Ss. 9 & 10---Constitution of Pakistan, Arts. 4, 9, 10A, 14, 185(3) & 199---Criminal Procedure Code (V of 1898), S. 497---Person accused of an offence under the National Accountability Ordinance, 1999 ( NAB Ordinance )---Grant of bail in Constitutional jurisdiction of the High Court/Supreme Court---Scope---High Courts had the power to grant bail, under Art. 199 of the Constitution, to any person accused of an offence under the NAB Ordinance, independent of any statutory source of jurisdiction and notwithstanding the prohibition contained in S.9(b) of the NAB Ordinance---High Court, under Art.199 of the Constitution, had the power to judicially review an order passed by the Executive, viz, Chairman NAB or some other authorized officer of the NAB, regarding arrest and detention of a person---High Court while exercising its jurisdiction under Art. 199 of the Constitution for the enforcement of fundamental rights could pass appropriate orders, which included an unconditional release or release on bail, to grant the relief to the aggrieved person---For the enforcement of fundamental rights under the Constitution and not under the sub-constitutional statutory grounds provided in S.497, Cr.P.C., the Supreme Court had been granting bails to the accused persons in NAB cases in exercise of constitutional jurisdiction under Art. 199 read with Art. 185(3) of the Constitution, mainly on the grounds of: (i) delay in conclusion of the trial (ii) life-threatening health condition of the accused, and (iii) non-availability of sufficient incriminating material against the accused.

Asfandyar Wali v. Federation PLD 2001 SC 607; Manzoor Ilahi v. Federation PLD 1975 SC 66; Anwar Saifullah v. State 2001 SCMR 1040; Zulfiqar Ali v. State PLD 2002 SC 546; Arif Sharif v. Chairman, NAB 2004 SCMR 1805; Aga Jehanzeb v. National Accountability Bureau 2005 SCMR 1666; Himesh Khan v. National Accountability Bureau 2015 SCMR 1092; Zulfiqar Ali v. State PLD 2002 SC 546; Saeed Mehdi v. State 2002 SCMR 282; Nawaz Sharif v. State 2019 SCMR 734; Asif Zardari v. Federation 2005 SCMR 422 and Maqbool Ahmed v. National Accountability Bureau 2016 SCMR 154 ref.

**(b) Constitution of Pakistan---**

----Arts. 184(3) & 199---Judicial review of executive actions---Scope---Reasonableness and proportionality were recognized as established grounds of judicial review of executive action.

Salman Rafique v. National Accountability Bureau PLD 2020 SC 456 ref.

**(c) National Accountability Ordinance (XVIII of 1999)---**

----Ss. 5(a), 9, 10, 12(a), 24(a) & 24(d)---Constitution of Pakistan, Arts. 4, 9, 10A, 14, 185(3) & 199---Person accused of an offence under the National Accountability Ordinance, 1999 ( NAB Ordinance )---Bail, grant/refusal of---Requirement of "sufficient material" against the accused---Scope---Law authorised proceedings against a person accused of an offence under the NAB Ordinance, and for the freezing of his property, only when there were reasonable grounds for believing that the accused had committed an offence triable under the Ordinance---In order to ascertain whether reasonable grounds existed or not, the Court should not probe into the merit of the case, but restrict itself to the material placed before it by the prosecution (NAB) to see whether some tangible material/evidence was available against the accused which may lead to the inference of his guilt---Mere accusation of an offence would not be sufficient to disentitle an accused from being bailed out; there should be reasonable grounds as distinguished from mere allegations or suspicion---Prosecution (NAB) had to show reasonable grounds to believe that the accused had committed the crime---If the Court was not satisfied that there existed reasonable grounds to believe that the accused was guilty, the Court was to grant bail in enforcement of his fundamental rights---

Sufficiency of material/evidence connecting the accused with the crime must be viewed with utmost care and caution at the bail stage.

**(d) National Accountability Ordinance (XVIII of 1999)---**

----Ss. 9 & 10---Constitution of Pakistan, Art. 185(3)---Corruption and corrupt practices---Bail, grant of---Material on the record indicated that the accused was the Director, while the co-accused was the Accountant, in company P , the company which availed the financial facility (loan) from the Banks---However, they had no concern with the management of company PLE , whose Directors were alleged to be the ultimate beneficiary of the loan---Banks had filed suits for recovery of their loan in the court of competent jurisdiction, which were pending adjudication---If, after the decree, their company failed to pay the decretal amount, the decree would be satisfied by auction of the mortgaged property---Neither the banks nor the National Accountability Bureau (NAB) had alleged that the property mortgaged against the loan did not exist or its ownership was disputed or forged---Counsel for NAB and representatives of the Bank were unable to show the court from the material available as to how the accused and co-accused had committed any fraud or forgery, or the offence of corruption or corrupt practices as defined in S. 9 of the NAB Ordinance, in obtaining the loan for the company they were working for---Material on record did not point out that there existed reasonable grounds to believe that the accused and co-accused had committed the offence alleged---Furthermore a period of more than two years has lapsed since their arrest in the present case, but the completion of the trial was not yet in sight, for no fault of theirs---Petitions for leave to appeal were converted into appeals and allowed, and accused and co-accused were granted bail.

**(e) Jurisdiction---**

----Objection as to jurisdiction of a Court/Tribunal---Such objection was to be taken first of all before the same Court or Tribunal for its decision.

Abbas Hussain v. State 1992 SCMR 320 ref.

Barrister Umar Aslam, Advocate Supreme Court for Petitioners (in both cases).

Imran-ul-Haq, D.P.G. along with Qasim, A.D. NAB for Respondents/NAB.

Date of hearing: 16th June, 2021

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J**.---The National Accountability Bureau ("NAB") has arrested and detained the petitioners in the course of investigation in NAB Case No. NABR-20190123158165/ 2019/IW/ INV, which was, and is still, being conducted for the alleged offence of corruption and corrupt practices, as defined in section 9 and punishable under section 10 of the National Accountability Ordinance, 1999 ("Ordinance"), against persons involved in the fake bank accounts scam of obtaining bank loans and their misappropriation by Messrs Parthenon (Pvt.) Ltd., Messrs Park Lane Estates (Pvt.) Ltd. and others. The petitioners filed two separate writ petitions in the Islamabad High Court under Article 199 of the Constitution of the Islamic Republic of Pakistan 1973 ("Constitution") praying for their release on bail till decision of the case. The High Court dismissed their petitions vide its consolidated order dated 26.06.2019 ("impugned order"). They have, therefore, filed the present petitions, under Article 185(3) of the Constitution, for leave to appeal against the said order of the High Court.

2. The allegations against the petitioner, Muhammad Iqbal Khan Noori, are that he as the shareholder and director of a dummy and front company, Messrs Parthenon (Pvt.) Ltd, fraudulently obtained loans from the National Bank of Pakistan and the Summit Bank and misappropriated the same by extending the benefit to the real beneficiaries, i.e., the directors of Messrs Park Lane Estates (Pvt.) Ltd., hence causing loss to the Banks and Government exchequer. While the other petitioner, Muhammad Hanif, is alleged to have abetted other accused persons/ beneficial owners in fraudulently obtaining the financial facility (loan) from the said Banks, in his capacity as the accountant in Messrs Park Lane Estates (Pvt.) Ltd. and the company secretary in the front/dummy company, Messrs Parthenon (Pvt.) Ltd.

3. We have heard the learned counsel for the parties and have gone through the record with their able assistance. The High Court has, in the impugned order, observed while declining the relief of bail prayed

for that "[t]he offence with which the petitioners have been charged falls within the prohibitory clause of section 497 Cr.P.C." section 9(b) of the Ordinance has specifically made section 497, along with other related sections, of the Code of Criminal Procedure, 1898 ("Cr.P.C") to be not applicable in NAB cases while prohibiting Courts to grant bail to persons accused of offences under the Ordinance. The said observation of the High Court has, therefore, prompted us to elucidate briefly that these are the grounds under the Constitution and not the statutory grounds mentioned in section 497 of the Cr.P.C, which are relevant and are to be considered by the High Courts for allowing or declining bail to any person accused of an offence under the Ordinance.

4. It needs hardly any argument to state that provisions of section 9(b) of the Ordinance being sub-constitutional legislation do not affect the constitutional jurisdiction of the High Courts under Article 199 of the Constitution. Clauses (1)(a)(ii) and (1)(b)(i) of Article 199 empower the High Courts to pass orders of the kind[1] of writ of certiorari[2] and writ of habeas corpus[3] against persons performing functions in connection with the affairs of the Federation, a Province or a local authority and Clause (1)(c) of that Article authorizes to make an order giving appropriate directions to any person or authority for the enforcement of any of the Fundamental Rights.[4] Such orders, under Article 199, can also be passed in relation to the actions of arrest and detention of a person by an executive authority. That is why this Court held in Asfandyar Wali v. Federation[5] that the High Courts have the power to grant bail, under Article 199 of the Constitution, to any person accused of an offence under the NAB Ordinance, independent of any statutory source of jurisdiction and notwithstanding the prohibition contained in section 9(b) of the Ordinance.

5. Under our democratic constitutional scheme, firmly anchored in the rule of law, the constitutional courts are to jealously protect and safeguard the fundamental rights of a person. The High Court, under Article 199, has the power to judicially review the order passed by the Executive, viz, Chairman NAB or some other authorized officer of the NAB, regarding arrest and detention of a person. Article 4 mandates that no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. Article 9 is a cherished fundamental right of a person, which, inter alia, guarantees right to liberty, which may be curtailed "save in accordance with law." The phrase except or save in accordance with law implies that not only should the procedural requirements of the "law" be fully met but also its substantive content i.e., there must be sufficient material/ evidence on the record that can justify the application of such a "law." Therefore, material/evidence must be sufficient enough to persuade the constitutional court to deprive an individual of his fundamental right. The requirement of sufficiency of material is also echoed in the right guaranteed under Article 10, which requires that any person who is arrested shall not be detained in custody without being informed of the grounds for such arrest. The word "grounds" used in Article 10 is not limited to mere allegations but means allegations supported by sufficient material/evidence connecting the person with the offence justifying his arrest and detention. Article 10-A creates a constitutional obligation to conduct a fair trial and ensures due process. The spectrum of fair trial and due process is extensive and over-arching; an arrest and detention of a person without any sufficient incriminating material/ evidence would offend his right to fair trial. Right to dignity under Article 14 is an absolute constitutional standard, which is not subject to law. This is because dignity inheres in a human person and is not granted by law or cannot be taken away by law.[6] Human dignity encapsulates the notion that every person has inherent equal worth; no one's life and liberty is more important than any other person's. Arresting and detaining a person without any incriminating material offends his or her right to dignity. This brings us to the most familiar maxim in criminal justice: the presumption of innocence - the principle that a person is presumed innocent until proven guilty by a court of law. This principle is pillared on constitutional right to liberty, fair trial and human dignity. This presumption can only be dislodged if there is sufficient incriminating material against a person as underlined and reinforced by the aforesaid constitutional rights. Over the years reasonableness and proportionality have also come to be recognized as established grounds of judicial review of the executive action.[7] Thus, while exercising jurisdiction under Article 199, the High Court has to examine the

order of arrest and detention passed by the Chairman NAB and see if it passes the constitutional muster. The High Court while exercising its jurisdiction under Article 199 of the Constitution for the enforcement of fundamental rights can pass appropriate orders, which include an unconditional release or release on bail, to grant the relief to the aggrieved person.**8** It is for the enforcement of fundamental rights under the Constitution and not the sub-constitutional statutory grounds provided in section 497, Cr.P.C., that this Court has been granting bails to the accused persons in NAB cases in exercise of constitutional jurisdiction under Article 199 read with Article 185(3) of the Constitution, mainly on the grounds of: (i) delay in conclusion of the trial,**9** (ii) life-threatening health condition of the accused,**10** and (iii) non-availability of sufficient incriminating material against the accused.**11**

6. The Ordinance requires the Chairman NAB to form an "opinion" if proceedings are to be initiated against any person and the matter referred for inquiry or investigation. After appraising the material and the evidence collected during the inquiry or investigation, the Chairman NAB, if finds that there is "sufficient material" to justify filing of a reference, refer the matter to the Accountability Court for trial. While section 24(a) of the Ordinance provides that the Chairman NAB shall have the power, at any stage of the inquiry or investigation under this Ordinance, to direct that the accused, if not already arrested, shall be arrested. Section 24(d) mandates that NAB shall, as soon as may be, inform the accused of the "grounds" and "substance" on the basis of which he has been arrested. Section 5(a) defines that "accused" shall, inter alia, include a person in respect of whom there are "reasonable grounds" to believe that he is or has been involved in the commission of any offence triable under this Ordinance. Section 12(a) states that the Chairman NAB or the Court trying an accused for any offence as specified under the Ordinance, may, at any time, if there appear reasonable grounds for believing that the accused has committed such an offence, order the freezing of his property. The combined reading of all these provisions of the Ordinance leaves no room for doubt that the law authorises proceedings against a person accused of an offence under the Ordinance, and for the freezing of his property, only when there are reasonable grounds for believing that the accused has committed an offence triable under the Ordinance.

7. In order to ascertain whether "reasonable grounds" exist or not, the Court should not probe into the merit of the case, but restrict itself to the material placed before it by the prosecution (NAB) to see whether some tangible material/ evidence is available against the accused which may lead to the inference of his guilt. Mere accusation of an offence would not be sufficient to disentitle an accused from being bailed out. There should be "reasonable grounds" as distinguished from mere allegations or suspicion. It is for the prosecution (NAB) to show reasonable grounds to believe that the accused has committed the crime. If the Court is not satisfied that there exist reasonable grounds to believe that the accused is guilty, the Court is to grant bail in enforcement of the aforesaid fundamental rights. Pre-trial arrest and detention of the accused casts a heavy burden on the conscience of the court. If after trial the accused is acquitted there is no recompense or reparation for the loss of his valuable years spent behind bars including its economic, social and psychological impact on the accused, as well as, his family or near ones due to denial of bail. The sufficiency of material/ evidence connecting the accused with the crime must therefore be viewed with utmost care and caution at the bail stage.

8. Coming to the merits of the case, we have carefully gone through the material available on record, to ascertain whether reasonable grounds and sufficient incriminating material exist for believing that the petitioners have committed the offence alleged, as arrest and detention on the basis of reasonable grounds and sufficient incriminating material meet the requirement of fair trial, due process and human dignity. The material on the record indicates that the petitioner, Muhammad Iqbal Khan Noori, is the Director, while the petitioner, Muhammad Hanif, is the Accountant, in M/s. Parthenon (Pvt.) Ltd., the company which availed the financial facility (loan) from the Banks. However, they have no concern with the management of M/s. Park Lane Estates (Pvt.) Ltd., whose Directors are alleged to be the ultimate beneficiary of the loan. The petitioners have not disputed obtaining the loan from the Banks by Messrs Parthenon (Pvt.) Ltd. against the security of mortgaged property. Their stance is that the loan was obtained for the company, and not for their personal benefit, against mortgaging the property to the satisfaction of

the Banks. They assert that they have not committed any fraud in this regard with the Banks, nor have the Banks made any complaint to the NAB alleging fraud against them. The Banks have filed suits for recovery of their loan in the court of competent jurisdiction, which are pending adjudication. If, after the decree, their company fails to pay the decretal amount, the decree would be satisfied by auction of the mortgaged property. Neither the Banks nor the NAB has alleged that the property mortgaged against the loan does not exist or its ownership is disputed or forged. We, for our satisfaction as to the version of the petitioners, issued notice to the said Banks in the present petitions; whose representatives have appeared before us and verified that the Banks have filed suits for recovery of the loan amount with interest due thereon against the borrowers as well as against the mortgagers of the property, which are pending adjudication. We asked the learned counsel for the NAB and the representative of the Banks to show us from the material available on record of the case as to how the petitioners have committed any fraud or forgery, or the offence of corruption or corrupt practices as defined in section 9 of the Ordinance, in obtaining the loan for the company they were working for, but they failed to point out any such material. We are, therefore, not satisfied, in view of the material currently available on record of the case, that there exist reasonable grounds to believe that the petitioners have committed the offence alleged. The petitioners were arrested in the present case in the month of April 2019; a period of more than two years has lapsed since then, but the completion of the trial is not yet in sight, for no fault of the petitioners.

9. In view of these circumstances, we find that the further detention of the petitioners in the case would be without lawful authority. We are of the considered view that it was a fit case for exercise of constitutional jurisdiction by the High Court, under Article 199 of the Constitution. We, therefore, convert these petitions into appeals and allow the same. We set aside the impugned order, accept their constitutional petitions and make order that the petitioners shall be released on bail subject to their furnishing bail bonds in the sum of rupees one million each with one surety each in the like amount to the satisfaction of learned Accountability Court. Needless to say that the observations made in this order are tentative and shall not influence the trial court while concluding the case after recording evidence.

10. Before parting with the judgment, we think it our obligation to mention that the learned counsel for the petitioners, during arguments, also emphasized the points that the NAB and Accountability Court have no jurisdiction to proceed in the present matter without a reference from Governor, State Bank of Pakistan as provided in section 31D of the Ordinance, and that only the relevant Court under the Financial Institutions (Recovery of Finances) Ordinance 2001 has jurisdiction to proceed in the matter. The High Court has not given any finding on these two points in the impugned order. We also do not consider it proper to decide these points in the present bail matter, and leave them open to be agitated by the petitioners, if so advised, before the trial court, i.e., the Accountability Court, as the objection pertaining to the jurisdiction of a Court or Tribunal is to be taken first of all before the same Court or Tribunal for its decision.[12]

11. Foregoing are the reasons for our short order dated 16.6.2021, whereby these petitions were converted into appeals and allowed. For the sake of convenience and for completion of record, the same is reproduced hereunder:-

> For the reasons to be recorded later, petitioners are granted bail subject to their furnishing bail bonds in the sum of rupees one million each with one surety each in the like amount to the satisfaction of learned Accountability Court. Both these petitions are converted into appeal and allowed.

MWA/M-59/SC Bail granted.

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1 The use of the terminology of traditional "writs" was done away with in the 1962-Constitution and this discontinuance was carried on in the 1973-Constitution by the Legislature, making the exercise

of constitutional jurisdiction untrammelled by the substantive limitations and procedural formalities of the old prerogative writs. See Manzoor Ilahi v. Federation PLD 1975 SC 66 per Salahuddin, J. and Paper on "Judicial Review of Administrative Action" by Fazal Karim.

2 Talat Ishaq v. NAB PLD 2019 SC 112.

3 Government of Sindh v. Raeesa Farooq1994 SCMR 1283.

4 Manzoor Ilahi v. Federation PLD 1975 SC 66 per Anwar ul Haq, J.

5 PLD 2001 SC 607.

6 Erin Daly, James R. May - Dignity Law - Global recognition, cases and perspectives. (see preface)

7 See Salman Rafique v. National Accountability Bureau PLD 2020 SC 456.

8 Manzoor Ilahi v. Federation PLD 1975 SC 66.

9 Anwar Saifullah v. State 2001 SCMR 1040; Zulfiqar Ali v. State PLD 2002 SC 546; Arif Sharif v. Chairman, NAB 2004 SCMR 1805; Aga Jehanzeb v. NAB 2005 SCMR 1666 and Himesh Khan v. NAB 2015 SCMR 1092.

10 Zulfiqar Ali v. State PLD 2002 SC 546; Saeed Mehdi v. State 2002 SCMR 282 and Nawaz Sharif v. State 2019 SCMR 734.

11 Asif Zardari v. Federation 2005 SCMR 422 and Maqbool Ahmed v. NAB 2016 SCMR 154.

12 Abbas Hussain v. State 1992 SCMR 320

**P L D 2021 Supreme Court 927**

**Present: Umar Ata Bandial, Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed, JJ**

**MUHAMMAD ARSHAD NADEEM---Appellant**

**Versus**

**The STATE---Respondent**

Criminal Petition No.408-L of 2021, decided on 13th July, 2021.

(Against the order of Lahore High Court, Lahore dated 14.12.2020, passed in Crl. Misc. No. 62691-B of 2020).

Per Syed Mansoor Ali Shah, J; Umar Ata Bandial, J agreeing; Qazi Muhammad Amin Ahmed also agreeing but with different reasons.

**(a) Supreme Court Rules, 1980---**

----O.XXIII, R. 2, Second proviso.---Constitution of Pakistan, Art. 185(3)---Petition for leave to appeal in a criminal matter filed before the Supreme Court---Condonation of delay---Sufficient cause, determination of---Sufficiency of the cause was to be determined in each case on the basis of its own peculiar facts and circumstances.

Sherin v. Fazal Muhammad 1995 SCMR 584 ref.

**(b) Supreme Court Rules, 1980---**

----O.XXIII, R. 2, Second proviso.---Constitution of Pakistan, Arts. 9, 10A, 14, 185(3)---Petition for leave to appeal in a criminal matter filed before the Supreme Court---Condonation of delay---Sufficient cause---In cases relating to imprisoned accused (seeking post-arrest bail) or convicted persons sufficient cause for condoning delay was to be viewed through the lens of fundamental rights to liberty, dignity and fair trial, and determined with a lenient and liberal approach for providing such persons with equal access to court and proper opportunity to defend themselves---Person approaching a court of law for the redressal of his grievance from behind bars, suffered a disability in comparison to those who enjoyed liberty and freedom of movement---Incarceration of an accused seeking post arrest bail by itself constituted sufficient cause to allow condonation of delay, unless it was established that the delay was caused by the accused due to some ulterior motive.

Per Syed Mansoor Ali Shah, J [Majority view]

Consistent practice of the Supreme Court was to lean in favour of deciding on merits, the petitions including jail petitions, for leave to appeal and the appeals filed by or on behalf of the persons imprisoned against their convictions and sentences by condoning the delay with a lenient and liberal approach, in the interest of justice. The reason for taking such a permissive view of sufficient cause in the said cases appeared to be founded on the assumption that a person behind bars had a restricted access to the outside world; as a result he faced numerous impediments in pursuing his legal remedies before the courts. The delay, therefore, usually occurred due to constraints imposed on him for being in prison and not because of his contumacious conduct or some ulterior purpose.

Muhammad Bakhsh v. State 1968 SCMR 1269; Amjad Ali v. M.C.B. 2002 CLD 1143; Mureed v. State 2003 SCMR 64; Zafar v. Muhammad Abad 2011 SCMR 218 and Director FBR v. Akhtar Zaman 2011 SCMR 1951 distinguished.

Muhammad Nawaz v. State PLD 2002 SC 287; Qalab Ali v. Sipahia 2005 SCMR 1857; Badar Munir v. State 2009 SCMR 569; Razia v. State 2009 SCMR 1428; Muhammad Fayyaz v. State 2012 SCMR 522; Faiz-Ur-Rehman v. State 2012 SCMR 538 and Asia Bibi v. State PLD 2019 SC 64 ref.

In a criminal case where the liberty and freedom of a person was at stake, sufficient cause was to be viewed by the Court through the lens of fundamental rights guaranteed under the Constitution, in particular through the right to liberty, dignity and fair trial guaranteed to an accused under Articles 9, 14 and 10A of the Constitution, which primarily translated into providing the accused, behind bars, with equal access to court and proper opportunity to defend and avail remedies allowed by law, as were available to a free person.

The reasons to condone delay in jail petitions or criminal appeals filed against convictions applied with same force to matters of post-arrest bail, as it also attracted the right to liberty, human dignity and fair trial. A person approaching a court of law for the redressal of his grievance from behind bars, suffered a disability in comparison to those who enjoyed liberty and freedom of movement. Therefore, incarceration of the accused-petitioner seeking post arrest bail by itself constituted sufficient cause to allow condonation of delay, unless it was established that the delay was caused by the petitioner due to some ulterior motive. Per Qazi Muhammad Amin Ahmed, J [agreeing with his own views]

Supreme Court being the highest Court of appeal ordinarily did not interfere with the discretion exercised by a High Court in bail matters, if found reasonably within the remit of law; it was only in those extraordinary situations, manifestly requiring further probe into the guilt of an offender that may represent a compelling option for the Supreme Court to substitute finding recorded by the High Court and in so doing the Supreme Court had shown a consistent generosity in condoning a belated approach beyond prescribed period of limitation. It was even more generous in examining the propriety of a conviction, impugned beyond the period of limitation.

Prosecution of offences was essentially a State attribute as well as a responsibility that it owed to its people to protect their life and liberty; it was also important to safeguard the society by placing an effective and meaningful control on criminal behaviour to deter the potential offenders and it was for this reason that right of freedom was subject to observance of laws as well as under the shadow of equal protection thereof. However, the forfeited freedom may be restored through recourse to mechanisms provided under the procedural law. Grant of bail, having regard to the categories of offences providing different sentences, was one form of restoration of interim freedom pending trial. Thus, in the given statutory framework, consideration of a motion warranted a dynamic and liberal approach being the only appropriate course to ensure a judicial oversight on an unjustified detention, though temporary, even beyond the prescribed period of limitation as it conferred no vested right on the prosecution.

Another reason for this latitude was that flux of time could not validate a flawed adjudication in criminal jurisdiction involving one sided irreversible corporeal consequences for an alleged offender and, thus, such a liberal approach was most essential to ensure safe administration of criminal justice.

Per Syed Mansoor Ali Shah, J [Majority view]

**(c) Criminal Procedure Code (V of 1898)---**

----S. 497---Constitution of Pakistan, Art. 185(3)---Petition for leave to appeal before the Supreme Court seeking bail---Bail, grant of---Scope---Practice of the Supreme Court was not to intervene in bail matters ordinarily, leaving them to the discretion of the courts inquiring into the guilt of the accused persons, unless it was found that those courts had exercised the discretion arbitrarily, perversely or contrary to the settled principles of law regulating bail matters.

Haq Nawaz v. State 1969 SCMR 174 and Zaro v. State 1974 SCMR 11 ref.

**(d) Criminal Procedure Code (V of 1898)---**

----S. 497---Constitution of Pakistan, Art. 185(3)---Petition for leave to appeal before the Supreme Court seeking bail---Offence falling within prohibitory clause of S.497(1), Cr.P.C---Bail, grant/refusal of---Principles.

Bail was not to be withheld as a punishment. However, refusal of bail to an accused found prima facie involved in the commission of offences falling within the prohibitory clause of section 497(1), Cr.P.C. was not a punitive measure but was more of a preventive step, taking care of the bi-focal interests of justice towards the right of the individual involved and the interest of the society affected. The law presumed that the severity of the punishment provided for offences falling within the prohibitory clause of section 497(1), Cr.P.C. was such that it was likely to induce the accused person to avoid conviction by escaping trial or by tampering with the prosecution evidence including influencing the prosecution witnesses. The law allowed bail, in such cases, if there were no reasonable grounds for believing that the accused had committed a non-bailable offence, but there were sufficient grounds for further inquiry into his guilt. Otherwise by declining bail, the courts ensured the presence of the accused person to face trial and protect the prosecution

evidence from being tampered with or the prosecution witness from being influenced. The courts attempted to balance the interest of the society in bringing the offenders to justice and the presumption of innocence in favour of the accused person, by determining whether or not there were reasonable grounds for believing that the accused person had committed the offence, in exercising their discretion to grant or decline the relief of bail.

**(e) Criminal Procedure Code (V of 1898)---**

----S. 497---Constitution of Pakistan, Art. 185(3)---Penal Code (XLV of 1860), Ss. 409, 420, 468, 471, 477-A & 109---Prevention of Corruption Act (II of 1947), S. 5(2)---Preparing forged deed, managing fake Bank guarantees, and misappropriation of public money---Bail, refusal of---Allegation against the accused was that he along with the co-accused prepared forged deed of Joint Venture for a builder and contractor, obtained two construction contracts worth Rs.67,92,88,000/- on the basis of that deed for construction of the building of the government school, managed fake Bank guarantees, and misappropriated an amount of Rs.13,79,06,538/- of the Provincial Government paid for construction of the building of the school---Counsel for accused was unable to explain why the accused had been a beneficiary of Rs 20 million, in the absence of any construction supplies made to the contractors of the Joint Venture---Counsel although submitted that said payment was the commission due to the accused, yet remained unable to explain the nature of the said commission---In such background, the conclusion of the High Court that there were reasonable grounds for believing that the accused had committed the offences alleged was consistent with the incriminating material available on the record of the case, and was in no manner perverse or arbitrary---Petition for leave to appeal was dismissed, and accused was refused bail.

Zahid Saleem, Advocate Supreme Court for Petitioner.

Syed Nayab Hussain Gardezi, D.A.G. for the State with Aftab Gohar, S.I.

Syed Najaf Hussain Shah, Advocate Supreme Court for the Complainant.

Date of hearing: 13th July, 2021.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---** Application for condonation of delay in a post-arrest matter Crl. M. A. No. 123-L of 2021

There is a delay of 72 days in filing the present petition for leave to appeal against the order of the High Court whereby post-arrest bail has been declined to the petitioner. In the application for condonation of delay the petitioner submits that he is behind bars and there is no male member in his family to pursue the case; the delay has occurred in contacting and engaging the counsel for filing the petition, hence it is neither deliberate nor intentional. The counsel for the State and the complainant have opposed the application and have placed reliance on the judgments of this Court reported as Muhammad Bakhsh v. State 1968 SCMR 1269, Amjad Ali v. M.C.B. 2002 CLD 1143, Mureed v. State 2003 SCMR 64, Zafar v. Muhammad Abad 2011 SCMR 218 and Director FBR v. Akhtar Zaman 2011 SCMR 1951.

2. Rule 2 of Order XXIII, Supreme Court Rules, 1980 provides that a Petition for leave to appeal, under Article 185(3) of the Constitution, in criminal matter shall be lodged within thirty days from the date of judgment or final order sought to be appealed from. The second proviso to the said Rule authorizes the Court to condone the delay, if "sufficient cause" is shown. The expression "sufficient cause" cannot be defined with any precision or exactitude; the sufficiency of the cause is, therefore, to be determined in each case on the basis of its own peculiar facts and circumstances.**1**

3. It has been the consistent practice of this Court to lean in favour of deciding on merits, the petitions including jail petitions, for leave to appeal and the appeals filed by or on behalf of the persons imprisoned against their convictions and sentences by condoning the delay with a lenient and liberal approach, in the interest of justice.**2** The reason for taking such a permissive view of "sufficient cause" in the said cases appears to be founded on the assumption that a person behind bars has a restricted access to the outside world; as a result he faces numerous impediments in pursuing his legal remedies before the courts. The delay, therefore, usually occurs due to constraints imposed on him for being in prison and not because of his contumacious conduct or some ulterior purpose. In a criminal case where the liberty and freedom of a

person is at stake, "sufficient cause" is to be viewed by the Court through the lens of fundamental rights guaranteed under the Constitution, in particular through the right to liberty, dignity and fair trial guaranteed to an accused under Articles 9, 14 and 10A of the Constitution, which primarily translates into providing the accused, behind bars, with equal access to court and proper opportunity to defend and avail remedies allowed by law, as are available to a free person.

4. The reasons to condone delay in jail petitions or criminal appeals filed against convictions applies with same force to matters of post-arrest bail, as it also attracts the right to liberty, human dignity and fair trial. It would be fair to assume that a person approaching a court of law for the redressal of his grievance from behind bars, suffers a disability in comparison to those who enjoy liberty and freedom of movement. Therefore, incarceration of the petitioner seeking post arrest bail by itself constitutes "sufficient cause" to allow condonation of delay, unless it is established that the delay was caused by the petitioner due to some ulterior motive.

5. The cases referred to and relied upon by the counsel for the State and the counsel for the complainant have different facts and do not negate the said rule of practice. The cases of Zafar and Akhtar Zaman relate to petitions for leave to appeal filed by the complainants and not by the imprisoned accused persons. They were filed against bail granting order and not against refusal of bail and order refusing to cancel the bail granted, respectively. The case of Amjad Ali arose out of a civil matter, i.e., an application for setting aside an ex-parte decree. In the case of Mureed, the Court after hearing the argument of the parties, dismissed the petition on merits as well as on the ground of limitation, and not solely on the point of limitation. In the case of Muhammad Bakhsh, the ground of ignorance of law, viz, "a relative of the petitioners who was pursuing the case for them was under the impression that there was no time limit for filing a petition in this Court in a bail matter" was pleaded for condoning the delay which the Court did not accept stating it to be "manifestly untenable." Even otherwise, there is no discussion in these cases on the points deliberated above; they can, therefore, hardly be cited as guiding precedents on the point.

6. The ground stated by the petitioner for condonation of the delay, in the present case, has not been disputed on behalf of the State and the complainant. We, therefore, accept it as a "sufficient cause" for condoning the delay, in the facts and circumstances of the present case, by following the practice of taking a lenient and permissive view in cases of persons imprisoned, for the above reasons. We, therefore, allow the application and condone the delay.

Petition for leave to appeal

Crl.P.L.A. No. 408-L of 2021

7. The petitioner seeks leave to appeal against order dated 04.11.2020 of the High Court whereby his application for grant of post-arrest bail filed under section 497, Cr.P.C. has been dismissed, in case FIR No.37/2020 dated 07.10.2020 registered at Police Station FIA/CCC, Lahore for the offences under sections 409, 420, 468, 471, 477-A/ 109 of the P.P.C., and section 5 of the Prevention of Corruption Act, 1947.

8. As per the crime report (FIR), the allegations against the petitioners, briefly stated, are that he along with other co-accused prepared forged deed of Joint Venture for Ajwad Builders with Mehsud Engineers and Contractors, obtained two construction contracts of worth Rs.67,92,88,000/- on the basis of that deed for construction of the building of the Danish School in District Bhakkar, managed fake bank guarantees, and misappropriated an amount of Rs.13,79,06,538/- of the Punjab Government paid for construction of the building of the Danish School.

9. We have heard the arguments of the learned counsel for the parties, on merits of the petition, at some length and perused the record of the case minutely.

10. The High Court, after thorough and careful examination of the material available on record of the case, has observed in the impugned order that "there is sufficient incriminating material available on record showing strong nexus of the petitioner with this case", and has therefore declined the grant of relief of post-arrest bail to the petitioner. It is the practice of this Court not to intervene in bail matters ordinarily, leaving them to the discretion of the courts inquiring into the guilt of the accused persons, unless it is found that those courts have exercised the discretion arbitrarily, perversely or contrary to the settled principles

of law regulating bail matters.**3** The learned counsel for the petitioner has failed to point out that the said observation of the High Court and the exercise of discretion in declining the relief of bail to the petitioner in offences, some of which fall within the prohibitory clause of section 497(1), Cr.P.C. as well as the prohibitory provisions of Section 5(6) of the Offences in Respect of Banks (Special Courts) Ordinance, 1984, are the result of gross misreading of the material available on record, and are thus arbitrary and perverse, or that the High Court has acted contrary to some settled principle of law in exercise of that discretion.

11. It is by now well-established that bail is not to be withheld as a punishment. However, refusal of bail to an accused found prima facie involved in the commission of offences falling within the prohibitory clause of section 497(1), Cr.P.C. is not a punitive measure but is more of a preventive step, taking care of the bi-focal interests of justice towards the right of the individual involved and the interest of the society affected. The law presumes that the severity of the punishment provided for offences falling within the prohibitory clause of section 497(1), Cr.P.C. is such that it is likely to induce the accused person to avoid conviction by escaping trial or by tampering with the prosecution evidence including influencing the prosecution witnesses.**4** The law allows bail, in such cases, if there are no reasonable grounds for believing that the accused has committed a non-bailable offence, but there are sufficient grounds for further inquiry into his guilt. Otherwise by declining bail, the courts ensure the presence of the accused person to face trial and protect the prosecution evidence from being tampered with or the prosecution witness from being influenced. The courts attempt to balance the interest of the society in bringing the offenders to justice and the presumption of innocence in favour of the accused person, by determining whether or not there are reasonable grounds for believing that the accused person has committed the offence, in exercising their discretion to grant or decline the relief of bail.

12. In the present case, the learned counsel for the petitioners has been unable to explain why the petitioner has been a beneficiary of Rs. 20 million, in the absence of any construction supplies made to the contractors of the Joint Venture. The learned counsel although submitted the said payment was the "commission" due to the petitioner, yet remained unable to explain the nature of the said commission. In this background, we find that the conclusion of the High Court that there are reasonable grounds for believing that the petitioner has committed the offences alleged is consistent with the incriminating material available on the record of the case, and is in no manner perverse or arbitrary. The impugned order, therefore, does not call for any interference by this Court. The petition being devoid of merit is hereby dismissed. It is needless to mention that the observations made in the impugned order as well as in this order are tentative and shall not influence the trial court while concluding the case after recording evidence.

Sd/-

JUDGE

Sd/- Sd/-

JUDGE JUDGE

**QAZI MUHAMMAD AMIN AHMED, J**.---I agree with the conclusions drawn by Syed Mansoor Ali Shah, J. with concurrence of Umar Ata Bandial, J., Judges with erudition par excellence, both on condonation of delay in filing of Criminal Petition No.408-L of 2021 as well as its dismissal on merit, however, my agreement on condonation of delay in filing of criminal petitions, both by under-trial prisoners or convicts, is structured upon reasons, somewhat different; these are elaborated below:

Though the Statutes provide period of limitation for filing an appeal against conviction or acquittal, as the case may be, there is no timeframe restricting an under-trial prisoner to make a motion for his release on bail before a Magisterial Court, Court of Session or the High Court pending conclusion of the trial, however, his approach to the Supreme Court for interlocutory relief, through leave of the Court, is subject to a statutory timeframe. The Supreme Court being the highest Court of appeal ordinarily does not interfere with the discretion exercised by a High Court in bail matters, if found reasonably within the remit of law; it is only in those extraordinary situations, manifestly requiring "further probe" into the guilt of an offender

that may represent a compelling option for this Court to substitute finding recorded by the High Court and in so doing the Court has shown a consistent generosity in condoning a belated approach beyond prescribed period of limitation. It is even more generous to examine the propriety of conviction, impugned beyond the period of limitation.

Prosecution of offences, injury to an individual notwithstanding, is essentially a State attribute as well as a responsibility that it owes to its people to protect their life and liberty; it is also important to safeguard the society by placing an effective and meaningful control on criminal behaviour to deter the potential offenders and it is for this reason that right of freedom is subject to observance of laws as well as under the shadow of equal protection thereof. However, the forfeited freedom may be restored through recourse to mechanisms provided under the procedural law, principles whereof are by now well settled. Grant of bail, having regard to the categories of offences providing different sentences, is one form of restoration of interim freedom pending trial and, thus, in the given statutory framework, consideration of a motion warrants a dynamic and liberal approach being the only appropriate course to ensure a judicial oversight on an unjustified detention, though temporary, even beyond the prescribed period of limitation as it confers no vested right on the prosecution.

Yet another reason for this latitude is that flux of time cannot validate a flawed adjudication in criminal jurisdiction involving one sided irreversible corporeal consequences for an alleged offender and, thus, such a liberal approach is most essential to ensure safe administration of criminal justice.

Sd/-

JUDGE

MWA/57/SC Bail refused.

***

1 See Sherin v. Fazal Muhammad 1995 SCMR 584.

2 See Muhammad Nawaz v. State PLD 2002 SC 287; Qalab Ali v. Sipahia 2005 SCMR 1857; Badar Munir v. State 2009 SCMR 569; Razia v. State 2009 SCMR 1428; Muhammad Fayyaz v. State 2012 SCMR 522; Faiz-Ur-Rehman v. State 2012 SCMR 538 and Asia Bibi v. State PLD 2019 SC 64

3 See Haq Nawaz v. State 1969 SCMR 174 and Zaro v. State 1974 SCMR 11.

4 The constitutionality of the presumption as embodied in the prohibitory clause of section 497(1), Cr.P.C., wherein an accused, applying for bail is not provided with an opportunity to rebut it, is yet open to examination on the touchtone of the fundamental rights.

**P L D 2021 Supreme Court 940**

**Present: Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed, JJ**

**COMMISSIONER INLAND REVENUE, MULTAN ZONE, RTO, MULTAN---Petitioner**

**Versus**

**FALAH UD DIN QURESHI---Respondent**

C. P. No. 159 of 2021, decided on 12th October, 2021.

(Against the order of Lahore High Court, Multan Bench dated 11.02.2020, passed in T.R. No.8 of 2019)

**Supreme Court Rules, 1980---**

----O. I, R. 2 & O. IV, Rr. 2, 6, 15, 22, 26, 30, 31 & 32---Advocate-on-Record ( AOR )---Responsibilities/duties towards the client and the Supreme Court stated.

Principal responsibility under the Supreme Court Rules, 1980 ( the Rules ) to act, appear and plead on behalf of the party was that of the Advocate-on-Record ( AOR ). It was the AOR who engaged the Advocate Supreme Court ( ASC ) and it on the instructions of the AOR that such ASC pleaded the case of the party. Engagement of the ASC did not absolve the AOR of his primary responsibility to attend to the case on behalf of the party before the Court, and in case the ASC was not available, it was the responsibility of the AOR to appear and plead the case of the party. It was, of course, the discretion of the Court to grant adjournment in any particular case if the ASC was not available, considering the nature and complexity of the case, but that did not relieve the AOR from his responsibility under the Rules to be fully prepared to act, appear and plead the case of the party, irrespective whether the ASC was present or not.

The concept of enrolling AORs at the Supreme Court, as the Rules signified, was to ensure that the cases filed in the Supreme Court were handled by certain designated lawyers called the AORs; this ensured proper management of cases, timely service of court-process to parties and certainty of representation before the Court leaving no margin for adjournments as was in other courts. All this was to achieve timely decisions of cases by the apex Court. Supreme Court observed that if the AORs were not performing their responsibility, it certainly begged the questions: whether the institution of AORs was required anymore?; had it outlived its utility and was causing more disservice to the litigants and the Court than achieving the benefits of this institution alluded to in the Rules?

Syed Rifaqat Husain Shah, Advocate-on-Record for Petitioner.

Nemo for Respondent.

Date of hearing: 12th October, 2021.

**ORDER**

**SYED MANSOOR ALI SHAH, J**.---No one appeared on behalf of the petitioner when the case was called as there was a written request for adjournment by the Advocate-on-Record ("AOR") for the petitioner on behalf of the Advocate Supreme Court of Pakistan ("ASC"). We sent for the AOR in the case, who appeared later in the day. He was asked to address the Court on the question of limitation, as the petition for leave to appeal before this Court was barred by time and the application for condonation of the delay did not disclose any sufficient cause to condone the delay. Learned AOR, instead of arguing the application, submitted without any remorse that he was not aware of the application (which had been signed and filed by him) and did not even have the file of the case, with him.

2. We are thus constrained to remind the learned AOR of his responsibilities to his client, the petitioner, and the Court under the Supreme Court Rules, 1980 ("Rules"). Relevant provisions of the Rules are reproduced hereunder for ready reference:

ORDER I, Rule-2

> "Advocate-on-Record" means an Advocate, who is entitled, under these Rules, to act and plead for a party in the Supreme Court. "Party" and all words descriptive of parties to proceedings before the Court (such as "appellant", "respondent", "plaintiff", "defendant" and the like) include, in respect of all acts proposed to be done by an Advocate-on-Record, Advocate-on-Record of the party in question, when it is represented by an Advocate-on- Record....

ORDER IV

ADVOCATES AND ADVOCATES-ON-RECORD

2. A Senior Advocate, an Advocate and an Advocate-on-Record shall be entitled to appear and plead before the Court on signing his respective Roll; Provided that an Advocate shall not be allowed to sign the Roll unless he produces a certificate of enrolment from the Pakistan Bar Council; and Provided further that the Chief Justice and the Judges may refuse to allow a person to sign the Roll or remove his name from the Roll after affording him an opportunity of oral hearing if he has, at any time, been adjudged guilty of professional misconduct or is otherwise considered unfit to be enrolled or allowed to remain as an advocate.

..

6. No Advocate other than an Advocate-on-Record shall appear or plead in any matter unless he is instructed by an Advocate-on-Record.

..

15. No Advocate other than an Advocate-on-Record shall be entitled to act for a party in any proceedings in the Court.

..

22. Every Advocate-on-Record shall, before acting on behalf of any person or party, file in the Registry a power of attorney in the prescribed form authorizing him to act.

..

26. No person having an Advocate-on-Record in the case shall be heard in person save by special leave of the Court:

Provided that where a person is not represented by an Advocate-on-Record or has been permitted by the Court to appear in person, he shall be subject to same discipline and restrictions as are applicable to an Advocate-on-Record.

..

30. Where, on the complaint of any person or otherwise, the Chief Justice or the Court is of the opinion that a Senior Advocate or an Advocate or an Advocate-on-Record has been guilty of misconduct or conduct unbecoming of an Advocate, with regard to any matter concerning the Court, the Chief Justice or the Court may either after affording him an opportunity of oral hearing, take such disciplinary action, including suspension and removal form practice of the Court, against him as it may deem fit, or refer to the Pakistan Bar Council for inquiry and action under the Legal Practitioners and Bar Councils Act, 1973.

31. In an appropriate case, where the Chief Justice or the Court is of the opinion that a Senior Advocate or an Advocate-on-Record is unfit to act and plead as such, the Chief Justice or the Court may, after providing him an opportunity of oral hearing, direct removal of his name from the Roll of Senior Advocates or of Advocates- on-Record, as the case may be.

32. Nothing in this Order shall be deemed to limit or otherwise affect the inherent powers of the Court to make such order and take such action as may be necessary for the conduct and proceedings of the Court.

Perusal of the above Rules shows that the AOR is defined as an Advocate, who is to act and plead for a party in the Supreme Court. The definition of "party" also include an AOR, when such a party is represented by the AOR. Rule 2 of Order IV states that the AOR is entitled to appear and plead before the Court on signing his respective roll. Rule 6 of the said Order provides that no Advocate other than AOR shall appear and plead on behalf of the party unless he is instructed by the AOR while Rule 15 states that no Advocate other than AOR shall be entitled to act on behalf of a party in any proceedings in the Court. Rules 22 and 26 underline that every AOR on submission of his power of attorney shall act on behalf of the party and that no person having an AOR shall be heard in person except with specific leave of the Court.

3. The above provisions clearly show that the principal responsibility under the Rules to act, appear and plead on behalf of the party is that of the AOR. It is the AOR who engages the ASC and it on the instructions

of the AOR that such ASC pleads the case of the party. Engagement of the ASC does not absolve the AOR of his primary responsibility to attend to the case on behalf of the party before the Court, and in case the ASC is not available, it is the responsibility of the AOR to appear and plead the case of the party. It is, of course, the discretion of the Court to grant adjournment in any particular case if the ASC is not available, considering the nature and complexity of the case, but that does not relieve the AOR from his responsibility under the Rules to be fully prepared to act, appear and plead the case of the party, irrespective whether the ASC is present or not.

4. In the instant case, the learned AOR did not even find it appropriate to appear before the Court after having submitted a written application for adjournment on behalf of the ASC, and when he appeared, a simple question was asked by the Court to justify whether condonation of the delay in filing the petition for leave to appeal can be granted on the ground agitated in the application, which stated:

> "2. That since it is the official matter and there are many formalities to be fulfilled while getting the permission of high-ups for filing the petition against any order/judgment before any higher forum which takes time."

The response of the learned AOR was that he does not even have the file of the case. It is important to draw the attention of the AOR to Rules 30 and 31, reproduced above, under which such a behavior may make the AOR liable for misconduct, leading to disciplinary action against him including suspension of his license and removal from the practice of the Court. Therefore, the AOR ought to have taken his responsibility seriously.

5. The concept of enrolling AORs at the Supreme Court, as the Rules signify, is to ensure that the cases filed in the Supreme Court are handled by certain designated lawyers called the AORs; this ensures proper management of cases, timely service of court-process to parties and certainty of representation before the Court leaving no margin for adjournments as is in other courts. All this is to achieve timely decisions of cases by the apex Court. However, if the AORs are not performing their responsibility, as in this case, it certainly begs the questions: Whether the institution of AORs is required anymore? Has it outlived its utility and is causing more disservice to the litigants and the Court than achieving the benefits of this institution alluded to in the Rules?

6. We have examined the application for condonation of delay (C.M.A. No. 949/2021) in the presence of the learned AOR for the petitioner, which does not disclose any sufficient cause for condonation of the delay. The learned AOR has not rendered any assistance or made any other submission. The application for condonation of the delay is found meritless and is therefore dismissed. Consequently, the main petition for leave to appeal is also dismissed as being barred by time.

MWA/C-17/SC Petition dismissed.

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**2022 S C M R 1**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Muhammad Ali Mazhar, JJ**

**SHAKEEL SHAH---Petitioner**

**Versus**

**The STATE and others---Respondents**

Criminal Petition No. 1072 of 2021, decided on 4th October, 2021.

(Against the order of Islamabad High Court, Islamabad dated 08.12.2020 passed in Criminal M. No. 677-B of 2021)

**(a) Criminal Procedure Code (V of 1898)---**

----S. 497(1), third & fourth provisos---Offence not punishable with death---Bail---Delay in conclusion of the trial---Extent and scope of the right of an accused to bail on the statutory ground of delay in conclusion of the trial under the third proviso to S. 497(1), Cr.P.C. and the exceptions to such right provided under the fourth proviso, stated.

Part (a) of third proviso to section 497(1), Cr.P.C. envisaged that in an offence not punishable with death, the trial of the accused was to be concluded within a period of one year from the date of detention of the accused, and in case the trial was not so concluded, the law mandated the release of the accused on bail. The accused, thus, had a statutory right to be released on bail if his trial for such offence was not concluded within a period of one year from the date of his detention. Period of one year for the conclusion of the trial began from the date of the arrest/detention of the accused and it was of little importance as to when the charge was framed and the trial commenced. The purpose and objective of the provision was to ensure that the trial of an accused was conducted expeditiously and the pre-conviction detention of an accused did not extend beyond the period of one year, in cases involving offences not punishable with death. In such cases, if the trial of an accused was not concluded within a year of his detention, the statutory right to be released on bail ripened in his favour.

This statutory right to be released on bail was, however, subject to two exceptions: one was embodied in the third proviso itself and the second was provided in the fourth proviso to section 497, Cr.P.C. As per these exceptions, the right to be released on bail on the ground of delay in conclusion of the trial was not available to an accused if: (i) the delay in conclusion of the trial was occasioned by an act or omission of the accused or by any other person acting on his behalf, or (ii) the accused was a convicted offender for an offence punishable with death or imprisonment for life or was in the opinion of the court a hardened, desperate or dangerous criminal or was accused of an act of terrorism punishable with death or imprisonment for life.

With respect to the first exception the act or omission on the part of the accused to delay the timely conclusion of the trial must be the result of a visible concerted effort orchestrated by the accused. Merely some adjournments sought by the counsel of the accused could not be counted as an act or omission on behalf of the accused to delay the conclusion of the trial, unless the adjournments were sought without any sufficient cause on crucial hearings, i.e., the hearings fixed for examination or cross-examination of the prosecution witnesses, or the adjournments were repetitive, reflecting a design or pattern to consciously delay the conclusion of the trial. Thus, mere mathematical counting of all the dates of adjournments sought for on behalf of the accused was not sufficient to deprive the accused of his right to bail under the third proviso.

The second exception to the right of the accused to be released on bail on the ground of delay in conclusion of the trial was provided in the fourth proviso to section 497, Cr.P.C. According to which the provisions of the third proviso did not apply to the accused who was: (i) a convicted offender for an offence punishable with death or imprisonment for life; or (ii) a hardened, desperate or dangerous criminal, in the opinion of the Court; or (iii) an accused of an act of terrorism punishable with death or imprisonment for life.

Conditions (i) and (iii) above were self-explanatory and must be borne out from the record. Under condition (i), the accused must have been earlier convicted by a court of law for an offence punishable with death or imprisonment for life. Under condition (iii), the accused must be accused of an act of terrorism punishable with death or imprisonment for life. It was condition (ii) which required the Court to apply its judicious mind to the facts and circumstances of the case and make an opinion as to whether or not the accused was a hardened, desperate or dangerous criminal. The words hardened, desperate or dangerous had been couched in between conditions (i) and (iii) and therefore signified the same sense of gravity and seriousness as to the nature of the offence and character of the accused. "Dangerous" meant harmful, perilous, hazardous or unsafe - someone who could cause physical harm or injury or death. "Hardened" was someone who was pitiless, hardhearted, callous or unfeeling and set in his bad ways and no longer likely to change, having a tendency of repeating the offence and was, thus, dangerous to the society. "Desperate" was someone who was reckless, violent and ready to risk or do anything; such person was, therefore, also dangerous to society. All the three words painted a picture of a person, who was likely to seriously injure and hurt others without caring for the consequences of his violent act. Therefore, for this exception to apply, there had to be material to show that the accused was such a person who would pose a serious threat to the society if set free on bail. In the absence of any such material, bail could not be denied to an accused on the statutory ground of delay in conclusion of the trial. Moundar v. State PLD 1990 SC 934 rel.

**(b) Interpretation of statutes---**

----Maxim "noscitur a sociis"---Scope---Word or phrase in an enactment must always be construed in the light of the surrounding text, and their colour and meaning must be derived from their context.

Bennion on Statutory Interpretation. 7th edition. p. 459 ref.

**(c) Interpretation of statutes---**

----Ejusdem generis, principle of---Scope---Ejusdem generis principle was a principle of constriction whereby wide words associated in the text with more limited words were taken to be restricted by implication to matters of the same limited character---For the said principle to apply, there must be sufficient indication of the category or word that could be properly described as the class or genus, which was to control the general words---Genus must be narrower than the general words it was to regulate.

Bennion on Statutory Interpretation. 7th edition. pp. 554 and 557 ref.

Raja Ikram Ameen Minhas, Advocate Supreme Court for Petitioner.

Israr-ul-Haq, Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for the Complainant.

Sub-Inspector Mehboob Hasan and ASI, Ishaq for the State.

Date of hearing: 4th October, 2021.

**ORDER**

**SYED MANSOOR ALI SHAH, J**.---Criminal M. A. No.1276/2021: For the reasons given in the application, the delay in the filing of this criminal petition by the petitioner, an imprisoned person, is condoned. (See Arshad Nadeem v. State[1]).

Criminal Petition No.1072/2021:

2. The petitioner seeks leave to appeal against the order dated 14.07.2021 passed by the Islamabad High Court, whereby post-arrest bail on the statutory ground of delay in the conclusion of the trial, has been denied to him in case FIR No.399 registered at Police Station Sabzi Mandi, Islamabad for offences punishable under sections 392 and 411 read with section 75, P.P.C. The High Court observed that the delay in the conclusion of the trial was caused by the petitioner and that the petitioner having been previously convicted for other offences was a hardened, desperate and dangerous criminal.

3. We have heard the learned counsel for the parties and have examined the record of the case with their able assistance. In order to examine the legality of the impugned order, it would be useful to first examine the extent and scope of the right of an accused to bail on the statutory ground of delay in conclusion of the

trial under the third proviso to section 497(1), Cr.P.C. The said proviso and the related fourth proviso to section 497(1), Cr.P.C. are reproduced hereunder for ready reference and convenience:

497. When bail may be taken in case of non-bailable offence.

(1) ..

Provided

Provided

Provided further that the Court shall, except where it is of the opinion that the delay in the trial of the accused has been occasioned by an act or omission of the accused or any other person acting on his behalf, direct that any person shall be released on bail-

(a) Who, being accused of any offence not punishable with death, has been detained for such offence for a continuous period exceeding one year or in case of a woman exceeding six months and whose trial for such offence has not concluded' or

(b) Who, being accused of an offence punishable with death, has been detained for such offence for a continuous period exceeding two years and in case of woman exceeding one year and whose trial for such offence has not concluded:

Provided further that the provisions of the foregoing proviso shall not apply to a previously convicted offender for an offence punishable with death or imprisonment for life or to a person who, in the opinion of the court, is a hardened, desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life.

The petitioner is charged with offences punishable under sections 392 and 411, P.P.C., which are not punishable with death; his bail plea is, therefore, covered by part (a) of the third proviso to section 497(1), Cr.P.C. The above provision envisages that in an offence not punishable with death,[2] the trial of the accused is to be concluded within a period of one year from the date of detention of the accused, and in case the trial is not so concluded, the law mandates the release of the accused on bail. The accused, thus, has a statutory right to be released on bail if his trial for such offence is not concluded within a period of one year from the date of his detention. The period of one year for the conclusion of the trial begins from the date of the arrest/detention of the accused and it is of little importance as to when the charge is framed and the trial commenced. The purpose and objective of the provision is to ensure that the trial of an accused is conducted expeditiously and the pre-conviction detention of an accused does not extend beyond the period of one year, in cases involving offences not punishable with death. In such cases, if the trial of an accused is not concluded within a year of his detention, the statutory right to be released on bail ripens in his favour.

4. This statutory right to be released on bail is, however, subject to two exceptions: one is embodied in the third proviso itself and the second is provided in the fourth proviso. As per these exceptions, the right to be released on bail on the ground of delay in conclusion of the trial is not available to an accused if: (i) the delay in conclusion of the trial is occasioned by an act or omission of the accused or by any other person acting on his behalf, or (ii) the accused is a convicted offender for an offence punishable with death or imprisonment for life or is in the opinion of the court a hardened, desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life.

Delay in conclusion of the trial if occasioned by an act or omission of the accused or by any other person acting on his behalf.

5. The act or omission on the part of the accused to delay the timely conclusion of the trial must be the result of a visible concerted effort orchestrated by the accused. Merely some adjournments sought by the counsel of the accused cannot be counted as an act or omission on behalf of the accused to delay the conclusion of the trial, unless the adjournments are sought without any sufficient cause on crucial hearings, i.e., the hearings fixed for examination or cross-examination of the prosecution witnesses, or the adjournments are repetitive, reflecting a design or pattern to consciously delay the conclusion of the trial. Thus, mere mathematical counting of all the dates of adjournments sought for on behalf of the accused is not sufficient to deprive the accused of his right to bail under the third proviso. The statutory right to be released on bail flows from the constitutional right to liberty and fair trial under Articles 9 and 10A of the

Constitution. Hence, the provisions of the third and fourth provisos to section 497(1), Cr.P.C must be examined through the constitutional lens and fashioned in a manner that is progressive and expansive of the rights of an accused, who is still under trial and has the presumption of innocence in his favour. To convince the court for denying bail to the accused, the prosecution must show, on the basis of the record, that there is a concerted effort on the part of the accused or his counsel to delay the conclusion of the trial by seeking adjournments without sufficient cause on crucial hearings and/or by making frivolous miscellaneous applications.

6. In the present case, the petitioner was arrested on 21.01.2020 and the charge against him was framed on 08.12.2020. He moved the application for bail on statutory ground of delay in January, 2021. The order sheet of the period commencing from 08.12.2020, the date of framing charge, till the date of his filing the application for bail does not reflect any design, pattern or concerted effort on the part of the accused to delay the conclusion of the trial. The adjournments mentioned in the impugned order are after the lapse of the first year of detention of the accused and are therefore of little significance, besides the impugned order does not discuss whether the said adjournments were on crucial dates and without sufficient cause.

The accused, a hardened, desperate or dangerous criminal, in the opinion of the Court

7. The second exception to the right of the accused to be released on bail on the ground of delay in conclusion of the trial is provided in the fourth proviso. According to which the provisions of the third proviso do not apply to the accused who is:

(i) a convicted offender for an offence punishable with death or imprisonment for life; or

(ii) a hardened, desperate or dangerous criminal, in the opinion of the Court; or

(iii) an accused of an act of terrorism punishable with death or imprisonment for life.

Conditions (i) and (iii) are self-explanatory and must be borne out from the record. Under condition (i), the accused must have been earlier convicted by a court of law for an offence punishable with death or imprisonment for life. Under condition (iii), the accused must be accused of an act of terrorism punishable with death or imprisonment for life. It is condition (ii) which requires the Court to apply its judicious mind to the facts and circumstances of the case and make an opinion as to whether or not the accused is a hardened, desperate or dangerous criminal. The words hardened, desperate or dangerous have been couched in between conditions (i) and (iii) and therefore signify the same sense of gravity and seriousness as to the nature of the offence and character of the accused. The principle that the meaning of a word is recognized by its associates is traditionally expressed in the Latin maxim noscitur a sociis. A word or phrase in an enactment must always be construed in the light of the surrounding text, and their colour and meaning must be derived from their context.[3]

8. Further, the words hardened, desperate or dangerous are to be understood collectively. The ejusdem generis principle is a principle of constriction whereby wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same limited character.[4] For the said principle to apply, there must be sufficient indication of the category or word that can be properly described as the class or genus, which is to control the general words. The genus must be narrower than the general words it is to regulate[5]. Applying this principle to the phrase a hardened, desperate or dangerous criminal, it is the word dangerous which not only meets the requirements of conditions (i) and (iii) discussed above, it is also precise and narrow in order to regulate the meaning of the other two words. "Dangerous" means harmful, perilous, hazardous or unsafe - someone who can cause physical harm or injury or death.[6] "Hardened" is someone who is pitiless, hardhearted, callous or unfeeling and set in his bad ways and no longer likely to change,[7] having a tendency of repeating the offence and is, thus, dangerous to the society. "Desperate" is someone who is reckless, violent and ready to risk or do anything;[8] such person is, therefore, also dangerous to society. All the three words paint a picture of a person, who is likely to seriously injure and hurt others without caring for the consequences of his violent act. Therefore, for this exception to apply, there has to be material to show that the accused is such a person who will pose a serious threat to the society if set free on bail. In the absence of any such material, bail cannot be denied

to an accused on the statutory ground of delay in conclusion of the trial. (See Moundar v. State (PLD 1990 SC 934),

8(sic.) In the present case, the earlier convictions of the petitioner passed in the years 2004-2005 do not fall under the offences mentioned in the fourth proviso to section 497(1), Cr.P.C., i.e., an offence punishable with death or imprisonment for life. Further, according to the prosecution, there has been no criminal case registered against the petitioner since 2005, which shows that for the last fourteen years, he has had no criminal record. Even otherwise, he has served out his sentences under the earlier convictions and even the nature of the said offences are not such as to indicate that he is a hardened, desperate or dangerous criminal who can pose a serious threat to the society at large if released on bail, nor do the facts and circumstances of the present case give such indication.

9. We have, therefore, come to the conclusion that the delay in concluding the trial of the petitioner beyond the period of one year from the date of his arrest/detention has not been occasioned by an act or omission of the petitioner or any other person acting on his behalf, and that in the facts and circumstances of the case the accused does not appear to be a hardened, desperate or dangerous criminal. The petitioner has, thus, made out a case for grant of bail as a matter of right under the third proviso to section 497(1), Cr.P.C. The High Court has failed to correctly appreciate the scope of the third and fourth proviso to section 497(1), Cr.P.C in the light of the fundamental rights guaranteed by the Constitution. This petition is, therefore, converted into appeal and allowed: the impugned order is set aside, the application of the petitioner for grant of post arrest bail is accepted and he is admitted to post-arrest bail subject to his furnishing bail bond in the sum of Rs.100,000/- with one surety in the like amount to the satisfaction of the trial court.

10. Foregoing are the reasons for our short order dated 04.10.2021, which is reproduced hereunder for completion of record:

> For reasons to be recorded separately, this petition is converted into an appeal and allowed. Resultantly, the petitioner is admitted to bail subject to furnishing bail bond in the sum of Rs.100,000/- with one surety in the like amount to the satisfaction of the trial Court, with further directions to the trial Court to proceed with the trial expeditiously and conclude the same at the earliest.
>
> MWA/S-54/SC Bail granted.

**2022 S C M R 42**

**[Supreme Court of Pakistan]**

**Present: Mushir Alam, Syed Mansoor Ali Shah and Munib Akhtar, JJ**

Civil Appeals Nos. 1498 and 1499 of 2018

(On appeal under section 9(5) of the Elections Act, 2017 against the order dated 1.10.2018 passed by the Election Commission of Pakistan in Cases Nos. 30(26)/2018-Leg and 1(19)/2018)

And

Civil Petitions Nos. 972-L and 973-L of 2019

(On appeal from the judgment dated 26.2.2019 passed by the Lahore High Court, Multan Bench in W.Ps. Nos.14893/18 and 16234/18)

MUHAMMAD SALMAN---Petitioner

**Versus**

**NAVEED ANJUM and others---Respondents**

Civil Appeals Nos. 1498 and 1499 of 2018 and Civil Petitions Nos.972-L and 973-L of 2019, decided on 17th August, 2021.*

Per Syed Mansoor Ali Shah, J; agreeing with Munib Akhtar, J. but with a different view on the scope of Explanation to section 9(1) of the Elections Act, 2017.

**(a) Constitution of Pakistan---**

----Arts. 62, 63 & 218(3)---Elections Act (XXXIII of 2017), S. 9(1)---Qualification/disqualification/eligibility of a candidate or member of Parliament---Power of the Election Commission ('the Commission')---Scope---Commission had no jurisdiction, either under Art. 218(3) of the Constitution or under S. 9(1) of the Election Act, 2017, to deal with and decide the matter of alleged pre-election qualification or disqualification of a returned candidate.

**(b) Elections Act (XXXIII of 2017)---**

----S. 9(1)--- Representation of the People Act (LXXXV of 1976), S. 103AA [since repealed]---Powers and jurisdiction of the Election Commission ('the Commission') to declare a poll void under S. 9 of the Elections Act, 2017 ('the 2017 Act')---Scope---Power of the Commission to declare the poll at one or more polling stations or in the whole constituency void, being ancillary and incidental, was implied in the power conferred on the Commission by S. 9(1) of the 2017 Act to declare that grave illegalities or violations of the provisions of the 2017 Act or the Rules had materially affected the result of the poll and in its power to call upon the voters in the polling station or stations concerned or in the whole constituency, as the case may be, to recast their votes---Such was also the mandate of S. 103AA of the erstwhile law, i.e., the Representation of the People Act, 1976---Without declaring the result of the earlier poll(s) void (i.e., cancelled) the Commission could not call upon the voters to recast their votes, as results of two polls could not co-exist---Therefore, it was inevitable for the Commission to declare the result of the earlier poll(s) void before calling upon the voters to recast their votes.

**(c) Elections Act (XXXIII of 2017)---**

----S. 9(1), Explanation ---Representation of the People Act (LXXXV of 1976), S. 103AA(1) [since repealed]---Conditions under which the Election Commission ('the Commission') could declare a poll void under S. 9 of the Elections Act, 2017 ('the 2017 Act')---Scope---Section 9(1) of the 2017 Act read with its "Explanation" specified two conditions in which the Commission could exercise its jurisdiction under that section, namely; (i) grave illegalities and (ii) violation of the provisions of the 2017 Act or the Rules --- Implementation of an agreement restraining women from casting their votes as provided in S. 9(1) of the 2017 Act, was not, an independent third condition rather was part of the first two conditions.

**(d) Interpretation of statutes---**

----Explanation provided after a section/provision of the statute---Scope---Ordinary purpose that an Explanation was supposed to serve was to facilitate the proper understanding of a provision---Meaning of an Explanation could not generally go beyond the controlling main provision.

**(e) Elections Act (XXXIII of 2017)---**

----S. 9(1), Explanation---Representation of the People Act (LXXXV of 1976), S. 103AA(1) [since repealed]---Conditions under which the Election Commission ('the Commission') could declare a poll void under S. 9 of the Elections Act, 2017 ('the 2017 Act')---Scope---Implementation of an agreement restraining women from casting their votes in the constituency---Explanation to S. 9(1) of the 2017 Act simply added a presumption in the context of the ground of "implementation of an agreement restraining women from casting their votes" and provided that if the turnout of women voters was less than ten percent of the total votes polled in a constituency, the Commission may presume that the women voters had been restrained through an agreement from casting their votes---In pith and substance, this was all what the Explanation explained---Word "election" used in the Explanation was though somewhat confusing, but in order to harmonize and balance the meaning and import of the "Explanation" and also to keep it within the fold of the main provision, the word "election" may be read to mean "poll"---Explanation to S. 9(1), did not attract any "special case," where the "election" instead of the "poll" in the whole constituency may be declared void.

Muhammad Shahzad Shaukat, Advocate Supreme Court for Appellant/Petitioner (in call cases).

Tahir Munir Malik, Advocate Supreme Court, Kh. Waseem Abbas, Advocate Supreme Court and Imran Humayun Cheema, Advocate Supreme Court for Respondent No. 1 (in C.A. 1498/18).

Waqar Ahmed Rana, Advocate Supreme Court for Respondent No.4 (in C.A. 1498/18).

Hamid Khan, Senior Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Respondent No. 1 (in C.A. 1499/18).

Sajeel Shehryar Swati, Advocate Supreme Court for Respondent No.5 (in C.Ps. 972-L and 973-L/18).

Ch. Aamir Rehman, Additional A.G.P. on Court's Notice on 28 and 29/1/2020.

Dates of hearing: 28th, 29th January and 3rd February, 2020.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J**.---I have had the privilege of perusing the eloquent opinions recorded by my learned brethren, Justice Mushir Alam and Justice Munib Akhtar. With all deference, I could not make myself agree to the opinion of Justice Mushir Alam. I concur with the opinion handed down by my learned brother Justice Munib Akhtar that the Election Commission ("Commission") has no jurisdiction, either under Article 218(3) of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution") or under Section 9(1) of the Election Act, 2017 ("Election Act") to deal with and decide the matter of alleged pre-election qualification or disqualification of a returned candidate, and that the present appeals should therefore be allowed. I also agree with the interpretation of the provisions of Article 218 of the Constitution and generally on the construction of the provisions of Section 9 of the Election Act, by Justice Munib Akhtar. With respect, I have a slightly different view on the construction of section 9(1) and its Explanation, which I consider my solemn obligation to express; hence this note.

2. I respectfully disagree with the view of my learned brother stated in para 20 of the judgment that "the Commission no longer has the power to declare the poll in a constituency (or in any one or more polling stations) void except in the special case." To my humble understanding, the power of the Commission to declare the poll at one or more polling stations or in the whole constituency void, being ancillary and incidental, is implied in the power conferred on the Commission by section 9(1) to declare that grave illegalities or violations of the provisions of the Act or the Rules have materially affected the result of the poll and in its power to call upon the voters in the polling station or stations concerned or in the whole constituency, as the case may be, to recast their votes. This was also the mandate of section 103AA of the erstwhile law, i.e., the Representation of the People Act, 1976. It is obvious that without declaring the result of the earlier poll(s) void (i.e., cancelled) the Commission cannot call upon the voters to recast their votes - the result of two polls cannot co-exist. Therefore, it is inevitable for the Commission to declare the result of the earlier poll(s) void before calling upon the voters to recast their votes.

3. My learned brother has held that Section 9(1) read with its "Explanation" specifies three conditions in which the Commission could exercise its jurisdiction under that Section, namely; (i) grave illegalities,

(ii) violation of the provisions of the Act or the rules, and (iii) implementation of an agreement restraining women from casting their votes, while section 103AA(1) of the erstwhile law stipulated only the first two conditions. I, with respect, differ and find that the conditions still continue to be two under the new law, as were the case under the old law: (i) grave illegalities, and (ii) violation of the provisions of the Act or the rules. "The implementation of an agreement restraining women from casting their votes" is not, in my opinion, an independent third condition rather is part of the first two conditions. The word 'including' used in section 9(1) has led me to this finding. The Election Act contains several provisions to ensure participation of women in the election process, and preventing women from exercising their right to vote has been made an offence of corrupt practice under its section 167(a) read with Section 170(vii). The implementation of an agreement restraining women from casting their votes is thus a grave illegality and violation of the provisions of the Act, which materially affects the result of the poll.

4. My next concern is as to the finding of my learned brother to the effect that the "Explanation" to Section 9(1) can render in some "special case" the entire election in the constituency void meaning thereby that fresh elections shall be held in the constituency, as opposed to declaring the poll(s) void resulting in recasting of the votes for the same contesting candidates afresh. In my humble understanding, the "Explanation" to section 9(1) serves the ordinary purpose that an Explanation is supposed to serve, i.e., to facilitate the proper understanding of a provision. The power of the Commission under section 9(1) is only to declare the poll at one or more polling stations or in the whole constituency void, which then leads to recasting of the votes for the same candidates. The grounds of declaring the polls to be void are: (i) grave illegalities, or (ii) violation of the provisions of the Act or the rules including "the implementation of an agreement restraining women from casting their votes." The Explanation simply adds a presumption in the context of the ground of "implementation of an agreement restraining women from casting their votes" and provides that if the turnout of women voters is less than ten percent of the total votes polled in a constituency, the Commission may presume that the women voters have been restrained through an agreement from casting their votes. In pith and substance, this is all what the Explanation explains. The word "election" used in the Explanation is though somewhat confusing, but in order to harmonize and balance the meaning and import of the "Explanation" and also to keep it within the fold of the main provision, the word "election" may be read to mean "poll"; as the meaning of an Explanation cannot generally go beyond the controlling main provision. The Explanation to section 9(1), in my understanding, does not attract any "special case," where the "election" instead of the "poll" in the whole constituency may be declared void. However, we are not faced with the interpretation of the word "election" in this case, therefore, it is best to leave it to be considered more elaborately in an appropriate case, where the facts of the case would so require.

MWA/M-52/SC Appeals/Petitions allowed.

**2022 S C M R 72**

**[Supreme Court of Pakistan]**

**Present: Umar Ata Bandial, Syed Mansoor Ali Shah and Munib Akhtar, JJ**

C.M.A.5777/2021 IN C.P.NIL/2021

(Against the order of Lahore High Court, Lahore dated 26.01.2021, passed in I.C.A. No.5251/2021)

and

Civil Petition No.4944 of 2021

(Against the order of Islamabad High Court, Islamabad dated 02.8.2021, passed in W.P No.2391/2021)

**MAMOON WAZIR and others---Petitioners**

**Versus**

**ABWA KNOWLEDGE VILLAGE (PVT) LIMITED FAISALABAD and others.---Respondents**

C.M.A. No. 5777/2021 in C.P. NIL/2021 and Civil Petition No.4944 of 2021, decided on 27th September, 2020.

**Pakistan Medical Commission Act, 2020---**

----Ss. 8(1), 8(2), 8(3) & 18---Pakistan Medical Commission Admission Regulations 2020-2021, Reglns. 13 & 14---Medical and dental undergraduate programs for the academic year 2021---Admission---"Medical and dental colleges admissions test" ("MDCAT")---MDCAT was the basic minimum mandatory requirement, across the board, for admission to all medical and dental colleges, both public or private, in the country---Said requirement had been made applicable to students who had enrolled in the medical and dental undergraduate program for the year 2021 and onwards---While the private colleges enjoyed the flexibility of setting their own admission criteria including an entrance test (detailed in their prospectus) any such criteria or entrance test were over and above the basic statutory minimum requirement of MDCAT, which was mandatory for admission to both the private or public medical and dental colleges - Regulation 14 of the Pakistan Medical Commission Admission Regulations 2020-2021 ('the Regulations') did not in any manner dispense with the requirement of MDCAT and therefore had no bearing on the issue of MDCAT, which stood regulated under S. 18 of the Pakistan Medical Commission Act, 2020 ('the Act')---Even otherwise, Regulations, being subordinate to the Act, could not dilute or dispense with the statutory requirement provided under the Act---Regulations 13 & 14 of the Regulations, neither authorized the private colleges to dispense with the requirement of MDCAT nor were they inconsistent with S. 18 of the Act.

Muhammad Akram Ch. Senior Advocate Supreme Court, Noor Alam Khan, Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Petitioners.

Ch. Muhammad Umar, Advocate Supreme Court for Respondents.

Date of hearing: 27th September, 2021.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**C.M.A. No.5777/2021: The applicants seek permission to file the instant petition against the decision of the learned Division Bench of the Lahore High Court dated 26.01.2021 passed in I.C.A. No.5251 of 2021, reason being that the said judgment has been adopted and followed by the Islamabad High Court, Islamabad in its judgment dated 02.08.2021 passed in Writ Petition No.2391 of 2021, which is impugned before us by the petitioner in Civil Petition No.4944 of 2021, fixed with this case today. As same question arises for determination in the instant matter, we allow this application, therefore, the petition filed by the applicants/ petitioners be put up for hearing along with C.P. No.4944/2021 before us today, after it is registered and numbered by the office.

Main Petitions:

2. Petitioners are newly enrolled students in the medical and dental undergraduate program for the academic year 2021 at the ABWA Knowledge Village (Pvt.) Limited (respondent No.1), a private medical college. Their admissions were subsequently cancelled due to their failure to pass the "medical and dental colleges admissions test" ("MDCAT"). They have challenged the pre-admission requirement of MDCAT introduced through section 18 of the Pakistan Medical Commission Act, 2020 ("Act") on the ground that

it is violative of Regulations Nos.13 and 14 of the Admission Regulations (Amended) 2020-2021 ("Regulations")[1] in as much as the admissions to a private medical college is governed by the respective prospectus of the medical college, which in this case, did not require the petitioners to take MDCAT.

3. Learned counsel for the petitioners explaining their ground of challenge submitted that the Prospectus issued by respondent No.1 (private medical college), did not provide for MDCAT, but instead, set out their own admission criteria, which the petitioners have successfully met and were thereafter granted admission. They cannot be subjected to the requirement of MDCAT which falls outside the prospectus. Learned counsel for the respondent on the other hand supported the impugned judgment and submitted that statutory requirement of MDCAT under the Act is a mandatory requirement and even the Regulations do not dispense with the said requirement.

4. We have heard the learned counsel for the parties and have examined the Act and the Regulations. Section 18 of the Act and regulations Nos. 13 and 14 of the Regulations are reproduced hereunder for convenience:-

Section 18 of the Act:

18. Medical and dental colleges admissions tests (MDCAT)----(1) The Authority shall conduct annually on a date approved by the Council and as per standards approved by the Board a single admissions test which shall be mandatory requirement for all students seeking admission to medical or dental undergraduate programs anywhere in Pakistan.

(2) No student shall be awarded a medical or dental degree in Pakistan who has not passed the MDCAT prior to obtaining admission in a medical or dental college in Pakistan:

Provided that such requirement shall be mandatory for all students who have been enrolled in medical or dental under-graduate programs in the year 2021 and thereafter.

(3) The admission to medical or dental programs conducted by the public colleges shall be regulated as per the policy of the Provincial Governments strictly on merit and admission to a private college shall be in accordance with the criteria and requirements stipulated by the private college at least one year in advance of admissions including any additional entrance test as may be conducted by a private college subject to any conditions imposed by the relevant university to which such college is affiliated:

Provided that the marks obtained by a student in the MDCAT conducted by the Authority shall constitute a minimum of fifty percent of the weightage for the purposes of admission in the public colleges.

Regulations Nos.13 and 14 of the Regulations:

Private College Admissions

13. Both Agha Khan University and NUMS in respect of its constituent, affiliated and administered colleges have a previously declared admission criteria for admissions which includes in addition to the MDCAT an entry test and other criteria specific to such colleges hence substantially fulfilling the requirement of prior disclosure of admission criteria pursuant to Section 18(3) of the PMC Act, 2020. Therefore, admissions in the Army Medical College and all constituent, affiliated and administered colleges of NUMS shall be undertaken by NUMS and admissions to Agha Khan Medical College shall be undertaken by Agha Khan University respectively, subject to the mandatory requirement of any student admitted having passed the MDCAT. Any student seeking to apply to said colleges shall be required to apply directly to the relevant university and fulfill the additional requirements for admission imposed and declared by such colleges.

Provided quota for special seats in colleges under the administrative control of NUMS shall be regulated by NUMS as may be notified by the relevant Directorate and approved by the Ministry of Defence subject to the maximum allocated seat limit of each college.

Provided further, that students admitted against special quotas seats shall be required to have mandatorily passed the MDCAT and obtained a high school leaving certificate/degree.

14. Admissions to all private medical and dental [colleges] shall be conducted only for the 2021 Session through a centralized automated admission system.

Section 18 of the Act clearly mandates that the Authority (i.e., the National Medical Authority constituted under section 15 of the Act) shall conduct MDCAT, which shall be a mandatory requirement for all students seeking admission to medical or dental undergraduate program anywhere in Pakistan. Subsection (2) provides that no student shall be awarded a medical or dental degree in Pakistan who has not passed the MDCAT prior to obtaining the admission in a medical or dental college in Pakistan. MDCAT is the basic minimum mandatory requirement, across the board, for admission to all medical and dental colleges, both public or private, in Pakistan. This requirement has been made applicable to students who have enrolled in the medical and dental undergraduate program for the year 2021 and onwards.

5. Section 8(3) of the Act when read with sections 8(1) and 8(2) shows that while the private colleges enjoy the flexibility of setting their own admission criteria including an entrance test (detailed in their prospectus) any such criteria or entrance test are over and above the basic statutory minimum requirement of MDCAT, which is mandatory for admission to both the private or public medical and dental colleges. Proviso to section 18(3) lays down that public colleges are to assign 50% weightage to MDCAT, while no such weightage requirement is provided for the private colleges. However, for the enrollment in the year 2021 (as in this case) the weightage of 50% was retained by the private colleges and is not in dispute[2] or under challenge in this case.

6. Coming to the Regulations framed under section 8(2)(f) of the Act. Regulation 2 provides as follows:

2. Any student seeking admission in any medical or dental college shall mandatorily be required to have passed the MDCAT examination held by PMC. The passing marks for the MDCAT examination shall be 60%.

..

Regulation 13 reiterates the mandatory requirement of MDCAT for private colleges and is, therefore, in sync with section 18. Regulation 14, according to PMC, was a one-time arrangement for admissions to the year 2021. As per PMC, MDCAT was introduced through the Act in September, 2020 and students took the MDCAT in November, 2020, leaving little time for the students to apply to colleges independently, therefore, in order to meet the shortage of time, PMC extended the database facility of Centralized Automated Admission System to the students whereby the students could directly apply online through the PMC portal. Other than this administrative facility, Regulation 14 does not in any manner dispense with the requirement of MDCAT and therefore has no bearing on the issue of MDCAT, which stands regulated under section 18 of the Act. Even otherwise, Regulations, being subordinate to the Act, cannot dilute or dispense with the statutory requirement provided under the Act. Regulations 13 and 14, therefore, in no manner authorize the private colleges to dispense with the requirement of MDCAT or are inconsistent with section 18 of the Act. The criteria, as well as, other entrance tests devised by private colleges are in addition to MDCAT, which is the basic minimum statutory requirement for admissions to any medical college in Pakistan, be it private or public.

7. In light of the above, we see no reason to take a view different from the one taken by the High Court in the impugned judgment and in the judgment of the learned single judge. These petitions are, therefore, dismissed and leave refused.

MWA/M-78/SC Order accordingly.

**2022 S C M R 277**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed, JJ**

**GOVERNMENT OF KHYBER PAKHTUNKHWA through District Collector/District Officer (R&E) (Now) Deputy Commissioner Mardan and others---Petitioners**

**Versus**

**MISAL KHAN and others---Respondents**

Civil Review Petitions Nos.758 and 759 of 2019 and Civil Review Petitions Nos. 7 to 84 and 121 of 2020, decided on 14th October, 2021.

(For review of the order dated 14.11.2019, passed by this Court, in Civil Appeal No.169-P/2018 and other connected matters)

**Land Acquisition Act (I of 1894)---**

----S. 28 [as amended by the Khyber Pakhtunkhwa Land Acquisition (Amendment) Ordinance 2001]---Interest on enhanced compensation---Scope---Section 28 of the Land Acquisition Act, 1894 as it existed in the Province of Khyber Pakhtunkhwa (KPK), authorized the Court to determine the amount of compensation to be paid to a land owner, which was over and above the enhanced sum of compensation awarded by the Court---Said determination of the amount included the interest on the enhanced sum of the compensation for the period when the possession of the land was taken till the payment of the enhanced sum of the compensation to the land owner---In the Province of KPK the Court was not bound by any fixed rate of interest and could grant interest at any just, proper and reasonable rate as it determined, which could also be the rate determined by the State Bank of Pakistan.

Atif Ali Khan, Additional A.G. Khyber Pakhtunkhwa and Malik Akhtar Awan, Additional A.G. Kbyber Pakhtunkhwa for Petitioners (in all cases).

Nemo for Respondents.

Date of hearing: 14th October, 2021.

**ORDER**

**SYED MANSOOR ALI SHAH, J**.---These review petitions have been filed against the consolidated order dated 14.11.2019 passed by this Court, whereby the civil appeals filed by the Government of KPK through District Collector, Mardan were dismissed. The solitary contention of the learned counsel for the petitioners in these petitions is that section 28 of Land Acquisition Act, 1894 ("Act") as amended by the North-West Frontier Province Land Acquisition (Amendment) Ordinance 2001, does not provide for payment of 6% interest on the enhanced compensation to the landowner from the date of taking possession of the land till the date of payment, yet the same has been granted by the Referee Court and the High Court and maintained by this Court in the order under review. It is further contended that the amended section 28 of the Act simply provides for the payment of the enhanced compensation to the landowners without any interest irrespective of the date of possession and the actual date of payment of compensation to the landowner.

2. We have considered the contention of the learned counsel for the petitioners. Section 28 of the Act, as amended by the North-West Frontier Province Land Acquisition (Amendment) Ordinance, 2001 (XVII of 2001) provides as follows:-

28. lf the sum which, in the opinion of the Court, the Collector ought to have awarded as compensation is in excess of the sum which the Collector did award as compensation, the award of the Court may direct that the Collector shall deposit with the Court such amount as determined by it. (emphasis supplied)

Before we examine the meaning and scope of the aforementioned amended section 28, it is important to trace the genealogy of section 28 from its inception in the year 1894. History of section 28 of the Act, across Pakistan, shows that interest has been an integral part of the

enhanced compensation which is paid to the landowner to cover for the period between the actual taking over of the possession of the land and the actual date of payment to the landowner. The said interest has originally been 6%, which was increased to 8% compound interest in 1969, as shown below:-

Land Acquisition Act, 1894

28. Collector may be directed to pay interest on excess compensation: If the sum which, in the opinion of the Court, the Collector ought to have awarded as compensation is in excess of the sum with the Collector did award as compensation; the award of the Court may direct that the Collector shall pay interest on such excess at the rate of six per centum per annum from the date on which he took possession of the land to the date of payment of such excess into Court.

Provincial Amendments

West Pakistan Amendment of 1969 (applicable to all the provinces including Punjab)

By Land Acquisition (W.P. Amendment) Act, III of 1969.

In Section 28, for the words "interest on such excess at the rate of six per centum" the words "compound interest on such excess at the rate of eight per centum" shall be substituted; and the following proviso be added at the end:

Provided that in all cases where the Court has directed that Collector shall pay interest on such excess at the rate of six per centum from the date on which possession was taken and the payment of compensation or a part thereof has not been made up to the commencement of the Land Acquisition (West Pakistan Amendment) Act, 1969, the rate of compound interest on such excess or balance shall be eight per centum.

Sindh Amendment of 1971 By the Land Acquisition (W.P. Amd.) (Repeal) Ordinance, VI of 1971

The Land Acquisition (West Pakistan Amendment) Act, 1969 was repealed and section 28 was substituted with the following:

Where a Court has directed payment of interest on any amount of compensation payable under the Land Acquisition Act, 1894 (Act I of 1894), at a rate exceeding six per centum simple interest per annum, interest shall be able on such amount, notwithstanding any judgment, decree or order of the Court, at six per centum simple interest per annum.

Balochistan Amendment of 1985 By the Land Acquisition (Balochistan Amd.) Act, XIII of 1985

Section 34 was omitted and section 28 was substituted with the following:

28. Additional compensation: In addition to the compensation fixed on the basis of market-value as prevailing on the date of notification under section 4, an additional amount of fifteen per cent per annum of the compensation so fixed shall be paid from the date of the notification under Section 4 to the date of payment of compensation.

N.W.F.P. Amendment of 1983 By the Land Acquisition (N.-W.F.P. Amd.) Ordinance, V of 1983.

For Section 28, the following section shall be substituted:

28. Collector may be directed to pay interest on excess compensation: If the sum which, in the opinion of the Court, the Collector ought-to have awarded as compensation is in excess of the sum which the Collector did award as compensation, the award of the Court may direct that the Collector shall pay simple interest on such excess at the rate of six per centum per annum from the date on which he took possession of the land to the date of payment of such excess into Court.

N.W.F.P. Amendment of 2001 By the NWFP Land Acquisition (Amendment) Ordinance, 2001

In section 28, for the words "pay simple interest on such excess at the rate of six per centum per annum from the date on which he took possession of the land to the date of payment of such excess into Court", the words "deposit with the Court such amount as determined by it"

were substituted.

Reading of the above provisions shows that interest is to be paid for the period from the date of the taking over of the possession of the land till the date of the payment of the enhanced compensation and this is the position prevalent all over Pakistan. In this background, we examine the amended section 28 which reads that once the "sum" of compensation granted by the collector is enhanced by the court, the court shall direct the Collector to deposit such "amount" (as opposed to the enhanced "sum") as determined by it. The amendment has retained the power of the Referee Court to determine the "amount" payable by the Collector to the landowner over and above the enhanced sum of compensation after considering the factum of possession and the date of actual payment. If it were just the enhanced sum of the award which had to be paid to the landowner, the phrase "amount as determined by it" would have no significance. Section 28 envisages that after the enhanced sum of the award has been worked out, the Court then embarks upon determining the "amount" to be paid to the landowner after considering the sum and the delay in payment. This determination has to be of the period that has passed by after the possession of the land of the landowner was taken over and of the interest over and above the enhanced sum of the compensation to be paid to the landowner who has been deprived of this amount of compensation since then. Our reading of the amended section 28 in KPK shows that the court is now free to award any rate of interest on the enhanced sum of compensation and is not bound by the limit of 6%. It does not mean that the court is not to grant any interest on the sum enhanced. The argument of the learned counsel for the petitioner that the enhanced sum of compensation by the court, even though paid to the landlord several years after taking over of the possession of the land, will still be the same sum and will carry no interest because the amendment takes away the term 6% interest, appears to us to be not only fanciful but also hopelessly misconceived. The distinction between the terms sum and amount to be determined is that while the "sum" is simply the enhanced compensation, the "amount" is the interest over and above the enhanced compensation to provide for the loss caused to the landowner due to the delay in making payment of the adequate compensation since the taking over of the possession of the land. This construction of section 28 (KPK amendment) blends with the prevalent law in other provinces in Pakistan and is true to the spirit of the original law and is also constitutionally compliant with Article 24 of the Constitution of Pakistan 1973.

3. Another dimension of the case which reinforces the concept of interest is under section 34 of the Act (which was not amended by the 2001 Ordinance in KPK), which deals with the payment of interest on the sum of compensation awarded by the Collector. Section 34 states as follows:

> 34. When the amount of such compensation is not paid or deposited on or before-taking possession of the land, the Collector shall pay the amount awarded with simple interest thereon at the rate of six per centum from the time of so taking possession until it shall have been so paid or deposited.

Under the said provision, the Collector is to pay simple interest at the rate of 6% on the amount of the compensation for the delay in the payment of compensation from the date of taking over of the possession of the land till the date of payment. This provision is still intact in KPK. So, while interest is provided for on the compensation awarded by the Collector, the same cannot be denied when the compensation is enhanced by the court. Sections 28 and 34 have to complement each other and, therefore, section 28 also provides for interest but unlike other provinces, KPK has no statutory limit on the interest to be granted by court.

4. For the above reasons we hold that section 28 of the Act, as it exists in the Province of KPK, authorizes the Court to determine the amount of compensation to be paid to a land owner, which is over and above the enhanced sum of compensation awarded by the Court. This

determination of the amount includes the interest on the enhanced sum of the compensation for the period when the possession of the land was taken till the payment of the enhanced sum of the compensation to the land owner. Under the amended section 28, the court is no more bound by any fixed rate of interest and can grant interest at any just, proper and reasonable rate as it determines, which could also be the rate determined by the State Bank of Pakistan. Therefore, the award of 6% interest is well within the scope of the powers of the Referee Court under section 28 of the Act (as amended) and is in line with the interest to be granted under section 34 of the Act.

5. For the above reasons, we find no merit in these review petitions, which are therefore dismissed.

MWA/G-30/SC Petitions dismissed.

**2022 S C M R 515**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Amin-ud-Khan, JJ**

**SALMAN KHAN---Petitioner**

**Versus**

**The STATE---Respondent**

Criminal P. No. 127-Q of 2021, decided on 13th January, 2022.

(Against the order dated 09.10.2021 passed by the High Court of Balochistan, Quetta in Criminal Bail Application No.633 of 2021)

**Criminal Procedure Code (V of 1898)---**

----S. 497(1)---Constitution of Pakistan, Art. 185(3)---Penal Code (XLV of 1860), Ss. 302, 319, 322, 324 & 34---Qatl-bis-sabab, qatl-i-khata---Bail, grant of---Four members of the law enforcement agency, including the accused, allegedly signaled the car of the complainant to stop but he continued to drive on, whereupon the accused fired at the car, which ended up in causing injuries to the complainant and death of his cousin, who was also seated in the car---Accused and other members of the law enforcement agency were on their routine duty of maintaining law and order in the city, at the time of incident---Nothing was available on record to show that there was a background of any enmity between the parties, or the incident was the result of some provocation, or the accused fired at the car that had tainted glasses, with the intention to cause death of the complainant and his cousin---From the contents of the crime report, it appeared that an offence of qatl-bis-sabab punishable under S. 322, P.P.C. was made out other than qatl-i-khata punishable under S. 319, P.P.C.---However, qatl-i-amd under S. 302 did not appear to be made out in the present facts and circumstances of the case---Section 322, P.P.C. fell outside the prohibitory clause of S. 497(1), Cr.P.C. while S. 319, P.P.C. was bailable---Detention of the accused pending trial could only be justified if the case fell within the scope of any of the exceptions stated in the cases of Tariq Bashir v. State PLD 1995 SC 34, Muhammad Tanveer v. State PLD 2017 SC 733 and Zafar Iqbal v. Muhammad Anwar 2009 SCMR 1488---However, nothing was available on record that may attract any of the said exceptions and justify denial of post arrest bail to the accused---Petition for leave to appeal was converted into appeal and allowed, and the accused was admitted to bail.

Manzoor v. State 1992 PCr.LJ 1374; Muhammad Nadeem v. State 1998 MLD 1537; Yousuf Khan v. State 2000 PCr.LJ 203; Aamir v. State 2006 PCr.LJ 1236; Tariq Bashir v. State PLD 1995 SC 34; Muhammad Tanveer v. State PLD 2017 SC 733 and Zafar Iqbal v. Muhammad Anwar 2009 SCMR 1488 ref.

Kamran Murtaza, Senior Advocate Supreme Court for Petitioner.

Qazi Mushtaq Ahmed, Additional P.G. Balochistan for the State.

Amir Muhammad Lehri, Advocate Supreme Court for the Complainant.

Date of hearing: 13th January, 2022.

**ORDER**

**SYED MANSOOR ALI SHAH, J**.---The petitioner seeks leave to appeal against the order dated 09.10.2021 passed by the High Court of Balochistan, whereby post-arrest bail has been denied to him in case FIR No.68/2021 registered at Police Station Sariab, for offences punishable under sections 302, 324 and 34, P.P.C.

2. The allegation in the crime report against the petitioner, a member of the Eagle Squad (a law enforcement agency), briefly stated is that four members of the Eagle Squad, including the petitioner, signaled the car of the complainant to stop but he continued to drive on, whereupon the petitioner fired at the car, which ended up in causing injuries to the complainant and death of his cousin, Faizan, who was also seated in the car.

3. We have heard the parties and examined the record. The petitioner and others members of the Eagle Squad were on their routine duty of maintaining law and order in the city, at the time of incident. There is

nothing on record to show that there was a background of any enmity between the parties, or the incident was the result of some provocation, or the petitioner fired at the car that had tainted glasses, with the intention to cause death of the complainant and his cousin. From the contents of the crime report, it appears that an offence of qatl -bis-sabab punishable under section 322, P.P.C. is made out other than qatl-i-khata punishable under section 319, P.P.C. However, qatl-i-amd under section 302 does not appear to be made out in the present facts and circumstances of the case. Section 322, P.P.C. falls outside the prohibitory clause of section 497(1), Cr.P.C.[1] while section 319, P.P.C. is bailable. That being so, the detention of the petitioner pending trial can only be justified if this case falls within the scope of any of the exceptions stated in the cases of Tariq Bashir[2], Muhammad Tanveer[3] and Zafar Iqbal.[4] There is, however, nothing on record that may attract any of the said exceptions and justify denial of post arrest bail to the petitioner.

4. The High Court has not exercised its discretion judiciously in denying the relief of post arrest bail to the petitioner. This petition is, therefore, converted into appeal and allowed: the impugned order is set aside and the bail application of the petitioner is accepted. The petitioner is admitted to bail subject to his furnishing the bail bond in the sum of Rs. 100,000/- with one surety each in the like amount to the satisfaction of the trial Court.

5. Needless to mention that the observations made in this order are of tentative nature which shall not in any manner influence the trial court, and that this concession of bail may be cancelled, under section 497(5), Cr.P.C., if the petitioner misuses it in any manner, including causing delay in the expeditious conclusion of the trial.

MWA/S-3/SC Bail granted.

**2022 S C M R 580**

**[Supreme Court of Pakistan]**

**Present: Umar Ata Bandial, Sajjad Ali Shah and Syed Mansoor Ali Shah, JJ**

**COMMISSIONER OF INLAND REVENUE---Petitioner**

**Versus**

**Messrs MUGHAL BOARD INDUSTRY---Respondent**

Civil Petition No. 1026-L of 2019, decided on 2nd November, 2021.

(Against the order dated 13.02.2019 of the Lahore High Court, Lahore passed in STR No. 8160 of 2019)

**(a) Sales Tax Act (VII of 1990)---**

----S. 34A---Illegally adjusted input tax---Default surcharge and penalties---Amnesty Scheme---Purpose and scope---Purpose of an amnesty scheme is to incentivize payment and collection of stuck-up revenue---Taxpayer who had made voluntary payment before the cut-off date under the amnesty scheme can avail the amnesty scheme.

Plain reading of SRO No. 606(I)/2012 dated 01.06.2012 ("amnesty notification") shows that if the default surcharge and penalties payable by a registered person are outstanding on account of illegally adjusted input tax, the registered person may avail exemption against default surcharge and penalties provided the whole of the principal amount of illegally adjusted input tax is deposited by 25th June, 2012 and any case or complaint filed by the registered person against the department is withdrawn by the said date.

The contention of the (tax) department that the amount of sales tax must be outstanding against the person on 01-06-2012 for the amnesty notification to apply, is not convincing. The spirit and object of the amnesty notification is to incentivize quick recovery of stuck up tax revenue, hence the notification offers that if only the principal amount of illegally adjusted sales tax is deposited by 25th June, 2012 the default surcharge and penalties stand exempted. The importance is of the cut-off date i.e. 25th June, 2012. There appears to be no bar in the notification and no possible disadvantage caused to the department, if the principal amount of sales tax is deposited prior to the date of the amnesty notification. In fact it is advantageous for the department as the stuck up tax revenue has been voluntarily deposited by the taxpayer, which is in line with the scheme of the amnesty being offered by the department. The other condition is the withdrawal of any case or complaint filed by the registered person against the department in this regard. Admittedly, the respondent (tax payer) deposited the principal amount of sales tax before 01-06-2012, and the respondent has not filed any case, etc against the department except the present case, hence the respondent successfully meets the conditions of the amnesty notification and is, therefore, entitled to the benefit of it.

The main purpose of the amnesty scheme is to incentivize payment and collection of stuck up tax revenue and, therefore, what matters is the payment by or before the cut-off date. The government must actually welcome any voluntary payment made by a taxpayer before the cut-off date. In any case, extension of the benefit of the amnesty notification to the tax payer ensures level playing field, creasing out any trace of discrimination amongst taxpayers who have already paid the principal amount of tax before the cut-off date.

There was no justification to deny the benefit of the amnesty notification to the respondent taxpayer. Petition for leave to appeal was dismissed.

**(b) Sales tax---**

----Amnesty scheme--- Notification--- Interpretation--- Amnesty notification being beneficial subordinate legislation must be viewed liberally in favour of the taxpayer in order to achieve the solitary fiscal objective of quick recovery of stuck up tax revenue.

Ms. Kausar Parveen, Advocate Supreme Court (video-link from Lahore) along with Naeem Hassan, Secy (Lit.) FBR for Petitioner.

Nemo for Respondent.

Date of hearing: 2nd November, 2021.

**ORDER**

**SYED MANSOOR ALI SHAH, J**.---The sole question that has come up for our determination is whether the benefit of SRO 606(I)/2012 dated 01.06.2012 ("amnesty notification"), reproduced hereunder, can be extended to the respondent. The amnesty scheme under the notification grants exemption of the whole amount of default surcharge and penalties to a person against whom an amount of sales tax is outstanding on account of illegally adjusted input tax provided that two conditions are met: (i) the whole principal amount of illegally adjusted sales tax is paid by the 25th June, 2012 and (ii) any case, complaint or proceedings filed by the registered person before any court of law, etc. are withdrawn by the said date. Once the above conditions are complied with, all criminal proceedings lodged against the taxpayer by the department shall also abate.

GOVERNMENT OF PAKISTAN MINISTRY OF FINANCE, ECONOMIC AFFAIRS, STATISTICS AND REVENUE (REVENUE DIVISION)

Islamabad, the 1st June, 2012.

NOTIFICATION

(SALES TAX)

S.R.O. 606(I)/2012.---In exercise of the powers conferred by section 34A of the Sales Tax Act, 1990, the Federal Government, in supersession of its Notification No. S.R.O. 563(I)/2012, dated 25th May, 2012, is pleased to exempt the whole amount of default surcharge and penalties payable by a person against whom an amount of sales tax is outstanding on account of illegally adjusted input tax, subject to the following conditions:-

(i) whole of the principal amount of illegally adjusted sales tax is paid by the 25th June, 2012, and

(ii) any case, complaint or proceedings filed by the registered person before any court of law, Federal Tax Ombudsman or any other authority is withdrawn by the said date.

2. Any criminal proceedings lodged by the department shall abate from the date of complying with the above conditions by the registered person.

[C.No.4(2 1)ITP/2011-Pt.II]

Sd/-

(Shahid Hussain Asad)

Additional Secretary

2. In the present case, the respondent registered person deposited the whole of the principal amount of sales tax payable in lieu of illegally adjusted input tax much before 01.06.2012 (date of the amnesty notification). Proceedings were initiated against the respondent for the recovery of default surcharge and penalties by issuance of show cause notice dated 20.11.2012. The respondent sought the benefit of the amnesty notification, which came subsequent to the deposit of the principal amount of sales tax by the petitioner. However, the benefit of the amnesty notification was denied to the petitioner by the department on the ground that it was only applicable to registered persons against whom the principal amount of sale tax was outstanding on 01.06.2012. The High Court while hearing the sales tax reference filed by the respondent disagreed with the view of the department and allowed the benefit of the amnesty notification to the respondent. The order of the High Court has been assailed by the department before us.

3. We have heard the learned counsel for the petitioner-department and have carefully gone through the amnesty notification. Plain reading of the amnesty notification shows that if the default surcharge and penalties payable by a registered person are outstanding on account of illegally adjusted input tax, the registered person may avail exemption against default surcharge and penalties provided the whole of the principal amount of illegally adjusted input tax is deposited by 25th June, 2012 and any case or complaint filed by the registered person against the department is withdrawn by the said date. The contention of the department that the amount of sales tax must be outstanding against the person on 01.06.2012 for the amnesty notification to apply, is not convincing. The spirit and object of the amnesty notification is to incentivize quick recovery of stuck up tax revenue, hence the notification offers that if only the principal amount of illegally adjusted sales tax is deposited by 25th June, 2012 the default surcharge and penalties

stand exempted. The importance is of the cut-off date i.e. 25th June, 2012. There appears to be no bar in the notification and no possible disadvantage caused to the department, if the principal amount of sales tax is deposited prior to the date of the amnesty notification. In fact it is advantageous for the department as the stuck up tax revenue has been voluntarily deposited by the taxpayer, which is in line with the scheme of the amnesty being offered by the department. The other condition is the withdrawal of any case or complaint filed by the registered person against the department in this regard. Admittedly, the respondent deposited the principal amount of sales tax before 01.06.2012, and the respondent has not filed any case, etc against the petitioner department except the instant case, hence the respondent successfully meets the conditions of the amnesty notification and is, therefore, entitled to the benefit of it.

4. Any other interpretation of the amnesty notification will lead to anomalous results. For example, if the respondent had not deposited the principal amount of sales tax before 01.06.2012, he would still be entitled to avail the amnesty notification if he were to deposit the principal amount of sales tax by 25th June, 2012 along with the withdrawal of any case or complaint filed by the registered person by the said date. In such a situation the taxpayer is encouraged to withhold the principal amount of sales tax, draw benefit on it till the last date and then deposit the same to avail the benefits of the amnesty notification. However, on the other hand, in the present case, the petitioner, in the absence of an amnesty notification, voluntarily deposited the whole of the principal amount of illegally adjusted input tax before the cut-off date i.e., 25th June, 2012, while the amnesty scheme was notified subsequently. Denial of relief to such a registered person would imply that the notification penalizes voluntary deposit of tax by a taxpayer and adds premium on an intentional withholding of the tax and delay in payment of tax. This cannot be the purpose of any taxing law or of any amnesty scheme under such law. The main purpose of the amnesty scheme is to incentivize payment and collection of stuck up tax revenue and, therefore, what matters is the payment by or before the cut-off date. The government must actually welcome any voluntary payment made by a taxpayer before the cut-off date. In any case, extension of the benefit of the amnesty notification to the petitioner ensures level playing field, creasing out any trace of discrimination amongst taxpayers who have already paid the principal amount of tax before the cut-off date. Additionally, amnesty notification being beneficial subordinate legislation must be viewed liberally in favour of the taxpayer in order to achieve the solitary fiscal objective of quick recovery of stuck up tax revenue.

5. We, for the above reasons see no justification to deny the benefit of the amnesty notification to the respondent taxpayer. This petition, therefore, fails and is accordingly dismissed.

MWA/C-2/SC Petition dismissed.

**2022 S C M R 1082**

**[Supreme Court of Pakistan]**

**Present: Umar Ata Bandial, C.J., Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed, JJ**

**COMMISSIONER OF INLAND REVENUE,LAHORE---Petitioner**

**Versus**

**Messrs SARGODHA SPINNING MILLS (PVT.) LTD. FAISALABAD and others---Respondents**

Civil Petition No.757-L of 2021, decided on 3rd February, 2022.

(Against the judgment dated 01.02.2021 of the Lahore High Court, Lahore passed in S.T.R. No. 17 of 2012)

**Sales Tax Act (VII of 1990)---**

----Ss. 46 & 47---Sales tax Reference to the High Court---Findings of facts determined by the Tribunal/Appellate Tribunal---Interference by the High Court---Tax Tribunal is the final fact finding body---Only "question of law" is to be examined by the (High) Court in a Sales tax Reference.

Tribunal is the final forum for determination of facts in tax matters. The Appellate Tribunal is therefore the final fact-finding body and its findings of facts are conclusive; the High Court cannot disturb them unless it is shown that there was no evidence on which the Appellate Tribunal could arrive at its conclusion and record such findings, or the same are perverse or based on surmises and conjectures. Further, the High Court cannot go behind any finding of fact recorded by the Appellate Tribunal even on such grounds, unless it has been expressly challenged by raising a 'question of law' relating thereto in the application. Without raising a 'question of law' in the terms, like, 'whether there was evidence to support the finding of the Appellate Tribunal on such and such fact', the High Court is bound by the finding of fact recorded by the Tribunal. Thus, in a case, where no question of law is raised to challenge the finding of fact recorded by the Appellate Tribunal as being not supported by any evidence or being perverse, the finding recorded by the Tribunal attains finality.

Messrs Shah Nawaz v. Commissioner of I.T. 1969 SCMR 123; Commissioner of I.T. v. Messrs Smith, Kline and French 1991 SCMR 2374; Commissioner of I.T. v. Messrs Farrokh Chemical 1992 SCMR 523; Ibrahim Ishaq v. Commissioner of I.T. 1993 SCMR 287; Messrs Irum Ghee Mills v. I.T. A.T. 2000 SCMR 1871; Commissioner of I.T. v. Muhammad Ismail & Co. 1986 SCMR 968 and Oriental investment Co. v. Commissioner of I.T. 1972 PTD 181 ref.

The "question of law" must arise from the decision of the Appellate Tribunal and in the absence thereof, any Reference before the High Court is not maintainable.

Messrs Mohammad Akbar v. I.T.A.T. 1972 SCMR 409; Messrs F.M.Y. Industries v. Deputy Commissioner I. T. 2014 SCMR 907; Messrs PTV Corporation Ltd. v. Commissioner Inland Revenue 2017 SCMR 1136 and Messrs Squibb Pakistan v. Commissioner of I.T. 2017 SCMR 1006 ref.

Sarfraz Ahmed Cheema, Advocate Supreme Court and Naeem Hassan, Secretary (Lit.) FBR for Petitioner.

Anis-ur-Rehman, Legal Advisor for Respondents.

Date of hearing: 3rd February, 2022.

**ORDER**

**SYED MANSOOR ALI SHAH, J**.---The question of law raised before the High Court in the Sales Tax Reference by the petitioner Department was whether the respondent assesse could claim refund on the goods in respect of which sales tax had not been deposited in the government treasury by the respective supplier, hence violating sections 2(14), 7, 8, 8A, 10, 22, 26 and 36 of the Sales Tax Act, 1990 ("Act") .

2. As a matter of background, during the process of refund, a claim of Rs.158,523/- by the registered person (respondent) for tax period 12/2005 was deferred by the department against the invoices issued by the black-listed units. In this regard, the petitioner department issued show cause notices to the registered persons charging them with the violation of various provisions of the Act and the Sales Tax Refund Rules, 2006 ("Rules"). Order in Original dated 18.5.2007 was passed against the petitioner. The appeal before the Collectorate of Customs, Sales Tax and Federal Excise (Appeals) was also dismissed vide order dated 17.12.2007. However, on appeal before the Appellate Tribunal, Inland Revenue, Lahore, the same was

allowed vide order dated 29.9.2011. The Tribunal determined the factual controversy in the case by holding that the department failed to refer or produce any document or evidence to establish that the invoices issued by the suppliers were fake or forged and that the same could not have been issued by the suppliers to the respondent assesse. With this factual determination, the appeal of the respondent assesse was allowed against the department. The department filed a sales tax reference before the High Court. The only question of law raised was that could the Tribunal allow refund based on invoices where sales tax was not deposited in the government treasury by the respective supplier. No question of law specifically regarding gross misreading of evidence by the Tribunal was raised as a question of law.

3. We have heard the learned counsel for the department and have examined the record of the case. It is now well established that the Tribunal is the final forum for determination of facts in tax matters. The Appellate Tribunal is therefore the final fact-finding body and its findings of facts are conclusive; the High Court cannot disturb them unless it is shown that there was no evidence on which the Appellate Tribunal could arrive at its conclusion and record such findings, or the same are perverse or based on surmises and conjectures.[1] Further, the High Court cannot go behind any finding of fact recorded by the Appellate Tribunal even on such grounds, unless it has been expressly challenged by raising a 'question of law' relating thereto in the application. Without raising a 'question of law' in the terms, like, 'whether there was evidence to support the finding of the Appellate Tribunal on such and such fact', the High Court is bound by the finding of fact recorded by the Tribunal. Thus in a case, where no question of law is raised to challenge the finding of fact recorded by the Appellate Tribunal as being not supported by any evidence or being perverse, the finding recorded by the Tribunal attains finality.[2] It has also been established and clearly borne out from section 47(1) of the Act that the "question of law" must arise from the decision of the Appellate Tribunal and in the absence thereof, any such reference is not maintainable.[3]

4. In the present case, the High Court has clearly noted in the impugned order that the Tribunal has settled the factual controversy and the department has failed to produce or establish that the tax receipts from the suppliers were illegal or no tax was deposited against them by the suppliers in the Government Treasury. In this background the High Court held that no "question of law" arose from the order of the Tribunal and declined to exercise advisory jurisdiction.

5. For the above reasons, we see no reason to take a view different from the one taken by the High Court. Leave is, therefore, declined and this petition is dismissed.

MWA/C-10/SC Petition dismissed.

**2022 S C M R 1104**

**[Supreme Court of Pakistan]**

**Present: Umar Ata Bandial, Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed, JJ**

**COMMISSIONER OF INCOME TAX (LEGAL)---Petitioner**

**Versus**

**Messrs ASKARI BANK LIMITED, RAWALPINDI and others---Respondents**

Civil Petitions Nos.2597 to 2600 of 2020, decided on 1st February, 2022.

(Against the judgment dated 16.07.2020 of the Islamabad High Court, Islamabad passed in I.T.Rs. Nos.24 to 27 of 2009)

**Income Tax Ordinance (XLIX of 2001)---**

----S. 23---Eligible depreciable asset---Initial allowance, deduction of---Scope---Taxpayer can claim deduction of initial allowance for an eligible depreciable asset (Such as a building) being put to use by the taxpayer for the first time in a tax year, irrespective of the fact that the said building had been in use in the past in the hands of other taxpayers.

Section 23 of the Income Tax Ordinance, 2001 states that "A person who places an eligible depreciable asset into service in Pakistan for the first time in a tax year." It means that the term "first time in a tax year" relates to the first time use of the building by the taxpayer and has no concern with the history of usage of the building prior to it falling in the hands of the taxpayer. The act of placing the eligible depreciable asset into service or use, for the first time in a tax year, is of the taxpayer and it is inconsequential if the same asset/building was earlier put into service or use while it was in the hands of an earlier owner or proprietor. A taxpayer becomes entitled to deduction of initial allowance if he, through his own act, has placed an eligible depreciable asset into service for the first time in a tax year.

The above-mentioned view is fortified from the reading of subsection (5) of section 23 of the Income Tax Ordinance, 2001 which defines "eligible depreciable asset" and specifically excludes a plant or machinery which has been used previously in Pakistan from the definition of "eligible depreciable asset". A previously used building has not been excluded and is therefore an eligible depreciable asset and if put to use by the taxpayer for the first time in the tax year, irrespective of its previous use, the taxpayer is entitled to deduction of initial allowance.

Manzoor Hussain, Advocate Supreme Court for Petitioner.

Muhammad Idrees, Advocate Supreme Court for Respondents.

Date of hearing: 1st February, 2022.

**ORDER**

**SYED MANSOOR ALI SHAH, J**.---The controversy in this case revolves around the meaning and scope of section 23 of the Income Tax Ordinance, 2001 ("ITO"). Briefly, the admitted facts between the parties give rise to the question: whether the respondent taxpayer can claim deduction of initial allowance for an eligible depreciable asset (building in this case) being put to use by the taxpayer for the first time in a tax year, irrespective of the fact that the said building had been in use in the past in the hands of other taxpayers.

2. It has been argued before us that the phrase "first time in a tax year" in section 23 means that the building must have been put to use for the first time in its life. And in the present case as the building has already been put to use earlier by its previous owner or proprietor, the use of the building by the respondent taxpayer is not for the first time, hence the respondent taxpayer is not entitled to deduct initial allowance regarding the said asset. Learned counsel for the respondent taxpayer has supported the judgment of the High Court.

3. The relevant portion of section 23 of ITO is reproduced hereunder for convenience:-

> 23. Initial allowance.---(1) A person who places an eligible depreciable asset into service in Pakistan for the first time in a tax year shall be allowed a deduction (hereinafter referred to as an "initial allowance") computed in accordance with subsection (2), provided the asset is used by the person

for the purposes of his business for the first time or the tax year in which commercial production is commenced, whichever is later.

(2) ...

(3) ...

(4) ...

(5) In this section, "eligible depreciable asset" means a depreciable asset other than -

(a) any road transport vehicle unless the vehicle is plying for hire;

(b) any furniture, including fittings;

(c) any plant or machinery that has been used previously in Pakistan; or

(d)

The above provision states that "A person who places an eligible depreciable asset into service in Pakistan for the first time in a tax year." It means that the term "first time in a tax year" relates to the first time use of the building by the taxpayer and has no concern with the history of usage of the building prior to it falling in the hands of the taxpayer. The act of placing the eligible depreciable asset into service or use, for the first time in a tax year, is of the taxpayer and it is inconsequential if the same asset/building was earlier put into service or use while it was in the hands of an earlier owner or proprietor. A taxpayer becomes entitled to deduction of initial allowance if he, through his own act, has placed an eligible depreciable asset into service for the first time in a tax year.

4. This view is fortified from the reading of subsection (5) of section 23 which defines "eligible depreciable asset" and specifically excludes a plant or machinery which has been used previously in Pakistan from the definition of "eligible depreciable asset". A previously used building has not been excluded and is therefore an eligible depreciable asset and if put to use by the taxpayer for the first time in the tax year, irrespective of its previous use, the taxpayer is entitled to deduction of initial allowance.

5. In this case, admittedly, the asset (building) has been put into service/use by the respondent taxpayer for the first time in the tax year and, therefore, the respondent taxpayer is entitled to the deduction of the initial allowance in terms of section 23 of the ITO.

6. We, therefore, see no reason to interfere in the well reasoned judgment of the Islamabad High Court dated 19.5.2020. Leave is, therefore, declined and these petitions are dismissed.

MWA/C-9/SC Petitions dismissed.

2022 S C M R 1124

[Supreme Court of Pakistan]

Present: Umar Ata Bandial, Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ

MUHAMMAD IBRAHIM---Petitioner

Versus

FEDERATION OF PAKISTAN through DG NAB, Sindh---Respondent

Civil Petition No. 4599 of 2017, decided on 20th January, 2022.

(Against the judgment dated 23.11.2017 of the High Court of Sindh, Karachi passed in Constitution Petition No.D-881 of 2017)

**(a) Criminal Procedure Code (V of 1898)---**

----S. 498---National Accountability Ordinance (XVIII of 1999), S. 9(a)---Constitution of Pakistan, Art. 185(3)---Ad-interim pre-arrest bail, confirmation of---Housing Society---Fraudulent transfer of plots of original allottees to fake persons and illegal sale of plots to builders---Record revealed that the accused was neither an original member of the Housing Society nor a subsequent fake member of the Society as no plot was transferred by the Society to him---Accused had no active role to play in the Managing Committee of the Society---Name of the accused appeared as a nominee of a co-accused, who was the actual transferee of the plots from the Society, and the accused held 25 plots as a sub-lessee of the co-accused---However, on finding out about the illegalities in the transfer of these plots, the accused surrendered the said 25 plots to the Society through a duly registered deed of surrender---Said plots were not transferred to the building project, hence the allegation in the Reference that the plots were illegally procured by the accused and sold for gain to the project was not supported by the record---No material was available on the record, at present stage, to connect the accused with the violations allegedly committed by the Society or with the alleged illegally elected Managing Committee---Petition for leave to appeal was converted into appeal and allowed, and ad-interim pre-arrest bail granted to the accused was confirmed.

**(b) National Accountability Ordinance (XVIII of 1999)---**

----Ss. 18(g), 18(e), 24(a) & 24(d)---National Accountability Bureau Reference---Arrest of accused---Pre-requisites---Permission of the Chairman National Accountability Bureau (NAB) or any officer of NAB duly authorized by the Chairman NAB must be obtained by the investigating officer before the accused can be arrested, and there must be reasonable grounds and substance on the basis of which permission to arrest is to be granted.

Under section 24(a) of the National Accountability Ordinance, 1999 ('the Ordinance'), the Chairman National Accountability Bureau (NAB) has the power, at any stage, of the inquiry or investigation under the Ordinance, to direct that the accused be arrested, while under section 24(d) of the Ordinance the officer making the arrest is under an obligation to inform the accused of the grounds and substance on the basis of which he is arrested. The proviso to section 18(e) of Ordinance mandates that no person shall be arrested without the permission of the Chairman NAB or any officer of NAB duly authorized by him. Collective reading of these provisions show that the permission of the Chairman NAB or any officer of NAB duly authorized by the Chairman NAB must be obtained by the investigating officer before the accused can be arrested, and there must be reasonable grounds and substance on the basis of which permission to arrest is to be granted. Mere filing of the Reference by the Chairman NAB or an officer of the NAB duly authorized by him, under section 18(g) of the Ordinance, against the accused does not carry an implied permission to arrest the accused. Arrest and filing of the Reference are two independent actions under the Ordinance. The permission to arrest must be express and based on reasonable grounds and substance.

Munir A. Malik, Senior Advocate Supreme Court for Petitioner along with Petitioner.

Nasir Mehmood Mughal, Special Prosecutor for NAB.

Date of hearing: 20th January, 2022.

**ORDER**

**SYED MANSOOR ALI SHAH, J**.---The petitioner seeks leave to appeal against order dated 23.11.2017 passed by the High Court of Sindh on his constitutional petition under Article 199 of the

Constitution of the Islamic Republic of Pakistan 1973 ("Constitution"), whereby pre- arrest bail has been denied to him in NAB Reference No.6/2017 ("Reference").

2. The case set out in the Reference is that there were various complaints filed against the Management Committee of the Pak Punjab Cooperative Housing Society ("Society") with the allegations that they fraudulently transferred the plots of the original allottees to fake persons and also illegally sold plots to some builders. According to the Reference, the investigation in the matter revealed that the Society had 358 plots, which were allotted to the original/genuine members of the Society. However, with the connivance of Abrar Ahmed and Afzal Khan (co-accused), bogus share certificates were issued to enroll fake members, which were employees of the Sindh Workers Welfare Board ("SWWB"). Thereafter, a fraudulent Managing Committee was illegally elected under the supervision of Mirza Munir Baig and Mirza Afzal Baig, the other co- accused. The illegally elected Managing Committee approved a new layout plan in which all previous categories of residential plots were cancelled and converted into one category of plots measuring 120 sq. yards each in order to be sold further through fake allotment process. As a result, 541 plots in the name of employees of SWWB were allotted. The investigation further revealed that 100 such plots of the Society were transferred in the name of Messrs Falak Naz Golden Pebbles, 336 plots were transferred to a joint venture run and managed by Syed Amir Ali Shah, Muhammad Iqbal and Muhammad Arif (co-accused) who further transferred these plots for a building project namely, Premier Regency Villas ("Project").

3. The specific allegation against the petitioner in the Reference is that he was acting as a nominee of Muhammad Iqbal, the co-accused, and was holding 25 such plots as a sub-lessee and the said plots were subsequently transferred to the Project, hence he is alleged to be liable under section 9(a) of the National Accountability Ordinance, 1999 ("Ordinance").

4. We have heard the learned counsel for the parties and have gone through the record of the case. The record reveals that petitioner (accused No.19 in the Reference) was neither an original member of the Society nor a subsequent fake member of the Society as no plot was transferred by the Society to him. The name of the petitioner appears as a nominee of Muhammad Iqbal, who was the actual transferee of the plots from the Society, and the petitioner held 25 plots as a sub-lessee of Muhammed Iqbal. However, on finding out about the illegalities in the transfer of these plots, the petitioner surrendered the said 25 plots to the Society through a duly registered deed of surrender dated 12.3.2019. It is also observed that the said plots were not transferred to the Project, hence the allegation in the Reference that the plots were illegally procured by the petitioner and sold for gain to the Project is not supported by the record. Learned Prosecutor when confronted with this position of the case against the petitioner was unable to refer to any material available on record, at this stage, connecting the petitioner with the scam that allegedly took place in the Society. He also could not controvert that the said 25 plots were duly surrendered, and not transferred to the Project, by the petitioner.

5. In absence of such incriminating material, it needs examination, whether the NAB can lawfully arrest the petitioner. Under section 24(a) of the Ordinance, the Chairman NAB has the power, at any stage, of the inquiry or investigation under the Ordinance, to direct that the accused be arrested, while under section 24(d) of the Ordinance the officer making the arrest is under an obligation to inform the accused of the grounds and substance on the basis of which he is arrested. The proviso to section 18(e) of Ordinance mandates that no person shall be arrested without the permission of the Chairman NAB or any officer of NAB duly authorized by him. Collective reading of these provisions show that the permission of the Chairman NAB or any officer of NAB duly authorized by the Chairman NAB must be obtained by the investigating officer before the accused can be arrested, and there must be reasonable grounds and substance on the basis of which permission to arrest is to be granted. Mere filing of the Reference by the Chairman NAB or an officer of the NAB duly authorized by him, under section 18(g) of the Ordinance, against the accused does not carry an implied permission to arrest the accused. Arrest and filing of the Reference are two independent actions under the Ordinance. The permission to arrest must be express and based on reasonable grounds and substance. In this case, the NAB Prosecutor could not place before us

any such permission to arrest the petitioner given by the Chairman NAB or any officer of NAB duly authorized by the Chairman NAB.

6. In this case, examination of the record available before us prima facie shows that the petitioner has no nexus with the Society as he is not a member of the Society nor has an active role to play in the Managing Committee of the Society. According to the record, no plot was transferred to the petitioner from the Society and only 25 plots were sub leased to him by Muhammad Iqbal, the co-accused, which were surrendered by him through the registered deed dated 12.3.2019, and no gain was thus made by the petitioner in the said transaction. There is also no material on the record, at this stage, connecting the petitioner with the violations allegedly committed by the Society or with the alleged illegally elected Managing Committee. Thus, there are no reasonable grounds and substance to believe that the petitioner is involved in the commission of the offence alleged.

7. We, therefore, convert this petition into appeal and allow the same. Consequently, the constitution petition of the petitioner is accepted and the ad-interim bail granted to the petitioner vide order dated 29.11.2017 is confirmed, subject to his furnishing bail bond in the sum of Rupees one million with one surety in the like amount to the satisfaction of the learned Trial Court.

8. Foregoing are the reasons for our short order dated 20.01.2022, which is reproduced hereunder for sake of convenience and completion of record:

> For reasons to be recorded later, this petition is converted into appeal and allowed. The ad interim pre-arrest bail granted to the petitioner is confirmed subject to his furnishing bail bonds in the sum of Rupees One million with one surety in the like amount to the satisfaction of the learned Trial Court.

MWA/M-31/SC Bail confirmed.

**2022 S C M R 1135**

**[Supreme Court of Pakistan]**

**Present: Umar Ata Bandial, Syed Mansoor Ali Shah and Muhammad Ali Mazhar, JJ**

**COMMISSIONER INLAND REVENUE, ZONE-IV, LAHORE---Petitioner**

**Versus**

**Messrs PANTHER SPORTS AND RUBBER INDUSTRIES (PVT.) LTD. and others---Respondents**

Civil Petition No. 1691-L of 2018, decided on 21st September, 2021.

(Against the orders of Lahore High Court, Lahore dated 05.03.2018 passed in W.P. No. 133023 of 2018)

**Income Tax Ordinance (XLIX of 2001)---**

----Ss. 161(1A), 165(2B) & 174(3)---Income Tax Rules, 2002, Rr. 29(4) & 44(4)---Books of account, documents and records to be maintained for a period of six years---Scope of section 174(3) of the Income Tax Ordinance 2001---Taxpayer is obliged to maintain the record under section 174(3) of the Income Tax Ordinance, 2001 for a period of six years and the taxpayer cannot be compelled to produce the record for a tax year beyond the period of six years as stipulated in section 174(3) of the Ordinance---Supreme Court approved the view expressed by the Lahore High Court in the case reported as Maple Leaf Cement Factory Ltd v. Federal Board of Revenue 2016 PTD 2074.

Section 174 of the Income Tax Ordinance, 2001 ('the Ordinance') creates an obligation on the taxpayer to maintain such accounts, documents and records as prescribed for a period of six years, except in case of pending proceedings, where the obligation of a taxpayer to maintain the record is till the final decision of the proceedings, while the same provision protects the taxpayer from being asked to produce the record beyond the said period. The tax department is under an obligation to be vigilant and efficient enough so as to proceed against a taxpayer within the statutory timeframe provided under section 174(3) of the Ordinance.

In the context of the present case even though there is no specific limitation for issuance of notices under section 161(1A) or 165(2B) of the Ordinance or Rule 44(4) of the Income Tax Rules, 2002 ('the Rules') but these provisions cannot be actualized or given effect to unless the record, available with the taxpayer, is examined and verified by the tax authorities. Since the said provisions of law require taxpayer to maintain record for a period of six years, hence notices beyond a period of six years cannot be given effect to. As the taxpayer is under no legal obligation to maintain tax records after the said statutory period, any such notices demanding the taxpayer to furnish such information are inconsistent with the clear provisions of the Ordinance and hence unlawful.

Even though notices under sections 161(1A), 165(2B) of the Ordinance and Rule 44(4) of the Rules have no prescribed period of limitation, the statutory timeframe kicks in the minute the time period under section 174(3) is exhausted rendering such notices ineffective and unenforceable, attracting no penal consequences for the taxpayer. It is however to be noted that the department is only restricted where it seeks record beyond the statutory period under section 174(3) from the taxpayer but is otherwise free to proceed if the action or proceedings under the Ordinance are based on the record already in possession of the department.

Supreme Court approved the view expressed in the case reported as Maple Leaf Cement Factory Ltd v. Federal Board of Revenue 2016 PTD 2074, whereas the view taken in the case reported as Habib Bank Limited v. Federation of Pakistan 2013 PTD 1659 was disapproved.

Habib Bank Limited v Federation of Pakistan 2013 PTD 1659 disapproved.

Maple Leaf Cement Factory Ltd. v. Federal Board of Revenue 2016 PTD 2074 approved.

Ch. Muhammad Zafar Iqbal, Advocate Supreme Court (video-link - Lahore) along with Naeem Hassan, Secy (Lit.) FBR for Petitioner.

Nemo for Respondents.

Date of hearing: 21st September, 2021.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J**.---The petitioner seeks leave to appeal against order dated 05.03.2018 of the High Court whereby the notices[1] issued to the respondent taxpayer in the years 2017 regarding tax years 2007 and 2009, seeking statements under section 165 of the Income Tax Ordinance, 2001 ("Ordinance"), reconciliation statements under Rule 44(4) of the Income Tax Rules, 2002 ("Rules") and recovery under section 161(1A) of the Ordinance were set aside on the ground that a taxpayer cannot be asked to furnish record beyond the period of six years after the end of the tax year to which it relates, as provided under section 174(3) of the Ordinance.

2. The respondent challenged the said notices through a constitutional petition before the Lahore High Court. Relying on its earlier decision in Maple Leaf[2], the High Court allowed the petition and set aside the notices. The principle settled in Maple Leaf is that as the taxpayer is under no obligation to maintain records after a period of six years under section 174(3) of the Ordinance, therefore, any notice requiring a taxpayer to furnish records beyond the statutory period of six years is not lawful and no penal action could be taken against the taxpayer under such a notice.

3. We have heard the learned counsel for the petitioner at length and perused the record. The respondent taxpayer was under an obligation to deduct tax from an amount to be paid to a recipient at the time and in the manner specified in section 158 of the Ordinance. Section 165 read with Rule 44(4) of the Rules requires a taxpayer, who deducts tax as aforesaid, to furnish a Statement/Reconciliation Statement giving details of the amount of tax deducted and collected from a recipient. The said Statement and Reconciliation Statement has to be prepared on the basis of the tax records maintained by the taxpayer under the law.[3] A taxpayer, under the law, is to retain tax records under section 174(3) of the Ordinance read with Rule 29(4) of the Rules for a period of six years after the end of the tax year to which they relate.

4. Section 174(1) binds a taxpayer to maintain such accounts, documents and records as may be prescribed. Rule 29(1) of the Rules provides a list of such records. Subsection (3) of section 174 makes the duty of the taxpayer to maintain the records for a period of six years. Rule 29(4) reiterates the same timeline. Time based obligation of maintaining records contemplated under the Ordinance and the Rules is a legislative mandate that promotes efficient and smart fiscal administration and governance. It is underlined that the Ordinance is largely structured around time-framed provisions in order to make the taxing mechanism certain and transparent and the tax administration and tax governance smarter and efficient. Reference, with advantage, can be conveniently made to sections 120 (assessment), 122 (amendment of assessment) and 221 (rectification of mistakes) of the Ordinance in this regard.

5. Reading of the Ordinance and the Rules envisages that any proceedings against a taxpayer that is based on the tax records maintained by the taxpayer should be initiated within a fixed timeframe. Section 174 creates an obligation on the taxpayer to maintain such accounts, documents and records as prescribed for a period of six years, except in case of pending proceedings, where the obligation of a taxpayer to maintain the record is till the final decision of the proceedings (exception is not attracted in the present case), while the same provision protects the taxpayer from being asked to produce the record beyond the said period. As notices under sections 161, 165 and Rule 44(4) can only be replied to on the basis of the record maintained by the taxpayer, joint reading of sections 161, 165 and Rule 44(4) and section 174(3) and Rule 29 establishes that the tax department is under an obligation to be vigilant and efficient enough so as to proceed against a taxpayer within the statutory timeframe provided under section 174(3). Even though there is no specific limitation for issuance of notices under section 161(1A) or 165(2B) or Rule 44(4) but these provisions cannot be actualized or given effect to unless the record, available with the taxpayer, is examined and verified by the tax authorities. Since the aforesaid provisions of law require taxpayer to maintain record for a period of six years, hence notices beyond a period of six years cannot be given effect to. As the taxpayer is under no legal obligation to maintain tax records after the said statutory period, any such notices demanding the taxpayer to furnish such information are inconsistent with the clear provisions of the Ordinance and hence unlawful. Harmonized reading of the statute requires that section 174(3) and sections 161, 165 and Rule 44(4) must complement each other so as to promote the purposes of the Ordinance and equally protect and safeguard the rights of both the tax manager and the taxpayer as

envisaged under the Ordinance. Therefore, even though notices under sections 161(1A), 165(2B) and Rule 44(4) have no prescribed period of limitation, the statutory timeframe kicks in the minute the time period under section 174(3) is exhausted rendering such notices ineffective and unenforceable, attracting no penal consequences for the taxpayer. It is clarified that the department is only restricted where it seeks record beyond the statutory period under section 174(3) from the taxpayer but is otherwise free to proceed if the action or proceedings under the Ordinance are based on the record already in possession of the department.

6. We, therefore, endorse the view expressed in Maple Leaf[4] by the Lahore High Court, where a similar question had come up before the court. We have also examined Habib Bank[5] which holds that the department can override the timeframe under section 174(3) by justifying the delay in initiating the matter against the taxpayer. Section 174(3) of the Ordinance read with Rule 29(4) of the Rules is clear and leaves no room for any such departmental justification, which in any case cannot deprive the taxpayer of the statutory protection under section 174(3) of the Ordinance. We, therefore, do not support the view expressed in Habib Bank as we have not been able to find any statutory support for the conclusion arrived at in the said case.

7. It is also useful to draw attention to section 214A of the Ordinance which specifically deals with "condonation of time limit". Perusal of the said provision shows that it applies where there is a time limit provided in the provision, which is not so in the case of sections 161 and 165 of the Ordinance. Further section 214A deals with "any act or thing to be done" within a timeframe. Section 174(3) on the other hand does not require any act or thing to be done in a particular timeframe but quite on the contrary provides that after a lapse of a period of six years, the taxpayer shall not be obligated to maintain its tax records. Therefore, section 214A has no application to the present case and cannot be invoked to deprive the taxpayer of the statutory protection under section 174(3) of the Ordinance.

8. For the above reasons we hold that a taxpayer is obliged to maintain the record under section 174(3) of the Ordinance for a period of six years and the taxpayer cannot be compelled to produce the record for a tax year beyond the period of six years as stipulated in section 174(3) of the Ordinance. Hence notices issued under section 165(2B) or 161(1A) of the Ordinance being ineffective and unenforceable are set aside.

9. For the foregoing reasons, we take no exception to the impugned order. Leave is, therefore, declined and this petition is dismissed.

MWA/C-14/SC Petition dismissed.

**2022 S C M R 1411**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ**

**Raja ZAHOOR AHMED and others---Petitioners**

**Versus**

**CAPITAL DEVELOPMENT AUTHORITY through Chairman and others---Respondents**

Civil Petitions Nos.3347 to 3351, 4229 and 4263 of 2021, decided on 20th May, 2022.

(Against the consolidated judgment of Islamabad High Court, Islamabad dated 16.02.2021, passed in W.Ps. Nos.4126 of 2015 and connected cases)

**(a) Capital Development Authority Ordinance (XXIII of 1960)---**

----Ss. 11, 12 & 13---Status of properties changed from residential to commercial---Legality---Violation of the Master Plan---Capital Development Authority ("CDA") has no discretionary power to give effect to any scheme or accord any permission for change of status or use of property in breach of the Master Plan---Board of Directors ("Board") in which vests the management of the CDA is not competent to allow any change in the character of any property in violation of the Master Plan---Master Plan is protected under the Capital Development Authority Ordinance, 1960 ('the Ordinance') and the Ordinance obliges the CDA to regulate the use of land pursuant to the Master Plan---Prohibition contained against the use of land for a purpose other than the one specified in the Master Plan is absolute.

The Board of Directors ("Board") of the Capital Development Authority ("CDA") took the decision dated 13-02-1995 ('earlier decision') to commercialize the residential properties of the petitioners. The Board soon realized that the decision dated 13-02-1995 would be in violation of the Master Plan of the city. Taking note of the fact that the decision dated 13-02-1995 had not till then been implemented as conversion rate could not be finalized, the Board through a fresh decision dated 05-10-1995 rescinded its earlier decision. Subsequently, the CDA issued notices to the petitioners for non-conforming use of their properties.

The properties owned by the petitioners did not fall within a commercial area as set out in the Master Plan or the Scheme prepared thereunder. They sought a change in the status of their properties from residential to commercial. However, such a change was not permissible under the Capital Development Authority Ordinance, 1960 ('the Ordinance') without a change in the Master Plan which could only be done with the approval of the Federal Government. Any scheme prepared relating to land use, zoning and land reservation, among other things, was required to be in pursuance of the Master Plan. The CDA had no discretionary power to give effect to any scheme or accord any permission for change of status or use of property in breach of the Master Plan. The Master Plan was protected under the Ordinance and the Ordinance obliges the CDA to regulate the use of land pursuant to the Master Plan. The prohibition contained against the use of land for a purpose other than the one specified in the Master Plan was absolute. There was, therefore, no escape from the conclusion that the earlier decision of the Board was taken without lawful authority. The Board itself realized that its earlier decision would be in violation of the Master Plan and, thus, rightly rescinded it through a fresh decision.

No vested rights could be created in favour of the petitioners under the earlier decision. The Board in which vests the management of the CDA was not competent to allow any change in the character of the properties of the petitioners in violation of the Master Plan. The Master Plan could only be amended with the approval of the Federal Government. The earlier decision was in breach of provisions of the Ordinance and in conflict with the Master Plan. It was taken without lawful authority and was rightly undone by the Board. Moreover, the CDA did not implement its earlier decision. It did not approve any change in the status of the properties owned by the petitioners during the period this decision remained in the field. The petitioners could not, in the given circumstances, claim to have taken any decisive steps in pursuance of the earlier decision. The doctrine of locus poenitentiae was not, therefore, attracted to their case.

Supreme Court directed that the CDA shall ensure to factor in adaptation, climate resiliency and sustainability into their plans, policies and decisions in order to protect the constitutional rights to life,

dignity and property of the residents of the Capital City, in particular, and people of the country, in general. Petitions for leave to appeal were dismissed, and leave was refused.

**(b) Environmental law---**

----Urban planning and climate change---Adaptation, climate resiliency and sustainability---Urban development authorities---Factors to be considered by urban development authorities in Pakistan while making urban development plans stated.

The importance of regulating land use for orderly urban development cannot be understated. Planning and regulating building construction activity in urban environments is emphasized around the world in the interest of organized growth of cities. It is an exercise based on scientific research and experience which recommends in a comprehensive manner from social, economic, environmental, infrastructure capacity, aesthetic, and other relevant aspects, the best present and future uses of geographically specified land areas called zones. Zoning is a public welfare management tool employed in urban planning to serve the city's interests. Public welfare today would naturally encompass the pressing issues of the time i.e., climate change; environmental degradation; food and health safety; air pollution; water pollution; noise pollution; soil erosion; natural disasters; and desertification and flooding having an appreciable impact on public health, food safety, natural resource conservation, environmental protection, social equity, social choice, etc. Any initiative to revise land use regulations must be based on the said considerations in order to ensure that urban development standards stay relevant to current issues of the community.

Jerold S. Kayden, 'National Land-Use Planning in America: Something Whose Time Has Never Come' (2000) 3 WASH. U. J. L. & POL'Y 445, 446-447; Agins v. City of Tiburon 447 U.S. 255, 262 (1980); Keith H. Hirokawa, 'Making Sense of a "Misunderstanding of the Planning Process" (2012) 44 Urb. Law. 295 and D. G. Khan Cement Company Limited v. Government of Punjab 2021 SCMR 834 ref.

The necessity of planned urban development is accentuated in the vulnerable age of climate change. Climate change poses a series of interrelated challenges to the country's most densely populated places: its cities. Many cities depend on infrastructure, like water and sewage systems, roads, bridges, and power plants, that is aging and in need of repair or replacement. Rising sea levels, storm surges, heat waves, and extreme weather events will compound these issues, stressing or even overwhelming these essential services. Climate change and its impacts threaten the well-being of urban residents. Essential infrastructure systems such as water, energy supply, and transportation will increasingly be compromised by interrelated climate change impacts. The nation's economy, security, and culture all depend on the resilience of urban infrastructure systems. Direct and interacting effects of climate change will expose people who live in cities to multiple threats. Climate changes affect the built, natural, and social infrastructure of cities, from storm drains to urban waterways to the capacity of emergency responders. Climate change increases the risk, frequency, and intensity of certain extreme events like intense heat waves, heavy downpours, flooding from intense precipitation and coastal storm surges, and disease incidence related to temperature and precipitation changes. The vulnerability of urban dwellers multiplies when the effects of climate change interact with pre-existing urban stressors, such as deteriorating infrastructure, areas of intense poverty, and high population density.

https://nca2014.globalchange.gov/report/sectors/urban ref.

National response to climate change, inter alia, is to continuously evolve innovative and smart "adaptation" strategies. Adaptation climate change strategy requires that Pakistan and its public institutions make climate resilient policies and rest their decisions on sustainability. Infrastructures must be strong enough to withstand climate change e.g., heavy rains, floods, earthquakes and other extreme weather. Shutting eyes to the ominous signs of climate change will plunge the country into a world that may not be able to sustain fundamental human values. It could affect basic physical and larger social needs including harnessing and consuming energy, water and food as well as habitation, travelling and communication potentialities. It is doubtful that early town planners were driven by climate considerations. However, climate must, in the wake of climate change, form a basic determinant of urban planning and design. Climate-resilient development in cities of all sizes is crucial for improving the well-being of people and

increasing the life opportunities of future generations. Any change in the Master Plan to an urban scheme without taking account of the climate factor would be detrimental.

Shelby D. Green, 'Zoning Neighborhoods for Resilience: Drivers, Tools and Impacts' (2016) 28 Fordham Envtl. Law Rev. 41 ref.

Urban development authorities need to ensure that their urban development plans consider and support adaptation, climate resiliency and sustainability. Before putting up a proposal for amendment or modification in the Master Plan or a scheme or before proposing a new development plan or scheme, the urban development authorities need to seriously consider the climate change angle. Any conversion of residential neighbourhoods to commercial zones is likely to lead to adverse environmental consequences on account of increased human and vehicular traffic and activity, and should not be permitted without proper investigation, forethought and remedial measures to control the soaring thermal environment. Urban planners should prioritize the climate factor in their development approaches to address the triple planetary crises of Climate Change, Air Pollution and Loss of Biodiversity.

**(c) Constitution of Pakistan---**

----Arts. 9, 14, 18 & 23---Environmental law---Climate change---Effect of climate change on Fundamental rights of people explained.

Effect of climate change on cities, affects its residents and their core fundamental rights to life, dignity and property guaranteed under Articles 9, 14, 18 and 23 of the Constitution. In an urban living, climate change can impair the quality of life of a person, offend his dignity and deprive him of his property or the right to fully enjoy his property. Incorporating adaptation, climate resilience and sustainability, in the policy decisions by the urban development authorities, are essential to actualize the fundamental rights of the people and therefore form an integral part of the fundamental human rights of the people of the country. In the face of the grave existential threat of climate change, adaptation, climate resilience and sustainability assume the role of a constitutional necessity and of an overarching constitutional obligation.

Mansoor Ahmed, Advocate Supreme Court and Ch. Akhtar Ali, Advocate-on-Record for Petitioners (in C.Ps. Nos. 3347-3351 of 2021).

Syed Asghar Hussain Sabzwari, Senior Advocate Supreme Court and Mahmood A. Sh., Advocate-on-Record for Petitioners (in C.Ps. Nos. 4229 and 4263 of 2021).

Nemo for Respondents.

Hasan Riaz, Research Officer, SCRC for Research Assistance.

Date of hearing: 20th May, 2022.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The case stems from a decision of the Board of Directors ("Board") of the Capital Development Authority ("CDA") dated 13.02.1995 to commercialize the residential properties of the petitioners situated in front of the Industrial and Trading Centre, Sector G-9/4, Islamabad. The Board soon realized that the decision dated 13.02.1995 would be in violation of the Master Plan of Islamabad. Taking note of the fact that the decision dated 13.02.1995 had not till then been implemented as conversion rate could not be finalized, the Board through a fresh decision dated 05.10.1995 rescinded its earlier decision dated 13.02.1995. Subsequently, the CDA issued notices to the petitioners for non-conforming use of their properties. These notices were challenged by them, claiming in their writ petitions that their residential properties stood commercialized on the basis of the decision dated 13.02.1995. They also asserted that they could not be asked to pay conversion fee in lieu of such commercialization. Additionally, other petitioners filed civil suits seeking declaration that their properties had acquired commercial character. The applications under Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure filed along with the suits were dismissed by the Trial Court; appeals also met the same fate; and, then, civil revisions were preferred before the High Court. The High Court through the impugned consolidated judgment dismissed the writ petitions and civil revisions filed by the petitioners. The petitioners now seek leave to appeal against said judgment of the High Court.

2. We consider in this case whether the decision of the Board dated 13.02.1995 was taken in the exercise of lawful authority and/or whether such decision had created any rights in favour of the petitioners. Also, the facts and circumstances of the case merit attention to the relationship between urban development and climate change, and the role of urban planning and development agencies.

3. The Capital Development Authority Ordinance 1960 ("Ordinance") was enacted to establish the CDA for the purpose of making all arrangements for the planning and development of Islamabad. The CDA was required to prepare a master plan and a phased master programme for the development of the 'Capital Site' and a similar plan and programme for the rest of the 'Specified Areas'.[1] All such plans and programmes were required to be submitted to the Federal Government for approval.[2] A Master Plan was prepared at the time of the inception of the city and subsequently different sectors were set up under different schemes. The Master Plan aimed at a rationalized reproduction of the attributes of the city by establishing the same sized and carefully organized spatial structures of the central facilities and public spaces as a coherent urban design scheme as evident in the detailed designs of different sectors.[3]

4. We see that the properties owned by the petitioners do not fall within the commercial area of Sector G-9 as set out in the Master Plan or the Scheme prepared thereunder. They seek a change in the status of their properties from residential to commercial. However, such a change is not permissible under the Ordinance without a change in the Master Plan which can only be done with the approval of the Federal Government. Any scheme prepared relating to land use, zoning and land reservation, among other things, is required to be in pursuance of the Master Plan.[4] We agree with the impugned judgment of the High Court that the CDA has no discretionary power to give effect to any scheme or accord any permission for change of status or use of property in breach of the Master Plan. The Master Plan is protected under the Ordinance and the Ordinance obliges the CDA to regulate the use of land pursuant to the Master Plan. The prohibition contained against the use of land for a purpose other than the one specified in the Master Plan is absolute. There is, therefore, no escape from the conclusion that the decision of the Board dated 13.02.1995 was taken without lawful authority. The Board itself realized that the decision dated 13.02.1995 would be in violation of the Master Plan of Islamabad and, thus, rightly rescinded it through the decision dated 05.10.1995.

5. We also agree with the High Court that no vested rights could be created under the decision dated 13.02.1995. The Board in which vests the management of the CDA was not competent to allow any change in the character of the properties of the petitioners in violation of the Master Plan. The Master Plan could only be amended with the approval of the Federal Government. The decision dated 13.02.1995 was in breach of provisions of the Ordinance and in conflict with the Master Plan. It was taken without lawful authority and was rightly undone by the Board. Moreover, the CDA did not implement the decision dated 13.02.1995. It did not approve any change in the status of the properties owned by the petitioners during the period this decision remained in the field. The petitioners cannot, in the given circumstances, claim to have taken any decisive steps in pursuance of the decision dated 13.02.1995. The doctrine of locus poenitentiae is not, therefore, attracted to their case.

Urban Planning, Climate Change and the role of the CDA and other Urban Development Authorities

6. The importance of regulating land use for orderly urban development cannot be understated. Planning and regulating building construction activity in urban environments is emphasized around the world in the interest of organized growth of cities. It is an exercise based on scientific research and experience which recommends in a comprehensive manner from social, economic, environmental, infrastructure capacity, aesthetic, and other relevant aspects, the best present and future uses of geographically specified land areas called zones.[5] Zoning is a public welfare management tool employed in urban planning to serve the city's interests.[6] Public welfare today would naturally encompass the pressing issues of the time i.e., climate change; environmental degradation; food and health safety; air pollution; water pollution; noise pollution; soil erosion; natural disasters; and desertification and flooding having an appreciable impact on public health, food safety, natural resource conservation, environmental protection, social equity, social choice,

etc.[7] Any initiative to revise land use regulations must be based on the aforesaid considerations in order to ensure that urban development standards stay relevant to current issues of the community.

7. The necessity of planned urban development is accentuated in the vulnerable age of climate change. Climate change poses a series of interrelated challenges to the country's most densely populated places: its cities. Many cities depend on infrastructure, like water and sewage systems, roads, bridges, and power plants, that is aging and in need of repair or replacement. Rising sea levels, storm surges, heat waves, and extreme weather events will compound these issues, stressing or even overwhelming these essential services. Climate change and its impacts threaten the well-being of urban residents. Essential infrastructure systems such as water, energy supply, and transportation will increasingly be compromised by interrelated climate change impacts. The nation's economy, security, and culture all depend on the resilience of urban infrastructure systems. Direct and interacting effects of climate change will expose people who live in cities to multiple threats. Climate changes affect the built, natural, and social infrastructure of cities, from storm drains to urban waterways to the capacity of emergency responders. Climate change increases the risk, frequency, and intensity of certain extreme events like intense heat waves, heavy downpours, flooding from intense precipitation and coastal storm surges, and disease incidence related to temperature and precipitation changes. The vulnerability of urban dwellers multiplies when the effects of climate change interact with pre-existing urban stressors, such as deteriorating infrastructure, areas of intense poverty, and high population density.[8]

8. Pakistan falls amongst the most vulnerable countries and is seriously hit by climate change, even though it has negligible contribution towards greenhouse gases (GHGs). The National Climate Change Policy 2012 underlined the seriousness of this existential threat. Climate resilient development and adaptation[9] was the focus of this policy document though as a responsible member of the global community due importance was also accorded to mitigation[10] efforts. However, after Paris Climate Accord 2015, Pakistan has updated its climate policy and the focus of the National Climate Change Policy 2021 is equally placed on adaptation and mitigation with the major emphasis on nature-based solutions. Such solutions include vegetal cover expansion, coastal resource management, and mangrove and natural reef ecosystem protection. Infrastructure-based solutions comprise climate-proofing infrastructure, including storm drainage systems, water supply and treatment plants, as well as the protection or relocation of energy or solid waste management facilities. Some coastal cities may also need to plan for infrastructure development, protection and/or relocation related to a rise in sea level.[11]

9. Our national response to climate change, inter alia, is to continuously evolve innovative and smart "adaptation" strategies. Our adaptation climate change strategy requires that Pakistan and its public institutions make climate resilient policies and rest its decisions on sustainability. Our infrastructures must be strong enough to withstand climate change e.g., heavy rains, floods, earthquakes and other extreme weather. Shutting eyes to the ominous signs of climate change will plunge us into a world that may not be able to sustain fundamental human values. It could affect our basic physical and larger social needs including harnessing and consuming energy, water and food as well as habitation, travelling and communication potentialities. It is doubtful that our early town planners were driven by climate considerations. However, climate must, in the wake of climate change, form a basic determinant of urban planning and design.[12] Climate-resilient development in cities of all sizes is crucial for improving the well-being of people and increasing the life opportunities of future generations. Any change in the Master Plan to an urban scheme without taking account of the climate factor would be detrimental.

10. The concept of "the Right to the City"[13] has become a common framework for articulating alternative visions of the city and making a host of demands on issues related to urban equity and social justice. It has also been used for making urban governance, planning, and budgeting more participative and inclusive. The Right to the City is interdependent to all recognized international human rights; and its conception is based on an integral view, which includes civil, political, economic, social, cultural and environmental rights enshrined in the International Human Rights Treaties.[14]

11. Effect of climate change on cities, affects its residents and their core fundamental rights to life, dignity and property guaranteed under Articles 9, 14, 18 and 23 of the Constitution of the Islamic Republic of Pakistan, 1973. In an urban living, climate change can impair the quality of life of a person, offend his dignity and deprive him of his property or the right to fully enjoy his property. Incorporating adaptation, climate resilience[15] and sustainability, in the policy decisions by the urban development authorities, are essential to actualize the fundamental rights of the people and therefore form an integral part of the fundamental human rights of the people of Pakistan. In the face of the grave existential threat of climate change, adaptation, climate resilience and sustainability assume the role of a constitutional necessity and of an overarching constitutional obligation.

12. Our urban development authorities need to ensure that their urban development plans consider and support adaptation, climate resiliency and sustainability. Before putting up a proposal for amendment or modification in the Master Plan or a scheme or before proposing a new development plan or scheme, the urban development authorities need to seriously consider the climate change angle. Any conversion of residential neighbourhoods to commercial zones is likely to lead to adverse environmental consequences on account of increased human and vehicular traffic and activity, and should not be permitted without proper investigation, forethought and remedial measures to control the soaring thermal environment. It is high time that our urban planners prioritize the climate factor in their development approaches to address the triple planetary crises of Climate Change, Air Pollution and Loss of Biodiversity. The CDA shall ensure to factor in adaptation, climate resiliency and sustainability into their plans, policies and decisions in order to protect the constitutional rights to life, dignity and property of the residents of Islamabad, in particular, and people of Pakistan, in general.

13. In view of the above, we do not take any exception to the judgment of the High Court. Consequently, leave is refused and the petitions are dismissed. Copy of this Order shall be dispatched to the Chairman, CDA for information, guidance and compliance.

MWA/Z-9/SC Petitions dismissed.

**2022 S C M R 1691**

**[Supreme Court of Pakistan]**

**Present: Umar Ata Bandial, Sajjad Ali Shah,Syed Mansoor Ali Shah, Qazi Muhammad Amin Ahmed and Amin-ud-Din Khan, JJ**

**HADAYAT ULLAH and others---Petitioners**

**Versus**

**FEDERATION OF PAKISTAN and others---Respondents**

Civil Review Petitions Nos. 292 to 302, 351 to 432, 442 to 456 of 2021 along with C.M.As. Nos. 11812 to 11814, 11837, 11862 to 11864, 11902-11903, 11982-11983, 11987, 11679, 12017, 12019, 12020, 12024, 12025, 12028, 12029, 12031-12033, 12035, 12075, 11993, 12103-12104, 12161-12162, 12172-12173, 12403, 12372-12373 of 2021 along with Civil Misc. Appeals Nos. 168, 158 and 175 of 2021, decided on 17th December, 2021.

(For review of the judgment dated 17.08.2021 passed in C.A. No.491 of 2012 and others)

Per Umar Ata Bandial, J; Sajjad Ali Shah, Qazi Muhammad Amin Ahmed and Amin-ud-Din Khan, JJ agreeing; Syed Mansoor Ali Shah, J dissenting. (Majority view)

**(a) Constitution of Pakistan---**

----Art. 188---Review jurisdiction of the Supreme Court---Scope---Review jurisdiction of the Court operates in a limited area---Review does not succeed merely because a material error has crept into the disputed judgment---Instead, a review is only allowed when the material error alters the outcome of the case thereby rendering the disputed judgment bad law.

Mukhtar Mai v. Abdul Khaliq 2019 SCMR 1302 ref.

**(b) Constitution of Pakistan---**

----Arts. 240 & 260(1)---Civil Servants Act (LXXI of 1973), S. 2(1)(b)---Terms "Service of Pakistan" and "Civil Servant"---Said terms were not synonymous, in fact, the phrase 'service of Pakistan' appeared to be of wider import---Although the terms 'civil service' and 'service of Pakistan' are not identical they do overlap in that the former is a sub-category of the latter.

Registrar, Supreme Court of Pakistan v. Wali Muhammad 1997 SCMR 141 and Muhammad Mubeen-us-Salam v. Federation of Pakistan PLD 2006 SC 602 ref.

**(c) Constitution of Pakistan---**

----Art. 260(1)---Term "Service of Pakistan"---Test for determining whether a person is in the 'service of Pakistan'---Test whether a person is in the service of Pakistan is whether he is performing functions in connection with the affairs of the Federation---For an entity (where a person is employed) to qualify as being in the service of Pakistan, it must fulfill three criteria; first, it must exercise public or sovereign power in some form; second, the government must retain effective/substantial control over its functioning; and third its activities must be mainly financed by the government.

Salahuddin v. Frontier Sugar Mills and Distillery Ltd. PLD 1975 SC 244 and Aitchison College v. Muhammad Zubair PLD 2002 SC 326 ref.

**(d) Constitution of Pakistan---**

----Art. 240---Appointments to service of Pakistan---Principles of merit, non-discrimination, transparency and fairness---Article 240 of the Constitution is simply the bedrock on which appointments to the service of Pakistan are to be made; it is then the responsibility of the appointing authorities to ensure that appointments are made strictly in accordance with the relevant laws (including the applicable rules and regulations) that incorporate the principles of merit (selection through a competitive process), non-discrimination, transparency and fairness---Same principles apply to appointments on any post in public service since an organisation can only best serve the people when all its employees are qualified individuals who are selected through a fair and transparent process---In the absence of dedicated supporting staff, no senior officer sitting at the helm of affairs can succeed in guiding the nation towards prosperity---However, it is significant that said principles are not merely fruit of judge made law but they also emanate from the fundamental rights enshrined in the Constitution, especially Article 18 (freedom of trade, business or profession) for which reason they occupy an immutable character.

Mubashir Raza Jaffri v. Employees Old-Age Benefits Institutions 2014 SCMR 949; Mushtaq Ahmad Mohal v. Honourable Lahore High Court 1997 SCMR 1043; Munawar Khan v. Niaz Muhammad 1993 SCMR 1287 and Abdul Jabbar Memon: In re 1996 SCMR 1349 ref.

**(e) Sacked Employees (Re-instatement) Act (XXII of 2010)---**

----Ss. 2(d), 2(f)(vi), 4, 10, 11, 12 & 13 & Preamble---Constitution of Pakistan, Arts. 4, 9, 14, 18, 25, 184(3), 187, 188, 240 & 242---Supreme Court Rules, 1980, O. XXXIII, R. 6---[Per Umar Ata Bandial, J. (Majority view): Initial appointment of majority of the reinstated employees ('the beneficiary employees') was made without following the principles of merit, non-discrimination, transparency and fairness---Through operation of section 4 of the Sacked Employees (Re-instatement) Act, 2010 ('the 2010 Act') all beneficiary employees were ordered to be regularised (either on the same scale or on one-step higher scale) within a certain timeframe without complying any codal formalities and without regard to the nature of the post that they occupied prior to their dismissal, removal or termination from service---Furthermore the 2010 Act discriminated against similarly placed persons who were dismissed, removed or terminated from service in the periods prior to 01-11-1996 and subsequent to 12-10-1999---Such classification of the time period was neither reasonable nor based on any intelligible differentia---By giving leeway to the beneficiary employees and by placing them at the same (or in some cases better) footing in the organisational structure of the employers the fundamental rights of the regular employees were breached --- Act of 2010 was violative of the different provisions of the Constitution, specifically Articles 4, 9, 18, 25, 240 & 242, therefore the same was declared to be void with retrospective effect---Review petitions were dismissed with certain directions regarding services rendered by the re-instated employees of the "employers" [as defined in section 2(d) of the Sacked Employees (Re-instatement) Act, 2010]---[Per Syed Mansoor Ali Shah, J. (Minority view): Vires of the Sacked Employees (Re-instatement) Act, 2010 ('the 2010 Act') enacted by the Parliament could not be examined and declared ultra vires, on the touchstone of Articles 4, 240 & 242 of the Constitution, as said Articles did not provide any criterion to test the vires of a law---Parliamentary debates relating to the objects and reasons of the enactment of the 2010 Act showed that the persons to be reinstated in service had suffered "political victimization" in the matter of their dismissal, removal or termination from service, at the hands of the Government during that period, and the object of the 2010 Act was to provide relief to such persons---Hence, persons reinstated formed a distinct class, and their classification was based on intelligible differentia, distinguishing them from those who had been left out, and it had a rational nexus to the object sought to be achieved by the 2010 Act, therefore, only their reinstatement and regularization under the 2010 Act as such did not offend the fundamental right to equal treatment under Article 25(1) of the Constitution---However, the issue of seniority that affected the right to 'status' enshrined in fundamental 'right to life' of the regular employees serving in the relevant departments, had arisen only in cases of employees reinstated and regularized on "one scale higher", under sections 4(a) & 10 of the 2010 Act---Such reinstatement and regularization was violative of the right to 'status' enshrined in fundamental 'right to life' of the regular employees serving in the relevant departments at the time of promulgation of the 2010 Act, and it was also violative of the 'right to dignity' and 'right to equality before law' as it gave an undue advantage to the reinstated employees to the disadvantage of the rights of the already working regular employees---Proper course, in such circumstances, was for the Court to declare (as ultra vires) only that part of the provisions of sections 4(a) & 10 of the 2010 Act that had the said offending effect, i.e., the reinstatement and regularization on "one scale higher" and this could have easily been done by reading out (severing) the words "one scale higher to" from the provisions of section 4(f) and the words "one scale higher than" from the provisions of section 10 of the 2010 Act---Furthermore sections 2(f)(vi), 11, 12 & 13, of the 2010 Act which dealt with and provided for reinstatement and regularization of such sacked employees who had been dismissed, removed or terminated from service on account of absence from duty, misconduct, mis-appropriation of Government money or stock, or unfitness on medical grounds, and the determination of their guilt or medical unfitness had attained finality by being unchallenged or unsuccessfully challenged, were also ultra vires the Constitution].

Per Umar Ata Bandial, J. (Majority view):

The material on record in the present case, furnished by the relevant Ministries/Divisions, establishes that these principles of merit, non-discrimination, transparency and fairness were not followed in the vast majority of the

initial appointments (from 01.11.1993 to 30.11.1996). Therefore, such defective appointments suffered from illegality and were void.

For the initial appointments of reinstated employees ('the beneficiary employees') that were illegal from the outset, it was not within the competence of Parliament to enact laws that firstly, bypassed the settled requirements enshrined in the Constitution for joining public employment and secondly, protected these unlawful appointments without curing their respective defects. Such contravention can be seen in section 4 of the Sacked Employees (Re-instatement) Act, 2010 ('the 2010 Act') where all beneficiary employees were ordered to be regularised (either on the same scale or on one-step higher scale) within a certain timeframe without complying any codal formalities and without regard to the nature of the post that they occupied prior to their dismissal, removal or termination from service.

State and public functionaries act as fiduciaries for and are responsible/accountable to the people of the country. They are duty bound to act in the furtherance of public interest. However, how the public interest was promoted by reinstating the beneficiary employees in question who had been inducted without complying with the duly prescribed procedure for appointment is neither determinable nor defensible.

In re: Suo Motu 2010 SCMR 885 ref.

The 2010 Act was enacted to achieve a specific object and purpose, namely, the reinstatement of those employees who had been initially appointed during tenure of a political party. The 2010 Act discriminates against similarly placed persons who were dismissed, removed or terminated from service in the periods prior to 01-11-1996 and subsequent to 12-10-1999. The Preamble of the 2010 Act coupled with its substantive provisions do not disclose the reason for reinstatement of only those employees who had been dismissed, removed or terminated from service during the specific period of 01-11-1996 till 12-10-1999. Clearly then the Act's classification of the time period is neither reasonable nor based on any intelligible differentia. There is also no rational nexus with the object being sought to be achieved because if the intent of Parliament was to assist people who had been dismissed, removed or terminated from service on account of political victimisation then there is no rhyme or reason as to why only the persons dismissed, removed or terminated between 01-11-1996 and 12-10-1999 were granted this relief. Surely such a classification ought to have been preceded by some study, data collection and analysis, however, the same are lacking. There must exist a plethora of people since independence of the country (till date) who have been unfairly removed from service on account of political victimisation yet no favour is extended to them by the 2010 Act.

Mobashir Hassan v. Federation of Pakistan PLD 2010

SC 265 ref.

The reinstatements under the 2010 Act were carried out without following any proper procedure and without having regard to the nature of the posts occupied by the beneficiary employees during their initial appointments. On the other hand, the regular employees were inducted into service after fulfilling all the codal formalities. Therefore, by giving leeway to the beneficiary employees and by placing them at the same (or in some cases better) footing in the organisational structure of the employers the fundamental rights of the regular employees were breached, in particular Articles 4, 9 and 18 of the Constitution. Said three constitutional provisions envisage a State in which all aspects of a citizen's life, including his/her right to enter a profession, will be regulated by law. Nevertheless, the 2010 Act by reinstating the beneficiary employees whilst ignoring the applicable laws, rules and regulations, which detailed the process to be followed in making appointments, has flouted these guarantees of the Constitution. Therefore, the 2010 Act has directly impinged upon the fundamental rights of regular employees.

Argument that the judgment under review should have read down section 4 of the 2010 Act and preserved its watered-down version along with the other provisions of the Act that were not inconsistent with fundamental rights, fails to recognise two important aspects of section 4; firstly, section 4 as it stands does not suffer from just a singular defect. Instead, it is fundamentally flawed. It not only provides one-step higher regularisation in subsection (a) [which could potentially have been read down] but it also regularises all beneficiary employees regardless of the post they were occupying before their initial termination. This defect is so central to section 4 that to read it down would essentially require the Court to rewrite it which is not permissible as such an exercise

would enter into the realm of legislation. Secondly, section 4 is the governing/primary provision of the 2010 Act. Therefore, once it is declared unconstitutional no substance is left in the 2010 Act as all other provisions are secondary to section 4 and cannot control the operation of the 2010 Act on their own. As a result, no purpose will be achieved in retaining the 2010 Act on the statute book when its effect will have been destroyed by the deletion of section

Zahid Iqbal v. Muhammad Adnan 2016 SCMR 430 ref.

Since the 2010 Act has been adjudged to be violative of the different provisions of the Constitution, specifically Articles 4, 9, 18, 25, 240 and 242, the judgment under review would have retrospective effect.

Ali Azhar Khan Baloch v. Province of Sindh 2015 SCMR 456 and Shahid Pervaiz v. Ejaz Ahmad 2017 SCMR 206 ref.

Supreme Court considered that having rendered a service of 10 years or more since their reinstatement under the 2010 Act (and Ordinances before that), the beneficiary employees, most of whom are nearing retirement and have minimal future job prospects, have dedicated a considerable period of their life to their employers and so deserve to be treated with leniency. More so, when through no fault of their own, the beneficiary employees were inducted and subsequently reinstated into the service of their employers without the fulfilment of the necessary codal formalities. Therefore, in exercise of its inherent power conferred under Order XXXIII, Rule 6 of the Supreme Court Rules, 1980 and in reliance of its power to do ex debito justitiae, the Supreme Court converted present review proceedings filed under Article 188 of the Constitution into proceedings under Article 184(3) read with Article 187 to grant the following relief to the beneficiary employees:

(i) The beneficiary employees who were holding posts for which no aptitude, scholastic or skill test was required at the time of initial termination (01-11-1996 to 12-10-1999) shall be restored to the same posts they were holding when they were terminated by the judgment under review;

(ii) All other beneficiary employees who were holding posts on their initial termination (01-11-1996 to 12-10-1999) which required the passing of an aptitude, scholastic or skill test shall be restored to the posts, on the same terms and conditions, they were occupying on the date of their initial termination. However, to remain appointed on these posts and to uphold the principles of merit, non-discrimination, transparency and fairness expected in the process of appointment to public institutions these beneficiary employees shall have to undergo the relevant test, applicable to their posts, conducted by the Federal Public Service Commission within 3 months from the date of receipt of this judgment;

(iii) The improvement in the terms and conditions of service of all the beneficiary employees shall be granted strictly in accordance with the applicable laws, rules and regulations;

(iv) The relief granted in sub-paragraphs (i) and (ii) above shall not be granted to those beneficiary employees whose initial termination of service (01-11-1996 to 12-10-1999) was on grounds of absence from duty, misconduct, corruption, misappropriation of money/stock or unfitness on medical grounds if such termination was not set aside finally by a court of law. [pp. 1732, 1733, 1734] U, V, W, X & Y

Sher Alam Khan v. Abdul Munim PLD 2018 SC 449; Muhammad Akram v. Registrar, Islamabad High Court PLD 2016 SC 961 and Gul Taiz Khan Marwat v. Registrar, Peshawar High Court PLD 2021 SC 391 ref.

All review petitions were dismissed and all applications/appeals were disposed accordingly. [p. 1734] Z

Per Syed Mansoor Ali Shah, J. (Minority view):

The vires of the Sacked Employees (Re-instatement) Act, 2010 ('the 2010 Act') enacted by the Parliament (Legislature) cannot be examined and declared ultra vires, on the touchstone of Articles 240 and 242 of the Constitution as both these Articles only command for dealing with the matters specified therein by an Act of the Parliament, and provide for nothing more. Article 240 does not provide any criterion for judging the constitutionality of an Act of the Parliament, except that the Act of Parliament must relate to the appointments to and the conditions of service of persons in the service of Pakistan concerning the Federation, not concerning any Province other than All-Pakistan Service which is a service common to the Federation and the Provinces. Likewise, the constitutional limitation on the power of the Parliament to enact a law under Article 242 is that it can enact a law for the establishment of a Public Service Commission and prescribing its functions, in relation to the affairs of the Federation, not of any Province. Said aspect of the provisions of Articles 240 and 242 of

the Constitution was not presented by the parties before the Court, and the same thus escaped notice of the Court in applying the said Articles of the Constitution to judge the constitutional vires of the 2010 Act, in the judgment under review.

Fauji Foundation v. Shamimur Rehman PLD 1983 SC 457 and LDA v. Imrana Tiwana 2015 SCMR 1739 ref.

Similarly, Article 4 of the Constitution, which provides for a right to be dealt with in accordance with law, does not provide any criterion, and thus cannot be a touchstone, to test the vires of a law such as the 2010 Act. [p. 1763] $W_2$

Fauji Foundation v. Shamimur Rehman PLD 1983 SC 457 and LDA v. Imrana Tiwana 2015 SCMR 1739 ref.

Parts from the parliamentary debates relating to the objects and reasons of the enactment of the 2010 Act, made by the parliamentarians who were member(s) of the Standing Committee that had considered and approved the Bill as well as by the other parliamentarians who had supported the same, showed that the reason for choosing the persons appointed in and dismissed from service during the specified period, for the beneficial treatment of reinstatement and regularization in service notwithstanding any other law on the subject, was that they had suffered "political victimization" in the matter of their dismissal, removal or termination from service, at the hands of the Government (Executive) during that period, and the object of the enactment of the 2010 Act was that the Parliament (Legislature) intended to provide relief to such persons. Nobody disputed before the Supreme Court, the correctness of the factual statement regarding political victimization made by the parliamentarians, nor does such statement of fact appear to be inherently improbable; it is, rather, supported by the circumstance that a large number of employees, not a few, were sacked during the specified period. Therefore, the Court is to proceed on assuming that undisputed statement of fact to be correct.

After accepting the undisputed statement of fact that the persons going to be reinstated under the 2010 Act had suffered "political victimization", in the matter of their dismissal, removal or termination from service, there remains no difficulty to hold that they formed a distinct class, and their classification was based on intelligible differentia, distinguishing them from those who had been left out, and had a rational nexus to the object sought to be achieved by the 2010 Act. Therefore, only their reinstatement and regularization under the 2010 Act as such did not offend the fundamental right to equal treatment, guaranteed by Article 25(1) of the Constitution, of other employees sacked in other durations as well as of regular employees appointed under the general laws relating to the appointments to and terms of conditions of the service concerned.

Prabodh Verma v. State of U.P. AIR 1985 SC 167 and Amarendra Kumar v. State of Orissa AIR 2014 SC 1716 ref.

The issue of seniority that affected the right to 'status' enshrined in fundamental 'right to life' of the regular employees serving in the relevant departments, had arisen only in cases of employees reinstated and regularized on "one scale higher", under sections 4(a) and 10 of the 2010 Act. Their reinstatement and regularization on "one scale higher" had made them senior to those regular employees who were senior to them even as per their date of initial appointments and were serving in the same grade and post in which they had been appointed prior to the initial appointment of the reinstated employees, because of the slow channel of promotion. Therefore, to the extent of reinstatement and regularization of some sacked employees, under Sections 4(a) and 10, on "one scale higher", such reinstatement and regularization was violative of the right to 'status' enshrined in fundamental 'right to life' of the regular employees serving in the relevant departments at the time of promulgation of the 2010 Act, and it was also violative of the fundamental 'right to dignity' guaranteed under Article 14 and fundamental 'right to equality before law' guaranteed by Article 25 of the Constitution as it gave an undue advantage to the reinstated employees to the disadvantage of the rights of the already working regular employees. The proper course, in such circumstances, was that the Court should have declared (as ultra vires) only that part of the provisions of sections 4(a) and 10 of the 2010 Act that had the said offending effect, i.e., the reinstatement and regularization on "one scale higher". And this could have easily been done by reading out (severing) the words "one scale higher to" from the provisions of section 4(f) and the words "one scale higher than" from the provisions of section 10 of the 2010 Act, and reading down those provisions to mean that the sacked employees mentioned in those Sections were to be reinstated and regularized in the same or restructured, as the case may be, scale, grade, cadre, group, post or designation from which they had been dismissed, removed

or terminated from service, for the purpose of saving the constitutional validity of those provisions and construing them as constitution compliant.

Sections 2(f)(vi), 11, 12 and 13, of the 2010 Act which deal with and provide for reinstatement and regularization of such sacked employees who had been dismissed, removed or terminated from service on account of absence from duty, misconduct, mis-appropriation of Government money or stock, or unfitness on medical grounds, and the determination of their guilt or medical unfitness had attained finality by being unchallenged or unsuccessfully challenged, had the effect of nullifying, or giving the power to the Executive to nullify, the judicial orders passed on charge of misconduct, inefficiency or unfitness that had attained finality. Such employees, even, do not fall within the class of the sacked employees who had suffered "political victimization," envisaged by the 2010 Act for a beneficial treatment. The said Sections of the 2010 are, therefore, ultra vires the Constitution.

All the employees terminated from service on the basis of the judgment under review, stand restored in the service with effect from the date they were so terminated, and shall be paid the pay of the intervening period treating the said period as an extraordinary leave with pay. The cases decided by the judgment under review, which now stands recalled, shall be deemed pending and decided on their own merits by the regular Bench(es) of the Supreme Court in accordance with the provisions of the 2010 Act, subject to the above declarations regarding vires of certain provisions of the 2010 Act.

Per Umar Ata Bandial, J (Majority view):

**(f) Constitution of Pakistan---**

----Art. 25---Equality of citizens---Reasonable classification---Scope---Although Article 25 of the Constitution envisages equality amongst citizens, it also allows for differential treatment of persons who are not similarly placed under a reasonable classification---However, to justify this difference in treatment the reasonable classification needs to be based on intelligible differentia that has a rational nexus with the object being sought to be achieved'---Only if this test is satisfied can the distinct treatment meted out to a class of persons be sustained under Article 25 of the Constitution.

Commissioner Inland Revenue v. Tariq Mehmood 2021 SCMR 440 ref.

**(g) Interpretation of statutes---**

----Reference to legislative history---Scope---Reference to legislative history is permissible only as an aid to construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity i.e. from the text of a statute, the court is unable to decipher the real intent of the Legislature.

Gulshan Bibi v. Muhammad Sadiq PLD 2016 SC 769 ref.

**(h) Constitution of Pakistan---**

----Arts. 184 & 185--- Judgments/orders of the Supreme Court---Academic exercise---Ordinarily the Supreme Court does not enter into purely academic exercises.

Munawar Iqbal Gondal v. Nasira Iqbal 2014 SCMR 860 ref.

**(i) Constitution of Pakistan---**

----Arts. 184 & 185--- Judgments of the Supreme Court---Prospective/retrospective effect---Scope---Judgments of the Supreme Court operate prospectively, however, they could operate retrospectively if so declared---Consequently, there is no binding rule that all judgments issued by the Court take effect only from the date of pronouncement.

Mobashir Hassan v. Federation of Pakistan PLD 2010 SC 265 and Pakistan Medical and Dental Council v. Muhammad Fahad Malik 2018 SCMR 1956 ref.

**(j) Locus poenitentiae, principle of---**

----Applicability---Principle of locus poenitentiae would not be attracted in a case under which the benefit has been extended by a law which was violative of the provisions of the Constitution.

Azam Shah v. Federation of Pakistan 2022 SCMR 201 ref.

Per Syed Mansoor Ali Shah, J; dissenting with Umar Ata Bandial, J.

**(k) Separation of powers, doctrine of---**

----Scope of the doctrine of Separation of powers in a constitutional democracy stated.

Separation of powers is the backbone of a constitutional system. The legislature, the executive and the judiciary have no authority beyond that granted to them under the Constitution. None of them is omnipotent.

Cooper v. Canada [1996] 3 S.C.R 854, 867 ref.

Separation of powers means reciprocal checks and balances between the different branches. It does not mean walls between the branches but rather bridges which balance and check. The concept of separation of powers is not to maximize efficiency but rather to maximize freedom. The principle of separation of powers has double meaning: First, it means distinguishing among different branches of government, giving each branch a central and primary function. Second, it means that different branches have reciprocal relationship in which each checks and balances over the other branches. Thus, for example, the legislature can change the rules of the game by amending the existing law or by enacting new law, but it must do so within the framework of the Constitution. On the other hand, the judiciary is authorized to interpret the Constitution and law but it is not authorized to create, amend or rewrite the Constitution or to enact a new law. Judiciary, like the other branches of the government, is also not invincible but is to function under the supreme law of the land i.e., the Constitution.

Myers v. United States 272 US 52, 293 (1926) and Responding to Imperfection: The Theory and Practice of Constitutional Amendments (Stanford Levison ed., 1995) and Aharon Barak, The Judge in Democracy ref.

The primary and central function of the legislative branch is to create laws and the courts must give weight to the purpose of the law remembering that legislation promotes social policy and is a tool for achieving a societal goal. This subjective purpose of the statute becomes a key factor in interpreting the statute. Therefore, in the first instance, the role of the courts is to safeguard and actualize these laws in the public interest. Judges should therefore give statutes a meaning that bridges the gap between the law and the social reality. Next is the objective purpose of the statute, where it honours and protects the constitutional values, and the fundamental rights of the people. It is only when the subjective or the objective purpose of the legislature outsteps the constitutional boundary that the courts interfere and set the course right by enforcing the constitutional limits. Even in that case when the courts rule that a statute is unconstitutional and invalidates it, it does not undermine the legislature or violate the separation of powers because it is the principle of separation of powers that informs us that legislative authority does not include the authority to pass unconstitutional laws. Hence, the principle of separation of powers is the very source of judicial review.

**(l) Judicial review---**

----Scope---Legislation is the manifestation of the will of the people and the collective wisdom of their chosen representatives in the Parliament---Courts must therefore tread carefully to judicially review the act of the legislature---First, efforts should be made by the Court to save the constitutionality of the legislation by exhausting the interpretative tools e.g. of "reading down" or "reading out" to make the legislation constitution compliant---Only when the legislation happens to be opposed to the constitutional values and the fundamental rights and allowing such a statute to remain on the statute book would be unconstitutional, should the courts interfere---Such freedom and respect is enjoyed by the branches of the government under a prosperous and a progressive constitutional democracy.

**(m) Constitution of Pakistan---**

----Arts. 184(3) & 188---Constitutional jurisdiction of the Supreme Court under Article 184(3) of the Constitution---Scope---Original jurisdiction of the Supreme Court under Article 184(3) of the Constitution cannot be exercised as a parallel review jurisdiction, and a judgment or an order of the Supreme Court can never be challenged by virtue of filing independent proceedings under Article 184(3) of the Constitution---Such course is absolutely impermissible.

Shabbar Raza's case 2018 SCMR 514 ref.

**(n) Supreme Court Rules, 1980---**

----O. XI, R. 1, Second proviso---Semper praesumitur pro negante, rule of---Scope---When the Judges of an appellate Court are equally divided in their opinion, the judgment of the Court below is affirmed and maintained, and the decision given pro negante is authoritative and binding as any other decision of the appellate Court---However, the said rule is not applicable to the final decision of a case by the Supreme Court in view of the

second proviso to Rule 1 of Order XI of the Supreme Court Rules, 1980, which provides that "if the Judges hearing a petition or an appeal are equally divided in opinion, the petition or appeal, as the case may be, shall, in the discretion of the Chief Justice, be placed for hearing and disposal either before another Judge or before a larger Bench to be nominated by the Chief Justice." Hence, the application of the rule of pro negante decision is restricted to the division of opinion on a point of law decided in the judgment of the Supreme Court, notwithstanding of which there is a majority of opinion on the final decision of the case.

Inland Revenue v. Scottish General Electric Power Co. (1931) UKHL 15 TC 761 ref.

**(o) Judgment---**

----Judgment in rem---Neither necessary nor the requirement of law that Court should issue a separate notice and offer an opportunity of hearing to each and every person who is likely to be affected, and bound, by judgment in rem---Meaning and scope of a judgment in rem stated.

A judgment in rem binds the parties and the nonparties alike. A judgment in rem settles the fate of the res by determining its status and thus operates directly on the res itself; it binds all persons claiming a right or interest in or under the res, even though pronounced in their absence.

Federation v. Qamar Hussain PLD 2004 SC 77 ref.

In actions in rem it is neither practicable nor is it the requirement of law that the Court should issue a separate notice and offer an opportunity of hearing to each and every person who is likely to be affected, and bound, by the judgment. However, for complying with the constitutional command of fair trial and due process to a possible extent in such cases, the Court may order, as it is usually done by the civil courts dealing with actions in rem, for service of the public notice of the case through its publication in the press or any other mode deemed appropriate, for the knowledge of the persons likely to be affected by the judgment, who may then appear before the Court and seek permission to intervene and argue in the proceedings.

Surinder Kumar v. Gian Chand 1958 SCR 548; SHCBA v. Federation PLD 2009 SC 879 and Justice Bhinder v. Federation PLD 2010 SC 483 ref.

**(p) Interpretation of statutes---**

----Aid to statutory interpretation---Parliamentary debates---Scope---Parliamentary debates, especially the speech made by the mover of the Bill or by the chairman or member(s) of the Standing Committee that considered the Bill, explaining the reason for introducing the Bill can be referred to for ascertaining the mischief sought to be remedied by the legislation and the object and purpose for which the legislation was enacted.

Mubeen-Us-Salam v. Federation PLD 2006 SC 602; Benazir Bhutto v. Federation PLD 1988 SC 416; Pepper v. Hart (UKHL) 1993 SCMR 1019 and K. P. Varghese v. ITO, Ernakulam AIR 1981 SC 1922 ref.

**(q) Constitution of Pakistan---**

----Art. 25---Equality of citizens---Reasonable classification---Scope of reasonable classification stated.

Article 25(1) of the Constitution which declares, and guarantees as a fundamental right, that all citizens are equal before law and are entitled to equal protection of law, does not prohibit reasonable classification for equal treatment, that is, "equality among equals", which is based on intelligible differentia, distinguishing persons or things that are grouped together from those who are left out, and has a rational nexus to the object sought to be achieved by law. And a classification having a reasonable basis does not offend against fundamental right to equality, merely because it is not made with mathematical nicety or because in practice it results in some inequality. Further, when the classification made by a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed, and the one who assails the classification must carry the burden of showing that it does not rest upon any reasonable basis but is essentially arbitrary.

Jibendra Kishore v. East Pakistan PLD 1957 SC 9; Fauji Foundation v. Shamimur Rehman PLD 1983 SC 457; I. A. Sharwani v. Government of Pakistan 1991 SCMR 1041; Government of Balochistan v. Azizullah Memon PLD 1993 SC 341; Schwartz, Constitution of the United States, Vol. II, p. 501 and Willis, Constitutional Law of the United States, pp. 579-580 approvingly cited in Fauji Foundation v. Shamimur Rehman PLD 1983 SC 457 ref.

**(r) Vires of statute---**

----Courts lean in favour of upholding the constitutionality of laws and are reluctant to strike them down---Cardinal principles of construction of statutes stated.

Two cardinal principles of construction of statutes are, (i) that there is always a presumption in favour of the constitutionality of a legislative enactment (a law); and (ii) that a law enacted by a competent legislature is to be construed in such a manner that its constitutional validity may be saved rather than destroyed. It is because of these principles that the courts lean in favour of upholding the constitutionality of laws and are reluctant to strike them down by declaring them as unconstitutional. The one who challenges the constitutionality of a law bears the burden to show that the law is violative of any of the constitutional provisions, and when two opinions as to the construction of a law are possible, the courts prefer to adopt that which upholds the constitutionality of the law, over that which does not. The courts, therefore, construe a law in such a manner that saves the law than destroys it, and declare it unconstitutional only when it clearly contravenes any constitutional provision and cannot be read as constitution compliant by applying any of the methods, techniques or tools of rule of constitution complaint construction, e.g., reading out or reading down. The primary purpose of applying these techniques, methods or tools, is to endeavor for saving the constitutional validity of the statute, to a possible extent, and the main reason for applying them in preference to declaring the law unconstitutional is that their application makes the process of judicial review of legislative actions less intrusive than invalidating the whole law, as the court should not strive officiously to kill a law to any extent greater than it is compelled to do. Declaring the law unconstitutional is thus one of the last resorts taken by the courts.

SSGCL v. Federation 2018 SCMR 802 and Dunkley v. Evans [1981] 1 W.L.R. 1522 ref.

**(s) Vires of statute---**

----'Reading out' (severance) and 'reading down' parts of a statute---Principles stated.

Courts apply the methods of "reading out" (severance) and "reading down", with certain conditions, for the purpose of construing the provisions of a law as constitution compliant and to save it, as much as possible, from being declared ultra vires the Constitution. The primary condition for applying these methods for a constitution compliant construction is to see whether the Legislature would have enacted the law in the form that remains or turns out to be after application of any of the said methods. Further, in case of applying the method of reading out (severance) the court is to see whether after reading out (severing) the invalid part, the remaining provisions of law would remain operative within the scope of the object of the law. Therefore, when confronting a constitutional flaw in a statute, court should try to limit the solution to the problem - severing the flawed portion while leaving the remainder intact. Because the unconstitutionality of a part of a statute does not necessarily defeat or affect the validity of its remaining provisions. If after severing the flawed part, the remaining provisions of law would remain fully operative, court must sustain those provisions unless it is evident that the Legislature would not have enacted those provisions independently of that which is invalid.

Haroon-Ur-Rashid v. LDA 2016 SCMR 931; Baz Muhammad Kakar v. Federation PLD 2012 SC 923; Province of Sindh v. M.Q.M. PLD 2014 SC 531 and Free Enterprise Fund v. Public Co. Accounting Oversight Board, (2010) 561 U.S. 477 ref.

In attendance:

Kh. Muhammad Arif, Advocate Supreme Court (in C.R.Ps. 292, 388 of 2021), Muhammad Yousaf Khan (in C.R.P. 293 of 2021), Muhammad Tariq Asad, Advocate Supreme Court (in C.R.P. 294 and C.M.A. 12033 of 2021), Khalid Javed Khan, Attorney General for Pakistan, Ayaz Shoukat, D.A.G. along with Ms. Maryam Rasheed and Usman Paracha, Advocates (in C.R.P. 295 of 2021), Muhammad Nawaz Abbasi (in person) (in C.R.Ps. 296 and 446 of 2021), S.A. Mehmood Khan Sadozai, Advocate Supreme Court (in C.R.Ps. 297-300 and 416 of 2021), Muhammad Ilyas Siddiqui, Advocate Supreme Court (in C.R.P. 301 of 2021), Hazrat Said (in C.R.P. 302 of 2021), S. Iftikhar Hussain Gillani, Senior Advocate Supreme Court (in C.R.Ps. 351 and 392 of 2021), Ms. Shireen Imran, Advocate Supreme Court (in C.R.Ps. 252, 393, 394, 448 and C.M.A. 12104 of 2021), M. Safdar Shaheen Pirzada, Advocate Supreme Court (in C.R.Ps. 253, 372 and 375 of 2021), Nisar A. Mujahid, Advocate Supreme Court (in C.R.P. 354 of 2021), Raja Abdul Ghafoor, Advocate-on-Record/Advocate Supreme Court (in C.R.Ps. 355, 374, C.M.As. 11982 and 12029 of 2021), Ch. Afrasiab Khan, Advocate Supreme Court (in C.R.P. 356 of 2021), Mian Raza Rabbani, Senior Advocate Supreme Court, Saalim

Salam Ansari, Advocate Supreme Court assisted by Zeeshan Abdullan (in C.R.P. 357, C.M.As. 175, 12172 and 12173 of 2021), Shah Khawar, Advocate Supreme Court, Hassan Rashid Qamar, Advocate Supreme Court (in C.R.Ps. 355, 378-381, 442, 455, 456, C.M.As. 12028 and 12162 of 2021), Zubair Hussain, Advocate Supreme Court (in C.R.P. 359 and C.M.A. 11983 of 2021), Syed M. Iqbal Hashmi, Advocate Supreme Court (in C.R.Ps. 360-363 of 2021), Mazullah Khan (in-person) (in C.R.P. 364 of 2021), Zulfikar Khalid Maluka, Advocate Supreme Court (in C.R.Ps. 365 and 428 of 2021), Ghulam Sajjad Gopang, Advocate Supreme Court (in C.R.P. 366 of 2021), Omer Farouk Adam, Advocate Supreme Court (in C.R.P. 367 of 2021), Tariq Mehmood Mughal, Advocate Supreme Court (in C.R.P. 368 of 2021), Syed Rifaqat Hussain Shah, Advocate-on-Record/Advocate Supreme Court (in C.R.Ps. 369, 385, 420, C.M.As. 168, 12032 and 12035 of 2021), Muhammad Sharif Janjua, Advocate-on-Record/Advocate Supreme Court (in C.R.Ps. 370, 386, 399, 400 and 423 of 2021), Saleem Ullah Ranazai, Advocate Supreme Court (in C.R.P. 371 of 2021), Kamran Murtaza, Senior Advocate Supreme Court (in C.R.Ps. 373 and 377 of 2021), Waseem Sajjad, Senior Advocate Supreme Court (in C.R.Ps. 376 and 383 of 2021), Dr. Saeed Ahmed (in person) (in C.R.P. 382 of 2021), Aftab Alam Yasir, Advocate Supreme Court (in C.R.P. 384 and C.M.A. 12020 of 2021), Abdul Razzaq Shar, Advocate Supreme Court (in C.R.Ps. 387, 454 and C.M.A. 12024 of 2021), Jam Khursheed Ahmed, Advocate Supreme Court (in C.R.P. 389 of 2021), Muhammad Sajid Khan, Advocate Supreme Court (in C.R.P. 390, C.M.As. 12031 and 12161 of 2021), Hamid Khan, Senior Advocate Supreme Court, M. Waqar Rana, Advocate Supreme Court (in C.R.P. 391 of 2021), Liauqat Ali Karim, Advocate Supreme Court (in C.R.P. 395 of 2021), Abid A. Zuberi, Advocate Supreme Court (in C.R.P. 396 of 2021), Azhar Navid Shah, Advocate Supreme Court (in C.R.P. 397 of 2021), Malik Faiz Rasool Rajwana, Advocate Supreme Court (in C.R.P. 398 of 2021), Muhammad Umair Baloch, Advocate Supreme Court, Shoaib Shaheen, Advocate Supreme Court (in C.R.Ps. 401-415, 418, 419 and C.M.A. 12372 of 2021), Muhammad Haseeb Jamali, Advocate Supreme Court (in C.R.P. 417 of 2021), Malik Mansoor Hussain, Advocate Supreme Court (in C.R.P. 421 of 2021), Ch. Aitzaz Ahsan, Advocate Supreme Court, Gohar Ali Khan, Advocate Supreme Court (in C.R.P. 422 of 2021), Shakirullah (in-person) (in C.R.P. 424 of 2021), Muhammad Nawaz Rai, Advocate Supreme Court (in C.R.P. 425 of 2021), Muddasar Khalid Abbasi, Advocate Supreme Court (in C.R.P. 426 of 2021), Mrs. Kausar Iqbal Bhatti, Advocate Supreme Court (in C.R.P. 427 of 2021), Khalid Javed (in-person) (in C.R.P. 429 of 2021), Abdul Latif Afridi, Senior Advocate Supreme Court (in C.R.Ps. 430-431 of 2021), S. Asghar Hussain Sabzwari, Senior Advocate Supreme Court, S. Qamar Hussain Shah Sabzwari, Advocate Supreme Court, S. Nayyar Hussain Bukhari, Advocate Supreme Court (in C.R.P. 432 of 2021), Sh. Mehmood Ahmed, Advocate-on-Record (in C.M.A. 11812 of 2021), Sikandar Javed, Advocate Supreme Court (in C.M.As. 11813 and 11993 of 2021), Ms. Attiya Khanam (in-person) (in C.M.A. 11814 of 2021), Fazal e Rabbi (in-person) (in C.M.A. 11837 of 2021), Malik Muhammad Riaz, (in-person) (in C.M.A. 11862 of 2021), Arshad Ali Makhdoom, Advocate Supreme Court (in C.M.A. 11863 of 2021), Muhammad Ibrahim (in-person) (in C.M.A. 11864 of 2021), Faisal Siddiqui, Advocate Supreme Court (in C.M.A. 11902 of 2021), Anees M. Shahzad, Advocate-on-Record/Advocate Supreme Court (in C.M.A. 11903 of 2021), Mir Aurangzeb, Advocate-on-Record/Advocate Supreme Court (in C.M.A. 11987 of 2021), Jawaid Masood Tahir Bhatti, Advocate Supreme Court (in C.M.A. 11679 and C.M.A. 158 of 2021), Mir Shahzad Khan Talpur (in-person) (in C.M.A. 12017 of 2021), Malik Muhammad Munsif Awan, Advocate Supreme Court (in C.M.A. 12019 of 2021), Muhammad Afzal Khan (in C.M.A. 12025 of 2021), Tassawar Abbas Tanvir (in-person) (in C.R.P. 443 of 2021), Dr. Umar Farooq Siddiqui (in-person) (in C.R.P. 444 of 2021), Sardar M. Latif Khosa, Senior Advocate Supreme Court, Sardar M. Shahbaz Khosa, Advocate Supreme Court (in C.R.Ps. 445 and 447 of 2021), Pervez Rauf, Advocate Supreme Court (in C.R.Ps. 449 and 452 of 2021), Mir Afzal Malik, Advocate Supreme Court (in C.R.P. 450 of 2021), Malik Saleem Iqbal Awan, Advocate Supreme Court (in C.R.P. 453 of 2021), Raja Farakh Arif Bhatti, Advocate Supreme Court (in C.M.A. 12075 of 2021), Rai M. Nawaz Kharal, Advocate Supreme Court (in C.M.A. 12103 of 2021), Ch. M. Younas, Advocate Supreme Court (in C.M.A. 12403 of 2021), Shahid Anwar Bajwa, Advocate Supreme Court (in C.M.A. 12373 of 2021) and Niazullah Niazi, AG ICT.

Barrister Umer Aslam for SSGPL.

Syed Waqar Naqvi, Advocate Supreme Court for State Life.

Aftab Alam Yasir, Advocate Supreme Court for OPF.

Asad Jan, Advocate Supreme Court for SNGPL.

Dates of hearing: 1st, 6th to 9th, 13th to 17th December, 2021.

**JUDGMENT**

**UMAR ATA BANDIAL, J.---**By this judgment we are deciding 108 Review Petitions, 35 Civil Misc. Applications and 3 Civil Misc. Appeals filed against the judgment of this Court reported as Muhammad Afzal v. Secretary Establishment Division (2021 SCMR 1569) dated 17.08.2021 ("judgment under review").

**FACTUAL BACKGROUND**

2. In order to understand the objections raised, it is helpful to briefly traverse the history of the matter at hand. The genesis of these proceedings can be found in the critical period of 01.11.1993 to 30.11.1996 (the significance of this time frame will be explained shortly) when numerous appointments, running into the thousands, were made to various corporation and government services and autonomous/semi-autonomous bodies ("employers") by the political government of the time i.e., the Pakistan Peoples Party ("PPP"). However, over the course of the next 2-3 years the appointments so made were reversed by the different political governments who came into power. Eventually, when PPP won the General Elections in 2008, the persons who had been removed were reinstated en masse with the aid of Ordinances, the first of which was promulgated on 14.02.2009. It was termed the 'Sacked Employees (Reinstatement) Ordinance, 2009' ("Ordinance I"). The purpose of this Ordinance was laid down in its preamble, which reads as below:

"Whereas it is expedient for the purpose of providing relief to persons who were appointed in a corporation service or autonomous or semi-autonomous bodies or in Government service during the period from the 1st day of November, 1993 to the 30th day of November, 1996 and were dismissed, removed or terminated from service during the period from the 1st day of November, 1996, to the 31st day of December, 1998;"

(emphasis supplied)

3. It may be observed from the above-cited passage that the Ordinance was indeed enacted to grant the relief, inter alia, of reinstatement to a group of people ("beneficiary employees") who were appointed in the service of employers between 01.11.1993 and 30.11.1996 but were removed during the period 01.11.1996 to 31.12.1998. However, no grounds were specified in the Ordinance to justify the relief being granted to only this specific class of persons. Ordinance I was followed by a chain of Ordinances promulgated on 11.06.2009 ("Ordinance II"), 30.10.2009 ("Ordinance III") and 05.02.2010 ("Ordinance IV"), respectively. All three subsequent Ordinances were almost verbatim replicas of their predecessor Ordinance with some very minor changes that are not relevant for present purposes.

4. Ultimately PPP, perhaps to achieve finality in the matter and to provide permanent relief to the beneficiary employees, introduced the Sacked Employees Reinstatement Bill, 2010. The same was passed by Parliament and received the assent of the President on 06.12.2010 bearing the title of 'Sacked Employees (Re-instatement) Act, 2010 ("Act"). The preamble to this Act reads:

"Whereas it is expedient for the purpose of providing relief to persons who were appointed in a corporation service or autonomous or semi-autonomous bodies or in Government service during the period from the 1st day of November, 1993 to the 30th day of November, 1996 (both days inclusive) and were dismissed, removed or terminated from service during the period from the 1st day of November, 1996 to the 12th day of October 1999 (both days inclusive);"

(emphasis supplied)

It becomes apparent from the preamble quoted hereinabove that whilst the object of the Act remained consistent with that of the Ordinances, the class of persons who were entitled to its benefit was enlarged. This was done by moving the last date of dismissal, removal or termination from service from 31.12.1998 to 12.10.1999. Again the Act failed to indicate the rationale for favouring only such affected persons with this extraordinary relief. Allegedly, thousands of beneficiary employees (the exact figure is disputed) were reinstated pursuant to the Ordinances and the Act. This act of reinstatement triggered a two-fold series of litigation:

i. By the regular employees of the employers whose seniority had been affected due to the reinstatement of the beneficiary employees; and

ii. By the employees who were eligible to receive the benefit of the Act but were not granted the same by the employers.

5. These cases, decided primarily over a period of 2-4 years by the various High Courts, eventually arrived in the Supreme Court. They pertained to the employees of 10 employers, namely:

i. Intelligence Bureau ("IB");

ii. Commissioner Afghan Refugees, KPK ("CAR");

iii. National Highway Authority ("NHA");

iv. Pakistan Telecommunication Company Ltd. ("PTCL");

v. Overseas Pakistani Foundation ("OPF");

vi. State Life Insurance Corporation ("SLIC");

vii. Civil Aviation Authority ("CAA");

viii. Water and Power Development Authority ("WAPDA");

ix. Sui Southern Gas Company Ltd ("SSGC"); and

x. Trading Corporation of Pakistan ("TCP").

6. After hearing the parties, the judgment under review held that the Act had violated Articles 4, 9 and 25 of the Constitution by granting backdated seniority to the beneficiary employees; and it had contravened Articles 240 and 242 of the Constitution by overlooking the relevant framework established by the aforesaid provisions for regulating appointments to the civil service/service of Pakistan. Consequently, the following pronouncements were made in respect of the Act and the benefits extended under it to the beneficiary employees:

"59. Therefore, in light of the discussion above, the Act of 2010 is hereby declared to be ultra vires of the Constitution. The effect of such a declaration is that any/all the benefits accrued to the beneficiaries are to be ceased with immediate effect.

60. This Court, in light of Shahid Pervaiz (supra), is empowered/mandated to examine the benefits accruing to each recipient and undo the same if it is not a past and closed transaction. Therefore, the cases of employees who have retired and/or passed away are past and closed transactions as we do not find it appropriate to interfere in their cases as it will be an exercise in futility.

61. Whereas, the beneficiaries of the Act of 2010, who are still in service, will go back to their previous positions, i.e. to the date when the operation of the Act of 2010 has taken effect. However, it would be inequitable to reverse any monetary benefits received by them under the Act of 2010 for the period they have served and those shall remain intact as they were granted against service. However, the lump sum received by such 'sacked employees' upon reinstatement shall be reversed."

(emphasis supplied)

7. As a result of this decision, thousands of beneficiary employees who had rendered service of 10 years or more after their reinstatement under the Ordinances or Act were removed by their respective employers. Feeling aggrieved by this decision, many beneficiary employees and the Federation filed review petitions against the judgment under review.

**ARGUMENTS OF COUNSEL**

8. Mainly the contentions of learned counsel representing the beneficiary employees and the learned Attorney General can be summarised as follows:

i. No notice under Order XXVII-A of C.P.C. was issued to the Attorney General before the judgment under review was released;

ii. The non-obstante clause contained in section 4 of the Act did not have any bearing on the vires of the Act as a whole;

iii. The reinstatement of the beneficiary employees has not infringed the fundamental rights of any regular employee;

iv. The application of Articles 240 and 242 of the Constitution to the facts of the present case was misconceived as the beneficiary employees were not civil servants;

v. The beneficiary employees granted relief under the Act constituted a distinct class based on reasonable classification;

vi. Some of the beneficiary employees were dismissed, removed or terminated by the caretaker government which was not legally permissible;

vii. Instead of declaring the Act void as whole, the judgment under review should have read down its unconstitutional provisions, if any; and

viii. Even if the Act was ultra vires the Constitution, such declaration should have been prospective in effect.

9. After hearing the petitions, applications and appeals over the course of 10 days, the Court by a majority of 4-1 dismissed the review petitions vide short order dated 17.12.2021:

**"O R D E R**

For reasons to be recorded later, these review petitions are dismissed. The impugned legislation, namely, the Sacked Employees (Re-instatement) Act, 2010 ("Act") is held to be violative of, inter alia, Articles 25, 18, 9 and 4 of the Constitution of Islamic Republic of Pakistan, 1973 ("Constitution") and therefore void under the provisions of Article 8 of the Constitution.

2. However, in exercise of the Court's jurisdiction under Article 184(3) of the Constitution read with Article 187, we have taken into consideration the services rendered by the re-instated employees of the "employers" [as defined in section 2(d) of the Act] and hereby order that:

i. Employees who were holding posts that on the date of their initial termination of service (from 01.11.1996 to 12.10.1999) did not require any aptitude or scholastic or skill test, for appointment thereon, shall be restored from the date of the judgment under review to the posts they were holding on the same terms and conditions of service applicable on the date of their termination pursuant to the judgment under review.

ii. Such other employees who were holding posts that on the date of their initial termination of service (from 01.11.1996 to 12.10.1999) required the passing of any aptitude or scholastic or skill test, for appointment thereon shall from the date of the judgment under review be restored to their said posts on the same terms and conditions of service applicable on the date of their initial termination.

iii. Any improvement in the terms and conditions of service of all the restored employees shall be granted strictly in accordance with the laws and rules applicable to their service or employment and in the absence thereof by regulations laid down for this purpose by their respective employers.

iv. The relief granted in sub-paragraphs (i) and (ii) above shall not be granted to employees whose initial termination of service (from 01.11.1996 to 12.10.1999) was on grounds of absence from duty, misconduct, corruption, misappropriation of money/ stock or unfitness on medical grounds if such termination was not set aside finally by a Court of law.

Syed Mansoor Ali Shah, J. Parliamentary sovereignty or legislative supremacy is the cornerstone of a strong democracy. We must, therefore, recognize the central role of the legislature. Undermining the legislature undermines democracy. Both the legislature and the judicature must play their role in a spirit of profound respect for the other and within the limits set out in the Constitution. Rule of law is not merely public order, it is social justice based on public order. The law exists to ensure proper social life by balancing the needs of the society and the individual. The courts must protect this rich concept of rule of law. Under Article 8 of the Constitution, any law enacted by the legislature is void only to the extent it takes away or abridges fundamental rights of the people.

2. For the reasons to be recorded later and subject to ancillary and incidental declarations and orders (if any) to be made in the detailed judgment, I allow these review petitions in the following terms:

i. The judgment under review is recalled;

ii. The following Sections and part of Sections of the Sacked Employees Reinstatement Act 2010 are declared ultra vires the Constitution:

(a) Sections 4(a) and 10 to the extent of reinstatement and regularization on "one scale higher", which give an undue advantage to the reinstated employees to the detriment of the rights of the already working regular employees and thus violate their fundamental rights. The provisions of the said Sections, except the words "one scale higher", shall however remain operative with effect from the date of enactment of the Act, and be read to

mean the reinstatement and regularization in the same or restructured, as the case may be, scale, grade, cadre, group, post or designation.

(b) Sections 2(f)(vi), 11, 12 and 13, which deal with and provide for reinstatement and regularization of such sacked employees who had been dismissed, removed or terminated from service on account of absence from duty, misconduct, mis-appropriation of Government money or stock, or unfitness on medical grounds, and the determination of their guilt or medical unfitness attained finality by being unchallenged or unsuccessfully challenged. Such employees fall outside the class of sacked employees who suffered "political victimization," envisaged by the Act for a beneficial treatment, and they by themselves do not constitute a distinct class having an intelligible differentia, which bears a reasonable relation to the object and purpose of the Act.

iii. All the employees terminated from service on the basis of the judgment under review, stand restored in the service with effect from the date they were so terminated, and shall be paid the pay of the intervening period treating the said period as an extraordinary leave with pay; and

iv. The cases decided by the judgment under review, which now stands recalled, shall be deemed pending and decided on their own merits by the regular Bench(es) of this Court in accordance with the provisions of the Sacked Employees Reinstatement Act, 2010, subject to the declaration made at No. ii above.

**ORDER OF THE BENCH**

For reasons to be recorded later, by a majority of four to one (Justice Syed Mansoor Ali Shah dissenting), these review petitions are dismissed."

**SCOPE OF REVIEW**

10. Before setting out our detailed reasons for upholding the judgment under review dated 17.08.2021, we consider it appropriate to briefly specify the scope of review jurisdiction that has been conferred on this Court in terms of Article 188 of the Constitution. A succinct yet comprehensive explanation of this power can be found in the case of Mukhtar Mai v. Abdul Khaliq (2019 SCMR 1302):

"5. ... A review... will [not] be warranted merely because the conclusion drawn is wrong or erroneous but is limited to eventualities where something obvious has been overlooked or where there is a glaring omission or patent mistake of fact or law, which is self-evident, manifest and floating on the surface, materially affecting the outcome of the adjudicatory process..."

(emphasis supplied)

What becomes clear from the above-mentioned passage is that the review jurisdiction of the Court operates in a limited area. A review does not succeed merely because a material error has crept into the disputed judgment. Instead, a review is only allowed when the material error alters the outcome of the case thereby rendering the disputed judgment bad law. Therefore, it is against this test that the decision arrived at in the judgment under review shall now be examined.

**OBJECTIONS TO THE JUDGMENT UNDER REVIEW**

**A. Notice to Attorney General under Order XXVII-A, C.P.C.**

11. One of the main objections raised by learned counsel against the judgment under review was the failure of the Court to issue a notice to the Attorney General even though the matter at hand involved a 'substantial question as to the interpretation of constitutional law.' Reliance was placed on two judgments of this Court reported as Federation of Pakistan v. Aftab Ahmad Khan Sherpao (PLD 1992 SC 723) and Federal Public Service Commission v. Muhammad Afaq (PLD 2002 SC 167).

12. In our view, there may have been weight in learned counsel' arguments if no notice had actually been served on the learned Attorney General. However, the record suggests otherwise. In the leave granting order dated 18.05.2012, passed in the main Civil Appeal No.491 of 2012 titled Muhammad Afzal v. Secretary Establishment Division, notice was specifically issued to the learned Attorney General (pg.61).

Therefore, when compliance was made with Order XXVII-A of the C.P.C., no ground for review is made out in this regard.

**B. Articles 240 and 242 of the Constitution**

13. The next argument of learned counsel was that the judgment under review had wrongly held Articles 240 and 242 of the Constitution to be applicable to the reinstatement process of the beneficiary employees under the Act when none of them were in fact civil servants.

14. To better understand the proposition put forward by learned counsel, Articles 240 and 242 are being produced below:

"240. Appointments to service of Pakistan and conditions of service. Subject to the Constitution, the appointments to and the conditions of service of persons in the service of Pakistan shall be determined-

(a) in the case of the services of the Federation, posts in connection with the affairs of the Federation and All-Pakistan Services, by or under Act of [Majlis-e -Shoora (Parliament)];

. . .

242. Public Service Commission. (1) [Majlis-e-Shoora (Parliament)] in relation to the affairs of the Federation, and the Provincial Assembly of a Province in relation to affairs of a Province may, by law provide for the establishment and constitution of a Public Service Commission."

It may be observed from the text of Articles 240 and 242 that the two govern/regulate appointments to the service of Pakistan and not the civil service as argued by learned counsel. The term 'civil service' has been defined in the Civil Servants Act, 1973:

"2. Definitions.---(1) In this act, unless there is anything repugnant in the subject or context,--

. . .

(b) "civil servant" means a person who is a member of an All-Pakistan Service or of a civil service of the Federation, or who holds a civil post in connection with the affairs of the Federation, including any such post connected with defence,..."

(emphasis supplied)

On the other hand, the phrase 'service of Pakistan' has been explained in Article 260 of the Constitution as follows:

"260. Definitions (1) In the Constitution, unless the context otherwise requires, the following expressions have the meaning hereby respectively assigned to them, that is to say,-

. . .

"service of Pakistan" means any service, post or office in connection with the affairs of the Federation or of a Province, and includes an All-Pakistan Service, service in the Armed Forces and any other service declared to be a service of Pakistan by or under Act of [Majlis-e-Shoora (Parliament)] or of a Provincial Assembly..."

(emphasis supplied)

15. It may be observed from the meanings assigned to the two terms that they are not synonymous. In fact, the phrase 'service of Pakistan' appears to be of wider import, a fact which was confirmed by the Court in Registrar, Supreme Court of Pakistan v. Wali Muhammad (1997 SCMR 141):

"...The expression 'service of Pakistan' used in Article 260 of the Constitution has a much wider connotation than the term 'Civil Servant' employed in the Civil Servants Act. While a 'Civil Servant' is included in the expression 'service of Pakistan', the vice versa is not true. 'Civil Servant' as defined in the Civil Servants Act, 1973 is just a category of service of Pakistan mentioned in Article 260 of the Constitution..."

(emphasis supplied)

This dictum was later cited with approval by the Court in the case of Muhammad Mubeen-us-Salam v. Federation of Pakistan (PLD 2006 SC 602) at para 35. These definitions and declarations of the Court show that although the terms 'civil service' and 'service of Pakistan' are not identical they do overlap in that the former is a sub-category of the latter. Consequently, the argument of learned counsel that Articles 240 and 242 do not apply because the beneficiary employees helped by the Act are not civil servants is a tenuous one. It may very well be possible that these employees fall within the category of service of Pakistan.

16. The test whether a person is in the service of Pakistan is whether he is performing functions in connection with the affairs of the Federation. In the judgment reported as Salahuddin v. Frontier Sugar Mills and Distillery Ltd. (PLD 1975 SC 244) the Court elaborated this function test as follows:

"Now, what is meant by the phrase "performing functions in connection with the affairs of the Federation or a Province." It is clear that the reference is to governmental or state functions, involving, in one form or another, an element of exercise of public power. The functions may be the traditional police functions of the State, involving the maintenance of law and order and other regulatory activities; or they may comprise functions pertaining to economic development, social welfare, education, public utility services and other State enterprises of an industrial or commercial nature. Ordinarily, these functions would be performed by persons or agencies directly appointed, controlled and financed by the State, i.e. by the Federal Government or a Provincial Government. However, in recent years, there has been manifest a growing tendency on the part of Governments to create statutory corporations for undertaking many such functions, particularly in the industrial and commercial spheres, in the belief that free from the inhibiting effect of red-tapism, these semi-autonomous bodies may prove more effective, flexible and also profitable. Inevitably, Government retains effective control over their functioning by appointing the heads and other senior officers of these corporations, by regulating their composition and procedures by appropriate statutes, and by finding funds for financing their activities.

...The primary test must always be whether the functions entrusted to the organization or person concerned are indeed functions of the State involving same exercise of sovereign or public power; whether the control of the organization vests in a substantial manner in the hands of Government; and whether the bulk of the funds is provided by the State. If these conditions are fulfilled, then the person, including a body politic or body corporate, may indeed be regarded as a person performing functions in connection with the affairs of the Federation or a Province; otherwise not."

(emphasis supplied)

Therefore, in essence for an entity (where a person is employed) to qualify as being in the service of Pakistan, it must fulfill three criteria:

i. It must exercise public or sovereign power in some form;

ii. The government must retain effective/ substantial control over its functioning; and

iii. Its activities must be mainly financed by the government.

The application of this test was duly explained in Aitchison College v. Muhammad Zubair (PLD 2002 SC 326):

"Applying the above test (laid down in Frontier Sugar Mills) on the facts of instant cases, we feel no hesitation in drawing

inference that the Board of Governors, Aitchison College, Lahore headed by the Governor of the Province as its President along with other officers i.e. Secretaries Education, Finance and General Officer Commanding as well as unofficial Members are involved in providing education which is one of the responsibility of the State and by taking over its management and control the Board, exercises sovereign powers as well as public powers being a statutory functionary of Government... and even if for sake of arguments if it is presumed that no financial aid is being provided to the College from the Provincial Public exchequer, even then, the College remains in dominating control of the Provincial Government through Board of Governors. Therefore, the above test stands fully satisfied and we are persuaded to hold that organization of the Aitchison College, Lahore falls within the definition of a person."

(emphasis supplied)

17. We have already noted in para 5 above that the present matter pertains (primarily) to 10 employers, namely: IB; CAR; NHA; PTCL; OPF; SLIC; CAA; WAPDA; SSGC and TCP. Except for IB, which is a civilian intelligence agency, all other 9 employers are attached departments/ corporations of Ministries/ Divisions:

| Sr No. | Employers | Ministry/ Division | Functions |
|---|---|---|---|
| 1 | CAR | Ministry of States and Frontier Regions | Facilitation of Afghan Refugees crossing the border into Pakistan. |
| 2 | NHA | Ministry of Communications | Planning, development, operation, repair and |

| | | | |
|---|---|---|---|
| | | | maintenance of National Highways and Strategic Roads. |
| 3 | PTCL | Ministry of Information Technology and Tele-communication | Provision of domestic and international tele-communication and related services. |
| 4 | OPF | Ministry of Overseas Pakistani and Human Resource Development | Welfare of overseas Pakistanis and their families. |
| 5 | SLIC | Ministry of Commerce | Life Insurance Business. |
| 6 | CAA | Cabinet Secretariat Aviation Division | Regulation and control of civil aviation activities within Pakistan. |
| 7 | WAPDA | Ministry of Water Resources | Development of water and hydropower resources in an efficient manner. |
| 8 | SSGC | Ministry of Energy | Transmission and distribution of natural gas. |
| 9 | TCP | Ministry of Commerce | Public sector trade house i.e., export of agricultural and consumer goods and import of essential commodities. |

18. On an examination of the data listed above, it becomes clear that the vast majority of the employers involved in the litigation before us are performing functions which fall within the exclusive domain of the State. Equally, their affairs are also substantially controlled by the Federal Government:

| Sr. No. | Employers | Administrative Control |
|---|---|---|
| 1 | CAR | All Chief Commissionerates and Commissioners work under the Ministry of States and Frontier Regions (http://kpkcar.org/about/introduction). |
| 2 | NHA | 6 of the 7 members of the National Highway Council are either representatives of the Federal Government or are nominated by the President [Section 5(1) of the National Highway Authority Act, 1991]. |
| 3 | PTCL | The Federal Government owns majority of the shares of PTCL (SRO 453(I)/2006 dated 09.05.2006). |
| 4 | OPF | Board of Governors is comprised of the relevant Minister and such other members as the Government nominates [Rule 2(gg) of the Emigration Rules, 1979]. All operations of OPF are managed by the Board of Governors taking into account the policy directions issued by the Government (https://www.opf.org.pk/about/). |
| 5 | SLIC | Directors are appointed by the Federal Government and Chairman of SLIC is also nominated by the Federal Government from amongst the Directors [Article 12(1) of Life Insurance (Nationalisation) Order, 1972]. |
| 6 | CAA | 5 of the 6 members of the Board are either representatives of the Federal Government or are nominated by it [Sections 4(2) |

| | | |
|---|---|---|
| | | and 14(1) of the Pakistan Civil Aviation Authority Ordinance, 2021 ("2021 Ordinance")]. Additionally, the directives issued by the Federal Government on matters of policy are binding on CAA [Section 28(1) of the 2021 Ordinance]. |
| 7 | WAPDA | The appointment and removal of the Chairman and members of WAPDA are under the control of the Government [Sections 4(1) and 6 of Pakistan Water and Power Development Authority Act, 1958]. |
| 8 | SSGC | Government of Pakistan directly and indirectly owns majority of the shareholding of SSGC (https://www.ssgc.com.pk/web/?page_id=68). |
| 9 | TCP | Directors of TCP are appointed by, and hold office during, the pleasure of the Federal Government (Article 92 of Memorandum and Articles of Association of TCP). Shares of TCP are owned by the Ministry of Commerce (https://tcp.gov.pk/page-page-aboutus). |

19. In view of the above information, it is clear that nearly all of the employers before us are involved in the service of Pakistan (except employees of IB who are civil servants) and so there employees are squarely covered by the provisions of Articles 240 and 242 of the Constitution.

20. Learned counsel then argued that Article 240 merely specifies that appointments to the service of Pakistan must be governed by Federal legislation. It does not lay down any specific conditions for compliance by the appointing authorities during the appointment process. We consider that the said argument is best addressed by the judgment of this Court in Mubashir Raza Jaffri v. Employees Old-Age Benefits Institutions (2014 SCMR 949):

"22. In the 1st case of Muhammad Yasin [PLD 2012 SC 132] (supra) the appointment of Chairman Oil and Gas Regulatory Authority (OGRA) was declared illegal. In the 2nd case of Muhammad Ashraf Tiwana [2013 SCMR 1159] (supra) the appointment of the Chairman Securities and Exchange Commission of Pakistan (SECP) was held to be in contravention to statutory requirements. Both these cases reiterated the principle that appointments made in a statutory body or Corporation under the control of Provincial or Federal Government in an arbitrary and capricious manner cannot be allowed to hold the field. In the 3rd case of Tariq Aziz-ud-Din [2010 SCMR 1301] (supra) this Court underscored the integral link between good governance and a strong and honest bureaucracy. It was stated that this could only come about if appointments made were based on a clear merit criterion, in accordance with the relevant laws and rules as opposed to favouritism and nepotism... All the cases discussed above reveal that the jurisdiction of this Court has been clear and consistent with regard to the manner in which appointments to public offices are to be made strictly in accordance with applicable rules and regulations, without any discrimination and in a transparent manner. Thus, it is essential that all appointments to public institutions must be based on a process that is palpably and tangibly fair and within the parameters of its applicable rules, regulations and bye-laws..."

(emphasis supplied)

21. It may be noticed from the dictum cited that Article 240 is simply the bedrock on which appointments to the service of Pakistan are to be made. It is then the responsibility of the appointing authorities to ensure that appointments are made strictly in accordance with the relevant laws (including the applicable rules and regulations) that incorporate the principles of merit (selection through a competitive process), non-discrimination, transparency and fairness. Whilst the cases just cited were primarily concerned with appointments to the senior most posts in an organisation, in our considered view the same principles apply to appointments on any post in public service since an organisation can only best serve the people of Pakistan when all its employees are qualified individuals who are selected through a fair and transparent process. In the

absence of dedicated supporting staff, no senior officer sitting at the helm of affairs can succeed in guiding the nation towards prosperity. However, it is significant that these cherished principles are not merely fruit of judge made law but they also emanate from the fundamental rights enshrined in the Constitution, especially Article 18 (freedom of trade, business or profession) wherefor they occupy an immutable character. This is confirmed by the Court in Mushtaq Ahmad Mohal v. Honourable Lahore High Court (1997 SCMR 1043):

"16. ...It may be observed that even otherwise, the Constitutional requirement, inter alia, enshrined in Article 18 of the Constitution... includes the right of a citizen to compete and participate for appointment to a post in any Federal or a Provincial Government department or an attached department or autonomous bodies/corporations etc. on the basis of open competition, which right he cannot exercise unless the process of appointment is transparent, fair, just and free from any complaint as to its transparency and fairness..."

(emphasis supplied)

The above enunciation of law reiterates principles laid down by the Court in Munawar Khan v. Niaz Muhammad (1993 SCMR 1287) at para 6 and Abdul Jabbar Memon: In re (1996 SCMR 1349). However, the material on record in the present case, furnished by the relevant Ministries/ Divisions, establishes that these principles of merit, non-discrimination, transparency and fairness were not followed in the vast majority of the initial appointments (from 01.11.1993 to 30.11.1996). Therefore, such defective appointments suffered from illegality and were void.

| Sr. No. | Employer | Violations |
|---|---|---|
| 1 | IB | Appointed without advertisement and test and/or interview. FST and Hon'ble Supreme Court dismissed their appeals/petitions before their reinstatement under the Act. |
| 2 | NHA | Appointed without advertisement and competitive process. |
| 3 | OPF | Some employees were appointed on contract without observing codal formalities. Others were terminated on competition of respective projects. 01 was terminated after disciplinary proceedings. |
| 4 | SLIC | Appointed without following codal formalities. |
| 5 | CAA | Appointed without advertisement and rules. |
| 6 | WAPDA | Employees were terminated as they were irregularly appointed. |
| 7 | SSGC | Employees were hired on special projects on temporary assignments and were declared redundant after competition of projects. |
| 8 | TCP | Employees were terminated on winding up of their organizations (which subsequently merged with TCP). |

22. For the initial appointments of beneficiary employees that were illegal from the outset, it was not within the competence of Parliament to enact laws that firstly, bypassed the settled requirements enshrined in the Constitution for joining public employment and secondly, protected these unlawful appointments without curing their respective defects. Such contravention can be seen in section 4 of the Act where all beneficiary employees were ordered to be regularised (either on the same scale or on one-step higher scale) within a certain timeframe without complying any codal formalities and without regard to the nature of the post that they occupied prior to their dismissal, removal or termination from service. A few examples of the types of employees who were required to be regularised under the Act are listed below for reference:

i. Employees appointed on permanent, temporary, regular or ad hoc basis or otherwise against a regular or temporary post [section 4(a)];

ii. Employees appointed on contract basis against a regular or temporary post [section 4(b)]; and

iii. Employees appointed as any type of trainee [section 4(d)].

23. It is an established principle of law that State and public functionaries act as fiduciaries for and are responsible/accountable to the people of Pakistan. They are duty bound to act in the furtherance of public

interest [In re: Suo Motu (2010 SCMR 885) at para 63]. However, how the public interest was promoted by reinstating these beneficiary employees who had been inducted without complying with the duly prescribed procedure for appointment is neither determinable nor defensible. Consequently, this ground raised by the review petitioners fails to satisfy the test of 'error apparent on the face of the record.'

**C. Beneficiary Employees Constitute a Distinct Class**

24. In the alternate to provide constitutional protection to the Ordinances and Act, learned counsel for the parties vehemently argued that these pieces of legislation were promulgated and enacted to redress the grievous wrong committed by the unlawful dismissal, removal or termination of the beneficiary employees. It was emphasised that the beneficiary employees had been appointed during PPP's rule which is why they were later removed by the caretaker government. Reference was made to the Debates of the Senate from the relevant time period by the learned Attorney General to demonstrate that the Act was indeed passed to provide relief to the beneficiary employees as causalities of political victimisation. Therefore, the learned counsel argued that the beneficiary employees formed a distinct class founded on reasonable classification so their reinstatement did not violate the command in Article 25 for equal treatment.

25. It is by now settled law that although Article 25 of the Constitution envisages equality amongst citizens, it also allows for differential treatment of persons who are not similarly placed under a reasonable classification. However, to justify this difference in treatment the reasonable classification needs to be 'based on intelligible differentia that has a rational nexus with the object being sought to be achieved' [Commissioner Inland Revenue v. Tariq Mehmood (2021 SCMR 440) at para 14]. Only if this test is satisfied can the distinct treatment meted out to a class of persons be sustained under Article 25. Consequently, it needs to be examined whether the beneficiary employees formed members of a class on the basis of reasonable classification in order to be entitled to the relief granted by the Act.

26. As great emphasis was laid by learned counsel on political victimisation, it would be appropriate to consider that point first. A similar matter of this nature, albeit in the context of criminal prosecution for offences, came up in Mobashir Hassan v. Federation of Pakistan (PLD 2010 SC 265). In that case the constitutionality of the National Reconciliation Ordinance, 2007 ("2007 Ordinance") was challenged before this Court. Whilst many objections were raised against the 2007 Ordinance, the only provision pertinent for our present attention is section 2 ibid which provided:

"2. Amendment of section 494, Act V of 1898.---

In the Code of Criminal Procedure, 1898 (Act V of 1898), section 494 shall be renumbered as subsection (1) thereof and after sub section (1) renumbered as aforesaid, the following subsections (2) and (3) shall be added, namely:-

(2) Notwithstanding anything to the contrary in subsection (1), the Federal Government or a Provincial Government may, before the judgment is pronounced by a trial court, withdraw from the prosecution of any person including an absconding accused who is found to be falsely involved for political reasons or through political victimization in any case initiated between 1st day of January, 1986 to 12th day of October, 1999..." (emphasis supplied)

27. The Court, whilst examining the vires of section 2 observed:

"64. The amendment in section 494 Cr.P.C .... had also created discrimination with the accused, who were facing trial prior to 1st January, 1986 or had been charged for the offence after 12th October, 1999. The preamble of the NRO, 2007 coupled with any of its substantive part, had not disclosed the reasons, calling for so-called `national reconciliation' in between this period, presuming that an accused, facing charge entailing major penalty of death, is not entitled for discharge, by means of extra judicial forum, or for the same treatment, if he has committed the crime after 13th October, 1999, and up till now. We have posed a question to ourselves i.e. whether there had been no political victimization after 12th October, 1999 uptill now, on account of which accused persons were involved falsely in the commission of the offence but we could not succeed in getting the answer of the same except observing that specific dates were incorporated in the NRO, 2007 for achieving specific object as well as the specific purpose...

. . .

66. Above discussion... persuades us to hold that the classification amongst the accused persons, facing trial during the specific period i.e. 1st January 1986 to 12th October 1999, is based on arbitrariness and no reasons have been disclosed in the NRO, 2007 for entering into so-called `reconciliation' with particular group of accused persons, except in the name of `national reconciliation' on the pretext that the cases were politically motivated against them... Similarly on the basis of intelligible differentia for reasonable classification, the differentiation has not been understood logically and it seems that for specific purpose, an artificial grouping was made, causing injustice to the accused persons, who were placed in the same position and instead of achieving the `national reconciliation' the NRO, 2007 had served the purpose of `individual reconciliation'." (emphasis supplied)

28. The extracts produced hereinabove make it clear that the features of section 2 that persuaded the Court, inter alia, to declare the 2007 Ordinance ultra vires the Constitution also exist in the present case. These are as follows:

i. The Act discriminates against similarly placed persons who were dismissed, removed or terminated from service in the periods prior to 01.11.1996 and subsequent to 12.10.1999;

ii. The preamble of the Act coupled with its substantive provisions do not disclose the reason for reinstatement of only those employees who had been dismissed, removed or terminated from service during the specific period of 01.11.1996 till 12.10.1999; and

iii. The Act was enacted to achieve a specific object and purpose, namely, the reinstatement of those employees who had been initially appointed during PPP's tenure.

29. Clearly then the Act's classification of the time period is neither reasonable nor based on any intelligible differentia. There is also no rational nexus with the object being sought to be achieved because if the intent of Parliament was to assist people who had been dismissed, removed or terminated from service on account of political victimisation then there is no rhyme or reason as to why only the persons dismissed, removed or terminated between 01.11.1996 and 12.10.1999 were granted this relief. Surely such a classification ought to have been preceded by some study, data collection and analysis, however, the same are lacking. In our view there must exist a plethora of people since 1947 (till date) who have been unfairly removed from service on account of political victimisation yet no favour is extended to them by the Act. Even the Debates of the Senate are of no help to the review petitioners because it is well-established 'that reference to legislative history is permissible only as an aid to construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity i.e. from the text of a statute, the court is unable to decipher the real intent of the Legislature' [Gulshan Bibi v. Muhammad Sadiq (PLD 2016 SC 769) at para 6]. However, no such absurdity or obscurity exists in the present case because the Act categorically omits to mention any reason for only reinstating the beneficiary employees who were initially appointed during the relevant period (between 01.11.1993 and 30.11.1996). In this way, the Act is on an even worse footing than the 2007 Ordinance which at least referred to political victimisation in section 2 to justify its chosen time period. As a result, this contention of learned counsel also does not satisfy the test of review.

**D. Caretaker Government had no Power to Dismiss, Remove or Terminate the Beneficiary Employees**

30. To sustain the validity of the legislation, learned counsel next submitted that the beneficiary employees were removed by the caretaker government even though the latter possessed no such power. However, even if for the sake of argument we were to accept this contention of learned counsel, the issue arises that the time period (from 01.11.1996 till 12.10.1999) for which relief has been granted by the Act significantly exceeds the tenure of the caretaker government of the time (from 05.11.1996 till 17.02.1997). If indeed the purpose of reinstating the beneficiary employees was solely to redress this illegality then it needs to be pondered why the Act granted relief to beneficiary employees who had been dismissed, removed or terminated prior to 05.11.1996 and subsequent to 17.02.1997 when no caretaker government was in office. In fact, a substantial portion of the time period fixed by the Act (during which the allegedly illegal dismissals, removals or terminations took place) overlaps with the tenure of constitutionally elected governments which enjoyed the power to dismiss, remove or terminate persons from service. Therefore, this argument of learned counsel has no relevance to the facts of the present case.

**E. Fundamental Rights of the Regular Employees**

31. Learned counsel then submitted that by the reinstatement of the beneficiary employees, no fundamental rights of any regular employee had been violated. Specifically, it was argued that if at all there was some disadvantage suffered by the regular employees it was limited only to the extent of seniority/promotion which in any event was not a right, let alone a fundamental right.

32. We respectfully disagree with this contention put forward by learned counsel. We have already observed in paras 21 and 22 that the reinstatements under the Act were carried out without following any proper procedure and without having regard to the nature of the posts occupied by the beneficiary employees during their initial appointments. On the other hand, the regular employees were inducted into service after fulfilling all the codal formalities. Therefore, by giving leeway to the beneficiary employees and by placing them at the same (or in some cases better) footing in the organisational structure of the employers the fundamental rights of the regular employees were breached, in particular Articles 4, 9 and 18 of the Constitution, which read:

"4. Right of individuals to be dealt with in accordance with law, etc. (1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.

. . .

9. Security of person. No person shall be deprived of life or liberty save in accordance with law.

. . .

18. Freedom of trade, business or profession. Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business:"

(emphasis supplied)

33. All three constitutional provisions envisage a State in which all aspects of a citizen's life, including his/her right to enter a profession, will be regulated by law. Nevertheless, the Act by reinstating the beneficiary employees whilst ignoring the applicable laws, rules and regulations, which detailed the process to be followed in making appointments, has flouted these guarantees of the Constitution. Therefore, the Act has directly impinged upon the fundamental rights of regular employees. Consequently, no exception can be taken to the finding recorded in the judgment under review in this regard.

**F. Non-Obstante Clause**

34. Learned counsel then submitted that the judgment under review attached undue weightage to the non - obstante clause contained in Section 4 of the Act. It was argued that it was within the legislative competence of Parliament to nullify a Judgment of the Supreme Court, therefore, the judgment under review could not hold that the 'non-obstante clause has failed abysmally to provide unfettered protection to the Act of 2010' (refer to para 23 of the judgment under review).

35. As already pointed out in para 5, the cases before us are chiefly concerned with the beneficiary employees of 10 employers. These employees run into the thousands and in many cases employees of the same employer are represented by different counsel. During arguments, it was argued by counsel and became clear to us that of the beneficiary employees before us only some had challenged their removal, dismissal or termination before the relevant fora whereas the rest had not pursued any legal action (this is also the case with beneficiary employees who have worked for the same employer). In light of these unusual circumstances and our findings recorded above, we consider it best not to delve deeper into this issue as it will purely be an academic exercise which this Court does not ordinarily enter into [Munawar Iqbal Gondal v. Nasira Iqbal (2014 SCMR 860) at para 4]. We are solidified in our view by the fact that this ground was primarily used in the judgment under review not as a reason to strike down the Act but to simply hold that the non-obstante clause did not prevent judicial scrutiny of the Act on the constitutional plane. Therefore, not much substance, if any, is left in determining what the implication of the non-obstante clause is.

**G. Reading Down of the Act**

36. The next challenge thrown to the decision in the judgment under review by learned counsel was that it exceeded the mandate of Article 8(1) of the Constitution. For ease of reference, this provision is produced below:

"8. Laws inconsistent with or in derogation of fundamental rights to be void. (1) Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void."

(emphasis supplied)

Learned counsel argued that in deference to Article 8(1) of the Constitution, the judgment under review should have read down section 4 of the Act and preserved its watered-down version along with the other provisions of the Act that were not inconsistent with fundamental rights. However, such contention of learned counsel fails to recognise two important aspects of section 4:

i. Firstly, section 4 as it stands does not suffer from just a singular defect. Instead, it is fundamentally flawed. It not only provides one-step higher regularisation in subsection (a) [which could potentially have been read down] but it also, as already observed in para 22, regularises all beneficiary employees regardless of the post they were occupying before their initial termination. This defect is so central to section 4 that to read it down would essentially require this Court to re write it which is not permissible as such an exercise would enter into the realm of legislation [Zahid Iqbal v. Muhammad Adnan (2016 SCMR 430) at para 14]; and

ii. Secondly, section 4 is the governing/primary provision of the Act. Therefore, once it is declared unconstitutional no substance is left in the Act as all other provisions are secondary to section 4 and cannot control the operation of the Act on their own. As a result, no purpose will be achieved in retaining the Act on the statute book when its effect will have been destroyed by the deletion of section 4.

**H. Prospective Application of Judgment Under Review**

37. Learned counsel finally argued that even if the Act was ultra vires the Constitution, the declaration in the judgment under review should have applied prospectively, in accordance with law settled by this Court, thereby protecting the benefits accorded to the beneficiary employees.

38. In our considered opinion, the proposition put forward by learned counsel does not fully understand the true import of the judgments of this Court on the effect of a declaration made by it. In Pakistan Medical and Dental Council v. Muhammad Fahad Malik (2018 SCMR 1956) the Court acknowledged that judgments of the Court operate prospectively, however, it qualified the said finding by holding that the judgments of this Court could operate retrospectively if so declared [para 24(k)]. Consequently, there is no binding rule that all judgments issued by the Court take effect only from the date of pronouncement. An example of this can be seen in the Mobashir Hassan case (supra) wherein the Court observed:

"171. We... have come to the conclusion that the NRO, 2007 as a whole, particularly its sections 2, 6 and 7, is declared void ab initio being ultra vires and violative of Articles 4, 8, 12, 13, 25, 62(f), 63(1)(h), 63(1)(p), 89, 175, 227 of the Constitution, therefore, it shall be deemed non est from the day of its promulgation i.e. 5th October 2007 as a consequence whereof all steps taken, actions suffered, and all orders passed by whatever authority, any orders passed by the Courts of law including the orders of discharge and acquittals recorded in favour of accused persons, are also declared never to have existed in the eyes of law and resultantly of no legal effect."

(emphasis supplied)

39. In the instant case, we are also faced with a similar situation since the Act has been adjudged to be violative of the different provisions of the Constitution, specifically Articles 4, 9, 18, 25, 240 and 242. The judgment under review has placed reliance on two other judgments of this Court reported as Ali Azhar Khan Baloch v. Province of Sindh (2015 SCMR 456) and Shahid Pervaiz v. Ejaz Ahmad (2017 SCMR 206) [refer to paras 54-56 of the judgment under review] to arrive at the same decision. We have perused these judgments and find no cavil with what has been stated therein. Even the principle of locus poenitentiae is of no help to learned counsel since the consistent stance of this Court has been that the said principle 'would not be attracted in a case under which the benefit has been extended by a law which was violative of the provisions of the Constitution' [Azam

Shah v. Federation of Pakistan (2022 SCMR 201) at para 13]. As a result, no ground for review is made out on this front.

**CONCLUSION**

40. For the detailed reasons set out above, we dismiss the 108 review petitions. The 35 Civil Misc. Applications and 3 Civil Misc. Appeals are disposed of as having become infructuous.

41. However, we consider that having rendered a service of 10 years or more since their reinstatement under the Ordinances and the Act the beneficiary employees, most of whom are nearing retirement and have minimal future job prospects, have dedicated a considerable period of their life to their employers and so deserve to be treated with leniency. More so, when through no fault of their own, the beneficiary employees were inducted and subsequently reinstated into the service of their employers without the fulfilment of the necessary codal formalities. Therefore, in exercise of our inherent power conferred under Order XXXIII, Rule 6 of the Supreme Court Rules, 1980 and in reliance on our power to do ex debito justitiae, as elaborated in the judgment reported as Sher Alam Khan v. Abdul Munim (PLD 2018 SC 449):

"20. We are aware that in the instant case, the lis has reached this Court not by invoking Article 184(3) of the Constitution (though the learned High Court was exercising its Constitutional jurisdiction under Article 199). Be that as it may, this Court is not precluded from converting one type of proceedings into another type, including the existing proceedings under Article 185(3) of the Constitution and exercising our jurisdiction under Article 184(3) of the Constitution so as to adjudicate upon disqualification or lack of qualification of Respondent No.l. This Court in the judgment reported as Muhammad Akram v. DCO, Rahim Yar Khan and others (2017 SCMR 56) held as follows:

"7. The Courts are sanctuaries of justice, and in exercise of authority to do ex debito justitiae, that is to say remedy a wrong and to suppress a mischief to which a litigant is entitled. No fetters or bar could be placed on the High Court and or this court to convert and treat one type of proceeding into another type and proceed to decide the matter either itself provided it has jurisdiction over the lis before it in exercise of another jurisdiction vested in the very court... Courts have been treating and or converting appeal into revisions and vice versa and Constitution Petitions into appeal or revision and vice versa.'"

we convert these review proceedings filed under Article 188 of the Constitution into proceedings under Article 184(3) read with Article 187 ibid to grant the following relief to the beneficiary employees:

i. Following the principle set out in Muhammad Akram v. Registrar, Islamabad High Court (PLD 2016 SC 961) at para 79 [we note that this judgment was subsequently overruled in Gul Taiz Khan Marwat v. Registrar, Peshawar High Court (PLD 2021 SC 391), however, that declaration was only to the extent that the administrative orders of a Chief Justice of a High Court are not amenable to writ jurisdiction], we hold that the beneficiary employees who were holding posts for which no aptitude, scholastic or skill test was required at the time of initial termination (01.11.1996 to 12.10.1999) shall be restored to the same posts they were holding when they were terminated by the judgment under review;

ii. All other beneficiary employees who were holding posts on their initial termination (01.11.1996 to 12.10.1999) which required the passing of an aptitude, scholastic or skill test shall be restored to the posts, on the same terms and conditions, they were occupying on the date of their initial termination. However, to remain appointed on these posts and to uphold the cherished principles of merit, non-discrimination, transparency and fairness expected in the process of appointment to public institutions these beneficiary employees shall have to undergo the relevant test, applicable to their posts, conducted by the Federal Public Service Commission within 3 months from the date of receipt of this judgment;

iii. The improvement in the terms and conditions of service of all the beneficiary employees shall be granted strictly in accordance with the applicable laws, rules and regulations; and

iv. The relief granted in sub-paragraphs (i) and (ii) shall not be granted to those beneficiary employees whose initial termination of service (01.11.1996 to 12.10.1999) was on grounds of absence from duty, misconduct, corruption, misappropriation of money/stock or unfitness on medical grounds if such termination was not set aside finally by a court of law.

42. Copies of this judgment shall be sent to the concerned employers, the Ministry of Law and Justice and the Establishment Division for appropriate action. Consequently, all review petitions are dismissed and all applications/appeals are disposed of in the above terms.

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| Sd/- Umar Ata Bandial, J Sd/- Sajjad Ali Shah, J | Sd/- Qazi Muhammad Amin Ahmed, J Sd/- Amin-ud-Din Khan, J |

**SYED MANSOOR ALI SHAH, J.---**

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Preface

"Unless we protect democracy, democracy cannot protect us."[1] One of the foundations of democracy is a legislature elected freely and periodically by the people. This dissent recognizes the central role of legislature and the principle of separation of powers in a constitutional democracy. Justice McLachlin[2] has rightly said that in democracies, "the elected legislators, the executive and the courts all have their role to play. Each must play that role in a spirit of profound respect for the other. We are not adversaries. We are all in the justice business, together." Separation of powers is the backbone of a constitutional system.[3] The legislature, the executive and the judiciary have no authority beyond that granted to them under the Constitution. **None of them is omnipotent.**

2. Separation of powers means reciprocal checks and balances between the different branches. It does not mean walls between the branches but rather bridges which balance and check.[4] Montesquieu put freedom at the core of separation of powers.[5] The concept of separation of powers is not to maximize efficiency but rather to maximize freedom.[6] The principle of separation of powers has double meaning: First, it means distinguishing

among different branches of government, giving each branch a central and primary function. Second, it means that different branches have reciprocal relationship in which each checks and balances over the other branches. Thus, for example, the legislature can change the rules of the game by amending the existing law or by enacting new law, but it must do so within the framework of the Constitution. On the other hand, the judiciary is authorized to interpret the Constitution and law but it is not authorized to create, amend or rewrite the Constitution or to enact a new law.[7] Judiciary, like the other branches of the government, is also not invincible but is to function under the supreme law of the land i.e., the Constitution.

3. The primary and central function of the legislative branch is to create laws and the courts must give weight to the purpose of the law remembering that legislation promotes social policy and is a tool for achieving a societal goal. This subjective purpose of the statute becomes a key factor in interpreting the statute. Therefore, in the first instance, the role of the courts is to safeguard and actualize these laws in the public interest. Judges should therefore give statutes a meaning that bridges the gap between the law and the social reality. Next is the objective purpose of the statute, where it honours and protects the constitutional values, and the fundamental rights ofthe people. It is only when the subjective or the objective purpose of the legislature outsteps the constitutional boundary that the courts interfere and set the course right by enforcing the constitutional limits. Even in that case when the courts rule that a statute is unconstitutional and invalidates it, it does not undermine the legislature or violate the separation of powers because it is the principle of separation of powers that informs us that legislative authority does not include the authority to pass unconstitutional laws. Hence, the principle of separation of powers is the very source of judicial review.

**Reasons for Dissent**

4. As I have differed with the view of all my learned colleagues on this Bench, I owe an obligation to explain why I remained unable to subscribe to their opinion.

5. First and foremost, I hold the principles of separation of powers and legislative supremacy, subject to the overarching constitutional limitations, to be the bedrock of a constitutional democracy. The courts must remember that the legislation is the manifestation of the will of the people and the collective wisdom of their chosen representatives in the Parliament. Courts must therefore tread carefully to judicially review the act of the legislature. First, efforts should be made by the Court to save the constitutionality of the legislation by exhausting the interpretative tools e.g. of "reading down" or "reading out" to make the legislation constitution compliant. Only when the legislation happens to be opposed to the constitutional values and the fundamental rights and allowing such a statute to remain on the statute book would be unconstitutional, should the courts interfere. Such freedom and respect is enjoyed by the branches of the government under a prosperous and a progressive constitutional democracy. Instead of adopting this route the majority struck down the legislation and granted similar relief to the sacked employees, already granted by the legislation, in the first place. I found myself in minority in subscribing to this constitutional construct.

6. Secondly, I could not sidestep the decision of a 7-Member Bench of this Court in Shabbar Raza[8] which was overlooked by the majority. Needless to mention that the declaration of law made in Shabbar Raza by a larger Bench of 7-Members is binding on the present 5-Member Bench. Shabbar Raza categorically and authoritatively holds that the original jurisdiction of this Court under Article 184(3) of the Constitution "cannot be exercised as a parallel review jurisdiction", and a judgment or an order of this Court "can never be challenged by virtue of filing independent proceedings under Article 184(3) of the Constitution". Such course has been held to be "absolutely impermissible". In utmost humility, I am at loss to comprehend how the majority after dismissing all the review petitions, and other miscellaneous applications, could go ahead and convert the proceedings of the same review petitions into proceedings under Article 184(3) of the Constitution. After dismissal of the review petitions, there remain no proceedings that can be converted into some other proceedings. I also regret my inability to understand how a judgment of this Court can be modified in exercise of the jurisdiction under Article 184(3), after the dismissal of the review petitions which also prayed for similar modification.

7. Thirdly, the initial appointments of the review petitioners were not challenged either before us or before the Bench that originally heard these cases. In this background, the assumption of jurisdiction regarding

appointments by the majority on its own without specifying the jurisdiction under which it has such power to do so, in my humble view, was a jurisdictional overstepping to which I could not be a party. Further, the expression of adverse remarks against a political party in making appointments of the petitioners through executive actions and in making their reinstatement through legislative actions, without impleading that political party in the present proceedings and without providing the political party an opportunity of hearing, appears to me to be negation of the elementary principle of natural justice. Without impleading the political party, in my view, the Court could only discuss the appointment of the petitioners as an executive action of the Government and their reinstatement as a legislative action of the Parliament, and not of a particular political party.

Enactment of the Sacked Employees (Re-instatement) Act 2010 and its salient features

8. The Parliament of Pakistan enacted the Sacked Employees (Re-instatement) Act, 2010 ("Re-instatement Act"), on 8 December 2010, "for the purpose of providing relief to persons who were appointed in a corporation service or autonomous or semi-autonomous bodies or in Government service during the period from the 1st day of November, 1993 to the 30th day of November, 1996 (both days inclusive) and were dismissed, removed or terminated from service during the period from the 1st day of November, 1996 to the 12th day of October, 1999 (both days inclusive)."[9] Earlier to the enactment of the Re-instatement Act, the President of Pakistan, on the advice of the Federal Cabinet, had promulgated four Sacked Employees (Re-instatement) Ordinances for the same purpose: Ordinance No. II of 2009 promulgated on 14 February 2009, Ordinance No. XI of 2009 promulgated on 11 June 2009, Ordinance No. XIII of 2009 promulgated on 30 October 2009[10] and Ordinance No. XII of 2010 promulgated on 5 February 2010.

9. Under the Re-instatement Act, the persons of the specified class were to be reinstated and regularized in service, mostly in the same scale, grade, cadre, group, post or designation from which they were dismissed, removed or terminated.[11] Only two categories of the persons, namely, (i) the persons who had earlier been appointed on permanent or temporary basis, or regular or ad hoc basis,[12] and (ii) the persons the structure of whose posts had been changed meanwhile,[13] were to be reinstated and regularized in service on one scale higher than the scale, grade, cadre, group, post or designation from which they were dismissed, removed or terminated. The persons who had been dismissed, removed or terminated from service on any charges or allegations were also classified into two categories: (i) the persons who were proved not guilty of those charges or allegations in enquiry conducted on directions of any administrative authority or of any court or tribunal,[14] and (ii) the persons the determination of whose guilt was either unchallenged or unsuccessfully challenged. For reinstatement and regularization of persons belonging to category (ii), a Review Board was established.[15] The Review Board was to make, on the review petitions of such employees,[16] a fresh enquiry into facts and pass an order of reinstatement and regularization if it was satisfied that they were not guilty of the charges or allegations.[17] As to the date of regularization and seniority of the reinstated employees, the Re-instatement Act provided that an employee reinstated under the Act in a post, scale, grade, cadre, group or designation would be regularized as a permanent employee in that post, scale, grade, cadre, group or designation with effect from the day of enactment of the Act and would be placed at the bottom of the seniority list effective as on the date of enactment of the Act.[18]

Disputes under the Re-instatement Act in the cases decided by the judgment under review

10. In the course of implementation of the Re-instatement Act, the disputes started arising between the persons claiming their reinstatement and regularization under the Re-instatement Act and persons working as regular employees at the time of enactment of the Re instatement Act, in Government departments, corporations or bodies. The disputes between the former were regarding the entitlement of such persons to the relief provided under the Re-instatement Act, while the disputes between the latter were regarding the issue of seniority arising from the reinstatement and regularization of such persons on one scale higher than the scale, grade, cadre, group, post or designation from which they had been dismissed, removed or terminated. These two types of disputes also arose in the cases decided by the judgment under review, and were stated in para 2 of the judgment:

2. There are a number of groups of cases, in which appellants/petitioners have impugned the appointments/ promotions under the Sacked Employees (Reinstatement) Ordinance Act, 2010 ... Those groups can be divided into two categories, i.e. (i) those employees who were the regular employees of the organizations/ departments,

whose seniority has been affected by the employees inducted under the Act of 2010; and (ii) those persons who have not been extended the benefit of the Act of 2010.

It was in the backdrop of these disputes that this Court took up and decided the question of constitutional vires of the Re-instatement Act. The Court, by the judgment under review, held that the Re-instatement Act is ultra vires the Constitution with the following findings:

52 ... The Act has extended undue advantage to a certain class of citizens thereby violating the fundamental rights under Articles 4, 9, and 25 of the employees in the Service of Pakistan and being [sic - is] void under Article 8 of the Constitution.

53. The Legislature also lacked the legislative competence to enact The Act of 2010 as it has wrongfully attempted to circumvent the jurisprudence of this Court and Article 240 and Article 242 of the Constitution for which reason we are inclined to hold the Act to be ultra vires of the Constitution.

**Contentions of the petitioners**

11. To persuade the Court to recall its judgment under review, the learned Attorney-General for Pakistan and other learned counsel for the petitioners made the following main contentions: (i) that the question of vires of the Re-instatement Act had neither been raised before, nor decided by, the forums below, therefore, the Court should not have taken up and decided the said question, for the first time in the appeals/ petitions filed against the judgments of the forums below; (ii) that the substantial question as to the interpretation of constitutional law that concerns the Federal Government was involved in the cases decided by the judgment under review, therefore, the Court could not have proceeded to determine the question without giving notice to the Attorney-General for Pakistan, as mandated by Rule 1 of Order XXVII-A of the Code of Civil Procedure 1908 ("C.P.C."); (iii) that the persons likely to be affected by the decision of the Court on the question of constitutionality of the Reinstatement Act were neither issued notice nor heard before passing the judgment under review, thus, the Court breached their right of hearing guaranteed by the principles of natural justice; (iv) that the Court wrongly held that the "sacked employees", as per the definition given in section 2(f), fell into the definition of either a "civil servant" or a person in the "service of Pakistan", for major portion of the reinstated employees were employees of the corporations and other autonomous or semi-autonomous bodies, thus, they did not fall under either of the said two categories: (v) that the Court misconstrued and misapplied Articles 240 and 242 of the Constitution for judging the constitutionality of the Reinstatement Act; (vi) that the Court overlooked the important aspect of the case that the employees reinstated under the Reinstatement Act belonged to a distinct class of employees who suffered "political victimization", in the matter of their dismissal, removal or termination during the relevant period, and the Parliament (Legislature) had enacted the Reinstatement Act for the benefit of this distinct class of employees, therefore, the said Act did not offend Article 25 of the Constitution; and (vii) that the Court instead of declaring the whole Reinstatement Act to be ultra vires the Constitution may have declared only those provisions of the Reinstatement Act which infringed the fundamental rights to 'status' of the regular employees, guaranteed under Article 9 of the Constitution, by applying the rules of severance and reading down.

12. No one appeared before us to oppose the review petitions, and defend the judgment under review that has declared the Reinstatement Act to be ultra vires the Constitution. The Court, however, cannot decide the questions of law either way by consent of parties or on concession made at the Bar, or on the ground that there is no contesting respondent before it. We, therefore, must proceed to determine the questions arising out of the contentions of the petitioners on their merits irrespective of no-contest.

**Constitution of larger bench for hearing review petitions**

13. It would be pertinent to mention here that it was because of the importance of the contentions/questions (ii), (iii), (iv), (v) and (viii) raised by the learned Attorney-General, noted in order dated 11.11.2021, that the three member Bench hearing these review petitions referred the matter to the Hon'ble Chief Justice of Pakistan for constitution of a larger Bench, and this larger Bench of five members was thus constituted.

**Short Order**

14. After hearing and considering the contentions of the petitioners, I allowed the review petitions vide my short order dated 17 December 2021, in the following terms:

i. The judgment under review is recalled;

ii. The following Sections and part of Sections of the Sacked Employees Reinstatement Act 2010 are declared ultra vires the Constitution:

(a) Sections 4(a) and 10 to the extent of reinstatement and regularization on "one scale higher", which give an undue advantage to the reinstated employees to the detriment of the rights of the already working regular employees and thus violate their fundamental rights. The provisions of the said Sections, except the words "one scale higher", shall however remain operative with effect from the date of enactment of the Act, and be read to mean the reinstatement and regularization in the same or restructured, as the case may be, scale, grade, cadre, group, post or designation.

(b) Sections 2(f)(vi), 11, 12 and 13, which deal with and provide for reinstatement and regularization of such sacked employees who had been dismissed, removed or terminated from service on account of absence from duty, misconduct, mis-appropriation of Government money or stock, or unfitness on medical grounds, and the determination of their guilt or medical unfitness attained finality by being unchallenged or unsuccessfully challenged. Such employees fall outside the class of sacked employees who suffered "political victimization," envisaged by the Act for a beneficial treatment, and they by themselves do not constitute a distinct class having an intelligible differentia, which bears a reasonable relation to the object and purpose of the Act.

iii. All the employees terminated from service on the basis of the judgment under review, stand restored in the service with effect from the date they were so terminated, and shall be paid the pay of the intervening period treating the said period as an extraordinary leave with pay; and

iv. The cases decided by the judgment under review, which now stands recalled, shall be deemed pending and decided on their own merits by the regular Bench(es) of this Court in accordance with the provisions of the Sacked Employees Re-instatement Act, 2010, subject to the declaration made at No. ii above.

In this discourse, I proceed to deal with the contentions of the petitioners and record my reasons for the above short order.

**Discussion and decision on the contentions of the petitioners**

**(i) Question of vires of the Re-instatement Act, not raised in the forums below**

15. So for as the contention that the Court should not have taken up and decided the question of constitutional vires of the Re instatement Act as the said question had neither been raised before nor decided by the forums below, is concerned, it is true that in petitions filed for leave to appeal under Article 185(3) of the Constitution, this Court generally does not permit to raise those questions of law that have not been urged before the forum below.[19] In the present case, the leave granting Benches of this Court permitted to raise the question of constitutional vires of the Re-instatement Act and granted the leaves to appeal to consider the same, despite that the question had neither been raised before nor decided by the forums below, i.e., High Courts and Service Tribunal, and that too without explaining the circumstances that justified departure from the general practice of the Court. However, none of the respondents in those petitions filed any review petition to recall that leave granting order(s), nor was any such objection raised before the Bench that heard the appeals and decided the question. It is now too late in the day to make such contention before this Bench hearing review petitions against the judgment that decided the question, and not hearing the review petitions against the orders that granted the leaves to appeal to consider the question. The contention is, therefore, now untenable.

**(ii) Omission to give notice to Attorney-General for Pakistan, under Rule 1 of Order XXVII-A of the C.P.C**.

16. Much was argued on the point that the substantial question as to the interpretation of constitutional law that concerns the Federal Government was involved in the cases decided by the judgment under review, therefore, the Court could not have determined the question without giving notice to the Attorney-General for Pakistan, as mandated by Rule 1 of Order XXVII-A of the C.P.C. The reliance, in this regard, was placed on Federation v. Aftab Sherpao,[20] the judgment of a twelve-member Bench of this Court.

17. Careful reading of the cited case shows that the learned Judges in this case were equally divided by six to six, on the point of requirement of issuing a formal notice to the Attorney-General under Rule 1 of Order XXVII-A of the C.P.C. and effect of its non-issuance in the circumstances of the case. The ancient rule of the

common law - semper praesumitur pro negante, means that presumption always exists in favor of one who denies or that the presumption is always in favour of the negative. So when the Judges of an appellate Court are equally divided in their opinion, the judgment of the Court below is affirmed and maintained,[21] and the decision given pro negante is authoritative and binding as any other decision of the appellate Court.[22] However, the said rule is not applicable to the final decision of a case by this Court in view of the second proviso to Rule 1 of Order XI of the Supreme Court Rules, 1980, which provides that "if the Judges hearing a petition or an appeal are equally divided in opinion, the petition or appeal, as the case may be, shall, in the discretion of the Chief Justice, be placed for hearing and disposal either before another Judge or before a larger Bench to be nominated by the Chief Justice." Hence, the application of the rule of pro negante decision is restricted to the division of opinion on a point of law decided in the judgment of this Court, notwithstanding of which there is a majority of opinion on the final decision of the case. Exactly, this happened in the Aftab Sherpao case. Although the learned Judges were equally divided 6 to 6 in their opinion on the point of notice under Rule 1 of Order XXVII-A of the C.P.C., but there was a clear majority of 8 to 4 in the final decision of the appeals, viz, in allowing the appeals. Thus, the rule of pro negante decision was applicable to the point of notice under Rule 1 of Order XXVII-A of the C.P.C., and it was the decision of the High Court on this point that became the pro negante decision of this Court, having the authority and binding effect of a decision of a twelve-member Bench of this Court.

18. We, therefore, need to ascertain what was decided by the High Court on this point, which because of equal division of opinion in appeal became the pro negante decision of this Court. The decision of the High Court on this point has been reproduced in the leading judgment authored by Justice Shafiur Rahman in the Aftab Sherpao case. The relevant portions of the decision of the High Court on the point are reproduced here also for ready reference:

As the Federation of Pakistan is a party to these proceedings, no separate notice under the law is required to be issued to the Attorney-General and if he so chooses, he may represent the Federation in this case.

The Federation is already a party in this petition and there was no hindrance in the way of the Attorney-General of Pakistan to appear and argue the case on behalf of the applicant during the hearing of this matter.

Furthermore, Order XXVIIA, Rule 1, C.P.C. would normally deal with a situation where suit is filed before the Court wherein the Federation or the Province is not a party but a substantial question of Constitutional interpretation is involved concerning the Federal Government or the Provincial Government as the case may be. In such a situation it is quite obvious that either the Advocate-General of the Province or the Attorney-General of Pakistan shall assist the Court concerned. Here before us both the Province and the Federation are arraigned as parties. Due notice has been received by them. The Provincial Government has engaged a private counsel along with the Advocate-General of the Province to whom notice was issued by the Court on 22-8-1990. Similarly the Federal Government has decided to engage a counsel who represented it before us. If the Attorney-General had decided to represent the Federation we would, have been too happy to hear him as well. But we do not find it incumbent on us in the circumstances of the case to needlessly issue him a notice while he is busy in arguing similar cases before other High Courts and we were requested to wait for the conclusion of those cases in order to hear him.

In terms of the above observations of the High Court, the pro negante decision of a twelve-member Bench of this Court on the point was that Rule 1 of Order XXVII-A of the C.P.C. deals with a situation where the Federation of Pakistan or the Province concerned is not a party to the proceedings but a substantial question as to the interpretation of constitutional law is involved in those proceedings, concerning the Federal Government or the Provincial Government, as the case may be. However, in cases where the Federation of Pakistan or the Province concerned is already a party to the proceedings, no separate notice under the said Rule is required to be given to the Attorney-General for Pakistan or the Advocate-General of the Province, as the case may be.

19. In some of the cases decided by the judgment under review, the Federation of Pakistan was a party and represented before the Court by Mr. Sajid Ilyas Bhatti, Additional Attorney-General, and Mr. Sohail Mehmood, Deputy Attorney-General; therefore, no separate notice under Rule 1 of Order XXVII-A of the C.P.C. was required to be given to the Attorney-General for Pakistan. The contention that the Court could not have

determined the question of constitutional vires of the Re instatement Act without giving notice to the Attorney-General for Pakistan under Rule 1 of Order XXVII-A of the C.P.C., thus does not hold water and is accordingly rejected. However, it may be brought on record that the Court did issue the notice to the Attorney-General for Pakistan in the main case, i.e., Muhamad Afzal v. Secretary Establishment (C.A. 491/2012) wherein leave to appeal was granted to consider the question of vires of section 4 of the Reinstatement Act.

**(iii) Non-issuing notice to and non-hearing of the persons likely to be affected by the decision of the Court**

20. So far as the next contention that the persons likely to be affected by the decision of the Court on the question of constitutionality of the Reinstatement Act were neither issued notice nor heard before passing the judgment under review, thus, the Court breached their right of hearing guaranteed by the principles of natural justice, is concerned, it does not detain us long in view of the principle of law enunciated by a fourteen-member Bench of this Court, in the case of Justice Bhinder v. Federation[23].

21. In Bhinder, the Court had held in the judgment sought to be reviewed,[24] the Proclamation of Emergency, the Provisional Constitution Order and the Oath of Office (Judges) Order of 2007 to be ultra vires the Constitution and also passed some consequential orders, including the order as to unconstitutionality of the appointments of certain Judges. Some of such Judges, in their applications seeking permission to file review against that judgment, contended that they had not been issued notice nor had they been heard before making the adverse order as to their appointments, therefore, the judgment to that extent was not sustainable. The Court repelled that contention observing that a judgment in rem binds parties and non-parties alike as opposed to a judgment in personam which only affects the parties to a lis, and that a judgment in rem apply to all regardless of whether they were parties or not and a judgment in personam does not bind non-parties. The Court went on to hold that the judgment sought to be reviewed was a judgment in rem enunciating a legal principle; it, therefore, had the status of conclusiveness and finality, and no person could be allowed to challenge it merely for the reason that he was not a party in the case and had not been heard.

22. The same principle applies to the judgment that is under review in the present case. The judgment under review was also a judgment in rem[25] as it decided the status of the Re-instatement Act, that is, its constitutional vires; it, therefore, binds the parties and the non -parties alike. A judgment in rem settles the fate of the res by determining its status and thus operates directly on the res itself; it binds all persons claiming a right or interest in or under the res, even though pronounced in their absence. It is true that the actions (cases) brought before this Court were not originally in rem rather were in personam agitating the individual grievances, but the Court by granting leave to appeal to consider the status, i.e., the constitutional vires, of the Re-instatement Act, converted them into actions in rem and thus the consequent judgment under review was also delivered in rem. Needless to mention that in actions in rem it is neither practicable nor is it the requirement of law that the Court should issue a separate notice and offer an opportunity of hearing to each and every person who is likely to be affected, and bound, by the judgment. The objection that some or most of the persons affected by the judgment under review were neither issued notices nor heard before passing the judgment is, therefore, not sustainable because of the nature of the judgment under review[26] and cannot be accepted as a ground for recalling that judgment.

23. But, I must add, for complying with the constitutional command of fair trial and due process to a possible extent in such cases, the Court may order, as it is usually done by the civil courts dealing with actions in rem, for service of the public notice of the case through its publication in the press or any other mode deemed appropriate, for the knowledge of the persons likely to be affected by the judgment, who may then appear before the Court and seek permission to intervene and argue in the proceedings.[27] In fact, in the present case though no such public notice was served, some persons who thought them likely to be affected by the judgment on the question of vires of the Re-instatement Act did intervene and were allowed the opportunity of hearing; as they by themselves became aware of the pendency of the matter since it remained pending in the Court for a considerable period of about seven years from 2012 to 2019 for hearing.

**(iv) All employees dealt with by the Re-instatement Act, not either "civil servants" or persons in the "service of Pakistan"**

24. Next contention of the petitioners is that the Court wrongly held in para 44 of the judgment under review that the "sacked employees", as per the definition given in section 2(f) of the Re instatement Act, fell into the definition of either "civil servants" or persons in the "service of Pakistan", for major portion of the reinstated employees being employees of the corporations and other autonomous or semi-autonomous bodies did not fall under either of the said two categories. I find the contention correct, as not all the employees of the corporations and other autonomous or semi-autonomous bodies established by or under a Federal law, or owned or controlled by the Federal Government, falls within the definition of persons in the "service of Pakistan".[28] However, nothing turns on this point as to the legality of the judgment under review.

**(v) Misconstruction and misapplication of Articles 240 and 242 of the Constitution**

25. The petitioners have contended that the Court misconstrued and misapplied Articles 240 and 242 of the Constitution for judging the constitutionality of the Reinstatement Act. To appreciate this contention, we need to see what these Articles of the Constitution provide for in relation to the service of Pakistan concerning the Federation, as the Re instatement Act partly relates thereto, and what the Court has held in the judgment under review as regards thereto.

26. In relation to the service of Pakistan concerning the Federation, Article 240 of the Constitution provides that subject to the Constitution, the appointments to and the conditions of service of persons in the service of Pakistan shall be determined, "in the case of the services of the Federation, posts in connection with the affairs of the Federation and All-Pakistan Services, by or under Act of Majlis-e-Shoora (Parliament)"; while Article 242 provides that "Majlis-e-Shoora (Parliament) in relation to the affairs of the Federation... may, by law, provide for the establishment and constitution of a Public Service Commission" and the "Public Service Commission shall perform such functions as may be prescribed by law".

27. The Court has observed in the judgment under review that the Constitutional framework under Article 240 clearly envisions that any appointments in the service of Pakistan for the Federation shall be made under the Act of Parliament, and that in pursuance to Article 240 of the Constitution, the Parliament has enacted the Civil Servants Act, 1973. The Court has further observed that Article 240 of the Constitution is supplemented by Article 242, which envisions the creation of a Public Service Commission that is intended to be the supervisory body to oversee the process of recruitments. The Court, with the said observation, has held that the legislature, by enacting the Re -instatement Act, circumvented the constitutional process envisioned under Articles 240 and 242 of the Constitution, for which reason also the Re-instatement Act is ultra vires the Constitution.[29]

28. No doubt, the appointments to and the conditions of service of persons in the service of Pakistan concerning the Federation, as per the constitutional mandate of Article 240, are to be determined by or under Act of Parliament. The Parliament (Legislature) is, thus, the only repository of the constitutional power in relation to the appointments to and the conditions of such service; the Executive has no direct and independent power in this regard and exercises such power delegated to it by or under an Act of the Parliament (Legislature).[30] However, the Parliament is not required, or bound, under Article 240, to enact only one Act for this purpose. The enactment of the Civil Servants Act, 1973, therefore, does not make the Parliament functus officio, or divest it of its legislative power, to enact another Act on the subject of appointment to and conditions of such service or a part of such service, and to give that Act an overriding effect against the provisions of the Civil Servants Act, 1973.

29. As for selection and recruitment of persons for appointment in the service of Pakistan concerning the Federation to be made through the Federal Public Service Commission ("FPSC"), Article 242 of the Constitution by itself neither establishes the FPSC nor prescribes the functions thereof, rather leaves these matters to be done by the Parliament by enacting law. The law enacted by the Parliament on these matters, is the Federal Public Service Commission Ordinance, 1977. The FPSC has been established under section 3 of the Ordinance, and its main functions, as prescribed under section 7 of the Ordinance, are: (a) to conduct tests and examinations for recruitment of persons to All- Pakistan Services, the civil services of the Federation and civil posts in connection with the affairs of the Federation in basic pay scales 16 and above or equivalent; and (b) to advise the President of Pakistan on matters relating to qualifications for and methods of recruitment to,

the said services and posts. The status of the FPSC established under the law, not under the Constitution, is thus of a statutory body not constitutional one, and its functions are also statutory not constitutional.[31]

30. In view of the above constitutional position, the vires of one law, i.e., the Re-instatement Act, enacted by the Parliament (Legislature) cannot be examined on the touchstone of another law, i.e., the FPSC Ordinance 1977, made by the same Legislature, especially when the law enacted later in time has been given an overriding effect against all other laws on the subject, nor can the same be examined, and declared ultra vires, on the touchstone of Articles 240 and 242 of the Constitution as both these Articles only command for dealing with the matters specified therein by an Act of the Parliament, and provide for nothing more.[32] Article 240 does not provide any criterion for judging the constitutionality of an Act of the Parliament, except that the Act of Parliament must relate to the appointments to and the conditions of service of persons in the service of Pakistan concerning the Federation, not concerning any Province other than All-Pakistan Service which is a service common to the Federation and the Provinces. Likewise, the constitutional limitation on the power of the Parliament to enact a law under Article 242 is that it can enact a law for the establishment of a Public Service Commission and prescribing its functions, in relation to the affairs of the Federation, not of any Province. I find that the said aspect of the provisions of Articles 240 and 242 of the Constitution was not presented by the parties before the Court, and the same thus escaped notice of the Court in applying the said Articles of the Constitution to judge the constitutional vires of the Reinstatement Act, in the judgment under review. The contention of the petitioners in this regard, therefore, sustains.

**(vi) Employees reinstated under the Reinstatement Act, whether belong to a distinct class and their reinstatement does not offend Article 25 of the Constitution**

31. Next comes one of the main contentions of the petitioners, that the Court overlooked the important aspect of the case that the employees reinstated under the Reinstatement Act belonged to a distinct class of employees who suffered "political victimization", in the matter of their dismissal, removal or termination during the relevant period, and that the Parliament (Legislature) had enacted the Reinstatement Act for the benefit of this distinct class of employees, therefore, the said Act did not offend Article 25 of the Constitution.

32. The Preamble to the Re-instatement Act simply states that the Act is enacted "for the purpose of providing relief to persons who were appointed in a corporation service or autonomous or semi autonomous bodies or in Government service during the period from the 1st day of November, 1993 to the 30th day of November, 1996 (both days inclusive) and were dismissed, removed or terminated from service during the period from the 1st day of November, 1996 to the 12th day of October, 1999 (both days inclusive)." It does not specifically mention that the said persons have suffered "political victimization" in the matter of their dismissal, removal or termination from service. Nor any statement of objects and reasons for enactment of the Re-instatement Act has been presented by any of the petitioners before us; we, therefore, assume that there is no such statement. To show that the said persons had suffered "political victimization" and the Re-instatement Act was enacted by the Parliament for the purpose of providing relief to them, learned counsel for some of the petitioners have referred to certain parliamentary debates made by the parliamentarians who had presented the Bill for enactment of the Re-instatement Act in two Houses (National Assembly and Senate) of the Parliament and who had supported the same.

33. It hardly needs reiterating that the parliamentary debates, especially the speech made by the mover of the Bill or by the chairman or member(s) of the Standing Committee that considered the Bill, explaining the reason for introducing the Bill can be referred to for ascertaining the mischief sought to be remedied by the legislation and the object and purpose for which the legislation was enacted.[33] Therefore, it would be expedient to quote here some parts from the parliamentary debates relating to the objects and reasons of the enactment of the Re instatement Act, made by the parliamentarians who were member(s) of the Standing Committee that had considered and approved the Bill as well as by the other parliamentarians who had supported the same:

Debates in the National Assembly of Pakistan (25th Session) dated 7 October 2010[34]

Syed Khurshid Ahmad Shah:

English Translation: This was our commitment that we would reinstate the persons who had suffered victimization..... If the Opposition thinks that it was their Government that sacked these persons, therefore, they have to oppose it, then it is unjust..... It is the problem of nine thousand families of persons who had been sacked. They do not belong only to Sindh, Punjab, Pakhtunkhwa or Balochistan; they belong to whole Pakistan. They all do not belong to Peoples Party .... I say it with great regret that these persons were sacked in the regime of Mian Nawaz Sharif.... You are adamant to oppose it as these nine thousand persons reinstated by us were sacked by the Government of Mian Nawaz Sharif...They are not just nine thousand persons, they are ninety thousand families: Nine families are linked with one family.

Iqbal Muhammd Ali Khan:

English Translation: Those who had been given gold medals and performance certificates in banking, were given letter [of their termination] one morning; it was a victimization at that time.

Riaz Fatiana:

English Translation: It has been a culture in this country that when one Government comes and other goes, all persons recruited [in one Government] are sacked.

Mian Riaz Hussain Pirzada:

English Translation: There have been traditions of sacking the persons employed in a Government, at the end of term of that Government.

Rahmat Ullah Kakar:

English Translation: All the coalition partners were committed on this that the persons who had been deprived of their livelihood on political victimization [were to be reinstated]... for this purpose a Committee had been constituted, which had fulfilled the promise of reinstatement of such employees by its hard work day and night in nine months on merits.

Debates in the Senate of Pakistan (65th Session) dated 10 November 2010[35]

Senator Mian Raza Rabbani:

English Translation: During that period for which this bill has been introduced, all orders [of termination] without exception were made without issuing show cause notice to those persons, nor were any explanation called from them. A blanket order was handed over to them on one morning [stating] that because your appointment have been made in the period of Pakistan Peoples party, you are therefore being terminated; because you have been appointed on political grounds, and this is a matter of record.
Senator Colonel (R) Syed Tahir Hussain Mash'hidi:

English Translation: Their only fault was that they had unfortunately been employed during the period of Pakistan Peoples Party. It is not my party; therefore, I am making statement with all honesty. It was their only fault that they had got jobs during the period of Pakistan Peoples Party. And when the Government of Pakistan Muslim League (N) came in power, they were sacked without investigating whether who had political affiliation, who had got job on reference or not, whether they got the job on merit. They were sacked on because they had got job during the period of Pakistan Peoples Party. You can say, it was a political victimization.
Senator Molana Gul Naseeb Khan:

English Translation: We have lived in such period in the history of Pakistan when political parties used to pursue vindictive politics, and for this reason they used to indulge in activities against each other and also against each other's Government... The employees sacked in the year 1997 were also sacked because of that vindictiveness ... Earlier to that period some individual incident [of this kind] had happened, and had been happening; but if any general action had been taken that is only this which is before us.
Senator Syed Nayyer Hussain Bokhari:

English Translation: The basic thing is that there was victimization in this, and I think which irritates somebody is probably the period, which is specific, during which the persons sacked from their employments were politically victimized.
The above extracts from the parliamentary debates that took place on the floor of the two Houses of the Parliament provide a valuable insights into the objects and reasons for which the Bill for enactment of the Re instatement Act was introduced. A plain reading of the extracts of the debates supports the contention of the petitioners and makes it clear that the reason for choosing the persons appointed in and dismissed from service during the specified period, for the beneficial treatment of reinstatement and regularization in service notwithstanding any other law on the subject, was that they had suffered "political victimization" in the matter of their dismissal, removal or termination from service, at the hands of the Government (Executive) during that period, and the object of the enactment of the Re-instatement Act was that the Parliament (Legislature) intended to provide relief to such persons, statedly nine thousands.
34. I fully recognize that there is a distinction between the fact that a particular statement was made by a parliamentarian, which narrates certain objects and reasons for enactment of an Act of the Parliament, and the

truth of any matter of fact stated in that statement. The former is itself a fact relevant for ascertaining the objects and reasons for enactment of an Act of the Parliament and need no further proof other than the authentic record of such statement; while the latter, if disputed, is to be proved aliunde, that is, by evidence apart from the fact that a statement about it was made in the parliamentary debates.[36] In the present case, it is a question of fact whether or not the persons going to be reinstated under the Re-instatement Act had suffered "political victimization", in the matter of their dismissal, removal or termination from service; the correctness of which, if disputed, is to be proved by evidence other than the above quoted statements of the parliamentarians. However, nobody has disputed, before us, the correctness of that factual statement made by the parliamentarians, nor does that statement of fact appear to be inherently improbable; it is, rather, supported by the circumstance that a large number of employees, not a few, were sacked during the specified period. Therefore, the Court is to proceed on assuming that undisputed statement of fact to be correct.

35. Needless to mention that Article 25(1) of the Constitution which declares, and guarantees as a fundamental right, that all citizens are equal before law and are entitled to equal protection of law, does not prohibit reasonable classification for equal treatment, that is, "equality among equals", which is based on intelligible differentia, distinguishing persons or things that are grouped together from those who are left out, and has a rational nexus to the object sought to be achieved by law.[37] And a classification having a reasonable basis does not offend against fundamental right to equality, merely because it is not made with mathematical nicety or because in practice it results in some inequality. Further, when the classification made by a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed, and the one who assails the classification must carry the burden of showing that it does not rest upon any reasonable basis but is essentially arbitrary.[38]

36. In the present case, after accepting the undisputed statement of fact that the persons going to be reinstated under the Re instatement Act had suffered "political victimization", in the matter of their dismissal, removal or termination from service, there remains no difficulty to hold that they formed a distinct class, and their classification was based on intelligible differentia, distinguishing them from those who had been left out, and had a rational nexus to the object sought to be achieved by the Re-instatement Act. Therefore, only their reinstatement and regularization under the Re-instatement Act as such did not offend the fundamental right to equal treatment, guaranteed by Article 25(1) of the Constitution, of other employees sacked in other durations as well as of regular employees appointed under the general laws relating to the appointments to and terms of conditions of the service concerned.[39] This aspect of the Re-instatement Act, it appears, escaped notice of the Court at the time of passing the judgment under review. The contention of the petitioners in this regard, therefore, sustains.

**(vii) Application of the principles of reading out and reading down,**
**to uphold the constitutionality of the Re-instatement Act**

37. The next main contention of the petitioners is that instead of declaring the whole Reinstatement Act to be ultra vires the Constitution, the Court may have declared only those provisions of the Reinstatement Act which had infringed the fundamental right to 'status' of the regular employees, guaranteed under Article 9 of the Constitution, by applying the rules of severance (reading out) and reading down.

38. To begin with on this contention of the petitioners, I would cite here the two cardinal principles of construction of statutes: (i) that there is always a presumption in favour of the constitutionality of a legislative enactment (a law); and (ii) that a law enacted by a competent legislature is to be construed in such a manner that its constitutional validity may be saved rather than destroyed.[40] It is because of these principles that the courts lean in favour of upholding the constitutionality of laws and are reluctant to strike them down by declaring them as unconstitutional. The one who challenges the constitutionality of a law bears the burden to show that the law is violative of any of the constitutional provisions, and when two opinions as to the construction of a law are possible, the courts prefer to adopt that which upholds the constitutionality of the law, over that which does not. The courts, therefore, construe a law in such a manner that saves the law than destroys it, and declare it unconstitutional only when it clearly contravenes any constitutional provision and cannot be read as constitution compliant by applying any of the methods, techniques or tools of rule of constitution

complaint construction, e.g., reading out or reading down. Declaring the law unconstitutional is thus one of the last resorts taken by the courts.

39. The primary purpose of applying these techniques, methods or tools, like, reading out or reading down, is to endeavor for saving the constitutional validity of the statute, to a possible extent, and the main reason for applying them in preference to declaring the law unconstitutional is that their application makes the process of judicial review of legislative actions less intrusive than invalidating the whole law, as "the court should not strive officiously to kill [a law] to any extent greater than it is compelled to do"[41]. The principle of constitutional compliant construction of laws has been recognized by our Constitution itself in its Article 268(6), and this Court has been applying the methods of "reading out" (severance)[42] and "reading down"[43], with certain conditions, for the purpose of construing the provisions of a law as constitution compliant and to save it, as much as possible, from being declared ultra vires the Constitution. The primary condition for applying these methods for a constitution compliant construction is to see whether the Legislature would have enacted the law in the form that remains or turns out to be after application of any of the said methods. Further, in case of applying the method of reading out (severance) the court is to see whether after reading out (severing) the invalid part, the remaining provisions of law would remain operative within the scope of the object of the law.[44] Therefore, when confronting a constitutional flaw in a statute, court should try to limit the solution to the problem - severing the flawed portion while leaving the remainder intact. Because the unconstitutionality of a part of a statute does not necessarily defeat or affect the validity of its remaining provisions. If after severing the flawed part, the remaining provisions of law would remain fully operative, court must sustain those provisions unless it is evident that the Legislature would not have enacted those provisions independently of that which is invalid.

40. In the light of the above principles of statutory interpretation, I proceed to examine the contention of the petitioners as to declaring the Re-instatement Act invalid partially, instead of as a whole.

41. In the judgment under review,[46] the Court formulated the proposition for decision on the question of constitutional vires of the Re instatement Act, thus:

Whether the law [i.e., the Re-instatement Act] has placed the regular employees, who remained in service, at a disadvantageous position in terms of seniority and other benefits to reinstated employees. If so, then the [re-instatement] Act of 2010 would be violative of right enshrined under Article 9 and Article 25 of the Constitution, of the regular employees.

And for answering the question in affirmative, the Court reasoned:[47]

The legislature has, through the operation of The [Re-instatement] Act of 2010, attempted to extend undue benefit to a limited class of employees. This legislation has a direct correlation to the right enshrined under Article 9 of the Constitution for employees currently serving in the departments falling under section 2(d) of The [Re-instatement] Act of 2010. Under Article 9 of the Constitution, a civil servant has been extended the right to 'status' and 'reputation'. The right to 'status' and 'reputation' are not mutually exclusive and are encompassed by the wider umbrella of Article 9 of the Constitution. Upon the 'reinstatement' of the 'sacked employees', the 'status' of the employees currently in service is violated as the reinstated employees are granted seniority over them. This is an absurd proposition to consider as the legislature has, through legal fiction, deemed that employees from a certain time period are reinstated and regularized without due consideration to how the fundamental rights of the people currently serving would be affected.

(Underlined for emphasis)

A careful reading of the above quoted observations of the Court shows that the Court declared the Re-instatement Act to be violative of the right to 'status' enshrined in fundamental 'right to life', guaranteed under Article 9 of the Constitution, of the regular employees serving in the relevant departments at the time of promulgation of the Re-instatement Act, for the only reason that "Upon the 'reinstatement'... the reinstated employees are granted seniority over them." While the Court did not specify the relevant provisions of the Re-instatement Act, in the judgment under review, which grants the seniority to the reinstated employees over the then working regular employees, those provisions are that of sections 4(a) and 10 which provide for reinstatement of certain categories of sacked employees and their regularization on "one scale higher" than the

scale, grade, cadre, group, post or designation from which they were dismissed, removed or terminated. Both these Sections are reproduced here for ready reference:

Section 4(a): a sacked employee appointed on permanent or temporary basis or regular or ad hoc basis or otherwise in any corporation or Government service against a regular or temporary post shall be reinstated and regularized in regular service of the employer on one scale higher to his substantive scale, grade, cadre, group, post or designation, whatever the case may be, held by the sacked employee at the time of his dismissal, removal or termination from service or at the time forced golden hand shake was given to the sacked employee;

Section 10: In cases where any change in structure of any scale, grade, cadre, group, post or designation, whatever the case may be, has been made by the competent authority or employer after the 1st day of November, 1996, the sacked employee on re-instatement shall be placed in service of the employer on one scale higher than the scale, grade, cadre, group or designation, whatever the case may be, from which he was dismissed, removed or terminated from service or given forced golden hand shake.

It is very pertinent to mention here that only the above two categories of the sacked employees were to be reinstatement and regularized on "one scale higher", while all the rest of the categories of the sacked employees, i.e., contract employees [section 4(b)], employees found not guilty in enquiry [section 4(c)], trainee employees [section 4(d)] and employees given forced golden hand shake [section 4(e)], were to be reinstated and regularized against a regular post of the same scale, grade, cadre, group, post or designation, whatever the case may be, from which they had been dismissed, removed or terminated from service or given forced golden hand shake. And as per section 4(f), all the employees Re-instated under the Re-instatement Act were to be regularized from the day of enactment of the Re-instatement Act (not from the date of their initial appointment) and were to be placed at the bottom of the seniority list effective on the date of enactment of the Re-instatement Act. Section 4(f) is also reproduced here for ease of reference:

Section 4(f): a sacked employee re-instated under this Act shall be regularized in the service of the employer in post, scale, grade, cadre, group or designation, whatever the case may be, on which he is re instated under the Act, as a permanent and a regular employee, with effect from the day of enactment of this Act, at par with other regular employees of the employer concerned and shall be placed at bottom of the seniority list, effective as on the date of enactment of this Act, for scale, grade, cadre, post, group or designation, whatever the case may be, in which the sacked employee is re-instated in accordance with the provisions of this Act;

It is thus evident that the issue of seniority that affected the right to 'status' enshrined in fundamental 'right to life' of the regular employees serving in the relevant departments, had arisen only in cases of employees reinstated and regularized on "one scale higher", under sections 4(a) and 10. Their reinstatement and regularization on "one scale higher" had made them senior to those regular employees who were senior to them even as per their date of initial appointments and were serving in the same grade and post in which they had been appointed prior to the initial appointment of the reinstated employees, because of the slow channel of promotion.[48] Therefore, to the extent of reinstatement and regularization of some sacked employees, under sections 4(a) and 10, on "one scale higher", I fully agree with, and reaffirm, the observation made in the judgment under review that such reinstatement and regularization was violative of the right to 'status' enshrined in fundamental 'right to life' of the regular employees serving in the relevant departments at the time of promulgation of the Re-instatement Act, and add that it was also violative of the fundamental 'right to dignity' guaranteed under Article 14 and fundamental 'right to equality before law' guaranteed by Article 25 of the Constitution as it gave an undue advantage to the reinstated employees to the disadvantage of the rights of the already working regular employees.

42. The proper course, however, in my humble view was that the Court should have declared only that part of the provisions of sections 4(a) and 10 of the Re-instatement Act that had the said offending effect, i.e., the reinstatement and regularization on "one scale higher". And this could have easily been done by reading out (severing) the words "one scale higher to" from the provisions of section 4(f) and the words "one scale higher than" from the provisions of section 10 of the Re instatement Act, and reading down those provisions to mean that the sacked employees mentioned in those Sections were to be reinstated and regularized in the same or restructured, as the case may be, scale, grade, cadre, group, post or designation from which they had been

dismissed, removed or terminated from service, for the purpose of saving the constitutional validity of those provisions and construing them as constitution compliant. Because from the reasons and objects of the enactment of the Re-instatement Act, it is more than clear: (i) that the Legislature would have enacted the law, i.e., sections 4(a) and 10, in the form that remains or turns out to be after application of methods of reading out and reading down, (ii) that it cannot be said that the Legislature would not have enacted those provisions independently of the part that is invalid, and (iii) that after reading out (severing) the invalid part, the remaining provisions of the law, i.e., sections 4(a) and 10, remains operative within the scope of the object of the law, i.e., providing relief to persons who had suffered "political victimization".

43. The next reason that prevailed with the Court, in the judgment under review,[49] for declaring the Re-instatement Act ultra vires the Constitution was that the sacked employees had not opted for remedy available to them under the law upon their termination from service within the limitation-period provided therefor, thus, they had forgone their right to be reinstated by availing the due process of law. I am afraid, this reason was not plausible. It escaped the notice of the Court that the sacked employees were seeking their reinstatement, under a new law, i.e. the Re-instatement Act, enacted by a competent Legislature, and not under the laws that were in force at the time of their termination form service. Therefore, the question of forgoing the right to be reinstated by not availing the remedy under the laws in force at the time of orders of their termination from service and of expiry of limitation-period under those laws, was not relevant.

44. It could also not be appreciated in the judgment under review that the administrative orders of termination from service passed without any charge of misconduct, inefficiency or unfitness and the judicial orders passed on such a charge, under the relevant law, have different bearing on the legislative power of the Legislature: the former can be undone by the Legislature by any means, but the effect of the latter can only be neutralized by changing the relevant law, with retrospective effect, on the basis of which they have been passed[50]. Thus, only those provisions of the Re-instatement Act that have the effect of nullifying, or give the power to the Executive to nullify, the judicial orders passed on charge of misconduct, inefficiency or unfitness that had attained finality by being unchallenged or unsuccessfully challenged, and that too without changing the law under which those orders had been passed, would have the effect of interference into the functioning and independence of the judicial organ of the State, and thus be violative of the provisions of Articles 175 and 212 of the Constitution. A careful reading of the Re-instatement Act identifies that sections 2 (f) (vi), 11, 12 and 13, which deal with and provide for reinstatement and regularization of such sacked employees who had been dismissed, removed or terminated from service on account of absence from duty, misconduct, mis-appropriation of Government money or stock, or unfitness on medical grounds, and the determination of their guilt or medical unfitness had attained finality by being unchallenged or unsuccessfully challenged, have such effect. Such employees, even, do not fall within the class of the sacked employees who had suffered "political victimization," envisaged by the Act for a beneficial treatment. The said Sections of the Re-instatement Act are, therefore, ultra vires the Constitution.

45. The Court, in the judgment under review, has inadvertently relied upon Article 4 of the Constitution also to declare the Re instatement Act to be ultra vires the Constitution, as the attention of the Court was not invited to its previous judgments in the cases of Fauji Foundation v. Shamimur Rehman[51] and LDA v. Imrana Tiwana[52], wherein it has been held of Article 4 of the Constitution, which provides for a right to be dealt with in accordance with law, that this Article does not provide any criterion, and thus cannot be a touchstone, to test the vires of a law.

46. The Court, in the judgment under review,[53] has declared the

Re-instatement Act to be ultra vires the Constitution mainly on the touchstone of Articles 4, 9 and 25 of the Constitution, as discussed above, and quoted[54] those Articles of the Constitution and discussed[55] the rights guaranteed thereunder, but neither cited nor discussed the specific provisions of the Re-instatement Act which had, in view of the Court, violated those rights. The attention of the Court was not invited, nor did it adhere, to the principle, as based upon in LDA v. Imrana Tiwana,[56] that a Court examining the constitutional vires of a law is to put down the provisions of the law under examination next to the fundamental rights guaranteed by the Constitution and state why the two cannot be reconciled, before striking them down. I find that the attention

of the Court was not invited to the methods of "reading out" and "reading down" for construing the ex facie invalid provisions of the Re-instatement Act as constitution complaint, and the same thus escaped notice of the Court. I am sure that had this aspect been considered by the Court, the decision would have been otherwise.

47. The contention of the petitioner as to upholding the constitutionality of the Re-instatement Act by applying the methods of constitution complaint construction, i.e., reading out (severance) and reading down, to the ex facie unconstitutional provisions of that Act is therefore accepted as a valid ground for making review of the judgment under review. For misconstruction of law,[57] and non-consideration of an important aspect of the matter which if had been considered the decision would have been otherwise,[58] amount to errors apparent on the face of the record and are thus well-established grounds for making review of a judgment or order.

48. These are my reasons for the above-cited short order.

Providing equal opportunity to all citizens and ensuring transparency in the process for appointment to the public employment

49. However, before parting with the judgment, I think it appropriate to underline that I have taken the above view on the premise that there was no violation of Articles 25 and 27 of the Constitution, in the process of initial appointments of the sacked employees, as no one has alleged before us, and produced any evidence, of such violation, nor was the initial appointment of the sacked employees was under challenge before the Court in the cases decided by the judgment under review.

50. Article 25 of the Constitution, which commands for ensuring equality of all citizens before law and their entitlement to equal protection of law, by necessary implication forbids the State, its organs and instrumentalities, to deny to any citizen such equality and equal protection. This constitutional guarantee is of very wide import and amplitude, encompassing within its comprehensive scope different shades, facets and implications as 'equality' is a dynamic concept with many aspects and dimensions. Equality is antithetic to discrimination and arbitrariness. Article 27 of the Constitution, which safeguards against discrimination in appointments in the 'service of Pakistan', also guarantees 'equality' to all citizens in respect of such appointments; it is therefore an instance of the application of 'equality' commanded by Article 25, in respect of appointments in the 'service of Pakistan'. The appointments to the posts or services in any organ or instrumentality of the State (such as, corporations, organizations, or bodies established under law or controlled by Government) that do not fall within the 'service of Pakistan', as defined in Article 260 of the Constitution, are covered under the wide import and amplitude of 'equality' guaranteed under Article 25 of the Constitution. Therefore, such appointments are also to be made by providing equal opportunity to all citizens by public advertisement and ensuring maximum transparency in the selection process to dispel any impression of favouritism and nepotism.

Sd/- **Syed Mansoor Ali Shah, J**

MWA/H-4/SC Order accordingly.

**2022 S C M R 1787**

**[Supreme Court of Pakistan]**

**Present: Umar Ata Bandial, C.J. and Syed Mansoor Ali Shah, J**

**FARRUKH RAZA SHEIKH---Petitioner**

**Versus**

**The APPELLATE TRIBUNAL INLAND REVENUE and others---Respondents**

Civil Petition No. 1417 of 2022, decided on 28th July, 2022.

(Against the judgment of Lahore High Court, Lahore dated 03.03.2022, passed in W.P. No. 55044 of 2021)

**(a) Interpretation of statutes---**

----Rules made under an Act or Ordinance---Subservient to the parent Act/Ordinance---Rules being subordinate or delegated legislation, are framed under the authority of the parent statute, and are therefore subservient to the primary legislation---Rules cannot contradict, override or add to the clear provisions of the parent statute---Rules are to carry out the purposes of the parent statute and cannot offend, oppose or be inconsistent with the provisions of the parent statute---Any rule, to the extent of any inconsistency with the parent statute is, therefore, ultra vires of the parent statute.

N S Bindra's - Interpretation of Statutes 12th Edition, p.108; Suo Motu Case No. 11 of 2011, PLD 2014 SC 389 and Suo Motu Case No. 13 of 2009 PLD 2011 SC 619 ref.

**(b) Income Tax Ordinance (XLIX of 2001)---**

----S. 132(2)---Appellate Tribunal Inland Revenue Rules, 2010, R. 22(1)---Appeal before the Appellate Tribunal (Inland Revenue)---Appeal dismissed in default i.e. due to absence of party without sufficient cause---Rule 22(1) of the Appellate Tribunal Inland Revenue Rules, 2010, vires of---Rule 22(1) of the Appellate Tribunal Inland Revenue Rules, 2010 ("Rules") is ultra vires section 132(2) of the Income Tax Ordinance, 2001 ("Ordinance") to the extent where the Rule allows that the tax appeal before the Appellate Tribunal Inland Revenue ("Tribunal") can also be dismissed in default---Section 132(2) of the Ordinance clearly provides that the Tribunal shall afford an opportunity of hearing to the parties to the appeal and in case of default by any of the party on the date of hearing, the Tribunal may proceed ex-parte to decide the appeal on the basis of available record.

Walayat Flour Mills Lyallpur v. Commissioner of Income-Tax Rawalpindi 1973 PTD 530; Chenniappa Mudaliar v. Commissioner of Income-Tax, (1964) 53 ITR 323 and Income-Tax Commissioner, Madras v. S. Chenniappa AIR 1969 SC 1068 ref.

Ahsan Mehmood, Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Petitioner.

Ch. Muhammad Shakeel, Advocate Supreme Court for Respondents.

Date of hearing: 28th July, 2022.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**The question before us is whether Rule 22(1) of the Appellate Tribunal Inland Revenue Rules, 2010 ("Rules") is ultra vires section 132(2) of the Income Tax Ordinance, 2001 ("Ordinance") to the extent where the Rule allows that the tax appeal before the Appellate Tribunal Inland Revenue ("Tribunal") can also be dismissed in default, whereas section 132(2) of the Ordinance clearly provides that the Tribunal shall afford an opportunity of hearing to the parties to the appeal and in case of default by any of the party on the date of hearing, the Tribunal may proceed ex parte to decide the appeal on the basis of available record.

2. The facts giving rise to the above question are that the petitioner taxpayer challenged the amendment in the assessment order passed against him under section 122(1) of the Ordinance before the CIR (Appeals), Lahore. Remaining unsuccessful he challenged the order passed by the CIR (Appeals) before the Tribunal. The appeal of the petitioner was dismissed for non-prosecution vide order dated 09.2.2021 and thereafter the applications for restoration of the same were also dismissed for non-prosecution vide order dated 17.6.2021. The petitioner

challenged both the orders through a constitutional petition challenging the vires of Rule 22(1) of the Rules before the High Court. The said petition was dismissed through the impugned order dated 03.03.2022.

3. The contention of the petitioner is that the appeal of the petitioner pending before the Tribunal could not have been dismissed for non-prosecution and could only have been decided on merits by proceeding ex-parte on the basis of the available record. He referred to section 132(2) of the Ordinance in this respect and submits that dismissal of appeal on the ground of default provided in Rule 22(1) of the Rules is, therefore, ultra vires to the provisions of the Ordinance. Learned counsel for the respondent Department supported the judgment of the High Court and reiterated that the Rules are not ultra vires the Ordinance. He also pointed out that the petitioner instead of filing a Tax Reference under the Ordinance filed a constitutional petition. Learned counsel for the petitioner replying to the said objection contented that the order passed by the Tribunal is not envisaged under the Ordinance and therefore Reference could not be maintained against it. Besides the vires of the Rules was under question therefore the petitioner opted for a constitutional petition. He further contended that no such objection by the respondent Department was taken before the High Court.

4. We have heard the learned counsel for the parties and have examined the law on the subject and the record of the case. At the outset we do not wish to go into the question whether tax reference was maintainable before the High Court against the order of dismissal of appeal in default passed by the Tribunal. It is enough for us to note that this objection was not raised before the High Court by the respondent Department and remanding the matter at this stage will unnecessary delay the adjudication of an important issue involving the vires of the Rules which affect a large number of cases pending at various Tribunals in the country. Therefore, in the peculiar circumstances of this case, we find it appropriate and in the interest of justice, to proceed with the merits of the case.

5. Section 132(2) of the Ordinance and Rule 22(1) of the Rules, are reproduced hereunder for convenience:-

Section 132(2) of the Ordinance:

132. Disposal of appeals by the Appellate Tribunal.- (1) ...

(2) The Appellate Tribunal shall afford an opportunity of being heard to the parties to the appeal and, in case of default by any of the party on the date of hearing, the Tribunal may proceed ex parte to decide the appeal on the basis of the available record.

Rule 22(1) of the Rules:

22. Ex parte decision and recall of order.- (1) Where on the date fixed for hearing or any day to which the hearing is adjourned, any or both the parties fail to appear when the appeal or application is called for hearing, the Tribunal may if it deems fit, dismiss the appeal or application in default or may proceed ex parte to decide the appeal or application on the basis of the available record.

The present section 132(2) of the Ordinance was last amended through Finance Act, 2011 when the words "may, if it deems fit, dismiss the appeal in default or..." were omitted from the said sub section. It appears that no corresponding amendment was made in the Rules, which were promulgated in 2010[1] and continue to retain the above words as reproduced above.

6. It is important to underline that the Appellate Tribunal Inland Revenue established under section 130 of the Ordinance is one and the same under the Sales Tax Act, 1990[2] and the Federal Excise Act, 2005[3] and follows the same procedure[4] as laid down in sections 131 and 132 of the Ordinance. Therefore the implication of Rule 22(1), under discussion in this case, is not only limited to the Ordinance but also extends to the appeals before the Tribunal arising under the Sales Tax Act, 1990 and Federal Excise Act, 2005.

7. These Rules were notified in exercise of powers available in section 130(12) of the Ordinance, prior to amendment vide Tax Laws (Amendment) Act, 2020 and are saved in terms of amended section 130(6) of the Ordinance. Section 130(12) of the Ordinance provided that "Subject to the Ordinance, the Appellate Tribunal shall have the power to regulate its own procedure...." In the year 2011 section 132(2) was amended and the portion dealing with appeal being dismissed in default was deleted. These Rules are "subject to the Ordinance" under section 130(12) and therefore cannot offend or contradict the substantive provisions of the Ordinance. Even otherwise, it is axiomatic that Rules being subordinate or delegated legislation, are framed under the authority of the parent statute, and are therefore subservient to the primary legislation. Rules cannot contradict

or add to the clear provisions of the parent statute. Section 132(2) of the Ordinance provides that the Tribunal shall provide an opportunity of being heard to the parties to the appeal, however, in case any one of the parties is in default on the date of hearing, the Tribunal may proceed ex-parte and decide the appeal on the basis of available record. Section 132(2) no more provides for dismissal in default as was the case prior to the amendment brought about in section 132(2) in the year 2011 (supra). Rule 22(1) of the Rules, inter alia, provides that if the parties fail to appear before the Tribunal on the date of hearing, the appeal can also be dismissed in default. This part of Rule 22(1) clearly contradicts the parent statute i.e., Section 132(2) of the Ordinance. It is trite law that Rules cannot override the specific provisions of the parent statute. The Rules are to carry out the purposes of the Ordinance and cannot offend, oppose or be inconsistent with the provisions of the parent statute (Ordinance in this case).[5] Any rule, to the extent of any inconsistency with the parent statute is, therefore, ultra vires of the parent statute.

8. It is important, as well as, interesting to record that the tax jurisprudence evolved over the years in the sub-continent, interpreting the powers and procedure of hearing an appeal by the Appellate Tax Tribunal under the Income Tax law has repeatedly held that the Tribunal is to decide the tax controversy before it in an appeal on merits and not to dismiss the appeal in default. This view was expressed by the courts when the language of the corresponding section 33(4) of the Income Tax Act, 1922 was not as explicit as that of section 132(2) of the Ordinance. In Walayat Flour Mills[6] the Appellate Tribunal Rules, 1948[7] were examined on the touchstone of the then Income Tax Act, 1922.[8] Section 33(4) of the said Act provided as follows:

The Appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such order thereon as it thinks fit, and shall communicate any such orders to the assessee and to the Commissioner.

Relying on Chenniappa,[9] a decision of the Madras High Court (India) on the same provision, it was held that under section 33(4) the Tribunal can only decide on merits and therefore cannot dismiss the appeal in default. In Chenniappa the High Court while discussing the scope of section 33(4) of the Income Tax Act, 1922 (as reproduced above) held that the word 'thereon" in the said provision lays down that the power of the Tribunal is confined to dealing with the subject-matter of the appeal; that the order of the Tribunal is correlated to the actual subject-matter in the controversy and dismissal for default of appearance has nothing to do with the matter in controversy as it puts an end to the appeal; that section 33(4) obliges the Tribunal to decide the appeal after giving an opportunity to the parties to put forward their case; the fact that the opportunity had not been availed by any party cannot obviously discharge the obligation cast on the Tribunal of passing orders on the merits of the appeal; that there can be no decision on its merits if the matter is to be dismissed for default of appearance of parties; that adjudication on the merits of the case is essential to enable the High Court to perform its statutory duty of hearing the tax reference on a question of law arising out the of decision of the Tribunal. Chenniappa was later on upheld by the Supreme Court of India[10] where the court held that 'thus looking at the substantive provisions of the Act there is no escape from the conclusion that under section 33(4) the Appellate Tribunal has to dispose of the appeal on the merits and cannot short-circuit the same by dismissing it for default of appearance." There has been consistent jurisprudence over the years from our High Courts and from the constitutional courts in the subcontinent empowering the tax Tribunal to decide the appeal on merits.[11] The jurisprudence under the Income Tax Act, 1922, discussed above, highlights the judicial sagacity of the court in realizing the importance of good tax governance for the country. The Courts applied purposive interpretation of the taxing statute to curb protracted litigation and help disentangle the taxpayer from extended litigative process.

9. Section 132(2) of the Ordinance is far more detailed, explicit, direct and clear compared to Section 33(4) of the Income Tax Act, 1922. It is therefore underlined that the logic and rationale behind section 132(2) of the Ordinance and the consistent jurisprudence evolved over the years around Section 33(4) of the erstwhile tax law is to promote and support an efficient tax administration and encourage smart tax governance in the country. Re-engineering the litigative process and procedure by removing dilatory steps in the dispute resolution mechanism is a welcome development. The order of dismissal of appeal on the ground of default, gives rise to a new set of litigation on a technical issue totally unrelated to the tax controversy in hand. Any further proceedings against the order of dismissal is a futile exercise for a tax collector, as well as, the tax payer, as the

real tax dispute goes unattended till such time that the parties settle the issue of dismissal in default from the highest court in the land. The parties if successful have to start all over again before the Tribunal on merits. Section 132(2) avoids this double exercise and mandates that the appeal be decided on merits so that any further proceedings before a higher forum lead to a decision on merits. These unnecessary delays in tax dispute resolution seriously impair the overall tax governance in the country, which rests on efficient tax management and speedy tax collection. Section 132(2) of the Ordinance has no appetite for delays and penalizes the indolent party by empowering the Tribunal to proceed ex-parte on the basis of the available record. It is also to be noted that section 132(2) does not encourage adjournments by the parties. The Tribunal can proceed ex-parte if any of the parties is in default on the date of hearing. "In default" means absence of a party without a sufficient cause on any date fixed for hearing.

10. For the reasons elaborated above, we hold and declare that Rule 22(1) of the Rules to the extent whereby it allows the Tribunal to dismiss an appeal in default is ultra vires section 132(2) of the Ordinance and is, therefore, struck down to that extent. Consequently, the appeal of the petitioner shall be deemed to be pending before the Tribunal and shall be decided by the Tribunal within a period of three months from the receipt of this judgment.

11. This petition is converted into appeal and allowed in the above terms as a consequence the impugned judgment dated 03.03.2022 of the High Court is set aside.

12. Office shall dispatch copies of the judgment to the Federal Government through Secretary, Ministry of Finance, Revenue Division, Islamabad and to the Federal Board of Revenue, through its Chairman, for information and compliance.

MWA/F-12/SC Appeal allowed.

**2022 S C M R 1923**

**[Supreme Court of Pakistan]**

**Present: Umar Ata Bandial, C.J. and Syed Mansoor Ali Shah, JJ**

**PAKISTAN ELECTRONIC MEDIA REGULATORY AUTHORITY and others---Petitioners**

**Versus**

**ARY COMMUNICATIONS LTD. and others---Respondents**

Civil Petitions Nos. 1716 to 1724 of 2022, decided on 25th July, 2022.

(Against the consolidated order of High Court of Sindh, Karachi dated 08.02.2022, passed in C.Ps. Nos. D-2795, D-2796, D-2797, D-3308, D-3312, D 3313, D-3314 of 2018, C.Ps. Nos.D-6644 and D-6645 of 2017)

**Pakistan Electronic Media Regulatory Authority Ordinance (XIII of 2002)---**

----S. 26---Pakistan Electronic Media Regulatory Authority (Council of Complaints) Rules 2010, R. 3---Constitution of Pakistan, Arts. 25 & 27---Honorary appointments to public offices---Appointment process---Chairperson and Members of the Council of Complaints ("COC"), Pakistan Electronic Media Regulatory Authority ("PEMRA")---Appointments to honorary public offices, such as the COC, are to be made through an open and competitive process including advertisement---Offices of the COC are associated with important roles and are required to be filled with the most meritorious candidates---Although neither the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 ('the Ordinance') nor the Pakistan Electronic Media Regulatory Authority (Council of Complaints) Rules 2010 ("Rules"), expressly require the public advertisement of the COC slots, however, the Ordinance, and also the Rules, require that the Chairperson and Members of the COC shall be citizens of eminence---Equally true that "citizens of eminence" may not themselves come forward to apply for these honorary positions, rather, the Government itself needs to spot such individuals through a process of headhunt---Relevant directions issued by the Supreme Court for filling places available on the COC stated.

Appointees to the Council of Complaints ("COC") play an important role in public life relating to the issue of public complaints in the realm of regulation of electronic media in the country. Obviously, the process of making such public appointments should be designed and conducted in a way to ensure that the best people, from the widest possible pool of candidates, are considered and appointed to these positions.

Sir Gerry Grimstone, 'Better Public Appointments - A Review of the Public Appointments Process' (Cabinet Office Whitehall 2016) ref.

Open selection process allows for unexpected expressions of interest. It prioritizes competition and helps discovering best possible candidates. The process, in turn, improves the governance and performance of the organization. In addition, such transparent process wins public confidence that appointees are selected on merit from a wide and inclusive pool of applicants. On the other hand, a closed selection approach limited to a headhunt itself conducted by the Government may prevent the organization from tapping in best available talent. Many outstanding candidates of whom the Government is unaware can be missed. Headhunting selectors have been observed to be looking for people like themselves and thus limiting the prospect of diversity. Besides, public appointments made behind closed doors raise eyebrows because the door of partisan intervention and patronage remains open.

Elena Doldor, Susan Vinnicombe, Mary Gaughan and Ruth Sealy, 'Gender Diversity on Boards: The Appointment Process and the Role of Executive Search Firms' (Equality and Human Rights Commission Research Report 85, International Centre for Women Leaders, Cranfield School of Management Cranfield University 2012) ref.

Making appointment to a public office is a sacred trust which is to be discharged justly and fairly in the best interest of the public, based on a process that is fair, transparent and nondiscriminatory. Highest standards of diligence, transparency and probity are to be observed so that a qualified, eligible and most deserving person is selected for a post. The constitutional guarantee of equality and safeguard against discrimination is not limited to paid services or jobs but extends to all appointments to public offices, honorary or otherwise.

Chief Secretary Punjab v. Abdul Raoof Dasti 2006 SCMR 1876; Syed Mubashir Raza Jaffri v. Employees Old Age Benefits Institutions (EOBI) 2014 SCMR 949; Muhammad Ashraf Tiwana v. Pakistan 2013 SCMR 1159 and Muhammad Yasin v. Federation of Pakistan PLD 2012 SC 132 ref.

There cannot be agreement with the argument that COC appointments being of honorary nature do not need to go through the requirements associated with other appointments' selection process. It is as if to suggest that honorary appointments are not important enough to merit a selection process based on competitive transparency. Such a notion is belied by the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 ('the Ordinance') which requires that only eminent citizens could be given a place on the COC. The words "citizens of eminence" show that seeking the best person for the job becomes the only consideration before the appointing authority. COC offices are associated with important roles and are required to be filled with the most meritorious candidates. The honorary nature of COC appointments is significant and a step in the direction to attract eminent persons willing to take up the job of independently settling complaints against electronic media without any pecuniary strings attached to the terms and conditions of their offices. This further accentuates the need that COC membership should consist of the finest and most accomplished persons.

Hadayat Ullah v. Federation of Pakistan 2022 SCP 242 (Syed Mansoor Ali Shah J) and Moinuddin v. State of Uttar Pradesh AIR 1960 All 484 ref.

Although neither the Ordinance nor the Pakistan Electronic Media Regulatory Authority (Council of Complaints) Rules 2010 ("Rules"), expressly require the public advertisement of the COC slots, however, the Ordinance, and also the Rules, require that the Chairperson and Members of the COC shall be citizens of eminence. The idea is that the composition of the COC shall consist of respected, qualified and experienced members of society who shall work independently under facilitation of PEMRA and take action on the complaints received against broadcast media and distribution service providers. The search for such an array of individuals must begin with a transparent call for candidates. Only then can optimum utilization of talent be achieved and ensured and purpose behind the provision of sending the citizens of eminence to the COC be realized.

It is also true that advertising may leave out some high-caliber candidates who would have accepted a direct appointment but would prefer not to join an open competition. It was possible that "citizens of eminence" may not themselves come forward to apply for these honorary positions, rather, the Government itself needs to spot such individuals through a process of headhunt.

Supreme Court directed that alongside the process initiated with the advertisement of the places available on the COC, the Government may carry out its own search of finding the best possible candidates for the job; that any suitable candidates identified in this executive search may be approached with the prospective offer of serving on the COC; that consent of such candidates to such offer may be treated as their application for the available positions, and such candidatures shall be added to the group of applications received in response to the public advertisement; that all candidates, whether identified in Government search or those who themselves choose to apply in response to advertisement, shall be assessed against an objective criteria which may relate to conduct, reputation, credibility, integrity, professional excellence etc., and that the most eligible candidates shall be selected out of the consolidated pool.

Moinuddin v. State of Uttar Pradesh AIR 1960 All 484; Danielle Wood, Kate Griffiths and Anika Stobart, 'New politics: A better process for public appointments' (Report No. 2022-09, Grattan Institute 2022) 16 ref.

Haroon Dugal, Advocate Supreme Court (video-link Lahore) along with Mohsin Hameed Dohar, Dir. PEMRA and Jalal Haider, Law Officer for Petitioners.

Ayan Mustafa Memon, Advocate Supreme Court for Respondents.

Date of hearing: 25th July, 2022.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**We consider in this case whether honorary appointments to public offices like the Chairperson and Members of the Council of Complaints ("COC"), Pakistan Electronic Media Regulatory Authority ("PEMRA") need to be made after advertising the positions or the Government could itself headhunt and fill these slots.

2. Brief facts of the case are that a number of television broadcasting companies and a private citizen filed separate constitutional petitions in the High Court of Sindh for issuance of the writ of quo warranto against the individuals then holding the offices of the Chairperson and Members of the COC Sindh, PEMRA on the ground that they were not fit, eligible and qualified to hold said offices. The High Court dismissed the constitutional petitions and observed that the appointments in question did not seem to suffer from any inherent defect under the law. However, the High Court directed that "in the future, the appointment of Chairperson and Members of the COC PEMRA is required to be made after advertising the positions" and it is against this direction that present petitions for leave to appeal have been filed by PEMRA.

3. It has been contended by the learned counsel for the petitioners that the Chairperson and Members of the COC are appointed on honorary basis for a period of two years. There is no prevalent statutory provision, he argues, which calls for advertisement of the positions of the Chairperson and Members of the COC and, therefore, there is no such requirement. The learned counsel says that the High Court failed to appreciate the fact that the Chairperson and Members of the COC neither fall in the category of civil servant nor are permanent posts so as to require advertisement. Additionally, he submits that the PEMRA Ordinance 2002 ("Ordinance") requires that the Chairperson and Members of the COC must be "citizens of eminence" and that persons of such stature do not usually feel inclined to themselves come forward and apply for honorary positions. He maintains that the Government would be hard-pressed to find citizens of eminence if said honorary offices are to be necessarily filled after inviting applications.

4. We have heard the learned counsel for the petitioners at length and perused the record. The question before us is whether appointments to honorary public offices are to be made through an open and competitive process or the Government could itself pick and choose the suitable individuals to occupy such positions. PEMRA is envisaged, in the Ordinance, as an independent statutory body that would regulate electronic media in Pakistan. The Ordinance hands out a distinct legal personality and operational autonomy to PEMRA. One of the objects identified in the preamble is to "improve the standards of information, education and entertainment". Thus, the COC is established under section 26 of the Ordinance to address public complaints against any aspects of programmes broadcast or distributed by electronic media.

5. For the regulation of electronic media in the country, the COC evidently holds an important adjudicatory-cum -recommendatory position vis- -vis review of public complaints. The COC is required to receive and review complaints made by persons or organizations from the general public against any aspects of programmes broadcast or distributed by a station established through a licence issued by PEMRA.[1] The COC has powers to summon a licensee against whom a complaint has been made and call for explanation regarding any matter relating to their operation.[2] The COC is supposed to render opinions on such complaints.[3] Finally, in case of violation of the codes of programme content and advertisements, the COC may recommend appropriate action of censure or fine to PEMRA.[4] It thus appears that appointees to the COC are to play an important role in public life relating to the issue of public complaints in the realm of regulation of electronic media in the country. Obviously, the process of making such public appointments should be designed and conducted in a way to ensure that the best people, from the widest possible pool of candidates, are considered and appointed to these positions. It is said that a competition is as good as the competitors who take part in it.[5]

6. Open selection process allows for unexpected expressions of interest. It prioritizes competition and helps discovering best possible candidates. The process, in turn, improves the governance and performance of the organization. In addition, such transparent process wins public confidence that appointees are selected on merit from a wide and inclusive pool of applicants. On the other hand, a closed selection approach limited to a headhunt itself conducted by the Government may prevent the organization from tapping in best available talent. Many outstanding candidates of whom the Government is unaware can be missed. Headhunting selectors have been observed to be looking for people like themselves and thus limiting the prospect of diversity.[6] Besides, public appointments made behind closed doors raise eyebrows because the door of partisan intervention and patronage remains open.

7. Making appointment to a public office is a sacred trust which is to be discharged justly and fairly in the best interest of the public[7], based on a process that is fair, transparent and non -discriminatory.[8] Highest standards

of diligence, transparency and probity are to be observed so that a qualified, eligible and most deserving person is selected for a post.[9] Article 25 of the Constitution guarantees equality of status to all citizens of Pakistan. Article 27 of the Constitution which is an instance of the application of 'equality' commanded by Article 25, in respect of appointments in the service of Pakistan, safeguards against discrimination in respect of such appointments.[10] The constitutional guarantee of equality and safeguard against discrimination is not limited to paid services or jobs but extends to all appointments to public offices, honorary or otherwise.[11]

8. We do not agree with the argument that COC appointments being of honorary nature do not need to go through the requirements associated with other appointments' selection process. It is as if to suggest that honorary appointments are not important enough to merit a selection process based on competitive transparency. Such a notion is belied by the Ordinance which requires that only eminent citizens could be given a place on the COC. The words "citizens of eminence" show that seeking the best person for the job becomes the only consideration before the appointing authority. COC offices are associated with important roles and are required to be filled with the most meritorious candidates. We see that an individual is nominated to an honorary position in recognition of his or her individual standing and professional reputation. Some offices, though honorary or unpaid, may be highly coveted by citizens. They do not carry any salary or emoluments but they may be offices of prestige, status and dignity.[12] The honorary nature of COC appointments is significant and a step in the direction to attract eminent persons willing to take up the job of independently settling complaints against electronic media without any pecuniary strings attached to the terms and conditions of their offices. This further accentuates the need that COC membership should consist of the finest and most accomplished persons.

9. It is correct that neither the Ordinance nor the Pakistan Electronic Media Regulatory Authority (Council of Complaints) Rules, 2010 ("Rules"), framed in exercise of the powers conferred by section 26(4) read with section 39 of the Ordinance, expressly require the public advertisement of the COC slots. Notable, however, is the fact that the Ordinance, and also the Rules, require that the Chairperson and Members of the COC shall be citizens of eminence. The idea is that the composition of the COC shall consist of respected, qualified and experienced members of society who shall work independently under facilitation of PEMRA and take action on the complaints received against broadcast media and distribution service providers.[13] The important thing here is to see as to how to fulfil legislative will and find the citizens of eminence to sit on the COC. The search for such an array of individuals must begin with a transparent call for candidates. Only then can optimum utilization of talent be achieved and ensured and purpose behind the provision of sending the citizens of eminence to the COC be realized.

10. We do recognize that advertising may leave out some high-caliber candidates who would have accepted a direct appointment but would prefer not to join an open competition. However, meritocracy does not obviate the need for transparency nor should it devolve into elitism with limited opportunities for less privileged.[14] The constitutional imperative of equality and non -discrimination demands that public sector appointments be made in an open and competitive process with equal opportunity for all. Appointing authorities must factor in transparency to the design and planning of public appointments processes. The overall standard of selections to be made in an open selection would be higher than the current uncompetitive approach. We do not entirely disagree with the argument of learned counsel for the petitioners that "citizens of eminence" may not themselves come forward to apply for these honorary positions, rather, the Government itself needs to spot such individuals through a process of headhunt. Rather, we point out that the Government is missing out on the fact that advertising doesn't preclude running a headhunting process in parallel.[15] Alongside the process initiated with the advertisement of the places available on the COC, the Government may carry out its own search of finding the best possible candidates for the job. Any suitable candidates identified in this executive search may be approached with the prospective offer of serving on the COC. Consent of such candidates to such offer may be treated as their application for the available positions. Such candidatures shall be added to the group of applications received in response to the public advertisement. All candidates, whether identified in Government search or those who themselves choose to apply in response to advertisement, shall be assessed against an

objective criteria which may relate to conduct, reputation, credibility, integrity, professional excellence etc. The most eligible candidates shall be selected out of the consolidated pool.

11. For the above reasons, we are not persuaded that the

COC slots should not be advertised. Consequently, the impugned consolidated order is upheld, subject to clarifications/elaborations/ observations given in paragraph 10.

12. These petitions are disposed of in the above terms.

MWA/P-21/SC Order accordingly.

**2022 S C M R 1943**

**[Supreme Court of Pakistan]**

**Present: Qazi Faez Isa and Syed Mansoor Ali Shah, JJ**

**Messrs KOHINOOR SPINNING MILLS LTD.---Petitioner**

**Versus**

**COMMISSIONER INLAND REVENUE---Respondent**

Civil Petition No. 2006 of 2022, decided on 23rd August, 2022.

(Against the order of Lahore High Court, Lahore dated 21.04.2022 passed in PTR No. 209 of 2012)

**(a) Income Tax Ordinance (XLIX of 2001)---**

----Ss. 131 & 133---Constitution of Pakistan, Art. 185(3)---Questions of law not raised before the Tribunal or High Court---Supreme Court is not a forum to raise fresh questions of law which have not been examined by the Tribunal or the High Court or do not even arise from the decision of the Tribunal---In numerous cases, a totally new question of law, which has not been raised earlier is agitated before the Supreme Court for the first time without disclosing that it has not been raised earlier---Supreme Court deprecated such practice and observed that the parties must restrict themselves to the questions of law raised and decided by the High Court and desist from introducing a new question of law by giving an impression that the same was not addressed by the forums below.

**(b) Income Tax Ordinance (XLIX of 2001)---**

----S. 21(e)---Income from business, computation of---Deductions not allowed---Contributions made by tax-payer company to an unapproved gratuity fund---Section 21(e) of the Income Tax Ordinance, 2001 clearly stipulates that the contributions to an unapproved gratuity fund cannot be deducted while computing the income tax of a person under the head "Income from Business"---Admittedly, in the present case, the gratuity fund has not been approved---Contention of the counsel for the tax payer that once the contribution is made to a gratuity fund, section 21(e) is not applicable, is an absurd argument and totally negates the purpose and object of the statutory requirement of an approved gratuity fund---If the argument of the counsel were to hold true, the requirement of an approved gratuity fund is rendered totally meaningless, if the taxpayer simply states making the contribution to an unapproved gratuity fund and thereafter seeks deduction from the income from business---Such an interpretation is not only absurd but is also unsustainable in law---Petition for leave to appeal was dismissed and leave was refused.

Faiz Rasool Jalbani, Advocate Supreme Court for Petitioner (video link Lahore).

Ibrar Ahmed, Advocate Supreme Court for Respondent.

Date of hearing: 23rd August, 2022.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The question of law raised in the Tax Reference filed before the High Court was whether the learned Appellate Tribunal Inland Revenue ("Tribunal") was justified in holding that the contributions made by the petitioner to an unapproved gratuity fund were not allowed to be deducted while computing the income of a person under the head "income from business" under section 21(e) of the Income Tax Ordinance, 2001 ("Ordinance"). The view of the Tribunal was affirmed in the Tax Reference through the impugned order dated 21.4.2022.

2. Learned counsel for the petitioner submits that once the contributions have been made by the petitioner company to the gratuity fund, section 21(e) of the Ordinance is no more applicable. In addition to this argument, he also submitted that the petitioner enjoyed exemption under clause 33 of Part-II of Second Schedule of the Ordinance.

3. As to the latter submission regarding exemption, we note that this contention has not been raised by the petitioner before any fora below. The learned counsel has raised this question before us for the first time in this case. This Court in the instant petition is to examine the judgment passed by the High Court in a tax reference. We have to see if the questions of law raised before the High Court were decided in accordance with the law. This is not a forum to raise fresh questions of law which have not been examined by the Tribunal or the High Court or do not even arise from the decision of the Tribunal. We have also noticed that in number of other cases,

a totally new question of law, which has not been raised earlier is agitated before this Court for the first time without disclosing that it has not been raised earlier. Such a practice is deprecated. Learned counsel for the parties must restrict themselves to the questions of law raised and decided by the High Court and desist from introducing a new question of law by giving an impression that the same was not addressed by the forums below. Even otherwise, on merits, the said exemption is nor available to the petitioner, as it applies to the beneficiaries of said fund and not to a person who is making a contribution to a gratuity fund.

4. Coming to the legal question raised in the Reference, section 21(e) is reproduced hereunder for convenience:

21. Deductions not allowed.---Except as otherwise provided in this Ordinance, no deduction shall be allowed in computing the income of a person under the head Income from Business" for-

(a) - (d)

(c) any contribution made by the person to a fund that is not a recognized provident fund, approved pension fund, approved superannuation fund or approved gratuity fund;

The above provision clearly stipulates that the contributions to an unapproved gratuity fund cannot be deducted while computing the income tax of a person under the head "Income from Business". Admittedly, in this case, the gratuity fund has not been approved. The contention of the learned counsel for the petitioner that once the contribution is made to a gratuity fund, section 21(e) is not applicable, is an absurd argument and totally negates the purpose and object of the statutory requirement of an approved gratuity fund. If the argument of the learned counsel were to hold true, the requirement of an approved gratuity fund is rendered totally meaningless, if the taxpayer simply states making the contribution to an unapproved gratuity fund and thereafter seeks deduction from the income from business. Such an interpretation is not only absurd but is also unsustainable in law.

5. In view of the above, we see no reason to interfere in the well-reasoned impugned order. Leave is, therefore, declined and this petition is dismissed.

MWA/K-15/SC Petition dismissed.

**2022 S C M R 1950**

**[Supreme Court of Pakistan]**

**Present: Qazi Faez Isa and Syed Mansoor Ali Shah, JJ**

**Mst. FURSAN---Petitioner**

**Versus**

**The STATE---Respondent**

Criminal Petition No. 994 of 2022, decided on 26th August, 2022.

(Against the judgment of Peshawar High Court, Peshawar, dated 06.07.2022 passed in Criminal Miscellaneous B.A. No.2023-P of 2022)

**(a) Khyber Pakhtunkhwa Control of Narcotic Substances Act (XXXI of 2019)---**

----S. 26---Criminal Procedure Code (V of 1898), Ss. 497 & 498---Provisions of sections 497 & 498, Cr.P.C. that deal with grant of bail in non-bailable offences apply to the offences under the Khyber Pakhtunkhwa Control of Narcotics Substances Act, 2019 ('the Act'), by virtue of the general provisions of section 26 of the Act, according to which the provisions of the Cr.P.C. apply to trials and appeals under the Act, except as otherwise provided in the Act.

**(b) Criminal Procedure Code (V of 1898)---**

----S. 497(1), first proviso & 497(2)---Khyber Pakhtunkhwa Control of Narcotic Substances Act (XXXI of 2019), S. 11(c)---Constitution of Pakistan, Art. 185(3)---Female accused found in possession of 1005 grams of methamphetamine---Likelihood of repeating the offence---Bail, refusal of---Offence alleged against the accused fell within the prohibitory clause of section 497(1), Cr.P.C.---Accused was arrested red handed on the spot and a considerable quantity of contraband ICE (methamphetamine) was recovered from her personal possession, but no plausible explanation had been offered by her in respect of the narcotics substance---Recovery memo was duly supported by marginal witnesses who were present on the spot with the seizing officer---No ill-will or mala fide had been shown by the accused on the part of police to falsely implicate her in the present case---Accused has thus not been able to make out a case of further inquiry for grant of bail in an offence of prohibitory clause, under section 497(2), Cr.P.C.---Examining the case of the accused under the first proviso to section 497(1), Cr.P.C., as she was a woman, there were three settled exceptions to the rule of granting bail under the said proviso i.e. the likelihood of the accused to abscond to escape the trial; to tamper with the prosecution evidence, which included influencing the prosecution witnesses; or to repeat the offence---Offences relating to narcotic drugs were of such a nature that did indicate the likelihood of the repetition of the offence by the accused---Dealing in narcotic drugs was usually the business of the persons involved therein, and was not a spontaneous or one time act, and the women were often involved in it as carriers for the transportation, supply and sale of narcotic drugs---Likelihood of such an offence being repeated by the accused could not, therefore, be ruled out---Case of the accused thus came within the scope of the exception of likelihood of repeating the offence---Accused was not found entitled to the relief of bail under the first proviso to section 479(1), Cr.P.C. also---Petition for leave to appeal was dismissed.

Tahira Batool v. State 2022 SCP 247 - Citation from the SCP website distinguished.

M. Amjad Iqbal Qureshi, Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Petitioner.

Mian Shafaqat Jan, Additional A.G., Khyber Pakhtunkhwa, Niaz Muhammad DSP and Noor Muhammad, SI for the State.

Date of hearing: 26th August, 2022.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The principles of the law of bail have been developed gradually by courts, in their effort to maintain a right balance between the two competing factors: the rights of the accused and the interests of the society. The accused enjoys the right to be presumed innocent until he is proven guilty and the bail cannot be denied to punish him before he is convicted by a court of law. On the other hand, it is in the interest of the society that the accused does not avoid trial and frustrate the process of law, and be a risk to the public in the meanwhile. Thus, when there is a likelihood of the accused to escape trial or tamper with the

prosecution evidence or repeat the offence, the public interest trumps the rights of the accused, who is detained till the conclusion of his trial. The bail is thus declined to him as a preventive measure, and not as a punishment.[1]

2. In the present case, the petitioner who has been denied bail by the courts below seeks intervention of this Court for her release on bail pending conclusion of her trial in case FIR No. 1230 of 2022 registered at Police Station Pishtakhara, Peshawar for the offence punishable under section 11(c) of the Khyber Pakhtunkhwa Control of Narcotic Substances Act 2019 ("Act"). The allegation against her is that the Police caught her and her co-accused each carrying 1005 grams of "methamphetamine"[2], a psychotropic substance, also referred to as "ice"[3] under the schedule.

3. Besides his submissions on the insufficiency of the incriminating material to connect the petitioner with the commission of the alleged offence, learned counsel for the petitioner, has contended that the petitioner being a woman is entitled to be released on bail under the first proviso to section 497(1) of the Code of Criminal Procedure 1898 ("Cr.P.C.") and in support of the contention, has placed reliance on the case of Tahira Batool v. State[4]. Opposing his contention, the learned counsel for the State has referred to the exceptions mentioned in paragraph 6 of the order in Tahira Batool case and submitted that in view of the nature of the offence there is a likelihood of repeating the same by the petitioner if released on bail.

4. We have heard the learned counsel for the parties, read the cited case and perused the record.

5. Although section 20 of the Act provides that all the offences under the Act shall be cognizable and non-bailable, there is no other provision in the Act on the subject of bail nor is there any provision that bars application of the provisions of Cr.P.C. in regard to bail in non-bailable offences. Therefore, the provisions of sections 497 and 498, Cr.P.C. that deal with grant of bail in non-bailable offences apply to the offences under the Act, by virtue of the general provisions of section 26 of the Act, according to which the provisions of the Cr.P.C. apply to trials and appeals under the Act, except as otherwise provided in the Act.

6. The offence alleged against the petitioner is punishable with death, imprisonment for life or imprisonment upto fourteen years, and thus falls within the prohibitory clause of section 497(1), Cr.P.C. Perusal of record would reveal that the accused-petitioners have been arrested red handed on the spot and a considerable quantity of contraband ICE was recovered from her personal possession, but no plausible explanation has been offered by the accused in respect of the narcotics substance. The recovery memo is duly supported by marginal witnesses who were present on the spot with the seizing officer. No ill-will or mala fide has been shown by the petitioner on the part of police to have been implicated falsely in the instant case. The two courts below, therefore, formed an opinion, though tentative, that there was sufficient incriminating material available on record of the case that prima facie connected the petitioner with the commission of the alleged offence. We do not find their concurrent opinion to be perverse or arbitrary, which could have justified interference by this Court. The petitioner has thus not been able to make out a case of further inquiry for grant of bail in an offence of prohibitory clause, under section 497(2), Cr.P.C. However, the petitioner being a woman her prayer for post arrest bail should also have been examined under the first proviso to section 497(1), Cr.P.C., if she was not found entitled to bail under section 497(2), Cr.P.C., as held by this Court in Tahira Batool case. The courts below have not adverted to it. We therefore proceed to examine the prayer of the petitioner for bail under the said proviso, in the interest of justice.

7. Under the first proviso to section 497(1), Cr.P.C., grant of bail is a rule and refusal an exception, as held in Tahira Batool case, in a case where the accused is a minor under the age of sixteen years, a woman, or a sick or infirm person, even in a non-bailable offence of prohibitory clause, in the same manner as bail is granted or refused in offences of non-prohibitory clause of section 497(1), Cr.P.C. Thus, we are to only examine, whether the case of the petitioner falls within any of the three settled exceptions to the rule of granting bail, which are the likelihood of the accused: (a) to abscond to escape the trial; (b) to tamper with the prosecution evidence, which includes influencing the prosecution witnesses; or (c) to repeat the offence.

8. The learned counsel for the State has, in the present case, pressed only the third exception, i.e., the likelihood of the petitioner to repeat the offence, on the basis of nature of the offence. This Court has described three circumstances in the Tahira Batool case that may be considered for deciding, whether or not there is a likelihood of repeating the offence by the accused, which are: (i) his previous criminal record, (ii) nature of the offence,

or (iii) manner of committing the offence. These circumstances are, as held by this Court in Iftikhar Ahmad v. State[5], only illustrative in character, and not exhaustive, and the courts may take into consideration "some other striking circumstance that impinges on the proceedings of the trial, or poses a threat or danger to the society" and thus brings the case of an accused within any of the said three settled exceptions to the rule.

9. While examining the applicability of the third exception, relied upon by the learned counsel for the State, as to the likelihood of the repetition of the offence by the petitioner, we find that the offences relating to narcotic drugs are of such a nature that do indicate the likelihood of the repetition of the offence by the accused. Dealing in narcotic drugs is usually the business of the persons involved therein, and is not a spontaneous or one time act, and the women are often involved in it as carriers for the transportation, supply and sale of narcotic drugs.[6] The likelihood of such an offence being repeated by the petitioner cannot, therefore, be ruled out. The case of the petitioner thus comes within the scope of the exception of likelihood of repeating the offence. The reliance of the learned counsel for the petitioner on Tahira Batool case is misconceived, as in the said case also the Court observed that "the persons involved in the commission of offences of robbery or dacoity are usually the professional criminals and there is a likelihood that they would repeat the offence if enlarged on bail", and distinguished the case of Tahira Batool, the women accused in the case, because she was employed in the house of the complainant as a maid. Had this distinguishing fact not been there, her case might also have fallen within the exception of likelihood of repeating the offence because of the nature of the offence of robbery.

10. In view of the above factual and legal position, the petitioner is not found entitled to the relief of bail under the first proviso to section 479(1), Cr.P.C. also. We therefore maintain the impugned order and dismiss the petition. However, the learned trial court is directed to proceed with and conclude the trial expeditiously.

MWA/F-14/SC Bail refused.

**2022 S C M R 2006**

**[Supreme Court of Pakistan]**

**Present: Umar Ata Bandial and Syed Mansoor Ali Shah, JJ**

**ZAFAR IQBAL and others---Appellants**

**Versus**

**NASEER AHMED and others---Respondents**

C.A. No. 775 of 2015, decided on 1st October, 2021.

(Against the judgment dated 12.11.2014 and decree dated 22.06.2015 of Lahore High Court, Lahore passed in R.S.A. No. 19 of 2006)

**Civil Procedure Code (V of 1908)---**

----S. 100---Second appeal---Scope of jurisdiction of High Courts in second appeal under section 100, C.P.C. and of the expression "contrary to law" used therein stated.

Under section 100 of the Code of Civil Procedure 1908 ("C.P.C."), a second appeal to the High Court lies only on any of the following grounds: (a) the decision being contrary to law or usage having the force of law; (b) the decision having failed to determine some material issue of law or usage having the force of law; and (c) a substantial error or defect in the procedure provided by C.P.C. or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon merits. The scope of second appeal is thus restricted and limited to these grounds, as section 101 of C.P.C. expressly mandates that no second appeal shall lie except on the grounds mentioned in section 100. Notwithstanding such clear provisions on the scope of second appeal, sometimes the High Courts deal with and decide second appeals as if those were first appeals; they thus assume and exercise a jurisdiction which the High Courts do not possess, and thereby also contribute for unjustified prolongation of litigation process which is already chocked with high pendency of cases.

No doubt, the expression "law" used in the phrase "the decision being contrary to law" in the ground (a) mentioned in section 100 of the C.P.C. is not confined to "statutory law" only, but also includes the "principles of law" enunciated by the constitutional courts, which have the binding force of law. And, it is an elementary principle of law that a court is to make a decision on an issue of fact on the basis of legally relevant and admissible evidence available on record of the case. The decision of a court is, therefore, considered "contrary to law" when it is made by ignoring the relevant and duly proved facts, or by considering the irrelevant or not duly proved facts. The expressions "relevant evidence" and "admissible evidence" are often used interchangeably, in legal parlance, with "relevant facts" and "duly proved facts" respectively, and a decision is said to be "contrary to law" and is open to examination by the High Courts in second appeal when: (i) it is based no evidence, or (ii) it is based on irrelevant or inadmissible evidence, or (iii) it is based on non-reading or misreading of the relevant and admissible evidence. A decision on an issue of fact that is based on correct reading of relevant and admissible evidence cannot be termed to be "contrary to law"; therefore, it is immune from scrutiny in second appeal. A High Court cannot, in such case, enter into the exercise of re-reading and re-appraisal of evidence, in second appeal, and reverse the findings of facts of the first appellate court, much less the concurrent findings of facts reached by the trial court as well as the first appellate court. It has, in second appeal, no jurisdiction to go into the question relating to weightage to be attached to the statements of witnesses, or believing or disbelieving their testimony, or reversing the findings of the courts below just because the other view can also be formed on the basis of evidence available on record of the case.

Rafiul Qadre v. Safia Sultana 2009 SCMR 254; Nazeer Ahmed v. Maqsood Ahmed 2008 SCMR 190; Amjad Sharif v. Salim Ullah PLD 2006 SC 777; Mussarat Sultana v. Muhammad Saeed 1997 SCMR 1866; Abdul Rashid v. Bashiran 1996 SCMR 808; Muhammad Amir v. Khan Bahadur PLD 1996 SC 267; Sultan Ahmad v. Naeem Raza 1996 SCMR 1729 and Keramat Ali v. Muhammad Yunus PLD 1963 SC 191 ref.

Barrister Umer Aslam, Advocate Supreme Court for Appellants.

Moulvi Anwar-ul-Haq, Advocate Supreme Court for Respondents Nos. 1 - 3.

Ex parte: Respondents Nos. 4 - 8.

Date of hearing: 1st October, 2021.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J**.---The appellants have filed this appeal, as of right, under Article 185(2)(d) of the Constitution of the Islamic Republic of Pakistan 1973 against the judgment dated 12.11.2014 and decree dated 22.06.2015[1] of the Lahore High Court passed in Regular Second Appeal No. 19 of 2006 of respondents Nos. 1 to 3.

2. The High Court has, by the impugned judgment, set aside the judgment of the first appellate court, whereby that court had upheld the judgment of the trial Court, with minor modification, decreeing the recovery of the paid advance consideration amount instead of specific performance of the agreement to sell prayed for by respondents Nos. 1 to 3 in their suit.

3. The facts of the case, briefly stated, are that one Waryam, the predecessor-in-interest of respondents Nos. 1 to 3 ("vendee"), instituted a suit for specific performance of an agreement to sell dated 15.01.1984 ("agreement") against Mirza Abdul Rashid ("vendor") and his wife Noor Begum ("wife of vendor"), the predecessors-in-interest of respondents Nos. 4 to 8, and for cancellation of sale deed dated 21.02.1985 executed by the vendor in favour of the present appellants ("subsequent purchasers"). He asserted that the vendor agreed to sell his land as well as land of his wife measuring 10 acres ("suit land") to him by the agreement against a consideration of Rs.40,000/- per acre; but despite having received partial consideration amount Rs.2,79,000/- from him, the vendor transferred land measuring 6 acres out of the suit land to the subsequent purchasers, to defeat the fulfillment of the agreement.

4. The vendor, the wife of the vendor, and the subsequent purchasers contested the suit by filling their written statements separately. The vendor admitted the execution of the agreement to the extent of his land, but denied to have agreed to sell the land owned by his wife. He further asserted that the vendee failed to make payment of the balance consideration amount till the agreed date, therefore, the agreement stood cancelled. The wife of the vendor asserted that she was not a party to the agreement and also denied to have given any authority to her husband to sell her land. The subsequent purchasers claimed themselves to be the bona fide purchasers of 6-acre land out of the suit land.

5. The trial court came to the conclusion that the wife of the vendor was not party to the agreement, therefore, the agreement could not be operative to the extent of her land, and that the subsequent purchasers were bona fide purchasers for value without notice. In view of these findings, the trial court rejected the prayer of the vendee for specific performance of the agreement, but granted him the relief of recovery of the paid consideration amount of Rs.2,79,000/- against the vendor. The vendee being not satisfied of the relief granted appealed in the District Court. As the vendor had not appealed against the decree passed by the trial court against him for recovery of the paid consideration amount, the appellate court only examined the issue on the assertion of the subsequent purchasers to be the bona fide purchasers, in detail, and affirmed the findings of the trial court thereon. The appellate court thus dismissed the first appeal of the vendee, maintaining the judgment of the trial court with a minor modification in the terms that the vendee was held entitled to receive 10% markup also on the paid consideration amount from the date of payment till its recovery.

6. The vendee still being not content with the relief granted to him by the appellate court, filed a second appeal in the High Court, pressing for the grant of relief of specific performance of the agreement and challenging the concurrent findings of fact on the issue of claim of the subsequent purchasers to be the bona fide purchasers. The High Court allowed the second appeal: set aside the concurrent findings of fact of the two courts below on that issue, and decreed partially the claim of the vendee for specific performance of the agreement to the extent of 6-acre land owned by the vendor, which had been purchased by the subsequent purchasers, as well as 5-kanal land owned by the wife of the vendor. Hence, the subsequent purchasers have filed the present appeal.

7. We have heard the arguments of the learned counsel for the parties and gone through the record of the case with their assistance.

8. At the very outset, we observe that the High Court hearing a second appeal, in the present case, has re-read and re appraised the evidence of the parties in the way a first appellate court does, without realizing the distinction between the scope of the first appeal and the second appeal. Under section 100 of the Code of Civil Procedure, 1908 ("C.P.C."), a second appeal to the High Court lies only on any of the following grounds: (a)

the decision being contrary to law or usage having the force of law; (b) the decision having failed to determine some material issue of law or usage having the force of law; and (c) a substantial error or defect in the procedure provided by C.P.C. or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon merits. The scope of second appeal is thus restricted and limited to these grounds, as section 101 expressly mandates that no second appeal shall lie except on the grounds mentioned in section 100. But we have noticed that notwithstanding such clear provisions on the scope of second appeal, sometimes the High Courts deal with and decide second appeals as if those were first appeals; they thus assume and exercise a jurisdiction which the High Courts do not possess, and thereby also contribute for unjustified prolongation of litigation process which is already chocked with high pendency of cases.

9. No doubt, the expression "law" used in the phrase "the decision being contrary to law" in the ground (a) mentioned in section 100 of the C.P.C. is not confined to "statutory law" only, but also includes the "principles of law" enunciated by the constitutional courts, which have the binding force of law under Articles 189 and 201 of the Constitution of the Islamic Republic of Pakistan 1973. And, it is an elementary principle of law that a court is to make a decision on an issue of fact on the basis of legally relevant and admissible evidence available on record of the case, which principle is also incorporated in the statutory law, that is, the first proviso to Article 161 of the Qanun-e-Shahadat Order 1984. The said proviso states in unequivocal terms that a judgment must be based upon facts declared by the Qanun-e- Shahadat Order to be relevant and duly proved.

10. The decision of a court is, therefore, considered "contrary to law" when it is made by ignoring the relevant and duly proved facts, or by considering the irrelevant or not duly proved facts. The expressions "relevant evidence" and "admissible evidence" are often used interchangeably, in legal parlance, with "relevant facts" and "duly proved facts" respectively, and a decision is said to be "contrary to law" and is open to examination by the High Courts in second appeal when: (i) it is based no evidence, or (ii) it is based on irrelevant or inadmissible evidence, or (iii) it is based on non-reading or misreading of the relevant and admissible evidence. A decision on an issue of fact that is based on correct reading of relevant and admissible evidence cannot be termed to be "contrary to law"; therefore, it is immune from scrutiny in second appeal. A High Court cannot, in such case, enter into the exercise of re-reading and re-appraisal of evidence, in second appeal, and reverse the findings of facts of the first appellate court, much less the concurrent findings of facts reached by the trial court as well as the first appellate court. It has, in second appeal, no jurisdiction to go into the question relating to weightage to be attached to the statements of witnesses, or believing or disbelieving their testimony, or reversing the findings of the courts below just because the other view can also be formed on the basis of evidence available on record of the case.[2]

11. In the present case, the trial court and the appellate court after reading and appraising all the relevant and admissible evidence adduced by the parties in support of their respective assertions, recorded the findings that the vendee could not prove his assertion that two of the subsequent purchasers were present at the time of execution of the agreement and he had also informed them about the agreement after execution thereof, while the subsequent purchasers proved their stance of having purchased 6 acre of land out of the suit land with payment of consideration amount Rs.300,000/- in good faith and without notice of the agreement between the vendor and vendee. The said courts underlined the facts that the vendee was not put in possession of the suit land in pursuance of the agreement, rather the subsequent purchasers were in possession of the suit land as tenants before as well as at the time of purchasing land measuring 6 acre, and that the agreement between the vendor and vendee was entered between them in a city other than that where the suit land was situate; therefore, they held that the subsequent purchasers could not be presumed to have knowledge of the agreement prior to purchasing 6 acres of land. The appellate court also believed the stance of the subsequent purchasers that they had purchased the land after inquiry (poochh guchh) from the residents of the village.

12. The High Court, in the second appeal, without pointing out non-reading or misreading of relevant and admissible evidence by the trial court and the appellate court, proceeded to re-appraise the evidence and came to the conclusion that the sale transaction between the vendor and the vendee was "the talk of the town", and the subsequent purchasers had also not inspected the revenue record regarding title of the vendor before purchasing land. With this view formed on the basis of re-appraising the evidence, the High Court set aside the

concurrent findings of the two courts below. We have observed that it was nobody's case that the copy of his ownership record for selling out the suit land (fard malkiat barai bai) was obtained by the vendor from the revenue officials before execution of the agreement in favour of the vendee with an entry of issuance of that copy in the revenue record, i.e., the daily dairy (roznamcha), or that the fact of execution of the agreement was reported by the vendor or vendee to the revenue officials for entering the same in the daily dairy (roznamcha); therefore, the emphasis of the High Court on the fact that the subsequent purchasers did not enquire from the revenue officials and inspect the revenue record before purchasing the land is totally misconceived. Nor was there any such overwhelming evidence on the basis of which it could be held that the agreement of the vendee to purchase the suit land was "the talk of the town." The High Court also fell into error by reversing the finding of the trial court that the wife of the vendor was not party to the agreement therefore the agreement was not operative to the extent of the wife of the vendor.

13. The argument of the learned counsel for respondents Nos. 1 to 3 regarding grant of partial performance of the agreement under section 14 of the Specific Relief Act, 1877 pales into insignificance after the categorical finding that the appellants were bona fide purchasers for value without notice.

14. The decision rendered by the two courts below was in no way based on no evidence, or on irrelevant or inadmissible evidence, or on non-reading or misreading of the relevant and admissible evidence. The High Court wrongly interfered with their concurrent findings of fact and in so doing exceeded its jurisdiction under section 100 of the C.P.C. We, therefore, allow this appeal: set aside the judgment of the High Court and restore that of the first appellate court.

MWA/Z-10/SC Appeal allowed.

**P L D 2022 Supreme Court 7**

**Present: Umar Ata Bandial, Sajjad Ali Shah and Syed Mansoor Ali Shah, JJ**

**HASNAIN RAZA and another---Petitioners**

**Versus**

**LAHORE HIGH COURT, LAHORE and others (in both cases)---Respondents**

C.P.L.As. Nos.1862-L and 1863-L of 2021, decided on 9th November, 2021.

(Against the strictures passed by the Lahore High Court, in its judgment dated 22.6.2021 delivered in F.A.O. No.28948 of 2019)

**(a) Constitution of Pakistan---**

----Arts. 202 & 203---Judicial strictures recorded against a judge of district/subordinate judiciary by the High Court/Appellate Court---Improper---Principles for warning or proceeding against a judge of the subordinate judiciary for grave inefficiency or misconduct stated.

Following are the principles for warning or proceeding against a judge of the subordinate judiciary for incompetence or misconduct:

i. An appellate court should not pass strictures in its judgment against the judge of the lower court whose judgment or order was impugned before it, relating to his efficiency or conduct;

ii. An appellate court should not summon in court the judge of the lower court whose judgment or order was impugned before it, to explain why and how he or she has made that judgment or order;

iii. An appellate court, if notices such procedural errors or irregularities in the proceedings conducted by the lower court which, it thinks, should not be repeated in other cases, may bring the same to the notice of the judge concerned through a confidential note separate from its judgment; and

iv. An appellate court, if is of the considered but tentative view supported by reasonable grounds that the judge of the lower court has exhibited grave inefficiency or has committed serious misconduct in discharge of his judicial duty that warrants disciplinary action, may inform the competent authority or the officer appointed by the competent authority to deal with such complaints, through a confidential report. The authority or the officer concerned was to deal with such confidential report and proceed with it further as per the relevant service laws, rules and instructions, notwithstanding the view of the appellate court, in the same manner as it or he dealt with other such complaints.

Nusrat Yasmin v. Registrar, PHC PLD 2019 SC 719 and Aijaz Ahmed v. State PLD 2021 SC 752 ref.

**(b) Constitution of Pakistan---**

----Arts. 202 & 203---Judicial strictures recorded by the High Court/Appellate Court against a judge of district/subordinate judiciary relating to his or her efficiency or conduct---Propriety---Public reprimand of a judge of the lower court regarding his judicial conduct by an appellate court while sitting in judgment over his or her judicial decision, either by recording a stricture or a censorious remark in its appellate judgment or by summoning the judge and reproaching him orally in open court, did not behove the judiciary of a constitutional democracy which boasted of the independence of judiciary as its salient pillar---Any such public condemnation of a judge lowered the public trust in the judicial institution, besides the harmful effect it had on the morale and confidence of the judge concerned as well as of his colleagues---While examining the decision of a court below, the higher court was to assess the reasoning and the legality of the decision challenged before it and not the ability or conduct of the author judge---Latter was the function of the disciplinary authority---Higher court, if so decided, could refer the matter to the disciplinary authority, in the manner elucidated in the judgment reported as Nusrat Yasmin v. Registrar, PHC (PLD 2019 SC 719), only on the administrative side.

Nusrat Yasmin v. Registrar, PHC PLD 2019 SC 719 ref.

**(c) Constitution of Pakistan---**

----Arts. 189 & 201---Vertical and horizontal precedents---Distinction and binding effect---Judicial effrontery---Effect---Judicial precedents may be classified into two categories: vertical and horizontal precedents---Vertical precedents meant the decisions of a higher court, and horizontal precedents meant the decisions of the same or coordinate court---All courts were absolutely bound by the vertical precedents

of a higher court---Such binding tie was often said to be a matter of owing obedience---Articles 189 & 201 of the Constitution also reinforced the binding effect of the vertical precedents---Judges were therefore obliged to follow a vertical precedent even when they disagreed with it; this ensured a degree of national uniformity in judicial decisions---Judges had little room to decide how much weight or value was to be given by them to that precedent---Precedent of the apex Court of the country must be followed by all other courts of the country who owed unflinching fealty to its decisions under the Constitution---Ignoring or refusing to follow the controlling precedent of the Supreme Court amounted to judicial effrontery, offended the constitutional mandate, and weakened the public confidence in the decisions of the apex Court of the country---Furthermore a higher court generally adhered to horizontal precedents - its own earlier decisions - but it may depart from or overrule any of its own decisions by sitting as a larger bench if there was a compelling justification to do so.

Garner et al., The Law of Judicial Precedent, p. 27 (2016); Gately v. Massachusetts, 2 F.3d 1221 (1st Cir. 1993); Hutto v. Davis, 454 U.S. 370 (1982); Brown v. Allen, 344 U.S. 443 (1953) and Garner et al., The Law of Judicial Precedent, p. 35 (2016). ref.

Shahid Shaukat Ch. Advocate Supreme Court for Petitioners along with Petitioner in person.

Nemo for Respondents.

Date of hearing: 9th November, 2021.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J**.---"Every judge of the courts of this land - from the highest to the lowest - should be protected to the same degree, and liable to the same degree. If the reason underlying this immunity is to ensure that they may be free in thought and independent in judgment, it applies to every judge, whatever his rank."**1**

2. Two judges of the District Judiciary of Punjab have approached this Court for redressal of their grievance against the stricture and direction passed against them by the Lahore High Court in para 23 of its judgment dated 22.06.2021 while deciding appeals against their judicial orders. They have prayed that the said stricture and direction, having been passed against them in derogation of the principles enunciated by this Court in Nusrat Yasmin v. Registrar, PHC (PLD 2019 SC 719) and Aijaz Ahmed v. State (PLD 2021 SC 752), may be expunged. The impugned stricture and direction are as follows:

> 23. Before parting with this order, it is observed that the conduct of Messrs Hasnain Raza and Nazia Ali, the then Civil Judges, Sheikhupura, while holding proceedings in the suit for specific performance as well as application under section 12(2) C.P.C., filed by the first vendee, prima facie, seems to be dubious. In this backdrop, let the Office to put the matter before the Hon'ble Chief Justice for initiation of regular inquiry against the said Judicial Officers.

The facts of the appeals, relating to the dispute between the parties thereto, are not relevant for deciding the grievance agitated before us in the present petitions; they are, therefore, not being stated here.

3. We have considered the submissions of the petitioners and read the cases cited by them. The question involved in the present case is: whether a High Court, or any other appellate court, can record in its judgment a stricture against the judge of the lower court whose judgment or order is impugned before it, relating to his or her efficiency or conduct. This question has been considered in depth and answered authoritatively, in the light of relevant provisions of the Constitution and law, by a three member Bench of this Court in the Nusrat Yasmin case. The decision made in the Nusrat Yasmin case on the said question of law was later-on endorsed and followed by another Bench of this Court in the Aijaz Ahmed case, relied upon by the petitioners. We, therefore, think it unnecessary to re-consider the same question again, especially when we find ourselves in agreement with what was decided in the Nusrat Yasmin case. What we consider appropriate to do is to recapitulate the principles enunciated therein for clear understanding of, and strict compliance by, all the appellate courts including the High Courts:

i. An appellate court should not pass strictures in its judgment against the judge of the lower court whose judgment or order is impugned before it, relating to his efficiency or conduct;

ii. An appellate court should not summon in court the judge of the lower court whose judgment or order is impugned before it, to explain why and how he or she has made that judgment or order;

iii. An appellate court, if notices such procedural errors or irregularities in the proceedings conducted by the lower court which, it thinks, should not be repeated in other cases, may bring the same to the notice of the judge concerned through a confidential note separate from its judgment;

iv. An appellate court, if is of the considered but tentative view supported by reasonable grounds that the judge of the lower court has exhibited grave inefficiency or has committed serious misconduct in discharge of his judicial duty that warrants disciplinary action, may inform the competent authority or the officer appointed by the competent authority to deal with such complaints, through a confidential report. The authority or the officer concerned is to deal with such confidential report and proceed with it further as per the relevant service laws, rules and instructions, notwithstanding the view of the appellate court, in the same manner as it or he deals with other such complaints.

Public reprimand of a judge of the lower court regarding his judicial conduct by an appellate court while sitting in judgment over his or her judicial decision, either by recording a stricture or a censorious remark in its appellate judgment or by summoning the judge and reproaching him orally in open court, does not behove the judiciary of a constitutional democracy which boasts of the independence of judiciary as its salient pillar. Any such public condemnation of a judge lowers the public trust in the judicial institution, besides the harmful effect it has on the morale and confidence of the judge concerned as well as of his colleagues.

4. The District Judiciary is the backbone of our judicial system, and the judges of the District Judiciary perform the onerous task of dispensing justice at the frontline by dealing with a large number of cases in a difficult and demanding environment. The judges of the higher courts must appreciate the stressful and challenging conditions in which these judges perform. Our judicial system acknowledges the fallibility of judges, and hence provides for appeals and revisions. Higher courts everyday come across orders of the lower courts which are not justified either in law or in fact and modify or set them aside; that is the function of an appellate court. It is often said that a judge who has not committed an error is yet to be born. This applies to all judges, no matter how high or low in rank they may be. The intemperate or extravagant criticism on the ability of a person having a contrary view is often founded on one's sense of his own infallibility. This must be avoided, and the judicial approach should always be based on the consciousness that everyone may make a mistake. While examining the decision of a court below, the higher court is to assess the reasoning and the legality of the decision challenged before it and not the ability or conduct of the author judge. The latter is the function of the disciplinary authority. The higher court, if so decides, can refer the matter to the disciplinary authority, in the manner elucidated in Nurat Yasmin case, only on the administrative side.

5. The Nusrat Yasmin case enunciated important principles of law for dealing with the matters like the present one, and it was therefore circulated amongst all the Hon'ble Judges of all the High Courts of the country for their information. And those principles were reiterated by this Court in the Aijaz Ahmed case. Needless to mention that a decision of this Court, to the extent it decides a question of law or enunciates a principle of law, is binding on all other courts of the country including the High Courts, under the mandate of Article 189 of the Constitution of the Islamic Republic of Pakistan 1973 ("Constitution"). Similar is the binding effect of such a decision of a High Court, under Article 201 of the Constitution, on all courts subordinate to that High Court. To appreciate the scope and extent of the binding force and authority of judicial precedents, they may be classified into two categories: vertical and horizontal precedents.**2** Vertical precedents mean the decisions of a higher court, and horizontal precedents mean the decisions of the same or coordinate court. All courts are absolutely bound by the vertical precedents of a higher court. This binding tie is often said to be a matter of "owing obedience".**3** Articles 189 and 201 of our Constitution also reinforces the binding effect of the vertical precedents. Judges are therefore obliged to follow a vertical precedent even when they disagree with it; this ensures a degree of national uniformity in judicial decisions. The judges have little room to decide how much weight or value is to be given by

them to that precedent. Unless we wish anarchy to prevail within the judicial system, a precedent of the apex Court of the country must be followed by all other courts of the country who owe unflinching fealty to its decisions under the Constitution.**4** Ignoring or refusing to follow the controlling precedent of this Court amounts to judicial effrontery, offends the constitutional mandate, and weakens the public confidence in the decisions of the apex Court of the country. As Jackson J. said, humbly but firmly, of the Supreme Court: "we are not final because we are infallible, but we are infallible only because we are final."**5** A higher court generally adheres to horizontal precedents - its own earlier decisions - but it may depart from or overrule any of its own decisions by sitting as a larger bench if there is a compelling justification to do so.**6**

6. For the above reasons, these petitions are converted into appeals and allowed: the impugned stricture and direction are expunged. The learned Judge of the High Court may, if deems it proper and necessary, act in accordance with the principles settled in the cited precedents, and recapitulated above. Office shall dispatch a copy of this judgment to the Registrar, Lahore High Court to be placed before the learned Judge concerned.

MWA/H-14/SC Petitions allowed.

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1 Lord Denning, The Due Process of Law, p. 65 (1993) quoting from Sirros v. Moore 1974 3 All ER 776.

2 Not until the early 1980s did scholarly commentators first use the antonyms *horizontal* and *vertical* in reference to precedents. Before that time, the phrase *stare decisis* was often ambiguous. It could refer to a court's standing by its own earlier decisions or to a court's following or distinguishing the precedent of a higher court. The vertical/horizontal terminology promotes clearer thinking by avoiding the ambiguity. See Garner et al., *The Law of Judicial Precedent,* p. 27 (2016).

3 Gately v. Massachusetts, 2 F.3d 1221 (1 st Cir. 1993).

4 Hutto v. Davis, 454 U.S. 370 (1982).

5 Brown v. Allen, 344 U.S. 443 (1953).

6 Garner et al., *The Law of Judicial Precedent*, p. 35 (2016).

**P L D 2022 Supreme Court 27**

**Present: Syed Mansoor Ali Shah and Jamal Khan Mandokhail, JJ**

**MUHAMMAD AMJAD KHAN AFRIDI and others---Appellants**

**Versus**

**SHAD MUHAMMAD and others---Respondents**

Civil Appeal No. 263 of 2014, decided on 17th November, 2021.

(Against the judgment dated 13.05.2013 passed by the Peshawar High Court, Peshawar in C.R. No. 1414 of 2021)

**(a) Civil Procedure Code (V of 1908)---**

----O.XXXII, R. 11---Guardian for the suit (guardian ad litem) appointed for minors to represent and defend them in the suit---Guardian s failure to appear before the court and defend the suit resulting in ex-parte proceedings against the minors---Effect---Where the guardian for the suit did not do his duty, the Court was to remove him and appoint a new guardian in his place---Failure of a guardian ad litem to appear in Court to defend the minor was by itself a clear proof of the fact that he had failed to do his duty of protecting the interests of the minor---Court, in such circumstance, must act in accordance with R.11 of O. XXXII of the C.P.C., remove that guardian, and appoint a new guardian in his place, for the protection of the interests of the minor---Order XXXII of the C.P.C., visualized no such occasion where a minor defendant could be proceeded against ex parte---In the present case Courts below fell into error by not allowing the application for setting aside the ex-parte decree to the extent of the two minors (defendants) at the time of institution of suit as well as at the time of passing of the ex parte decree---Appeal to the extent of the minors was allowed, consequently application for setting aside the ex parte order and ex parte decree, to their extent was accepted and the Trial Court was directed to proceed with the suit against the minors from the stage where it was when the order of proceeding ex parte was made against them.

Fauzia Parveen v. Sahib Khatoon 1988 SCMR 552 ref.

**(b) Civil Procedure Code (V of 1908)---**

----O.XXXII, Rr. 4, 7 & 11---Constitution of Pakistan, Art. 25(3)---Guardian for the suit (guardian ad litem) appointed for minors to represent and defend them in the suit---Court, duty of---Scope---Provisions of O. XXXII of the C.P.C., which advanced the mandate of Art. 25(3) of the Constitution, were to be interpreted and applied with a dynamic and progressive approach to achieve the object for which they had been made, that is, the protection of the rights and interests of the minors---Courts were to realize that a minor litigant was considered to be under their protection, and primarily it was their duty to watch over his interests and ensure that he was duly represented and defended in the proceedings before them---Despite appointment of a guardian ad litem, no agreement or compromise could be entered into on behalf of the minor by that guardian without leave of the Court---Court was to see vigilantly the conduct of the guardian ad litem in representing and defending the minor, and to remove him if he failed to do his duty by acting in a manner that was detrimental to the interests of the minor---Where there was no other person fit and willing to act as guardian for the minor, the Court was to appoint any of its officers to be such a guardian.

Amar Chand v. Nem Chand AIR 1942 All 150 ref.

Muhammad Ikram Ch., Advocate Supreme Court and Ijaz Khan Sabi, Advocate Supreme Court for Appellants.

Abdul Sattar Khan, Advocate Supreme Court for Respondents Nos. 1-6.

Date of hearing: 17th November, 2021.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J**.---The facts necessary to state for decision of the present appeal are quite simple: The predecessor of the respondents instituted a suit for possession through pre-emption against the appellants and respondent No. 7, who is also father of appellants Nos. 1 and 2 and husband of appellant No.3. Appellants Nos.1 and 2 were minors at that time, therefore, the trial court appointed respondent No. 7, their father, as their guardian for the suit (guardian ad litem) to represent and defend them in the suit. All four of them filed a joint written statement, contesting the claim made in the

suit, and the trial court framed the issues for trial. On 16.04.2009 when the suit was fixed for evidence of the plaintiff, no one appeared on behalf of the defendants (appellants and respondent No.7); so, the trial court made order of proceeding against them ex parte. The evidence of the plaintiff was recorded ex parte on the next dates of hearing, and ultimately the suit was decreed ex parte on 30.05.2009.

2. The appellants, on 10.07.2009, filed an application in the trial court for setting aside the order dated 16.04.2009, whereby they had been proceeded against ex parte, as well as the ex parte decree dated 30.05.2009. Their said application was dismissed by the trial court vide its order dated 08.06.2010. The appellants appealed in the District Court, but it also failed on 02.06.2011. They then filed revision petition in the Peshawar High Court, which was dismissed vide the impugned judgment dated 13.05.2013. The appellants, as a last resort, knocked at the doors of this Court by filing a petition for leave to appeal, and this Court granted them the leave to examine the following question:

> Whether the learned forums below fell into error by not allowing the application filed by the Petitioners [appellants] for setting aside the ex-parte decree particularly in view of the fact that Petitioners [appellants] Nos. 1 and 2 were at that time minors.

3. We have heard the arguments of the learned counsel for the parties on the said question and perused the record of the case with their assistance.

4. The answer to the above question lies in the provisions of Rule 11 of Order XXXII of the Code of Civil Procedure 1908 ("C.P.C."), which is reproduced below for ready reference:

> 11. Retirement, removal or death of guardian for the suit-
>
> (1) Where the guardian for the suit desires to retire or does not do his duty, or where other sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him, and may make such order as to costs as it thinks fit.
>
> (2) Where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit the Court shall appoint a new guardian in his place. (emphasis supplied)

Reading of the above Rule leaves little room to speculate as to what a Court is to do if the guardian ad litem appointed by it does not do his duty. As per the said Rule, where the guardian for the suit does not do his duty, the Court is to remove him and appoint a new guardian in his place. The failure of a guardian ad litem to appear in Court to defend the minor is by itself a clear proof of the fact that he has failed to do his duty of protecting the interests of the minor. The Court, in such circumstance, must act in accordance with Rule 11 of Order XXXII of the C.P.C., remove that guardian, and appoint a new guardian in his place, for the protection of the interests of the minor.

5. Justice Henry Brand, speaking for the Allahabad High Court, said in Amar Chand v. Nem Chand (AIR 1942 All 150) that the Court had inherent power, derived from the Crown as parens patriae, to protect the interests of minors. Similarly, the State of the Islamic Republic of Pakistan is also a parens patriae**1** for its own minor citizens and for all its vulnerable and marginalized citizens. Reference may be made to the preambular constitutional values of social justice and equality, of protecting the legitimate interest of the backward and depressed classes. Article 25(3) of the Constitution authorizes the State to make special provision for the protection of women and children and Article 35 lays down the principle of policy for the protection of the child.

6. The provisions of Order XXXII of the C.P.C., which advance the mandate of Article 25(3) of the Constitution, are to be interpreted and applied with a dynamic and progressive approach to achieve the object for which they have been made, that is, the protection of the rights and interests of the minors. The Courts are to realize that a minor litigant is considered to be under their protection, and primarily it is their duty to watch over his interests and ensure that he is duly represented and defended in the proceedings before them. That is why, despite appointment of a guardian ad litem, no agreement or compromise can be entered into on behalf of the minor by that guardian without leave of the Court.**2** The Court is to see vigilantly the conduct of the guardian ad litem in representing and defending the minor, and to remove him if he fails to do his duty by acting in a manner that is detrimental to the interests of the minor.**3** Where there is no other person fit and willing to act as guardian for the minor, the Court is to appoint any of its

officers to be such a guardian.[4] Order XXXII of the C.P.C., thus, visualizes no such occasion where a minor defendant can be proceeded against ex parte.

7. In Fauzia Parveen case,[5] a four member Bench of this Court while maintaining the orders of the courts below setting aside an ex parte decree passed against the minors, observed:

> A fact noted by the District Judge as well as by the High Court which was by itself considered sufficient to set aside the ex parte decree was the fact that respondents 3 and 4 were admittedly minors at the relevant time. They were proceeded against in the litigation through their guardian Mst. Musarrat Begum respondent No.2 who was their mother. It is also an admitted fact that Mst. Musarrat Begum had defaulted in putting in appearance on her own behalf and on behalf of these minor respondents whom she was required to represent under the orders of the Court. It was, therefore, a case where the guardian had been negligent and had defaulted in representing and protecting the interest of the minors. Rule 11, Order XXXII, C.P.C. requires that "where the guardian for the suit desires to retire or does not do his duty, or where other sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him, and may make such order as to costs as it thinks fit." The same rule goes beyond further to prescribe "where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, the Court shall appoint a new guardian in his place".
>
> In this case, the guardian had failed to do her duty and was liable to be removed and substituted by the Court. As the Court happens to be the custodian of the interest of the minors it has to be watchful whether a party discharges its duty or not. We are therefore, in agreement with the view taken by the two Courts at this omission to ensure proper representation of the minors was material factor to be taken note of while considering the application for setting aside the ex parte decree.

We find that these observations fully answer the question raised in this case. In view of what has been discussed above, we answer the question by holding that the Courts below fell into error by not allowing the application for setting aside the ex parte decree to the extent of appellants Nos. 1 and 2, who were minors at the time of institution of suit as well as at the time of passing of the ex parte decree. However, the orders to the extent of appellant No.3 (mother), who was not suffering from any legal disability to pursue and defend the suit against her, do not suffer from any legal error.

8. We, therefore, dismiss the present appeal to the extent of appellant No.3 and accept it to the extent of appellants Nos. 1 and 2, setting aside the impugned judgments and orders, and accepting the application for setting aside the ex parte order and ex parte decree, to their extent. The trial court shall proceed with the suit against appellants Nos. 1 and 2 from the stage where it was on 16.04.2009 when the order of proceeding ex parte was made against them and shall decide the same as early as possible and not later than six months from the receipt of the copy of this judgment.

MWA/M-77/SC Order accordingly.

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1 The monarch, or any other authority, regarded as the legal protector of citizens unable to protect themselves.

2 Rule 7 of Order XXXII of the C.P.C.

3 Rule 11 of Order XXXII of the C.P.C.

4 Rule 4 of Order XXXII of the C.P.C.

5 *Fauzia Parveen v. Sahib Khatoon* (1988 SCMR 552)

**P L D 2022 Supreme Court 64**

**Present: Umar Ata Bandial, Sajjad Ali Shah, Syed Mansoor Ali Shah, Qazi Muhammad Amin Ahmed and Amin-ud-Din Khan, JJ**

**HADAYAT ULLAH and others---Petitioners**

**Versus**

**FEDERATION OF PAKISTAN and others---Respondents**

Civil Review Petitions Nos. 292 to 302 of 2021 and Civil Review Petitions Nos. 351 to 432 of 2021 and Civil Review Petitions Nos. 442 to 456 of 2021 along with C.M.As. Nos. 11812 to 11814 of 2021, C.M.As. Nos. 11837, 11862 to 11864 of 2021, C.M.As. Nos. 11902-11903, 11982-11983 of 2021, C.M.A. No. 11987 of 2021, C.M.As. Nos. 11679, 12017, 12019, 12020, 12024 of 2021, C.M.As. Nos. 12025, 12028, 12029, 12031-12033 of 2021, C.M.As. Nos. 12035, 12075, 11993, 12103-12104 of 2021, C.M.As. Nos. 12161-12162, 12172-12173, 12403 of 2021 and C.M.As. Nos. 12372-12373 of 2021 and along with Civil Miscellaneous Appeals Nos. 168, 158 and 175 of 2021, decided on 17th December, 2021.

(For review of the judgment dated 17.08.2021 passed in C.A. No.491 of 2012, etc.).

Per Umar Ata Bandial, J; Sajjad Ali Shah, Qazi Muhammad Amin Ahmed and Amin-ud-Din Khan, JJ agreeing; Syed Mansoor Ali Shah, J dissenting.

**(a) Sacked Employees (Re-instatement) Act (XXII of 2010)---**

----Ss. 2(d) & 4 & Preamble---Constitution of Pakistan, Arts. 4, 8, 9, 18, 25, 184(3) & 187---Sacked Employees (Re-instatement) Act, 2010, ( Act of 2010 ), vires of---Said Act of 2010 was violative of, inter alia, Arts. 25, 18, 9 & 4 of the Constitution and therefore void under the provisions of Art. 8 of the Constitution---Review petitions were dismissed with certain directions regarding services rendered by the re-instated employees of the employers [as defined in S.2(d) of the Sacked Employees (Re-instatement) Act, 2010]. [Majority view]

Supreme Court declared the Sacked Employees (Re-instatement) Act, 2010 as violative of the Constitution and thus void. However, in exercise of the Court s jurisdiction under Article 184(3) of the Constitution read with Article 187, the Court took into consideration the services rendered by the re-instated employees of the employers [as defined in section 2(d) of the Sacked Employees (Re-instatement) Act, 2010], and passed the following directions:

(i) Employees who were holding posts that on the date of their initial termination of service (from 01.11.1996 to 12.10.1999) did not require any aptitude or scholastic or skill test, for appointment thereon, shall be restored from the date of the judgment under review to the posts they were holding on the same terms and conditions of service applicable on the date of their termination pursuant to the judgment under review;

(ii) Such other employees who were holding posts that on the date of their initial termination of service (from 01.11.1996 to 12.10.1999) required the passing of any aptitude or scholastic or skill test, for appointment thereon shall from the date of the judgment under review be restored to their said posts on the same terms and conditions of service applicable on the date of their initial termination;

(iii) Any improvement in the terms and conditions of service of all the restored employees shall be granted strictly in accordance with the laws and rules applicable to their service or employment and in the absence thereof by regulations laid down for this purpose by their respective employers; and

(iv) The relief granted in sub-paragraphs (i) and (ii) above shall not be granted to employees whose initial termination of service (from 01.11.1996 to 12.10.1999) was on grounds of absence from duty, misconduct, corruption, misappropriation of money/stock or unfitness on medical grounds if such termination was not set aside finally by a Court of law.

Per Syed Mansoor Ali Shah, J; dissenting with Umar Ata Bandial, J. [Minority view]

**(b) Parliamentary sovereignty, principle of---**

----Scope---Parliamentary sovereignty or legislative supremacy was the cornerstone of a strong democracy---Courts must, therefore, recognize the central role of the legislature---Undermining the

legislature undermined democracy---Both the legislature and the judicature must play their role in a spirit of profound respect for the other and within the limits set out in the Constitution.

**(c) Sacked Employees (Re-instatement) Act (XXII of 2010)---**

----Ss. 2(f)(vi), 4(a), 10, 11, 12 & 13 & Preamble---Constitution of Pakistan, Arts. 4, 9 & 25---Sacked Employees (Re-instatement) Act, 2010, ( Act of 2010 ), vires of---By way of judgment under review the Supreme Court held that the Sacked Employees (Re-instatement) Act, 2010 violated Arts. 4, 9 & 25 of the Constitution and was thus void and ultra vires the Constitution---Held, that judgment under review was to be recalled---His Lordship declared that only certain sections, and parts of sections of the Sacked Employees (Re-instatement) Act, 2010 were ultra vires the Constitution and passed certain directions regarding restoration in service of employees terminated from service on basis of judgment under review. [Minority view]

(i) Only certain sections and part of sections of the Sacked Employees Reinstatement Act, 2010 ( the 2010 Act ) were ultra vires the Constitution: firstly, sections 4(a) and 10 to the extent of reinstatement and regularization on one scale higher , which gave an undue advantage to the reinstated employees to the detriment of the rights of the already working regular employees and thus violated their fundamental rights. The provisions of the said sections, except the words one scale higher , shall however remain operative with effect from the date of enactment of the 2010 Act, and be read to mean the reinstatement and regularization in the same or restructured, as the case may be, scale, grade, cadre, group, post or designation; secondly, sections 2(f)(vi), 11, 12 and 13, which dealt with and provided for reinstatement and regularization of such sacked employees who had been dismissed, removed or terminated from service on account of absence from duty, misconduct, mis-appropriation of Government money or stock, or unfitness on medical grounds, and the determination of their guilt or medical unfitness attained finality by being unchallenged or unsuccessfully challenged. Such employees fell outside the class of sacked employees who suffered political victimization, envisaged by the 2010 Act for a beneficial treatment, and they by themselves did not constitute a distinct class having an intelligible differentia, which bore a reasonable relation to the object and purpose of the 2010 Act;

(ii) All the employees terminated from service on the basis of the judgment under review, stood restored in the service with effect from the date they were so terminated, and shall be paid the pay of the intervening period treating the said period as an extraordinary leave with pay; and

(iii) The cases decided by the judgment under review, which now stood recalled, shall be deemed pending and decided on their own merits by the regular Bench(es) of the Supreme Court in accordance with the provisions of the Sacked Employees Reinstatement Act 2010, subject to the declaration made at para (i) above.

In attendance:

Kh. Muhammad Arif, Advocate Supreme Court (in C.R.P. Nos. 292 and 388 of 2021).

Muhammad Yousaf Khan, (in C.R.P. No. 293 of 2021).

Muhammad Tariq Asad, Advocate Supreme Court (in C.R.P. No. 294 and C.M.A. 12033 of 2021).

Khalid Javed Khan, Attorney General for Pakistan

Ayaz Shoukat, D.A.G. along with Ms. Maryam Rasheed and Usman Paracha, Advocates (in C.R.P. No. 295 of 2021)

Muhammad Nawaz Abbasi (in person) (in C.R.Ps. Nos. 296 and 446 of 2021)

S.A. Mehmood Khan Sadozai, Advocate Supreme Court (in C.R.Ps. Nos. 297-300 and 416 of 2021).

Muhammad Ilyas Siddiqui, Advocate Supreme Court (in C.R.P. No. 301 of 2021).

Hazrat Said (in C.R.P. No. 302 of 2021).

S. Iftikhar Hussain Gillani, Sr. Advocate Supreme Court (in C.R.Ps. Nos. 351 and 392 of 2021)

Ms. Shireen Imran, Advocate Supreme Court (in C.R.Ps. Nos. 252, 393, 394, 448 and C.M.A. No. 12104 of 2021).

M. Safdar Shaheen Pirzada, Advocate Supreme Court (in C.R.Ps. Nos. 253, 372 and 375 of 2021).

Nisar A. Mujahid, Advocate Supreme Court (in C.R.P. No. 354 of 2021).

Raja Abdul Ghafoor, Advocate-on-Record/Advocate Supreme Court (in C.R.Ps. Nos. 355, 374, C.M.As. Nos. 11982 and 12029 of 2021).

Ch. Afrasiab Khan, Advocate Supreme Court (in C.R.P. No. 356 of 2021).

Mian Raza Rabbani, Senior Advocate Supreme Court,

Saalim Salam Ansari, Advocate Supreme Court assisted by Zeeshan Abdullah (in C.R.P. No. 357, C.M.Apl. No. 175, C.M.As. Nos. 12172 and 12173 of 2021)

Shah Khawar, Advocate Supreme Court and

Hassan Rashid Qamar, Advocate Supreme Court (in C.R.Ps. Nos. 355, 378-381, 442, 455, 456, C.M.As. Nos. 12028 and 12162 of 2021).

Zubair Hussain, Advocate Supreme Court (in C.R.P. No. 359 and C.M.A. No. 11983 of 2021).

Syed M. Iqbal Hashmi, Advocate Supreme Court (in C.R.Ps. Nos. 360-363 of 2021).

Mazullah Khan (in-person) (in C.R.P. No. 364 of 2021).

Zulfikar Khalid Maluka, Advocate Supreme Court (in C.R.Ps. Nos. 365 and 428 of 2021).

Ghulam Sajjad Gopang, Advocate Supreme Court (in C.R.P. No. 366 of 2021).

Omer Farouk Adam, Advocate Supreme Court (in C.R.P. No. 367 of 2021).

Tariq Mehmood Mughal, Advocate Supreme Court (in C.R.P. No. 368 of 2021).

Syed Rifaqat Hussain Shah, Advocate-on-Record/Advocate Supreme Court (in C.R.Ps. Nos. 369, 385, 420, C.M.Apl. No. 168, C.M.As. Nos. 12032 and 12035 of 2021).

Muhammad Sharif Janjua, Advocate-on-Record/Advocate Supreme Court (in C.R.Ps. Nos. 370, 386, 399, 400 and 423 of 2021).

Saleem Ullah Ranazai, Advocate Supreme Court (in C.R.P. No. 371 of 2021).

Kamran Murtaza, Senior Advocate Supreme Court (in C.R.Ps. Nos. 373 and 377 of 2021).

Waseem Sajjad, Senior Advocate Supreme Court (in C.R.Ps. Nos. 376 and 383 of 2021).

Dr. Saeed Ahmed (in person) (in C.R.P. No. 382 of 2021).

Aftab Alam Yasir, Advocate Supreme Court (in C.R.P. No. 384 and C.M.A. No. 12020 of 2021).

Abdul Razzaq Shar, Advocate Supreme Court (in C.R.Ps. Nos. 387, 454 and C.M.A. No. 12024 of 2021).

Jam Khursheed Ahmed, Advocate Supreme Court (in C.R.P. No. 389 of 2021).

Muhammad Sajid Khan, Advocate Supreme Court (in C.R.P. No. 390, C.M.As. Nos. 12031 and 12161 of 2021).

Hamid Khan, Senior Advocate Supreme Court and M. Waqar Rana, Advocate Supreme Court (in C.R.P. No. 391 of 2021).

Liauqat Ali Karim, Advocate Supreme Court (in C.R.P. No. 395 of 2021).

Abid A. Zuberi, Advocate Supreme Court (in C.R.P. No. 396 of 2021).

Azhar Navid Shah, Advocate Supreme Court (in C.R.P. No. 397 of 2021).

Malik Faiz Rasool Rajwana, Advocate Supreme Court (in C.R.P. No. 398 of 2021)

Muhammad Umair Baloch, Advocate Supreme Court and Shoaib Shaheen, Advocate Supreme Court (in C.R.Ps. Nos. 401-415, 418, 419 and C.M.A. No. 12372 of 2021).

Muhammad Haseeb Jamali, Advocate Supreme Court (in C.R.P. No. 417 of 2021).

Malik Mansoor Hussain, Advocate Supreme Court (in C.R.P. No. 421 of 2021).

Ch. Aitzaz Ahsan, Advocate Supreme Court and Gohar Ali Khan, Advocate Supreme Court (in C.R.P. No. 422 of 2021).

Shakirullah (in-person) (in C.R.P. No. 424 of 2021).

Muhammad Nawaz Rai, Advocate Supreme Court (in C.R.P. No. 425 of 2021).

Muddasar Khalid Abbasi, Advocate Supreme Court (in C.R.P. No. 426 of 2021).

Mrs. Kausar Iqbal Bhatti, Advocate Supreme Court (in C.R.P. No. 427 of 2021).

Khalid Javed (in-person) (in C.R.P. No. 429 of 2021).

Abdul Latif Afridi, Sr. Advocate Supreme Court (in C.R.Ps. Nos. 430-431 of 2021).

S. Asghar Hussain Sabzwari, Senior Advocate Supreme Court, S. Qamar Hussain Shah Sabzwari, Advocate Supreme Court and S. Nayyar Hussain Bukhari, Advocate Supreme Court (in C.R.P. No. 432 of 2021).

Sh. Mehmood Ahmed, Advocate-on-Record (in C.M.A. No. 11812 of 2021).

Sikandar Javed, Advocate Supreme Court (in C.M.As. Nos. 11813 and 11993 of 2021).

Ms. Attiya Khanam (in-person) (in C.M.A. No. 11814 of 2021).

Fazal e Rabbi (in-person) (in C.M.A. No. 11837 of 2021).

Malik Muhammad Riaz, (in-person) (in C.M.A. No. 11862 of 2021).

Arshad Ali Makhdoom, Advocate Supreme Court (in C.M.A. No. 11863 of 2021).

Muhammad Ibrahim (in-person) (in C.M.A. No. 11864 of 2021).

Faisal Siddiqui, Advocate Supreme Court (in C.M.A. No. 11902 of 2021).

Anees M. Shahzad, Advocate-on-Record/Advocate Supreme Court (in C.M.A. No. 11903 of 2021).

Mir Aurangzeb, Advocate-on-Record/Advocate Supreme Court (in C.M.A. No. 11987 of 2021).

Jawaid Masood Tahir Bhatti, Advocate Supreme Court (in C.M.A. No. 11679 and C.M.Apl. No. 158 of 2021).

Mir Shahzad Khan Talpur (in-person) (in C.M.A. No. 12017 of 2021).

Malik Muhammad Munsif Awan, Advocate Supreme Court (in C.M.A. No. 12019 of 2021).

Muhammad Afzal Khan (in C.M.A. No. 12025 of 2021).

Tassawar Abbas Tanvir (in-person) (in C.R.P. No. 443 of 2021).

Dr. Umar Farooq Siddiqui (in-person) (in C.R.P. No. 444 of 2021).

Sardar M. Latif Khosa, Sr. Advocate Supreme Court and Sardar M. Shahbaz Khosa, Advocate Supreme Court (in C.R.Ps. Nos. 445, 447 of 2021).

Pervez Rauf, Advocate Supreme Court (in C.R.Ps. Nos. 449, 452 of 2021).

Mir Afzal Malik, Advocate Supreme Court (in C.R.P. No. 450 of 2021).

Malik Saleem Iqbal Awan, Advocate Supreme Court (in C.R.P. No. 453 of 2021).

Raja Farakh Arif Bhatti, Advocate Supreme Court (in C.M.A. No. 12075 of 2021).

Rai M. Nawaz Kharal, Advocate Supreme Court (in C.M.A. No. 12103 of 2021).

Ch. M. Younas, Advocate Supreme Court (in C.M.A. No. 12403 of 2021).

Shahid Anwar Bajwa, Advocate Supreme Court (in C.M.A. No. 12373 of 2021).

Niazullah Niazi, AG ICT

SSGPL

Barrister Umer Aslam

State Life

Syed Waqar Naqvi, Advocate Supreme Court.

OPF

Aftab Alam Yasir, Advocate Supreme Court.

SNGPL

Asad Jan, Advocate Supreme Court.

Dates of hearing: 1st, 6th, 9th, 13th and 17th December, 2021.

**ORDER**

For reasons to be recorded later, these review petitions are dismissed. The impugned legislation, namely, the Sacked Employees (Re-instatement) Act, 2010 ("Act") is held to be violative of, inter alia, Articles 25, 18, 9 and 4 of the Constitution of Islamic Republic of Pakistan, 1973 ("Constitution") and therefore void under the provisions of Article 8 of the Constitution.

2. However, in exercise of the Court's jurisdiction under Article 184(3) of the Constitution read with Article 187, we have taken into consideration the services rendered by the re-instated employees of the "employers" [as defined in Section 2(d) of the Act] and hereby order that:

i. Employees who were holding posts that on the date of their initial termination of service (from 01.11.1996 to 12.10.1999) did not require any aptitude or scholastic or skill test, for appointment thereon, shall be restored from the date of the judgment under review to the posts they were holding on the same terms and conditions of service applicable on the date of their termination pursuant to the judgment under review.

ii. Such other employees who were holding posts that on the date of their initial termination of service (from 01.11.1996 to 12.10.1999) required the passing of any aptitude or scholastic or skill test, for appointment thereon shall from the date of the judgment under review be restored to their said posts on the same terms and conditions of service applicable on the date of their initial termination.

iii. Any improvement in the terms and conditions of service of all the restored employees shall be granted strictly in accordance with the laws and rules applicable to their service or employment and in the absence thereof by regulations laid down for this purpose by their respective employers.

iv. The relief granted in sub-paragraphs (i) and (ii) above shall not be granted to employees whose initial termination of service (from 01.11.1996 to 12.10.1999) was on grounds of absence from duty, misconduct, corruption, misappropriation of money/stock or unfitness on medical grounds if such termination was not set aside finally by a Court of law.

Sd/-
Judge
Sd/-
Judge

I have attached my dissenting short order.

Sd/-
Judge
Sd/-
Judge
Sd/-
Judge
Sd/-
J(1)

**SYED MANSOOR ALI SHAH, J**.---Parliamentary sovereignty or legislative supremacy is the cornerstone of a strong democracy. We must, therefore, recognize the central role of the legislature. Undermining the legislature undermines democracy. Both the legislature and the judicature must play their role in a spirit of profound respect for the other and within the limits set out in the Constitution. Rule of law is not merely public order, it is social justice based on public order. The law exists to ensure proper social life by balancing the needs of the society and the individual. The courts must protect this rich concept of rule of law. Under Article 8 of the Constitution, any law enacted by the legislature is void only to the extent it takes away or abridges fundamental rights of the people.

2. For the reasons to be recorded later and subject to ancillary and incidental declarations and orders (if any) to be made in the detailed judgment, I allow these review petitions in the following terms:

i. The judgment under review is recalled;

ii. The following Sections and part of Sections of the Sacked Employees Reinstatement Act 2010 are declared ultra vires the Constitution:

a) Sections 4(a) and 10 to the extent of reinstatement and regularization on "one scale higher", which give an undue advantage to the reinstated employees to the detriment of the rights of the already working regular employees and thus violate their fundamental rights. The provisions of the said Sections, except the words "one scale higher", shall however remain operative with effect from the date of enactment of the Act, and be read to mean the reinstatement and regularization in the same or restructured, as the case may be, scale, grade, cadre, group, post or designation.

b) Sections 2(f)(vi), 11, 12 and 13, which deal with and provide for reinstatement and regularization of such sacked employees who had been dismissed, removed or terminated from service on account of absence from duty, misconduct, mis-appropriation of Government money or stock, or unfitness on medical grounds, and the determination of their guilt or medical unfitness attained finality by being unchallenged or unsuccessfully challenged. Such employees fall outside the class of sacked employees who suffered "political victimization," envisaged by the Act for a beneficial treatment, and they by themselves do not constitute a distinct class having an intelligible differentia, which bears a reasonable relation to the object and purpose of the Act.

iii. All the employees terminated from service on the basis of the judgment under review, stand restored in the service with effect from the date they were so terminated, and shall be paid the pay of the intervening period treating the said period as an extraordinary leave with pay; and

iv. The cases decided by the judgment under review, which now stands recalled, shall be deemed pending and decided on their own merits by the regular Bench(es) of this Court in accordance with the provisions of the Sacked Employees Reinstatement Act 2010, subject to the declaration made at No. ii above.

Sd/-
Judge

ORDER OF THE BENCH

For reasons to be recorded later, by a majority of four to one (Justice Syed Mansoor Ali Shah dissenting), these review petitions are dismissed.

Sd/-
Judge
Sd/-
Judge
Sd/-
Judge
Sd/-
Judge
Sd/-
Judge

MWA/H-16/SC Petitions dismissed.

**P L D 2022 Supreme Court 92**

**Present: Sardar Tariq Masood, Mazhar Alam Khan Miankhel and Syed Mansoor Ali Shah, JJ**

**KHYBER MEDICAL UNIVERSITY and others---Petitioners**

**Versus**

**AIMAL KHAN and others---Respondents**

Civil Petition No. 3429 of 2021, decided on 4th January, 2022.

(Against the order dated 25.3.2021 of the Peshawar High Court, Peshawar, passed in Writ Petition No. 1189-P of 2021).

**(a) Constitution of Pakistan---**

----Arts. 199 & 185(3)---Educational institution---Internal governance and disciplinary policies---Courts should sparingly interfere in university matters and academic freedom and institutional autonomy---Democracy, human rights and the rule of law cannot become and remain a reality unless higher education institutions, and staff and students, enjoy academic freedom and institutional autonomy---Academic, administrative and disciplinary autonomy of a university must be therefore, respected.

Courts must sparingly interfere in the internal governance and affairs of educational institutions. It is simply prudent that the courts keep their hands off educational matters and avoid dislodging decisions of the university authorities, who possess technical expertise and experience of actual day to day workings of the educational institutions. Every university has the right to set out its disciplinary and other policies in accordance with law, and unless any such policy offends the fundamental rights of the students or violates any law, interference by the courts results in disrupting the smooth functioning and governance of the university. It is, therefore, best to leave the disciplinary, administrative and policy matters of the universities or educational institutions to the professional expertise of the people running them, unless of course there is a violation of any of the fundamental rights or any law.

Khyber Medical College v. Raza Hassan 1999 SCMR 965; Muhammad Ilyas v. Bahauddin Zakariya University 2005 SCMR 961; Muhammad Arif v. University of Balochistan PLD 2006 SC 564; Secretary Economic Affairs Division, v. Anwarul Haq Ahmed 2013 SCMR 1687; J.P. Kulshreshtha v. Allahabad University AIR 1980 SC 2141; Maharashtra State BS&HSE. v. Paritosh Bhupeshkumar AIR 1984 SC 1543 and Hindi Hitrakshak Samiti v. Union of India AIR 1990 SC 851 ref.

This self-restraint by the courts in matter of educational institutions is based on the wisdom that academic freedom and institutional autonomy of the universities must be protected and safeguarded. Academic freedom is not merely liberty from restraints on thought, expression, and association in the university, but also that the university should have the freedom to make decisions about the educational matters including disciplinary matters. As it is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail the four essential freedoms of a university; who may teach, what may be taught, how it shall be taught and who may be admitted to study.

University of Wisconsin System v. Scott Harold Southworth 151 F.3d 717 ref.

Democracy, human rights and the rule of law cannot become and remain a reality unless higher education institutions, and staff and students, enjoy academic freedom and institutional autonomy. Conversely, one cannot have genuine democracy unless the higher education and research community is able to enquire freely. Higher education institutions are places that have to be imbued with democratic culture, and that, in turn, helps to promote democratic values in the wider society. Universities are the playgrounds of democracy and the more freedom and independence they enjoy, the more free thinkers and leaders they will produce. The academic, administrative and disciplinary autonomy of a university must be therefore, respected.

Academic Freedom, Institutional Autonomy and the Future of Democracy, Council of Europe Higher Education Series No. 24, United Nations Educational, Scientific and Cultural Organization ref.

Raison d etre of courts is to settle disputes, which come before them. It is not the constitutional mandate of the courts to run and manage public or private institutions or to mirco-manage them or to interfere in

their policy and administrative internal matters. Courts neither enjoy such jurisdiction nor possess the requisite technical expertise in this regard. Courts should step in only when there arise justiciable disputes or causes of action between the parties involving violation of the Constitution or the law.

**(b) Administration of justice---**

----Relief granted on basis of compassion or hardship---Scope---Judges are to decide disputes before them in accordance with the Constitution and the law, not on the basis of their whims, likes and dislikes or personal feelings---Compassion and hardship, therefore, may be considered by courts for providing relief to an aggrieved person, but only when there is scope in the relevant law to do so, not in breach of the law.

Constitutional democracy was run by laws and not by men. Judges are to decide disputes before them in accordance with the Constitution and the law, not on the basis of their whims, likes and dislikes or personal feelings. A good judge intelligently balances law and equity to ensure that justice is tempered with mercy but never at the expense of overriding the letter of the law. Compassion, which may be said to be a shade of, and have nexus to, the rules of equity cannot be given precedence and superseding effect over the clear mandate of law. Compassion and hardship, therefore, may be considered by courts for providing relief to an aggrieved person, but only when there is scope in the relevant law to do so, not in breach of the law.

D.G., National Savings v. Balqees Begum PLD 2013 SC 174 ref.

The reduction of a penalty such as disqualification-period by the Court, in contravention of the relevant law, is an example of judicial overreach or judicial overstepping, where law is ignored or modified by the court to give way to personal emotions and sense of compassion. Such exercise of judicial power is not permissible.

Wood v. Strickland 420 U.S. 308. (1975) and MEPCO v. Muhammed Ilyas 2021 SCMR 775 ref.

Abdul Munim Khan, Advocate Supreme Court and Sharif Janjua, Advocate-on-Record for Petitioners.

Respondent No. 1 in person.

Date of hearing: 4th January, 2022.

**ORDER**

**SYED MANSOOR ALI SHAH, J**.---Respondent No. 1, a medical student of 4th Semester, BS-Paramedics (Dental Technology) at the Ahmed Medical Institute, Peshawar, was apprehended while impersonating a female student and appearing on her behalf in the examination paper of Human Physiology (2nd Semester) of the Khyber Medical University ("University"). Proceedings were initiated under Regulation 32(c) of the Khyber Medical University Examination Regulations, 2017 ("Regulations") and after giving a hearing to the respondent No.1 he was disqualified for three years by the Unfair Means (UFM) Committee of the University vide its decision dated 16.12.2020. The said decision was maintained, on appeal of respondent No. 1, by the UFM Appellate Committee of the University vide its decision dated 03.2.2021. Respondent No.1 impugned both these decisions before the High Court in its constitutional jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan 1973 ("Constitution") and vide the impugned judgment dated 25.3.2021 the High Court, while accepting the position that respondent No.1 was caught red-handed by impersonating another student in an examination, reduced the penalty under Regulation 32(c) from three years to one year by taking a 'lenient view' and holding that the penalty was a "little bit harsh and liable to rectification".

2. Learned counsel for the petitioners submits that impugned judgment is against the law as under Regulation 32(c) the penalty imposed is for a period of three years; therefore, the High Court has erred in reducing the said penalty. He further submits that the University has not granted any such concession to any other student who has violated Regulation 32(c) and the impugned judgment by interfering in the internal working of the University and by ignoring the Regulations has disrupted the disciplinary and regulatory control of the University over its students. Respondent No.1 has appeared in person and submits that he wishes to argue the case himself. His only submission is that while he admits his mistake i.e., the act of impersonation, he may be dealt with leniently.

3. We have heard the parties and gone through the record of the case. We note that respondent No.1, has admitted in writing, before the University authorities, his act of impersonation and appearing in the examination of Human Physiology (2nd Semester) on behalf of another student. He, however, repeatedly requested to be forgiven for his mistake. The relevant law on the issue, i.e., Regulation 32(c) of the Regulations, is reproduced hereunder, for ready reference:

32. USE OF UNFAIR MEANS:

(c) Any candidate found guilty of impersonation, which impersonates such candidate and is on the rolls of an affiliated College, shall be, disqualified, i.e. both candidate and impersonator, for a period of three years.

(Emphasis supplied)

The above Regulation clearly states that in case a student is found guilty of impersonation, he (along with the candidate) shall be disqualified for a period of three years; it gives no discretion to the decision-making authority to fix the period of disqualification as it provides only one period, i.e., three years. Had the expression used been "for a period up to three years", the decision-making authority would have got the discretion to fix the period of disqualification for any period up to three years, but the law does not so provide; therefore, the decision-making authority (UFM Committee) or the appellate authority (UFM Appellate Committee) could not fix the period of disqualification for Respondent No.1 to a period less than three years. The UFM Committee and the UFM Appellate Committee of the University, after considering that the respondent No.1 was caught red-handed, who had also admitted his guilt in writing, found him liable and hence disqualified him for a period of three years as provided in Regulation 32(c). The High Court, however, has reduced the penalty of disqualification of the respondent No.1 from three years to one year on the ground of 'leniency', in disregard of the Regulation. The High Court has failed to appreciate that it cannot ignore the relevant law as everyone is to be treated in accordance with law under the constitutional command of Article 4 of the Constitution, and that under Article 199 (1) (a) (ii) of the Constitution it can declare only such act or proceeding of a public functionary to have no legal effect, which has been done or taken without lawful authority. In the present case, without finding that the public functionaries, i.e., the UFM Committee and the UFM Appellate Committee of the University, had acted without lawful authority in making their decisions dated 16.12.2020 and 03.02.2021, the High Court could not have interfered with and modified those decisions.

4. It has been time and again held by this Court**1** that courts must sparingly interfere in the internal governance and affairs of educational institutions. It is simply prudent that the courts keep their hands off educational matters and avoid dislodging decisions of the university authorities, who possess technical expertise and experience of actual day to day workings of the educational institutions. Every university has the right to set out its disciplinary and other policies in accordance with law, and unless any such policy offends the fundamental rights of the students or violates any law, interference by the courts results in disrupting the smooth functioning and governance of the university.**2** It is, therefore, best to leave the disciplinary, administrative and policy matters of the universities or educational institutions to the professional expertise of the people running them, unless of course there is a violation of any of the fundamental rights or any law.

5. This self-restraint by the courts in matter of educational institutions is based on the wisdom that academic freedom and institutional autonomy of the universities must be protected and safeguarded. Academic freedom is not merely liberty from restraints on thought, expression, and association in the university, but also that the university should have the freedom to make decisions about the educational matters including disciplinary matters. As "it is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university; who may teach, what may be taught, how it shall be taught and who may be admitted to study."**3**

6. Democracy, human rights and the rule of law cannot become and remain a reality unless higher education institutions, and staff and students, enjoy academic freedom and institutional autonomy.

Conversely, we cannot have genuine democracy unless the higher education and research community is able to enquire freely. Higher education institutions are places that have to be imbued with democratic culture, and that, in turn, helps to promote democratic values in the wider society.**4** Universities are the playgrounds of democracy and the more freedom and independence they enjoy, the more free thinkers and leaders they will produce. The academic, administrative and disciplinary autonomy of a university must be therefore, respected.

7. Raison d'etre of courts is to settle disputes, which come before them. It is not the constitutional mandate of the courts to run and manage public or private institutions or to mirco-manage them or to interfere in their policy and administrative internal matters. Courts neither enjoy such jurisdiction nor possess the requisite technical expertise in this regard. Courts should step in only when there arise justiciable disputes or causes of action between the parties involving violation of the Constitution or the law.

8. Our constitutional democracy is run by laws and not by men. Judges are to decide disputes before them in accordance with the Constitution and the law, not on the basis of their whims, likes and dislikes or personal feelings. A good judge intelligently balances law and equity to ensure that justice is tempered with mercy but never at the expense of overriding the letter of the law. Compassion, which may be said to be a shade of, and have nexus to, the rules of equity cannot be given precedence and superseding effect over the clear mandate of law. Compassion and hardship, therefore, may be considered by courts for providing relief to an aggrieved person, but only when there is scope in the relevant law to do so, not in breach of the law.**5** Regulation 32(c), made by the University under its delegated legislative power, is a law within the scope of the term "law" as used in Article 4 of the Constitution; it fixes a penalty of three years and allows no discretion to the decision-making authority for it to be reduced. There is thus no scope, in the relevant law, to grant relief of reducing the disqualification-period to the respondent No.1 on the ground of compassion or hardship**6**. The reduction of the disqualification-period by the High Court, in contravention of the relevant law, is an example of judicial overreach**7** or judicial overstepping, where law is ignored or modified by the court to give way to personal emotions and sense of compassion. Such exercise of judicial power is not permissible.

9. For the above reasons, the impugned judgment is set-aside and the decisions dated 16.12.2020 and 03.02.2021 of the UFM Committee and the UFM Appellate Committee of the University respectively, are restored. This petition is converted into an appeal and allowed in these terms.

MWA/K-1/SC Appeal allowed.

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1 Khyber Medical College v. Raza Hassan 1999 SCMR 965; Muhammad Ilyas v. Bahauddin Zakariya University 2005 SCMR 961; Muhammad Arif v. University of Balochistan PLD 2006 SC 564 and Secretary Economic Affairs Division v. Anwarul Haq Ahmed 2013 SCMR 1687.

2 J.P. Kulshreshtha v. Allahabad University AIR 1980 SC 2141; Maharashtra State BS&HSE. v. Paritosh Bhupeshkumar AIR 1984 SC 1543 and Hindi Hitrakshak Samiti v. Union of India AIR 1990 SC 851.

3 University of Wisconsin System v. Scott Harold Southworth 151 F.3d 717.

4 Academic Freedom, Institutional Autonomy And The Future of Democracy, Council of Europe Higher Education Series No. 24, United Nations Educational, Scientific and Cultural Organization.

5 D.G., National Savings v. Balqees Begum PLD 2013 SC 174.

6 Wood v. Strickland 420 U.S. 308. (1975)

7 See MEPCO v. Muhammed Ilyas 2021 SCMR 775.

**P L D 2022 Supreme Court 112**

**Present: Sardar Tariq Masood, Syed Mansoor Ali Shah and Jamal Khan Mandokhail, JJ**

**NADEEM SAMSON---Appellant**

**Versus**

**The STATE and others---Respondents**

Criminal Petition No. 1016-L of 2021, decided on 6th January, 2022.

(Against the order dated 08.06.2021 passed by the Lahore High Court in Criminal Miscellaneous No.20944-B of 2021).

**(a) Criminal Procedure Code (V of 1898)---**

----S. 497---Withdrawal of first bail petition without any arguments---Second bail petition, filing of---Fresh grounds---Scope---Withdrawal of an earlier bail petition before addressing any argument on the merits of the case, does not preclude filing of a subsequent bail petition for the same relief on the same grounds before the same court.

Nazir Ahmed v. State PLD 2014 SC 241 ref.

**(b) Criminal Procedure Code (V of 1898)---**

----S. 497---First bail petition before the High Court dismissed as withdrawn with direction to the Trial Court for expeditious conclusion of the trial---Second bail petition, filing of---Fresh grounds---Scope---Non-compliance by the Trial Court of the direction to conclude the trial within the specified period per se is not a fresh ground for bail only to the extent that an accused cannot, claim bail on this ground as a matter of right, but it is certainly a fresh ground to be assessed and examined by the court for exercise of its discretion in either way, in the overall facts and circumstances of the case.

Talat Ishaq v. National Accountability Bureau PLD 2019 SC 112 ref.

**(c) Criminal Procedure Code (V of 1898)---**

----S. 497(1), third and fourth provisos---Bail---Delay in conclusion of the trial---Scope of statutory bail under third proviso to S.497(1), Cr.P.C explained.

(i) The purpose and object of the third proviso to section 497(1), Cr.P.C. is to ensure that the trial of an accused is conducted and concluded expeditiously, and that the pre-conviction detention of an accused does not extend beyond the period of two years in cases involving an offence punishable with death, or one year in other cases;

(ii) The period of one year or two years, as the case may be, for the conclusion of the trial begins from the date of the detention of the accused in the case, not from the date when the charge is framed and trial commenced;

(iii) A statutory right to be released on bail accrues in favour of the accused if his trial is not concluded within the specified period, i.e., exceeding one year or two years as the case may be, from the date of his detention;

(iv) This statutory right of the accused to be released on bail is, however, subject to two exceptions: one is embodied in the 3rd proviso itself and the second is provided in the 4th proviso, which are: (a) the delay in conclusion of the trial is occasioned by an act or omission of the accused or by any other person acting on his behalf, and (b) the accused is a convicted offender for an offence punishable with death or imprisonment for life, or is in the opinion of the court a hardened, desperate or dangerous criminal, or is accused of an act of terrorism punishable with death or imprisonment for life;

(v) The act or omission on the part of the accused to delay the timely conclusion of the trial must be the result of a visible concerted effort orchestrated by the accused. Merely some adjournments sought by the counsel for the accused cannot be counted as an act or omission on behalf of the accused to delay the conclusion of the trial, unless the adjournments are sought without any sufficient cause on crucial hearings, i.e., the hearings fixed for examination or cross-examination of the prosecution witnesses, or the adjournments are repetitive reflecting a design or pattern to consciously delay the conclusion of the trial;

(vi) Any delay attributable to the accused after the expiry of the periods stipulated under the 3rd proviso to section 497(1) Cr.P.C. is not relevant for determining his right to be released on bail on the statutory ground; and

(vii) The phrase a hardened, desperate or dangerous criminal denotes an accused who is likely to seriously injure and hurt others without caring for the consequences of his violent act and will pose a serious threat to the society if set free on bail. Such tentative finding as to character of the accused must be based upon careful examination of the facts and circumstances of the case, supported by sufficient incriminating material.

Saif-ul-Malook, Advocate Supreme Court for Petitioner.

Syed Nayab Hasan Gardezi, D.A.G. for the State.

Date of hearing: 6th January, 2022.

**ORDER**

**SYED MANSOOR ALI SHAH, J**.---The petitioner seeks leave to appeal against the order dated 08.06.2021 passed by the Lahore High Court, whereby the post-arrest bail, on the statutory ground of delay of over two years in the conclusion of the trial since his detention, has been denied to him in case FIR No. 123/2017 registered for offences punishable under sections 3, 4, 11, 13, 16 and 20 of the Prevention of Electronic Crimes Act 2016. ("PECA") and sections 295A, 295C, 298A, 419, 420, 468, 471 and 109 of the Pakistan Penal Code 1860 ("P.P.C.").

2. The allegations against the petitioner, briefly stated, are that he created a fake Facebook account in the name of complainant (respondent No.3) and posted blasphemous material on the said account. The case FIR No. 123/2017 was registered against him on 23.11.2017, and he was also arrested on the same date. Since that date, he is detained and his trial has not yet been concluded.

3. As a background, the petitioner moved a post arrest bail petition[1], among others, on the ground of statutorily delay under the 3rd proviso to section 497(1), Cr.P.C. on 27.02.2020, which was dismissed by the trial court on 10.06.2020. The petitioner approached the High Court praying for the same relief; however, on the date of hearing, counsel for the petitioner, instead of arguing the petition on merits, withdrew the petition praying for a direction to the trial court to conclude the trial within a period of three months, which was accordingly passed by the High Court. The trial could not be concluded within the direction period, and the petitioner once again approached the High Court through a fresh bail petition[2] mainly agitating the ground of statutory delay in conclusion of the trial. The High Court dismissed the bail petition vide the impugned order dated 08.06.2021, by considering the conduct of the petitioner in the trial proceedings during the direction period of three months. The High Court found that it was the petitioner who had failed to cross-examine the prosecution witnesses during the said period; therefore, the delay was attributable to him. With this finding, the High Court denied the relief of post arrest bail to the petitioner. Hence this petition.

4. Learned counsel for the petitioner has submitted that the first bail petition before the High Court had not been argued on merits and was simply withdrawn availing the option of a direction to the trial court for expeditious conclusion of the trial within the specified period. Therefore, the second bail petition was as good as the first bail petition and had to be heard on merits. He argued that the petitioner was arrested on 24.11.2017 and the first prosecution witness was recorded on 27.02.2020 after over a period of two years and during that period, except the framing of the charge on 03.04.2018, no proceedings took place; therefore, the right to be released on bail on the basis of the lapse of the statutory period of two years from the date of detention had accrued to the petitioner on 25.11.2019 and any conduct of the petitioner after that date was not relevant. He has, in this regard, relied upon the judgment of this Court passed in Shakeel Shah v. State[3].

5. Learned Deputy Attorney General, appearing for the State, has submitted that after the dismissal of the first bail petition with a direction to the trial court for expeditious conclusion of the trial, the second bail petition could have been filed by the petitioner only on any fresh ground which was not available at the time of the first bail petition, and that the statutory ground of delay in conclusion of the trial was

available to the petitioner at the time of the first bail petition, therefore it was not a fresh ground for the second bail petition, nor could the non-compliance with the said direction constitute a fresh ground for maintaining a second bail petition. He has placed reliance upon the Talat Ishaq case[4] and Nazir Ahmed case[5], in support of his submissions.

6. We have considered the arguments of the parties, read the cases cited by them and examined the record of the case.

7. There is no mention of arguments made by the counsel for the petitioner in the order of the High Court whereby the first bail petition of the petitioner had been dismissed as withdrawn with direction to the trial court for expeditious conclusion of the trial. As the presumption is always in favour of the negative (semper praesumitur pro negante), we are to assume, and proceed on that assumption, that arguments had not been advanced by the counsel for the petitioner before the High Court in that bail petition. Withdrawal of an earlier bail petition before addressing any argument on the merits of the case, as held by this Court in the Nazir Ahmed case, does not preclude filing of a subsequent bail petition for the same relief on the same grounds before the same court. Therefore, we see no bar on the petitioner to agitate statutory ground of delay in conclusion of his trial, which was available to him at the time of withdrawal of first bail petition, before the High Court in the second bail petition. While the second submission of the counsel for the State that the non-compliance of the direction to conclude the trial within the specified period per se is not a fresh ground for bail is correct only to the extent that an accused cannot, as held by this Court in the Talat Ishaq case, claim bail on this ground as a matter of right, but it is certainly a fresh ground to be assessed and examined by the court for exercise of its discretion in either way, in the overall facts and circumstances of the case. Before us, however, the counsel for the petitioner has not pressed non-compliance of the direction as a ground for grant of bail to the petitioner, he instead has argued for right of the petitioner to be released on bail on the statutory ground of delay within the scope of the 3rd proviso to section 497(1), Cr.P.C.

8. The scope of the 3rd proviso to section 497(1), Cr.P.C. has recently been expounded by this Court in the Shakeel Shah case, cited by the counsel for the petitioner, by examining and interpreting its provisions as well as the provisions of the related 4th proviso, in detail. We, therefore, think it unnecessary to re-examine the scope of those provisos again in this case, especially when we find ourselves in agreement with what has been held in that case. What we consider appropriate to do is to recapitulate the main principles enunciated therein, as to the meaning, extent and scope of the 3rd proviso, for clear understanding of, and compliance by, all the other courts in the country in terms of Article 189 of the Constitution of the Islamic Republic of Pakistan 1973. They are:

(i) The purpose and object of the 3rd proviso to section 497(1), Cr.P.C. is to ensure that the trial of an accused is conducted and concluded expeditiously, and that the pre-conviction detention of an accused does not extend beyond the period of two years in cases involving an offence punishable with death, or one year in other cases;

(ii) The period of one year or two years, as the case may be, for the conclusion of the trial begins from the date of the detention of the accused in the case, not from the date when the charge is framed and trial commenced;

(iii) A statutory right to be released on bail accrues in favour of the accused if his trial is not concluded within the specified period, i.e., exceeding one year or two years as the case may be, from the date of his detention;

(iv) This statutory right of the accused to be released on bail is, however, subject to two exceptions: one is embodied in the 3rd proviso itself and the second is provided in the 4th proviso, which are: (a) the delay in conclusion of the trial is occasioned by an act or omission of the accused or by any other person acting on his behalf, and (b) the accused is a convicted offender for an offence punishable with death or imprisonment for life, or is in the opinion of the court a hardened, desperate or dangerous criminal, or is accused of an act of terrorism punishable with death or imprisonment for life.

(v) The act or omission on the part of the accused to delay the timely conclusion of the trial must be the result of a visible concerted effort orchestrated by the accused. Merely some adjournments sought by the counsel for the accused cannot be counted as an act or omission on behalf of the accused to delay the conclusion of the trial, unless the adjournments are sought without any sufficient cause on crucial hearings, i.e., the hearings fixed for examination or cross-examination of the prosecution witnesses, or the adjournments are repetitive reflecting a design or pattern to consciously delay the conclusion of the trial; and

(vi) The phrase "a hardened, desperate or dangerous criminal" denotes an accused who is likely to seriously injure and hurt others without caring for the consequences of his violent act and will pose a serious threat to the society if set free on bail. Such tentative finding as to character of the accused must be based upon careful examination of the facts and circumstances of the case, supported by sufficient incriminating material.

In the light of the above principles, we proceed to appreciate the statutory ground of delay in conclusion of the trial pleaded by the counsel for the petitioner, for grant of bail to the petitioner.

9. The petitioner was arrested and detained, in this case, on 24.11.2017. The charge against the petitioner was framed on 03.04.2018. Two prosecution witnesses were recorded on 27.02.2020. Till that date, a continuous period of exceeding two years since the detention of the petitioner in the case had lapsed without conclusion of the trial; therefore, a right to be released on bail had prima facie accrued to the petitioner, which could have been denied to the petition only if his case fell into any of the above-stated two exceptions: (a) if the delay in conclusion of the trial had been occasioned by an act or omission of the petitioner or by any other person acting on his behalf, and (b) if the petitioner was found to be a convicted offender for an offence punishable with death or imprisonment for life, or was in the opinion of the court a hardened, desperate or dangerous criminal, or was accused of an act of terrorism punishable with death or imprisonment for life.

10. We have examined the record of the case and found that there is no delay in conclusion of the trial till expiry of the two year period of detention of the petitioner on 25.11.2019, which can be attributed to the petitioner or to any person acting on his behalf reflecting a design or pattern to consciously delay the conclusion of the trial. Any delay attributable to the petitioner after the expiry of the said period is not relevant for determining his right to be released on bail on the statutory ground provided in the 3rd proviso to Section 497(1), Cr.P.C. Nor he appears, in the facts and circumstances of the case, to be a hardened, desperate or dangerous criminal" who is likely to seriously injure and hurt others without caring for the consequences of his violent act and will thus pose a serious threat to the society if set free on bail. The petitioner is, therefore, entitled to be released on bail as a matter of right, not as a concession. The delay in conclusion of the trial, noted by the High Court, attributable to the counsel for the petitioner representing him before the trial court, relates to the period after expiry of the continuous two year period since detention of the petitioner in the case; therefore, it could not have been considered by the High Court for determining the right of the petitioner to be released on bail under the 3rd proviso to section 497(1), Cr.P.C.

11. The High Court has thus failed to correctly appreciate the scope of the 3rd proviso to section 497(1), Cr.P.C. This petition is, therefore, converted into appeal and allowed: the impugned order is set aside, the bail petition of the petitioner is accepted and he is admitted to post-arrest bail subject to his furnishing bail bond in the sum of Rs.500,000/- with two sureties in the like amount to the satisfaction of the trial court.

MWA/N-1/SC Bail granted.

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1 Criminal Miscellaneous No. 42206/B/2020.

2 Criminal Miscellaneous No. 20944/B/2021

3 Criminal Petition No. 1072/2021 decided on 04.10.2021, available online at https://www.supremecourt.gov.pk/downloads_judgements/crl.p._1072_2021.pdf

4 Talat Ishaq v. National Accountability Bureau PLD 2019 SC 112.

5 Nazir Ahmed v. State PLD 2014 SC 241.

**P L D 2022 Supreme Court 119**

**Present: Umar Ata Bandial, Maqbool Baqar, Manzoor Ahmad Malik, Mazhar Alam Khan Miankhel, Sajjad Ali Shah, Syed Mansoor Ali Shah, Munib Akhtar, Yahya Afridi, Qazi Muhammad Amin Ahmed and Amin-ud-Din Khan, JJ**

**Justice QAZI FAEZ ISA and others---Petitioners**

**Versus**

**PRESIDENT OF PAKISTAN and others---Respondents**

Civil Review Petitions Nos.296 to 301, 308, 309 and 509 of 2020 and C.M.A. No. 4533 of 2020, decided on 29th January, 2022.

(Against the short order dated 19.06.2020 and the detailed judgment dated 23.10.2020 passed by this court in Const. Petition. 17 of 2019, etc.)

Per Maqbool Baqar, Mazhar Alam Khan Miankhel, Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ; Manzoor Ahmed Malik, J. agreeing; Yahya Afridi, J. also agreeing but with his own reasons; Umar Ata Bandial, Sajjad Ali Shah, Munib Akhtar and Qazi Muhammad Amin Ahmed, JJ. dissenting.

**(a) Constitution of Pakistan---**

----Art. 4(1)---Right to be dealt with in accordance with law---Scope---No one, including a Judge of the highest court in the land, is above the law---At the same time, no one, including a Judge of the highest court in the land, can be denied his right to be dealt with in accordance with law; it matters little if the citizen happens to hold a high public office, he is equally subject to and entitled to the protection of law.

**(b) Supreme Court Rules, 1980---**

----O.XXVI, R. 8---Civil Procedure Code (V of 1908), O. XLVII, R.1---Constitution of Pakistan, Art. 188---Review petition, hearing of---Constitution of Bench---Scope---Judicial power to be exercised by the dissenting Judges in review jurisdiction---Dissenting Judges on the Bench that heard the case, subject to their availability, are necessary members of the Bench constituted to hear review petition filed against the majority judgment, i.e., judgment of the Court, in particular, when the Bench that first heard the case was a specially constituted Bench for hearing that case---Dissenting Judges, subject to their availability, being necessary members of the review Bench possess the same judicial power as that of the other members of the Bench.

As the judgment of the Court is considered to be the judgment of all the members of that Bench, irrespective of its being majority judgment or unanimous judgment, there can be no difference in judicial powers of the members who earlier delivered the majority or minority judgment while hearing the review petition, under Article 188 of the Constitution, against the judgment of the Court, i.e., the majority judgment. This is because the judgment of the Court is under review and not the view of the majority judges. There is nothing in the Constitution or the Supreme Court Rules, 1980 that restricts the judicial power of dissenting Judges in review jurisdiction in comparison to that of the Judges who delivered the majority judgment. The dissenting Judges, subject to their availability, being necessary members of the review Bench possess the same judicial power as that of the other members of the Bench. The Judge whose opinion remained the minority view in the main case is as empowered to review the judgment of the Court, as can a Judge who delivered the majority opinion. This is because under the review jurisdiction the Judges enjoy the flexibility to change their view, they might continue to hold or reverse their earlier view and thus subscribe to either the earlier majority or minority view. Adjudication is a deliberative process and the power of review, within its limited scope, allows the Judge to reconsider his earlier opinion.

Zulfikar Ali Bhutto v. State PLD 1979 SC 741 ref.

Justice Qazi Faez Isa v. President of Pakistan PLD 2021 SC 639 and Cherat Cement Co. v. Federation PLD 2021 SC 327 endorsed.

In case of review of its own judgment by a Bench of the Supreme Court, the review Bench with the same Judges, if available, and with the same numeric strength can review, within the scope of its review jurisdiction, any part of its judgment including any principle of law enunciated therein.

**(c) Supreme Court Rules, 1980---**

----O.XXVI, R. 1---Constitution of Pakistan, Art. 188---Split decision of Supreme Court in its review jurisdiction---Majority and minority judgments---Scope---In case of a split decision (where there is dissent by one or more members of the Bench), the majority judgment is the judgment of the Supreme Court in terms of Art. 188 of the Constitution---While the majority and minority views of the judgment become part of the jurisprudence, to be read, analyzed and applied in future, it is the majority view, at the time, that attains the status of the judgment of the Court---Judgment of the Court is characterized as the judgment of the entire Bench, rather than of the majority Judges---Entire Bench means the full numeric strength of the Bench, including the dissenting Judges---For instance, if a case is decided by a 4-3 majority of a 7 member Bench, the judgment of the majority of 4 members, which becomes the judgment of the Court, is considered to be the judgment of a 7 member Bench of the Court, and not of a 4 member Bench.

**(d) Supreme Court Rules, 1980---**

----O.XI---Principles of law settled in unanimous and split judgments of the Supreme Court---Numerical strength of Bench required for overruling such principles---Where a case is decided by a 4-3 majority of a 7 member Bench, the judgment of the majority of 4 members, which becomes the judgment of the Court, is considered to be the judgment of a 7 member Bench of the Court, and not of a 4 member Bench---Any principle of law enunciated in such majority judgment of 4 members cannot be overruled in any other case by a unanimous decision of a 5, 6, or even 7 member Bench; this can be done only by a Bench larger than a 7 member Bench---Conversely, any principle of law enunciated in the unanimous judgment of a 5 member Bench can be overruled by majority of only 4 members sitting in a 6 or 7 member Bench---Extent of the judicial power of the members of a Bench in this regard is thus dependent upon the total numeric strength of the Bench.

Cherat Cement Co. v. Federation PLD 2021 SC 327 and Shanti Fragrances v. Union of India (2018) 11 SCC 305 ref.

**(e) Constitution of Pakistan---**

----Arts. 25, 184(3), 187(1), 188, 209(5)(b) & 211---Income Tax Ordinance (XLIX of 2001), Ss.11(5), 111, 116(1)(b), 121, 122, 198, 199, 209 & 216---Review petitions before the Supreme Court challenging the directions given to the tax authorities by the Supreme Court to conduct an inquiry into the foreign assets of a Supreme Court Judge's family members and submit a report to the Supreme Judicial Council despite quashing of Presidential reference against the Judge---By way of the impugned directions contained in paras 4 to 11 of the short order [reported as (PLD 2020 SC 346)], along with supporting detailed reasons given in the majority judgment (reported as PLD 2021 SC 1), the Supreme Court directed the Commissioner, Inland Revenue and Federal Board of Revenue to inquire into and seek explanation from the spouse and children of the judge as to the nature and source of the funds whereby the properties in a foreign country were acquired in their names, and also send a report in such regard to the Supreme Judicial Council, which, it was held had the powers to, if it considered justified, to commence proceedings against the judge in exercise of its suo motu jurisdiction---[Per Maqbool Baqar, Mazhar Alam Khan Miankhel, Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ. [Majority view]: Impugned directions contained in paras 4 to 11 of the short order [reported as (PLD 2020 SC 346)], and other connected matters along with supporting detailed reasons given in the majority judgment [reported as (PLD 2021 SC 1)], of the same date were recalled and set-aside---All the subsequent proceedings, actions, orders, information and reports in pursuance of the directions contained in the short order [reported as (PLD 2020 SC 346)], and the detailed reasons thereof [reported as (PLD 2021 SC 1)], were declared to be illegal and without any legal effect---Resultantly, the Supreme Court directed that any such proceedings, actions, orders or reports could not be considered or acted upon and pursued any further by any forum or authority including the Supreme Judicial Council]---[Per Yahya Afridi, J, agreeing with the Majority view but with his own reasons: Impugned directions contained in paragraphs Nos. 4 to 11 of the short order [reported as (PLD 2020 SC 346)] had been made without appropriately considering the scope of the ouster clause of Art. 211 of the Constitution and the relevant provisions of the Income Tax Ordinance, 2001 ("the 2001 Ordinance")---Said two crucial omissions were marked and distinct "errors apparent on the face of the record" and thus,

warranted the positive exercise of the review jurisdiction of the Supreme Court---Directions contained in paragraphs Nos. 4 to 11 of the short order [reported as (PLD 2020 SC 346)], and the detailed judgment [reported as (PLD 2021 SC 1)], and other connected petitions were recalled---Consequently, all the subsequent proceedings, actions, orders and reports made in pursuance to the said directions were declared to be of no legal effect and/or consequences]---[Per Umar Ata Bandial, J. dissenting [Minority view]: Being in the Service of Pakistan, the petitioner-Judge remained answerable for the unaccounted assets of his spouse---Two out of the three foreign properties were purchased while the petitioner-Judge was holding the public office of Chief Justice of the High Court and the said properties were undeclared in his wealth statements and that of his wife---No fundamental right of either the petitioner-Judge or his wife had been infringed by the impugned direction to the Federal Board of Revenue (FBR) to investigate the nature and source of funding of the foreign properties because there was no fundamental right granted in the Constitution to public servants/citizens to be immune from investigations into their financial affairs---Judge's wife herself demanded why FBR had not approached her regarding the foreign properties, which is why she could not subsequently take the contradictory plea that a direction to the FBR to such effect was contrary to law---Impugned direction to the FBR to commence proceedings against the Judge's wife did not affect the person, property or any other right of the wife, instead, it only asked the FBR to initiate proceedings to verify her sources of funding the foreign properties---In no way did the impugned direction to the FBR determine or influence the outcome of the proceedings which were to be conducted under the 2001 Ordinance by a Commissioner, Inland Revenue (CIR)---Essential ingredients of the right to be heard, namely, prior notice of the subject-matter and opportunity of hearing to articulate plea of the Judge's wife, were complied with in the present case---Documents produced by the Bank revealed the connection of the petitioner-Judge with the Foreign Currency Account of his wife, that was statedly used for purchasing the foreign properties---In the present case, there was material that called for an explanation before the Council which must be provided to protect the petitioner-Judge and the (Supreme) Court from aspersions cast on their integrity]---[Per Munib Akhtar, J. dissenting (Minority view) : Four Member Judgment authored by Maqbool Baqar, Mazhar Alam Khan Miankhel, Syed Mansoor Ali Shah and Amin-ud-Din Khan JJ, had purportedly also been signed by a retired Judge i.e. Manzoor Ahmad Malik, J---Said retired Judge was a signatory to one of the short orders dated 26-04-2021 but he retired on 30.04.2021---Therefore, he could not, as a matter of law, have signed the judgment---Judge who has already retired, cannot thereafter give, make or sign any judgment, order or decree---Short order passed by Maqbool Baqar, Mazhar Alam Khan Miankhel, Syed Mansoor Ali Shah and Amin-ud-Din Khan JJ, and the short order of Yahya Afridi, J, did not have commonality between them and hence lacked the support of the majority i.e. six judges---For such reason the short order was not operative in and of itself---Neither the Four Member Judgment nor that of Yahya Afridi, J, nor such reasoning or ratio as may be common between them had any binding precedential effect or value]---Detailed reasons for allowing the review petitions and recalling the impugned directions stated.

Per Maqbool Baqar, Mazhar Alam Khan Miankhel, Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ [Majority view]:

The foreign properties were purchased, in the present case, by the petitioner (wife of the Judge of the Supreme Court) and her children in the years 2004 and 2013; their income and sources to purchase those properties obviously relate to those years or the years prior thereto. When the Supreme Court made the impugned directions to the Tax Commissioner on 19 June 2020, a period of more than five years had lapsed since the end of those tax years to which their income and sources of fund for purchase of those properties relate. The bar of time-limit within which an assessment can be amended under Section 122 of the Income Tax Ordinance, 2001 ('the 2001 Ordinance') is a statutory recognition of the protection against arbitrary power of reopening or amending a tax assessment after the expiry of the prescribed period. This statutory bar vests a right in the taxpayer that after efflux of the prescribed period, his tax assessment will not be reopened or amended. Therefore, the impugned directions, prima facie, affected the vested right of the

petitioner, as after the expiry of the statutory period a vested right accrues to the taxpayer that his assessment will not be reopened.

Taxation Officer v. Rupafil 2018 SCMR 1131; Assistant Collector v. Khyber Electric Lamps 2001 SCMR 838; Federation v. Ibrahim Textile Mills 1992 SCMR 1898; Commissioner v. Eastern Federal Union Insurance Co. PLD 1982 SC 247; Nagina Silk Mill v. Income-Tax Officer PLD 1963 SC 322 and Commissioner of Income Tax v. Eli Lilly Ltd. 2009 SCMR 1279 ref.

The impugned directions did not leave any option with the Tax Commissioner to consider his legal authority before initiating proceedings in the tax matter of the petitioner. Further, it was admittedly the Tax Commissioner, Karachi who had the jurisdiction, under section 209 of the 2001 Ordinance, to proceed in respect of the income tax returns filed by the petitioner, but the impugned directions mandated the Tax Commissioner, Islamabad to proceed in the matter. And it was only after the impugned directions that the Federal Board of Revenue (FBR) transferred the cases of the petitioner and of her children to the Tax Commissioner, Islamabad vide its order dated 25-06-2020. The impugned directions have, thus, affected the vested right of the petitioner which have accrued to her after lapse of the period prescribed under sections 121 and 122 of the 2001 Ordinance for issuing, or making amendment in, the tax assessment order and have the effect of causing "material disadvantage" to the petitioner. Therefore, it was necessary to provide her a fair and "meaningful hearing" before making the impugned directions.

A day before the impugned directions were passed the petitioner addressed the Supreme Court through video link and made her statement. Perusal of the transcript of her statement as well as of the observations made by the Senior Member of the Bench showed that neither said Member nor any other Member of the Bench asked her whether she had anything to say if the Court would direct the tax authorities to inquire into her sources of fund whereby she had purchased the foreign properties, and to conduct proceedings for determining her tax liability regarding those properties under the 2001 Ordinance. She was not informed of the action the Court was contemplating to take, nor was she given a chance to state her stance on that. Thus, she was not given "notice of the case to be met", nor was she provided with an "opportunity to explain" why the Court should not make such directions. Both the essential requirements of right of hearing were not complied with before making the impugned directions. Hearing the petitioner on 18th June 2020 by the Court on video-link before making the impugned directions on 19th June 2020, therefore, cannot be said to be a fair and "meaningful hearing" in the context of making the impugned directions. While the independent, adult and married children of the petitioner (her son and daughter) were not heard at all, before making the impugned directions that related to and affected them also. The petitioner, in the present case, was deprived of her vested right by the impugned directions, without providing her an opportunity of fair and meaningful hearing, i.e., by giving her notice of the contemplated action (the impugned directions) and opportunity to explain why such action (the impugned directions) should not be made. The impugned directions are, therefore, vitiated on this ground. Furthermore, non- hearing of petitioner is an error on the face of record meriting interference in review jurisdiction.

Federation v. Nawaz Sharif PLD 2009 SC 644 ref.

The petitioner and her children being private citizens, their tax matters had no nexus with the essential pre-requisite for invoking and maintaining any proceedings in the original jurisdiction of the Court under Article 184(3) of the Constitution, and were thus not amenable to the jurisdiction that was invoked and exercised thereunder through the short order dated 19-06-2020 [reported as (PLD 2020 SC 346)]. Further, the tax matter of the petitioner could not have been referred to the Supreme Judicial Council ('the Council') as the role and jurisdiction of the Council is limited to the matters relating to the conduct and capability of the superior Court Judges. It is not mandated to delve into the affairs of someone who is not a Judge of a superior Court. The impugned directions tend to stretch the scope of jurisdiction of the Council beyond the constitutional mandate and vest in the Council the jurisdiction and authority not granted to it by the Constitution.

The impugned directions also create an anomalous situation as they provide that the proceedings before the Council, as contemplated thereby, shall not be effected by the filing or pendency of any appeal under

the 2001 Ordinance against the order/report of the Tax Commissioner, or against any order made or decision taken at any appellate stage. If in the event the Council, on the basis of the report submitted by the Chairman FBR in pursuance of the impugned directions, recommends removal of the Judge, but subsequently his wife i.e. the petitioner, succeeds in her challenge to the order of the Tax Commissioner, and the said order is found not sustainable, the time for the retrieval may have passed as by then Judge may have reached the age of superannuation. The injury inflicted upon the Judge and the damage suffered by this institution will thus be irretrievable. In a reverse scenario where the Council may not agree with the findings of the Tax Commissioner, but such findings are upheld by the forums, including the Supreme Court, before which the Tax Commissioner's findings are amenable to correction, an anomalous and embarrassing situation may occur. [p. 166] $U_1$

Another aspect of referring the matter to the Council by the Supreme Court for exercise of its suo motu power is that it infringes the independence of the Council. Therefore, asking the Council, by the impugned directions, to conduct "proceedings" to decide whether or not it will inquire into the matter of alleged misconduct by the Judge in exercise of its suo motu powers is also tantamount to interference into the independent functioning of the Council and, thus, against the spirit of the provisions of Articles 209 and 211 of the Constitution.

Ikram Chaudhry v. Federation PLD 1998 SC 103 ref.

The impugned directions to the Chairman, FBR to submit report to the Council and asking the Council to consider that report for deciding to take any action thereon against the Judge have the effect of directing the Chairman, FBR to file a complaint in the Council against the Judge, in the form of report. The impugned directions have thus authorized the Chairman, FBR to do that which he cannot do under the Constitution and the law. He being an officer subordinate to the Federal Government cannot make any complaint against a constitutional court Judge directly to the Council; only the Federal Government can do so and that too by the constitutional process of acting through the President. If the officers of the Federal or Provincial Governments or of the autonomous bodies or authorities under the control of such Governments are allowed or empowered to file complaints concerning or emanating from their official actions against Judges of the constitutional courts who, in exercise of their constitutional jurisdiction, make judicial review of official actions and inactions of such officers, there would be disastrous consequences for the independence of judiciary.

The impugned directions singled out the petitioner and her husband-Judge for special treatment by directing initiation of proceedings into their matters by the tax authorities and the Council in accordance with a procedure that was not provided by the law and the Constitution; their fundamental right to equality before the law and equal protection of law guaranteed by Article 25 of the Constitution was thus infringed by the impugned directions.

The impugned directions were in no way a relief consequential or incidental to the matter adjudicated upon by the Court, i.e., the constitutionality and legality of the Reference filed against the Judge, or to the relief prayed for by the parties, i.e., the quashing of the Reference or dismissal of the constitutional petitions. The impugned directions must have come as a surprise to the parties being unexpected, as they were beyond the scope of the case before the Court, on a matter that was not debated in the course of the hearing.

The impugned directions having been made without providing a fair and meaningful hearing to the petitioner, thus violating the principles of natural justice, and without adverting to, and in contravention of, the relevant provisions of law and the Constitution, definitely fall within the scope of the well-established ground of review, namely, "error apparent on the face of the record"; thus they can be recalled by the Supreme Court in exercise of its review jurisdiction under Article 188 of the Constitution read with Rule 1 of Order XXVI of the Supreme Court Rules, 1980.

Review petitions were allowed and the impugned directions contained in paras 4 to 11 of the impugned short order dated 19-06-2020 [reported as (PLD 2020 SC 346)]and other connected matters, along with supporting detailed reasons given in the majority judgment of the same date [reported as (PLD 2021 SC

1)], were recalled and set-aside. All the subsequent proceedings, actions, orders, information and reports in pursuance of the directions contained in the short order dated 19-6-2020 [reported as (PLD 2020 SC 346)] and the detailed reasons thereof[reported as (PLD 2021 SC 1)],were declared to be illegal and without any legal effect. Resultantly, any such proceedings, actions, orders or reports cannot be considered or acted upon and pursued any further by any forum or authority including the Supreme Judicial Council.

Per Yahya Afridi, J.;agreeing with the Majority view but with his own reasons [Majority view]:

The Supreme Court has wide-ranging power vested in it under Article 184(3) or Article 187(1) of the Constitution, to issue appropriate directions, while disposing of a case. However, where the Constitution under Article 211 expressly forbids all courts, including the Supreme Court, not to interfere in the proceedings of the Supreme Judicial Council ('the Council'), then the authority of the Supreme Court under Article 184(3), or, for that matter, under any other Article of the Constitution, has to yield to such definite ouster. The very essence of the ouster clause provided in Article 211 of the Constitution is to curtail the jurisdiction of the courts, including the Supreme Court, to protect and preserve the autonomy and supremacy of the "proceedings" of the Council against judicial interference. The decision on the question, whether to commence an inquiry or otherwise, is a matter that is within the exclusive domain of the Council. The Supreme Court, or for that matter any other Court, lacks the jurisdiction to restrict this vast authority vested in the Council by the Constitution. And unless the very proceedings of the Council to proceed against a Judge of the Superior Judiciary is positively adjudged to be coram non judice, mala fide or without jurisdiction, Courts are to jealously maintain the constitutional independence of the Council.

Any directions of the Supreme Court setting steps for the Council, and for that matter, for its Chairman and Secretary, to follow or to refrain from following and that too, without first adjudging its actions or inactions to be coram non judice, mala fide or without jurisdiction would amount to excessive exercise of jurisdiction by the Supreme Court under Article 184(3) and Article 187(1) of the Consti-tution. Such directions of the Court amount to usurping the exclusive constitutional jurisdiction vested in the Council under Article 209 and protected under Article 211 of the Constitution.

The impugned directions of the Supreme Court to the Council to consider the report of the tax officials amounts to judicial interference in the "proceedings before the Council", and thus violates the autonomy and supremacy of the "proceedings" of the Council against judicial interference envisaged under Article 211 of the Constitution.

The Supreme Court did not have the jurisdiction to issue the impugned directions to the Council to consider initiating, or otherwise, an inquiry against the Judge based on the "information" received from the tax officials of the Federal Board of Revenue (FBR). Even if the instructions of the Court to the Council to consider the report of the tax officials, are not strictly considered or taken as "directions" to the Council, even then the same has the effect of making the Supreme Court a "complainant", and not the "adjudicator" in the matter. Similarly, if the Supreme Court issues directions to the contrary, that is, refraining the Council from considering "information" obtained, the Supreme Court would then too be exceeding its mandated constitutional jurisdiction.

The Supreme Court has, in the judgment under review, passed binding directions to the tax officials to proceed in a set manner, overlooking the provisions of the 2001 Ordinance relating to taking cognizance of "definite information", scrutiny of information and assessment of income tax returns, and territorial jurisdiction. Moreover, in making the impugned directions, the Court also lost sight of the procedure provided in the 2001 Ordinance, as to how tax officials are: (i) to proceed against a tax filer that has undeclared income and assets or mis-declared the same and within what time period; (ii) to determine the source of funds for purchasing the undeclared assets, whether generated in Pakistan or in some foreign country; and (iii) above all, to which tax year the undeclared local assets or source of funds and the undeclared foreign assets and source of funds are to be added to and assessed.

In the circumstances of the case, the matter of probe against the spouse and children of the Judge should best have been left to the concerned tax authorities to proceed under the 2001 Ordinance, without any specific directions. By giving directions to the tax authorities to proceed with the matter on the basis of a

procedure and timeline foreign to the 2001 Ordinance, the Supreme Court has ultimately subdued the procedure prescribed under the 2001 Ordinance by expanding its role, inadvertently, as 'legislator' rather than 'adjudicator'.

Another error that crept in while making the impugned directions is the distraction from the fundamental issue of alleged misconduct of the Judge qua the non-disclosure of foreign assets of his spouse, in his wealth statement, filed with the income tax returns under section 116 of the 2001 Ordinance. Though this was the main controversy, the impugned directions directed the tax officials to proceed against the spouse and children of the Judge regarding the subject foreign properties, instead of directing the tax officials to proceed against the Judge to determine his liability, if any, in accordance with the 2001 Ordinance. In case the spouse and children of the Judge fail to adequately justify the sources of fund for purchasing the foreign assets, the same would be deemed even then, under the 2001 Ordinance, to be owned by them, and not by the Judge. In the constitutional petitions, wherein the impugned directions have been given, the concern of the Supreme Court was with respect to the independence of the judiciary and the accountability of the judges in the context of alleged misconduct of the Judge, which has been detracted from, by making the impugned directions against his family members.

The impugned directions affecting the rights of the Judge's wife, her son and daughter, have been passed by the Supreme Court in excess of jurisdiction, and are, therefore, recalled. Consequently, the "superstructure" of subsequent proceedings, actions, orders and reports built on the legally faulty "foundation" of the impugned directions would fall and have no legal effect on the rights and obligations of the Judge's wife, her son and daughter.

His Lordship observed that the tax officials are competent to proceed against any Judge of the Superior Judiciary, serving or retired, his spouse or/and children, without fear or favour, in relation to his or her tax affairs only in accordance with the provisions of the 2001 Ordinance and not otherwise on the basis of unlawful directions; that section 216 of the 2001 Ordinance, commands confidentiality of the information of a tax filer, and breach thereof exposes the delinquent to penal consequences under sections 198 and 199 of the 2001 Ordinance; that such consequences are attracted in the present case to those giving the unlawful directions, namely, Chairman, Assets Recovery Unit (ARU), with the concurrence of the Federal Law Minister, the tax officials executing the unlawful directions in breach of section 216 of the 2001 Ordinance, and finally, the Prime Minister, who despite clear and unanimous finding of misdoings of the said delinquents by the Supreme Court, retained them in positions of authority, thereby blatantly exposed himself to complicity in the commission of the said violation.

Per Umar Ata Bandial; Sajjad Ali Shah, Munib Akhtar and Qazi Muhammad Amin Ahmed, JJ. agreeing [Minority view]

In the present case, it is admitted that the three foreign Properties belong to the Judge's wife and children; that two of the properties were purchased in the year 2013 when the petitioner-Judge was holding the public office of Chief Justice of a High Court; and that the said properties were undeclared in the wealth statements of the petitioner-Judge and his wife. In these circumstances, the non-disclosure of the properties causes suspicion and trepidation. More so when one views sections 11(5) and 111(1)(d) of the Income Tax Ordinance, 2001 ('the 2001 Ordinance') which mandate since the promulgation of the Ordinance [in the case of section 11(5)] and since 2011 [in the case of Section 111(1)(d)] that the income of a resident person includes both his domestic and foreign income and the failure to disclose the same renders a resident person liable to pay the tax evaded. Therefore, in such circumstances a question to the petitioner-Judge about the source of funding of the properties is natural, relevant and lawful, notwithstanding any procedural lapses committed in the preparation of the Reference against him. That question must not be bypassed because being in the Service of Pakistan, the petitioner-Judge remains answerable for the unaccounted assets of his spouse. No satisfactory reasoning was put forward by any review petitioner on why no standards of accountability or separate or lower ones should apply to Judges (who also fall in the category of public servants) and why the Supreme Judicial Council ('the Council') should wait for a final determination by the relevant statutory authorities before processing an information received against a Judge on this score.

It is of vital importance that public office holders, particularly Judges of the Superior Courts, serving the people of Pakistan remain answerable before their relevant forums to safeguard the integrity and credibility of their person as well as of their Court. Courts try people and hold them accountable according to the Constitution and the law. Their judicial orders are accepted and obeyed by the people for their trust in the Courts' moral authority which is dependent upon the personal rectitude of the Judges. If aspersions cast against Judges on the basis of admitted facts are not dispelled, the said moral authority of the Courts is eroded and the execution of their primary function, namely, to decide the peoples' rights and obligations in accordance with the Constitution and the law becomes severely undermined.

Corruption in Hajj Arrangements in 2010's case PLD 2011 SC 963 ref.

When a Judge and/or his spouse admit to acquiring undisclosed foreign assets and there is an element of indiscretion in their omission to declare the said assets, namely, a violation of the duty under Section 111 of the 2001 Ordinance and a failure to live up to the standard of propriety expected of Judges and their spouses under the Code of Conduct for Judges of the Supreme Court and High Courts ('the Code of Conduct'), an inquiry into the source of acquisition of the undeclared foreign assets serves the public interest and right which according to settled jurisprudence can prevail over the private rights of individuals.

Pakistan Muslim League (N) v. Federation of Pakistan PLD 2007 SC 642 and Mohammad Imran v. Province of Sindh 2019 SCMR 1753 ref.

In the present case no fundamental right of either the petitioner-Judge or his wife has been infringed by the impugned direction to the Federal Board of Revenue (FBR) to investigate the nature and source of funding of the foreign properties. This is because there is no fundamental right granted in the Constitution to public servants/citizens to be immune from investigations into their financial affairs. In fact, section 216(3)(p) of the 2001 Ordinance specifically allows such investigations.

In issuing the impugned direction to the FBR to commence proceedings in respect of the foreign properties, the Court was moved by two factors: firstly, that the Judge's wife be given an opportunity to explain the source of funding of the properties so that any stigma surrounding them is erased from the person of the Judge and the Court; and secondly, to redress the wife's complaint as expressed in her video link statement made before the Court that she should have, but had not, been asked about the properties from the beginning. Consequently, having herself demanded why the FBR had not approached her regarding the properties, the Judge's wife cannot now take the contradictory plea that a direction to the FBR to this effect is contrary to law.

The impugned directions contained in the short order [reported as (PLD 2020 SC 346)] had been misconstrued. No direction of any nature was issued to the Council. In fact, the essence of the short order is that the Judge's wife be given the opportunity to explain the facts to the FBR and the factual findings thereon be placed for the perusal of the Council. Such process was meant to allay the disquiet of the petitioner-Judge and his wife by securing a finding that settled the allegations levelled against the former. This is precisely why the short order simply notes that the Secretary of the Council will place the report of the Chairman FBR before the Chairman of the Council for the perusal of the Council. Thereafter, it was for the Council to act as it deemed appropriate in the matter. Therefore, it is wrong to suggest that the Court has bound the Council to investigate the petitioner-Judge.

A strong grievance was voiced by the review petitioners against the short order [reported as (PLD 2020 SC 346)] for allegedly exposing the Judge's wife to scrutiny by a tax forum without giving her a hearing. Such a plea is legally unsound because on the facts of the present case, the allegation that the Judge's wife was not given a hearing (or was given an inadequate hearing) is inconsequential. This is because the short order is not adverse in nature. It did not affect the person, property or any other right of the Judge's wife. Instead, it only asked the FBR to initiate proceedings to verify her sources of funding the foreign properties. Hence, any right to be heard that accrued to the Judge's wife was in the FBR proceedings because the outcome thereof could have either exonerated her or adversely affected her property and reputation.

University of Dacca v. Zakir Ahmed PLD 1965 SC 90 ref.

The controversy in the present case is about the consequences of non-declaration of foreign assets by the Judge's wife. Therefore, referring her case to the FBR for verification and scrutiny was wholly in accordance with the scheme of the 2001 Ordinance. In no way did the impugned direction to the FBR determine or influence the outcome of the proceedings which were to be conducted under the 2001 Ordinance by a Commissioner, Inland Revenue (CIR) who was duly authorised. Such proceedings before a statutory authority were completely independent and separate from the proceedings held before the (Supreme) Court under Article 184(3) of the Constitution.

During the hearing of the judgment under review, the Judge's wife made an oral statement through video link that presented her version of the sources of funds used for purchasing the foreign properties. She was informed at the outset that her statement will be recorded. She displayed before the camera documents that allegedly explained her sources of funding the properties. The Court allowed her to address the Bench for roughly 30 minutes but declined to consider her plea and documents on the ground that jurisdiction to ascertain the facts about the funds used for acquiring the properties lay with two fora in her case, namely, FBR (in her capacity as a taxpayer) and the Council (as a witness) both of which were available to her to do. Her statement clearly reflected her knowledge of the crucial issue, namely, her means for acquiring the properties and her plea on the subject i.e., her independent means for purchasing the same and her willingness to substantiate this claim. After hearing her, the Court decided to refer her to a competent forum, the FBR, to explain the nature and source of the funds utilised for buying the properties. By following this process, the essential ingredients of the right to be heard, namely, prior notice of the subject-matter and opportunity of hearing to articulate her plea, were complied with. As a result, the due process requirements of Art. 10A of the Constitution were fulfilled Ali Muhammad v. State PLD 2010 SC 623 and Michael Francis Hamilton v. Peter Charles Forrest [1981] AC 1038 ref.

In the present case, new material has surfaced during the proceedings of Commissioner, Inland Revenue (CIR). Documents including the Procuration and Delegation Form and the cheques issued by the former (law firm) partner of the Judge existed on the day the short order [reported as (PLD 2020 SC 346)] was passed. However, as these were confidential documents of the Judge's wife they were not in the knowledge of the other parties. It was only when the direction to the FBR was issued vide the short orderto proceed with the verification of the funding of the foreign properties owned by the Judge's wife that the CIRmade a request for information to her Banks under the 2001 Ordinance. The documents produced by the Bank revealed the connection of the petitioner-Judge with the ForeignCurrency Account of his wife. Resultantly, the perusal of and reliance on these documents in review jurisdiction is competent, relevant and critical for verifying the propriety of the Supreme Court's impugned direction to the FBR. Their contents are also crucial for arriving at an informed decision in the present review petitions.

By accepting the present review petitions and seeking to prevent a consideration of the freshly discovered relevant and genuine information, the Majority view has created an anomalous situation whereby a process of the Supreme Court in aid of justice has been turned into a process shrouding the truth under legal niceties. An unsatisfactory state of affairs, therefore, exists which unless explained casts an impression that the Court has adopted a different standard for one of its own. Judges occupy an exalted position in society as dispensers of justice. They are amongst the elites in society. Therefore, neglecting their duty to search and confront the truth goes against the express command of Almighty Allah who has warned against providing preferential treatment to privileged persons.

Surah Al-Isra, Verse 16 ref.

Judges, like all other persons in the Service of Pakistan and holding public office, are answerable for their errors and omissions. In the present case there is material that calls for an explanation before the Council which must be provided to protect the petitioner-Judge and the (Supreme) Court from aspersions cast on their integrity.

Per Munib Akhtar, J; Umar Ata Bandial, Sajjad Ali Shah and Qazi Muhammad Amin Ahmed, JJ. agreeing [Minority view]:

The Four Member Judgment (authored by Justice Maqbool Baqar, Justice Mazhar Alam Khan Miankhel, Justice Syed Mansoor Ali Shah and Justice Amin-ud-Din Khan) has purportedly also been signed by a former Supreme Court Judge i.e. Justice (R) Manzoor Ahmad Malik, who has expressed his agreement with the same. Said former Judge was of course a signatory to one of the short orders dated 26.04.2021 but he retired on 30-04-2021. He could not, as a matter of law, have signed the judgment.

Al-Jehad Trust v. Federation PLD 1996 SC 324 and CJP Iftikhar Muhammad Chaudhry v. President of Pakistan PLD 2010 SC 61 distinguished.

Once a Judge of the Supreme Court has retired he cannot thereafter give, make or sign any judgment, order or decree, and certainly not in such manner as has, or can have, operative effect. Upon retirement he has left office and thereafter cannot, as it were, return to service, whether of his own volition or at the request of any Judge(s) on the Court, unless the Constitution itself so allows. The former Judge i.e. Justice (R) Manzoor Ahmad Malik had retired by efflux of time and hence could not have signed the Four Member Judgment. His purported act of doing so, and expression of agreement, are in law non est and of no legal consequence, effect or operation. The Four Member Judgment remains precisely that: a judgment that has the support of only four of the Judges who heard and decided the review petitions.

Present review petitions were heard and decided by a 10-member Bench. The majority therefore had to comprise of at least six Judges. Three short orders were made in total. The short order made by Justice Umar Ata Bandial, Justice Sajjad Ali Shah, Justice Munib Akhtar and Justice Qazi Muhammad Amin Ahmed, had the support of only four Judges and can be put to one side. When the remaining two are considered it is seen that one commanded the support of five Judges (Justice Maqbool Baqar, Justice Manzoor Ahmad Malik, Justice Mazhar Alam Khan Miankhel, Justice Syed Mansoor Ali Shah and Justice Amin-ud-Din Khan) while the other was made by one Judge (Justice Yahya Afridi). Neither of these short orders had the support of six Judges and hence was not operative in and of itself. Rather, the two orders had to be considered in conjunction. What had operative effect was only that which was common between them. This was because it was only the commonality that commanded the support of a bare majority (i.e., six Judges) and therefore, and for that reason alone, had operative effect.

In the short order of Justice Maqbool Baqar, Justice Manzoor Ahmad Malik, Justice Mazhar Alam Khan Miankhel, Justice Syed Mansoor Ali Shah and Justice Amin-ud-Din Khan it was directed that "Resultantly, any such proceedings, actions, orders or reports cannot be considered or acted upon and pursued any further by any forum or authority including the Supreme Judicial Council." Said direction was not common in the short order passed by Justice Yahya Afridi, therefore said direction did not command the support of the majority, but only of, at most, a plurality (i.e., five Judges).Since even the commonality does not command the support of the majority it is not the judgment or ratio of the Court. Said direction therefore did not have operative effect. Any relevant forum or authority including the Supreme Judicial Council ('the Council') is therefore not precluded or prevented from considering, acting upon or pursuing any information or material contained in or to be obtained from "any such proceedings, actions, orders or reports".

There is no operative reasoning or ratio of the Court. Of course, there is an operative order in the field which is that what was common between the two short orders. It is not therefore the situation that the decision is bereft of any legal effect at all. Rather, the result is that the legally operative "short order" (i.e., the commonality) is not supported by any operative judgment (i.e., reasoning or ratio). There is nothing that commands the support of even a bare majority. There is no ratio or reasoning that has operative effect as being that of the Court. It therefore necessarily follows that neither the Four Member Judgment nor that of Justice Yahya Afridi nor such reasoning or ratio as may be common between them have any binding precedential effect or value.

Per Maqbool Baqar, Mazhar Alam Khan Miankhel, Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ [Majority view]

**(f) Administration of justice---**

----Courts cannot and should not create any right, liability or obligation that is not founded in law.

Yousaf Rerolling Mills v. Collector of Customs PLD 1973 SC 49 ref.

**(g) Maxim: Audi alteram partem, principle of---**

----Fair hearing, right of---Essential constituents of a fair hearing---To ensure the principle of fairness embedded in the right of hearing, the person sought to be affected must at least be made aware of the allegations made against him, upon which basis the decision is to follow, (i.e., notice of the case to be met) and, second, be given a fair opportunity to make any relevant statement putting forward his own case, and to correct or controvert any relevant statement brought forward to his prejudice (i.e., opportunity to explain)---In order to act justly and to reach at just ends by just means, a deciding authority is to comply with and implement, in all circumstances, these elementary and essential requirements of principle of fairness and right of hearing.

Kanada v. Government of Malaya (1962) AC 322; Ridge v. Baldwin (1964) AC 40; Pakistan v. Public at large PLD 1987 SC 304; Swadeshi Cotton Mills v. Union of India AIR 1981 SC 818 and University of Dacca v. Zakir Ahmed PLD 1965 SC 90 ref.

**(h) Maxim: Audi alteram partem, principle of---**

----Scope---Even in absence of any express provision in the statute, the principle of audi alteram partem is to be read into the relevant provision and applies in proceedings where adverse action is being considered to be taken against a person or if the contemplated action is going to affect any of his vested rights---Violation of this principle vitiates the proceedings and makes the action taken therein to be illegal, as the violation of said principle is considered as a violation of law.

Ali Muhammad v. State PLD 2010 SC 623; Asim Khan v. Zahir Shah 2007 SCMR 1451; PIA v. Nasir Jamal 2001 SCMR 934; Hazara Improvement Trust v. Qaisra Elahi 2005 SCMR 678; Anisa Rehman v. P.I.A.C. 1994 SCMR 2232 and Lilaram v. Ghulam Ali 1991 SCMR 932 ref.

**(i) Constitution of Pakistan---**

----Art. 187(1) & Pt. II, Chap. 1---"Power of the Supreme Court to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it"---Scope---Under Art. 187(1) of the Constitution, the Supreme Court can pass any order to do complete justice between the parties; however, it cannot make an order inconsistent with the fundamental rights or in contravention of any constitutional provision or any relevant statutory law.

Dossani Travels v. Travels Shop PLD 2014 SC 1 and Prem Chand v. Excise Commissioner AIR 1963 SC 996 ref.

**(j) Jurisdiction---**

----Scope---Where an authority has no jurisdiction in the matter under the law, jurisdiction cannot be conferred on that authority by an order of the Court.

Badshah Begum v. Additional Commissioner 2003 SCMR 629 ref.

**(k) Constitution of Pakistan---**

----Art. 209(8)---Code of Conduct for Judges of the Supreme Court and High Courts ('the Code of Conduct')---Spouses and children of Judges---No law or clause in the Code of Conduct prescribed for Judges of superior Courts makes the Judges liable to account for the alleged tax-evasion (if any) by his or her independent spouse---Nothing is present in any law or in the Code of Conduct which could possibly be stretched to hold a Judge liable for the conduct of his spouse and children, or for that matter of anybody else, without there being any evidence to connect him with, and hold him responsible for such conduct.

Messrs Avia International v. Assistant Collector of Customs 2004 PTD 997 ref.

**(l) Supreme Court Rules, 1980---**

----O.XXVI, R. 1---Civil Procedure Code (V of 1908), O. XLVII, R.1---Constitution of Pakistan, Art. 188---Review jurisdiction of the Supreme Court---Expression 'error apparent on the face of the record'---Meaning---Said expression cannot be defined with precision or exhaustiveness, and there would always remain an element of indefiniteness inherent in its very nature---Meaning of said expression is to be determined in each case on the basis of its own peculiar facts.

Anwar Husain v. Province of East Pakistan PLD 1961 Dacca 155 ref.

**(m) Constitution of Pakistan---**

----Art. 10A---Right to fair trial and due process---Scope---After recognition of the right to fair trial and due process as a fundamental right by insertion of Art. 10A in the Constitution, violation of the principles of natural justice, which are the necessary components of the right to fair trial and due process, is now to be taken as a violation of the said fundamental right as well.

**(n) Supreme Court Rules, 1980---**

----O.XXVI, R. 1---Civil Procedure Code (V of 1908), O. XLVII, R.1---Constitution of Pakistan, Art. 188---Review jurisdiction of the Supreme Court---Expression 'error apparent on the face of the record'---Scope---Any judgment pronounced or order made without adverting to, and in contravention of, the relevant provisions of law or Constitution is to be treated as an error apparent on the face of the record that warrants the review of that judgment or order.

Muhammad Amir v. Controller of Estate Duty PLD 1962 SC 335; Zulfikar Ali Bhutto v. State PLD 1979 SC 741; Suba v. Fatima Bibi 1996 SCMR 158 and Abdul Ghaffar v. Asghar Ali PLD 1998 SC 363 ref.

**(o) Supreme Court Rules, 1980---**

---O.XXVI, R. 1---Civil Procedure Code (V of 1908), O. XLVII, R. 1---Constitution of Pakistan, Art. 188---Review jurisdiction of the Supreme Court---Scope---Whenever Judges of the Supreme Court find that their judgment or order of which review is sought was pronounced or made without adverting to, and in contravention of, any provision of law or the Constitution, they must correct the error considering it their inviolable constitutional obligation and duty, not a favour or concession to the party seeking review---Judge, therefore, should not hesitate to review his/her decision if it is established not to be right.

**(p) Administration of justice---**

----When the basic order is without lawful authority, then the entire superstructure built on it falls on to the ground automatically.

Yousaf Ali v. Muhammad Aslam PLD 1958 SC 104; Executive District Officer v. Muhammad Younas 2007 SCMR 1835; Atta-ur-Rehman v. Umar Farooq PLD 2008 SC 663 and Province of Punjab v. Border Area Committee PLD 2011 SC 550 ref.

**(q) Constitution of Pakistan---**

----Art.4---Right to be dealt with in accordance with law---Scope---Constitutional guarantee of the right to be dealt with in accordance with law, under Art. 4 of the Constitution, is available not only to every citizen of the country but also to every other person for the time being within Pakistan---Said constitutional guarantee cannot be curtailed or limited in the case or matter of any person whosoever he may be and whatever the allegations against him may be.

Naveed Asghar v. State PLD 2021 SC 600 ref.

**(r) Constitution of Pakistan---**

----Arts. 209(5) & 209(6) & Preamble---'Independence of judiciary' and 'rule of law' importance of---Rule of law---Scope---Edifice of the judicial independence rests on the assumption that every Judge besides being fair and impartial is fiercely independent and is free to uphold his judicial views---Such judicial freedom is fundamental to the concept of the rule of law---Any attempt to muffle judicial independence or to stifle dissent shakes the foundation of a free and impartial judicial system, thus eroding public confidence on which the entire edifice of judicature stands---Judge whose decisions are dictated not by the fidelity to the letter and spirit of the law but based on what he deems to be palatable to the Government would cause irretrievable damage to the public confidence in the judiciary, and consequently jeopardize its credibility and moral authority---Rule of law and the independence of judiciary are conceptually interwoven---Without an independent judiciary, expecting the rule of law is a sheer farce---Rule of law and the independence of the judiciary are the only guarantee to the maintenance and preservation of a thriving democracy.

Per Yahya Afridi, J.;agreeing with the Majority view but with his own reasons [Majority view]

**(s) Supreme Court Rules, 1980---**

----O.XXVI, R. 1---Civil Procedure Code (V of 1908), O. XLVII, R.1---Constitution of Pakistan, Art. 188---Review jurisdiction of the Supreme Court---Expression 'error apparent on the face of the record'---Scope---Judgment passed on an erroneous assumption of material facts, or without adverting to a provision of law or Constitution, or without noticing an undisputed construction of law and Constitution amounts to an error apparent on the face of the record, and thus justifies positive exercise of the review jurisdiction.

Muhammad Boota v. Member (Revenue) BOR 2010 SCMR 1049 ref.

**(t) Constitution of Pakistan---**

----Art. 209(5)---Supreme Judicial Council ('the Council'), powers of---Expression 'information from any source' used in Art. 209(5) of the Constitution---Scope---Clause (5) of Art. 209 of the Constitution, clearly provides that "information from any source" can form the basis of an inquiry by the Council against a Judge of the Superior judiciary---Legal significance and practical implication of the insertion of the word "any" prefixing the word "source" in clause (5) of Art. 209 of the Constitution has, in fact, expanded the pool from which the Council may obtain "information" to initiate an inquiry into the conduct or capacity of a Judge of the Superior judiciary---To interpret the word "any" used in clause (5) of Art. 209 of the Constitution in a manner that would dilute the authority of the Council and restrict the information it can or cannot consider would amount to defeating the very command of the Constitution, therefore, the Council, "on information" emanating from "any source" can proceed, on its own motion, with an inquiry into the capacity or conduct of any Judge of the Superior judiciary.

**(u) Constitution of Pakistan---**

----Arts. 184(3), 188, 209(5)(b) & 209(8)---Income Tax Ordinance (XLIX of 2001), S. 116(1)(b)---Review petition before the Supreme Court challenging the directions given to the tax authorities by the Supreme Court to conduct an inquiry into the foreign assets of petitioner-Judge's family members and submit a report to the Supreme Judicial Council despite quashing of Presidential reference against the Judge---Maintainability---Said review petition was not maintainable as the locus standi of the petitioner-Judge to invoke the original jurisdiction of the Supreme Court under Art. 184(3) of the Constitution, as well as the review jurisdiction therein, stands eclipsed till he holds the office of a Judge of the Supreme Court; for he owes an obligation under clause (8) of Art. 209 of the Constitution to observe the Code of Conduct issued by the Council for Judges of the Superior judiciary, that, inter alia, requires him to avoid being involved in litigation, for himself or even on behalf of others, which includes public interest litigation under Art. 184(3) of the Constitution---Object is to avert any chance of a Judge of the Superior judiciary being placed in a position, where his conduct may be seen as unbecoming of a Judge, glimpses of which were seen during the proceedings of the present review petitions---Review petition filed by the petitioner-Judge was held to be not maintainable. [Minority view]

Per Umar Ata Bandial; Sajjad Ali Shah, Munib Akhtar and Qazi Muhammad Amin Ahmed, JJ. agreeing [Minority view]

**(v) Supreme Court Rules, 1980---**

----O.XXVI, R. 8---Civil Procedure Code (V of 1908), O. XLVII, R.1---Constitution of Pakistan, Art. 188---Review jurisdiction of the Supreme Court---Guiding principles of review jurisdiction stated.

Following are the guiding principles of review jurisdiction:

(i) Every judgment pronounced by the Court is to be considered a solemn and final decision on all points arising out of the case;

(ii) An error must be obvious and must not require an elaborate discussion to be detected;

(iii) An error should not only be significant but should also have a material effect on the outcome of the case in that it must change the decision of the case. Review jurisdiction is limited in nature and a review will only succeed if it can be shown that an error in the judgment has changed the outcome of the case, whether partially or entirely;

(iv) A review cannot be sustained merely on the ground that a different decision could have been taken by the Court; and

(v) A review is not an appeal or a rehearing.

Abdul Ghaffar-Abdul Rehman v. Asghar Ali PLD 1998 SC 363; Ghulam Murtaza v. Abdul Salam Shah 2010 SCMR 1883; Majid Mahmood v. Muhammad Shafi 2008 SCMR 554; Wajihul Hassan Zaidi v. Government of the Punjab PLD 2004 SC 801; Rashid Ali Channa v. Muhammad Junaid Farooqui 2017 SCMR 1519; Mukhtar Mai v. Abdul Khaliq 2019 SCMR 1302; Shireen Raza v. Federation of Pakistan 2002 SCMR 1218; Federation of Pakistan v. Muhammad Nawaz Sharif PLD 2009 SC 644 and Fida Hussain v. The Secretary, Kashmir Affairs and Northern Affairs Division PLD 1995 SC 701 ref.

**(w) Constitution of Pakistan---**

----Arts. 184(3) & 187(1)---Supreme Court issuing directions in its jurisdiction under Arts.184(3) & 187(1) of the Constitution---Scope---When the Supreme Court acts under the said two Articles of the Constitution it can issue directions which travel beyond the pleas/ pleadings of the parties---In its original jurisdiction under Art. 184(3) of the Constitution the Supreme Court can mould the relief in accordance with the facts and the circumstances that come to light during the proceedings.

Muhammad Hanif Abbasi v. Imran Khan Niazi PLD 2018 SC 189; Zulfiqar Ali Babu v. Government of the Punjab PLD 1997 SC 11 and Muhammad Asghar Khan v. Mirza Aslam Baig PLD 2013 SC 1 ref.

**(x) Constitution of Pakistan---**

---Arts. 176, 192(1) & 209(5)(b)---Judges of Superior Courts, accountability of---Financial affairs of the spouse and other family members of a Judge---Necessary corollary which flows from the nature of Judges' work and the unique position they occupy in society is that they, like other public servants, are expected to make reasonable efforts to keep themselves informed about the financial affairs of their spouse and other family members who are either dependent on them or with whom they have financial dealings---Although Judges may be protected from the ordinary processes of law, they are not subject to separate or lower legal standards of accountability compared to other public servants; they are answerable at the bare minimum against the same benchmarks applied to ordinary public servants; this includes being accountable for the unexplained assets of their spouses and family members---Only difference is that a Judge of a Superior Court is answerable before a specialised forum (i.e. the Supreme Judicial Council) created specifically for determining complaints of misconduct received against Judges.

**(y) Constitution of Pakistan---**

----Arts. 176, 192(1) & 209(5)(b)---National Accountability Ordinance (XVIII of 1999), S. 9(a)(v)---Prevention of Corruption Act (II of 1947), S. 5(1)(e)---Judges of Superior Courts, accountability of---National Accountability Ordinance, 1999 and Prevention of Corruption Act, 1947 are not applicable to Superior Court Judges, nevertheless, the legal tests and standards applied to other holders of public office/public servants under said laws can be utilised by the Supreme Judicial Council to evaluate the conduct of Judges.

Khan Asfandyar Wali v. Federation of Pakistan PLD 2001 SC 607; The State v. Mr. Justice Akhlaque Hussain PLD 1960 SC (Pak) 26 and The President v. Mr. Justice Shaukat Ali PLD 1971 SC 585 ref.

**(z) Constitution of Pakistan---**

----Arts. 176 & 192(1)---Judges of the High Courts and the Supreme Court---Said Judges are public servants and also in the Service of Pakistan; they occupy an office 'in connection with the affairs of the Federation'.

Muhammad Asghar Khan v. Mirza Aslam Baig PLD 2013 SC 1 and Salahuddin v. Frontier Sugar Mills and Distillery Ltd. PLD 1975 SC 244 ref.

**(aa) Constitution of Pakistan---**

----Arts. 184(3) & 187(1)---Power of Supreme Court to issue any directions necessary to do complete justice---Scope---Existence and exercise of the (Supreme) Court's power under the Constitution to issue directions is not dependent on express invocation of such power in its order---Not invoking the correct provision of law or citing an incorrect one for sustaining an order is of no consequence if the Court has jurisdiction under the law to pass that very order.

Olas Khan v. Chairman NAB PLD 2018 SC 40 ref.

**(bb) Civil Procedure Code (V of 1908)---**

----O. XLVII, R. 1---Review---Scope---In review proceedings the Court can examine only those events which existed at the time when the order was passed.

Rajah Kotagiri Venkata Subbamma Rao v. Rajah Vellanki Venkateama Rao (1900) LR 27 IA 197 and W.B. v. Kamal Sengupta [(2008) 8 SCC 612 ref.

**(cc) Constitution of Pakistan---**

----Preamble---Self-executory provisions of the Constitution---Meaning---When the Constitution intends any of its provisions to be immediately operational so that the right which it grants may be enjoyed and protected, or the duty which it imposes may be enforced without the aid of a legislative enactment, such provisions are termed self-executory.

Hakim Khan v. Government of Pakistan PLD 1992 SC 595 ref.

**(dd) Functus officio, doctrine of---**

----Scope---Body (or an authorised person) only becomes functus officio once it has passed an order or made a decision which is final so that no power is left with the said body to take any further action.

Black's Law Dictionary (10th Edn); Jowitt's Dictionary of English Law (5th Edn); Stroud's Judicial Dictionary (10th Edn) and Iqbal Pervaiz v. Harsan 2018 SCMR 359 ref.

**(ee) Constitution of Pakistan---**

----Arts. 209(5)(b) & 210---Supreme Judicial Council ('the Council'), jurisdiction of---Jurisdiction of the Council under Art. 209(5) of the Constitution is limited to inquiring into matters concerning a Judge of the Superior Courts---Only to the extent that the financial matters and activities of the family are intertwined with the affairs of a Judge, does such information become cognizable by the Council---Otherwise, the Council does not have jurisdiction to investigate into the affairs of a Judge's family members---Whilst the Council only has jurisdiction to examine the conduct and/or capacity of Judges of the Superior Courts, it may secure the attendance of any relevant person or the discovery/ production of any document whilst conducting an inquiry against a Judge---In exercise of such power the Council may yet examine persons, who are not Judges, or their record for understanding or deciding a pending information.

**(ff) Interpretation of statutes---**

----Ordinary and natural meaning---Scope---Words are generally to be given their ordinary and natural meaning except when such construction gives rise to absurdity or renders certain words meaningless.

Federation of Pakistan v. Durrani Ceramics 2014 SCMR 1630 ref.

**(gg) Constitution of Pakistan---**

----Art. 209(5)---Supreme Judicial Council ('the Council')---Information from 'any' source against a Judge---Scope---Supreme Court can be a source of such information under Art. 209(5) of the Constitution---Since the legislature itself consciously chose to keep the source of information in Art. 209 of the Constitution open ended, it will be contrary to the spirit of the provision to hold otherwise and prevent the Superior Courts from taking judicial notice of information and/or from forwarding the same for perusal and consideration of the Council when no such restriction exists in Art. 209(5) itself.

**(hh) Qanun-e-Shahadat (10 of 1984)---**

----Art. 18---Evidence Act (I of 1872), S. 5 (since repealed)---Illegally collected evidence---Survey of case-law and rules set therein regulating admissibility of illegally collected evidence in jurisdictions of Pakistan, India, United Kingdom, Canada, Australia and the United States of America stated.

Bisvil Spinners (Pvt) Ltd v. Pakistan PLD 1992 SC 96; Kuruma v. The Queen [ 1955] AC 197; R.M. Malkani v. State of Maharashtra AIR 1973 SC 157; Pooran Mal v. Director of Inspection (Investigation), New Delhi AIR 1974 SC 348; R v. Sang [ 1979] 2 All ER 1222; R v. Grant 2009 SCC 32; Weeks v. United States 232 US 383 (1914); United States v. Janis 428 US 433 (1976); INS v. Lopez-Mendoza 468 US 1032 (1984); Pennsylvania Board of Probation and Parole v Scott 524 US 357 (1998); Silverthorne Lumber Co, Inc v United States 251 US 385 (1920); Nix v. Williams (467 US 431 (1984); Brown v Illinois (422 US 590 (1975); United States v Leon (468 US 897 (1984) and Walder v. United States (347 US 62 (1954)) ref.

Per Munib Akhtar, J; Umar Ata Bandial; Sajjad Ali Shah and Qazi Muhammad Amin Ahmed, JJ. agreeing [Minority view]

**(ii) Constitution of Pakistan---**

----Art. 189---Multi-member Bench of the Supreme Court---Majority/ minority judgments---Operative decision---Scope---In any case heard by a multi-member Bench (i.e., a Bench comprising of more than one Judge, whether of even or odd numbered strength) the operative decision (whether judgment, decree or order) must have the support of a majority---Even fifty percent is not enough: that is only a plurality---Majority threshold must be crossed---"General" rule is that there must be at least a majority---If there is no majority then there is no operative order or decree, or in the case of a judgment no ratio decidendi of the Court, although there is of course a ratio of such judgment(s) as may have been delivered---Secondly, if there are multiple judgments or orders (short or otherwise) it is only the one which commands the support of the majority that has operative effect as the decision of the Court---If there be no such single judgment then it is the commonality (if any) between them such as commands the support of the majority that has operative effect---Anything (whether determination or decision on a legal point in issue, enunciation of any rule or principle of law or order) that falls short of such mark (i.e., is outside or beyond that what is common) is not the decision of the Court and has no operative effect.

Justice Qazi Faez Isa (in-person) Assisted by Barrister Kabir Hashmi for Petitioners (in C.R.Ps. Nos. 296 of 2020 and C.M.A. No. 3457 of 2021).

Mrs. Sarina Faez Isa (in-person) for Petitioner (in C.R.P. No. 298 of 2020 and Cr.O.Ps. Nos. 10-11 of 2021).

Hamid Khan, Senior Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Petitioners (in C.R.Ps. Nos.299, 300, 301 and 308 of 2020).

Rasheed A. Rizvi, Senior Advocate Supreme Court (through Video Link from Karachi) for Petitioners (in C.R.Ps. Nos.297 and 309 of 2020).

Nemo for Petitioner (in C.M.A. No. 4533 of 2020).

Syed Rifaqat Hussain Shah, Advocate-on-Record for Petitioners (in C.R.P. No. 509 of 2020).

Ch. Aamir Rehman, Addl. A.G.P. for Federation of Pakistan.

Sohail Mahmood, Addl. A.G.P. for President, PM and AGP.

Dates of hearing: 15th 19th, 20th, 21st, 22nd, 23rd and 26th April, 2021.

**JUDGMENT**

**MAQBOOL BAQAR, MAZHAR ALAM KHAN MIANKHEL, SYED MANSOOR ALI SHAH AND AMIN-UD-DIN KHAN, JJ.---**

Preface

This judgment must announce loud and clear that no one, including a Judge of the highest court in the land, is above the law. At the same time, no one, including a Judge of the highest court in the land, can be denied his right to be dealt with in accordance with law. Every citizen of Pakistan, notwithstanding his status or position, is entitled to due process of law in any action detrimental to his life, liberty, body, reputation or property under Article 4 of the Constitution and safeguarding of his fundamental rights guaranteed under Articles 9 to 28 of the Constitution. It matters little if the citizen happens to hold a high public office, he is equally subject to and entitled to the protection of law.

2. While judicial accountability is the cornerstone of judicial independence, it does not mean that accountability of a judge is bereft of due process of law and fair trial guaranteed under the Constitution. An open court-house is no less than a glass house, yet the judges boldly and courageously uphold the law even against the mightiest in the land, without fear and favour, in full public gaze. In doing so, they step on many a toes and rattle many a skeleton. This may at times, invite efforts to discredit them by creating doubts about their personal integrity. Since judges have no public platform to clarify, respond or defend themselves, such efforts go beyond the person of the judge and undermine public trust and public confidence in the judicial institution. Constitutional safeguard of due process to enjoy the protection of law and to be treated in accordance with law, therefore, assumes even greater significance in the case where integrity of a judge is in question.

Facts

3. The President of Pakistan, on advice of the Prime Minister of Pakistan, filed a Reference under Article 209 of the Islamic Republic of Pakistan 1973 ("Constitution") against Mr. Justice Qazi Faez Isa ("Justice Isa"), a Judge of the Supreme Court of Pakistan, in the Supreme Judicial Council of Pakistan ("Council") to conduct inquiry against him, alleging the commission of misconduct by Justice Isa mainly on the basis of his non-disclosure of three foreign properties of his family members - spouse and children - in the declaration of his assets filed with the annual income tax returns under section 116 of the Income Tax Ordinance, 2001 ("ITO"). The Council commenced inquiry-proceedings against Justice Isa, in the said Reference. Justice Isa and, among others, many Bar Councils and Bar Associations of the country, challenged the action of filing the Reference by the President and also the proceedings commenced on the basis thereof before the Council by invoking the original jurisdiction of this Court through constitution petitions filed under Article 184(3) of the Constitution. The constitution petitions were allowed by this Court vide order dated 19 June 2020, detailed reasons whereof were delivered on 23 October 2020. The Court quashed the Reference filed against the petitioner and held that the process adopted in preparing the Reference was fraught with illegalities of such scale and degree that amounted to mala fide in law[1] and declared that the proceedings initiated by the Council on the basis of that Reference, stood abated.[2] The Court left the matter of its alleged violation of section 116(1)(b) of the I.T.O. by Justice Isa to be determined in the first instance by the hierarchy of the concerned legal forums specified under the ITO. However, the Court, on its own, went on and directed the Commissioner of Inland Revenue, Islamabad ("Tax Commissioner") to initiate proceedings against the family members of Justice Isa [but not against Justice Isa], under the ITO and directed the Chairman, Federal Board of Revenue ("FBR"), to submit a report regarding the determination made in those proceedings by the Tax Commissioner to the Secretary, Council. The Secretary, Council was directed to place the said report before the Chairman, Council and the Chairman, Council to lay it before the Council, and the Council was asked to consider it in the matter of Justice Isa, in exercise of its suo motu powers, as it may deem appropriate. A strict time-frame was also given for immediate compliance of each step of the impugned directions. The impugned directions are reproduced here for ready reference:

Impugned directions

4. Within 7 days of this Order, the concerned Commissioner of Inland Revenue shall himself (and not some other officer exercising delegated powers) issue appropriate notices under the Income Tax Ordinance, 2001 ("2001 Ordinance") to the spouse and children of the Petitioner to offer an explanation regarding the nature and source of the funds (separately for each property) whereby the three properties in the United Kingdom (viz., No. 40, Oakdale Road, London E11 4DL; No. 90, Adelaide Road, London E10 5NW; and No. 50, Coniston Court, Kendal Street, London W2 2AN) that are in the names of the spouse and the children were acquired. For purposes of this Order the Commissioner Inland Revenue having jurisdiction over the spouse of the Petitioner (who must be a Commissioner exercising jurisdiction and performing functions at Islamabad) shall be deemed also to be the Commissioner having jurisdiction over the children. (The spouse and children are herein after referred to as "the respondents".) Any notices issued or proceedings taken (or proposed to be issued or taken) under the 2001 Ordinance in relation to any of the respondents in respect, or on account, of the properties aforesaid prior to the date of this Order stand terminated forthwith.
5. The notices shall be served at the official residence of the Petitioner at Islamabad through courier service and such other means as may be considered appropriate and shall be deemed served on the respondents when received at the said address.
6. The respondents shall furnish their replies to the notices along with such material and record as is deemed appropriate. In case any of them is outside the country, it shall be the responsibility of such person to timely file a response, and the proceedings before the Commissioner shall not be adjourned or delayed for the reason of nonavailability in Pakistan of such person.
7. Upon receipt of the replies (and of such additional material/ record as may be filed in response to such clarification or explanation, if any, as the Commissioner may, in writing, have sought), the

Commissioner shall give an opportunity of hearing to the respondents in person or through an authorized representative/ counsel and shall thereupon make an order in accordance with the 2001 Ordinance.

8. The proceedings shall be concluded before the Commissioner within 60 days of the date of receipt of the notices as aforesaid, and the order shall be issued by him within 75 days of the said date of receipt, and no adjournment or extension in time whatso-ever shall be given as affects or extends the aforesaid periods.

9. Within 7 days of the issuance of the order by the Commissioner, the Chairman, Federal Board of Revenue ("FBR") shall submit a report (to be personally signed by him) to the Council through its Secretary (i.e., the Registrar of the Supreme Court) regarding the proceedings as aforesaid, appending thereto the entire record of the said proceedings. The Secretary shall forthwith place such report before the Chairman of the Council (i.e., the Hon'ble Chief Justice of Pakistan) who shall, in such manner as is deemed appropriate, have the report laid before the Council for such perusal, consideration, action, order or proceedings, if any, in relation to the Petitioner as the Council may determine. The receipt of the report, the laying of it before the Council and the action/ proceedings, if any, or orders or directions, if any, as may be taken, made or given by the Council thereon shall be deemed, for purposes of Article 209 of the Constitution, to be in exercise of the suo motu jurisdiction as is conferred by that Article on the Council.

10. If, within 100 days from the date of this Order, no report as aforesaid is received by the Secretary from the Chairman, FBR, he shall inform the Chairman of the Council accordingly and shall, if so directed by him, write to the Chairman, FBR requiring an explanation as to why the report has not been received. If in reply the report is filed, then the matter shall proceed in terms of para 9 herein above. If a reply is received without the report or no reply is received, then the Secretary shall bring such fact to the attention of the Chairman of the Council who may direct that the matter be placed before the Council for such perusal, consideration, action, order or proceedings, if any, in relation to the Petitioner (or any other person as deemed appropriate) as the Council may determine. The action/ proceedings, if any, or orders or directions, if any, as may be taken, made or given by the Council shall be deemed, for purposes of Article 209 of the Constitution, to be in exercise of the suo motu jurisdiction as is conferred by that Article on the Council. Without prejudice to the foregoing, if at any stage the report is received from the Chairman, FBR, then the matter shall in any case proceed (or be deemed to proceed, as the case may be) in terms of para 9 herein above.

11. For the removal of any doubts, it is clarified that any of the proceedings under the 2001 Ordinance as herein contemplated on the one hand, and before the Council in terms of paras 9 or 10 herein above on the other, are distinct and separate from each other. Accordingly, nothing contained in this Order shall affect or prejudice the right(s) of appeal of any of the respondents under the 2001 Ordinance, if they feel aggrieved by the order made by the Commissioner or (as the case may be) any order made or decision taken at any appellate stage. Any such appeal(s) shall be decided on the merits, in accordance with the 2001 Ordinance. At the same time (and needless to say), the consideration by the Council of any matter placed before it under either paras 9 or 10 herein above shall not be affected by the filing or pendency of any appeal as aforesaid. But the Council may, if it deems appropriate, notice such appellate proceedings or orders/ decisions and may (for purposes only of the matter before it) make such orders or give such directions in relation thereto as it deems appropriate.

It is against these directions of the Court that Mrs. Isa ("petitioner"), the spouse of Justice Isa and other petitioners, namely, Justice Isa, the Bar Councils, Bar Associations and others, in whose constitution petitions these directions were made, have filed the present review petitions. It may be important to mention that we have treated Mrs. Isa as the main petitioner in the present review proceedings, because the contentions made, during arguments before us, mainly related to the contravention of her rights under the Constitution, law, and principles of natural justice, fair trial and due process.

Contentions of the parties

4. The petitioners, Mrs. Isa and Justice Isa, have appeared and argued in person, while the other petitioners have been represented through their learned counsel. They have mainly contended that: (i) the impugned directions have been made in contravention of the provisions of the ITO, particularly that of section 122 thereof, thereby infringing rights vested in the petitioner after lapse of the prescribed time-period for making amendment in the tax assessment order; (ii) the Tax Commissioner, Islamabad has no jurisdiction to proceed in the tax matter of the petitioner; (iii) the impugned directions have conferred such power and jurisdiction on the Tax Commissioner which are not vested in him by law; (iii) the impugned directions have been made in violation of the right of the petitioner to be heard before taking any adverse action against her - a basic principle of natural justice; (iv) the impugned directions have been made in breach of her fundamental right to fair trial and due process guaranteed by Article 10A of the Constitution and of her constitutional right to be dealt in accordance with law guaranteed by Article 4 of the Constitution; (v) the impugned directions have referred the tax matter of the petitioner, an independent person, to the Council for action against her spouse, Justice Isa, without his having any concern in her tax matters: Justice Isa cannot be held liable to account for alleged tax-evasion (if any) by her independent spouse, under any law of the land or under any clause in the Code of Conduct prescribed for Judges of the constitutional courts; (vi) this Court could not have issued any direction to the Council to exercise its suo motu jurisdiction; (vii) the impugned directions have been made against the Constitution, law and principles of natural justice, and are therefore liable to be recalled in exercise of review jurisdiction; and (vi) any proceedings taken and order passed by the Tax Commissioner and any action made by the Chairman FBR, of preparing and sending any report to the Council being a superstructure built on illegal and void impugned directions are also liable to be quashed.

5. Two learned Additional Attorneys-General have appeared before the Court on behalf of some of the respondents, namely, President of Pakistan, Federal Government, Prime Minister of Pakistan and Attorney-General for Pakistan ("contesting respondents") and opposed the review petitions, supporting the impugned directions. Rest of the respondents have not opted to appear and oppose the review petitions. Learned Additional Attorneys-General, to rebut the contentions of the petitioners, have submitted that: (i) the impugned directions do not comprise any adverse order against the petitioner, Mrs. Isa; therefore, there was no legal necessity to give her a hearing, as the Court has directed the Tax Commissioner to proceed against her in accordance with the law, i.e., the ITO; (ii) the Court has not, by the impugned directions, determined any civil right and obligation or any criminal charge against the petitioner; therefore, her fundamental right to fair trial and due process guaranteed by Article 10A of the Constitution has not been infringed by the impugned directions; (iii) the petitioner was provided with hearing on 18 June 2020 when the Court heard her on video link, before making the impugned directions on 19 June 2020; therefore, there has not been any violation of the principle of natural justice; (iv) the Court has directed the Tax Commissioner to proceed against the petitioner in accordance with law; therefore, constitutional right of the petitioner to be dealt in accordance with law guaranteed by Article 4 of the Constitution has not thereby been violated; (v) the public servants, including the Judges, are answerable to their disciplinary authorities for the unaccounted for assets of their spouses and children; therefore, the Court has legally and properly ordered for reporting the results of the proceedings to be conducted by the Tax Commissioner regarding the foreign properties of the petitioner, to the Council; (vi) the Court has not directed the Council to proceed against Justice Isa necessarily, rather has left it to the discretion of the Council to take such action or proceedings as deemed appropriate by the Council; (vii) the impugned directions have lawfully been made by the Court in exercise of its powers under Article 187 of the Constitution for doing complete justice; (viii) there is no apparent error in the impugned directions; therefore, they cannot be recalled within the limited scope of the review jurisdiction; and (ix) the Tax Commissioner could have, on his own, taken all such proceedings against the petitioner which have been directed to be taken by the Court in the impugned directions; therefore, the proceedings conducted and order made by the Tax Commissioner under the ITO against the petitioner cannot be quashed even if the impugned directions are recalled.

6. We have considered the arguments of the parties, gone through the case law referred and perused the record of the case minutely.

Judicial power of dissenting Judges in review jurisdiction

7. As two of us (Maqbool Baqar and Syed Mansoor Ali Shah, JJ.) and our learned brother, Yahya Afridi, J., earlier delivered dissenting opinions to the extent of making the impugned directions, we consider it appropriate to briefly state, at the very outset, our understanding of the judicial power to be exercised by the dissenting Judges in review jurisdiction. Needless to mention that the dissenting Judges on the Bench that heard the case, subject to their availability, are necessary members of the Bench constituted to hear review petition filed against the majority judgment, i.e., judgment of the Court,[3] in particular, when the Bench that first heard the case was a specially constituted Bench for hearing that case.

8. Review jurisdiction is conferred on this Court by Article 188 of the Constitution, which states that the "Supreme Court shall have power, subject to the provisions of any Act of Majlis-e-Shoora (Parliament) and of any rules made by the Supreme Court, to review any judgment pronounced or any order made by it." The phrase "any judgment pronounced or any order made by it" used in the Article unambiguously means "judgment or order of the Court." In case of a split decision (where there is dissent by one or more members of the Bench), the majority judgment is the judgment of the Supreme Court in terms of Article 188. While the majority and minority views of the judgment become part of the jurisprudence, to be read, analyzed and applied in future, it is the majority view, at the time, that attains the status of the judgment of the Court.

9. The Judgment of the Court is characterized as the judgment of the entire Bench, rather than of the majority judges. The entire Bench means the full numeric strength of the Bench, including the dissenting judges. For instance, if a case is decided by a 4-3 majority of a 7 member Bench, the judgment of the majority of 4 members, which becomes the judgment of the Court, is considered to be the judgment of a 7 member Bench of the Court, and not of a 4 member Bench. Any principle of law enunciated in such majority judgment of 4 members cannot be overruled in any other case by a unanimous decision of a 5, 6, or even 7 member Bench; this can be done only by a Bench larger than a 7 member Bench. Conversely, any principle of law enunciated in the unanimous judgment of a 5 member Bench can be overruled by majority of only 4 members sitting in a 6 or 7 member Bench. The extent of the judicial power of the members of a Bench in this regard is thus dependent upon the total numeric strength of the Bench.[4] In the present case, irrespective of the dissenting opinions of three members of the Bench, on the impugned directions, the majority judgment of the Court is to be considered to be a 10-member Bench judgment. For the purpose of exercising review jurisdiction under Article 188, the judgment of the Court (10-member Bench judgment) is under review, and the internal difference of opinion between members of the Bench in majority and minority is not relevant.

10. As the judgment of the Court is considered to be the judgment of all the members of that Bench, irrespective of its being majority judgment or unanimous judgment, there can be no difference in judicial powers of the members who earlier delivered the majority or minority judgment while hearing the review petition, under Article 188 of the Constitution, against the judgment of the Court, i.e., the majority judgment. This is because the judgment of the Court is under review and not the view of the majority judges. There is nothing in the Constitution or the Supreme Court Rules 1980 that restricts the judicial power of dissenting Judges in review jurisdiction in comparison to that of the Judges who delivered the majority judgment. The dissenting Judges, subject to their availability, being necessary members of the review Bench possess the same judicial power as that of the other members of the Bench.[5] The Judge whose opinion remained the minority view in the main case is as empowered to review the judgment of the Court, as can a Judge who delivered the majority opinion. This is because under the review jurisdiction the judges enjoy the flexibility to change their view, they might continue to hold or reverse their earlier view and thus subscribe to either the earlier majority or minority view. Adjudication is a deliberative process and the power of review, within its limited scope, allows the judge to reconsider his earlier opinion. Hence, there

can be no fetters on the exercise of his judicial power as that would offend the fundamental constitutional value of independence of the judiciary.

11. We may, however, underline the distinction between the revisiting of a principle of law enunciated in a judgment delivered in one case by a larger Bench of this Court in any other case and the review of its own judgment by a Bench of this Court in the same case: in the latter situation, the review Bench with the same Judges, if available, and with the same numeric strength can review, within the scope of its review jurisdiction, any part of its judgment including any principle of law enunciated therein.

Grounds of review

12. Rule 1 of Order XXVI of the Supreme Court Rules, 1980 provides that subject to the law and the practice of the Court, the Court may review its judgment or order in a Civil proceeding on grounds similar to those mentioned in Order XLVII, Rule 1 of the Code of Civil Procedure, 1908 and in a criminal proceeding on the ground of an error apparent on the face of the record. Under Order XLVII, Rule 1 of the Code of Civil Procedure 1908, there are three grounds of review: (i) the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the applicant or could not be produced by him at the time when the judgment was pronounced or order made, (ii) some mistake or error apparent on the face of the record, and (iii) any other sufficient reason. These grounds of review are, in fact, limitations on the power of review of this Court.

13. With this understanding that all members of the Bench (10 members) enjoy equal judicial power in review jurisdiction, we approach the three core questions involved in the present review petitions, in the light of the respective contentions of the parties.

Questions for determination

14. The core questions that arise out of the contentions of the parties, for our determination are:

i. Whether the directions contained in paragraphs 4 to 11 of the order dated 19 June 2020[6] ("impugned directions"), supported by the detailed reasons of the majority judgment delivered on 23 October 2020,[7] ("judgment under review") have been made by the Court without adhering to the principles of natural justice, fair trial and due process and by contravening the relevant provisions of the law and the Constitution;

ii. If the impugned directions are found to have been so made, whether they can be recalled in exercise, and within the scope, of review jurisdiction; and

iii. If the impugned directions are recalled, what will be the legal status and effect of any proceedings taken, orders passed or actions made in pursuance of those directions?

Question (i) as to constitutionality and legality of the impugned directions

15. This Court as back as in the year 1959 held in Chief Commissioner v. Dina Sohrab[8] that "it cannot be disputed that it is a principle of natural justice that no one should be dealt with to his material disadvantage or deprived of liberty or property without having an opportunity of being heard and making his defence", and later observed in Aman Ullah v. Federal Government[9] that "whenever a hearing has been provided it has to be meaningful." We are, therefore, to determine whether, in the present case, the impugned directions have the effect of causing any "material disadvantage" to the petitioner, Mrs. Isa, and whether a fair and "meaningful hearing" was given to her before making the impugned directions.

(a) Direction for tax proceedings against the petitioner and "material disadvantage" to her

14(sic). The petitioner has argued that the impugned directions affected her rights that had vested in her after lapse of the period prescribed under the ITO for issuing, or making amendment in, the tax assessment order; therefore, such directions could not have been issued without giving her an opportunity of fair hearing to put forth and explain her case against the issuance of such directions. She has submitted that under the ITO, the Tax Commissioner could not have issued any notice to her to explain her income, and make any assessment order for payment of tax against her, after lapse of a period of five years from the end of the tax year to which that income relates. The learned Additional Attorneys-General, opposing the contentions of the petitioners, submitted that the Court has, by the impugned directions, directed the Tax Commissioner to proceed against the petitioner in accordance with the law, i.e., the ITO, and has not made

any adverse order against the petitioner; therefore, it was not necessary to provide an opportunity of hearing to the petitioner before making the impugned directions.

16. A plain reading of the relevant provisions of the ITO, i.e., sections 114, 116, 120, 121 and 122, shows that section 114 of the ITO requires certain specified persons to furnish a return of their income for a tax year, accompanied with, inter alia, evidence of payment of tax due as per return of income and a wealth statement as required under Section 116. It also authorizes the Tax Commissioner to require, by notice in writing, any person who, in his opinion, is required to file a return of income for a tax year but who has failed to do so, to furnish a return of income for that year, in respect of one or more of the last five completed tax years. The Tax Commissioner can, under Section 120, make any adjustment in the income tax return filed by a taxpayer within six months of filing of return, or issue notice to the taxpayer informing him of the deficiencies in the tax return and directing him to provide any information, particulars, statement or documents till the expiry of one hundred and eighty days from the end of the financial year (six months) in which return was furnished. If no such adjustment is made or no such notice is issued within the prescribed period (six months), the income tax return filed by the taxpayer is treated to be complete and the assessment of due tax made by the taxpayer is deemed to be the assessment made by the Tax Commissioner. Under Section 121, the Tax Commissioner can by himself issue the tax assessment order for a tax year within a period of five years after the end of that tax year if the taxpayer has not filed the income tax return of that year. While under Section 122, he can amend a tax assessment order treated as such under Section 120 or a tax assessment order issued under Section 121 within a period of five years from the end of the financial year in which he has issued or treated to have issued the tax assessment order to the taxpayer.

17. The foreign properties were purchased, in the present case, by the petitioner and her children in the years 2004 and 2013; their income and sources to purchase those properties obviously relate to those years or the years prior thereto. When this Court made the impugned directions to the Tax Commissioner on 19 June 2020, a period of more than five years had lapsed since the end of those tax years to which their income and sources of fund for purchase of those properties relate. Therefore, the impugned directions, prima facie, affected the vested right of the petitioner, as this Court has, in several cases,[10] held that after the expiry of the statutory period a vested right accrues to the taxpayer that his assessment will not be reopened.

18. The bar of time-limit within which an assessment can be amended under Section 122 of the ITO, as held by this Court in Commissioner of Income Tax v. Eli Lilly Ltd.,[11] is a statutory recognition of the protection against arbitrary power of reopening or amending a tax assessment after the expiry of the prescribed period. This statutory bar vests a right in the taxpayer that after efflux of the prescribed period, his tax assessment will not be reopened or amended. The power conferred by Section 122 on the Tax Commissioner, having the potential of adding to the tax liability of the taxpayer, is more substantive than procedural; therefore, even any legislative amendment in the time-period prescribed in that Section cannot be applied retrospectively unless the Legislature gives that amendment retrospective effect by express words or necessary implication. Thus, there cannot be any cavil to the proposition that the Court cannot undo the statutory bar of time-limit provided in Section 122 of the ITO by its order or direction. The submission of the contesting respondents that the impugned directions cannot be termed as an adverse order against the petitioner is, therefore, not valid.

19. This Court has persistently reiterated the well-established principle that the courts cannot and should not create any right, liability or obligation that is not founded in law. One may refer to the case of the State v. Ziaur Rehman[12], in this regard. This principle is applied in the realm of taxation with even greater force, and thus while construing taxing statutes the language used, as held in Yousaf Rerolling Mills v. Collector of Customs,[13] is not to be either stretched in favour of the State, or narrowed in favour of the taxpayer. While interpreting tax laws Courts must look to the words of the statute and interpret it in light of what is clearly expressed and, in the words of Rowlett J. in Brady Syndicate v. Land Revenue Commissioner[14] quoted by Hamoodur Rehman, J. in Nawabzada Amir Khan v. Collector of Estate Duty[15],

"in a taxing Act, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

20. The submission of the contesting respondents that the Court directed the Tax Commissioner to proceed against the petitioner in accordance with the provisions of the ITO, and not otherwise, also appears incorrect. Had the Court directed the Tax Commissioner to issue notice to the petitioner after ascertaining his authority to do so under the ITO with the expression that "the Tax Commissioner shall, subject to the provisions of the ITO, issue notice to the petitioner", the submission of the contesting respondents might have carried weight. But the impugned directions did not leave any option with the Tax Commissioner to consider his legal authority before initiating proceedings in the tax matter of the petitioner. Further, it was admittedly the Tax Commissioner, Karachi who had the jurisdiction, under Section 209 of the ITO, to proceed in respect of the income tax returns filed by the petitioner, but the impugned directions mandated the Tax Commissioner, Islamabad to proceed in the matter. And it was only after the impugned directions that the FBR transferred the cases of the petitioner and of her children to the Tax Commissioner, Islamabad vide its order dated 25-06-2020. The impugned directions have, thus, affected the vested right of the petitioner which have accrued to her after lapse of the period prescribed under Sections 121 and 122 of the ITO for issuing, or making amendment in, the tax assessment order and have the effect of causing "material disadvantage" to the petitioner. Therefore, it was necessary to provide her a fair and "meaningful hearing" before making the impugned directions. Whether she was provided with such a "hearing" is the question, which we address hereunder.

(b) Hearing of the petitioner on video-link and the right of hearing.

21. The contesting respondents have submitted that the petitioner was provided with a hearing on 18 June 2020 when the Court heard her via video-link from her residence, before making the impugned directions on 19 June 2020, while the petitioner has argued that her voluntary statement made through video-link does not constitute a "meaningful hearing" that justifies the making of the impugned directions against her. To decide whether a fair and meaningful hearing was given to the petitioner before making the impugned directions, it is necessary to know: What does a fair hearing envisage? And what are the necessary requirements so that a hearing may be said to be fair and meaningful?

(c) Essential constituents of a fair hearing

22. The right of hearing is one of the basic principles of natural justice, expressed in the maxim audi alteram partem, i.e., no one is to be condemned unheard (right to be heard). The principles of natural justice aim to secure justice or to prevent miscarriage of justice. Lord Denning, speaking for the Privy Council in Kanada v. Government of Malaya,[16] described the two necessary characteristics of the right of hearing thus: "If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence is given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them...It follows, of course, that the Judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other." Lord Morris reiterated and re-emphasized these essential requirements of the right of hearing in Ridge v. Baldwin.[17] His lordship said: "It is well-established that the essential requirements of natural justice at least include that before someone is condemned he is to have an opportunity of defending himself and in order that he may do so that he is to be made aware of the charges or allegations or suggestions which he has to meet... here is something which is basic to our system: the importance of upholding it far transcend the significance of any particular case."

23. Justice Muhammad Afzal Zullah, speaking for this Court in Pakistan v. Public at large[18] referred to various injunctions of Islam and instances contained in the Holy Quran and Sunnah of the Holy Prophet (PBUH) and observed: "Right to property and honour, in addition to life, were also declared sacred which means: not only that their violation is to be punished and/or compensated but also that it is to be prevented... All this cannot be possible without a notice and opportunity of hearing. The denial of these safeguards for

doing justice would amount to Zulm [injustice] and Ziaditi [wrong doing] against oneself as also the victim... Command [of hearing the arguments of both parties] is specific to the effect that when a public authority is to be exercised for resolving a controversy regarding rights and liabilities, the decision would not be rendered without proceedings in which the person affected is also afforded an opportunity of hearing...It is common principle which governs the administration of justice in Islam that in case of liability with penal or quasi-penal consequences and/or deprivation of basic rights a notice as well as an opportunity of hearing, are of absolute necessity. This by itself has to be recognized as a basic right."[19]

24. Justice Sarkaria of the Indian Supreme Court also described these two facets of the rule as to right of hearing as "universally respected" in Swadeshi Cotton Mills v. Union of India.[20] He observed that the "maxim audi alteram partem has many facets. Two of them are: (a) notice of the case to be met; and (b) opportunity to explain. This rule is universally respected and duty to afford a fair hearing in Lord Loreburn's oft-quoted language, is 'a duty lying upon everyone who decides something', in the exercise of legal power. The rule cannot be sacrificed at the altar of administrative convenience or celerity; for, 'convenience and justice' -as Lord Atkin felicitously put it- 'are often not on speaking terms'."[21]

25. Thus, the general consensus of judicial opinions, as noted by this Court in University of Dacca v. Zakir Ahmed,[22] seems to be that to ensure the principle of fairness embedded in the right of hearing, the person sought to be affected must at least: (i) be made aware of the allegations made against him, upon which basis the decision is to follow, (i.e., notice of the case to be met) and (ii) be given a fair opportunity to make any relevant statement putting forward his own case, and to correct or controvert any relevant statement brought forward to his prejudice (i.e., opportunity to explain). In other words, in order to act justly and to reach at just ends by just means, a deciding authority is to comply with and implement, in all circumstances, these elementary and essential requirements of principle of fairness and right of hearing. As Lawton, L.J. said in Maxwell v. Department of Trade[23] that "doing what is right may still result in unfairness if it is done in the wrong way".

(d) Status of hearing petitioner on video-link before making impugned directions

26. In the light of the elementary and essential requirements for the fulfillment of the right of hearing, namely, (i) notice of the case to be met and (ii) opportunity to explain, we proceed to examine whether, in the present case, these essential requirements of right of hearing were complied with by providing the petitioner an opportunity of hearing on video-link, before making the impugned directions.

27. The Constitution Petition No. 17 of 2019 wherein the impugned directions have been made was filed by Justice Isa on 7 August 2019 and decided by the Court on 19 June 2020. On 17 June 2020, when concluding arguments of the respondents were being heard, Justice Isa appeared in person, for the first time, in Court and verbally conveyed the request of his spouse desiring to make a statement in Court on video link. The said request was allowed by the Court on 18 June 2020, and on the same day at 4:00 p.m. she addressed the Court via video-link from her residence and made her statement. The recording of her said statement was made and the transcript thereof was also prepared only for perusal of the Members of the Bench under order of the Hon'ble Senior Member of the Bench, the master and in-charge of the orderly conduct of court-proceedings. On the next day, i.e., 19 June 2020, the constitution petitions were decided and the impugned directions were made in the short order of the Court.

28. We have very carefully read the transcript of her statement as well as of the observations made by the Hon'ble Senior Member of the Bench. We do not find in it that his lordship or any other Hon'ble Member of the Bench asked her whether she had anything to say if the Court would direct the tax authorities to inquire into her sources of fund whereby she had purchased the foreign properties, and to conduct proceedings for determining her tax liability regarding those properties under the ITO. She was not informed of the action the Court was contemplating to take, nor was she given a chance to state her stance on that. Thus, she was not given "notice of the case to be met", nor was she provided with an "opportunity to explain" why the Court should not make such directions. Both the very essential requirements of right of hearing were not complied with before making the impugned directions. Hearing the petitioner on 18 June 2020 by the Court on video-link before making the impugned directions on 19 June 2020, therefore,

cannot be said to be a fair and "meaningful hearing" in the context of making the impugned directions. While the independent, adult and married children of the petitioner (her son and daughter) were not heard at all, before making the impugned directions that related to and affected them also. The impugned directions must have come as a surprise to the petitioner and her children.

(e) Effect of violation of right of hearing (principle of audi alteram partem)

29. This Court has time and again reiterated[24] that even in absence of any express provision in the statute, the principle of audi alteram partem is to be read into the relevant provision and applies in proceedings where adverse action is being considered to be taken against a person or if the contemplated action is going to affect any of his vested rights. The violation of this principle vitiates the proceedings and makes the action taken therein to be illegal, as the violation of this principle is considered as a violation of law.[25]

(f) Right of hearing and Article 10A of the Constitution

30. It may be pertinent to highlight here that after the insertion of Article 10A in the Constitution, "right of hearing" being a necessary component of "fair trial" and "due process" has become a fundamental right and is now to be read into every statute enacted by the Legislature by force of the constitutional provision, which was earlier so read because of the judicial pronouncements. Article 10A is cited here for ready reference:

10A-Right to fair trial

For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.

The expression "civil rights and obligations" used in Article 10A is of wide and expansive amplitude: it covers everything that has civil consequences. And "civil consequences", in the words of Lord Denning,[26] "cover infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. In its comprehensive connotation, everything that affects a citizen in his civil life inflicts a civil consequence." The petitioner, in the present case, was deprived of her vested right by the impugned directions, without providing her an opportunity of fair and meaningful hearing, i.e., by giving her notice of the contemplated action (the impugned directions) and opportunity to explain why such action (the impugned directions) should not be made. The impugned directions are, therefore, vitiated on this ground.

(g) Right of petitioner (spouse of a Judge) to be dealt with in accordance with law

31. We feel constrained to observe that the petitioner cannot be penalized and deprived of her constitutional right to be dealt with in accordance with law merely because she is the spouse of a Judge and action against her would establish the impartiality of the Court. We believe that public confidence in the impartiality and fairness of the court-process can be achieved only when Judges decide the matters presented before them against all persons, whosoever they may be, in accordance with law without fear or favour. Judges are under oath to discharge their duties and perform their functions, honestly to the best of their ability and faithfully in accordance with the Constitution and the law, and to do in all circumstances, right to all manner of people according to law without fear or favor, affection or ill-will. They cannot deviate from their solemn oath even if any popular action taken otherwise than in accordance with law helps paint the image of the Court in better light. Judges are to decide in accordance with law and protect the fundamental rights rather than sacrifice these constitutional rights at the altar of expediency and image building of the Court.

(h) Scope of the powers under Article 187(1) of the Constitution

32. The learned Additional Attorneys-General have attempted to support the impugned directions by making reference to the provision of Article 187(1) of the Constitution also. They have submitted that this Court, under the said constitutional provision, can issue any direction for doing complete justice. The petitioners have opposed it with the contention that no reference to Article 187(1) of the Constitution was made by the Court for making the impugned directions, therefore, the same cannot be treated to have been issued under that provision of the Constitution. They have further submitted that even under the said

Article, the Court could not have made the impugned directions in breach of the right of hearing of the petitioner, Mrs. Isa, and conferred such authority and jurisdiction on the Tax Commissioner which he did not have under the ITO.

33. So far as the contention of the petitioners that no reference to Article 187(1) of the Constitution was made by the Court for issuing the impugned directions, therefore, the same cannot be treated to have been issued under the said Article is concerned, we do not find it tenable. If this Court is found to have power to issue the impugned directions under Article 187(1) of the Constitution, the express mentioning of that Article while making the impugned directions was not necessary. We are, therefore, to see only whether this Court could have issued the impugned directions under Article 187(1) of the Constitution. We consider it proper to reproduce the provisions of Article 187(1) of the Constitution, for ease of reference, before appreciating the respective submissions of the parties on it:

Article 187(1):

Subject to clause (2) of Article 175, the Supreme Court shall have power to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it, including an order for the purpose of securing the attendance of any person or the discovery or production of any document.

No doubt, this Court has been conferred, under Article 187(1) of the Constitution, very vast power to issue "such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it", but the Court ordinarily issues such directions, orders or decrees, under Article 187, which are consequential or incidental to the matter adjudicated upon by the Court or to the relief prayed for by the parties.

34. The question that needs consideration, in the present case, however is whether the Court can issue any direction, order or decree against a person, under this Article, in contravention of provisions of some law. After deep deliberation, we find that the Court cannot do so. The main reason for our reaching this conclusion is that as per Article 4 of the Constitution, to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every person, and no action detrimental to the life, liberty, body, reputation or property of any person can be taken except in accordance with law. The right to be dealt with in accordance with law assured by Article 4 of the Constitution stands at a high pedestal and even outshines fundamental rights guaranteed by Articles 9 to 28 of the Constitution, as this right cannot be suspended during the proclamation and imposition of Emergency under Article 233 of the Constitution.[27] Article 4 of the Constitution is the bedrock of the rule of law, and antithesis to the rule of men, in our country. It is a restraint on the executive and judicial organs of the State to abide by the rule of law.[28] No person, authority, tribunal or court exercising executive or judicial powers can take any action against any person in contravention of any law. There is no exception to this principle, which equally applies to this Court exercising its judicial powers, including the power under Article 187(1) of the Constitution. Under the said Article, the Court can pass any order to do complete justice between the parties; however, it cannot make an order inconsistent with the fundamental rights or in contravention of any constitutional provision or any relevant statutory law.[29]

35. The Tax Commissioner, Islamabad had no territorial jurisdiction under Section 209 of the ITO and no authority and power to issue a tax assessment order under Section 121 or to amend a tax assessment order under Section 122 for a tax year after lapse of a period of five years from the end of that tax year, against the petitioner. The impugned directions mandated him to do that which he could not have done under the law, i.e., the ITO. Needless to mention, that if an Authority has no jurisdiction in the matter under the law, the jurisdiction cannot be conferred on that Authority by an order of the Court;[30] but the impugned directions had the effect of doing so. The Tax Commissioner could not have proceeded after lapse of the statutory period, against any other person; the petitioner has, it appears, been discriminated and deprived of her fundamental right to equality before law and equal protection of law guaranteed under Article 25 of the Constitution, by the impugned directions, in addition to negation of her right of hearing enshrined in fundamental right to "fair trial" and "due process" guaranteed under Article 10A and

constitutional right to be dealt with in accordance with law guaranteed by Article 4 of the Constitution. We, therefore, find that the impugned directions could not have been made by this Court in exercise of its power under Article 187(1) of the Constitution.

(i) Constitutionality of referring the matter to the Supreme Judicial Council for exercise of its suo motu power

36. As to referring the result of tax proceedings to be conducted against the petitioner, through report of the Chairman FBR, to the Council for considering suo motu action against Justice Isa, the petitioners have contended that the tax matter of the petitioner, an independent person, could not have been referred to the Council for action against her spouse, Justice Isa, without his having any concern in her tax matters; that Justice Isa cannot be held liable to account for alleged tax-evasion (if any) by her independent spouse, under any law of the land or under any clause in the Code of Conduct prescribed for Judges of superior Courts; and that this Court could not have issued any direction to the Council to exercise its suo motu jurisdiction. On the other hand, the contesting respondents have submitted that the public servants, including the Judges, are answerable to their disciplinary authorities for the unaccounted for assets of their spouses and children, therefore, the Court has legally and properly ordered for reporting the results of the proceedings to be conducted by the Tax Commissioner regarding the foreign properties of the petitioner, to the Council; and that the Court has not directed the Council to proceed against Justice Isa necessarily, rather has left it to the discretion of the Council to take such action as deemed appropriate by it.

37. We have considered the respective contentions of the parties on this point carefully. We agree with the submission of the contesting respondents that this Court did not direct the Council to proceed against Justice Isa necessarily, rather left it to the discretion of the Council to take such action as deemed appropriate by the Council, but the question is whether any law or any clause in the Code of Conduct prescribed for Judges of superior Courts makes the Judges liable to account for the alleged tax-evasion (if any) by his or her independent spouse. No such law or clause in the Code of Conduct has been referred to us, during arguments. We, therefore, find the answer to the said question clearly in the negative.

38. The petitioner, Mrs. Isa, and her children being private citizens, their tax matters had no nexus with the essential pre-requisite for invoking and maintaining any proceedings in the original jurisdiction of the Court under Article 184(3) of the Constitution, and were thus not amenable to the jurisdiction that was invoked and exercised thereunder through the short order dated 19.06.2020. Further, the tax matter of the petitioner, Mrs. Isa, could not have been referred to the Council as the role and jurisdiction of the Council is limited to the matters relating to the conduct and capability of the superior Court Judges. It is not mandated to delve into the affairs of someone who is not a judge of a superior Court. The impugned directions tend to stretch the scope of jurisdiction of the Council beyond the constitutional mandate and vest in the Council the jurisdiction and authority not granted to it by the Constitution.

39. The impugned directions also create an anomalous situation as they provide that the proceedings before the Council, as contemplated thereby, shall not be effected by the filing or pendency of any appeal under the ITO against the order/report of the Tax Commissioner, or against any order made or decision taken at any appellate stage. If in the event the Council, on the basis of the report submitted by the Chairman FBR in pursuance of the impugned directions, recommends removal of Justice Isa, but subsequently Mrs Isa, succeeds in her challenge to the order of the Tax Commissioner, and the said order is found not sustainable, the time for the retrieval may have passed as by then Justice Isa may have reached the age of superannuation. The injury inflicted upon Justice Isa and the damage suffered by this institution will thus be irretrievable. In a reverse scenario where the Council may not agree with the findings of the Tax Commissioner, but such findings are upheld by the forums, including this Court, before which the Tax Commissioner's findings are amenable to correction, an anomalous and embarrassing situation may occur.

(j) Obligation of a Judge as to the knowledge of financial matters of his or her financially independent family members.

40. So far as the submission of the contesting respondents is concerned, that the public servants, including the Judges, are answerable to their disciplinary authorities for the unaccounted for assets of their

spouses and children. Nothing is there in any law or in the Judges' Code of Conduct which could possibly be stretched to hold a Judge liable for the conduct of his spouse and children, or for that matter of anybody else, without there being any evidence to connect him with, and hold him responsible for such conduct. Needless to remind the salutary principle of law that everybody is responsible for his own deeds or misdeeds, acts and omissions, and nobody incurs any liability on account of any wrong committed by any other person.[31]

(k) Infringement of the Independence of the Supreme Judicial Council

41. Another aspect of referring the matter to the Council by this Court for exercise of its suo motu power is that it infringes the independence of the Council. Provisions of Articles 209 and 211 of the Constitution ensure the independence of the Council: only the President of Pakistan, acting in accordance with the constitutional procedure prescribed under Article 209 read with Article 48(1), can direct the Council to inquire into the matter of alleged misconduct or incapacity of Judges of the constitutional courts, and the proceedings before the Council cannot be called in question in any court including this Court as provided in Article 211 of the Constitution except when the Council acts with mala fide (in fact or in law), without jurisdiction or coram non judice. No one before us had argued that the Council with mala fide (in fact or in law) was not performing its constitutional duty under Article 209 of the Constitution; therefore, there was no occasion for this Court to direct the Chairman, Council to place the report of the Chairman, FBR regarding decision of the Tax Commissioner in the tax matter of Mrs. Isa and ask the Council to even conduct "proceedings" to decide whether or not it will inquire into the matter of alleged misconduct against Justice Isa in exercise of its suo motu powers. To uphold the independence of judiciary and to protect the Judges of constitutional courts against unwarranted harassment and oppression, the Constitution has established and constituted the Council to proceed and inquire into the allegations of incapacity or misconduct against such Judges independent of any extraneous influence, on direction of the President or in exercise its suo motu powers. In Ikram Chaudhry v. Federation,[32] Chief Justice Ajmal Mian, a distinguished Judge of this Court, speaking for a five member Bench of this Court held:

> [Clause (5) of Article 209 of the Constitution] does not admit filing of a Constitutional petition for a direction to the Supreme Judicial Council or to the President to initiate proceedings of a judicial misconduct against a Judge of a superior Court ... This Court or a High Court cannot take upon itself the exercise to record even a tentative finding that a particular Judge has committed misconduct warranting filing of a reference against him under Article 209 of the Constitution.

Therefore, asking the Council, by the impugned directions, to conduct "proceedings" to decide whether or not it will inquire into the matter of alleged misconduct by Justice Isa in exercise of its suo motu powers is also tantamount to interference into the independent functioning of the Council and, thus, against the spirit of the provisions of Articles 209 and 211 of the Constitution.

(l) Government Servants cannot file complaints against judges directly

42. Further, we note that the impugned direction to the Chairman, FBR to submit report to the Council and asking the Council to consider that report for deciding to take any action thereon against Justice Isa have the effect of directing the Chairman, FBR to file a complaint in the Council against Justice Isa, in the form of report. The impugned directions have thus authorized the Chairman, FBR to do that which he cannot do under the Constitution and the law. He being an officer subordinate to the Federal Government cannot make any complaint against a constitutional court Judge directly to the Council; only the Federal Government can do so and that too by the constitutional process of acting through the President. If the officers of the Federal or Provincial Governments or of the autonomous bodies or authorities under the control of such Governments are allowed or empowered to file complaints concerning or emanating from their official actions against Judges of the constitutional courts who, in exercise of their constitutional jurisdiction, make judicial review of official actions and inactions of such officers, there would be disastrous consequences for the independence of judiciary. This crucial aspect could not be noticed at the time of making the impugned directions, and it vitiates that direction of the Court being against the very

fundamental right of the public for which enforcement this Court entertained the constitution petitions in the present matter, i.e., the independence of judiciary.

Conclusion on question (i)

43. The above discussion, thus, leads us to conclude and answer question (i) in affirmative: the impugned directions are found to have been made by this Court without adhering to the principle of natural justice, fair trial and due process, i.e., the petitioner's right of hearing, guaranteed under Article 10A of the Constitution and without adverting to, and in contravention of, the relevant provisions of the law, i.e., Sections 114-122 and 209 of the Income Tax Ordinance, 2001 and the scope of Article 187 in the context of Article 4 of the Constitution.

Question (ii) as to recalling impugned directions in review jurisdiction

44. It would not take long to answer this question as the extent and scope of the review jurisdiction of this Court, in the light of the relevant provisions of the Constitution and the Supreme Court Rules, is well-settled by various pronouncements of this Court. Briefly stating, the review jurisdiction is vested in this Court by Article 188 of the Constitution and is subject to the provisions of any Act of Parliament and of any rules made by this Court. The Parliament has not so far passed any Act on this subject; this Court has, however, made rules to regulate its power of review, which are contained in Order XXVI of the Supreme Court Rules, 1980. The relevant Rule, for present purposes, is Rule 1 of Order XXVI which states:

> Subject to the law and the practice of the Court, the Court may review its judgment or order in a civil proceeding on grounds similar to those mentioned in Order XLVII, Rule 1 of the Code [of Civil Procedure, 1908] and in a criminal proceeding on the ground of an error apparent on the face of the record.

This Rule has, subject to the law and the practice of the Court, limited the review jurisdiction of this Court in criminal proceedings to one ground only, viz, an error apparent on the face of the record, while has made reference for review in civil proceedings to the grounds mentioned in rule 1 of Order XLVII of the Code of Civil Procedure, 1908 which provides three grounds for review: (1) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of, or could not be produced by, the party seeking review at the time when the decree was passed or order made; (2) some mistake or error apparent on the face of the record; (3) or any other sufficient reason. The third ground has been interpreted by the courts to be read ejusdem generis in the context of two preceding grounds. It is notable that the ground, "error apparent on the face of the record", is common for review in both civil and criminal proceedings. In the present case, it is this ground which has been agitated for praying review of the order of the Court that contains the impugned directions. Therefore, the simple question before the Court is whether the errors identified above in making the impugned directions can be said to be the errors apparent on the face of the record.

45. The expression, "error apparent on the face of the record", as observed by Hamoodur Rehman, J. in Anwar Husain v. Province of East Pakistan[33], cannot be defined with precision or exhaustiveness, and there would always remain an element of indefiniteness inherent in its very nature. It is to be determined in each case on the basis of its own peculiar facts. Therefore, we would not attempt to define the said expression exhaustively either, and restrict ourselves to examine: whether any judgment pronounced or order made without providing a fair and meaningful hearing to the person affected thereby or without adverting to, and in contravention of, relevant provisions of law and the Constitution can be termed "an error apparent on the face of the record".

46. The Federal Court of British India held in Raja Prithwi Chand v. Sukhraj Rai[34] that the "indulgence by way of review is granted mainly owing to the natural desire to prevent irremediable injustice being done by a Court of last resort as where by some accident, without any blame, the party has not been heard and an order has been inadvertently made as if the party had been heard." We find these observations of the Federal Court very relevant to the circumstances of the present case. In the present case, we acted on the assumption that we had heard the petitioner, Mrs. Isa, on video-link on 18 June 2020 before making the impugned directions, but it has been revealed to us during hearing of the present review petitions that the

said hearing did not meet even the very elementary and essential requirements of the right of hearing. This Court has held in Anisa Rehman v. P.I.A.C.[35] that the violation of principles of natural justice is equated with the violation of a provision of law, as they are to be read into the relevant provision of every statute even if not expressly incorporated therein. We may add that after recognition of the right to fair trial and due process as a fundamental right by insertion of Article 10A in the Constitution, violation of the principles of natural justice, which are the necessary components of the right to fair trial and due process, is now to be taken as a violation of the fundamental right as well. In Federation v. Nawaz Sharif,[36] this Court held that "non- hearing of petitioners is an error on the face of record meriting interference in review jurisdiction."

47. So far as any judgment pronounced or order made without adverting to, and in contravention of, the relevant provisions of law or Constitution is concerned, there is plethora of judicial opinions[37] enunciated by this Court on treating it as an error apparent on the face of the record that warrants the review of that judgment or order. We do not want to burden this judgment with reproduction of extracts from all such opinions, however, would like to narrate briefly the principles of law on which they are based, viz, their ratio decidendi.

48. The obedience to the Constitution and law is, under Article 5(2) of the Constitution, the inviolable obligation of every citizen, including the persons holding posts in the legislative, judicial or executive organs of the State. This obligation of the Judges of the constitutional courts is further emphasized by the oath they take before assuming charge of their posts, to discharge their duties and perform their functions in accordance with the Constitution and law, and to preserve, protect and defend the Constitution. Moreover, the persons whose matters are presented before them for determination also have a constitutional right to be treated in accordance with the law, guaranteed to them by Article 4 of the Constitution. Therefore, whenever Judges of these courts are pointed out, in review jurisdiction conferred by the Constitution or law, something in their judgment or order to be in conflict with the Constitution or any law of the land, it becomes their duty to unhesitatingly correct that error. Duty of the Judges of the apex Court of the country is more thoughtful and profound in this regard, as there is no other court which can correct their error, and the principles of law enunciated in their judgments are, under Article 189 of the Constitution, binding on all other courts in the country. Therefore, whenever they find that their judgment or order of which review is sought was pronounced or made without adverting to, and in contravention of, any provision of law or the Constitution, they must correct the error considering it their inviolable constitutional obligation and duty, not a favour or concession to the party seeking review.

49. In the present case, although this Court made the impugned directions in good faith to ensure the accountability of a constitutional court Judge and to uphold the public trust in the impartiality of the Court, but as these directions were made by the Court, on its own, without putting to the parties on notice, without informing them what the Court was contemplating to do and without inviting and hearing their arguments on the matters dealt with therein, the above-noted legal and constitutional aspects of the impugned directions with their ramifications were not present in the mind of the Court while making the impugned directions. If the Court had heard the arguments on the matters dealt with in the impugned directions and the legal position relating thereto had been debated and appropriately placed before it, the Court would not have made the said directions as the Court never intends to act contrary to law.

50. The impugned directions were in no way a relief consequential or incidental to the matter adjudicated upon by the Court, i.e., the constitutionality and legality of the Reference filed against Justice Isa, or to the relief prayed for by the parties, i.e., the quashing of the Reference or dismissal of the constitution petitions. The impugned directions must have come as a surprise to the parties being unexpected, as they were beyond the scope of the case before the Court, on a matter that was not debated in the course of the hearing.

51. Likewise, directing for speedier proceedings in the tax matter of Mrs. Isa to be conducted by a Tax Commissioner who had no jurisdiction to proceed in her tax matters under the law was unwarranted. The impugned directions singled out Mrs. Isa and Justice Isa for special treatment by directing initiation of

proceedings into their matters by the tax authorities and the Council in accordance with a procedure that was not provided by the law and the Constitution; their fundamental right to equality before the law and equal protection of law guaranteed by Article 25 of the Constitution was thus infringed by the impugned directions.

52. This Court, in its concern to enable the early resolution of the matter, made the impugned directions without noticing the relevant provisions of the ITO and without considering the consequences of ensuring accountability of a constitutional court Judge through a procedure that is not envisioned by Article 209 of the Constitution. "To seek to be wiser than the law is the very thing by good laws forbidden."[38] However, to err is human; Judges presiding courts including the apex one are no exception. Courts are, therefore, as much human institutions as any other and share all human susceptibilities to error. Owning his mistake on realization does not diminish one's prestige or ability; it perhaps enhances both. A Judge, therefore, should not hesitate to review his decision if it is established not to be right. Because it is better to return to what is right than to clinging onto what is wrong.[39]

Conclusion on question (ii)

53. We, therefore, find no difficulty to conclude and answer question (ii) in affirmative: the impugned directions having been made without providing a fair and meaningful hearing to the petitioner, Mrs. Isa, thus violating the principle of natural justice, and without adverting to, and in contravention of, the relevant provisions of law and the Constitution, definitely fall within the scope of the well-established ground of review, namely, "error apparent on the face of the record"; thus they can be recalled by this Court in exercise of its review jurisdiction under Article 188 of the Constitution read with rule 1 of Order XXVI of the Supreme Court Rules, 1980. Exercising that jurisdiction, we recall the impugned directions.

Question (iii) as to legal status of actions made in pursuance of impugned directions, and conclusion on this question

54. The question is quite simple and has an easy answer. We are of the view that the answer to this question lies in the same principle on the basis of which this Court, in the judgment under review[40], declared the proceedings initiated by the Council to stand abated on quashing of the Reference filed by the President. This Court held that the show cause notice issued by the Council derived its substance from the quashed Reference and without the Reference the show cause notice was just a blank piece of paper which could not become the basis for any subsequent inquiry against the petitioner, Justice Isa. No one has disputed the said decision of this Court, in the present review proceedings. Actually, the moment the foundation is removed, the entire structure collapses. The principle, having been enunciated by this Court in many cases,[41] is now well-settled that when the basic order is without lawful authority, then the entire superstructure built on it falls on to the ground automatically. Thus, any proceedings taken, orders passed or actions made in pursuance of the impugned directions being a superstructure built on those directions loses their legal status and effect, when their very foundation, viz, the impugned directions, is found to have been laid without lawful authority. They have, therefore, no legal status and effect.

55. These are the reasons for our short order dated 26 April 2021, which is reproduced below for completion of the record:

> For the reasons to be recorded later, captioned Review Petitions are allowed and the directions contained in paras 4 to 11 of the impugned short order dated 19.06.2020 passed in Const. Petition No. 17/2019 and other connected matters, along with supporting detailed reasons given in the majority judgment of the same date, are recalled and set-aside. All the subsequent proceedings, actions, orders, information and reports in pursuance of the directions contained in the short order dated 19.6.2020 and the detailed reasons thereof, are declared to be illegal and without any legal effect. Resultantly, any such proceedings, actions, orders or reports cannot be considered or acted upon and pursued any further by any forum or authority including the Supreme Judicial Council.

Our learned brother, Manzoor Ahmed Malik, J., (who has since retired) was a signatory to the above short order; therefore, following the precedents of Al-Jehad Trust v. Federation (PLD 1996 SC 324) and CJP Iftikhar Muhammad Chaudhry v. President of Pakistan (PLD 2010 SC 61), the office is directed to place

these detailed reasons recorded in support of that order before his lordship, for his consideration whether he agrees with the detailed reasons.

Right of a Judge to be dealt with in accordance with law in the matter of his accountability

56. Before parting with the judgment, we consider it appropriate to re-emphasize that we strongly believe that judicial independence and judicial accountability are two sides of the same coin and one cannot exist without the other - to compromise on judicial accountability is to compromise on independence of judiciary - but our only concern in the present matter is that a constitutional court Judge in the matter of his accountability, or for that matter his spouse, must be dealt with in accordance with the law. As it is said that injustice anywhere is a threat to justice everywhere; whatever affects one directly, affects all indirectly,[42] so would the accountability of one Judge in a manner not provided by the Constitution have adverse impact upon the independence of all Judges, and thus destroy the independence of the judiciary as an institution. The constitutional guarantee of the right to be dealt with in accordance with law, under Article 4 of our Constitution, is available not only to every citizen of the country but also to every other person for the time being within Pakistan. We are clear and firm in our view that this constitutional guarantee cannot be curtailed or limited in the case or matter of any person whosoever he may be and whatever the allegations against him may be. We think it would not be out of place to cite some observations which were recently made in Naveed Asghar[43] case by two of us (Mazhar Alam Khan Miankhel and Syed Mansoor Ali Shah, JJ) and our learned brother Manzoor Ahmed Malik, J.:

> An accused person cannot be deprived of his constitutional right to be dealt with in accordance with law, merely because he is alleged to have committed a gruesome and heinous offence. The zeal to punish an offender even in derogation or violation of the law would blur the distinction between arbitrary decisions and lawful judgments. No doubt, duty of the courts is to administer justice; but this duty is to be performed in accordance with the law and not otherwise. The mandatory requirements of law cannot be ignored by labelling them as technicalities in pursuit of the subjective administration of justice. One guilty person should not be taken to task at the sacrifice of the very basis of a democratic and civilised society, i.e., the rule of law. Tolerating acquittal of some guilty whose guilt is not proved under the law is the price which the society is to pay for the protection of their invaluable constitutional right to be treated in accordance with the law. Otherwise, every person will have to bear peril of being dealt with under the personal whims of the persons sitting in executive or judicial offices, which they in their own wisdom and subjective assessment consider good for the society.

This was our approach towards the rule of law in case of persons who were alleged to have committed a gruesome and heinous offence; we cannot deal with the case of a Judge any differently, who because of his unblemished character and honest performance of his duties both at the Bar and on the Bench during a life-long period of about forty years, enjoys great respect in the legal fraternity. The members of almost all the Bar Associations across the country hold Justice Isa as an honest, independent and impartial judge, with impeccable integrity. It may also be noted here that the various petitioners who earlier challenged the filing of Reference against Justice Isa, and now the impugned directions, include the premier Bar bodies like Supreme Court Bar Association, Pakistan Bar Council, all the four provincial Bar Councils and High Court Bar Association Quetta, Quetta Bar Association, Sindh High Court Bar Association, Karachi Bar Association, Peshawar High Court Bar Association, and Senior Lawyers like Mr. Abid Hassan Minto. All the above are the main stake-holders in the judicial system and are best suited to form and express their opinion about the integrity and ability of a Judge. In addition to those named above, Pakistan Federal Union of Journalists is also a petitioner; they certainly are the people who have their fingers on the pulse of the people of this country.

57. We are fully conscious of the fact that it is the impeccable integrity and high standard of ethics and transparency that engenders the public's confidence in the judiciary. It is in order to achieve and maintain the public confidence, trust and perception about the independence, impartiality and integrity of the superior Court Judges, that our Constitution has provided an elaborate scheme, for the accountability of

the Judges under Article 209, which needs to be adhered to strictly as rightly observed in the judgment under review,[44] that "infringements of Article 209 erode the independence of the judiciary." But unfortunately our chequered history has seen numerous attempts to trample upon judicial independence during both, civilian as well as military governments. Nonetheless, we must not become prisoner of our past and must now obviate any attempt to damage the judiciary.

58. History is witness to the fact that the fundamental rights, particularly of those who are the most vulnerable, becomes the first causality in societies where the judiciary comprises those who were compromised and thus susceptible to being influenced from those wielding power and influence. The edifice of the judicial independence rests on the assumption that every Judge besides being fair and impartial is fiercely independent and is free to uphold his judicial views. This judicial freedom is fundamental to the concept of the rule of law. Any attempt to muffle judicial independence or to stifle dissent shakes the foundation of a free and impartial judicial system, thus eroding public confidence on which the entire edifice of judicature stands. Public confidence is the most precious asset of this organ of the state, which controls neither the sword nor the purse. A judge whose decisions are dictated not by the fidelity to the letter and spirit of the law but based on what he deems to be palatable to the Government would cause irretrievable damage to the public confidence in the judiciary, and consequently jeopardize its credibility and moral authority. Judges should not be, in the words of Lord Denning, "diverted from their duty by any extraneous influence, nor by hope of reward nor by fear of penalties, nor by flattering praise, nor by indignant approach".

59. We believe that the rule of law and the independence of judiciary are conceptually interwoven: without an independent judiciary, expecting the rule of law is a sheer farce. And the rule of law and the independence of the judiciary are the only guarantee to the maintenance and preservation of a thriving democracy. We reiterate what two of us (Maqbool Baqar and Syed Mansoor Ali Shah, JJ.) and our learned brother, Yahya Afridi, J., said in their order of 19 June 2020 while disposing of the constitution petitions in the present matter:

> One of our pivotal Constitutional values is that the independence of judiciary shall be fully secured. The same Constitution also ordains that to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen. Therefore, it is reiterated that in our constitutional democracy, neither the petitioner judge, nor any other judge, or any individual or any institution, is above the law. The doors of the constitutional forum i.e., Supreme Judicial Council are always open, either on its own motion or for anyone who has a genuine and a bona fide grievance, amenable to the jurisdiction of the Council against a Judge of the Constitutional Court. At the same time, it is equally important, that a Judge like any other citizen of Pakistan enjoys the inalienable constitutional right to be treated in accordance with law. These fundamental values are to be protected at all cost in order to uphold the majesty and supremacy of the Constitution and to honour the people of Pakistan who have adopted and given to themselves this Constitution.

We proclaim that no one is above the law, but at the same time declare that no one can be denied his right to be dealt with in accordance with the law. If Mrs. Isa, or a spouse of any other Judge, does not comply with the tax law, she must be dealt with in accordance with the law, and if Justice Isa, or any other Judge, breaches any clause of the Code of Conduct prescribed for Judges of the constitutional courts, he also must be proceeded against but only in accordance with law and not otherwise.

Sd/-
(Maqbool Baqar)
Judge

I agree.

Sd/-
(Manzoor Ahmad Malik)
Judge

Sd/-
(Mazhar Alam Khan Miankhel)
Judge
Sd/-
(Syed Mansoor Ali Shah)
Judge

Apart from Civil Review Petition No.296 of 2020, all other Civil Review Petitions are allowed and the reasons for the same are recorded in my separate note.

Sd/-
(Yahya Afridi)
Judge
Sd/-
(Amin-ud-Din Khan)
Judge

**YAHYA AFRIDI, J**.---Every judgment pronounced by the Supreme Court of Pakistan is a considered, solemn and final pronouncement on all points raised and decided in the case.[45] However, under Article 188 of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution") read with Rule 1 of Order XXVI of the Supreme Court Rules, 1980 ("Rules") this Court is vested with the jurisdiction to review its judgment, in certain circumstances. The judicial consensus of this Court is that a judgment passed on an erroneous assumption of material facts, or without adverting to a provision of law or Constitution, or without noticing an undisputed construction of law and Constitution amounts to an error apparent on the face of the record, and thus justifies positive exercise of the review jurisdiction.[46]

2. After careful and cautious consideration of the directions of this Court to the officials of the Federal Board of Revenue ("FBR"), the Hon'ble Chairman and learned Secretary of the Supreme Judicial Council ("Council"), contained in paragraphs Nos. 4 to 11 of the short order dated 19.06.2020 ("impugned directions"), I find that the same have been made by us without appropriately considering the scope of the ouster clause of Article 211 of the Constitution and the relevant provisions of the Income Tax Ordinance, 2001 ("Ordinance"). These two crucial omissions on our part are the marked and distinct "errors apparent on the face of the record" and thus, warrant the positive exercise of the review jurisdiction of this Court.

3. To start with, we need to appreciate the exclusivity of the constitutional domain of the Council secured under Article 211 of the Constitution, which expressly commands all courts, including this Court, not to interfere in the proceedings of the Council. The said ouster provision reads:

> 211. Bar of Jurisdiction.
>
> The proceedings before the Council, its report to the President and the removal of a Judge under clause (6) of Article 209 shall not be called in question in any court.

No one can doubt the wide-ranging power vested in this Court under Article 184(3) or Article 187(1) of the Constitution, to issue appropriate directions, while disposing of a case. However, where the Constitution under Article 211 expressly forbids all courts, including this Court, not to interfere in the proceedings of the Council, then the authority of this Court under Article 184(3) or, for that matter, under any other Article of the Constitution, has to yield to such definite ouster.

4. The very essence of the ouster clause provided in Article 211 is to curtail the jurisdiction of the courts, including this Court, to protect and preserve the autonomy and supremacy of the "proceedings" of the Council against judicial interference. The term "proceedings" as used in Article 211, has been astutely elaborated in the case of Iftikhar Muhammad Chaudhry v. President of Pakistan[47], wherein it was observed that the word "proceedings" does not stand alone or is unqualified in the said provision but stands restricted and qualified by three other words, "before the council".[48] Accordingly, the ouster of this Court's jurisdiction applies to all proceedings that may take place before the Council. If the Council is to decide on whether or not it should exercise its suo motu powers, such a decision would be a "proceeding" before

the Council and thus protected under Article 211 against any judicial intrusion. This constitutional protection exalts the position of the Council and establishes its legally lofted supremacy in matters relating to initiating and proceeding with inquiries against the Judges of the Superior Judiciary. And unless the very proceedings of the Council to proceed against a Judge of the Superior Judiciary is positively adjudged to be coram non judice, mala fide or without jurisdiction, Courts are to jealously maintain the constitutional independence of the Council.

5. In view of this constitutional mandate, any directions of this Court setting steps for the Council, and for that matter, for its Hon'ble Chairman and learned Secretary, to follow or to refrain from following and that too, without first adjudging its actions or inactions to be coram non judice, mala fide or without jurisdiction would amount to excessive exercise of jurisdiction by this Court under Article 184(3) and Article 187(1) of the Constitution. Such directions of the Court amount to usurping the exclusive constitutional jurisdiction vested in the Council under Article 209 and protected under Article 211 of the Constitution.

6. To sum up, it would be safe to state that this Court did not have the jurisdiction to issue the impugned directions to the Council to consider initiating, or otherwise, an inquiry against the Petitioner Judge based on the "information" received from the tax officials of the FBR. If the instructions of the Court to the Council to consider the report of the tax officials, as vehemently argued by the contesting respondents, are not strictly considered or taken as "directions" to the Council, even then the same has the effect of making this Court a "complainant", and not the "adjudicator" in the matter. Similarly, if this Court issues directions to the contrary, that is, refraining the Council from considering "information" obtained, this Court would then too be exceeding its mandated constitutional jurisdiction.

7. Another important aspect that escaped the notice of this Court, while issuing the impugned directions to the tax officials was that the impugned directions, in effect, created a parallel regime alien to the scheme envisaged under the Ordinance. The Ordinance provides an intricate mechanism for the tax authorities to proceed in various matters relating to taxpayers, which range from procedural guidelines, specific timelines and jurisdiction available to the concerned authorities, while at the same time, it also provides protection to the person being assessed, adhering to the settled principles of 'due process' and 'natural justice'.

8. This Court has, in the judgment under review, passed binding directions to the tax officials to proceed in a set manner, overlooking the provisions of the Ordinance relating to taking cognisance of "definite information"; scrutiny of information and assessment of income tax returns; and territorial jurisdiction.[49] Moreover, in making the impugned directions, we also lost sight of the procedure provided in the Ordinance, as to how tax officials are: (i) to proceed against a tax filer that has undeclared income and assets or mis-declared the same and within what time period; (ii) to determine the source of funds for purchasing the undeclared assets, whether generated in Pakistan or in some foreign country; and (iii) above all, to which tax year the undeclared local assets or source of funds and the undeclared foreign assets and source of funds are to be added to and assessed.[50]

9. With the force and guidance of the impugned directions of this Court, and that too, against persons not party in the constitution petitions, expecting the probe by the tax authorities to abide by the "due process" provided under the Ordinance, would be a far cry. In the circumstances of the case, the matter of probe against the spouse and children of the Petitioner Judge should, I think, best have been left to the concerned tax authorities to proceed under the Ordinance, without any specific directions. By giving directions to the tax authorities to proceed with the matter on the basis of a procedure and timeline foreign to the Ordinance, this Court has ultimately subdued the procedure prescribed under the Ordinance by expanding its role, inadvertently, as 'legislator' rather than 'adjudicator'.

10. Much was argued from both sides about whether Mrs. Sarina Faez Isa, who was not a party to the proceedings, was provided with a fair "hearing" befitting the bare threshold to suffice the principles of natural justice, before her case was referred to the tax authorities. One should not expect a consensus of a ten-member Bench on this factual controversy, as to whether Mrs. Sarina Faez Isa was provided with a fair "hearing", and that too, based solely on her informal statement made while addressing the Court via video

link on 18.06.2020. Therefore, in these review proceedings, it would be appropriate to remain focused on the core issues involved in the constitution petitions, and not be distracted by the factual controversy, as to whether Mrs. Sarina Faez Isa was provided with a fair and adequate opportunity to be heard before directing the tax officials to scrutinise her foreign assets. For, when a Court sits to review its own judgment or order, it does not hear a new case but only reconsiders its decision on the issues involved in the case already heard and decided, within the limits of its review jurisdiction.

11. Another error that crept in while making the impugned directions is the distraction from the fundamental issue of alleged misconduct of the Petitioner Judge qua the non-disclosure of foreign assets of his spouse, in his wealth statement, filed with the income tax returns under Section 116 of the Ordinance. Though this was the main controversy, the impugned directions directed the tax officials to proceed against the spouse and children of the Petitioner Judge regarding the subject foreign properties, instead of directing the tax officials to proceed against the Petitioner Judge to determine his liability, if any, in accordance with the Ordinance. Under the Ordinance,[51] when a tax filer fails to furnish adequate justification for an asset, the same is then deemed as the tax filer's asset procured through unexplained income chargeable to tax, and the tax is charged accordingly by adding that income under the head "Income from other Sources". Thus, in case the spouse and children of the Petitioner Judge fail to adequately justify the sources of fund for purchasing the foreign assets, the same would be deemed even then, under the Ordinance, to be owned by them, and not by the Petitioner Judge. Our concern, in the constitution petitions, wherein the impugned directions have been given, was with respect to the independence of the judiciary and the accountability of the judges in the context of alleged misconduct of the Petitioner Judge, which has, in my opinion, been detracted from, by making the impugned directions against his family members.

12. In view of the above deliberations, I find that the impugned directions affecting the rights of Mrs. Sarina Faez Isa, her son and daughter, have been passed by this Court in excess of jurisdiction, and are, therefore, recalled. Consequently, the "superstructure" of subsequent proceedings, actions, orders and reports built on the legally faulty "foundation" of the impugned directions would fall and have no legal effect on the rights and obligations of Mrs. Sarina Faez Isa, her son and daughter.

13. As for the effect of the above declaration qua the allegation of misconduct against the Petitioner Judge, suffice it to state that it does not diminish or dilute the constitutional authority of the Council to consider, on its own motion, an "information" received from "any source", whatever it may be, including the "information" contained in the report received from the tax official, for deciding to initiate an inquiry, or otherwise, into the conduct of the Petitioner Judge. In this regard, we should not lose sight of clause (5) of Article 209 of the Constitution, which clearly provides that "information from any source" can form the basis of an inquiry by the Council against a Judge of the Superior Judiciary. The legal significance and practical implication of the insertion of the word "any" prefixing the word "source" in clause (5) of Article 209 of the Constitution has, in fact, expanded the pool from which the Council may obtain "information" to initiate an inquiry into the conduct or capacity of a Judge of the Superior Judiciary. To interpret the word "any" used in clause (5) of Article 209 of the Constitution in a manner that would dilute the authority of the Council and restrict the information it can or cannot consider would amount to defeating the very command of the Constitution. Therefore, the Council, "on information" emanating from "any source" can proceed, on its own motion, with an inquiry into the capacity or conduct of any Judge of the Superior Judiciary. The decision on the question, whether to commence the inquiry or otherwise, is a matter that is within the exclusive domain of the Council. This Court, or for that matter any other Court, lacks the jurisdiction to restrict this vast authority vested in the Council by the Constitution - the supreme law of the land.

14. Before concluding, I think it is proper to make clear that the present order, by no means, seeks to curtail the lawful authority of the President, the Council and the tax officials to proceed against any Judge of the Superior Judiciary, including the Petitioner Judge, in accordance with law as mandated by Article 4 of the Constitution. We cannot champion the rule of law if we breed complacency in judicial accountability, a feature that seeks to uphold and bolster the rule of law. Thus, it is important to ensure that there are no

artificial impediments to ensuring accountability of judges, provided accountability is pursued in accordance with law. This exposition of authority, in particular, of the tax officials, however, should in no way detract them from their statutory duty to remain steadfast in ensuring the confidentiality of the information of a tax filer as mandated under section 216 of the Ordinance which, as noted in the judgment under review, was blatantly breached in the case of Mrs. Sarina Faez Isa: the tax officials on the unlawful directions issued by the Chairman ARU, Barrister Shahzad Akbar with the concurrence of the Federal Law Minister, Dr. Farogh Naseem, breached the statutory confidentiality of Mrs. Sarina Faez Isa's tax returns. I feel constrained to observe that allowing the said delinquents to continue in such important positions of authority by the worthy Prime Minister, and that too after this Court has unanimously declared their actions to be in violation of the Constitution and law, particularly the provisions of section 216 of the Ordinance entailing penal consequences,[52] belies the most elementary principles of "good governance", and expose the worthy Prime Minister's complicity in the commission of the said violations.

15. As far as Civil Review Petition No.296 of 2020 is concerned, that is, in my view,[53] not maintainable, as the locus standi of the Petitioner Judge to invoke the original jurisdiction of this Court under Article 184(3), as well the review jurisdiction therein, stands eclipsed till he holds the office of a Judge of the Supreme Court of Pakistan; for he owes an obligation under clause (8) of Article 209 of the Constitution to observe the Code of Conduct issued by the Council for Judges of the Superior Judiciary, that, inter alia, requires him to avoid being involved in litigation, for himself or even on behalf of others, which includes public interest litigation under Article 184(3) of the Constitution. The object is to avert any chance of a Judge of the Superior Judiciary being placed in a position, where his conduct may be seen as unbecoming of a Judge, glimpses of which were seen during the proceedings of the present review petitions.

16. In summation of the above discourse, my considered opinion on the essential issues raised in the present review petitions are that:

i. This Court cannot pass any direction that would, in essence, prompt or pre-empt the Council to proceed in a certain manner or refrain it to proceed in any manner as it would, in fact, amount to judicial intervention in the "proceedings before the Council", and thereby offend the express mandate of Article 211 of the Constitution, unless the very "proceedings" are determined to be coram non judice, mala fide or without jurisdiction, which has not been established in the case in hand;

ii. The impugned directions of this Court to the Council to consider the Report of the tax officials amounts to judicial interference in the "proceedings before the Council", and thus violates the autonomy and supremacy of the "proceedings" of the Council against judicial interference envisaged under Article 211 of the Constitution;

iii. The Council is, however, on its own motion, competent to consider or refuse to consider "information" received from "any" source, be it the Report of the tax officials, to determine whether to inquire or not inquire into the conduct of the Petitioner Judge or otherwise;

iv. The impugned directions to the tax officials to inquire into the affairs of the spouse and children of the Petitioner Judge, setting out the manner and the timeframe in which they are to proceed, violate and are alien to, the provisions of the Income Tax Ordinance, 2001, and have subdued the procedure prescribed thereunder;

v. The President and the Council have the authority, and are free to proceed against any Judge of the Superior Judiciary, including the Petitioner Judge for alleged misconduct, in accordance with Article 209 of the Constitution;

vi. The tax officials are competent to proceed against the Petitioner Judge or any other Judge of the Superior Judiciary, serving or retired, his spouse or/and children, without fear or favour, in relation to his or her tax affairs only in accordance with the provisions of the Income Tax Ordinance, 2001 and not otherwise on the basis of unlawful directions;

vii. Section 216 of the Income Tax Ordinance, 2001, commands confidentiality of the information of a tax filer, and breach thereof exposes the delinquent to penal consequences under sections 198 and

199 of the Ordinance. Such consequences are attracted in the present case to those giving the unlawful directions, namely, Chairman ARU, Barrister Mirza Shahzad Akbar with the concurrence of the Federal Law Minister, Dr. Farogh Naseem; the tax officials executing the unlawful directions in breach of section 216 of the Ordinance; and finally, the worthy Prime Minister, who despite clear and unanimous finding of misdoings of the named delinquents by this Court, retained them in positions of authority, thereby blatantly exposed himself to complicity in the commission of the said violation.

viii. The Petitioner Judge or any other serving Judge of the Superior Judiciary lacks the locus standi to invoke the original jurisdiction of this Court under Article 184(3), as well as the review jurisdiction therein, as their right to invoke the same stands eclipsed, till they hold the office of a Judge of the Superior Judiciary, essentially to avert a position where their conduct may be seen as unbecoming of a Judge, as ordained in Code of Conduct issued by the Council for Judges of the Superior Judiciary.

17. These are the detailed reasons for my short order dated 26.04.2021, which read:

For the reasons to be recorded later, all review petitions except C.R.P. No. 296 of 2020, are allowed and the directions contained in paragraphs Nos. 4 to 11 of the order dated 19.06.2020 and detail judgment dated 23.10.2020 passed in Constitution Petition No. 17 of 2019 and other connected petitions are recalled. Consequently, all the subsequent proceedings, actions, orders and reports made in pursuance of the said directions are declared to be of no legal effect and/or consequences.

Sd/-

Judge

**UMAR ATA BANDIAL, J.---**

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"Surah An-Nisa, Verse 135

Believers! Be upholders of justice, and bearers of witness to truth for the sake of Allah, even though it may either be against yourselves or against your parents and kinsmen, or the rich or the poor: for Allah is more concerned with their well-being than you are. Do not, then, follow your own desires lest you keep away from justice. If you twist or turn away from (the truth), know that Allah is well aware of all that you do."

Translation by Abul Ala Maududi

(emphasis supplied)

The essence of the controversy in the instant review petitions is whether justice can be dispensed by a court of law by ignoring the truth. The answer to this pivotal question in these proceedings will decide the fate of substantive justice in our legal system.

Factual Background

2. The facts leading up to this long-drawn litigation can be found in paras 3-8 of the Detailed Reasons issued on 23.10.2020 reported as Justice Qazi Faez Isa v. President of Pakistan (PLD 2021 SC 1). However, for ease of reference they are being briefly recapitulated hereinbelow. On 10.04.2019, the Chairman Assets Recovery Unit ("ARU"), situated in PM Secretariat, Islamabad, received a complaint in the form of a letter which alleged that Justice Qazi Faez Isa ("the learned petitioner"), who was appointed Chief Justice of the Balochistan High Court on 05.08.2009, owned certain Properties ("London Properties") in the United Kingdom in the name of his wife ("Mrs. Isa") which had not been declared by him. The particulars of these Properties are:

i. 50 Coniston Court: originally leased to Mrs. Isa in 2004 for a sum of 236,000. The lease was later renewed in October 2011 with Mrs. Isa's daughter added as a co-lessee;

ii. 40 Oakdale Road: purchased by Mrs. Isa and her daughter on 27.03.2013 for a sum of 245,000; and

iii. 90 Adelaide Road: purchased by Mrs. Isa and her son on 28.06.2013 for a sum of 270,000.

3. On 16.04.2019, the Law Minister authorised the ARU to inquire into the London Properties, two of which were acquired when the learned petitioner was Chief Justice of the Balochistan High Court. The

investigation spearheaded by ARU confirmed, vide a letter written by the Commissioner, Inland Revenue ("CIR") on 10.05.2019, that neither the learned petitioner nor Mrs. Isa had declared the London Properties in their wealth statements. Ultimately this led to the President filing Reference No.1 of 2019 ("the Reference") against the learned petitioner in the Supreme Judicial Council ("SJC") on 23.05.2019. The Reference mainly alleged that the learned petitioner had violated Section 116(1)(b) of the Income Tax Ordinance, 2001 ("the Ordinance") by failing to declare the London Properties owned by his wife and children. However, during the pendency of the Reference before the SJC, the learned petitioner filed a Constitution Petition before this Court on 07.08.2019 praying for the quashment of the Reference and for restraining the SJC from proceeding in the said matter. Thereafter the matter was heard for ten months by the Full Court during which period the learned petitioner adopted (and maintained) the stance that he was not associated whatsoever with the London Properties that belonged to his financially independent wife.

4. On 19.06.2020 the Short Order reported as (Mr.) Justice Qazi Faez Isa v. President of Pakistan (PLD 2020 SC 346) was announced by a majority of 7-3. Both the Majority and the Minority quashed the Reference for suffering from legal and jurisdictional defects. However, the Minority also declared the Reference void for being tainted with malice in fact. This led to their different treatment of the fact that the London Properties owned by Mrs. Isa had neither been declared in her wealth statements nor in the wealth statements of the learned petitioner ("admitted information"). The Majority (comprised of the seven Judges, including the four signatories to this opinion) was of the view that the allegations levelled against the learned petitioner being based on true information were of a serious nature. Therefore, a probe by the Federal Board of Revenue ("FBR") into the source of funds used for purchasing the London Properties was necessary to ensure that any aspersions cast on the learned petitioner and the Court were dispelled. On the contrary, the Minority (comprised of the three Judges), with the exception of Justice Yahya Afridi, considered the excesses of the Executive to be so serious that they declared the admitted information to have lost all its evidentiary worth. This resulted in strong dissents advocating for the initiation of criminal/ disciplinary action against the different public functionaries involved in the preparation of the Reference.

5. Dissatisfied with this result, the learned petitioner and Mrs. Isa, along with the other review petitioners, filed nine Review Petitions (296, 297, 298, 299, 300, 301, 308, 309 and 509 of 2020) before this Court challenging paras 4-11 of the Short Order dated 19.06.2020 and the Detailed Reasons ("Majority Judgment") issued in support thereof on 23.10.2020. The disputed paras are produced below:

> "4. Within 7 days of this Order, the concerned Commissioner of Inland Revenue shall himself (and not some other officer exercising delegated powers) issue appropriate notices under the Income Tax Ordinance, 2001 ("2001 Ordinance") to the spouse and children of the Petitioner to offer an explanation regarding the nature and source of the funds (separately for each property) whereby the three properties in the United Kingdom (viz., No.40, Oakdale Road, London E11 4DL; No.90, Adelaide Road, London E10 5NW; and No. 50, Coniston Court, Kendal Street, London W2 2AN) that are in the names of the spouse and the children were acquired. For purposes of this Order the Commissioner Inland Revenue having jurisdiction over the spouse of the Petitioner (who must be a Commissioner exercising jurisdiction and performing functions at Islamabad) shall be deemed also to be the Commissioner having jurisdiction over the children. (The spouse and children are herein after referred to as "the respondents".) Any notices issued or proceedings taken (or proposed to be issued or taken) under the 2001 Ordinance in relation to any of the respondents in respect, or on account, of the properties aforesaid prior to the date of this Order stand terminated forthwith.
>
> 5. The notices shall be served at the official residence of the Petitioner at Islamabad through courier service and such other means as may be considered appropriate and shall be deemed served on the respondents when received at the said address.
>
> 6. The respondents shall furnish their replies to the notices along with such material and record as is deemed appropriate. In case any of them is outside the country, it shall be the responsibility of such person to timely file a response, and the proceedings before the Commissioner shall not be adjourned or delayed for the reason of non-availability in Pakistan of such person.

7. Upon receipt of the replies (and of such additional material/ record as may be filed in response to such clarification or explanation, if any, as the Commissioner may, in writing, have sought), the Commissioner shall give an opportunity of hearing to the respondents in person or through an authorized representative/counsel and shall thereupon make an order in accordance with the 2001 Ordinance.
8. The proceedings shall be concluded before the Commissioner within 60 days of the date of receipt of the notices as aforesaid, and the order shall be issued by him within 75 days of the said date of receipt, and no adjournment or extension in time whatsoever shall be given as affects or extends the aforesaid periods.
9. Within 7 days of the issuance of the order by the Commissioner, the Chairman, Federal Board of Revenue ("FBR") shall submit a report (to be personally signed by him) to the Council through its Secretary (i.e., the Registrar of the Supreme Court) regarding the proceedings as aforesaid, appending thereto the entire record of the said proceedings. The Secretary shall forthwith place such report before the Chairman of the Council (i.e., the Hon'ble Chief Justice of Pakistan) who shall, in such manner as is deemed appropriate, have the report laid before the Council for such perusal, consideration, action, order or proceedings, if any, in relation to the Petitioner as the Council may determine. The receipt of the report, the laying of it before the Council and the action/ proceedings, if any, or orders or directions, if any, as may be taken, made or given by the Council thereon shall be deemed, for purposes of Article 209 of the Constitution, to be in exercise of the suo motu jurisdiction as is conferred by that Article on the Council.
10. If, within 100 days from the date of this Order, no report as aforesaid is received by the Secretary from the Chairman, FBR, he shall inform the Chairman of the Council accordingly and shall, if so directed by him, write to the Chairman, FBR requiring an explanation as to why the report has not been received. If in reply the report is filed, then the matter shall proceed in terms of para 9 herein above. If a reply is received without the report or no reply is received, then the Secretary shall bring such fact to the attention of the Chairman of the Council who may direct that the matter be placed before the Council for such perusal, consideration, action, order or proceedings, if any, in relation to the Petitioner (or any other person as deemed appropriate) as the Council may determine. The action/ proceedings, if any, or orders or directions, if any, as may be taken, made or given by the Council shall be deemed, for purposes of Article 209 of the Constitution, to be in exercise of the suo motu jurisdiction as is conferred by that Article on the Council. Without prejudice to the foregoing, if at any stage the report is received from the Chairman, FBR, then the matter shall in any case proceed (or be deemed to proceed, as the case may be) in terms of para 9 herein above.
11. For the removal of any doubts, it is clarified that any of the proceedings under the 2001 Ordinance as herein contemplated on the one hand, and before the Council in terms of para 9 or 10 herein above on the other, are distinct and separate from each other. Accordingly, nothing contained in this Order shall affect or prejudice the right(s) of appeal of any of the respondents under the 2001 Ordinance, if they feel aggrieved by the order made by the Commissioner or (as the case may be) any order made or decision taken at any appellate stage. Any such appeal(s) shall be decided on the merits, in accordance with the 2001 Ordinance. At the same time (and needless to say), the consideration by the Council of any matter placed before it under either para 9 or 10 herein above shall not be affected by the filing or pendency of any appeal as aforesaid. But the Council may, if it deems appropriate, notice such appellate proceedings or orders/ decisions and may (for purposes only of the matter before it) make such orders or give such directions in relation thereto as it deems appropriate."

6. Since all review petitioners were primarily aggrieved by paras 4-11 of the Short Order, these petitions were initially placed on 28.10.2020 before a seven member bench (comprised of the seven Judges who were signatories to these paras of the Short Order and the Detailed Reasons). However, the matter was

adjourned to 16.11.2020 to allow time to the learned counsel to peruse the Detailed Reasons of the Majority Judgment which had been released on 23.10.2020.

7. On the next date of hearing, 16.11.2020, the review petitioners raised a preliminary objection to the composition of the review Bench on account of the exclusion of the three learned Minority Judges. Nevertheless, the matter could not proceed further and was adjourned as Mr. Munir A. Malik, Sr. ASC, counsel for the learned petitioner was unavailable on account of the COVID-19 pandemic. It was after this hearing and before any arguments on this issue had commenced that the learned petitioner and Mrs. Isa filed Additional Reasons in support of their review petitions (Mrs. Isa filed hers on 01.12.2020 whereas the learned petitioner filed his on 04.12.2020) in which they for the first time disputed the dissenting judgments authored by the three learned Minority Judges (the learned petitioner only challenged the judgment authored by Justice Yahya Afridi). The Additional Reasons did not explain the delay of six months in challenging the dissenting judgments. However, their rationale for belatedly questioning these judgments was to bolster the stance of the review petitioners that the three learned Minority Judges (who had struck down the admitted information) should be a part of the Bench hearing the review petitions. Accordingly, on 08.12.2020 and 10. 12.2020 when substantive arguments were made on the composition of the review Bench, Mrs. Isa specifically sought the inclusion of the three learned Minority Judges in the Bench for the reason that she had impugned their judgments while Mr. Munir A. Malik, Sr. ASC for the learned petitioner after expressing some initial doubts conceded that in certain situations dissenting judgments could be reviewed.

8. The decision in that matter i.e., composition of review Benches is reported as Justice Qazi Faez Isa v. President of Pakistan (PLD 2021 SC 639). It held that: It is the prerogative of the Hon'ble Chief Justice ("HCJ") to constitute Benches; ordinarily the strength of a review Bench should be equal to the number of Judges who heard the original matter; the review Bench should comprise the author Judge (if available). In his absence any Judge who agreed with the author Judge should be included in the Bench; and a review is contemplated only against judgments of this Court i.e., unanimous and majority verdicts. This decision also emphasised the restraint and quietude that must be exercised and maintained by a dissenting Judge (or any other Judge not part of the original Bench) sitting in a review Bench (paras 28-30) as review jurisdiction is not akin to appellate jurisdiction. Therefore, any disagreement with the decision of the Majority that falls short of the test of review should not qualify to set aside a judgment that is otherwise based on correct factual and legal premises. However, as will become clear later in the judgment, this basic principle was disregarded by the learned Minority Judges when the HCJ included them in the review Bench after our aforementioned decision.

9. Subsequently, when hearings resumed before the reconstituted review Bench the learned petitioner obtained leave of the Court on 02.03.2021 to argue his review himself as his counsel could not appear due to poor health and COVID-19 restrictions. At this juncture, instead of commencing his submissions in the review the learned petitioner surprisingly pressed a fresh application (C.M.A. No. 1243 of 2021) filed by him which sought public broadcast of the hearings in the review petitions. Pro and contra arguments on this application were heard over the course of five hearings (02, 03, 08, 17 and 18 March 2021) and the application was ultimately dismissed by a short order dated 13.04.2021 with a majority of 6-4 (the detailed reasons are recorded in a separate order).

10. Consequently, it was only on 15.04.2021 that hearings in the review petitions began. By this date only fifteen days were left till the retirement of Justice Manzoor Ahmad Malik, one of the learned members of the Bench, on 30.04.2021. The learned petitioner and Mrs. Isa made their substantive arguments in person over the course of three days. Perhaps due to their personal involvement in the case and paucity of time both were erratic and emotional whilst addressing the Court. The charged behaviour of the two review petitioners along with the interruptions by a learned Minority Judge, reminding specifically the learned Additional AG to shorten his submissions hindered the latter from arguing the matter freely whilst also disrupting the Court decorum. The resulting tension caused awkwardness and difficulties in the hearings of the review petitions.

Grounds of Review

11. Be that as it may, we have perused the arguments of the learned petitioner and Mrs. Isa presented before us. From these submissions we have gathered the alleged defects in the Majority Judgment that according to them call for its review. These are:

i. The Court lacked jurisdiction to issue directions to the FBR to commence proceedings against Mrs. Isa and her children;

ii. The Court encroached on the jurisdiction of the SJC by issuing a direction to its Secretary to place the Report of the Chairman FBR before the Chairman SJC for the SJC to consider whether to proceed against the learned petitioner;

iii. The directions issued by the Court to the FBR and SJC were invalid as these failed to satisfy the jurisdictional test under Article 184(3) of the Constitution, namely, the violation of a fundamental right which affects the public at large;

iv. The Court did not give Mrs. Isa a hearing before ordering the FBR to initiate proceedings against her thereby violating the principles of natural justice;

v. The Court's finding that the respondents' actions against the learned petitioner were not motivated by malice in fact suffers from an error apparent on the face of the record;

vi. The Court having unanimously observed that Mrs. Isa's Regional Tax Officer ("RTO") was in Karachi could not later, by a smaller majority, permit proceedings to be conducted in Islamabad; and

vii. The Court passed the Short Order without hearing the counsel of the learned petitioner on phase II of the arguments, namely, the mala fides of SJC.

12. Mr. Hamid Khan, Sr. ASC, (C.R.Ps. Nos.299, 300, 301 and 308 of 2020) also addressed the Court. Some of the points argued by him overlapped with those raised by the learned petitioner and Mrs. Isa while a few were concerned with minor procedural technicalities which had no bearing on the review. However, he also emphasised the following issues which had hitherto been untouched:

i. After the Short Order dated 19.06.2020 quashed the Reference, the SJC became functus officio and so could not entertain the Report of Chairman FBR on the same information which had formed the basis of the Reference;

ii. SJC under Article 209 of the Constitution is only competent to hear and decide disciplinary matters pertaining to the Superior Judiciary. It has no jurisdiction over the family members of Superior Court Judges;

iii. A direction/order of this Court cannot form the basis of an information for initiating an inquiry against a Superior Court Judge;

iv. The Report of Chairman FBR cannot be an information under Article 209(5) ibid because it contains a tentative opinion based only on the decision of the CIR; and

v. The direction to the FBR is tantamount to the Court passing person specific legislation.

Mr. Rasheed A. Rizvi, Sr. ASC, (C.R.Ps. Nos. 297 and 309 of 2020) adopted the arguments of Mr. Hamid Khan, Sr. ASC.

13. In reply, the learned Additional AG's main contention was that once the Court had reached a conscious and deliberate decision, its judgment could not be set aside unless there was an error apparent on the face of the record [ref: Engineers Study Forum v. Federation of Pakistan (2016 SCMR 1961) at para 6]. Since the review petitioners had not been able to point out such an error, the review petitions were not maintainable. To fortify his stance, he also made the following submissions:

i. This Court has vast powers under Article 184(3) of the Constitution read with Article 187 ibid to issue directions of any nature in a case to do complete justice;

ii. Mrs. Isa was afforded a hearing before the Majority Judgment was issued and in any case the inadequacy of a hearing cannot be a ground of review;

iii. Once SJC had received the Report of the Chairman FBR, it could not be restrained from examining the information provided in the said report, save in exceptional circumstances;

iv. If a ruling is set aside that does not necessarily efface the directions issued in the said judgment; and

v. No direction was issued by the Court to the SJC.

Decision

14. After extensively hearing all the sides, the review Bench vide short order dated 26.04.2021 allowed the review petitions by a majority of 6-4 (however, the Bench was evenly split 5-5 on the learned petitioner's review petition). This order is produced below:

"O R D E R

For reasons to be recorded later, these review petitions are dismissed.

ORDER OF THE BENCH

By majority of six to four (Justice Umar Ata Bandial, Justice Sajjad Ali Shah, Justice Munib Akhtar and Justice Qazi Muhammad Amin Ahmed dissenting), these review petitions, except as mentioned below, are allowed.

2. Civil Review Petition No.296 of 2020 titled Justice Qazi Faez Isa v. The President of Pakistan and others) is allowed by five and dismissed by five Hon'ble members of the Bench.

SHORT ORDER

For the reasons to be recorded later, captioned Review Petitions are allowed and the directions contained in paras 4 to 11 of the impugned short order dated 19.06.2020 passed in Const. Petition No.17/2019 and other connected matters, along with supporting detailed reasons given in the majority judgment of the same date, are recalled and set-aside. All the subsequent proceedings, actions, orders, information and reports in pursuance of the directions contained in the short order dated 19.6.2020 and the detailed reasons thereof, are declared to be illegal and without any legal effect. Resultantly, any such proceedings, actions, orders or reports cannot be considered or acted upon and pursued any further by any forum or authority including the Supreme Judicial Council.

Yahya Afridi, J. For the reasons to be recorded later, all review petitions except C.R.P. No. 296 of 2020, are allowed and the directions contained in paragraphs Nos. 4 to 11 of the order dated 19.06.2020 and detail judgment dated 23.10.2020 passed in Constitution Petition No. 17 of 2019 and other connected petitions are recalled. Consequently, all the subsequent proceedings, actions, orders and reports made in pursuance to the said directions are declared to be of no legal effect and/or consequences."

It is clear from the foregoing short orders that the learned Judges who had been in the minority (i.e., Justice Maqbool Baqar, Justice Syed Mansoor Ali Shah and Justice Yahya Afridi) were now joined by three Judges who had earlier been part of the majority (Justice Manzoor Ahmad Malik, Justice Mazhar Alam Khan Miankhel and Justice Amin-ud-Din Khan, who had replaced Justice Faisal Arab on the review Bench after the latter's retirement). Justice Yahya Afridi on the one hand and the other five learned Judges on the other made their own respective short orders. An examination of these short orders shows that there was some, but by no means complete, commonality between them. There was therefore a review majority (in relation only to that which was common between these short orders and nothing else), but only to a limited extent.

Test for Review

15. Before analysing the substantive arguments of the parties, we consider it appropriate to briefly state at the outset the settled parameters of the remedy of review laid down by Article 188 of the Constitution read with Order XXVI, Rule 1 of the Supreme Court Rules, 1980 ("SCR") which stipulate that a review in a civil matter will proceed on grounds similar to those mentioned in Order XLVII, Rule 1 of the C.P.C. This latter Rule lays down three grounds for review, namely:

i. Discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the aggrieved person or could not be produced by him/her at the time when the decree was passed or order was made;

ii. A mistake or error apparent on the face of the record; or

iii. Any other sufficient reason.

16. In the present review petitions, only the second principle was urged by the review petitioners. The Court has on numerous occasions dilated upon the expression 'mistake or error apparent on the face of the record.' However, the judgment in Abdul Ghaffar-Abdul Rehman v. Asghar Ali (PLD 1998 SC 363) after conducting a detailed survey of the law on the guiding principles of review jurisdiction has explained the phrase comprehensively. These principles have later been followed in and expanded by subsequent cases. For ease of reference, a summary of the principles is produced below:

i. Every judgment pronounced by the Court is to be considered a solemn and final decision on all points arising out of the case [ref: Ghulam Murtaza v. Abdul Salam Shah (2010 SCMR 1883)];

ii. An error must be obvious and must not require an elaborate discussion to be detected [ref: Majid Mahmood v. Muhammad Shafi (2008 SCMR 554)];

iii. An error should not only be significant but should also have a material effect on the outcome of the case in that it must change the decision of the case [ref: Wajihul Hassan Zaidi v. Government of the Punjab (PLD 2004 SC 801)];

iv. A review cannot be sustained merely on the ground that a different decision could have been taken by the Court [ref: Rashid Ali Channa v. Muhammad Junaid Farooqui (2017 SCMR 1519)]; and

v. A review is not an appeal or a rehearing [ref: Mukhtar Mai v. Abdul Khaliq (2019 SCMR 1302)].

17. These principles underline the key point that review jurisdiction is limited in nature and a review will only succeed if it can be shown that an error in the judgment has changed the outcome of the case, whether partially [ref: Shireen Raza v. Federation of Pakistan (2002 SCMR 1218) and Abdul Ghaffar's case (supra)] or entirely [ref: Federation of Pakistan v. Muhammad Nawaz Sharif (PLD 2009 SC 644) and Fida Hussain v. The Secretary, Kashmir Affairs and Northern Affairs Division (PLD 1995 SC 701)]. It is in this context that the objections urged against the Majority Judgment by the learned petitioner and Mrs. Isa need to be examined.

Objections of the Review Petitioners

C.R.Ps. Nos.296 and 298 of 2020

A. Directions to FBR and SJC

18. The principal issue highlighted by both the learned petitioner and Mrs. Isa was the lack of jurisdiction of this Court to issue directions to the FBR and the SJC (stated in points i, ii, iii and vi of para 11) . It was argued that under Article 175(2) of the Constitution, the Courts of Pakistan can only exercise jurisdiction which is conferred on them by the Constitution and/or the law. Even Article 184(3), it was stated, was of no help as the two basic requirements, namely, the breach of a fundamental right which affects the people at large and is of public importance, were not satisfied. In simple words, it was maintained that the tax affairs of a private person/citizen could not involve the public interest and therefore trigger Article 184(3). Finally, it was submitted that the Court only had the power to allow or dismiss Const. P. No. 17 of 2019 (or grant any of the other prayers) and it could not in its original jurisdiction issue directions to non-parties.

19. There is no cavil with the petitioners' proposition that Courts only have that jurisdiction which is conferred on them by the Constitution and the law. However, whilst deciding Const. P. No.17 of 2019, filed by the learned petitioner, the Court exercised its original jurisdiction conferred under Article 184(3) of the Constitution and its complete justice power under Article 187 thereof. It is by now well-settled that when this Court acts under these provisions it can issue directions which travel beyond the pleas/ pleadings of the parties. Reference is made to the decision in Muhammad Hanif Abbasi v. Imran Khan Niazi (PLD 2018 SC 189):

"(106)sic. The whole process entails queries being posed by the Court and directions being issued to persons to produce evidence on record that is relevant to the matters under scrutiny. The queries or directions emanating from the Court may travel beyond the pleas set out in the pleadings of the parties because their answers are necessary to resolve a controversy pending before the Court. Therefore, such queries and directions cannot always be anticipated by the persons who are asked to provide evidence or information. It is this feature of the inquisitorial jurisdiction under Article

184(3) of the Constitution that justifies considerable indulgence representing a fair and generous opportunity being granted to a party or person to answer a query or comply a direction that was otherwise unexpected or for which it was unprepared."

(emphasis supplied)

Similarly, in Zulfiqar Ali Babu v. Government of the Punjab (PLD 1997 SC 11) the Court held:

"9 ...once this Court is seized of a lis competently under the relevant law, its power to grant appropriate relief [under Article 187 of the Constitution] is not controlled by the technicalities of the pleadings or otherwise..."

It is also trite law that in its original jurisdiction the Court can mould the relief 'in accordance with the facts and the circumstances that come to light during the proceedings.' [ref: Muhammad Asghar Khan v. Mirza Aslam Baig (PLD 2013 SC 1) at para 38]. Therefore, in light of these oft-confirmed principles defining the extent of the Court's original jurisdiction and its complete justice power, the claim of the petitioners that this Court only has the power to grant the relief sought in a petition is devoid of force.

20. Even the argument that the tax affairs of private citizens does not attract Article 184(3) of the Constitution has failed to impress us. The submission may have carried weight if the petitioners involved in the matter were actually private persons. However, the present case is concerned with the financial affairs of the spouse of a Judge of the Supreme Court. A necessary corollary which flows from the nature of Judges' work and the unique position they occupy in society is that they, like other public servants, are expected to make reasonable efforts to keep themselves informed about the financial affairs of their spouse and other family members who are either dependent on them or with whom they have financial dealings (ref: para 38 of the Detailed Reasons):

"38. At first glance an obligation to remain informed about the financial affairs of one's family members seems archaic because modern jurisprudence emphasises the protection of the rights of the individual against the State and society. However, to understand the rationale behind the obligation on Judges to make reasonable efforts to be informed about or to watch over the financial affairs of their family members, one has to understand the nexus of this obligation with the nature of Judges work and the position they occupy in society. As has been held above, Judges exercise pre-eminent authority under the law. They adjudicate disputes between litigants, hold parties appearing before them accountable and impose liabilities and grant relief to such parties. With their authority comes an even greater responsibility to decide cases fairly, independently and in accordance with law. In such a situation, it is imperative for a Judge that he should make reasonable efforts to be informed about the financial interests of his family members for the simple reason that if a case comes before him which directly or indirectly involves the pecuniary, proprietary or other personal interests of any of his family members, he can recuse himself...

However, this is not the only object behind imposing such a burdensome obligation on Judges. Another equally, if not more, important reason for requiring Judges to be aware of the financial interests of their family members is that the law's intent is to prevent a Judge's family from becoming a conduit to discreetly influence his opinions and views. This assures the Judges independence and integrity apart from safeguarding the institution of the judiciary."

(emphasis supplied)

21. This obligation on Judges to be aware of and/or accountable for the financial affairs of their family members can also be found in the laws of Pakistan that govern the realm of unaccounted/unexplained wealth of public servants. For instance, the State Bank of Pakistan ("SBP") in exercise of its powers under Section 41 of the Banking Companies Ordinance, 1962 has framed the Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) Regulations for Banks and DFIs ("Regulations") (revised and issued on 13.09.2012). These Regulations, inter alia, aim to establish the source of wealth/funds of certain specific persons who are customers of Banks and DFIs and include Politically Exposed Persons ("PEPs"), a term that is defined to include Judges:

"PART - A

DEFINITIONS

For the purposes of these regulations-

..

27) "Politically Exposed Persons or PEPs" are individuals who are entrusted with prominent public functions either domestically or by a foreign country, or in an international organization, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations/ departments/autonomous bodies."

(emphasis supplied)

Regulation 1(30) of Part B requires Banks and DFIs to undertake enhanced precautionary measures in relation to PEPs and their family members. For ease of reference, this provision is produced hereinbelow:

"PART-B

REGULATIONS

.

Politically Exposed Persons (PEPs)

30. In relation to PEPs and their close associates or family members, banks/DFIs shall:

(a) implement appropriate internal policies, procedures and controls to determine if a customer or beneficial owner is a PEP;

(b) obtain approval from the bank's senior management to establish or continue business relations where the customer or a beneficial owner is a PEP or subsequently becomes a PEP;

(c) establish, by appropriate means, the sources of wealth or beneficial ownership of funds; including obtaining a self-declaration to this effect; and

(d) conduct during the course of business relations, enhanced monitoring of business relations with the customer."

(emphasis supplied)

Since the scope of the term 'family member' was vague and required clarification, the same was subsequently defined in the Regulations (updated version dated 30.09.2020):

"PART - B

DEFINITIONS

For the purposes of these regulations-

.

28) "Family member of a PEP" includes-

(a) spouse of the PEP; and

(b) lineal descendants and ascendants of the PEP and siblings of PEP."

(emphasis supplied)

22. The rationale behind treating family members as PEPs and subjecting them to the same enhanced precautionary measures can be gathered from the Financial Action Task Force Guidance for PEPs (June 2013):

"52. The FATF Recommendations require that family members and close associates of PEPs should be determined to be PEPs because of the potential for abuse of the relationship for the purpose of moving the proceeds... or facilitating their placement..."

The fiduciary obligations cast upon public office holders/public servants are also enshrined since long in the Federal and Provincial laws of the country. These make public servants liable for the unexplained assets of their family members. The earliest extant law on the subject is the Prevention of Corruption Act, 1947 ("PCA 1947"). Section 5(1) (e) of the said Act sets out the nature and extent of substantive obligations imposed on public servants vis a vis their dependent family members:

"5. (1) A public servant is said to commit the offence of criminal misconduct[:]

...

(e) If he, or any of his dependants, is in possession, for which the public servant cannot reasonably account, of pecuniary resources or of property disproportionate to his known sources of income.

Explanation: In this clause, "dependant" in relation to a public servant, means, his wife, children and step-children, parents, sisters and minor brothers residing with and wholly dependent on him."

(emphasis supplied)

Similar liability is also attached to public office holders in respect of their dependents or benamidars in the National Accountability Bureau Ordinance, 1999 ("NAB Ordinance"). The relevant portion is produced below:

"9. A holder of a public office, or any other person, is said to commit or to have committed the offence of corruption and corrupt practices:-

.

(v) If he or any of his dependents or benamidars owns, possesses, or has or has acquired right or title in any assets or holds irrevocable power of attorney in respect of any assets or pecuniary resources disproportionate to his known sources of income, which he cannot reasonably account for or maintains a standard of living beyond that which is commensurate with his sources of income;..."

(emphasis supplied)

23. The NAB Ordinance and PCA 1947 are not applicable to Superior Court Judges by virtue of the judgment in Khan Asfandyar Wali v. Federation of Pakistan (PLD 2001 SC 607). Nevertheless, the legal tests and standards applied to other holders of public office/public servants under these laws can be utilised by the SJC to evaluate the conduct of Judges. In fact, previous removal proceedings conducted against Judges confirm this approach. Reference is made to the decision in The State v. Mr. Justice Akhlaque Hussain (PLD 1960 SC (Pak) 26) in which this Court adjudicated on a charge of tax evasion levelled against a High Court Judge and recommended his removal thereon. Likewise, in The President v. Mr. Justice Shaukat Ali (PLD 1971 SC 585) the SJC applied the principles of Company Law to recommend the removal of a High Court Judge in respect of allegations that he was involved in activities of trade and industry. Similar examples are also available in foreign jurisdictions such as India and Canada:

i. Justice Soumitra Sen of Calcutta High Court was charged with appropriating around Rs.33 lacs as a Court appointed receiver in 1993. He was found guilty by an Inquiry Committee constituted by the Chairman of Rajya Sabha on 10.09.2010. He later resigned.

(<https://rajyasabha.nic.in/rsnew/judges_inquiry/> report_judges_enqury_english.pdf)

ii Justice Michel Girouard of the Superior Court of Quebec was charged with (amongst other allegations) allegedly purchasing approximately one kilo of cocaine between the years 1987-1992. While he was cleared of this charge on 18.11.2015 ("First Inquiry") by the Inquiry Committee, he was on 20.02.2018, in a Second Inquiry, recommended for removal by both the Inquiry Committee and the Canadian Judicial Council for giving false and deceitful evidence in the First Inquiry (ref: Canadian Judicial Council website). He later resigned.

24. It becomes clear from these illustrations that although Judges may be protected from the ordinary processes of law, they are not subject to separate or lower legal standards of accountability compared to other public servants. They are answerable at the bare minimum against the same benchmarks applied to ordinary public servants. This includes being accountable for the unexplained assets of their spouses and family members. The only difference is that a Judge of a Superior Court is answerable before a specialised forum created specifically for determining complaints of misconduct received against Judges. That SJC is one such forum was affirmed in the Khan Asfandyar Wali case (supra):

" ...The Supreme Judicial Council is a unique institution, which comprises the senior most Judges in judicial hierarchy and [is] entrusted with the onerous responsibility of deciding complaints [against Judges] that are referred to it... As held in the case of Zafar Ali Shah (supra), the Judges of the Superior Courts are not immune from accountability. They are accountable only in the manner laid down under Article 209 of the Constitution."

(emphasis supplied)

To treat, at the very least, Superior Court Judges on par with other public servants is not exceptional. In the Asghar Khan case (supra) Judges were declared to be in the Service of Pakistan (para 78). This is

because Judges occupy an office 'in connection with the affairs of the Federation,' a phrase which has been defined by the Court in Salahuddin v. Frontier Sugar Mills and Distillery Ltd.(PLD 1975 SC 244) to mean:

> "Now, what is meant by the phrase "performing functions in connection with the affairs of the Federation or a Province." It is clear that the reference is to governmental or state functions, involving, in one form or another, an element of exercise of public power..."
>
> (emphasis supplied)

25. Taking this analysis a step further, the Detailed Reasons also examined the features of public office and held that Judges in addition to being in the Service of Pakistan were also public servants:

> "83. ...there are five main ingredients present in the office of a public servant. These are:
>
> a. The office is a trust conferred for a public purpose;
>
> b. The functions of the office are conferred by law;
>
> c. The office involves the exercise of a portion of the sovereign functions of Government whether that be executive, legislative or judicial;
>
> d. The term and tenure of the office are determined by law; and
>
> e. Remuneration is paid from public funds.
>
> 84. When the office of a Judge of the Supreme Court is scrutinised against these ingredients, it becomes obvious that Judges of this Court are indeed public servants. Their office is created by the Constitution and so are the jurisdiction and powers that they possess. They perform an essential governmental function: the administration of justice for the benefit of the public at large. They have a fixed tenure, prescribed by Article 179 of the Constitution and their emoluments are paid from the Federal Consolidated Fund under Article 81 of the Constitution. As a result, there is no doubt that a Judge of the Supreme Court is a public servant for the purposes of Section 216(3)(p) of the [Income Tax] Ordinance..."
>
> (emphasis supplied)

26. In the present case, it is admitted that the three London Properties belong to Mrs. Isa and her children; that two of the Properties, namely, 40 Oakdale Road and 90 Adelaide Road, were purchased in 2013 when the learned petitioner was holding the public office of Chief Justice of the Balochistan High Court; and that the said Properties were undeclared in the wealth statements of Mrs. Isa and the learned petitioner. In these circumstances, the non-disclosure of the London Properties causes suspicion and trepidation. More so when one views Sections 11(5) and 111(1)(d) of the Ordinance which mandate since the promulgation of the Ordinance [in the case of Section 11(5)] and 2011 [in the case of Section 111(1)(d)] that the income of a resident person includes both his domestic and foreign income and the failure to disclose the same renders a resident person liable to pay the tax evaded:

> "11. Heads of Income.--
>
> ....
>
> (5) The income of a resident person under a head of income shall be computed by taking into account amounts that are Pakistan-source income and amounts that are foreign-source income.
>
> 111. Unexplained Income or Assets.---(1) Where--
>
> (a) ...
>
> (b) a person has made any investment or is the owner of any money or valuable article;
>
> (c) ...
>
> (d) any person has concealed income or furnished inaccurate particulars of income including...
>
> and the person offers no explanation about the nature and source of the... investment, money, valuable article... suppression of... any amount chargeable to tax and of any item of receipt liable to tax or the explanation offered by the person is not, in the Commissioner's opinion, satisfactory the... value of the investment, money, value of the article... or any amount chargeable to tax or of any item of receipt liable to tax shall be included in the person's income chargeable to tax under head "Income from Other Sources to the extent it is not adequately explained."
>
> (emphasis supplied)

27. Therefore, in such circumstances a question to the learned petitioner about the source of funding of these Properties is natural, relevant and lawful, notwithstanding any procedural lapses committed by the respondents in the preparation of the Reference. That question must not be bypassed because being in the Service of Pakistan, the learned petitioner remains answerable for the unaccounted assets of his spouse. No satisfactory reasoning was put forward by any review petitioner on why no standards of accountability or separate or lower ones should apply to Judges (who also fall in the category of public servants) and why the SJC should wait for a final determination by the relevant statutory authorities before processing an information received against a Judge on this score.

28. Indeed, it is of vital importance that public office holders, particularly Judges of the Superior Courts, serving the people of Pakistan remain answerable before their relevant forums to safeguard the integrity and credibility of their person as well as of their Court. As custodians of the Constitution and the guardian of peoples' fundamental rights [ref: Corruption in Hajj Arrangements in 2010 (PLD 2011 SC 963) at para 20] the Courts try people and hold them accountable according to the Constitution and the law. Their judicial orders are accepted and obeyed by the people for their trust in the Courts' moral authority which is dependent upon the personal rectitude of the Judges. If aspersions cast against Judges on the basis of admitted facts are not dispelled, the said moral authority of the Courts is eroded and the execution of their primary function, namely, to decide the peoples' rights and obligations in accordance with the Constitution and the law becomes severely undermined.

29. The obligation on Judges to be transparent in their conduct is also exemplified in the Code of Conduct for Judges of the Supreme Court and High Court ("CoC") issued by the SJC under Article 209(8) of the Constitution which calls upon Superior Court Judges 'to present before the public an image of justice of the nation.' It is further provided that a Judge must possess 'the highest qualities of intellect and character' and 'keep his conduct in all things, official and private, free from impropriety.' Recalling para 38 of the Detailed Reasons (reproduced above in para 20) it is only fair that Judges conduct themselves in a manner that demonstrates exemplary behaviour for the people to emulate. Consequently, when a Judge and/or his spouse admit to acquiring undisclosed foreign assets and there is an element of indiscretion in their omission to declare the said assets, namely, a violation of the duty under Section 111 of the Ordinance and a failure to live up to the standard of propriety expected of Judges and their spouses under the CoC, an inquiry into the source of acquisition of the undeclared foreign assets serves the public interest and right which according to settled jurisprudence can prevail over the private rights of individuals. Reference is made to the decision in Pakistan Muslim League (N) v. Federation of Pakistan (PLD 2007 SC 642):

> "28. ...while "interpreting Fundamental rights guaranteed by the Constitution, a cardinal principle has always to be borne in mind that these guarantees to individuals are subject to the overriding necessity or interest of community. A balance has to be struck between these rights of individuals and the interests of the community. If in serving the interests of the community, an individual or number of individuals have to be put to some inconvenience and loss by placing restrictions on some of their rights guaranteed by the Constitution, the restrictions can never be considered to be unreasonable"..."
>
> (emphasis supplied)

30. This dictum was subsequently approved in Mohammad Imran v. Province of Sindh (2019 SCMR 1753) at para 49. Whilst these observations were made in the context of balancing the fundamental rights of individuals on the one hand and the interests of the community on the other, they apply with even greater force in the instant case as no fundamental right of either the learned petitioner or Mrs. Isa has been infringed by our direction to the FBR to investigate the nature and source of funding of the London Properties. This is because there is no fundamental right granted in the Constitution to public servants/ citizens to be immune from investigations into their financial affairs. In fact, Section 216(3)(p) of the Ordinance specifically allows such investigations. The only provision which is somewhat relevant to and applicable in the present scenario is Article 4(2)(a) of the Constitution which reads:

> "4. Right of Individuals to be dealt with in accordance with law, etc.

...

(2) In particular-

(a) no action detrimental to the... reputation or property of any person shall be taken except in accordance with law;"

However, as will be discussed later in the judgment our direction to the FBR to commence proceedings against Mrs. Isa does not adversely affect either her reputation or her property. Therefore, Article 4 ibid is not attracted to the facts of the instant case.

31. Further, during the hearing of Const. P. No. 17 of 2019, the learned petitioner himself on 17.06.2020 made an oral request on behalf of Mrs. Isa for addressing the Court. The request was granted. Thereafter, in her video link statement on 18.06.2020 (a transcript of which is available with the order sheet), Mrs. Isa expressly asked why she had not been questioned by the tax authorities when the Reference alleged her London Properties to be shrouded in controversy. The assertion that she could fully explain the source of funding of the Properties was implicit in her statement. Equally her stand acknowledged an obligation to justify the same. She also referred to her sources of income that apparently financed the purchase of the London Properties. This indicated that she was prepared for and inclined to answer questions about the London Properties. Therefore, in issuing the direction to the FBR to commence proceedings in respect of the London Properties, the Court was moved by two factors: firstly, that Mrs. Isa be given an opportunity to explain the source of funding of the London Properties so that any stigma surrounding them is erased from the person of the learned petitioner and the Court; and secondly, to redress Mrs. Isa's complaint as expressed in her video link statement of 18.06.2020 made before the Court that she should have, but had not, been asked about the Properties from the beginning:

"Judge: ...We understand and we can notice and realize you have a great deal of record showing accrual of income and transfer from your own account to your foreign account and then the purchase of foreign property... We have a little problem; we cannot look at the merits of the case. There are two forums available. Your Hon'ble husband has in his pleadings indicated that this is a matter which should go to the tax authorities but it is a matter concerning your interest and your records; that is one option; and this is something we told the parties two days ago. The second thing is that another forum which is competent to hear you; and I assure you, you will be given a most sympathetic hearing, each and every document you say, will be considered, preserved... And that is the Supreme Judicial Council; you can make the statement there...

Mrs. Isa: Why has no one asked me this from the beginning? Why has the FBR not contacted me: I have waited and waited; 13 months of hell they have put us through; my family and I... I have requested as my husband has, please ask us from the beginning[.] Why after 13 months are you then saying then there are these two forum? Why were we not asked at the beginning...

Judge: We understand what you are saying but even this plea is on the merits. We cannot consider it... but now we will make sure that they will attend to you, they will not be derisory as your husband complained yesterday; they will respect you; they will consider all the documents you have and all this issue of limitation etc. that is something which has to be dealt with in accordance with law...

Judge: ... The point is Madam that we do not have jurisdiction to hear the dispute on merits; and for the Courts of law, jurisdiction is fundamental... Now we don't, we cannot give a finding that you have adequate funds or inadequate funds. These are matters which have to be decided by competent authorities so we are grateful that you came before us."

(emphasis supplied)

32. The above-quoted extracts demonstrate that it was made clear to Mrs. Isa that the Court could not decide her case on merits and that the competent authority, whether it be the FBR or the SJC, had the jurisdiction to determine the factual issue of source of funding along with all other ancillary matters. Ultimately, the decision was made to refer the matter to the FBR for reasons already set out in the Majority Judgment:

"138. ...Our decision to take such a step was primarily based on two grounds: to establish that Judges of the Superior Court are answerable for allegations casting aspersions not only on their personal integrity but also on the integrity of the institution; and to honour the petitioner's plea that the allegation of absence of source of funds and money laundering must be first put to Mrs. Isa who is an independent taxpayer.

...

142. Rather than allowing the disturbing allegation against the petitioner and his family to circulate and attract innuendos thereby injuring the reputation and integrity of both the petitioner and this Court, we adopted the fair, impartial and transparent route of allowing Mrs. Isa and her children to disclose the source of their funds to the relevant authorities, namely, the FBR. Such a transparent course of action is consistent with the CoC, the maintenance of institutional integrity and the image of Judges as the neutral and independent arbiters of law and justice... every public office holder including Judges of the Superior Courts, officers of the armed forces, elected representatives and public servants are accountable under the law. Indeed, neither the institution of the judiciary nor the other institutions of Pakistan can tolerate a contrary perception...

143. It may be mentioned here that our decision to refer the matter for verification to the FBR grants the petitioner's plea from the very start of the proceedings that his wife and children should be asked about their source of funds for the acquisition of the London Properties. This was reiterated by learned counsel for the petitioner during arguments. He submitted that a determination by the tax authorities was essential to ensure that the due process rights of the petitioner and his family under Article 10A of the Constitution were not violated. Mrs. Isa also adopted a similar stance in her statement, given through video link, on 18.06.2020 to the Court. To our minds the FBR being the premier tax authority in Pakistan is the most well equipped to deal with questions of a financial nature. It not only maintains the complete tax records of taxpayers, including those of Mrs. Isa's, but also employs personnel who are well-versed in comprehending and analysing financial and tax records."

(emphasis supplied)

Consequently, having herself demanded why the FBR had not approached her regarding the London Properties, Mrs. Isa cannot now take the contradictory plea that a direction to the FBR to this effect is contrary to law.

33. The next issue which was briefly touched upon during arguments was whether the FBR was even competent to inquire into the London Properties since a period of five years and more had elapsed from the date of purchase of the London Properties. Since this matter directly pertains to the application of the Ordinance to the merits of this case the Court cannot examine it (refer to previous para). This plea therefore also fails.

34. A jurisdictional objection was then raised by Mrs. Isa. She specifically questioned how CIR, Islamabad could proceed against her when her Regional Tax Officer ("RTO") had been relocated to Karachi, as evidenced by the Court's order dated 03.02.2020. To understand why the order dated 03.02.2020 was passed and what it observed, the events that transpired on the previous day of hearing i.e., 29.01.2020 as recorded in the order sheet of that hearing may be examined first:

"...During the course of his [Mr. Salman Akram Raja's] submissions, it was pointed out that according to the newspaper reports Mrs.Faez Isa had recently approached the FBR in order to obtain information about her Income Tax file which had been transferred from Karachi to Islamabad. The FBR authorities did not lend any assistance in the matter...

...

3. In view of the above situation, we have asked the learned Additional Attorney General to verify the above from the FBR and to report on the next date of hearing."

It was against this background that the order dated 03.02.2020 made the following observation:

"2. In pursuance of our earlier order dated 29.01.2020... He [Attorney General] states that vide Notification No.F.No.7(l) Jurisdiction/2018-11922-R dated 30th January 2020, the FBR has redressed her [Mrs. Isa's] grievance and transferred back her RTO from Islamabad to Karachi. This order has been conveyed to the tax advisor of Mrs.Faez Isa."

35. It becomes clear from these two orders that the Court on 03.02.2020 did not decide the question of jurisdiction nor issued any direction in relation to the RTO who has jurisdiction to assess Mrs. Isa's tax matters. Instead, it merely noted the statement made by the then AG that the FBR had by executive action transferred Mrs. Isa's RTO back to Karachi from Islamabad. This was done to address her grievance. In the absence of a lawful determination by this Court that Mrs. Isa's RTO should be situated in Karachi, the Short Order dated 19.06.2020 cannot be criticised for contravening the order dated 03.02.2020. In any event, Mrs. Isa and her daughter are currently residing in Islamabad. However, there is some confusion regarding the correct home address of Mrs. Isa in Karachi (there appear to be two addresses on record but Mr. Munir A. Malik, counsel for the learned petitioner, submitted during arguments in Const. P. No. 17 of 2019 that one of the properties was sold off in 1997). Therefore, it was for their convenience and for the expeditious finalisation of the Chairman FBR's Report that the proceedings were ordered to be conducted in Islamabad. It may also be noted that the direction to CIR, Islamabad is consistent with Section 209(2) of the Ordinance. This provision authorises, inter alia, the FBR to confer on any Officer of the Inland Revenue the powers and functions of a Commissioner in respect of any person or classes of persons or areas.

36. Further, the Short Order makes it obvious that CIR, Islamabad has only been granted power to act for the limited purpose of enquiring about the London Properties and the source of funds used for purchasing the same:

"4. ...the concerned Commissioner of Inland Revenue shall himself... issue appropriate notices under the Income Tax Ordinance, 2001 ("2001 Ordinance") to the spouse and children of the Petitioner to offer an explanation regarding the nature and source of the funds (separately for each property) whereby the three properties in the United Kingdom... were acquired. For purposes of this Order the Commissioner Inland Revenue having jurisdiction over the spouse of the Petitioner (who must be a Commissioner exercising jurisdiction and performing functions at Islamabad) shall be deemed also to be the Commissioner having jurisdiction over the children..."

(emphasis supplied)

Whether such a direction could have been issued is answered by Article 184(3) read with Article 187 of the Constitution. These Articles empower this Court to issue any directions necessary to do complete justice in a matter. It is settled law that the existence and exercise of the Court's power under the Constitution to issue directions is not dependent on express invocation of such power in its order. Not invoking the correct provision of law or citing an incorrect one for sustaining an order is of no consequence if the Court has jurisdiction under the law to pass that very order [ref: Olas Khan v. Chairman NAB (PLD 2018 SC 40) at para 10].

37. Finally, issue was taken with a presumed direction given to the SJC in the Short Order on account of the instruction to Secretary SJC to place the Chairman FBR's Report before the SJC. It was argued that the jurisdiction of the SJC had been infringed by taking away its discretion in deciding whether to initiate an inquiry against the learned petitioner. However, it seems that our Short Order has been misconstrued. No direction of any nature is issued to the SJC. In fact, the essence of the Short Order is that Mrs. Isa be given the opportunity to explain the facts to the FBR and the factual findings thereon be placed for the perusal of the SJC. Such process was meant to allay the disquiet of the learned petitioner and Mrs. Isa by securing a finding that settled the allegations levelled against the former. This is precisely why the Short Order simply notes that the Secretary SJC will place the Report of the Chairman FBR before the Chairman SJC for the perusal of SJC. Thereafter, it was for the SJC to act as it deemed appropriate in the matter. Therefore, it is wrong to suggest that the Court has bound the SJC to investigate the learned petitioner. This was also made clear in para 145 of the Detailed Reasons:

"145. ...However, it is reiterated that our short order dated 19.06.2020 merely issues a direction to the Chairman FBR and in no way obliges the SJC to take any action based on the report. The SJC may do so of its own volition if it considers that the report justifies any action against the petitioner. But it may also file the report if it finds that the same contains no substance/merit..."

(emphasis supplied)

Therefore, the objection regarding encroachment on the SJC's jurisdiction is unfounded. Moreover, it fails to disclose any error apparent on the face of the record justifying interference with the Majority Judgment.

B. No Hearing given to Mrs. Isa

38. A strong grievance was next voiced by the review petitioners against the Short Order dated 19.06.2020 for allegedly exposing Mrs. Isa to scrutiny by a tax forum without giving her a hearing. At the very outset such a plea is legally unsound because on the facts of the present case, the allegation that Mrs. Isa was not given a hearing (or was given an inadequate hearing) is inconsequential. This is because the Short Order is not adverse in nature. It did not affect the person, property or any other right of Mrs. Isa. Instead, it only asked the FBR to initiate proceedings to verify her sources of funding the London Properties. Indeed, it has always been the case of the learned petitioner that before the SJC can commence any proceedings against him for alleged misconduct, Mrs. Isa should in the first instance be asked to explain her independent source of funds used for acquiring the London Properties. We accepted this proposition of the learned petitioner and observed in the Detailed Reasons that:

"120. ...However, to establish the source of funds for the acquisition of the London Properties, the requirements of due process under Article 4 and Article 10A of the Constitution mandate that the first person concerned, namely, Mrs. Isa ought to be given an opportunity to explain her sources of funding for the London Properties and the reasons for not declaring such properties in her wealth statement. Without granting such opportunity, the framing of the Reference against the petitioner was premature, hypothetical and impulsive. Accordingly, even this allegation against the petitioner is entirely presumptive."

(emphasis supplied)

39. Hence, any right to be heard that accrued to Mrs. Isa was in the FBR proceedings because the outcome thereof could have either exonerated her or adversely affected her property and reputation [ref: University of Dacca v. Zakir Ahmed (PLD 1965 SC 90) at pg. 103]. The only scenario in which the review petitioners' demand for a comprehensive hearing by the Court would have carried weight was if our Short Order had been dispositive of the merits or substantially affected the outcome of the proceedings before the FBR [Regina (G) v. Governors of X School ([2012] 1 AC 167) at para 69]. The same view has been reiterated in Halsbury's Laws of England (Volume 61A, 2018):

"40. ...The rule [to be heard] generally applies, at least with full force, only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded. However, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected should be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice."

(emphasis supplied)

Even this Court, after reviewing the relevant case-law, held in Commissioner of Income Tax v. Media Network (PLD 2006 SC 787):

"26. The rules of natural justice are not inflexible. They yield to and change with the exigencies of different situations. They do not apply in the same manner to situations which are not alike. These rules are not cast in a rigid mould nor can they be put in a legal strait-jacket. They are not immutable but flexible... Depending upon the facts and circumstances of each case, there is no mandatory requirement of natural justice that in every case the other side must be given a notice before

> preliminary steps are taken. It might suffice if reasonable opportunity of hearing is granted to a person before an adverse action or decision is taken against him. However, it is not possible to lay down an absolute rule of universal application governing all situations as to the exclusion or otherwise of the audi alteram partem rule during the course of preliminary inquiries or investigations."
>
> (emphasis supplied)

40. It is restated that the heart of the controversy in the present case is about the consequences of Mrs. Isa's non-declaration of her foreign assets. Therefore, referring her case to the FBR for verification and scrutiny was wholly in accordance with the scheme of the Ordinance (refer to Section 111 (1) of the Ordinance, reproduced in para 26). In no way did the direction to the FBR determine or influence the outcome of the proceedings which were to be conducted under the Ordinance by a CIR who was duly authorised. Such proceedings before a statutory authority were completely independent and separate from the proceedings held before the Court under Article 184(3) of the Constitution. Therefore, the contention of the review petitioners that Mrs. Isa was not granted a hearing by the Court is baseless and does not disclose any error apparent on the face of the record.

41. In any event, as already discussed above, during the hearing of Const. P. No. 17 of 2019, Mrs. Isa made an oral statement on 18.06.2020 through video link that presented her version of the sources of funds used for purchasing the London Properties. She was informed at the outset that her statement will be recorded. She displayed before the camera documents that allegedly explained her sources of funding the London Properties. The Court allowed her to address the Bench for roughly 30 minutes but declined to consider her plea and documents on the ground that jurisdiction to ascertain the facts about the funds used for acquiring the London Properties lay with two fora in her case, namely, FBR (in her capacity as a taxpayer) and SJC (as a witness) both of which were available to her to do. Her statement clearly reflected her knowledge of the crucial issue, namely, her means for acquiring the London Properties and her plea on the subject i.e., her independent means for purchasing the same and her willingness to substantiate this claim. After hearing her, the Court decided to refer Mrs. Isa to a competent forum, the FBR, to explain the nature and source of the funds utilised for buying the London Properties. By following this process, the essential ingredients of the right to be heard, namely, prior notice of the subject-matter and opportunity of hearing to articulate her plea, were complied with [ref: Ali Muhammad v. State (PLD 2010 SC 623) at para 11 and Michael Francis Hamilton v. Peter Charles Forrest ([1981] AC 1038) at pg.1045]. As a result, the due process requirements of Article 10A of the Constitution were fulfilled.

Malice in Fact

42. The learned petitioner argued that the finding recorded in the Detailed Reasons dated 23.10.2020 that the respondents were not guilty of malice in fact was an error apparent on the face of the record. He submitted that the filing of the review petitions against the Dharna Judgment, the leaking of the Reference to the public, his vilification at the hands of the respondents and, subsequent to the Short Order, the temporary appointment of the Chairman FBR on 04.07.2020 for a period of 3 months (or till the posting/ appointment of a regular incumbent) [refer to pg.23 of C.R.P. No.296 of 2020] and the selection of Mr. Zulfiqar Ahmad as the relevant CIR, Islamabad all pointed to the irresistible conclusion that the entire exercise against him was motivated by malice in fact.

43. Since the learned petitioner has raised several allegations to justify his plea, these are dealt with separately. The temporary appointment of the Chairman FBR and the selection of Mr. Zulfiqar Ahmad as CIR to scrutinise Mrs. Isa's record for ascertaining the source of funding of the London Properties are events that occurred subsequent to the Short Order dated 19.06.2020. These developments are independent of our Short Order and therefore outside the ambit of review jurisdiction. It is well-settled that in review proceedings the Court can examine only those events which existed at the time when the order was passed. In this regard, reliance is placed on a decision of the Privy Council in Rajah Kotagiri Venkata Subbamma Rao v. Rajah Vellanki Venkateama Rao [(1900) LR 27 IA 197]:

"10. ...In the opinion of their Lordships, the ground of amendment must at any rate be something which existed at the date of the decree, and the section does not authorize the review of a decree which was right when it was made on the ground of the happening of some subsequent event..."

This view was affirmed by the Indian Supreme Court in State of W.B. v. Kamal Sengupta [(2008) 8 SCC 612] at para 17. Therefore, both the executive acts of replacing Chairman FBR and choosing Mr. Zulfiqar Ahmad as CIR, Islamabad are irrelevant for indicating the malice in fact of the respondents in filing the Reference.

44. Having said that, even if we ignore the aforenoted defect, the plea raised by the learned petitioner, that the changes in the personnel of the FBR were carried out to continue the persecution of the learned petitioner and his family, is still liable to fail because it is based on unfounded claims. The learned petitioner has alleged that para 9 of the Short Order does not require the contents of the Report of the Chairman FBR to be based on the findings recorded in the CIR's Assessment Order. This provides the former with the opportunity to manipulate his Report to the detriment of the learned petitioner. It appears, however, that the learned petitioner has ignored the express direction in para 9 of the Short Order that the Chairman FBR should append with his report the entire record of the proceedings conducted before the CIR, Islamabad for submission to the Secretary of SJC. Therefore, any unsubstantiated or biased finding noted in the Report would be easily verifiable from the record. Likewise, para 11 of the Short Order preserves Mrs. Isa's rights of appeal under the Ordinance providing her the full opportunity of challenging the alleged partiality of Mr. Zulfiqar Ahmad, CIR, if she so wished, before the relevant appellate fora. In such circumstances these particular allegations of malice in fact are completely fictional, without merit and of no relevance for reviewing the Majority Judgment (especially, as discussed later in the judgment, since the learned petitioner himself after getting these documents summoned in Court objected to their perusal).

45. Insofar as the other allegations of malice are concerned, it may be noticed that the same have been thoroughly examined in the Detailed Reasons dated 23.10.2020. Reference is made to paras 53-55 thereof which discuss the effect of the Dharna Judgment and paras 59-61 which are concerned with the leaking of the Reference. Agitating points that have already been answered in the Majority Judgment amounts to an appeal/re-hearing of the issues involved. This is specifically prohibited in review jurisdiction [noted in para16(v)]. Consequently, these contentions of the learned petitioner also fail the test of error apparent on the face of the record.

C. Arguments of Counsel on Phase II Not Heard

46. Lastly, learned petitioner objected to the Court passing the Short Order dated 19.06.2020 and the Detailed Reasons dated 23.10.2020 without hearing his counsel on phase II of the arguments, namely, the allegation about the mala fides of SJC. Learned petitioner stated that in his Constitution Petition he had framed 55 questions of law, out of which 32 were focused on the conduct of SJC. Therefore, he submitted that by ignoring the arguments on this crucial aspect of the case, particularly when learned counsel had specifically reserved his right to argue on phase II, a factually and legally incorrect judgment had been delivered. The learned petitioner placed reliance on certain submissions made by Mr. Munir A. Malik, Sr. ASC, during the hearings of the Constitution Petition inter alia on 17.06.2020 and 18.06.2020 (loose copies of the transcripts were filed during the hearings of the review petitions) to show that learned counsel intended to argue on phase II.

47. Learned petitioner maintained that his counsel's statements confirm that the latter had in no way given up his right to argue on phase II. The point urged by the learned petitioner is factually correct but it gives an incomplete account. The hearing of 19.06.2020 contains the outcome of the learned counsel's stance:

"19 June 2020

Mr. Munir A. Malik: If I recall from the Iftikhar Chaudhry case, the case was heard at length for days on what I call both phase 1 and phase 2 of the proceeding. Extensive arguments were made on

phase 2 as well. In its infinite wisdom the Supreme Court recorded finding only on phase 1 while it heard arguments on the mala fides of phase 2.

Justice Umar Ata Bandial: You are talking about the attribution of mala fide to the Supreme Judicial Council.

Mr. Munir A. Malik: Yes.

Justice Umar Ata Bandial: Do you you want to do that today?

Mr. Munir A. Malik: May I make a submission?

Justice Umar Ata Bandial: No, no but we would we would like that clarified sir.

...

Justice Umar Ata Bandial: Because there are certain red lines I have.

Mr. Munir A. Malik: I spoke of the principle of institutional harmony. It was out of respect for this principle that I had proposed to your Lordships that I will take the piecemeal approach and only address arguments on phase 1 but during the course of argument your Lordship, Justice Bandial had observed that your Lordships had invited me to address on the Show Cause Notice but I had declined. Most respectfully sir I had not declined. I had only sought a postponement. I am hoping that it will not be necessary for me to go into phase 2. I am hoping so I am in line with my earlier proposal confining myself to arguments on phase 1.

Justice Umar Ata Bandial: I think that's a good idea, good idea.

Mr. Munir A. Malik: If I prevail, if I am able to persuade your Lordships then I would rather rest my case there."

(emphasis supplied)

48. This discourse shows that two hurdles prevented learned counsel from arguing phase II:

i. The legal bar contained in Article 211 of the Constitution that had to be crossed before any finding could be given on phase II (this is perhaps why the three learned Minority Judges also did not touch upon phase II in their opinions); and

ii. Learned counsel's own desire to accord due respect to the principle of institutional harmony.

Additionally, learned counsel submitted that if he succeeded in persuading the Bench to pass a favourable order, he would not touch upon phase II. Thus, in effect learned counsel purported to make submissions before the Bench conditionally depending on the outcome of the case. In the absence of either a preliminary issue being framed in this regard or an order by the Court allowing the suggested format, such a presumptuous strategy had no foundation because it was transactional in its purport. The expectation of learned counsel was therefore fanciful. Nevertheless, this was the course adopted by Mr. Munir A. Malik, Sr. ASC on 19.06.2020. Having made the decision to not argue phase II, learned counsel abandoned the same. Consequently, learned petitioner cannot now plead that his counsel was not heard on phase II.

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D. Status of SJC

49. One of the main points canvassed by Mr. Hamid Khan, Sr. ASC, during arguments was that once the Reference was quashed by the Short Order dated 19.06.2020 the SJC had become functus officio and could not proceed further with the matter. According to him, for the SJC to be able to consider the Report of the Chairman FBR it would need to be constituted in terms of Article 209(2) of the Constitution (which details the composition of the SJC) . Implicit in the submission is the assumption that SJC is not a permanent body; rather it is a transitory one. However, this view reflects a misunderstanding of the function of the SJC and the scheme of Article 209.

50. The SJC first came into existence by virtue of Article 128(2) of the 1962 Constitution. Prior thereto, Judges of the Supreme Court could only be removed on an address of the National Assembly [Article 151(1) of the 1956 Constitution]. The rationale for creating this autonomous body was to ensure judicial accountability but away from the reach of the Government (ref: Assembly Debates, National Assembly of Pakistan, 07.04.1973) . The incumbent Constitution has retained the SJC (Article 209). As already mentioned above, the composition of SJC has been fixed in Article 209(2) which reads as follows:

"209. Supreme Judicial Council.

...

(2) The Council shall consist of-

(a) the Chief Justice of Pakistan;

(b) the two next most senior Judges of the Supreme Court; and

(c) the two most senior Chief Justices of High Courts.

Explanation---For the purpose of this clause, the inter se seniority of the Chief Justices of the High Courts shall be determined with reference to their dates of appointment as Chief Justice otherwise than as acting Chief Justice, and in case the dates of such appointment are the same, with reference to their dates of appointment as Judges of any of the High Courts."

Similarly, Article 209(3) identifies the course of action that has to be adopted if any member of the SJC is unable to perform his/her functions because he/she is the subject-matter of a complaint, is un-well or absent for any other reason. Clearly then, Article 209 caters for every contingency that can arise in relation to the composition of the SJC. Additionally, the SJC works continuously in the performance of its duties and functions. This includes its substantive duty of hearing and deciding actionable information received against Judges and its preliminary duty of processing and collecting material for evaluating the cognisability of an information. It also has the responsibility of updating judicial standards of conduct by amending the CoC. Indeed, Parliament (since 1962) has not found it necessary to delegate to any authority the power to constitute the SJC on a case-to-case basis because the SJC already stands constituted as a permanent body empowered to perform its substantive duties, including matters ancillary thereto.

51. Additionally, when the Constitution intends any of its provisions to be immediately operational '[so that] the right which it grants may be enjoyed and protected, or the duty which it imposes may be enforced without the aid of a legislative enactment' such provisions are termed self-executory [ref: Hakim Khan v. Government of Pakistan (PLD 1992 SC 595) at para 16]. The test to determine whether a Constitutional provision is self-executing was also explained in the same case:

"16. ...The question whether a Constitutional provision is self-executing is always one of intention, and to determine intent, the general rule is that Courts will consider the language used, the objects to be accomplished by the provision, and surrounding circumstances. Extrinsic matters may be resorted to where the language of the Constitution itself is ambiguous."

(emphasis supplied)

Having regard to the level of detail with which Article 209 is drafted,the object that it sets out to achieve, namely, judicial accountability and the manner and circumstances in which the SJC has been functioning since its inception in 1962, it is evident that in respect of the SJC's formation Article 209 is self-executory giving the body a permanent status.

52. Insofar as the argument of functus officio is concerned, it first needs to be examined what this phrase entails. Black's Law Dictionary (10th Edn) defines this term as follows:

"Pg.787: [Latin "having performed his or her office"]... (Of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished."

(emphasis supplied)

Similarly, Jowitt's Dictionary of English Law (5th Edn) states:

"An expression applied to a judge, magistrate or arbitrator who has given a decision or made an order or award so that his authority is exhausted..."

(emphasis supplied)

Likewise, Stroud's Judicial Dictionary (10th Edn) explains functus officio to mean:

"Functus officio means no more than that a judicial, ministerial or administrative actor has performed a function in circumstances where there is no power to revoke or modify it..."

(emphasis supplied)

53. What becomes clear from these definitions is that a body (or an authorised person) only becomes functus officio once it has passed an order or made a decision which is final so that no power is left with the said body to take any further action. This was confirmed in Iqbal Pervaiz v. Harsan (2018 SCMR 359):

> "8. ...Once a case is finally decided, the Court becomes functus officio. The only provision which allows to make change in the final order is the provision of review, scope of which is very limited i.e. to correct an error that is floating on the face of the record..."
>
> (emphasis supplied)

However, in the present case the SJC never issued a final decision regarding the learned petitioner's alleged misconduct. Prior to any verdict of the SJC the learned petitioner filed a Constitution Petition before this Court challenging the Reference pending in the SJC. The fact that by our Short Order dated 19.06.2020 the Reference was quashed and its proceedings in the SJC were abated simply means that the SJC cannot proceed further in the Reference and not that it has become functus officio. The Short Order also did not destroy the admitted information. Instead, the same was specifically preserved and forwarded by the Court to the FBR for verification. Any contrary interpretation of the directions given in the Short Order is erroneous. A summary of these directions is set out below:

i. The admitted information was preserved;

ii. The said information was referred to the FBR for verification;

iii. The subsequent Assessment Order of the CIR and its record together with the Report of the Chairman FBR were to be forwarded to the SJC as 'information' under Article 209 of the Constitution; and

iv. It was left to the discretion of the SJC to either proceed with the matter or file the information.

Since the FBR's findings would only supplement the admitted information, such consolidated information (which had not previously been available) was sent to the SJC for its perusal. In these circumstances, the SJC which has not previously expressed its views on such information cannot legally be said to have become functus officio.

E. Jurisdiction of the SJC

54. The next argument by learned counsel that the Short Order has authorised the SJC to proceed against Mrs. Isa and her children is based on a misconception. The jurisdiction of the SJC under Article 209(5) is limited to inquiring into matters concerning a Judge of the Superior Courts. Only to the extent that the financial matters and activities of the family are intertwined with the affairs of a Judge, does such information become cognisable by the SJC. Otherwise, the SJC does not have jurisdiction to investigate into the affairs of a Judge's family members. This is why the Majority Judgment has not entrusted any matter in this behalf to the SJC. Para 145 of the Detailed Reasons (reproduced above in para 37) explicitly acknowledges that if the SJC finds that the Report of the Chairman FBR justifies any action, it can proceed of its own volition against the learned petitioner. No mention in this respect is made of the learned petitioner's family members.

55. Be that as it may, it is clarified that whilst the SJC only has jurisdiction to examine the conduct and/or capacity of Judges of the Superior Courts, it may secure the attendance of any relevant person or the discovery/ production of any document whilst conducting an inquiry against a Judge (ref: Article 210 of the Constitution). Therefore, in exercise of this power the SJC may yet examine persons, who are not Judges, or their record for understanding or deciding a pending information.

F. Directions by this Court

56. Learned counsel also criticised the direction issued in the Short Order dated 19.06.2020 that the SJC could proceed against the learned petitioner on the basis of the findings recorded in the Report of the Chairman FBR. Two primary objections were taken:

i. The Supreme Court cannot be a source of information under Article 209(5) of the Constitution; and

ii. In Muhammad Ikram Chaudhry v. Federation of Pakistan (PLD 1998 SC 103), this Court categorically held that Article 209(5) ibid does not permit the filing of a Constitution Petition praying for a direction to either the SJC or the President to initiate an inquiry against a Judge of the Superior Courts (para 11).

57. With regard to the first point, Article 209(5) reads:

"209. Supreme Judicial Council.

...

(5) If, on information from any source, the Council or the President is of the opinion that a Judge of the Supreme Court or of a High Court---

(a) may be incapable of properly performing the duties of his office by reason of physical or mental incapacity; or

(b) may have been guilty of misconduct, the President shall direct the Council to, or the Council may, on its own motion, inquire into the matter."

(emphasis supplied)

It is a basic rule of interpretation that words are generally to be given their ordinary and natural meaning except when such construction gives rise to absurdity or renders certain words meaningless [ref: Federation of Pakistan v. Durrani Ceramics (2014 SCMR 1630) at para 31]. Unless the aforesaid exceptional consequences follow, the basic rule must be adhered to. The term 'any' in Article 209(5) is of significance in the present context. It has been defined by Stroud's Judicial Dictionary (10th Edn) as follows:

" ...a word which excludes limitation or qualification...; "as wide as possible...""

It may be noticed from the above-stated meaning that 'any' is a comprehensive term. Since the legislature itself consciously chose to keep the source of information in Article 209 open-ended, it will be contrary to the spirit of the provision to hold otherwise and prevent the Superior Courts from taking judicial notice of information and/or from forwarding the same for perusal and consideration of the SJC when no such restriction exists in Article 209(5) itself.

58. With regards to the case of Muhammad Ikram Chaudhry (supra), that is authority for the proposition that if a person has a grievance against a particular Judge the appropriate forum for redressal is the SJC (and not the Supreme Court) and that neither the Supreme Court nor the High Court can record even a tentative finding that a Superior Court Judge has committed misconduct. There can be no cavil with this ruling of the Court. However, in the instant case no adverse finding has been recorded against the learned petitioner and no direction has been issued to the SJC to take any action against him on the basis of the information forwarded by the FBR (refer to para 37 for a detailed discussion on this topic). Therefore, in the absence of such a finding and/or direction to the SJC, the principle laid down in the Muhammad Ikram Chaudhry case (supra) has not been contravened.

G. Report of Chairman FBR

59. Learned counsel then submitted that no proceedings could be initiated against the learned petitioner based on the Chairman FBR's Report because it does not express a final opinion and so cannot qualify as information under Article 209(5). It was argued that the said Report was based on the order of the CIR which was amenable to appeal (and was in fact appealed against by Mrs. Isa). There was a possibility that the findings recorded by the CIR may be set aside rendering the Report of the Chairman FBR irrelevant. However, this concern has already been answered in the Detailed Reasons:

"146. ...To our minds, the two directions, namely, the filing of the report by the Chairman FBR before the SJC and the protection of the affected persons right to appeal, issued by us were necessary in the interests of justice. The jurisdiction of the FBR is concerned with taxing income whereas the jurisdiction of the SJC is related only with the misconduct of a Judge. Therefore, the proceedings and/or the outcome before one forum do not affect those of the other forum. However, the SJC may if so inclined in the exercise of its suo motu jurisdiction conferred by the Constitution take into consideration any proceedings before the tax authorities or orders passed by them."

(emphasis supplied)

60. The above-quoted extract notes that the respective jurisdiction, object and authority of the SJC and FBR differ significantly. Consequently, the findings of the CIR and the Report based thereon by Chairman FBR merely provide information and have no binding effect on the SJC. The apprehension of learned counsel that the findings of FBR and SJC may differ and therefore the Short Order has created an

anomalous situation is fanciful. In its proceedings against a learned Judge the SJC scrutinises the factual narrative presented by an information. In the present case the Report of the Chairman FBR and the material attached to it would verify and present the facts from a tax perspective. This information may or may not satisfy the parameters for the SJC to take cognisance of the matter. There is nothing in the Short Order of 19.06.2020 that expects the SJC to accept the contents of that Report to be a binding depiction of the facts or as actionable material for its purposes. The outcome regarding tax liability (if any) imposed on Mrs. Isa in the hierarchy of tax fora does not concern the SJC. Such a determination has remedies before higher fora, as have been availed by Mrs. Isa.

61. It is also trite law that proceedings based on the same factual matrix and pending in different legal fora may arrive at divergent outcomes because the jurisdiction, object and authority of each forum may be distinct under the Constitution and the applicable law. A common example of this can be seen in the concurrent initiation of criminal and disciplinary proceedings in relation to service matters [ref: Muhammad Iqbal v. District Police Officer, Sahiwal (2011 SCMR 534) at para 8]. Therefore, the fate of the CIR's findings, if any on the sources of funds used for purchasing the London Properties, in the appellate tax for a will have no bearing on how the SJC evaluates such information, in the shape of Chairman FBR's Report, for its own purpose and jurisdiction. Accordingly, the objection raised by learned counsel is without force.

H. Person Specific Legislation

62. Lastly, learned counsel argued that the direction to the FBR to proceed against Mrs. Isa and her children was tantamount to person specific legislation. It was further contended that the issuance of a timeline was violative of the Ordinance which does not provide for a deadline for concluding tax proceedings. With respect to the first objection, it has already been noted in para 31 of this judgment that Mrs. Isa had herself questioned why she had not been asked by the FBR at the outset about the London Properties for which she possessed sufficient material to establish her sources of funding. Only the scrutiny of this record could confirm whether or not the learned petitioner had any connection with funding the London Properties, and if so whether he was answerable to the SJC for the same. In view of, inter alia, this background, the Court referred the matter to the FBR, being the relevant and competent fact-finding authority, for verification so that the controversy surrounding the learned petitioner and the Court could be put to rest promptly. In these circumstances, the judicial direction issued to the FBR under Articles 184(3) and 187 of the Constitution was factually and legally well-founded.

63. Precisely for this very reason, the Court also laid down a timeline in the Short Order for the FBR to follow whilst conducting the proceedings against Mrs. Isa. The issuance of such a direction is lawful and valid as exemplified by the judicial precedents of this Court [ref: Imran Ahmed Khan v. Muhammad Nawaz Sharif (PLD 2017 SC 692) at para 14(g) and Muhammad Khalid v. National Accountability Bureau (2017 SCMR 1340) at para 5]. The rationale behind passing these directions is also well-documented and was aptly explained in the case of Muhammad Nawaz Sharif v. Imran Ahmed Khan Niazi (PLD 2018 SC 1):

> "14. ...The argument that the direction to the trial court for deciding the References within 6 months from the date of filing them also tends to prejudice the fair trial of the petitioner is also misconceived as the purpose behind such direction is not to prejudice the trial but to ensure expeditious conclusion of the case which more often than not has been extended even in the past by this Court, if the trial was delayed by any hardship or anything imponderable..."
>
> (emphasis supplied)

Conversion of Dissenting View into Majority Opinion

64. After the Reference was quashed, the Majority and Minority differed in their treatment of the admission by the learned petitioner and Mrs. Isa that the latter owned undeclared foreign properties. In this regard, the dissenting opinion held that:

i. The tax information of the learned petitioner and Mrs. Isa as well as their passport details and travel history were illegally collected; and

ii. The learned petitioner and his family were subjected to covert surveillance.

In light of the said findings, the dissenting opinion of two learned Judges concluded that such illegally collected evidence was inadmissible for all purposes and that the acts of the respondents demonstrated their malice in fact. Insofar as the Majority is concerned, the allegations of covert surveillance and malice in fact were dismissed for reasons already stated in the Detailed Reasons (refer to paras 46-64 for malice in fact and paras 78-88 for covert surveillance). However, the Majority also held that the legal and jurisdictional defects in the preparation of the Reference amounted to malice in law. Nevertheless, as such a finding is materially different from malice in fact (refer to paras 140 and 141 of the Detailed Reasons) the admitted information was not destroyed as a result. The said information, therefore, could not be ignored because such admission of the truth cast a shadow on the integrity of the learned petitioner and the Court. Accordingly, the information called for an explanation before the competent forum i.e., the FBR.

65. With regards to the investigation carried out against the learned petitioner by the ARU, the Majority opined that the same was not authorised by the President. Instead, it was the Law Minister who had permitted ARU to inquire into the financial affairs of the learned petitioner. Due to the incompetence of the Law Minister to direct an investigation against a Judge of the Supreme Court, the search of the learned petitioner's and Mrs. Isa's tax records was declared unlawful. Accordingly, such tax records were not considered by the Majority for reaching its decision. During the present hearing, the alleged illegal collection and therefore the inadmissibility of such material was re-emphasised to attack the direction given to the FBR. Consequently, it has now become imperative to consider this issue because statedly it bars the issuance of the impugned direction to the FBR to verify the source of funding of the undeclared London Properties.

66. There are two important aspects of this subject that require our attention:

i. The rule regulating the admissibility of illegally collected evidence in Pakistan and comparable jurisdictions; and

ii. The prohibition against illegal search and seizure prescribed in the Fourth Amendment to the US Constitution.

67. Taking the first point, the general test for admitting evidence in Pakistan and comparable jurisdictions is whether the evidence is relevant to a fact in issue. This is evident from Article 18 of the Qanun-e-Shahadat Order, 1984 (previously this principle was enunciated in Section 5 of the now repealed Evidence Act, 1872) which reads:

"18. Evidence may be given of facts in issue and relevant facts.---Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant and of no others."

What becomes clear from the aforenoted rule is that ordinarily in both criminal and civil matters evidence which is connected to a fact in issue or a relevant fact is admissible simpliciter. Reliance in this regard is also placed on the jurisprudence and laws of Pakistan, Privy Council, India, United Kingdom, Canada and Australia. A few examples from these jurisdictions are produced below:

i. Pakistan

Bisvil Spinners (Pvt.) Ltd. v. Pakistan (PLD 1992 SC 96) :

" ...if a piece of evidence is otherwise relevant and pertinent for the decision of an issue, it is untenable argument that: notwithstanding the fact that it is genuine and otherwise reliable it should not be made use of because in the process employed for the collection of the material an irregularity or for that matter an illegality was committed." [This dictum was approved in Muhammad Ijaz Ahmad Chaudhry v. Mumtaz Ahmad Tarar (2016 SCMR 1) at para 12].

ii. Privy Council

Kuruma v. The Queen ([ 1955] AC 197):

"In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained... There can be no difference in principle for this purpose

between a civil and a criminal case. No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused..."

iii. India

R.M. Malkani v. State of Maharashtra (AIR 1973 SC 157):

"24. ...There is warrant for proposition that even if evidence is illegally obtained it is admissible... The Judicial Committee in Kuruma, Son of Kanju v. R. [ 1955] A.C. 197... held... that if evidence was admissible it matters not how it was obtained. There is of course always a word of caution. It is that the Judge has a discretion to disallow evidence in a criminal case if the strict rules of admissibility would operate unfairly against the accused. That caution is the golden rule in criminal jurisprudence."

Pooran Mal v. Director of Inspection (Investigation), New Delhi (AIR 1974 SC 348):

"24. ...Now, if the Evidence Act 1872 which is a law consolidating, defining and amending the law of evidence, no provision of which is challenged as violating the Constitution-permits relevancy as the only test of admissibility of evidence (See Section 5 of the Act) and, secondly, that Act or any other similar law in force does not exclude relevant evidence on the ground that it was obtained under an illegal search or seizure, it will be wrong to invoke the supposed spirit of our Constitution for excluding such evidence..."

iv. United Kingdom

R v. Sang [ 1979] 2 All ER 1222 (HL)

"...However much the judge may dislike the way in which a particular piece of evidence was obtained before proceedings were commenced, if it is admissible evidence probative of the accused's guilt it is no part of his judicial function to exclude it for this reason..."

v. Canada

R v. Grant (2009 SCC 32):

"[71] ...When faced with an application for exclusion under section 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the Charter -infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the Charter - protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits..."

vi. Australia

Evidence Act 1995

"138 Discretion to exclude improperly or illegally obtained evidence

....

(3) Without limiting the matters that the court may take into account under subsection (1) [exercise of discretion to exclude or admit illegally collected evidence], it is to take into account:

(a) the probative value of the evidence; and

(b) the importance of the evidence in the proceeding; and

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and

(d) the gravity of the impropriety or contravention; and

(e) whether the impropriety or contravention was deliberate or reckless; and

(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and

(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and

(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law."

68. A perusal of these cases and laws demonstrates that in both criminal and civil matters either there is no bar to the admission of evidence collected by any means [except for the absolute prohibitions enshrined in the Constitution such as the protection against self-incrimination (Article 13(b)), the inviolability of dignity of man (Article 14(1)) and the prohibition of torture for the purpose of extracting evidence (Article 14(2)] as long as it is relevant and genuine (Pakistan, UK, Privy Council and India) or a balancing exercise needs to be carried out by the Courts to determine the admissibility of the disputed evidence (Canada and Australia). However, in neither of these countries is there an absolute bar to the admission of illegally collected evidence.

69. In contrast, the United States follows what is known as the exclusionary rule which outrightly prohibits the admission of evidence collected via an illegal search and seizure. The rationale behind this strict approach is the Fourth Amendment to the US Constitution, inserted in 1791, which reads:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated... but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The rule, as explained by the Supreme Court in Weeks v. United States [232 US 383 (1914)], was enacted to limit the power of the Government to invade the home and privacy of a citizen and seize his/her private papers under the authority of general warrants. However, the rule has been made applicable only to criminal matters [it was first applied by the Supreme Court in the case of Weeks v. United States (supra)]. This was affirmed by the Supreme Court in United States v. Janis [428 US 433 (1976)]:

> "In the complex and turbulent history of the rule, the Court never has applied it to exclude evidence from a civil proceeding, federal or state."

This dictum was later reiterated by the Supreme Court in INS v. Lopez-Mendoza [468 US 1032 (1984)]. The restrictive application of the exclusionary rule only to criminal matters was explained by the Supreme Court in Pennsylvania Board of Probation and Parole v. Scott [524 US 357 (1998)]:

> " ...Moreover, because the rule is prudential rather than constitutionally mandated, we have held it to be applicable only where its deterrence benefits outweigh its "substantial social costs..."
>
> Recognizing these costs, we have repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials...
>
> As in Calandra, Janis, and Lopez-Mendoza, we are asked to extend the operation of the exclusionary rule beyond the criminal trial context. We again decline to do so...
>
> Because the exclusionary rule precludes consideration of reliable, probative evidence, it imposes significant costs: it undeniably detracts from the truthfinding process and allows many who would otherwise be incarcerated to escape the consequences of their actions... Although we have held these costs to be worth bearing in certain circumstances, our cases have repeatedly emphasized that the rule's "costly toll" upon truth-seeking and law enforcement objectives presents a high obstacle for those urging application of the rule..."
>
> (emphasis supplied)

70. Further, even in the context of criminal proceedings the Courts in the United States have recognised exceptions to the exclusionary rule to allow the admission of illegal evidence in such matters:

i. If the illegal evidence is later discovered from an independent source [ref: Silverthorne Lumber Co., Inc. v. United States (251 US 385 (1920))];

ii. If the illegal evidence would inevitably have been discovered by a lawful mean [ref: Nix v. Williams (467 US 431(1984))];

iii. The chain of causation between the illegal action and the tainted evidence is so attenuated that the taint stands dissipated [ref: Brown v. Illinois (422 US 590 (1975))];

iv. The search warrant was not based on probable cause but was executed by government agents in good faith [ref: United States v. Leon (468 US 897 (1984))]; and

v. To impeach the credibility of the defendant [ref: Walder v. United States (347 US 62 (1954))].

71. The United States by virtue of the Constitutional command in the Fourth Amendment is one of the strongest proponents of the exclusionary rule. Yet it has not transposed the approach of excluding illegal evidence to civil proceedings; and in criminal matters has qualified the severity of the rule due to its adverse effect on discovering the truth. There is no reason why in our jurisdiction where there is no such Constitutional or statutory obligation to exclude illegally collected evidence, the said rule should be adopted mechanically. As already stated, the jurisprudence of Pakistan and other comparable jurisdictions also points towards the admissibility of genuine and relevant evidence, namely, truthful evidence in civil proceedings. Consequently, applying a more stringent criteria for determining the admissibility of illegally collected evidence in removal proceedings against Judges is not justifiable. Moreso, when this Court in the case of Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan (PLD 2010 SC 61) has held that an inquiry against a Judge is merely an administrative matter:

"98. ... I am of the opinion that the true status of the Supreme Judicial Council is the one suggested by Syed Sharif-ud-Din Pirzada... while placing reliance on MR. JUSTICE SHAUKAT ALI'S CASE (PLD 1971 SC 585 at 602) wherein the said status had been determined as under:--

"Moreover, an inquiry into the conduct of a Judge is neither a criminal indictment nor even a quasi-criminal proceedings, but it is, in our opinion, mainly an ADMINISTRATIVE PROCEEDINGS conducted by a DOMESTIC FORUM to examine the professional fitness of a Judge. The subject-matter of these proceedings is neither civil rights and duties nor criminal liabilities. It is simply the conduct of a Judge which is to be properly reviewed in the interest of the purity and honour of the judiciary..."

(emphasis supplied)

72. In the present case, it was argued by the learned petitioner that the search of his and Mrs. Isa's tax records was illegal. The Minority agreed with this contention whereas the Majority did not issue any opinion on this matter because it did not take the tax records into consideration. Instead, it directed the FBR to verify the source of funding of the London Properties in accordance with the Ordinance, specifically Section 216(3)(a) which reads:

"216. Disclosure of information by a public servant-- ...

(3) Nothing contained in subsection (1) shall preclude the disclosure of any such particulars--

(a) to any person acting in the execution of this Ordinance, where it is necessary to disclose the same to him for the purposes of this Ordinance;"

(emphasis supplied)

By virtue of this provision CIR, Islamabad could lawfully access the tax records of Mrs. Isa to arrive at the true picture of who funded the London Properties and with what money. Indeed, the Holy Quran has ordained the believers to uphold the balance of justice and equity by seeking the truth because only by relying on the truth can justice be served:

"Surah Al-Ma'idah, Verse 8

O YOU who have attained to faith! Be ever stead fast in your devotion to God, bearing witness to the truth in all equity;"

Translation by Muhammad Asad

(emphasis supplied)

Maintainability of the Constitution Petition

73. During the hearings of the present review petitions crucial information surfaced which reinforces our direction to the FBR, to verify the source of funding of the London Properties, issued in the Majority Judgment. The new material that has come to light also significantly prejudices the maintainability of the Constitution Petition filed by the learned petitioner. A brief background of what this information is and how it was acquired is set out hereinbelow.

74. Mrs. Isa whilst making her submissions in the review on 19.04.2021 frequently referred to the Assessment Order dated 14.09.2020 passed against her by Mr. Zulfiqar Ahmad, CIR. The primary purpose for quoting from this Assessment Order, as stated by Mrs. Isa, was to show that the FBR had acknowledged

that Mrs. Isa had transferred 737,503/- and $17,966/- to the UK between the tax years of 2003-2013 which confirmed that she had the requisite sum of money to purchase the London Properties, namely, 50 Coniston Court; 40 Oakdale Road; and 90 Adelaide Road (total value: 751,000/-). However, she informed that although the Assessment Order was partially favourable to her, she had filed an appeal against it on other points. Additionally, both Mrs. Isa and the learned petitioner complained that they were unaware of the Report sent by Chairman FBR to the Secretary SJC. They had not been provided a copy of his Report even though Mrs. Isa had specifically asked for it (ref: pgs.559 and 562 of C.M.A. No.7602 of 2020 filed by Mrs. Isa). To redress this grievance, the Court passed a unanimous order on 19.04.2021 directing the Secretary of SJC to:

> "2. ...prepare 13 copies of the FBR report along with its attached record submitted to the SJC. He shall ensure that the said documents are made available in Court tomorrow at 11:30 a.m. for the perusal of the learned members of the Bench, the two petitioners and the learned Additional Attorney General."

75. The next day, namely, 20.04.2021 the documents were duly provided to all thirteen concerned persons mentioned in the order of 19.04.2021. These documents included the Assessment Order passed by the CIR, the Report of the Chairman FBR and certain ancillary material such as the banking documents of Mrs. Isa. It was in this data that the relevant information was discovered. The first piece of information which is of significance is a 'Procuration and Delegation of Authority Form' in connection with Mrs. Isa's Foreign Currency Account No.05386055801 in Standard Chartered Bank ("Bank"), World Trade Centre, 10-Khayabane-Roomi, Block-5, KDA Scheme 5, Clifton, Karachi. It is from this very account through which Mrs. Isa transferred 737,503/- and $17,966/- to different accounts in the UK statedly for the purchase of the London Properties. The Form, printed on the Bank's stationery, is signed by both Mrs. Isa and the learned petitioner and is dated 15.12.2003. It grants extensive powers to the learned petitioner, in relation to Mrs. Isa's Foreign Currency Account in the Bank. Some of these are:

i. Issuing cheques on behalf of the account holder;

ii. Depositing cash funds in the account;

iii. Issuing instructions for the transfer of funds from the account; and

iv. Issuing instructions for issuance of statements of account.

76. The Form can be found in Book-IV, Volume No.3, pg. 135 (one of the files in the record forwarded by the SJC) . Similarly, cheques amounting to 125,000/- in value were credited into the Foreign Currency Account of Mrs. Isa by Mr. Ahsan Zahir Rizvi, the learned petitioner's former partner at his law firm. Copies of these cheques are contained in the same Book-IV on pgs.22 and 47: 100,000/- [Cheque No.SA-1736344 drawn on NIB Bank, DHA-26th Street Branch-Khi ("NIB") and deposited on 03.09.2009] and 25,000/- [Cheque No. SA-1736340 drawn on NIB on 11.04.2008].

77. Having perused the material, when the Bench assembled in Court at 11:30 a.m. on 20.04.2021 to resume the hearing of the review, Mrs. Isa commenced her submissions by requesting the Bench to return the material received from the SJC. This request to the members of the Bench was also repeated by the learned petitioner at the very end of the hearing. In the midst of these objections one of us, on the basis of the newly unearthed material received earlier in the day from the SJC, posed three questions to the learned petitioner regarding the Foreign Currency Account in the Bank, Pakistan through which Mrs. Isa had transferred the 737,503/- and $17,966/- that she asserted were later used to purchase the London Properties. For completeness, those three questions are produced below:

i. Did learned petitioner have authority to operate the Foreign Currency Account?

ii. Did learned petitioner have anything to do with the credits made in the Foreign Currency Account?

iii. Did learned petitioner have anything to do with the debits from the Foreign Currency Account?

At this stage, the learned petitioner inquired whether he should answer the questions straightaway or tomorrow. To give the learned petitioner time to recollect his thoughts, the matter was deferred to the next day. Thereafter, a written document was submitted on 21.04.2021 in which the learned petitioner neither answered the questions in the affirmative or negative. Instead, the following response was given:

"20. ...it came as a complete surprise to the petitioner that the Hon'ble Mr. Justice Umar Ata Bandial, just before rising on Tuesday, 20 April 2021, asked a number of questions of fact which apparently emanated from Mr. Zulfiqar Ahmad's order and/or from the FBR Chairman's report; the petitioner was ready to respond but his lordship told him to do so on the next date of hearing which will be 'tomorrow at 9.30'...

21. That since Mrs. Sarina Isa and the petitioner give no credence to Mr. Zulfiqar Ahmad's order and the report of the FBR Chairman, with utmost respect, the questions should not have been put. If the petitioner submits to them and answers them he will effectively be endorsing a patent illegality and undermine his own case that nothing can be added to the Reference. It is further respectfully submitted that it is not appropriate to introduce the report at the stage of hearing of the said review applications..."

78. The purpose of asking these questions was to simply check whether the learned petitioner would admit his connection with Mrs. Isa's Foreign Currency Account, a fact which was by now known to the members of the Bench because of the material produced on Court's order by the SJC. However, since the learned petitioner avoided a response the matter was not pursued further in Court. In any event, a majority of the Bench vide an additional note issued subsequently on or about 05.05.2021, attached to the order of 20.04.2021, returned the documents procured from the SJC and objected to the questions posed to the learned petitioner.

79. What is perhaps puzzling about learned petitioner's refusal to answer the queries is its direct contradiction with his consistent stance (maintained before the SJC and throughout the hearings of Const. P. No.17 of 2019 and the review petitions) that he has no knowledge regarding the funding of the London Properties that are owned by his financially independent wife. Reference is made to his preliminary response, dated 31.07.2019, (para 56, pg.300 of Const. P. No. 17 of 2019, Part III) to the Show Cause Notice ("SCN") issued by the SJC on 17.07.2019:

"56. ...The particulars as to the price of the three properties, payment and matters pertaining thereto would be in the knowledge of their owners. The Respondent neither is, nor has ever been, the owner of the three properties or of any one or more of them..."

(emphasis supplied)

A similar statement to this effect can also be found in his Constitution Petition filed before this Court (para 14, pg. 18 of Const. P. No. 17 of 2019, Part I). It would, therefore, appear that if the learned petitioner was in fact unaware of the London Properties and its related details, he simply had to answer 'No' to each question posed to him. But as stated above such a reply was not forthcoming.

80. As has become clear from the discussion in paras 75 and 76, the reluctance of the learned petitioner in answering the Court's questions was his association with and knowledge of Mrs. Isa's Foreign Currency Account. This fact, however, is not reflected in his stand taken before the Court. The said omission adversely affects the maintainability of his Constitution Petition and review petition filed before the Court because knowledge of the Account demolishes the underlying basis of his Constitution Petition that he is not answerable before the SJC as he has no concern with the London Properties. As Mrs. Isa and her children are admittedly the owners of the London Properties, the pivotal issue in the present matter has always been the source of funds used for purchasing these Properties. Mrs. Isa has explained to CIR, Islamabad that the requisite funds were transferred to the UK from her Foreign Currency Account. The Procuration and Delegation of Authority Form in favour of the learned petitioner confers several powers on him giving him access and authority to issue directions regarding movement of funds in the Account (stated above in para 75) . Further, his former partner deposited a large sum of 125,000/- in the said account. It is to be noted that the learned petitioner took oath as Chief Justice of the Balochistan High Court on 05.08.2009. The bulk of the funds, 100,000/- were transferred into the Foreign Currency Account by the learned petitioner's former partner barely a month later, vide cheque deposited on 03.09.2009. Clearly, the learned petitioner had to exit the partnership firm on his assuming public office. Now, when a partner leaves a firm there is a settling of accounts and the outgoing partner has to be given his due from the firm's

capital etc. Was this payment into Mrs. Isa's account in substance part of that settlement? Or was it a payment for some bona fide arm's length transaction between the former partner and Mrs. Isa? Either way, it prima facie stretches credulity that the learned petitioner would not be aware of or linked to such a transaction. The other payment, of 25,000/- was made vide cheque drawn on 11.04.2008, when the learned petitioner was a partner at the firm. The question, prima facie, of knowledge if not linkage arises again with regard to this deposit.

81. It goes without saying that according to Mrs. Isa's version the funds that were credited to her Foreign Currency Account could only have contributed towards the acquisition of two of the London Properties in the year 2013 after the learned petitioner assumed public office. The foregoing facts prima facie suggest that in relation to the Foreign Currency Account, the learned petitioner at the very least knew the material facts at all relevant times. That he maybe even had a link with the funds that went into it. Therefore, a discrepancy now exists between the new information (which indicates the connection of the learned petitioner with the London Properties) and the stance of the learned petitioner (that he has no link whatsoever with the funding of the London Properties). These are quite obviously tentative observations and queries in view of what has come to light. They require a clear response or answer before the competent forum. If the matter had been left to the SJC to deal with at its own discretion in terms of the Short Order dated 19.06.2020 then perhaps the controversy could have been resolved.

82. However, the review majority vide the additional note issued on or about 05.05.2021 ordered the return of the material forwarded by the SJC and attempted to restrain various fora and authorities from scrutinising the same vide short order dated 26.04.2021. Nevertheless, this material can be considered by us for two reasons:

i. The review majority's direction cannot stand in our way as Judges sitting in the same Bench (in dissent though we may be) from accessing and evaluating the material which is available on the record, and passing judgment thereon or with reference thereto. This is necessary to protect the Judicial Independence of all members sitting in the Bench. No hurdles on the ability of dissenting Judges to express their views on the basis of available record can be imposed, especially if the dissent is specifically with the direction(s) issued by the majority. In any event, whilst 5 members of the majority have declared the banking information to be illegal and of no legal effect, none of them (including the 6th member) have restrained any forum or authority from considering or acting upon the said information. Therefore, the said material can be examined by us and any relevant forum or authority, including the SJC; and

ii. It may be recalled from para 15(i) that Courts can review a judgment if new and important evidence is produced which although existed at the time when the order was made could not be accessed and therefore produced. In the present case, new material has surfaced during the proceedings of CIR, Islamabad. Both documents that we have referred to (the Procuration and Delegation Form and the cheques issued by the former partner of the learned petitioner) existed on the day the Short Order dated 19.06.2020 was passed. However, as these were confidential documents of Mrs. Isa they were not in the knowledge of the other parties. It was only when the direction to the FBR was issued vide Short Order dated 19.06.2020 to proceed with the verification of the funding of the London Properties owned by Mrs. Isa that the CIR, Islamabad made a request for information to her banks under Section 176 of the Ordinance. The documents produced by Mrs. Isa's Bank revealed the connection of the learned petitioner with her Foreign Currency Account. Resultantly, the perusal of and reliance on these documents in review jurisdiction is competent, relevant and critical for verifying the propriety of this Court's direction to the FBR. Their contents are also crucial for arriving at an informed decision in the review petitions.

83. Be that as it may, by accepting the review petitions and seeking to prevent a consideration of the freshly discovered relevant and genuine information, the review majority has created an anomalous situation whereby a process of this Court in aid of justice has been turned into a process shrouding the truth under legal niceties. Reference is made to Verse 135 of Surah An-Nisa, quoted at the start of this

judgment which directs searching for the truth in order to do justice. An unsatisfactory state of affairs, therefore, exists which unless explained casts an impression that the Court has adopted a different standard for one of its own. Judges occupy an exalted position in society as dispensers of justice. They are amongst the elites in society. Therefore, neglecting their duty to search and confront the truth goes against the express command of Almighty Allah who has warned against providing preferential treatment to privileged persons:

"Surah Al-Isra, Verse 16

When We decide to destroy a population, We (first) send a definite order to those among them who are given the good things of this life and yet transgress; so that the word is proved true against them: then (it is) We destroy them utterly."

Translation by Abdullah Yusuf Ali

84. We must not falter in the face of such a powerful command. Judges, like all other persons in the Service of Pakistan and holding public office, are answerable for their errors and omissions. In the instant case there is material that calls for an explanation before the SJC which must be provided to protect the learned petitioner and the Court from aspersions cast on their integrity.

Conclusion

85. In view of what has been discussed, all the nine review petitions are dismissed. Accordingly, the Short Order dated 19.06.2020 and the Detailed Reasons dated 23.10.2020 are upheld in their entirety.

Sd/-
JUDGE
Sd/-
JUDGE

I agree. I have added a note of my own.

Sd/-
JUDGE
Sd/-
JUDGE

**MUNIB AKHTAR, J.---**

86. After we had finalized our reasons as above but before the release thereof, our learned colleagues, Justice Maqbool Baqar, Justice Mazhar Alam Khan Miankhel, Justice Syed Mansoor Ali Shah and Justice Amin-ud-Din Khan on the one hand, and Justice Yahya Afridi on the other, released their reasons vide their respective judgments on 29.01.2022. The judgment of the former does not identify any particular learned Judge as the author and therefore, for convenience, I respectfully refer to that decision as "the Four Member Judgment".

87. I of course fully respect the right of my learned colleagues to support their respective short orders with such reasoning in such manner as they deem appropriate. However, I have noted with concern one aspect of the Four Member Judgment. It is that that decision has (and I say this with all due respect) purported to be signed also by our learned former colleague Justice (R) Manzoor Ahmad Malik, who has expressed his agreement with the same. Our learned former colleague was of course a signatory to one of the short orders (as noted above in para 14) but he retired on 30.04.2021, i.e., several months ago. He could not, as a matter of law, have signed the judgment. The justification as to why he could do so is given in para 55 of the Four Member Judgment. In my view, our learned colleagues, with respect, erred in law in presenting/ sending their judgment to our learned former colleague. The matter is important and needs to be addressed. I do so in this additional note appended to our judgment.

88. The reason offered in the aforementioned para 55 is as follows:

"55. ... Our learned brother, Manzoor Ahmed Malik, J., (who has since retired) was a signatory to the above short order; therefore, following the precedents of Al-Jehad Trust v. Federation (PLD 1996 SC 324) and CJP Iftikhar Muhammad Chaudhry v. President of Pakistan (PLD 2010 SC 61), the

office is directed to place these detailed reasons recorded in support of that order before his lordship, for his consideration whether he agrees with the detailed reasons."

For reasons that follow I am, respectfully, unable to concur in what has been said and done. In particular, in my view the cited cases do not offer any precedent as could be applied to, and followed in, the circumstances of the present case.

89. In my view the settled position is that once a Judge of this Court has retired he cannot thereafter give, make or sign any judgment, order or decree, and certainly not in such manner as has, or can have, operative effect. Upon retirement he has left office and thereafter cannot, as it were, return to service, whether of his own volition or at the request of any Judge(s) on the Court, unless the Constitution itself so allows. The Constitution does so provide in Article 182, which relates to ad hoc Judges. It provides, inter alia, that a Judge of this Court who has ceased to hold office (three years having not elapsed since retirement) may be requested "to attend sittings of the Supreme Court as an ad hoc Judge for such period as may be necessary and while so attending an ad hoc Judge shall have the same power and jurisdiction as a Judge of the Supreme Court". Our learned former colleague is not an ad hoc Judge. By efflux of time he retired, period. As a matter of law he could not have signed the Four Member Judgment.

90. Before proceeding to consider the justification offered in the aforementioned para 55 certain points which, while both settled and self-evident, need to be made. Firstly, in any case heard by a multi-member Bench (i.e., a Bench comprising of more than one Judge, whether of even or odd numbered strength) the operative decision (whether judgment, decree or order) must have the support of a majority. Even fifty percent is not enough: that is only a plurality. The majority threshold must be crossed. Of course in most cases there is unanimity. But unanimity is, at least as relevant here, conceptually only a "special" situation of a majority (i.e., all the members of the Bench constitute the "majority"). The "general" rule is that there must be at least a majority. If there is no majority then there is no operative order or decree, or in the case of a judgment no ratio decidendi of the Court, although there is of course a ratio of such judgment(s) as may have been delivered. Secondly, if there are multiple judgments or orders (short or otherwise) it is only the one which commands the support of the majority that has operative effect as the decision of the Court. If there be no such single judgment then it is the commonality (if any) between them such as commands the support of the majority that has operative effect. Anything (whether determination or decision on a legal point in issue, enunciation of any rule or principle of law or order) that falls short of this mark (i.e., is outside or beyond that what is common) is not the decision of the Court and has no operative effect.

91. The points just made can be easily demonstrated by looking at the petitions at hand. They were heard and decided by a 10-member Bench. The majority therefore had to comprise of at least six Judges. Three short orders were made, which have been set out in para 14 above. The short order made by us had the support of only four Judges and can be put to one side. When the remaining two are considered it is seen that one commanded the support of five learned Judges (Justice Maqbool Baqar, Justice Manzoor Ahmad Malik, Justice Mazhar Alam Khan Miankhel, Justice Syed Mansoor Ali Shah and Justice Amin-ud-Din Khan) while the other was made by one learned Judge (Justice Yahya Afridi) . Neither of these short orders had the support of six Judges and hence was not operative in and of itself. Rather, the two orders had to be considered in conjunction. What had operative effect was only that which was common between them. This was because it was only the commonality that commanded the support of a bare majority (i.e., six Judges) and therefore, and for that reason alone, had operative effect. What was it that was in common? For convenience I reproduce the orders in tabular form (emphasis supplied):

| Short order of Maqbool Baqar, Manzoor Ahmad Malik, Mazhar Alam Khan Miankhel, Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ. | Short order of Yahya Afridi, J. |
|---|---|
| For the reasons to be recorded later, captioned Review Petitions are allowed and the directions contained in paras 4 to 11 of the impugned short | For the reasons to be recorded later, all review petitions except C.R.P. No. 296 of 2020, are allowed and the directions contained in paragraphs |

| | |
|---|---|
| order dated 19.06.2020 passed in Const. Petition No.17/2019 and other connected matters, along with supporting detailed reasons given in the majority judgment of the same date, are recalled and set-aside. All the subsequent proceedings, actions, orders, information and reports in pursuance of the directions contained in the short order dated 19.6.2020 and the detailed reasons thereof, are declared to be illegal and without any legal effect. Resultantly, any such proceedings, actions, orders or reports cannot be considered or acted upon and pursued any further by any forum or authority including the Supreme Judicial Council. | Nos. 4 to 11 of the order dated 19.06.2020 and detail judgment dated 23.10.2020 passed in Constitution Petition No. 17 of 2019 and other connected petitions are recalled. Consequently, all the subsequent proceedings, actions, orders and reports made in pursuance to the said directions are declared to be of no legal effect and/or consequences. |

As is obvious from even a bare perusal, the portion emphasized is not common between the two orders. It therefore did not command the support of the majority, but only of, at most, a plurality (i.e., five Judges). It did not therefore have operative effect. Any relevant forum or authority including the SJC is therefore not precluded or prevented from considering, acting upon or pursuing any information or material contained in or to be obtained from "any such proceedings, actions, orders or reports". Some of that information or material, at least prima facie, may be such as has been identified in paras 75 to 81 above.

92. While the point is clear and self-evident from a bare perusal of the short orders the matter has been put beyond any conceivable doubt by Justice Yahya Afridi in para 13 of his judgment which, as relevant for present purposes, is set out below (emphasis supplied):

> "13. As for the effect of the above declaration qua the allegation of misconduct against the Petitioner Judge, suffice it to state that it does not diminish or dilute the constitutional authority of the Council to consider, on its own motion, an "information" received from "any source", whatever it may be, including the "information" contained in the report received from the tax official, for deciding to initiate an inquiry, or otherwise, into the conduct of the Petitioner Judge...."

93. This brings me to para 55 of the Four Member Judgment and the justification sought to be given, on the basis of two earlier cases, as to why our retired learned colleague could sign the same. I begin with the second cited case, CJP Iftikhar Muhammad Chaudhry v. President of Pakistan (PLD 2010 SC 61). Now this was a decision of a 13- member Bench. A majority thereon had to comprise of at least 7 Judges. The short order was made by a majority of 10 Judges, with three in dissent. It therefore commanded the support of the majority and had operative effect. By the time the detailed reasons came to be written, the three learned Judges in dissent had retired. It appears that they did not release any reasons, whether before or after retirement. In addition, three of the learned Judges who were part of the 10- member majority had also retired. It was in these circumstances that the learned author-Judge of the main judgment, Justice Khalil-ur-Rehman Ramday, observed as follows:

> "205. I, along with the Chief Justice of Pakistan and some other learned brothers, got restored to office in March, 2009 and it is thereafter that I got down to collecting the lost, the forgotten and the scattered threads and this is what I have been able to produce now.
>
> 206. But in the meantime, some of us of this Bench had superannuated which includes three Hon. Members of the ten Members forming the Majority view in this case. In the AL-JEHAD TRUST's case (supra), two Hon. Judges who had signed the short judgment, had retired before the detailed reasons were recorded yet they signed the said reasons. Following the said precedent, I am offering these reasons even to the superannuated Honourable Judges, namely, Mr. Justice Muhammad Nawaz Abbasi, Mr. Justice Syed Jamshed Ali and Mr. Justice Hamid Ali Mirza, leaving it to them to decide whether they would or would not like to be party to these detailed reasons."

In the event all three of the learned retired Judges signed the main judgment and one of them (Justice Muhammad Nawaz Abbasi) even sent in a concurrence. In my respectful view, as a matter of law, Justice Khalil-ur-Rehman Ramday could, and ought, not to have sent the judgment to the three learned retired Judges and they could not have signed it. However, be that as it may, the crucial point is that their signatures (and also, with respect, the purported concurrence) were of no legal relevance or consequence. The reason is that the detailed judgment commanded the support of seven learned Judges who were still on the Court, i.e., there was a majority in support thereof regardless of the three retired Judges. Even if all three of the retired Judges had not signed the judgment it would not have made the slightest difference. The main judgment commanded the support of the majority that had heard and decided the case and hence had operative effect, i.e., it was the judgment of the Court. As a matter of law therefore, what was done was a mere courtesy, a gesture that was (respectfully) empty and devoid of any and all operative effect. It made not an iota of difference.

94. I turn to the other case, Al-Jehad Trust v. Federation (PLD 1996 SC 324). As will be seen the circumstances there were much more complex and (with respect) quite different from what was believed by Justice Khalil-ur-Rehman Ramday, as set out in para 206. As I show below, this case did not provide any precedential support for what was done through the aforesaid para. In order to fully satisfy myself, I have examined the original record of the case. The following position emerges.

95. The decision was of a learned 5-member Bench, comprising the then Chief Justice Sajjad Ali Shah, Justice Ajmal Mian, Justice Fazal Ilahi Khan, Justice Manzoor Hussain Sial and Justice Mir Hazar Khan Khoso. A majority therefore had to comprise of at least 3 Judges. Now, the short order was made on 20.03.1996 and, interestingly, was signed by four of the learned Judges. Justice Mir Hazar Khan Khoso did not sign the short order. However, since it commanded the support of the majority it had operative effect. Of the four learned Judges who signed the short order the first three were on the Court at all material times, their respective dates of leaving office being 16.02.1998, 30.06.1999 and 31.12.1997. What is crucial for present purposes is the retirement of Justice Manzoor Hussain Sial, who left office on 24.03.1996. Justice Mir Hazar Khan Khoso was at that time an ad hoc Judge and his term expired on 29.09.1996. Thus, contrary to what Justice Khalil-ur-Rehman believed, there was only one Judge whose retirement date was of any significance.

96. The record shows that on 28.03.1996, Justice Ajmal Mian sent the following note to the office (emphasis supplied):

> "I am enclosing herewith the original judgment in Civil Appeal No. 805 of 1995 and Constitution Petition No.29 of 1994 duly signed by me and by Mr. Justice Fazal Ilahi Khan and Mr. Justice Manzoor Hussain Sial, which is lying with me since 24th March, 1996, awaiting the opinion of Hon. C.J.
>
> Hon.C.J has told me that his opinion would also be ready by Saturday, the 30th March, 1996 and if the same would not be ready by then, the above joint opinion is to be released to the parties and to the Press on the above date. Since I would be leaving for Lahore on 30.3.1996 at 1.10 p.m., you may get the signature on it of Hon.C.J. on 30.3.1996 and then release the same to the learned counsel for the parties, amicus curiae and to the Press. 20 photostat copies are also enclosed hereto."

As is clear from the foregoing, three learned Judges had already signed the judgment authored by Justice Ajmal Mian, including Justice Manzoor Hussain Sial. Crucially for present purposes, the latter signed the judgment on his last day in office, i.e., when he was still on the Court, which means that the judgment authored by Justice Ajmal Mian commanded the support of the majority of the Bench. While it is not clear when the judgment of the Chief Justice was released it is clear from the foregoing note that that was after the date on which Justice Manzoor Hussain Sial stood retired. I will assume that the date was 30.03.1996. Now, the judgment of the Chief Justice was, in addition to himself, signed by three Judges (see at pg. 411): Justice Ajmal Mian, Justice Fazal Ilahi Khan and Justice Manzoor Hussain Sial. However, Justice Ajmal Mian made the following note above his signature (emphasis supplied):

"I had recorded my separate reasons copy of which sent to H.C.J. HJ(5) and then HJ(6). The latter two agreed with me and signed the same on 24-03-1996. I adhere to my above reasons."

It will be seen that the judgment of the learned Chief Justice was supported by only two Judges who were on the Court on 30.03.1996, being himself and Justice Fazal Ilahi Khan. The signing by Justice Manzoor Hussain Sial could not be taken into account as he had retired by then. Thus, this judgment did not command the support of a majority of the Bench. It is to be noted that Justice Manzoor Hussain Sial also gave his own judgment and indeed specifically noted that he would be doing so when signing the judgments of the Chief Justice and Justice Ajmal Mian (see at pp. 411 and 522). However, with respect, this is of no relevance for present purposes. Finally, for completeness I may note that the record shows that Justice Mir Hazar Khan Khoso gave his own judgment, dated 26.05.1996 (i.e., when he was still an ad hoc Judge). However, the judgment appears not to have been reported. Again, with respect, this judgment is not relevant for present purposes: Justice Mir Hazar Khan Khoso did not sign the judgments of either the Chief Justice or Justice Ajmal Mian.

97. The position that emerges from the foregoing is therefore as follows. There was a judgment, that of Justice Ajmal Mian, which commanded the support of the majority of the Bench as it was signed by three learned Judges all of whom were on the Court when they signed it. The judgment of the learned Chief Justice, it appears, was only supported by two learned Judges. Of the five Judges who comprised the Bench it was the retirement of only one learned Judge (Justice Manzoor Hussain Sial) that had relevance and not two as erroneously concluded by Justice Khalil-ur-Rehman Ramday. Furthermore, this retirement was relevant only in relation to the judgment of the Chief Justice. It was of no consequence for the judgment of Justice Ajmal Mian since the learned Judge signed the same on his last day in office. Two conclusions therefore follow. Firstly, in Al-Jehad Trust v. Federation (PLD 1996 SC 324) there was both an operative short order and an operative judgment of the Court. Secondly, with respect, Justice Khalil-ur-Rehman Ramday did not properly and fully appreciate the circumstances of that case. It is therefore clear, in my respectful view, that it provided no precedent whatsoever to support what his Lordship sought to do in terms of para 206 of his judgment.

98. The situation in the case at hand is however completely different from both decisions. There are in all three judgments. One is of course by us and has the support of four Judges. Like our short order it can be put to one side for present purposes. Of the two remaining judgments one is by one learned Judge, Justice Yahya Afridi. The other is by four learned Judges still on the Court, Justice Maqbool Baqar, Justice Mazhar Alam Khan Miankhel, Justice Syed Mansoor Ali Shah and Justice Amin-ud-Din Khan. There is therefore no judgment that commands the support of the majority of the Judges who heard and decided the review petitions and are still on the Court. In this situation, the (with respect) purported signing of the Four Member Judgment by our retired learned colleague can potentially have a material legal effect. It is not of no legal consequence or significance, and it is not merely by way of a courtesy or a (legally) empty gesture, as was the situation in the second cited case. (The first cited case is of course irrelevant for present purposes.) If the signature of our retired learned colleague is regarded as having legal effect then the situation may be materially altered. This is so because the Four Member Judgment will now have the support of a plurality (five Judges). That of course would still not be a majority, and in and of itself the Four Member Judgment would not be the judgment of the Court. However, now that portion of its reasoning and ratio as is common with the judgment of Justice Yahya Afridi would command the support of a bare majority (six Judges). This commonality would then be the operative judgment or ratio of the Court. As is obvious this would produce a situation materially different from (indeed, at odds with) the two cases cited by way of precedent. There an operative ratio or judgment of the Court came about without taking the retired Judge(s) into any account whatsoever. Here, it would only be with the inclusion of our retired learned colleague that an operative ratio or judgment of the Court could come about; without him it would be impossible. The circumstances of the cited cases were not at all the same as the situation here. They cannot therefore offer any support for the conclusion sought to be drawn in, and what was done through, para 55. I have already set out, in para 89 above, the general rule. In view of the same our learned retired

colleague could not, in law, have signed the Four Member Judgment. With respect, his purported act of doing so, and expression of agreement, are in law non est and of no legal consequence, effect or operation. The Four Member Judgment remains precisely that: a judgment that has the support of only four of the Judges who heard and decided the review petitions. It further follows from this that the reasoning and ratio as is common between the Four Member Judgment and the judgment of Justice Yahya Afridi has the support of only a plurality, i.e., five Judges. Since even the commonality does not command the support of the majority it is not the judgment or ratio of the Court.

99. It is obvious that one consequence of the conclusion just reached is that there is no operative reasoning or ratio of the Court. Of course, there is an operative order in the field which, as explained above, is that what was common between the two short orders. It is not therefore the situation that the decision is bereft of any legal effect at all. Rather, the result is that the legally operative "short order" (i.e., the commonality) is not supported by any operative judgment (i.e., reasoning or ratio). This result is certainly startling. It has been brought about by a highly unusual confluence of three facts: that these matters were heard by an even numbered Bench; the decision was by short order for which there was an operative (though bare) majority in terms as explained above; before the detailed reasons could be released one of the Judges retired. That is what the position is. It cannot be altered by the expedient, as it were, of bringing back the retired learned Judge to temporarily fill the office that he has long since vacated. Each of the three judgments has its own ratio and reasoning. There may even be a ratio and reasoning that is supported by a plurality. But that is the extent of it. There is nothing that commands the support of even a bare majority. There is no ratio or reasoning that has operative effect as being that of the Court. With respect, it therefore necessarily follows that neither the Four Member Judgment nor that of Justice Yahya Afridi nor such reasoning or ratio as may be common between them have any binding precedential effect or value. That is where the matter ends, and that is where it must lie.

Let this note be circulated among my learned colleagues.

Sd/-
JUDGE

I agree.

Sd/-
JUDGE

I agree.

Sd/-
JUDGE

I agree with the reasoning recorded by my learned brother Munib Akhtar, J.

Sd/-
JUDGE

MWA/J-2/SC Order accordingly.

**P L D 2022 Supreme Court 261**

**Present: Umar Ata Bandial and Syed Mansoor Ali Shah, JJ**

**Syed KHURSHEED AHMED SHAH---Petitioner**

**Versus**

**The STATE---Respondent**

Civil Petition No. 4387 of 2021, decided on 21st October, 2021.

(On appeal from the judgment/order dated 27.07.2021 of the High Court of Sindh, Karachi passed in C.P. No.D-4048/2021).

**(a) National Accountability Ordinance (XVIII of 1999)---**

----Ss. 9 & 10---Constitution of Pakistan, Arts. 9, 10, 10A, 14(1) & 185(3)---Criminal Procedure Code (V of 1898), S. 497---Person accused of an offence under the National Accountability Ordinance, 1999 ( NAB Ordinance )---Bail---Tentative assessment of the material available on record to decide whether there is, or is not, available on record such incriminating material which provides reasonable grounds for believing that the accused is guilty of the alleged offence---Scope---Said standard of making tentative assessment of the material available on record for deciding the question of detaining an accused in prison, or releasing him on bail, during his trial for the alleged offence under the NAB Ordinance is not borrowed from S.497, Cr.P.C. rather, it emanates from the fundamental rights to liberty, dignity, fair trial and protection against arbitrary detention guaranteed by the Constitution and from the operational scheme of the NAB Ordinance---Said Constitutional standard of reasonable grounds for depriving a person from his said fundamental rights is to be read in all laws dealing or interfering with his liberty---Material on which tentative assessment is to be made by the court includes material both for and against the accused collected during investigation.

Muhammad Iqbal Khan Noori v. National Accountability Bureau PLD 2021 SC 916 and Khalid Javed v. State PLD 1978 SC 256 ref.

**(b) Criminal Procedure Code (V of 1898)---**

----S. 497---National Accountability Ordinance (XVIII of 1999), S. 9(a)(v)---Constitution of Pakistan, Art. 185(3)---Benami assets disproportionate to known sources of income of the accused---Bail, grant of---No sufficient incriminating material was available to show that the properties held by the persons who are not the family members of the accused, but are alleged to be his benamidar, are actually of the accused---National Accountability Bureau ( the Bureau ) failed to point out any material, which could reasonably show that the properties alleged to be held by the accused, in name of other persons, as his benamidar, are in his actual or constructive possession and/or he receives the profits of those properties---So far as the value of the assets/properties in names of the accused and of his family members are concerned, the Bureau has determined the same by rejecting their value mentioned in the registered sale deeds without any solid lawful basis, to make a case that their assets are disproportionate to their known sources of income---Further it has not been specified whether the value determined by the Bureau is that of the time when the said properties were purchased by the petitioner and his family members, or the same is their current value---As for the transactions of amount credited and debited in the Bank accounts of the accused and his family members, the accused has taken the stance that all the said accounts are disclosed and accounted for in their annual income tax returns and declarations of assets, and the Bureau has not pointed out any material available on record to rebut that stance of the accused---Thus no tangible, sufficient incriminating material was available on record of the case against the accused which would lead to inference of his guilt for commission of the offence alleged against him; there are, therefore, at present stage no reasonable grounds for believing that the accused is guilty of the alleged offence---Petition for leave to appeal was converted into appeal and allowed, and the accused was released on bail with the observations that in a case where the Bureau has been unable to show sufficient incriminating material to the Court to justify the detention

of the accused, depriving the accused of his liberty and freedom even for a single day is, to say the least, unconscionable and below human dignity.

**(c) National Accountability Ordinance (XVIII of 1999)---**

----S. 9(a)(v)---Benami transaction---Proof---Factors to be considered by court---Number of factors were to be considered to determine the question whether a particular transaction is benami in character but perhaps the most crucial factors, in the criminal law context are, first, who is in actual possession, or control of possession, of the property, and second, who receives the profits arising out of the property.

**(d) National Accountability Ordinance (XVIII of 1999)---**

----S. 9(a)(v)---Assets disproportionate to known sources of income---Comparison with income of accused---Scope---Value of the property at the time of its purchase is to be compared with the known sources of income of the purchaser at the time of that purchase for determining whether or not the purchase of that property is disproportionate to his sources of income.

**(e) Criminal Procedure Code (V of 1898)---**

----S. 497---National Accountability Ordinance (XVIII of 1999), S. 9(a)(v)---Constitution of Pakistan, Art. 185(3)---Benami assets disproportionate to known sources of income of the accused---Bail, grant of---Inordinate and unconscionable delay in conclusion of trial---Accused was arrested in the present case on 18-09-2019 and facing trial on an interim reference---Since his arrest a period of more than two years has lapsed but the National Accountability Bureau ( the Bureau ) is yet to file the final reference, thus, the conclusion of the trial is not in sight for no fault of the accused---Such a long delay does constitute inordinate and unconscionable delay , justifying the release on bail of the accused pending his trial---Petition for leave to appeal was converted into appeal and allowed, and accused was released on bail.

Talat Ishaq v. NAB PLD 2019 SC 112 ref.

M. Makhdoom Ali Khan, Senior Advocate Supreme Court and Mohsin Shahwani, Advocate Supreme Court for Petitioner.

Sattar Awan, Spl. Prosecutor and Kashan, I.O. for Respondent.

Date of hearing: 21st October, 2021.

**ORDER**

**SYED MANSOOR ALI SHAH, J**.---The petitioner seeks leave to appeal against the order dated 27.07.2021 passed by the High Court of Sindh on his constitutional petition filed under Article 199 of the Constitution of the Islamic Republic of Pakistan 1973 ("Constitution"), whereby the post arrest bail has been denied to him in NAB Reference No. 17 of 2019 pending trial in the Accountability Court, Sukkur for the alleged offence of corruption and corrupt practices, as defined in section 9 and punishable under Section 10 of the National Accountability Ordinance 1999 ("NAB Ordinance").

2. Briefly stated, the allegation against the petitioner, who, having remained a Provincial Minister as well as a Federal Minister, was a "holder of public office" as defined in the NAB Ordinance, is that he, his dependents, i.e., his wives and sons, and his other benamidar own and possess assets that are disproportionate to his known sources of income and which he cannot reasonably account for. The petitioner's stance, mainly, is that all his income and assets, and that of his dependents and independent family members, are duly accounted for in their annual tax returns and declarations of assets, that the value of their assets shown by the NAB is baseless and exorbitant, and that the properties of his alleged benamidar are not his. The petitioner also relies upon the closure of earlier investigation on the same allegations by the then Chairman, NAB and approval of that closure by the High Court in the case reported as Syed Khursheed Ahmad Shah v. National Accountability Bureau (SBLR 2014 Sindh 821).

3. The High Court has declined grant of the relief prayed for to the petitioner with the findings that the incriminating material available on record is "sufficient to connect the petitioner, prima facie, with the alleged offence", and that the delay in conclusion of the trial is "attributable to the petitioner and other co-accused."

4. The learned counsel for the petitioner has submitted that the said findings of the High Court are against the material available on record of the case and are thus perverse and arbitrary - legally not

sustainable. On the other hand, the learned counsel for the respondents/NAB has made submissions supporting the impugned order.

5. We have considered the arguments of the learned counsel for the parties, read the case law cited and perused the record of the case. We are only to make a tentative assessment of the material available on record to decide whether there is, or is not, available on record such incriminating material which provides reasonable grounds for believing that the petitioner (accused) is guilty of the alleged offence. This standard of making tentative assessment of the material available on record for deciding the question of detaining an accused in prison, or releasing him on bail, during his trial for the alleged offence under the NAB Ordinance is not borrowed from section 497, Cr.P.C. rather, as held by this Court in the recently decided case of Muhammad Iqbal Khan Noori v. National Accountability Bureau (PLD 2021 SC 916), it emanates from the fundamental rights to liberty, dignity, fair trial and protection against arbitrary detention guaranteed by the Constitution and from the operational scheme of the NAB Ordinance. Needless to mention that this constitutional standard of "reasonable grounds" for depriving a person from his said fundamental rights is to be read in all laws dealing or interfering with his liberty. The material on which tentative assessment is to be made by the court includes material both for and against the accused collected during investigation: see Khalid Javed v. State (PLD 1978 SC 256).

6. Although the NAB has not referred to the substantial material as to the assets of the petitioner and his family members and their sources of income which has now been collected and was not available with the NAB in the earlier investigation, still we have made a fresh tentative assessment of the material available on record of the case, in the interest of justice, to satisfy ourselves whether there is incriminating material available on record which provides reasonable grounds for believing that the petitioner is guilty of the alleged offence. Having done so, we find that there is no sufficient incriminating material to show that the properties held by the persons who are not the family members of the petitioner, but are alleged to be his benamidar, are actually of the petitioner. Although, as held by the constitutional courts of the country that a number of factors are to be considered to determine the question whether a particular transaction is benami in character yet perhaps the most crucial factors, in the criminal law context are: (i) who is in actual possession, or control of possession, of the property, and (ii) who receives the profits arising out of the property. The NAB has failed to deal with these factors nor has pointed out to us, any material, which could reasonably show that the properties alleged to be held by the petitioner, in name of other persons, as his benamidar, are in his actual or constructive possession and/or he receives the profits of those properties.

7. So far as the value of the assets/properties in names of the petitioner and of his family members are concerned, we find that the NAB has determined the same by rejecting their value mentioned in the registered sale deeds without any solid lawful basis, to make a case that their assets are disproportionate to their known sources of income. What is more disturbing is that it has not been specified whether the value determined by the NAB is that of the time when the said properties were purchased by the petitioner and his family members, or the same is their current value. Needless to mention that it is the value of the property at the time of its purchase which is to be compared with the known sources of income of the purchaser at the time of that purchase for determining whether or not the purchase of that property is disproportionate to his sources of income. Further, the NAB has not estimated the agricultural income of the petitioner in accordance with the provisions of rule 3 of the West Pakistan Land Revenue Assessment Rules 1968, nor has included the same in his known sources of the income. As for the transactions of amount credited and debited in the bank accounts of the petitioner and his family members, the petitioner has taken the stance that all the said accounts are disclosed and accounted for in their annual income tax returns and declarations of assets, and the NAB has not pointed out any material available on record to rebut that stance of the petitioner. There is thus no such tangible, sufficient incriminating material available on record of the case against the petitioner which would lead to inference of the guilt of the petitioner for commission of the offence alleged against him; there are, therefore, at this stage no reasonable grounds for believing that the petitioner is guilty of the alleged offence.

8. While the petitioner is found entitled to the grant of bail on merits as discussed above, even as to the delay in conclusion of the trial he cannot be blamed therefor. The petitioner was arrested in the present case on 18.09.2019 and facing trial on an interim reference. Since his arrest a period of more than two years has lapsed but the NAB is yet to file the final reference, thus, the conclusion of the trial is not in sight for no fault of the petitioner. Such a long delay does constitute "inordinate and unconscionable delay", as held in Talat Ishaq v. National Accountability Bureau (PLD 2019 SC 112), justifying the release on bail of the petitioner pending his trial even on this ground as well. It must be remembered that in criminal law, everybody including the co-accused is liable only for his own acts and omissions, not of others. Even otherwise, in a case where the NAB has been unable to show sufficient incriminating material to the Court to justify the detention of the accused, depriving the accused of his liberty and freedom even for a single day is, to say the least, unconscionable and below human dignity.

9. In view of the above tentative findings, we are of the considered view that the further detention of the petitioner in the present case would be without lawful authority and in breach of his fundamental rights, and that it was a fit case for exercise of constitutional jurisdiction by the High Court, under Article 199 of the Constitution, to make an order for release of the petitioner on bail till decision of the case. The High Court has not exercised its discretion judiciously and reasonably. We, therefore, convert this petition into appeal and allow the same. We set aside the impugned order, accept the constitutional petition of the petitioner and make order that the petitioner shall be released on bail subject to his furnishing bail bond in the sum of Rs.10 million with one surety in the like amount to the satisfaction of the Trial Court. Needless to say that the observations made in this order are tentative and shall not influence the trial court while concluding the case after recording evidence.

10. Foregoing are the reasons for our short order dated 21.10.2021, which is reproduced hereunder for completion of record.

> "For reasons to be recorded later, this petition is converted into appeal and allowed. The petitioner is granted bail on the merits of the case subject to his furnishing bail bonds in the sum of Rs.10/- million with one surety in the like amount to the satisfaction of the learned Trial Court. The name of the petitioner shall be placed on the ECL subject to appropriate relief that may be granted by the learned Accountability Court on account of exigencies in his case."

MWA/K-3/SC Bail granted.

**P L D 2022 Supreme Court 281**

**Present: Sardar Tariq Masood, Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed, JJ**

**SHARAFAT KHAN---Appellant**

**Versus**

**The STATE---Respondent**

Criminal Appeal No. 241 of 2020, decided on 28th February, 2022.

(Against the judgment dated 10.02.2016 of the Peshawar High Court, Abbottabad Bench, passed in Criminal Appeal No.111-A of 2013).

Per Syed Mansoor Ali Shah, J; Sardar Tariq Masood, J agreeing; Qazi Muhammad Amin Ahmed, J dissenting. [Majority view]

**(a) Control of Narcotic Substances Act (XXV of 1997)---**

----Ss. 9 & 36---Control of Narcotic Substances (Government Analysts) Rules, 2001, R. 4---Constitution of Pakistan, Art. 10A---Possession of narcotics---Representative sample sent to Government analyst, nature of---[Per Syed Mansoor Ali Shah, J [Majority view]: Representative sample is to be collected from every packet/cake/slab of the alleged narcotic drug and sent for analysis to the Chemical Examiner---Right to fair trial of the accused under Art. 10A of the Constitution requires that the sample drawn from the alleged narcotic drug must be truly representative of the alleged narcotic drug recovered and therefore must be drawn from all the physically separate and independent units of the alleged narcotic drug]---[Per Qazi Muhammad Amin Ahmed, J [Minority view]: Not essential that every micro part of the contraband in single packet is to be separated for analysis nor is so contemplated by the Control of Narcotic Substances (Government Analysts) Rules, 2001].

Per Mansoor Ali Shah, J [Majority view]:

Before an accused is burdened with a criminal liability under the Control of Narcotic Substances Act, 1997 ( the Act ) of possessing the alleged narcotic drug, a representative sample of that alleged narcotic drug must be drawn and dispatched to be tested and analyzed by the Government Analyst. Testing and analysis of the alleged narcotic drug is a sine qua non for holding the accused liable under the Act, and the accused cannot be saddled with any liability under the Act unless the report of the Government Analyst is in the affirmative. As the severity of the punishment under the Act varies with the quantity of the narcotic drug recovered, it is therefore essential for the prosecution to establish that the entire alleged narcotic drug stood tested and analyzed by the Government Analyst by drawing representative sample(s) of the alleged narcotic drug. The test and analysis of the representative sample of an alleged narcotic drug amounts to test and analysis of the entire quantity of that narcotic drug. The acts of taking and testing of the representative sample become critical as they feed the assumption that the entire quantity from which the sample was drawn stands tested and analyzed. Therefore, the sample to be representative must be drawn for each and every physically independent and separate unit of the alleged narcotic drug recovered from the accused. A separate and independent unit of the alleged narcotic drug cannot be left out from test and analysis on the assumption that a representative sample has been drawn from other similar physically independent and separate units of the alleged narcotic. drug. Any such assumption would offend the fundamental right to fair trial and due process of the accused guaranteed under Article 10A of the Constitution, besides militating against the safe administration of justice.

State v. Iman Bakhsh 2018 SCMR 2039 and Ameer Zeb v. The State PLD 2012 SC 380 ref.

Right to fair trial of the accused under Article 10A of the Constitution requires that the sample drawn from the alleged narcotic drug must be truly representative of the alleged narcotic drug recovered and therefore must be drawn from all the physically separate and independent units of the alleged narcotic drug.

The representative sample can only retain its representative character and be also constitutional compliant, if it is drawn from every physically separate and independent unit of the alleged narcotic drug.

Per Qazi Muhammad Amin Ahmed, J [Minority view]:

Emphasis laid down in the case reported as Ameer Zeb v. The State (PLD 2012 SC 380) is to ensure representative character of the forensic sample and for that it is not essential that every micro part of the

contraband in single packet is to be separated for analysis nor is so contemplated by the Control of Narcotic Substances (Government Analysts) Rules, 2001, which even otherwise are merely directory in nature.

State v. Iman Bakhsh 2018 SCMR 2039 and Ameer Zeb v. The State PLD 2012 SC 380 ref.

**(b) Control of Narcotic Substances Act (XXV of 1997)---**

----Ss. 9(c) & 36---Control of Narcotic Substances (Government Analysts) Rules, 2001, R. 4---Constitution of Pakistan, Art. 10A---Possession of 25,000 grams of charas---Re-appraisal of evidence---Sample sent to Government analyst not collected from each independent slab of recovered narcotic---Sentence, reduction in---[Per Syed Mansoor Ali Shah, J [Majority view]: In the present case, 25 packets were recovered from the accused, each having 14 separate slabs of the alleged narcotic drug; thus, in fact, there were 350 (25 x 14) separate physically independent units of the alleged narcotic drug---In order to burden the accused with the liability of the entire quantity of the alleged narcotic drug recovered, the representative sample had to be taken from every physically separate and independent unit of the alleged narcotic drug, i.e., from all the 350 slabs of the alleged narcotic drug recovered from the accused---However only 25 samples of 5 grams were collected from each of the 25 packets, without specifying whether it was taken from one slab out of the 14 found in each packet, or that each 5-gram sample was obtained from all of the 14 slabs found in one packet---Prosecution had not even argued that the representative sample was taken from each of the 350 slabs, rather it is an admitted fact on part of the prosecution that 5-gram sample was taken from only one slab out of the 14 found in each packet---Thus, the prosecution was found to have proved only those parts of the charas allegedly recovered from the appellant to be the narcotic drug of which samples were taken and sent for analysis to the Forensic Science Laboratory , that is, about 1785 grams, not 25,000 grams as alleged---Accused had already served 9-years, 1-month and 20-days in prison---In view of the proved quantity of the charas recovered from him as being a narcotic drug, i.e., 1785 grams, his conviction was maintained but his sentence of life imprisonment was reduced to the imprisonment term already undergone by him while the fine of Rs.200,000/- was maintained]---[Per Qazi Muhammad Amin Ahmed, J. [Minority view]: Contents of the seizure memo confirmed that contraband in each packet comprised of integrated layers, inseparably constituting a composite unit and, thus, 5 grams separated from the corner of each packet squarely presented a representative sample---Samples were not only taken from each packet, they were kept separately for analysis that unambiguously confirmed the narcotic character of the seized contraband and, thus, through no mode of interpretation it could be possibly inferred that the remainder of the parcel was made up of a substance other than cannabis---Prosecution had established each limb of its case on the strength of proof beyond doubt from safe custody to transmission for forensic confirmation; there was no space to entertain any hypothesis other than accused s guilt---Sentence (of life imprisonment) awarded to the accused was mandatory in view of proviso to S.9 of the Control of Narcotic Substances Act, 1997]---Appeal was partly allowed.

Ansar Nawaz Mirza, Advocate Supreme Court for Appellant.

Arshad Hussain Yousafzai, Advocate Supreme Court for the State.

Date of hearing: 28th February, 2022.

**ORDER**

**SYED MANSOOR ALI SHAH, J**.---Upon suspicion, the appellant was apprehended by Police, and 25,000 grams of charas was allegedly recovered from the "bori" (big bag) he was carrying on his head. 25 packets of charas were found in the "bori", each packet carrying 14 slabs of charas, and every packet was weighed to be of 1000 grams. In this background, the appellant was booked in case FIR No.1 dated 01.01.2013 registered at Police Station City, Mansehra for the alleged commission of offence punishable under section 9(c) of the Control of Narcotic Substances Act, 1997 ("CNSA"), for being in possession of 25,000 grams of charas.

2. After a regular trial, the appellant was convicted and sentenced by the trial court to life imprisonment and fine of Rs.200,000/- or in default to suffer simple imprisonment for a term of six months. Benefit of section 382-B, Cr.P.C. was extended to him. On appeal, the said conviction and sentence was up-held by the High Court vide impugned judgment dated 10.02.2016. Leave to appeal was granted by this Court, vide

order dated 21.04.2020, to examine whether the courts below have correctly examined the case in the light of State v. Iman Bakhsh (2018 SCMR 2039) and Ameer Zeb v. The State (PLD 2012 SC 380).

3. The main contention of the learned counsel for the appellant is that the samples taken by the Police and sent to the FSL for analysis were not the representative samples of the narcotic drug (charas) allegedly recovered from the appellant; as a result, the appellant could not be burdened with the liability of the entire quantity (weight) of the alleged narcotic drug. He explains that 25 packets of charas were allegedly recovered from the appellant, while every packet had 14 slabs of charas; however, the representative sample collected was only 5 grams charas from each packet, not from every slab found in each packet, which was sent to the FSL and the positive report of the FSL is only with regard to that sample. He submits that the samples had to be taken from each of the 14 slabs allegedly found in each of the 25 packets. He relies, in support of his contention, on the Ameer Zeb s case.

4. Learned counsel for the State, however, supports the impugned judgment and submits that the samples taken were representative in nature and were taken from each of the 25 packets, and there was no further requirement of obtaining samples from every slab of the charas within the 25 packets.

5. We have considered the arguments of the learned counsel for the parties, read the cases cited by the learned counsel for the appellant and examined the record of the case.

6. Section 36 of CNSA provides that a sample of the narcotic drug has to be submitted with the Government Analyst for the test and analysis, while Rule 4 of the Control of Narcotics Substances (Government Analyst) Rules, 2001 ("Rules") provides that reasonable quantity of samples from the narcotic drug shall be drawn and dispatched to the testing laboratory. According to the Ameer Zeb s case, which is a decision of a five-member larger Bench of this Court and thus has the binding effect on this three-member Bench, a representative sample is to be collected from every packet/cake/slab of the alleged narcotic drug and sent for analysis to the Chemical Examiner. The relevant portion of the Ameer Zeb s case is reproduced here for ready reference:

> "...It is our considered opinion that a sample taken of a recovered substance must be a representative sample of the entire substance recovered and if no sample is taken from any particular packet/cake/slab or if different samples taken from different packets/cakes/slabs are not kept separately for their separate analysis by the Chemical Examiner then the sample would not be a representative sample and it would be unsafe to rely on the mere word of mouth of the prosecution witnesses regarding the substance of which no sample has been taken or tested being narcotic substance. It may be true that at least in some situations the Control of Narcotic Substances Act, 1997 stipulates disproportionately long and harsh sentences and, therefore, for the purposes of safe administration of criminal justice some minimum standards of safety are to be laid down so as to strike a balance between the prosecution and the defence and to obviate chances of miscarriage of justice on account of exaggeration by the investigating agency. Such minimum standards of safety are even otherwise necessary for safeguarding the Fundamental Rights of the citizens regarding life and liberty which cannot be left at the mercy of verbal assertions of police officers which assertions are not supported by independent evidence provided by a Chemical Examiner.
>
> (emphasis added)

Thus, in the present case, as every packet contained 14 slabs of the alleged charas, the narcotic drug, samples had to be collected from each and every slab present in the 25 packets.

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7. The underlining principle that emerges from the reading of the Act, Rules and the Ameer Zeb s case is that before an accused is burdened with a criminal liability under the Act of possessing the alleged narcotic drug, a representative sample of that alleged narcotic drug must be drawn and dispatched to be tested and analyzed by

the Government Analyst. Testing and analysis of the alleged narcotic drug is a sine qua non for holding the accused liable under the Act, and the accused cannot be saddled with any liability under the Act unless the report of the Government Analyst is in the affirmative. As the severity of the punishment under the Act varies with the quantity of the narcotic drug recovered, it is therefore essential for the prosecution to establish that the entire alleged narcotic drug stood tested and analyzed by the Government Analyst by drawing representative sample(s) of the alleged narcotic drug. The test and analysis of the representative sample of an alleged narcotic drug amounts to test and analysis of the entire quantity of that narcotic drug. The acts of taking and testing of the representative sample become critical as they feed the assumption that the entire quantity from which the sample was drawn stands tested and analyzed. Therefore, the sample to be representative must be drawn for each and every physically independent and separate unit of the alleged narcotic drug recovered from the accused. A separate and independent unit of the alleged narcotic drug cannot be left out from test and analysis on the assumption that a representative sample has been drawn from other similar physically independent and separate units of the alleged narcotic drug. Any such assumption would offend the fundamental right to fair trial and due process of the accused guaranteed under Article 10A of the Constitution, besides militating against the safe administration of justice. Right to fair trial of the accused under Article 10A of the Constitution requires that the sample drawn from the alleged narcotic drug must be truly representative of the alleged narcotic drug recovered and therefore must be drawn from all the physically separate and independent units of the alleged narcotic drug. In this regard, the mode of packaging of the alleged narcotic drug by the accused is totally inconsequential; for example, in this case each of the 25 packets have 14 slabs of the alleged narcotic drug, which could have easily been re-packaged as separate 350 packets with one slab each of the alleged narcotic drug or one big packet of 350 slabs of the alleged narcotic drug. The representative sample can only retain its representative character and be also constitutional compliant, if it is drawn from every physically separate and independent unit of the alleged narcotic drug.

8. In the present case, 25 packets were recovered, each having 14 separate slabs of the alleged narcotic drug; thus, in fact, there were 350 (25 x 14) separate physically independent units of the alleged narcotic drug. In order to burden the appellant with the liability of the entire quantity of the alleged narcotic drug recovered, the representative sample had to be taken from every physically separate and independent unit of the alleged narcotic drug, i.e., from all the 350 slabs of the alleged narcotic drug recovered from the appellant. In this case, 25 samples of 5 grams were collected from each of the 25 packets, without specifying whether it was taken from one slab out of the 14 found in each packet, or that each 5-gram sample was obtained from all of the 14 slabs found in one packet. The prosecution has not even argued that the representative sample was taken from each of the 350 slabs, rather it is an admitted fact on part of the prosecution that 5-gram sample was taken from only one slab out of the 14 found in each packet. Thus, the prosecution is found to have proved only those parts of the charas allegedly recovered from the appellant to be the narcotic drug of which samples were taken and sent for analysis to the FSL, that is, about 1785 grams,**1** not 25,000 grams as alleged.

9. According to the report dated 24.02.2022 received from the Superintendent, Central Prison, Haripur, the appellant has already served 9-years, 1-Month and 20-Days in prison. In view of the proved quantity of the charas recovered from the appellant, as being a narcotic drug, i.e., 1785 grams, we while maintaining the conviction of the appellant reduce his sentence to imprisonment for the term already undergone while retaining the fine of Rs.200,000/- or in default to suffer simple imprisonment for a term of six months and the benefit of section 382-B, Cr.P.C as held by the trial court. This appeal is partly allowed in these terms.

10. Foregoing are the reasons for the majority view of short order dated 28.2.2022, which is reproduced hereunder:--

> For reasons to be recorded separately and by majority of two-to one (Qazi Muhammad Amin Ahmad, J., dissenting), this criminal appeal is partly allowed in the terms that conviction of the appellant is maintained while the sentence awarded to him is reduced to imprisonment for a term already undergone.

Sd/-

Judge

Sd/-

Judge

Sd/-

Judge

**ORDER OF THE BENCH:**

By majority of two-to-one (Qazi Muhammad Amin Ahmad, J., dissenting), this criminal appeal is partly allowed in the terms of para-9 above.

Sd/-

Judge

Sd/-

Judge

Islamabad,
28th February, 2022.

Sd/-

Judge

**QAZI MUHAMMAD AMIN AHMED, J**.---By unanimity, we entertain no manner of doubt on appellant's guilt for being in possession of cannabis weighing 25000 grams on the eventful day, nonetheless, opinion divides on quantum of sentence having regard to the number of samples, dispatched to the Chemical Examiner for forensic analysis so as to be in line with the law declared by this Court in the case of Ameer Zaib (PLD 2012 Supreme Court 380).

My profound admiration for his vast and versatile erudition in law, notwithstanding, I have not been able to persuade myself to subscribe to the opinion proposed by Syed Mansoor Ali Shah, J. with the concurrence of Sardar Tariq Masood, J.

2. The dissent for its contextual clarity necessitates, a reference to the facts, at the cost of some repetition, hopefully tolerable. The prosecution successfully established that the appellant was intercepted by a police contingent within the remit of Police Station City Mansehra with a sack that contained 25 packets, each weighing 1000 grams of cannabis wherefrom 5 grams were separated and sealed for forensic analysis; the contraband is vividly described in the seizure memo, reproduced in extenso for the convenience of reference:--

01-01-2013

It unmistakably confirms that the contraband in each packet comprised of integrated layers, inseparably constituting a composite unit and, thus, 5 grams separated from the corner of each packet squarely presented a representative sample to qualify the riders laid down in the supra case, relevant portion whereof, is advantageously reproduced to substantiate the above legal position:-

> "In our considered opinion that a sample taken of a recovered substance must be a representative sample of the entire substance recovered and if no sample is taken from any particular packet/cake/slab or if different samples taken from different packets/cakes/s labs are not kept separately for their separate analysis by the Chemical Examiner then the sample would not be a representative sample "

In the present case samples were not only taken from each packet, these were kept separately for analysis that unambiguously confirmed the narcotic character of the seized contraband and, thus, through no mode of interpretation it can be possibly inferred that the remainder of the parcel was made up of a substance other than cannabis. The emphasis laid down in the supra case is to ensure representative character of the forensic sample and for that it is not essential that every micro part of the contraband in single packet is to be separated for analysis nor is so contemplated by the rules, referred to in the majority opinion, even otherwise merely directory in nature.

The menace of drugs, spreading ubiquitously, targeting our youth has jeopardized the very fabric of the society; it poses existential threat that must be combated with a pragmatic and dynamic judicial response,

a responsibility in accord with the legislative intent, articulated under section 29 of the Control of Narcotic Substances Act, 1997 and, thus, in the absence of any express position taken by the convict during the trial to prove the contrary, the proposed reduction in his sentence, in my estimation, is a concession neither conscionable nor expedient.

3. The prosecution has established each limb of its case on the strength of "proof beyond doubt" from safe custody to transmission for forensic confirmation; there is no space to entertain any hypothesis other than appellant's guilt. Sentence awarded to the appellant is mandatory in view of proviso to section 9 of the Act ibid. Appeal fails.

MWA/S-12/SC Order accordingly.

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1 Total quantity of 25 packets containing 14 slabs each weighs 25000 grams. Average weight of one slab = 71 grams (14 x 25 + 35 = 350 slabs. 25000/350 = 71 grams). 25 slabs actually tested and analysed weigh = 1785 grams (71 x 25)

**P L D 2022 Supreme Court 298**

**Present: Umar Ata Bandial, Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed, JJ**

**FEDERATION OF PAKISTAN and others---Petitioners**

**Versus**

**PROVINCE OF SINDH through Secretary Labour and Human Resources Department and others---Respondents**

Civil Petitions Nos. 5620, 5800 and 5959 of 2021, C.M.As. Nos. 12213, 12214 of 2021 in C.Ps. No. Nil/2021, C.M.A. No. 160 of 2022 in C.P. No. Nil/2022, Civil Petitions Nos.2-K, 64 and 59-K/2022 and C.M.A. No. 12221 of 2021, decided on 26th January, 2022.

(Against the consolidated judgment dated 15.10.2021 passed by the High Court of Sindh at Karachi in C.Ps. Nos.D-4596 of 2021, etc.)

**(a) Sindh Minimum Wages Act, 2015 (VIII of 2016)---**

----Ss. 4, 5 & 6---Minimum rate of wages, revision of---Provincial Government cannot itself revise the minimum rates of wages; it can only be done on the recommendation of the Minimum Wages Board ( Board )---Sindh Minimum Wages Act, 2015 has made it obligatory for the Government to act on the recommendation of the Board on all occasions of fixation as well as revision of minimum wages.

The (Provincial) Government could only declare the minimum rates of wages on the recommendation of the Minimum Wages Board ( Board ).

The power of the Government to declare the minimum rates of wages has been qualified to be exercised on the recommendation of the Board. The words subject to such exceptions as may be specified in the notification used in section 6(1)(a) of the Sindh Minimum Wages Act, 2015 ( the Act ) and subject to such modifications and exceptions as may be specified in the notification used in section 6(3) of the Act may refer to exceptions, or modifications in the exceptions, that could be created in view of various classes of workers or industry and should not be understood to mean that the Government could itself alter the minimum rates of wages recommended by the Board in view of a detailed and exhaustive mechanism for fixation of the minimum rates of wages spelled out in sections 4, 5 and 6 the Act.

The Act has made it obligatory for the Government to act on the recommendation of the Board on all occasions of fixation as well as revision of minimum wages. The revision of minimum wage is to be done according to the policy and mechanism laid down in the Act. The Government cannot go against the provisions of the Act and arrogate to itself the function entrusted to the Board.

**(b) Sindh Minimum Wages Act, 2015 (VIII of 2016)---**

----Ss. 4, 5 & 6 & Preamble---Constitution of Pakistan, Arts. 3, 9, 14, 37(a) & 38(a)---Universal Declaration of Human Rights (UDHR), Art. 23---Minimum wage---Importance of minimum wage stated.

Minimum wage laws help ensure justice at work. The minimum wage has remained a core element of public policy and the International Labour Organization (ILO) designated the minimum wage as an international labour standard. [p. 304] E

Brishen Rogers, 'Justice at Work: Minimum Wage Laws and Social Equality' (2014) 92 Tex. L. Rev. 1543, 1548 and David Neumark and William L. Wascher, Minimum Wages (MIT Press 2008) 1 ref.

Minimum wage is a primary measure of the social value of work; they bring a change in workplace power balance by giving workers rights vis- -vis employers; and they require employers and consumers to internalize costs of increased wages

The requirement of establishing equitable and egalitarian work based social structures is a Constitutional command. The Constitution emphasizes on distributive justice with constitutional values of social, economic and political justice. It calls for elimination of exploitation and enjoins to protect the economic interests of the workers and ensure equitable adjustment of rights between employers and employees. Right to life including right to livelihood under Article 9 ensures just and favourable remuneration for workers. Right to dignity under Article 14 ensures decent work for workers i.e., working conditions and wages that enhance rather than undermine workers self-respect and social standing. The Universal Declaration of

Human Rights also provides that remuneration must be paid to each worker to ensure an existence worthy of human dignity.

Wage fixation is an important social welfare measure to be determined in the light of the economic reality of the situation and the minimum needs of the worker with an eye to the preservation of his efficiency as a worker. It is a delicate task, a fine balance is to be achieved. The demands of social justice, necessitating that the workers receive their proper share in the national income they help to produce, need to be balanced against the depletion, every increase in wages brings in the profits of the industry. The central character in this process remains the worker who deserves to get a fair share in the deal, as far as that can be, without at the same time impinging on the vital interests of the industry whose continuity and success are also the mainstay of labour. Minimum wage may preferably be fixed at a level that is capable of meeting a worker s basic living needs and those of his family, for housing, nourishment, education, health, leisure, clothing, hygiene, transportation and social security, with periodic adjustments to maintain its purchasing power. With the growth and development of national economy, living standards improve and therefore notions about minimum wage need to be more progressive.

Hindustan Hosiery Industries v. F. H. Lala AIR 1974 SC 526 and The Constitution of the Federative Republic of Brazil 1988, Art. 7 (IV). ref.

Abid S. Zuberi, Advocate Supreme Court for Petitioners (in C.P. No. 5620 of 2021).

Zaheer-ul-Hassan Minhas, Advocate Supreme Court for Petitioners (in C.Ps. Nos. 5800 and 64 of 2021).

Mrs. Samia Faiz Durrani, Advocate Supreme Court for Petitioners (in C.P. No. 5959 of 2021).

Khalid Mahmood Siddiqui, Advocate Supreme Court and Haroon-ur-Rehman, Advocate Supreme Court for Applicant (in C.M.A. No. 12213 of 2021).

Khalid Javed, Advocate Supreme Court for Petitioner (in C.P. No. 2-K of 2022).

Syed Ziauddin Nasir, Advocate Supreme Court for Petitioners (in C.P. No. 59-K of 2022).

Fauzi Zafar, Addl. A.G. Sindh and Sajid Ilyas Bhatti, Addl. A.G. for Respondents.

Faisal Siddiqi, Advocate Supreme Court for Respondents (Video link - Karachi Registry) (in C.M.A. No. 173 of 2022).

Jan Muhammad Khashkheli (In person) (in C.M.A. No. 173 of 2022).

Hasan Riaz, Research Officer, SCRC for Research Assistance.

Date of hearing: 26th January, 2022.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J**.---The case stems from Notification dated 09.07.2021 ("Notification") issued by the Labour and Human Resource Department, the Government of Sindh ("Government"), under Section 4(1) read with Section 6 (1) (a) of the Sindh Minimum Wages Act, 2015 ("Act"), raising the minimum rates of wages for unskilled adult and juvenile workers employed in all industrial/ commercial establishments in the Province of Sindh to Rs. 25,000/- per month with effect from 01.07.2021.

2. The petitioners are the employers, or organizations of employers, running different industrial/ commercial establishments in the Province of Sindh and are aggrieved of the Notification for the reason that the minimum rates of wages could only be declared on the recommendation of the Minimum Wages Board ("Board") and that the Government and its line Department did not have the authority to itself decide the minimum rates of wages in disregard of the recommendation of the Board. Their challenge to the Notification remained unsuccessful before the High Court of Sindh.

3. We consider in this case whether the Government could itself revise the minimum rates of wages or could it be done only on the recommendation of the Board. For this purpose, it is necessary to refer briefly to relevant provisions of the Act. The Act provides for the regulation of the minimum rates of wages for different categories of workers employed in certain industrial and commercial undertakings and establishments. Under section 3 of the Act, the Government is required to constitute a five member Board with equal representation of employers and workers, one member each to represent the employers and workers, one member each to represent the employer and worker connected with or engaged in such

industry plus one independent member who is to serve as chair. Sections 4, 5 and 6 of the Act provide the mechanism for fixation of the minimum rates of wages. The Government, under Section 4 of the Act, makes a reference to the Board and the Board, after such enquiry as it may deem fit, recommends to the Government the minimum rates of wages for adult, skilled and unskilled workers and juvenile and adolescent workers employed in industrial establishments or commercial establishments or both. Section 5 of the Act relates to recommendation of the minimum rates of wages for workers with respect to particular industries. Section 6 provides that the Government may, on receipt of a recommendation of the Board under section 4 or section 5, declare that the minimum rates of wages recommended by the Board for the various workers shall, subject to any exceptions, be the minimum rates of wages.**1** Alternatively, if the Government considers that the recommendation of the Board is not, in any respect, equitable to the employers or the workers, it may within thirty days refer the recommendation back to the Board for reconsideration.**2** In such an event, the Board is bound to reconsider the recommendation taking into account any comments made and information given by the Government and submit to the Government a revised recommendation**3** or the Board could make a report to the Government that no revision or change in the recommendation is called for, stating reasons therefor.**4** The Government may then subject to any modifications and exceptions notify the minimum rates of wages as per the fresh recommendation whether revised by the Board or not.**5** Any further revision of the minimum rates of wages notified by the Government under section 6 of the Act is also to be based on the recommendation of the Board.**6** The Board is also required to periodically review its recommendations if a change in the economic conditions, cost of living and other relevant facts so demand. Such a review is to be considered as recommendation under section 4 or section 5, as the case may be, of the Act.**7**

4. It is thus evident of the relevant provisions of the Act that the power of the Government to declare the minimum rates of wages has been qualified to be exercised on the recommendation of the Board. We deem it necessary to clarify that the words "subject to such exceptions as may be specified in the notification" used in section 6(1)(a) and "subject to such modifications and exceptions as may be specified in the notification" used in Section 6(3) of the Act may refer to exceptions, or modifications in the exceptions, that could be created in view of "various" classes of workers or industry and should not be understood to mean that the Government could itself alter the minimum rates of wages recommended by the Board in view of a detailed and exhaustive mechanism for fixation of the minimum rates of wages spelled out in Sections 4, 5 and 6 the Act. In this case, the Government decided to revisit the minimum rates of wages and the Board recommended that the minimum rates of wages be increased to Rs. 19,000/- per month. The Government not agreeing with the recommendation of the Board and without sending the matter back to the Board as mandated by the Act, proceeded on its own to issue the Notification after increasing the minimum rates of wages to Rs. 25,000/- per month.

5. In case of disagreement between the Board and the Government, the Act provided a way out: the Government could within thirty days of the receipt of recommendation return it to the Board for reconsideration along with any comments and information, and the Board would be bound to reconsider its recommendation. It could revise it or stick to its earlier recommendation subject to justifying it with supporting reasons. In essence, the Government could only declare the minimum rates of wages on the recommendation of the Board. However, the Government chose to bypass the statutory mechanism by assuming the power vested, under the Act, in the Board and proceeded to declare the minimum rates of wages.

6. The Act has made it obligatory for the Government to act on the recommendation of the Board on all occasions of fixation as well as revision of minimum wages. The employers and the workers have equal representation on the Board in addition to an independent member who acts as chairperson and is expected to take a fair, disinterested and non-partisan view of the matter. The procedure acts as a check against any arbitrary or capricious decision-making by the Government and ensures that the minimum rates of wages be determined in an objective and participatory manner by an independent Board.

7. It is emphasized that we are concerned with the legality, and not the merits of the decision of the Government. No matter how noble the purpose or objective be, the Government cannot skirt around the mandate granted by the legislature. The Act makes the Government responsible for fixing the minimum rates of wages in certain industrial undertakings. It is the Government that takes cognizance of the circumstances necessitating fixation of the minimum rates of wages and sets the ball rolling by either referring the question of fixation of the minimum rates of wages to the Board under Section 4 of the Act or directing the Board under Section 5 of the Act to make recommendations on the said rates of wages and then the Government accepts the recommendations of the Board with or without exceptions or modifications or sends it back for reconsideration. Once the Board submits its recommendations to the Government, the Government cannot but act in a manner prescribed under Section 6 of the Act.**8**

8. Taking into consideration the provisions of the Act and the objective behind it, we are of the view that the Government travelled beyond its authority to encroach upon the mandate of the Board and issued the Notification without lawful authority. At the same time, it needs to be said that we are not unmoved by the considerations which urged the Government to issue the Notification. Rather, we do appreciate the concern shown by the Government for the welfare of the workers. However, the revision of minimum wage is to be done according to the policy and mechanism laid down in the Act. The Government cannot go against the provisions of the Act and arrogate to itself the function entrusted to the Board.

9. We are conscious of the fact that minimum wage laws help ensure justice at work.**9** The minimum wage has remained a core element of public policy and the International Labour Organization (ILO) designated the minimum wage as an international labour standard.**10** Minimum wages were originally proposed as a means to combat the proliferation of so-called sweatshops in manufacturing industries and to ensure that the workers received a fair wage for their work.**11** Minimum wage is a primary measure of the social value of work; they bring a change in workplace power balance by giving workers rights vis- -vis employers; and they require employers and consumers to internalize costs of increased wages.**12** In like manner, the Act seeks to ensure decent work for the workers. More importantly, the requirement of establishing equitable and egalitarian work based social structures is a constitutional command. Our Constitution emphasizes on distributive justice with constitutional values of social, economic and political justice. It calls for "elimination of exploitation"**13** and enjoins to protect the "economic interests"**14** of the workers and ensure "equitable adjustment of rights between employers and employees."**15** Right to life including right to livelihood under Article 9 ensures just and favourable remuneration for workers. Right to dignity under Article 14 ensures decent work for workers i.e., working conditions and wages that enhance rather than undermine workers' self-respect and social standing. The Universal Declaration of Human Rights also provides that remuneration must be paid to each worker to ensure "an existence worthy of human dignity."**16**

10. Wage fixation is an important social welfare measure to be determined in the light of the economic reality of the situation and the minimum needs of the worker with an eye to the preservation of his efficiency as a worker. It is a delicate task, a fine balance is to be achieved. The demands of social justice, necessitating that the workers receive their proper share in the national income they help to produce, need to be balanced against the depletion, every increase in wages brings in the profits of the industry. The central character in this process remains the worker who deserves to get a fair share in the deal, as far as that can be, without at the same time impinging on the vital interests of the industry whose continuity and success are also the mainstay of labour.**17** It is so because it is the worker for whose benefit the Act has primarily been promulgated. Minimum wage may preferably be fixed at a level that is "capable of meeting a worker's basic living needs and those of his family, for housing, nourishment, education, health, leisure, clothing, hygiene, transportation and social security, with periodic adjustments to maintain its purchasing power."**18** We also recognize that with the growth and development of national economy, living standards improve and therefore our notions about minimum wage need to be more progressive.

11. For what has been discussed above, we convert these petitions into appeals and allow the same, the impugned judgment of the High Court is set aside, the constitutional petitions of the petitioners are

accepted and the Notification is declared to have been issued by the Government without lawful authority and having no legal effect.

12. The objections, if any, of the Government to the recommendations made by the Board for the minimum wage to be Rs. 19,000/- per month may be taken up by the Government with the Board in accordance with Section 6(1)(b) of the Act. Given these circumstances, the Government and the Board shall endeavour to resolve the matter of appropriate minimum wage enforced in the Province with effect from 01.07.2021 within a period of two months from the receipt of this judgement. In the alternative, the Government may, if so inclined, issue a notification in accordance with the said recommendations in exercise of its power under Section 6 (1) (a) of the Act.

13. Till the final resolution of the matter, as there is no material objection by the petitioners to pay a minimum wage of Rs. 19,000/- per month, as recommended by the Board, we direct that subject to the final notification issued by the Government, the recommendations of the Board fixing a minimum wage of. Rs. 19,000/- per month shall be payable by the employers to their eligible workers w.e.f. 01.07.2021. MWA/F-3/SC Order accordingly.

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1 S.6(1)(a).

2 S.6(1)(b).

3 S.6(2)(a).

4 S.6(2)(b).

5 S.6(3).

6 S.6(5).

7 S.7.

8 *Khulna Textile Mills Ltd. v. Government of East Pakistan* PLD 1967 Dacca 229.

9 Brishen Rogers, 'Justice at Work: Minimum Wage Laws and Social Equality' (2014) 92 Tex. L. Rev. 1543, 1548.

10 David Neumark and William L. Wascher, Minimum Wages (MIT Press 2008) 1.

11 ibid.

12 Rogers (n 9) 1548-9.

13 The Constitution of the Islamic Republic of Pakistan 1973, Art. 3.

14 ibid Art. 37(a).

15 ibid Art. 38(a).

16 Art.23.

17 *Hindustan Hosiery Industries v. F. H. Lala* AIR 1974 SC 526.

18 The Constitution of the Federative Republic of Brazil 1988, Art. 7 (IV).

**P L D 2022 Supreme Court 345**

**Present: Umar Ata Bandial, Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmad, JJ**

**CIVIL PETITION NO. 271 OF 2021**

**MUHAMMAD UNEEB AHMED---Petitioner**

**Versus**

**FEDERATION OF PAKISTAN and others---Respondents**

(Against the judgment of Lahore High Court, Lahore dated 30.11.2010, passed in I.C.A. No. 33510 of 2019).

**CIVIL PETITION NO.293 OF 2021**

**ABDUL REHMAN and others---Petitioners**

**Versus**

**FEDERATION OF PAKISTAN and others---Respondents**

(Against the judgment of Lahore High Court, Lahore dated 30.11.2010, passed in I.C.A. No. 1554 of 2020).

**CIVIL PETITION NO.617 OF 2021**

**CHENAB COLLEGE OF ENGINEERING AND TECHNOLOGY---Petitioner**

**Versus**

**FEDERATION OF PAKISTAN and others---Respondents**

(Against the judgment of Lahore High Court, Lahore dated 30.11.2010, passed in I.C.A. No. 33510 of 2019)

Civil Petitions Nos. 271, 293 and 617 of 2021, decided on 18th October, 2021.

**(a) Pakistan Engineering Council Act (V of 1976)---**

----Ss. 3A & 25A(c)---B.Sc. (Engineering) program, admission to---Candidates with Diploma of Associate Engineers ("DAE")---Reserved quota of 2% imposed by the Pakistan Engineering Council for admission---Legality---Pakistan Engineering Council or its Governing Body is not empowered to restrict the admission of candidates with Diploma of Associate Engineers ("DAE") to the B.Sc. (Engineering) program by reserving 2% seats for them---Candidates holding an F.Sc. degree and DAE holders were to apply through open competition for a position in B.Sc. (Engineering), and there was no reserved quota for DAE holders---Both the said degrees are at par for admission into B.Sc. (Engineering)---Decision of Pakistan Engineering Council fixing 2% reserved seats for DAE holders is not only unsustainable under the Pakistan Engineering Council Act, 1976 but is also discriminatory.

There is no provision in section 8 of the Pakistan Engineering Council Act, 1976 ('the 1976 Act') that authorizes the Pakistan Engineering Council ('the Council') to reserve admission seats to an engineering program. In the absence of any such power available with the Council, the Governing Body, which under section 3A, exercising the powers of the Council, is also unable to impose such a condition. Perusal of sections 8 and 25A of the 1976 Act shows that the Council or the Governing Body has no power or authority to prescribe reserved seats for DAE for admission into any engineering program.

Decision of the Council reflected in its letter dated 25.03.2015 provides that the Governing Body of the Council has reserved seats upto a maximum of 2% for holders of DAE eligible for admission to B.Sc. (Engineering) program offered by the Engineering Institutions. This decision of the Governing Body does not find support from section 8 or 25A of the 1976 Act.

Other than the fact that the Council or the Governing Body has no power to impose such a condition (of 2% reserved quota), it is also ex-facie discriminatory against the DAE holders, especially when they are considered eligible for the B.Sc. (Engineering) Program along with the F.Sc. degree holders.

Both the holders of F.Sc. and DAE are considered eligible qualifications for the purposes of seeking admission to the B.Sc. (Engineering) program under Article 2 of the 'Regulations for Engineering Education in Pakistan' ('the Regulations'). In the absence of any power to reserve seats for admission to the B.Sc. (Engineering) program, both the set of candidates with F.Sc. and DAE have to be treated at par. This parity is created by equal eligibility of DAE for admission. Therefore, the decision of PEC dated 25-

03-2015 fixing 2% reserved seats for DAE holders is not only unsustainable under the 1976 Act but is also discriminatory. Since the Council cannot reserve seats for any program, the condition of "reserved seats" by the Governing Body under Article 2(c) of the Regulations is also illegal, ultra vires the 1976 Act, having no legal effect.

The best way forward is to allow admissions to B.Sc. (Engineering) on open merit and through open competition amongst the F.Sc. and DAE holders. Such a level playing field encourages competition and allows the best of the best amongst the F.Sc. and DAE to be admitted to the B.Sc. (Engineering) Program. Petitions for leave to appeal were converted into appeals and allowed.

**(b) Interpretation of statutes---**

---Regulations framed under an Act---Scope---Such Regulations have to remain within the four corners of the statutory mandate of the Act.

Azam Nazir Tarar, Advocate Supreme Court and Ch. Akhtar Ali, Advocate-on-Record for the Petitioners (in C.Ps. Nos.271 and 293/21).

Barrister Haris Azmat, Advocate Supreme Court assisted by Bar. Hamid Leghari and Ch. Akhtar Ali, Advocate-on-Record for Petitioner (in C.P. No. 617 of 2021).

Yasin Hatif, Advocate Supreme Court for the PEC.

Nemo for Federation.

Date of hearing: 18th October, 2021.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J**.---The question that has come up for our determination is whether the Pakistan Engineering Council ("PEC") constituted under the Pakistan Engineering Council Act, 1976 ("Act") is empowered to restrict the admission of candidates with Diploma of Associate Engineers ("DAE") to the B.Sc. (Engineering) program by reserving 2% seats for them, as opposed to allowing them to apply on open merit for the said program, like the candidates holding an F.Sc. degree. PEC has imposed the said restriction through its decision communicated vide letter dated 25.03.2015, which has been the main bone of contention between the parties and the main subject of challenge before us.

2. The grievance of the petitioners, who are holders of DAE, having secured more than 81% marks, is that instead of allowing them to apply and be considered on open merit in the B.Sc. (Engineering) program, the impugned decision of PEC dated 25.03.2015 has reserved 2% seats for DAE seeking admission in the B.Sc (Engineering), a power which the PEC does not enjoy under the Act. The learned Single Judge of the High Court allowed the writ petitions of the petitioners holding that the PEC has no authority to reserve seats for the holders of the DAE seeking admission in B.Sc. (Engineering). However, the learned Division Bench of the High Court overturned the decision of the learned Single Judge through the impugned judgment dated 30.11.2020 upholding the restriction of 2% reserved seats for DAE holders applying for admission to the B.Sc. (Engineering) program, hence these petitions.

3. The primary argument of the learned counsel for the petitioners has been that under the Act there is no power with the PEC to reserve seats for DAEs for admission to the B.Sc. Engineering Program. The prime purpose of the PEC under section 25A of the Act is to set minimum qualifications for enrollment to engineering programs and minimum standards for holding admission examinations, hence the impugned decision of PEC dated 25.03.2015 is ultra vires and violative of the Act. Learned counsel for the respondent PEC, however, supporting the impugned judgment reiterated that such a power is available under Article 2(c) of the Regulations for Engineering Education in Pakistan ("Regulations").[1]

4. We have heard the learned counsel for the parties and examined the record with their able assistance. The decision of the PEC passed in its 15th Governing Body Meeting communicated through letter dated 25.03.2015 of the PEC, reads as follows:-

> "The maximum reserved seats for relevant DAEs admission to an engineering program shall be upto 2% of the total enrollment in the program for the universities/HEIs offering admissions to DAE students against reserved seats."

We need to examine whether PEC can reserve seats for DAE holder applying for admission into B.Sc. (Engineering). Perusal of the Act reveals that the purpose of the Act and the role of PEC is to regulate the engineering profession which includes engineering education[2] and set standards of professional competence and ethics for engineers and engineering institutions[3] as reflected from its preamble. Sections 3, 8, 9 and 25A of the Act lay down the functions of PEC; the executive power of the Governing Body to act on behalf of PEC and to make regulations. The functions of PEC provided under section 8 of the Act are reproduced hereunder for reference:

8. Functions of the Council.---The following shall be the functions of the Council, namely:---

(a) maintenance of a Register of persons qualified to work as registered engineers, professional engineers, consulting engineers, constructors and operators;

(b) accreditation of engineering qualifications for the purpose of registration of registered engineers, professional engineers;

(c) removal of names from the Register and restoration to the Register of names which have been removed;

(d) laying down of standards of conduct for the members;

(e) safeguarding the interests of the members;

(f) promotion of reforms in the engineering profession;

(g) management of the funds and properties of the Council;

(h) promotion of engineering education and review of courses of studies in consultation with the Universities;

(i) levy and collection of fees from applicants for registration or temporary licences and members;

(j) exercise of such disciplinary powers over the members and servants of the Council as may be prescribed;

(k) formation of such committees and subsidiaries as may be prescribed;

(l) assistance to the Federal Government as a Think Tank;

(m) promotion of engineering profession in totality;

(n) encouragement, facilitation and regulation of working of professional engineering bodies for creativity and as custodian of engineering under the umbrella of the Council;

(o) ensuring and managing of continued professional development through engineering academies and professional bodies;

(p) establishing standards for engineering contracts, cost and services;

(q) facilitating engineering sector industries;

(r) coordinating between various engineering forums and Federal Government;

(s) providing forum for arbitrations, pertaining to disputes in construction and consultancy contracts, and

(t) performance of all other functions connected with, or ancillary or incidental to, the aforesaid functions.

There is no provision in section 8 that authorizes the Council to reserve admission seats to an engineering program. In the absence of any such power available with the Council, the Governing Body, which under section 3, exercising the powers of the Council, is also unable to impose such a condition. Under section 25A of the Act, reproduced hereunder, the Governing Body is authorized to frame regulations:---

25A. Power to make regulations.---The Governing Body may, in consultation with the committee of Vice-Chancellors of the Universities of Engineering and Technology of Pakistan set up by the Higher Education Commission, make regulations, not inconsistent with the provisions of the (sic) this Act and the bye-laws, to provide for-

(a) minimum standard of courses of study and practical training for obtaining graduate and post-graduate engineering qualifications to be included in the First and Second Schedules;

(b) minimum requirement for the content and duration of courses of study as aforesaid;

(c) minimum qualifications for admission to engineering institutions offering course of study and laying down minimum standard for holding admission examinations;

(d) qualification and experience required of teachers for appointment in engineering universities, colleges and institutions;

(e) minimum standards of examinations, and duration and standard of practical training, for securing accreditation of engineering qualifications under this Act; and

(f) qualifications and experience required of examiners for professional examinations of accredited engineering qualifications.

Perusal of the above shows that the relevant portion for admissions is section 25A(c), which authorizes the Regulations to provide for minimum qualifications for admission to engineering institutions and minimum standards for holding admission examinations. Section 25A of the Act also does not authorize the Governing Body of PEC to reserve admission seats to the B.Sc. (Engineering) program. The only restriction that can be imposed under section 25A, in the context of the present case, is the minimum qualification for admissions to an engineering institution.

5. The decision of PEC reflected in the letter dated 25.03.2015 provides that the Governing Body of the PEC has reserved seats upto a maximum of 2% for holders of DAE eligible for admission to B.Sc. (Engineering) program offered by the Engineering Institutions. This decision of the Governing Body does not find support from section 8 or 25A of the Act.

6. We now examine the Regulations. Needless to say that Regulations are framed under the Act and have to remain within the four corners of the statutory mandate of the Act. Article 2 of the Regulations provides for the minimum qualifications for admission to BSc (Engineering) programs, while the original Article 2(c) promulgated in the year 1985 provides as follows:-

(c) For admission in Engineering Institution/ University candidates who have passed Diploma of Associate Engineer shall be eligible for admission only against reserved seats.

DAE were eligible for admission only against the reserved seats. Subsequent to the decision of the Governing Body dated 25.03.2015 fixing 2% of the reserved seats for DAE holders, Article 2(c) also underwent a change and was duly amended vide SRO 417(I) of 2016 dated 14.05.2016 in the following manner:

ARTICLE 2. MINIMUM QUALIFICATION FOR ADMISSION TO ENGINEERING BACHELOR'S DEGREE PROGRAMMES OFFERED BY ENGINEERING INSTITUTIONS AND UNIVERSITIES

A candidate seeking admission in an Engineering Institution/ University for working towards Bachelor's Degree in any recognized branch of Engineering must fulfill the following minimum requirements:--

(a)-(b) ...

(c) (i) A candidate who has passed the Diploma of Associate Engineer (DAE) Examination, securing at least 60% aggregate marks shall be eligible for applying in admission against reserved seats in relevant discipline of Engineering in which he or she has passed the DAE examination; and the relevancy of DAE will be as determined by Accreditation Committee of this Council; and

(d) ...

While maintaining the condition of reserved seats, additional condition of obtaining 60% aggregate marks in DAE Examination was inserted as a requirement to apply against the reserved seats. Regarding the requirement for applying against reserved seats prescribed in the year 1985, we were informed by the learned counsel for the parties that prior to the amendment in Article 2(c) in 2016, the percentage of reserved seats for DAE holders was not specified and would largely vary from one Engineering Institution to another. Perhaps due to an equitable percentage of reserved seats maintained by the Engineering Institutions for the DAE, it never posed a problem earlier and hence was not challenged since 1985. The impugned restriction of 2% of reserved seats for DAE holders has highlighted the issue and has brought up the question whether admission seats can be reserved by PEC under the Act. Besides petitioners today

are aggrieved by it and have challenged the same and cannot be deprived of the right to make this challenge on the ground that earlier students had not challenged the said Regulation. Perusal of sections 8 and 25A of the Act shows that the PEC or the Governing Body has no power or authority to prescribe reserved seats for DAE for admission into any engineering program.

7. Another dimension of the case is that on one side the Regulations provide for the eligibility criteria/qualifications required to be admitted to the B.Sc. (Engineering) program and allow both the F.Sc. and DAE to be eligible to apply for B.Sc. (Engineering) program, subject to meeting the requirement of 60% aggregate marks in the respective examinations. Yet on the other hand, the Regulation puts a clog on the admission of DAE holders by imposing the condition of reserved seats on them. Other than the fact that the PEC or the Governing Body has no such power to impose such a condition, it is also ex-facie discriminatory against the DAE holders, especially when they are considered eligible for the B.Sc. (Engineering) Program along with the F.Sc. degree holders.

8. The issue of equivalence of F.Sc. and DAE also comes to an end, as both the holders of F.Sc. and DAE are considered eligible qualifications for the purposes of seeking admission to the B.Sc. (Engineering) program under Article 2 of the Regulations. The counsel for the respondent also failed to justify why DAE should not be considered at par with the F.Sc. students on open merit when both of them are eligible for admission under the Regulations. In the absence of any power to reserve seats for admission to the B.Sc (Engineering) program, both the set of candidates with F.Sc. and DAE have to be treated at par. This parity is created by equal eligibility of DAE for admission. Therefore, the decision of PEC dated 25.03.2015 fixing 2% reserved seats for DAE holders is not only unsustainable under the Act but is also discriminatory. Since PEC cannot reserve seats for any program, the condition of "reserved seats" by the Governing Body under Article 2(c) of the Regulations is also illegal and ultra vires the Act.

9. The best way forward is to allow admissions to B.Sc (Engineering) on open merit and through open competition amongst the F.Sc. and DAE holders. Such a level playing field encourages competition and allows the best of the best amongst the F.Sc. and DAE to be admitted to the B.Sc. (Engineering) Program. The learned Division Bench of the High Court has failed to appreciate the scope and extent of Sections 8 and 25A of the Act and the unlawful imposition of reserved seats for DAE holders through the decision dated 25.03.2015 and through Article 2(c) of the Regulations.

10. For the above reasons, while upholding the decision of the learned Single Bench dated 13.03.2019 and setting aside the impugned judgment dated 30.11.2020 of the Division Bench of the High Court, we hold and declare that the decision of the PEC passed in its 15th Governing Body Meeting dated 25.03.2015 and the words "reserved seats" in Article 2(c) of the Regulations are ultra vires the Act hence they are set aside, having no legal effect. In this view of the matter, these petitions are converted into appeals and allowed.

11. Foregoing are the reasons for our short order dated 18.10.2021 which for the sake of convenience and for completion of record is reproduced hereunder:-

"For reasons to be recorded later, these petitions are converted into appeals, allowed and the impugned judgment is set aside."

MWA/M-6/SC Appeals allowe

**P L D 2022 Supreme Court 370**

**Present: Umar Ata Bandial, Sajjad Ali Shah and Syed Mansoor Ali Shah, JJ**

**AZMAT TOWELLERS (PVT.) LTD., MULTAN---Petitioner**

**Versus**

**KHALID ANWAR and others---Respondents**

C.M.A No. 11338 of 2021 in Civil Petition No. 3184/2017, decided on 17th December, 2021.

(For recall of order of this court dated 06.10.2021, and restoration of Civil Petition No. 3184 of 2017).

**Supreme Court Rules, 1980---**

----O. I, R. 2 & O. IV, Rr. 2, 6, 15, 22, 26, 30, 31 & 32---"Advocate-on-Record" ('AOR')---Primary duties and responsibilities of an AOR stated.

Principal responsibility under the Supreme Court Rules, 1980 to act, appear and plead on behalf of the party is that of the Advocate-on-Record ('AOR'). It is the AOR who engages the Advocate Supreme Court (ASC) and it is on instructions of the AOR that such ASC pleads the case of the party. Engagement of the ASC does not absolve the AOR of his primary responsibility to attend to the case on behalf of the party before the Court and in case the ASC is not available, it is the responsibility of the AOR to appear and plead the case of the party.

Falah ud Din's case PLD 2021 SC 940 ref.

A case before any court, in particular, before the highest court of the land, ought to be attended to with utmost responsibility and seriousness. The concept of enrolling the AOR at the Supreme Court is to ensure that cases filed in the Supreme Court are handled with meticulous care and responsibility and to ensure certainty of representation before the Court.

Syed Rifaqat Hussain Shah, Advocate-on-Record for Petitioner.

Ch. Abdul Ghani, Advocate Supreme Court for Respondents.

Date of hearing: 17th December, 2021.

**ORDER**

**SYED MANSOOR ALI SHAH, J**.---This is an application for restoration of the titled petition, which was dismissed for non-prosecution on 06.10.2021. The order of dismissal of the petition records that no one tendered appearance on behalf of the petitioner, the learned AOR or the learned counsel for the petitioner on the said date.

2. The ground for restoration in the instant application is that the learned counsel for the petitioner was present in Court but had stepped out to the wash-room and by the time he returned the case had been dismissed for non-prosecution.

3. Today the learned counsel for the petitioner is not present and the learned AOR has made the above submission. We have examined the record of the case and have noticed that the learned counsel for the petitioner has not sworn an affidavit to certify the above facts. Additionally, the record of the Court Associate for 06.10.2021 does not reflect that the learned counsel or any representative of petitioner was present in court that day. No request was made by the learned counsel for restoring the case after he returned to the court-room that day and no such ground has been pleaded in the instant application. The restoration application also does not give any excuse or justification for the absence of the representative of the petitioner company or the learned AOR. We have recently held in Falah ud Din[1] that "the AOR is defined as an Advocate, who is to act and plead for a party in the Supreme Court. The definition of "party" also include an AOR, when such a party is represented by the AOR. Rule 2 of Order IV states that the AOR is entitled to appear and plead before the Court on signing his respective roll. Rule 6 of the said Order provides that no Advocate other than AOR shall appear and plead on behalf of the party unless he is instructed by the AOR while Rule 15 states that no Advocate other than AOR shall be entitled to act on behalf of a party in any proceedings in the Court. Rules 22 and 26 underline that every AOR on submission of his power of attorney shall act on behalf of the party and that no person having an AOR shall be heard in person except with specific leave of the Court." Order I, Rule-2 and Order IV, Rules 2, 6, 15, 22, 26, 30, 31 and 32 of the Supreme Court Rules, 1980 ("Rules") clearly show that the principal responsibility

under the Rules to act, appear and plead on behalf of the party is that of the AOR. It is the AOR who engages the ASC and it is on instructions of the AOR that such ASC pleads the case of the party. Engagement of the ASC does not absolve the AOR of his primary responsibility to attend to the case on behalf of the party before the Court and in case the ASC is not available, it is the responsibility of the AOR to appear and plead the case of the party.

4. In the present case, the learned AOR did not appear on the date when the case was dismissed for non-prosecution and there is no reason given in the instant application for his absence. A case before any court, in particular, before the highest court of the land, ought to be attended to with utmost responsibility and seriousness. The concept of enrolling the AOR at the Supreme Court is to ensure that cases filed in the Supreme Court are handled with meticulous care and responsibility and to ensure certainty of representation before the Court. In this case, it is more than evident that the learned AOR has fallen short of his responsibility expected of him under the Rules. He has not even bothered to furnish any explanation in the instant application regarding his absence on the fateful day.

5. For the above reasons, we find that there is no merit in the instant application, which is, therefore, dismissed.

MWA/A-8/SC Application dismissed.

**P L D 2022 Supreme Court 385**

**Present: Syed Mansoor Ali Shah and Amin -ud-Din Khan, JJ**

**TAHIR NAQASH and others---Petitioners**

**Versus**

**The STATE and others---Respondents**

Crl. P. No. 916-L of 2021, decided on 12 January, 2022.

(Against the order dated 24.05.2021 of Lahore High Court, Lahore, passed in Crl. Misc. No.31929 of 2021).

**(a) Constitution of Pakistan---**

----Arts. 14, 20, 22, 25 & Preamble---Minority rights---Freedom to profess and practice religion---Protections and fundamental rights available to minorities in the Constitution with respect to professing and practicing their religion stated.

Constitutional values enshrined in the Preamble to the Constitution require us to be tolerant as a people, believe in freedom, equality and social justice, and respect our minorities and make adequate provisions for them to freely profess and practice their religions and develop their cultures and to safeguard their legitimate interests. All citizens of Pakistan, whether Muslim or non-Muslim, are guaranteed fundamental rights under the Constitution including equality of status, freedom of thought, expression, belief, faith, worship subject to law and public morality.

To deprive a non-Muslim (minority) of the country from holding his religious beliefs, to obstruct him from professing and practicing his religion within the four walls of his place of worship is against the grain of the democratic Constitution and repugnant to the spirit and character of the Islamic Republic. It also deeply bruises and disfigures human dignity and the right to privacy of a non-Muslim minority, who like all other citizens of this country enjoy the same rights and protections under the Constitution. Bigoted behaviour towards minorities paints the entire nation in poor colour, labelling it as intolerant, dogmatic and rigid. It is time to embrace constitutional values and live up to rich Islamic teachings and traditions of equality and tolerance.

**(b) Constitution of Pakistan---**

----Art. 14---Right to dignity---Scope---Article 14 of the Constitution guarantees right to dignity to every person---Human dignity encapsulates the notion that every person has inherent equal worth; this simple but profound concept has three elements: first, every member of the human family has value - no one can be dismissed, ignored, mistreated or abused as if their humanity means nothing; second, each person's worth is equal to every other person and no one's life is more important than any other person; third, human dignity inheres in the human person and cannot be taken away.

Erin Daly & James R. May, Dignity Law, Global Recognition, Cases, and Perspectives. 2020 HEIN ref.

**(c) Constitution of Pakistan---**

----Arts. 20, 25, 260(3) & Preamble---Minority rights---Members of Ahmadi/Qadiani group---Protections and fundamental rights available under the Constitution---Article 260(3) of the Constitution though declares the Ahmadis/Qadianis as non-Muslim, it neither disowns them as citizens of Pakistan nor deprives them of their entitlement to the fundamental rights guaranteed under the Constitution---Constitution treats, safeguards and protects all its citizens equally, whether they are Muslims or non-Muslims.

**(d) Penal Code (XLV of 1860)---**

----Ss. 295-B, 295-C, 298-B & 298-C---Criminal Procedure Code (V of 1898), S. 561-A---Deletion of sections 295-B & 295-C, P.P.C. from the charge---Members of Ahmadi/Qadiani group styling their place of worship as a mosque; displaying sha'air-e-Islam on the walls inside their place of worship and maintaining copies of the Holy Quran therein---Accused persons were put to trial and the Trial Court framed the charge against them for offences punishable under sections 298-B & 298-C, P.P.C.---Later, the complainant filed an application under section 227, Cr.P.C. for alteration of the charge praying that offences punishable under sections 295-B & 295-C, P.P.C. were also attracted and the same be added to the charge---Trial Court allowed such application and added sections 295-B & 295-C, P.P.C. to the charge-

--Said order of Trial Court was upheld by the Revisional Court and the High Court---Legality---To constitute an offence under section 295-B, P.P.C. the accused must have defiled, damaged or desecrated a copy of the Holy Quran or an extract therefrom or use it in any derogatory manner or for any unlawful purpose---In the present case, there is no allegation in the crime report that attracts the said offence---Similarly, to constitute an offence under section 295-C, P.P.C., there must be words spoken or written or by visible representation or any imputation, innuendo or insinuation, direct or indirect, which defiles the sacred name of the Holy Prophet Muhammed (peace be upon him)---In the present case, the display of the Kalima, having name of the Holy Prophet Muhammed (peace be upon him) therein, inside the place of worship did not attract the constituents of section 295-C, P.P.C.---Acts charged in the present case did not attract sections 295-B & 295-C, P.P.C. either by the plain reading of the words of these two provisions or by their construction through the lens of the express or manifest intention of the Legislature behind them---Petition for leave to appeal was converted into appeal and allowed; petition of the accused persons under section 561-A, Cr.P.C. was accepted and the orders of the trial and revisional courts were set aside with the direction that the trial of the accused persons shall proceed on the basis of the charge framed only for offences punishable under sections 298-B & 298-C, P.P.C.

Zaheeruddin v. State 1993 SCMR 1718 ref.

**(e) Penal Code (XLV of 1860)---**

----S. 295-B---Defiling, etc., of Holy Qur'an, offence of---Pre-requisites---Mere reading of the Kalima or the Holy Quran by a non-Muslim/Ahmadi does not attract section 295-C, P.P.C.---Fundamental constituents of a crime were mens rea and actus reus---Only that which resides in the mind of a non-Muslim while reading the Holy Quran is not sufficient to constitute the offence---In order to attract section 295-B, P.P.C., there must be an overt act (actus reus) that shows that the copy of the Holy Quran or its extract has been defiled, damaged or desecrated or it has been put to use in a derogatory manner or for an unlawful purpose.

**(f) Penal Code (XLV of 1860)---**

----S. 295-C---Use of derogatory remarks, etc., in respect of the Holy Prophet (pbuh), offence of---Pre-requisites---What runs inside the mind of an Ahmadi, while reading the Kalima does not constitute an offence punishable under section 295-C, P.P.C. unless there is some overt act on his part that defiles the sacred name of the Holy Prophet Muhammed (peace be upon him).

**(g) Interpretation of statutes---**

----Penal statute---Rule of strict construction---Scope---Penal statute should be strictly construed in favour of the accused---Degree of strictness depends upon the severity of the statute---When it is said that all penal statues are to be construed strictly, it only means that the court must see that the act charged is an offence within the plain meaning of the words used and must not strain or stretch the words---In other words, the rule of strict construction requires that the language of the statute should not be so construed so as to include acts within it which do not fall within the reasonable interpretation of the statute---Rule of strict construction, however, must yield to the paramount rule that every statute is to be expounded according to the express or manifest intention of the Legislature

N.S. Bindra's Interpretation of Statutes, 12th edition (2017) LexisNexis, pp 824-5, 836 ref.

Mirza Mahmood Ahmad, Advocate Supreme Court and Sh. Usman Karim-ud-Din, Advocate Supreme Court for Petitioners.

Mirza Abid Majeed, D.P.G., PB, Syed Zahid Hussain, DSP, Arshad Ali, Inspector/I.O. and Abdur Rasheed, SHO for the State.

Shaukat Rafique Bajwa, Advocate Supreme Court assisted by Hafiz Mussab Rasool, Advocate for the Complainant.

Date of hearing: 12th January, 2022.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J**.---The petitioners seek leave to appeal against the order dated 24.05.2021 of the Lahore High Court, whereby their petition under section 561-A of the Code of Criminal

Procedure 1898 ("Cr.P.C."), challenging the alteration/addition of certain offences to the charge framed against them, has been dismissed and the orders dated 04.01.2021 and 03.05.2021 passed by the trial court and the revisional court respectively have been upheld.

2. Briefly stated, the petitioners and one other accused person were booked in case FIR No.352 of 2020 dated 03.05.2020 for the offences punishable under Sections 298-B and 298-C of the Pakistan Penal Code, 1860 ("P.P.C.") on the allegation that they being Ahmadi/ Qadiani had styled their place of worship as a mosque and displayed sha'air-e-Islam on the walls inside their place of worship including (Arabic) and maintained copies of the Holy Qur'an inside their place of worship. It was also alleged that the design of the place of worship resembled a mosque and its electricity bill described the place of worship as a mosque. On these allegations, the petitioner were put to trial and the learned trial court, i.e., the Court of Magistrate, on 23.11.2020, framed the charge against the petitioners for offences punishable under sections 298-B and 298-C, P.P.C.

3. Later, the complainant filed an application under Section 227, Cr.P.C. for alteration of the charge praying that offences punishable under sections 295-B and 295-C, P.P.C. were also attracted and the same be added to the charge. The trial court, vide its order dated 04.01.2021, held that allegations levelled against the petitioners attracted sections 295-B and 295-C, P.P.C., and therefore allowed the application. The petitioners filed a revision petition against the order of the trial court but the same was dismissed by the Court of Additional Sessions Judge vide order dated 03.05.2021. The petitioners assailed the said orders, through a petition under section 561-A, Cr.P.C., before the High Court, which met the same fate and was dismissed vide the impugned order dated 24.05.2021. Hence, this petition.

4. Learned counsel for the petitioners argued that the allegations levelled in the FIR do not attract the offences punishable under sections 295-B and 295-C, P.P.C. Only the public propagation of the Ahmadi religion by the Ahmadis posing themselves as Muslim or referring to their faith as Islam and the use in public of the epithets, descriptions and titles, etc., reserved for certain holy personages or places of Islam, has been restricted under the law, i.e., sections 298-B and 298-C, P.P.C., as construed in Zaheeruddin v. State[1], but there is no bar on the Ahmadis to privately profess and practice their religion as per their faith. He submitted that in this case, the petitioners were admittedly present inside their private place of worship, and the display of the sha'air-e-Islam was made, and the copies of the Holy Qur'an were placed, inside their private place of worship. He submitted that Ahmadis believe the Holy Quran to be the words of the God Almighty, and the Holy Prophet Muhammad (peace be upon him) to be the messenger of the God Almighty; they therefore cannot even think of defiling or desecrating the Holy Quran or the sacred name of the Holy Prophet. There is no material on record that the petitioners did any of such acts; therefore, sections 295-B and 295-C, P.P.C. are not attracted in the present case.

5. The State prosecutor, as well as, the learned counsel for the complainant also relied on Zaheeruddin case in addition to Majibur Rehman v. Federal Government,[2] Jahangir Joya v. State,[3] Khurshid Ahmad v. Government of Punjab,[4] to submit that the place of worship of the petitioners is a public place and the display of sha'air-e-Islam as well as maintaining copies of the Holy Qur'an and other material recovered from the said place of worship attract sections 295-B and 295-C, P.P.C. They submitted that mere reading of the Kalma and the Holy Qur'an by non-Muslim/Ahmadis constitutes defilement and desecration of the sanctity of the Kalma, the Holy Qur'an and the Holy Prophet.

6. We have given due consideration to the arguments of the learned counsel for the parties and have gone through the record of the case. The question before us is, whether the allegations levelled in the crime report and the material collected in the course of the investigation attract the commission of offences punishable under sections 295-B and 295-C, P.P.C.?

7. Much emphasis was laid on the cases cited above by the learned counsel for the respondents to establish that sections 295-B and 295-C, P.P.C. are attracted in the present case. The three main cases, Majibur Rehman, Khurshid Ahmed and Zaheeruddin, either deal with the constitutional vires of sections 298-B and 298-C, P.P.C. brought about through the Anti-Islamic Activities of the Qadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance, 1984 ("Ordinance") or the administrative

orders passed for restraining the public display or propagation of their religion by the Ahmadis. These cases hold that sections 298-B and 298-C, P.P.C. are intra vires the Constitution of the Islamic Republic of Pakistan 1973 ("Constitution"), besides maintaining such administrative orders passed by the local administration to prevent a law and order situation from arising.

8. In Zaheeruddin, this Court held that offences punishable under sections 298-B and 298-C, P.P.C. are intra vires the Constitution and do not offend Article 20 of the Constitution. The main consideration in Zaheeruddin was that the Ahmadis by performing the intended centenary celebrations and ceremonies in public may outrage the feelings of Muslims, generating resentment and hostility amongst them, and thus giving rise to law and order issues leading to serious threat to the life and property of the citizens. The Court further held that only such religious practices are protected by the "freedom of religion" guaranteed under Article 20 of the Constitution which are integral and essential part of the religion, while the appellant (therein) had failed to show that the practices they intended to perform at the centenary celebrations were the essential and integral part of their religion, and the same had to be performed only in public or in the public view, on the roads and streets or at the public places. However, this Court while maintaining the administrative orders that had restrained the Ahmadis to perform the intended centenary celebrations and ceremonies in public, clearly observed that the Ahmadis can perform such activities in private. Abdul Qadeer Chaudhry, J., speaking for the majority, in Zaheeruddin wrote[5]:

> The purpose of the order has also been spelt out in the last direction to say, that no other activity which may directly or indirectly incite or injure the feelings of the Muslims, shall be undertaken. The above restrictions clearly mean such activities which might have been performed in the public or in public view and not those to be performed in the private.

Likewise, in Majibur Rehman, Fakhre Alam CJ spoke for the Full Bench of the Federal Shariat Court of Pakistan in the following words[6]:

> This cannot be tolerated and non-Muslims cannot be allowed to encroach upon the rights and privileges of the Muslim community to utter disintegration of the Ummah. Moreover, this does not affect the rights of the Qadianis to profess their faith in Mirza sahib ... nor does it interfere with their right to practice their religion or to worship or in their place of worship according to its dictates.
>
> The Muslim Sharia affords full protection to the practice of religion by the non-Muslims as to its profession. ...It is for this reason that the Holy Prophet (P.B.U.H) and his worthy successors agreed to the best terms inter alia in connection with the freedom of religion to the Polytheisis and non-Muslims whether at war with Muslims or not.

Thus, neither Zaheeruddin nor Majibur Rehman imposes any prohibition or restriction on Ahmadis to profess and practice their religion in their place of worship according to their faith.

Constitutional values and fundamental rights

9. The above observations of this Court and of the Federal Shariat Court are in line with the constitutional values enshrined in the preamble to our Constitution which require us to be tolerant as a people, believe in freedom, equality and social justice, and respect our minorities and make adequate provisions for them to freely profess and practice their religions and develop their cultures and to safeguard their legitimate interests. All citizens of Pakistan, whether Muslim or non-Muslim, are guaranteed fundamental rights under the Constitution including equality of status, freedom of thought, expression, belief, faith, worship subject to law and public morality. The Constitution emphasizes that only when we honour these values can we, the people of Pakistan, prosper and attain the rightful and honoured place amongst the nations of the World and make full contribution towards peace, progress and happiness of the humanity.

10. Article 14 of the Constitution guarantees right to dignity to every person. Human dignity encapsulates the notion that every person has inherent equal worth. This simple but profound concept has three elements: first, every member of the human family has value - no one can be dismissed, ignored, mistreated or abused as if their humanity means nothing; second, each person's worth is equal to every other person and no one's life is more important than any other person; third, human dignity inheres in the

human person and cannot be taken away.[7] To deprive a non-Muslim (minority) of our country from holding his religious beliefs, to obstruct him from professing and practicing his religion within the four walls of his place of worship is against the grain of our democratic Constitution and repugnant to the spirit and character of our Islamic Republic. It also deeply bruises and disfigures human dignity and the right to privacy of a non-Muslim minority, who like all other citizens of this country enjoy the same rights and protections under the Constitution. Bigoted behaviour towards our minorities paints the entire nation in poor colour, labelling us as intolerant, dogmatic and rigid. It is time to embrace our constitutional values and live up to our rich Islamic teachings and traditions of equality and tolerance.

11. Article 20(a) of the Constitution provides that every citizen shall have the right to profess, practice and propagate his religion subject to law, public order and morality. Article 20(b) provides that every religious denomination or sect shall have the right to establish, maintain and manage its religious intuitions. Under Article 22, the Constitution provides that no person attending any educational institution shall be required to receive religious instruction or take part in any religious ceremony or attend religious worship if such instruction, ceremony or worship relates to a religion other than his own. Article 22(3)(a) provides that no religious community or denomination shall be prevented from providing religious instruction for pupils of that community in any educational institution maintained wholly by that community or denomination. Article 25 underlines that all citizens are equal before the law and are entitled to equal protection of law.

12. Article 260(3) of the Constitution though declares the Ahmadis/ Qadianis as non-Muslim, it neither disowns them as citizens of Pakistan nor deprives them of their entitlement to the fundamental rights guaranteed under the Constitution. The Constitution treats, safeguards and protects all its citizens equally, whether they are Muslims or non-Muslims. Article 4 of the Constitution is an inalienable right of every citizen, including minority citizens of Pakistan, which guarantees the right to enjoy the protection of law and to be treated in accordance with law.

Sections 295-B and 295-C, P.P.C.

13. With this constitutional perspective, we proceed to answer the question as to the applicability of Sections 295-B and 295-C, P.P.C. in the present case. For this purpose, we need to examine the definition of the offences as provided in these Sections, which are reproduced hereunder for convenience of reference:

> 295-B Defiling, etc., of Holy Qur'an: Whoever wilfully defiles, damages or desecrates a copy of the Holy Qur'an or of an extract therefrom or uses it in any derogatory manner or for any unlawful purpose shall be punishable with imprisonment for life.
>
> 295-C Use of derogatory remarks, etc., in respect of the Holy Prophet. Whoever by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinua-tion, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine.

To constitute an offence under section 295-B, the reading thereof shows, the accused must have defiled, damaged or desecrated a copy of the Holy Quran or an extract therefrom or use it in any derogatory manner or for any unlawful purpose. There is no allegation in the crime report that attracts the said offence. The courts below have held that mere reading of the Kalima or the Holy Quran by a non-Muslim/Ahmadi attracts section 295-C. This, in our view, is not only far-fetched, but also fails to meet the fundamental constituents of the crime, i.e., mens rea and actus reus. Only that which resides in the mind of a non-Muslim while reading the Holy Quran is not sufficient to constitute the offence. In order to attract section 295-B, P.P.C., there must be an overt act (actus reus) that shows that the copy of the Holy Quran or its extract has been defiled, damaged or desecrated or it has been put to use in a derogatory manner or for an unlawful purpose. There is nothing on the record to establish this, in the present case.

14. Similarly, to constitute an offence under section 295-C, P.P.C., there must be words spoken or written or by visible representation or any imputation, innuendo or insinuation, direct or indirect, which defiles the sacred name of the Holy Prophet Muhammed (peace be upon him). In the instant case, the display of the Kalima, having name of the Holy Prophet Muhammed (peace be upon him) therein, inside

the place of worship do not attract the constituents of the said offence. What runs inside the mind of an Ahmadi, while reading the Kalima does not constitute an offence punishable under section 295-C, P.P.C. unless there is some overt act on his part that defiles the sacred name of the Holy Prophet Muhammed (peace be upon him). There is nothing on the record to establish this, in the present case.

15. We feel it necessary to observe that laws in a constitutional democracy objectify public interest and are solicitous of individual liberties and interfere with them as little as possible. Thus, the rule of interpretation has been evolved according to which a penal statute should be strictly construed in favour of the accused. The degree of strictness depends upon the severity of the statute. It would nevertheless be appropriate to clarify that when it is said that all penal statues are to be construed strictly, it only means that the court must see that the act charged is an offence within the plain meaning of the words used and must not strain or stretch the words. In other words, the rule of strict construction requires that the language of the statute should not be so construed so as to include acts within it which do not fall within the reasonable interpretation of the statute. The rule of strict construction, however, must yield to the paramount rule that every statute is to be expounded according to the express or manifest intention of the Legislature.[8] The acts charged in the present case do not attract sections 295-B and 295-C, P.P.C. either by the plain reading of the words of these two provisions or by their construction through the lens of the express or manifest intention of the Legislature behind them.

16. For the above reasons, we are of the view that in the facts and circumstances of the present case, the trial court and the revisional court had not correctly examined the ingredients necessary to constitute the offences punishable under sections 295-B and 295-C, P.P.C. and had failed to correctly appreciate the import of the Zaheerudddin case, and the High Court has legally erred in maintaining those orders. This petition is therefore converted into appeal and allowed: The impugned order is reversed, the petition of the petitioners under section 561-A, Cr.P.C. is accepted and the orders of the trial and revisional courts are set aside. The trial of the petitioners shall proceed on the basis of the charge framed on 23.11.2020 only for offences punishable under sections 298-B and 298-C, P.P.C.

MWA/T-1/SC Petition allowed.

**P L D 2022 Supreme Court 409**

**Present: Umar Ata Bandial, Syed Mansoor Ali Shah and Muhammad Ali Mazhar, JJ**

**SAIF UR REHMAN KHAN (in all cases)---Petitioner**

**Versus**

**CHAIRMAN, NAB, ISLAMABAD and others---Respondents**

Civil Petitions Nos. 5178, 5179 and 5180 of 2021, decided on 22nd September, 2021.

(Against the orders dated 26.08.2021 of the Islamabad High Court, Islamabad passed in W.Ps. Nos. 1244, 1242 and 2862 of 2021)

**(a) National Accountability Ordinance (XVIII of 1999)---**

----Ss. 9(a)(ix) & 9(a)(x)---Companies Act (XIX of 2017), Ss. 84, 264(3), 482, 496(1)(d) & 500---Securities and Exchange Commission of Pakistan Act (XLII of 1997), Ss. 37 & 41B---Penal Code (XLV of 1860), Ss. 405 & 415---Defrauding and cheating the public at large---Inducing and luring members of the public to invest money in companies by way of a 'Ponzi/pyramid scheme'---Bar contained in sections 37 & 41B of the Securities and Exchange Commission of Pakistan Act, 1997 and S.482 of the Companies Act, 2017---Scope---Whether National Accountability Bureau (NAB) could inquire into and investigate the commission of the alleged offences without a reference from the Securities and Exchange Commission of Pakistan ('the SECP')---Held, that in the present case there was no bar for the NAB to inquire into and investigate the commission of alleged offence under section 9 of the National Accountability Ordinance, 1999 by the petitioner and to proceed further against him under the said Ordinance---Bar contained in sections 37 & 41B of the Securities and Exchange Commission of Pakistan Act, 1997 ('the SECP Act') and section 482 of the Companies Act, 2017 ('the Companies Act') were not attracted to the present matter---Question of cheating the public at large and of breach of trust did not fall within the domain of Companies Act or SECP Act, but squarely falls under the NAB Ordinance---Therefore, the SECP sending a reference to the NAB or the NAB taking cognizance on the basis of the reference had little significance in the facts and circumstances of the present case, when NAB could have taken cognizance on their own---Proceedings conducted by the NAB, in the present matter, against the petitioner were not without lawful authority.

As per the material collected by the National Accountability Bureau (NAB) so far, money from the investors has been received not only in the Bank accounts of the registered companies but also in the personal accounts of the accused-petitioner and his family members as well as of their unregistered companies, which does not fall within the domain of the Securities and Exchange Commission of Pakistan (SECP). The actions taken by the SECP under the Companies Act, 2017 ('the Companies Act') in the present matter, relates to the alleged illegal acts of the registered companies and their directors, not to those alleged illegal acts that have been done by the petitioner and his family members in their personal capacity.

Even as to registered companies, under Section 264 (3) of the Companies Act a person who forms a company for any fraudulent or unlawful purpose, or carries on unauthorized business, is liable to be proceeded against for any other action provided in any other law for the time being in force, in addition to the action taken under subsection (1) of that section. Likewise, under section 500 of the Companies Act a person who acts as a director or officer of the company and is responsible for carrying on any business or any transaction which is ultra vires of the company is also personally liable for the liabilities and obligations arising out of such business or transaction. These provisions leave little doubt to find that there is no bar for the NAB to inquire into and investigate the commission of alleged offence under Section 9 of the NAB Ordinance by the petitioner and to proceed further against him under that Ordinance.

The bar of Section 41B of the Securities and Exchange Commission of Pakistan Act, 1997 ('the SECP Act') pleaded on behalf of the petitioner is not attracted to the present matter. Section 41B relates to "any regulated activity, regulated securities activity, transaction, process or permission granted under this Act or any administered legislation". The petitioner has failed to show that the allegations against him falls within the scope of any of the said matters. Similarly, the bar of section 37 of the SECP Act and section

482 of the Companies Act pleaded by the petitioner is also not attracted to the investigation of the allegations against him by the NAB or taking cognizance of the alleged offences punishable under the NAB Ordinance by the Accountability Court, as the provisions of the said sections of both the Acts relate to taking cognizance of any offence punishable under those Acts, not to the offences punishable under other laws.

Another contention raised on behalf of the petitioner was that the provisions of the Companies Act and the SECP Act have effect notwithstanding any other law for the time being in force and are to prevail over the provisions of the NAB Ordinance. The question of taking precedence of those Acts over the NAB Ordinance does not arise unless it is shown that the offences of cheating as defined in section 415 of the P.P.C. and thereby dishonestly inducing members of the public at large to deliver any property including money or valuable security to any person and criminal breach of trust as defined in section 405 of the P.P.C. with regard to any property including money or valuable security entrusted by members of the public at large, as defined and made punishable under the NAB Ordinance, are also punishable under the Companies Act and the SECP Act.

The provisions of Section 496(1)(d) of the Companies Act referred to on behalf of the petitioner relate to any fraudulent scheme, artifice or practice that is employed in the course of business of the company. It is not the petitioner's case that it was the business of the petitioner's companies to invite and accept deposits from the public as those companies were admittedly not the banking companies; therefore, the alleged Ponzi scheme was not employed by the companies in the course of business of those companies. Therefore, prima facie the mischief addressed in the Companies Act and SECP Act has a limited scope restricted to invitation of deposits by companies, which can be both through fraud or by a bonafide mistake. Both said laws in no way impede NAB to assume jurisdiction under section 9(a) (ix) & (x) of the NAB Ordinance. The NAB enjoys a totally different jurisdiction, which does not overlap with the Companies Act or SECP Act. The question of cheating the public at large and of breach of trust does not fall within the domain of Companies Act or SECP Act, but squarely falls under the NAB Ordinance. Therefore, the SECP sending a reference to the NAB or the NAB taking cognizance on the basis of the reference has little significance in the facts and circumstances of the case, when NAB could have taken cognizance on their own.

The provisions of section 84 of the Companies Act referred to on behalf of the petitioner relate to mere inviting or accepting deposits from the public; they do not relate to commission of offence of cheating and criminal breach of trust in relation to the money deposited by the public. A company may invite and accept deposits from the public without any intention of committing, or actual commission of, cheating and criminal breach of trust in relation to the deposits of the public. In other words, if cheating and/or criminal breach of trust is not committed, or alleged to have committed, in inviting and accepting deposits, such act of a company and its officer in default is though still punishable under section 84 of the Companies Act, but it is not punishable under the P.P.C. or the NAB Ordinance. And, conversely the offences of cheating and criminal breach of trust in relation to inviting and accepting deposits from the public, which are punishable under the P.P.C. and the NAB Ordinance, are not punishable under section 84 of Companies Act. There is thus no conflict between the provisions of section 84 of the Companies Act and the provisions of Section 9 of the NAB Ordinance, and the question of giving precedence to one over the other does not arise.

It cannot be said that the proceedings being conducted by the NAB, in the present matter, against the petitioner are without lawful authority. Petitions for leave to appeal were dismissed and leave was refused.

**(b) Constitution of Pakistan---**

----Art. 13(a)---Protection against double punishment---Scope---Double jeopardy, principle of---Scope of Article 13(a) of the Constitution stated.

Article 13(a) of the Constitution provides that no person shall be prosecuted or punished for the same offence more than once. The expressions "prosecuted" and "same offence" used in Article 13 are of vital significance in determining the scope of the protection guaranteed. The expression "prosecuted" means prosecuted on a charge of criminal nature before a Court of law; it does not include prosecution on the

basis of breach of some code of conduct by a disciplinary authority or breach of some regulatory framework by an administrative authority. The expression "same offence" means offence constituted of the same ingredients and does not mean "same matter" or "same facts". The ingredients of the offence earlier charged and the offence subsequently charged should be the same, to attract the bar of Article 13, in the sense that the facts constituting the offence earlier charged were also sufficient to justify the conviction of the offence subsequently charged.

Jehangir Badar v. Chairman, NAB 2004 SCMR 1632 and Hoot Khan v. NIRC PLD 1977 Kar 145 ref.

**(c) Constitution of Pakistan---**

---Art. 13(a)---National Accountability Ordinance (XVIII of 1999), S. 9---Companies Act (XIX of 2017), Ss. 264(3) & 500---Securities and Exchange Commission of Pakistan Act (XLII of 1997), Ss. 37 & 41B---Protection against double punishment---Scope---Double jeopardy, principle of---Defrauding and cheating the public at large---Inducing and luring members of the public to invest money in companies by way of a 'Ponzi/pyramid scheme'---Plea of accused petitioner that in view of the proceedings conducted by the Securities and Exchange Commission of Pakistan (SECP), the second proceedings by the National Accountability Bureau (NAB) regarding the same matter would amount to double jeopardy and thus infringe his fundamental right to protection against double punishment guaranteed by Article 13 of the Constitution---Held, that SECP was not a court of law, nor were the offences under the Companies Act, 2017 for which it had imposed penalties on the accused-petitioner and his companies constituted, of the same ingredients as that of the offence defined in section 9 of the National Accountability Ordinance, 1999---Shield of Article 13 of the Constitution was therefore not available to the petitioner to prevent the proceedings against him under the National Accountability Ordinance, 1999---Petitions for leave to appeal were dismissed and leave was refused.

**(d) Criminal Procedure Code (V of 1898)---**

----S. 498---National Accountability Ordinance (XVIII of 1999), S. 9---Companies Act (XIX of 2017), Ss. 264(3) & 500---Constitution of Pakistan, Art. 185(3)---Pre-arrest bail, refusal of---Defrauding and cheating the public at large---Inducing and luring members of the public to invest money in companies by way of a 'Ponzi/pyramid scheme'---National Accountability Bureau (NAB) had recorded the statements of many affectees of the alleged fraud of the accused-petitioner and collected the credit and debit record of the Bank accounts operated by the petitioner and his family members as well as the tax record of the petitioner and his alleged shell companies, and the record of the properties in name of the petitioner---During inquiry the NAB found that about 57 Bank accounts had been used for collecting money from the investors, out of which 26 were in name of the petitioner, his wives and son, 18 were in the name of registered companies and 16 in the name of unregistered companies---Petitioner, his wives and son, being the authorized signatories, also operated the accounts in the name of registered and unregistered companies---In view of the said material collected by the NAB so far, the accusation against the petitioner was well founded, and his custody was also required by the NAB for the purpose of completing investigation of the case---Accused-petitioner was refused pre-arrest bail---Petitions for leave to appeal were dismissed and leave was refused.

**(e) Constitution of Pakistan---**

----Art. 185---Criminal Procedure Code (V of 1898), S. 498---National Accountability Ordinance (XVIII of 1999), S. 9---Companies Act (XIX of 2017), Ss. 264(3) & 500---Supreme Court deciding petitions for leave to appeal filed against short orders of the High Court, in circumstances where High Court had not yet given the detailed reasons for its short orders---Propriety---In the present matter the High Court had not yet given the detailed reasons in support of the impugned short orders---Although the Supreme Court ordinarily waits for the detailed reasons before deciding the appeals or the petitions for leave to appeals filed against the short orders passed by the High Courts, but the peculiar facts and circumstances of a case, as those of the present case, may justify departure from this rule of practice and propriety, which is neither a rule of law nor is an absolute one and, like most of the rules, admits exception(s)---Present case involves a bail matter, which is usually considered as an urgent one; the arguments advanced by counsel for the

parties mainly relates to the scope and applicability of certain legal provisions, and not to deep appraisal of the disputed facts and the evidence thereon; and the Supreme Court having heard the arguments of counsel for the parties in detail and perusing the material available on record with their able assistance, had reached a conclusion which is no different from the one arrived at by the High Court in its short orders---In such circumstances, it was not necessary to wait for the detailed reasons to be given by the High Court in support of the impugned short orders before pronouncing the present decision---Petitions for leave to appeal were dismissed and leave was refused.

Muhammad Latif Khan Khosa, Senior Advocate Supreme Court, Malik Javed Iqbal Wains, Advocate Supreme Court along with petitioner in person for Petitioner.

Sattar Awan, Spl. Prosecutor, Irfan Naeem Mangi, D.G. NAB, Fayaz Ahmad Qureshi, D.G. H.Q.NAB. Sardar Muzaffar Ahmad Khan, DPGA. Syed Jamil-ur-Rehman, A.D., M. Adil Shehzad, A.D. NAB, Shahid Islam, A.D. NAB, Haider Azmat, A.D. NAB, Qasim Hussain, ASI, M. Sadiq, H.C., Farrukh Abbas Shah, H.C., Abid Nazir, Constable and Abrar Hussain Shah, Constable for the NAB.

Date of hearing: 22nd September, 2021.

**ORDER**

**SYED MANSOOR ALI SHAH, J**.---Briefly, the allegations against the petitioner are that by using the business name of B4U Global (changed to SR Group during the pendency of the inquiry) through social media platforms he induced and lured the members of the general public ("investors") to invest money in "B4U Global" promising them unrealistic profit of 7% to 20% per month (equal to 84% to 240% per year). According to the National Accountability Bureau ("NAB") the lucrative return on investment promised by B4U Global/ SR Group is a ponzi or a pyramid scheme to defraud and cheat the public at large and to deprive them of their money. As a result, the members of the general public enticed by the ponzi scheme of the petitioner, deposited money into various accounts in the names of certain individuals, registered companies and unregistered businesses, all controlled and managed by the petitioner. On the inquiry conducted by the NAB, the petitioner has so far been found to have defrauded the public at large to the tune of Rs.10.86 billion.

2. On receipt of the complaints filed against petitioner, the NAB initiated proceedings under section 9(a)(ix)(x) of the National Accountability Ordinance, 1999 ("NAB Ordinance"). The NAB issued a notice to the petitioner, the Chief Executive Officer of the B4U Group of companies, under Section 19 of the NAB Ordinance on 3 March 2021, requesting him to furnish certain information relating to the B4U Group and its associate companies. The petitioner did not provide the information sought for. The NAB then issued two call up notices to the petitioner requiring him to appear along with record of the B4U Group of companies, its subsidiary companies and the list of bank accounts maintained by him and the companies of B4U Group, in the NAB office at Islamabad on 12 March 2021 and 19 March 2021 respectively, to make his statement. The petitioner did not turn up before the NAB, rather challenged the legality of the said three notices in the Islamabad High Court by invoking its constitutional jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan 1973 ("Constitution") through filing two writ petitions: one regarding the information requiring notice and the other regarding the call up notices. The petitioner also prayed for restraining the NAB from arresting him and for grant of bail before arrest, in the said petitions. The High Court issued notice to the NAB on the said writ petitions and meanwhile granted the relief of ad-interim bail before arrest to him, on 1 April 2021.

3. In the aforesaid writ petitions, the petitioner praying for quashing of the said notices inter alia pleaded that he owns private limited companies registered with the Securities and Exchange Commission of Pakistan ("SECP") under valid licenses/certificates; that the SECP has already issued him the show cause notice regarding the same matter of inviting investments, on 25 January 2021, under the relevant laws, namely, the Companies Act, 2017 ("Companies Act") and the Securities and Exchange Commission of Pakistan Act, 1997 ("SECP Act"), which proceedings are pending before the SECP, the competent authority; that the initiation of proceedings by the NAB amounts to double jeopardy; and that the

proceedings initiated by the NAB without a Reference from the SECP are also barred by the specific provisions of section 41-B of the SECP Act.

4. During pendency of the said writ petitions, the proceedings initiated by the SECP were concluded vide orders dated 20.05.2021, and the SECP also made a Reference to the NAB, on 9 July 2021, for proceedings under the NAB Ordinance, in terms of Section 41-B of the SECP Act. Regarding this Reference, the petitioner filed a third writ petition in the High Court praying for quashing of the Reference, mainly on the grounds that the Reference has been sent by the SECP to the NAB to fill the lacuna and defeat the adjudication of his pending two writ petitions; that the proceedings by the NAB on the Reference would amount to double jeopardy and thus infringe his fundamental right guaranteed by Article 13 of the Constitution; and that only the Court of Sessions can take cognizance of any offence under the Companies Act, in terms of Section 37 of the SECP Act and Section 482 of the Companies Act.

5. The High Court dismissed the said three writ petitions of the petitioner, vide its short orders dated 26.08.2021, and also recalled the ad-interim bail before arrest granted to him. The petitioner, therefore, has approached this Court seeking leave to appeal against the said orders of the High Court and praying for the same reliefs that have been declined to him by the High Court.

6. The main stance of the petitioner before the High Court as well as before this Court is that he has not collected any amount for investment from any person; these are his private limited companies registered with the SECP that have received investment of money from the investors. Therefore, the matter falls within the exclusive domain of the SECP. We find the stance is totally misconceived. As per the material collected by the NAB so far, money from the investors has been received not only in the bank accounts of the registered companies but also in the personal accounts of the petitioner and his family members as well as of their unregistered companies, which does not fall within the domain of the SECP. The actions taken by the SECP under the Companies Act, in the present matter, relates to the alleged illegal acts of the registered companies and their directors, not to those alleged illegal acts that have been done by the petitioner and his family members in their personal capacity.

7. Even as to registered companies, under Section 264(3) of the Companies Act a person who forms a company for any fraudulent or unlawful purpose, or carries on unauthorized business, is liable to be proceeded against for any other action provided in any other law for the time being in force, in addition to the action taken under Subsection (1) of that Section. Likewise, under Section 500 of the Companies Act a person who acts as a director or officer of the company and is responsible for carrying on any business or any transaction which is ultra vires of the company is also personally liable for the liabilities and obligations arising out of such business or transaction. These provisions leave little doubt to find that there is no bar for the NAB to inquire into and investigate the commission of alleged offence under Section 9 of the NAB Ordinance by the petitioner and to proceed further against him under that Ordinance.

8. The bar of Section 41B of the SECP Act vehemently pleaded on behalf of the petitioner is not, in our opinion, attracted to the present matter. Section 41B relates to "any regulated activity, regulated securities activity, transaction, process or permission granted under this Act or any administered legislation". The petitioner has failed to show that the allegations against him falls within the scope of any of the said matters. Similarly the bar of Section 37 of the SECP Act and Section 482 of the Companies Act pleaded by the petitioner is also not attracted to the investigation of the allegations against him by the NAB or taking cognizance of the alleged offences punishable under the NAB Ordinance by the Accountability Court, as the provisions of the said Sections of both the Acts relate to taking cognizance of any offence punishable under those Acts, not to the offences punishable under other laws.

9. It has also been argued on behalf of the petitioner that the provisions of the Companies Act and the SECP Act have the effect notwithstanding any other law for the time being in force and are to prevail over the provisions of the NAB Ordinance. We are of the opinion that the question of taking precedence of those Acts over the NAB Ordinance does not arise unless it is shown that the offences of cheating as defined in Section 415 of the P.P.C. and thereby dishonestly inducing members of the public at large to deliver any property including money or valuable security to any person and criminal breach of trust as defined in

Section 405 of the P.P.C. with regard to any property including money or valuable security entrusted by members of the public at large, as defined and made punishable under the NAB Ordinance, are also punishable under the Companies Act and the SECP Act.

10. The provisions of Section 496(1)(d) of the Companies Act referred to on behalf of the petitioner relate to any fraudulent scheme, artifice or practice that is employed in the course of business of the company. It is not the petitioner's case before us that it was the business of the petitioner's companies to invite and accept deposits from the public as those companies were admittedly not the banking companies; therefore, the alleged Ponzi scheme was not employed by the companies in the course of business of those companies. Therefore, we are of a prima facie view that the mischief addressed in the aforesaid laws has a limited scope restricted to invitation of deposits by companies, which can be both through fraud or by a bona fide mistake. The aforesaid laws in no way impede NAB to assume jurisdiction under section 9(a) (ix) & (x) of the NAB Ordinance. The NAB enjoys a totally different jurisdiction, which does not overlap with the Companies Act or SECP Act. The question of cheating the public at large and of breach of trust does not fall within the domain of Companies Act or SECP Act, but squarely falls under the NAB Ordinance. Therefore, the SECP sending a reference to the NAB or the NAB taking cognizance on the basis of the reference has little significance in the facts and circumstances of the case, when NAB in our tentative view could have taken cognizance on their own.

11. The provisions of Section 84 of the Companies Act referred to on behalf of the petitioner relate to mere inviting or accepting deposits from the public; they do not relate to commission of offence of cheating and criminal breach of trust in relation to the money deposited by the public. A company may invite and accept deposits from the public without any intention of committing, or actual commission of, cheating and criminal breach of trust in relation to the deposits of the public. In other words, if cheating and/or criminal breach of trust is not committed, or alleged to have committed, in inviting and accepting deposits, such act of a company and its officer in default is though still punishable under Section 84 of the Companies Act, but it is not punishable under the P.P.C. or the NAB Ordinance. And, conversely the offences of cheating and criminal breach of trust in relation to inviting and accepting deposits from the public, which are punishable under the P.P.C. and the NAB Ordinance, are not punishable under Section 84 of Companies Act. There is thus no conflict between the provisions of Section 84 of the Companies Act and the provisions of Section 9 of the NAB Ordinance, and the question of giving precedence to one over the other does not arise.

12. Similarly, the ground agitated by the petitioner that in view of the proceedings conducted by the SECP, the second proceedings by the NAB regarding the same matter would amount to double jeopardy and thus infringe his fundamental right to protection against double punishment guaranteed by Article 13 of the Constitution, is also not legally tenable. Article 13(a) provides that no person shall be prosecuted or punished for the same offence more than once. The expressions "prosecuted" and "same offence" used in Article 13 are of vital significance in determining the scope of the protection guaranteed. The expression "prosecuted" means prosecuted on a charge of criminal nature before a Court of law; it does not include prosecution on the basis of breach of some code of conduct by a disciplinary authority or breach of some regulatory framework by an administrative authority. The expression "same offence" means offence constituted of the same ingredients and does not mean "same matter" or "same facts". The ingredients of the offence earlier charged and the offence subsequently charged should be the same, to attract the bar of Article 13, in the sense that the facts constituting the offence earlier charged were also sufficient to justify the conviction of the offence subsequently charged (See Jehangir Badar v. Chairman, NAB 2004 SCMR 1632 and Hoot Khan v. NIRC PLD 1977 Kar 145). The SECP is not a court of law, nor are the offences under the Companies Act for which it has imposed penalties on the petitioner and his companies constituted, of the same ingredients as that of the offence defined in Section 9 of the NAB Ordinance, as explained above. The shield of Article 13 of the Constitution is therefore not available to the petitioner to prevent the proceedings against him under the NAB Ordinance.

13. In view of the above legal and factual position, it cannot be said that the proceedings being conducted by the NAB, in the present matter, against the petitioner are without lawful authority.

14. So far as the prayer of the petitioner for grant of bail before arrest is concerned, we find no merits in that also. The NAB has recorded the statements of many affectees of the alleged fraud of the petitioners under Section 161 of the Code of Criminal Procedure 1898 and collected the credit and debit record of the bank accounts operated by the petitioner and his family members as well as the tax record of the petitioner and his alleged shell companies, and the record of the properties in name of the petitioner. The NAB has found, during inquiry, that about 57 bank accounts have been used for collecting money from the investors: out of which 26 are in name of the petitioner, his wives and son, 18 are in the name of registered companies and 16 in the name of unregistered companies. The petitioner, his wives and son, being the authorized signatories, also operate the accounts in the name of registered and unregistered companies. We find that, in view of the said material collected by the NAB so far, the accusation against the petitioner is well founded, and his custody is also required to the NAB for the purpose of completing investigation of the case. The prayer of the petitioner for grant of bail before arrest is therefore not sustainable.

15. It may be pertinent to mention here that after arguing the case at length, the learned counsel for the petitioner drew our attention to the fact that the High Court has not yet given the detailed reasons in support of the impugned short orders. Although this Court ordinarily waits for the detailed reasons before deciding the appeals or the petitions for leave to appeals filed against the short orders passed by the High Courts, but the peculiar facts and circumstances of a case, as those of the present case, may justify departure from this rule of practice and propriety, which is neither a rule of law nor is an absolute one and, like most of the rules, admits exception(s). The present case involves a bail matter, which is usually considered as an urgent one; the arguments advanced by learned counsel for the parties mainly relates to the scope and applicability of certain legal provisions, and not to deep appraisal of the disputed facts and the evidence thereon; and we having heard the arguments of learned counsel for the parties in detail and perusing the material available on record with their able assistance, have reached a conclusion which is no different from the one arrived at by the High Court in its short orders. In these circumstances, we deem it unnecessary to wait for the detailed reasons to be given by the High Court in support of the impugned short orders before pronouncing the decision we have made. It is not uncommon that this Court maintains the decisions of the High Courts, in several cases, for its own reasons different from that of the High Courts.

16. For all what has been discussed above, we find that the High Court has rightly dismissed the writ petitions filed by the petitioner. The present petitions are meritless; they are therefore dismissed and leave to appeal is declined.

17. These are the reasons for our short order dated 22.09.2021, operative part of which is reproduced here for ease of reference and completion of the record:

> His [petitioner's] contentions on the alleged jurisdictional defects and the merits of the case have been heard and so have the submissions by the Special Prosecutor for NAB. Having examined both aspects of the case and for the reasons to be recorded later, the ad-interim bail before arrest granted to the petitioner on 30.08.2021 is hereby recalled and Civil Petition No.5178 of 2021, Civil Petition No.5179 of 2021 and Civil Petition No.5180 of 2021 are dismissed.

MWA/S-7/SC Petitions dismissed.

**P L D 2022 Supreme Court 475**

**Present: Umar Ata Bandial, C.J., Syed Mansoor Ali Shah and Ayesha A. Malik, JJ**

**CHAIRMAN, NATIONAL ACCOUNTABILITY BUREAU through P.G., NAB---Petitioner**

**Versus**

**NISAR AHMED PATHAN and others---Respondents**

Civil Petitions Nos. 1628 to 1636 of 2020, decided on 22nd February, 2022.

(Against the order dated 22.04.2020 of the High Court of Sindh, Sukkur Bench, passed in Constitutional Petitions Nos. D-1850, D-111, D-113, D-103, D-110, D-107, D-106, D-104 and D-108 of 2020 respectively).

**(a) Criminal Procedure Code (V of 1898)---**

----S. 497(5)---Constitution of Pakistan, Art. 185(3)---Petition for cancellation of bail---Invoking the appellate jurisdiction of the Supreme Court for cancellation of bail granted by the High Court---Principles---In its appellate jurisdiction, the Supreme Court usually interferes on two grounds; first, when the impugned order is perverse on the face of it, or, second, when the impugned order has been made in clear disregard of some principle of the law of bail---Perverse order is the one that has been passed against the weight of the material on the record or by ignoring such material or without giving reasons---Such order is also termed as arbitrary, whimsical and capricious.

Zaro v. State 1974 SCMR 11 and Sidra Abbas v. State 2020 SCMR 2089 ref.

**(b) Criminal Procedure Code (V of 1898)---**

----Ss. 497 & 498---Constitution of Pakistan, Art. 185(3)---Bail---Appreciation of material/evidence on record---Principles---Courts are not to indulge in the exercise of a deeper appreciation of material available on record at the bail stage and are only to determine tentatively, by looking at such material, whether or not there exist any "reasonable grounds" for believing that the accused person is guilty of the alleged offence.

Farid v. Ghulam Hussan 1968 SCMR 924 and Khalid Saigol v. State PLD 1962 SC 495 ref.

**(c) Criminal Procedure Code (V of 1898)---**

----Ss. 497 & 498---National Accountability Ordinance (XVIII of 1999), Ss. 9 & 10---Constitution of Pakistan, Arts. 9, 10, 10A, 14 & 199---National Accountability Bureau Reference---Bail---Constitutional petition before the High Court seeking grant of bail---Principles---In NAB cases, the standard of "reasonable grounds" for making a tentative assessment of the material available on record to decide in constitutional jurisdiction under Article 199 of the Constitution, the question of detaining an accused in prison, or admitting him to bail, during his trial for the alleged offence under the National Accountability Ordinance, 1999 ('the Ordinance') is not borrowed from section 497, Cr.P.C., rather it emanates from the fundamental rights to liberty, dignity, fair trial and protection against arbitrary detention guaranteed by the Constitution under Articles 9, 10, 10-A & 14 and from the operational scheme of the Ordinance.

Iqbal Noori v. National Accountability Bureau PLD 2021 SC 916 ref.

**(d) Criminal Procedure Code (V of 1898)---**

----Ss. 497 & 498---National Accountability Ordinance (XVIII of 1999), Ss. 9 & 10---Constitution of Pakistan, Arts. 9, 10, 10A, 14 & 199---National Accountability Bureau Reference---Bail---Two plausible opinions---Where two opinions can reasonably be formed on the basis of the same material, the courts should prefer and act upon that which favours the accused person and actualizes his fundamental rights to liberty, dignity, fair trial and protection against arbitrary detention---To err in granting bail is better than to err in declining; for the ultimate conviction and sentence of a guilty person can repair the wrong caused by a mistaken relief of bail, but no satisfactory reparation can be offered to an innocent person on his acquittal for his unjustified imprisonment during the trial.

Zaigham Ashraf v. State 2016 SCMR 18 and Tariq Bashir v. State PLD 1995 SC 34 ref.

**(e) Criminal Procedure Code (V of 1898)---**

----S. 497(5)---National Accountability Ordinance (XVIII of 1999), Ss. 9 & 10---Constitution of Pakistan, Art. 185(3)---Petitions for cancellation of bail, dismissal of---Main accused already granted bail---Allegation against the accused persons was that they had abetted the "main accused" in the commission of the alleged offence of corruption and corrupt practices, being his benamidars and ostensibly owning certain properties, while the co-accused persons were alleged to have offered illegal gratification/kickbacks to the main accused---High Court granted the relief of post and pre arrest bails to the accused and co-accused persons by considering the alleged role attributed to each of them and the material collected during investigation in support thereof---As to the accused persons who were alleged to be the benamidars of the main accused, the High Court had correctly observed that whether they were benamidars of the main accused or had purchased the properties from their own sources would be determined after recording evidence in the trial---No sufficient material was available on record, at present stage, as to the necessary elements of benami transactions---Further, the accused persons who were the family members of the main accused were not alleged to have played any role in the offence of corrupt practices allegedly committed by the main accused, nor were they alleged to have knowledge of his such alleged corrupt practices---About the co-accused persons who were alleged to have offered illegal gratification/kickbacks to the main accused, the High Court had rightly observed that the real purpose of making payment of certain amounts by them to the main accused could be determined only after recording evidence in the trial---Lastly, but most importantly, the National Accountability Bureau was not able to show sufficient incriminating material on the record of the case to connect the main accused with the commission of offence of corruption and corrupt practices, and therefore he was granted post arrest bail by the Supreme Court---Where the main accused had been granted bail, there remained little justification to decline the same relief to the accused and co-accused persons who were alleged to have merely abetted him in the commission of the offence, as the case against such accused and co-accused persons was at a lower rung than that against the main accused---Petitions for leave to appeal seeking cancellation of bail were dismissed.

Sattar Awan, Spl. Prosecutor National Accountability Bureau and M. Sharif Janjua, Advocate-on-Record for Petitioner (in all cases).

Syed Qalb-e-Hassan, Advocate Supreme Court along with Ch. Akhtar Ali, Advocate-on-Record for Respondents (in C.Ps. Nos. 1628-1929 of 2020).

Raja Amir Abbas, Advocate Supreme Court along with Abdul Razak Bahrani in person for Respondents (in C.P. No. 1630 of 2020).

Mukesh Kumar G. Karara, Advocate Supreme Court along with Kassim Mirjat, Advocate-on-Record along with Akram Khan along with Syed Zareekh Shah along with Syed Khalid Hussain Shah for Respondents (in C.Ps. Nos.1631, 1634 and 1636 of 2020).

Amer Raza Naqvi, Advocate Supreme Court for Respondents (in C.Ps. Nos.1632-1633 of 2020).

Muneer A. Malik, Advocate Supreme Court (video-link Karachi) along with Syed Awais Qadir Shah for Respondents (in C.P. No. 1635 of 2020).

Date of hearing: 22nd February, 2022.

**ORDER**

**SYED MANSOOR ALI SHAH, J**.---By this order, we shall decide all the above-captioned petitions as they arise out of the same order of the High Court of Sindh.

2. The Chairman, National Accountability Bureau ("NAB"), through these petitions, seeks leave to appeal against the order dated 22.04.2020 passed by the High Court of Sindh on the constitutional petitions filed by the respondents under Article 199 of the Constitution of the Islamic Republic of Pakistan 1973 ("Constitution"), whereby the post and pre arrest bails have been granted to them in NAB Reference No.17 of 2019 pending trial in the Accountability Court, Sukkur for the alleged offence of corruption and corrupt practices, as defined in Section 9 and punishable under Section 10 of the National Accountability Ordinance 1999 ("NAB Ordinance").

3. Briefly stated, the allegation against some of the respondents is that they have abetted the co-accused, Syed Khursheed Ahmad Shah, a former public office holder, ("main accused") in the commission of the alleged offence of corruption and corrupt practices, being his benamidars and ostensibly owning certain properties, while some respondents are alleged to have offered illegal gratification/ kickbacks to the main accused. The High Court has granted them bail mainly on the ground that the material available on record is not sufficient to connect them with the commission of the alleged offence and the case against them is one of further inquiry.

4. We have considered the arguments of the learned counsel for the parties, read the case-law cited and perused the record of the case.

5. The petitioner has invoked the appellate jurisdiction of this Court for the cancellation of bail granted by the High Court to the respondents. The scope of the interference to be made by this Court in its appellate jurisdiction, in such like matters, is well settled and hardly needs reiteration. This Court usually interferes on

two grounds: (i) when the impugned order is perverse on the face of it, or (ii) when the impugned order has been made in clear disregard of some principle of the law of bail.[1] A perverse order is the one that has been passed against the weight of the material on the record or by ignoring such material or without giving reasons;[2] such

order is also termed as arbitrary, whimsical and capricious. While it is one of the elementary principles of the law of bail that courts are not to indulge in the exercise of a deeper appreciation of material available on record at the bail stage and are only to determine tentatively, by looking at such material, whether or not there exist any "reasonable grounds" for believing that the accused person is guilty of the alleged offence.[3]

1 Zaro v. State 1974 SCMR 11.

2 Sidra Abbas v. State 2020 SCMR 2089.

3 Farid v. Ghulam Hussan 1968 SCMR 924 and Khalid Saigol v. State PLD 1962 SC 495.

6. Needless to mention that in NAB cases, the standard of "reasonable grounds" for making a tentative assessment of the material available on record to decide in constitutional jurisdiction under Article 199 of the Constitution, the question of detaining an accused in prison, or admitting him to bail, during his trial for the alleged offence under the NAB Ordinance is not borrowed from section 497, Cr.P.C., rather it emanates from the fundamental rights to liberty, dignity, fair trial and protection against arbitrary detention guaranteed by the Constitution under Articles 9, 10, 10-A and 14 and from the operational scheme of the NAB Ordinance.[4]

7. The arguments of the learned counsel for the petitioner, when considered in the light of the above principles, are found deficient to convince the Court for interfering with and setting aside the impugned order. The whole emphasis of the learned counsel was on the point that the opinion of the High Court regarding the insufficiency of the incriminating material to connect the respondents with the commission of alleged offence and the case being one of further inquiry is not plausible in view of the material available on the record of the case. In this regard, the distinction between a less plausible opinion and a perverse opinion must not be lost sight of. When two opinions can reasonably be formed on the basis of the same material, both pass as a plausible opinion; while it can be argued that one opinion is more or less plausible than the other, none of them can be termed as a perverse opinion. A perverse opinion is the one which no prudent person can reasonably form on the basis of the material available on record.

8. Where two opinions can reasonably be formed on the basis of the same material, the courts should prefer and act upon that which favours the accused person and actualizes his fundamental rights to liberty, dignity, fair trial and protection against arbitrary detention. To err in granting bail is better than to err in declining; for the ultimate conviction and sentence of a guilty person can repair the wrong caused by a mistaken relief of bail, but no satisfactory reparation can be offered to an innocent person on his acquittal for his unjustified imprisonment during the trial.[5]

9. In the present case, the High Court has granted the relief of post and pre arrest bails to the respondents, by considering the alleged role attributed to each of them and the material collected during investigation in support thereof. As to the respondents who are alleged to be the benamidars of the main accused, the High Court has observed that whether they were benamidars of the main accused or had purchased the properties from their own sources would be determined after recording evidence in the trial. We find this observation of the High Court quite reasonable, for there is no sufficient material available on record, at this stage, as to the necessary elements of benami transactions. Further, the respondents who are the family members of the main accused are not alleged to have played any role in the offence of corrupt practices allegedly committed by the main accused, nor are they alleged to have knowledge of his such alleged corrupt practices. About the respondents who are alleged to have offered illegal gratification/ kickbacks to the main accused, the High Court has observed by making a tentative assessment of their version in the light of the material available on record that the real purpose of making payment of certain amounts by them to the main accused can be determined only after recording evidence in the trial. We find this observation of the High Court, also in accordance with, and not against, the weight of the material available on the record of the case. Lastly, but most importantly, the NAB was not able to show sufficient incriminating material on the record of the case to connect the main accused with the commission of offence of corruption and corrupt practices, and therefore he was granted post arrest bail by this Court vide order dated 21.10.2021 passed in C.P. No.4387 of 2021 (titled Syed Khursheed Ahmed Shah v. The State)[6]. Where the main accused has been granted bail, there remains little justification to decline the same relief to his co-accused who are alleged to have merely abetted him in the commission of the offence, as the case against such co-accused is at a lower rung than that against the main accused.

4 Iqbal Noori v. NAB PLD 2021 SC 916.

5 Zaigham Ashraf v. State 2016 SCMR 18 and Tariq Bashir v. State PLD 1995 SC 34.

10. The learned counsel for the petitioner has thus not been able to show that the impugned order is either perverse or against any settled principle of the law of bail, warranting interference by this Court. The petitions for leave to appeal are found meritless; they are therefore dismissed and leave to appeal declined.

MWA/C-13/SC Petitions dismissed.

**P L D 2022 Supreme Court 497**

**Present: Umar Ata Bandial, C.J., Syed Mansoor Ali Shah and Ayesha A. Malik, JJ**

**CHAIRMAN, NAB through P.G., Accountability---Petitioner**

**Versus**

**NASAR ULLAH and 5 others---Respondents**

Civil Petitions Nos. 1809 to 1814 of 2020, decided on 19th April, 2022.

(Against the judgment of Lahore High Court, Lahore dated 10.03.2020, Passed in W.P. No.10586 of 2019 and other connected matters)

**(a) Criminal Procedure Code (V of 1898)---**

----S. 497---National Accountability Ordinance (XVIII of 1999), Ss. 9, 10 & 16(a)---Constitution of Pakistan, Arts. 4, 9, 10A & 199---National Accountability Bureau Reference---Bail---Grounds---Delay in conclusion of trial---Whether grant of bail on the ground of delay in the conclusion of the trial was permissible under the National Accountability Ordinance, 1999 ('the NAB Ordinance')---Held, that inordinate or long delay in the conclusion of the trial for no fault of the accused and his protracted detention without determination of his guilt, amount to harassment and abuse of the process of law---Such delay can therefore be a valid ground for releasing the accused on bail and restoring his fundamental right to life and liberty---Inordinate delay in conclusion of the trial of an accused, for no fault on his part, being not envisaged by the National Accountability Ordinance, 1999 ('the NAB Ordinance') would inevitably attract the constitutional protections under Articles 4, 9 & 10A of the Constitution---In such a situation, it is just, fair and equitable that the prosecution (NAB) should not oppose bail, and if it does so, the courts would consider the opposition as unreasonable and grant bail, enforcing the fundamental rights of the accused.

"Delay" in the conclusion of a criminal trial is antithetic to the very concept of a "fair trial" and "due process" guaranteed by Article 10A of the Constitution. The right to a fair trial is a cardinal requirement of the rule of law. Conclusion of trial within a reasonable time is an essential component of the right to a fair trial. The prolonged pre-trial detention of the accused also defies the presumption of innocence, another essential element of the right to a fair trial, for an accused is presumed innocent until he is proven guilty by proof beyond reasonable doubt.

The European Convention on Human Rights, Article 6 ref.

The National Accountability Ordinance, 1999 ('the NAB Ordinance') though does not provide for the release of an accused on bail pending his trial but ensures the expeditious conclusion of the trial, and thereby eliminates the possibility of protracted detention of the accused before his conviction. Under Section 16(a) of the NAB Ordinance, the trial is to proceed on a day-to-day basis and to be concluded within thirty days. The bar on granting bail to the accused under the NAB Ordinance is equitably balanced by providing for the trial to proceed on a day-to-day basis and its conclusion within thirty days. This statutory balance between the bar to grant bail and the expeditious conclusion of the trial would be rendered meaningless if an under-trial accused is detained for a long unexplained and unjustified period without determination of his guilt. While Section 16(a) of the NAB Ordinance that provides for concluding the trial within a period of thirty days is not to be construed strictly and applied rigidly, it manifests clearly the legislative intent for expeditious conclusion of the trial. The Legislature cannot be presumed to have intended an inordinate delay in conclusion of the trial and a prolonged detention of an under-trial accused, as a reasonable intention must always be attributed to the Legislature. Therefore, when the provision of NAB Ordinance requiring conclusion of trial within thirty days is not implemented, the corresponding provision barring grant of bail to the accused would also become proportionally pliant.

Tallat Ishaq v. National Accountability Bureau PLD 2019 SC 112 ref.

Inordinate delay in conclusion of the trial of an accused, for no fault on his part, being not envisaged by the NAB Ordinance would inevitably attract the constitutional protections under Articles 4, 9 and 10A of the Constitution. In such a situation, it is just, fair and equitable that the prosecution (NAB) should not oppose bail, and if it does so, the courts would consider the opposition as unreasonable and grant bail, enforcing the fundamental rights of the accused.

Inordinate or long delay in the conclusion of the trial for no fault of the accused and his protracted detention without determination of his guilt, amount to harassment and abuse of the process of law. Such delay can therefore be a valid ground for releasing the accused on bail and restoring his fundamental right to life and liberty.

Riasat Ali v. Ghulam Muhammad PLD 1968 SC 353 ref.

The case reported as Tallat Ishaq v. National Accountability Bureau PLD 2019 SC 112. ('Tallat Ishaq') also recognizes the ground of "shocking, unconscionable and inordinate delay" in the conclusion of the trial as a ground for granting the accused the relief of bail. Said case, however, does not specify what period of delay would be considered as "shocking, unconscionable and inordinate". It has left to the discretion of the courts to determine it in the peculiar facts and circumstances of each case. Such a discretion must be structured equitably and exercised uniformly. In this regard, the courts can borrow guidance from, and act upon, the legislative wisdom codified in the general criminal law balancing the public interest with the individual rights, and can accordingly give effect to the scheme of the NAB Ordinance and enforce the fundamental rights of the accused to life, liberty, fair trial and due process guaranteed under Articles 9 and 10A of the Constitution.

**(b) Constitution of Pakistan---**

----Art. 10A---Right to a fair trial and due process---Liberal and progressive interpretation---Incorporation of the right to a fair trial and due process by Article 10-A in the Constitution as an independent fundamental right underscores the constitutional significance of fair trial and due process and like other fundamental rights, it is to receive a liberal and progressive interpretation and enforcement.

**(c) National Judicial (Policy Making) Committee Ordinance (LXXI of 2002)---**

----Ss. 4(a) & 6---Police Order (No.22 of 2002), Arts. 109 & 111---Inordinate or long delay in the conclusion of trials---General directions issued by the Supreme Court to eradicate the issue of delay in conclusion of trials stated.

Inordinate and endless delay in the conclusion of a criminal trial is the singular most important challenge faced by the criminal justice system and has a devastating effect on the credibility, transparency, public confidence and health of the justice system. To meet this challenge coordinated efforts of all the organs of the Government; the Legislature, the Executive and the Judiciary, are required. One immediate solution is to activate the Provincial Justice Committees constituted under the National Judicial (Policy Making) Committee Ordinance 2002. The Chief Justices of the High Courts, who are the Chairpersons of these Committees, must convene and hold meetings of these Committees at least on quarterly basis. The Vice Chairpersons of the Provincial Bar Councils may also be invited to attend and participate in meetings of these Committees, as the Bar is an important stakeholder in the justice system. Similarly, the District Criminal Justice Coordination Committees established under the Police Order 2002 should also be revitalized for reviewing and improving the operation of the criminal justice system.

Additionally, the High Courts should take up and address, on priority basis, the issues relating to appointments of judges in the District Judiciary against the available vacant posts and consider the creation of new posts, to reduce and rationalize the heavy dockets of cases before the general and special courts.

Ch. Mumtaz Yousaf, D.P.G. for Petitioners. (In all cases).

Nemo for for Respondents.

Date of hearing: 19th April, 2022.

**ORDER**

**SYED MANSOOR ALI SHAH, J**.---The Chairman, National Accountability Bureau ("NAB"), seeks leave to appeal against the judgment dated 10.03.2020 passed by the Lahore High Court, on the writ petitions filed by the respondents under Article 199 of the Constitution of the Islamic Republic of Pakistan 1973 ("Constitution"), whereby post-arrest bail has been granted to the respondents in NAB Reference No.17/2018 ("Reference") dated 02.10.2018 for offences under Section 9 (a) (iii), (iv), (vi) and (xii) of the National Accountability Ordinance, 1999 ("NAB Ordinance")

2. Briefly stated, the Reference alleges that the respondents facilitated in making fake appointments in the Education Department and thereby embezzled and misappropriated funds from public exchequer by paying salaries, allowances, etc., to ghost/bogus employees.

3. Learned counsel for the petitioner contends that the respondents have been granted bail by the High Court, primarily on the ground of delay in the conclusion of the trial, which is not permissible under the NAB Ordinance. In support of his argument, he places reliance on Tallat Ishaq[1].

4. We have heard the learned counsel for the petitioner and have gone through the record of the case, as well as, the cited case law.

5. Perusal of the record shows insufficiency of incriminating material to prima facie establish that the appointments made in the Education Department were fake or that the respondents had gained any monetary benefits as a result thereof. There are thus no reasonable grounds for believing that the respondents are guilty of the alleged offences, hence they were entitled to post arrest bail on this ground alone.

6. So far as the ground of delay in conclusion of the trial is concerned, the High Court has rightly considered the delay unjustifiable and inordinate, thus enlarging the respondents on bail. We also have noticed the long delay in conclusion of the trial, with great concern. The Reference was filed in the year 2018, and the respondents were arrested in the same year. However, till date after lapse of a period of almost four years, the trial has yet not even commenced and no plausible explanation has been put forth by the NAB, in this regard.

7. "Delay" in the conclusion of a criminal trial is antithetic to the very concept of a "fair trial" and "due process" guaranteed by Article 10A of the Constitution. The right to a fair trial is a cardinal requirement of the rule of law. If an accused cannot be tried fairly for an offence, he should not be tried for it at all.[2] Conclusion of trial within a reasonable time is an essential component of the right to a fair trial.[3] The prolonged pre-trial detention of the accused also defies the presumption of innocence, another essential element of the right to a fair trial, for an accused is presumed innocent until he is proven guilty by proof beyond reasonable doubt.[4] Even before the addition of Article 10A in the Constitution, the right to a fair trial and due process was well-entrenched in our jurisprudence and considered to be a part of the right of access to justice enshrined in the constitutional right to be dealt with in accordance with law guaranteed by Article 4 and the fundamental right to life and liberty guaranteed by Article 9 of the Constitution.[5] The incorporation of the right to a fair trial and due process by Article 10-A in the Constitution as an independent fundamental right underscores the constitutional significance of fair trial and due process and like other fundamental rights, it is to receive a liberal and progressive interpretation and enforcement.

8. The NAB Ordinance[6] though does not provide for the release of an accused on bail pending his trial but ensures the expeditious conclusion of the trial, and thereby eliminates the possibility of protracted detention of the accused before his conviction. Under Section 16(a) of the NAB Ordinance, the trial is to proceed on a day-to-day basis and to be concluded within thirty days. The bar on granting bail to the accused under the NAB Ordinance is equitably balanced by providing for the trial to proceed on a day-to-day basis and its conclusion within thirty days. This statutory balance between the bar to grant bail and the expeditious conclusion of the trial would be rendered meaningless if an under-trial accused is detained for a long unexplained and unjustified period without determination of his guilt. While Section 16(a) of the NAB Ordinance that provides for concluding the trial within a period of thirty days is not to be construed strictly and applied rigidly as held in Tallat Ishaq, it manifests clearly the legislative intent for expeditious conclusion of the trial. The Legislature cannot be presumed to have intended an inordinate delay in conclusion of the trial and a prolonged detention of an under-trial accused, as a reasonable intention must always be attributed to the Legislature. Therefore, when the provision of NAB Ordinance requiring conclusion of trial within thirty days is not implemented, the corresponding provision barring grant of bail to the accused would also become proportionally plaint. If the scheme of a law in regard to a vital part fails, the sanctity of the other part, as observed by Salahuddin, J. in Zahur Ilahi[7], must of necessity be affected and what appears to be rigid must give way to flexibility. Inordinate delay in conclusion of the

trial of an accused, for no fault on his part, being not envisaged by the NAB Ordinance would inevitably attract the constitutional protections under Articles 4, 9 and 10A of the Constitution. In such a situation, it is just, fair and equitable that the prosecution (NAB) should not oppose bail, and if it does so, the courts would consider the opposition as unreasonable and grant bail,**8** enforcing the fundamental rights of the accused.

9. Inordinate or long delay in the conclusion of the trial for no fault of the accused and his protracted detention without determination of his guilt, as held by this Court in Riasat Ali**9**, amount to harassment and abuse of the process of law. Such delay can therefore be a valid ground for releasing the accused on bail and restoring his fundamental right to life and liberty. No doubt, the right to life and liberty guaranteed by Article 9 of the Constitution is "subject to law" but the law, which can curtail this right, means a law that promotes larger public interest and not a law that impedes "fair trial" and limits "due process". The general criminal law**10** has balanced the public interest and individual rights to life and liberty by recognizing the right of an accused to be released on bail, in case the trial against him is not concluded, for no fault on his part, within a specified period from the date of his detention, that is, one year for offences not punishable with death and two years for offences punishable with death. Tallat Ishaq relied upon by the learned counsel for the petitioner also recognizes the ground of "shocking, unconscionable and inordinate delay" in the conclusion of the trial as a ground for granting the accused the relief of bail. Tallat Ishaq, however, does not specify what period of delay would be considered as "shocking, unconscionable and inordinate". It has left to the discretion of the courts to determine it in the peculiar facts and circumstances of each case. Such a discretion must be structured equitably and exercised uniformly. In this regard, the courts can borrow guidance from, and act upon, the legislative wisdom codified in the general criminal law**11** balancing the public interest with the individual rights, and can accordingly give effect to the scheme of the NAB Ordinance and enforce the fundamental rights of the accused to life, liberty, fair trial and due process guaranteed under Articles 9 and 10A of the Constitution.

10. The impugned judgment, when viewed in the light of the above principles of law, is found to be in accord therewith. This Court usually interferes in its appellate jurisdiction in such like matters, on two grounds: (i) when the impugned order is perverse on the face of it, or (ii) when the impugned order has been made in clear disregard of some principle of the law of bail. None of these grounds is available to the petitioner in the present case. The petitions for leave to appeal are found meritless; they are therefore dismissed and leave to appeal declined.

General directions to eradicate the evil of delay in conclusion of trials.

11. Inordinate and endless delay in the conclusion of a criminal trial is the singular most important challenge faced by our criminal justice system and has a devastating effect on the credibility, transparency, public confidence and health of our justice system. To meet this challenge coordinated efforts of all the organs of the Government; the Legislature, the Executive and the Judiciary, are required. One immediate solution is to activate the Provincial Justice Committees constituted under the National Judicial (Policy Making) Committee Ordinance, 2002. The Chief Justices of the High Courts, who are the Chairpersons of these Committees, must convene and hold meetings of these Committees at least on quarterly basis. The Vice-Chairpersons of the Provincial Bar Councils may also be invited to attend and participate in meetings of these Committees, as the Bar is an important stakeholder in the justice system. Similarly, the District Criminal Justice Coordination Committees established under the Police Order 2002 should also be revitalized for reviewing and improving the operation of the criminal justice system.

12. Additionally, the High Courts should take up and address, on priority basis, the issues relating to appointments of judges in the District Judiciary against the available vacant posts and consider the creation of new posts, to reduce and rationalize the heavy dockets of cases before the general and special courts. Needless to reiterate that the High Courts have the constitutional mandate, under Article 203 of the Constitution, to supervise and control all courts, whether of general or special jurisdiction, established by law as per Article 175(1) of the Constitution, within their respective jurisdiction.

13. Office shall send copies of this order to the Registrars of all the High Courts and to the Secretaries of all the Federal and Provincial Law Ministries/Departments.

MWA/C-15/SC Petition dismissed.

**P L D 2022 Supreme Court 541**

**Present: Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ**

**ALLAH WASAYA---Petitioner**

**Versus**

**The STATE and others---Respondents**

Crl. P. No. 440 of 2022, decided on 22nd June, 2022.

(Against the order of Lahore High Court, Multan Bench, dated 24.11.2021 passed in Crl. Misc. No.7332-B of 2021)

**(a) Criminal Procedure Code (V of 1898)---**

----S. 497(1), fourth proviso---Bail---Expression "hardened, desperate or dangerous criminal" as used in the fourth proviso to Section 497(1) Cr.P.C.---Scope of the expression "hardened, desperate or dangerous criminal" explained.

The word "criminal" in the phrase "hardened, desperate or dangerous criminal" of the fourth proviso to Section 497(1), Cr.P.C., is not to be construed in the technical sense for a person who has been adjudged guilty of a charge in a Court of law, i.e., a convicted person; it has rather been used in its ordinary sense for a person who violates the law of the land and is accused of committing a crime. Further, the fourth proviso to section 497(1), Cr.P.C. deals with the previously convicted offenders separately. Therefore, in order to bring an accused within the compass of a hardened, desperate or dangerous criminal, it is not necessary to prove that he has a previous criminal record of conviction. It is thus obvious that the previous criminal record of convictions or of pendency of other criminal cases, though may be taken into consideration as a supporting material, is not an exclusive deciding factor to form an opinion as to whether the accused is a hardened, desperate or dangerous criminal. Such an opinion is to be formed by the court mainly on basis of the facts and circumstances of the case, borne out from the material available on record, wherein the bail is applied on the ground of delay in conclusion of the trial, by considering inter alia, the nature of the offence involved, its effects on the victims or the society at large, the role attributed to the accused, the manner in which the offence was committed and the conduct of the accused. The formation and recording of such opinion as to the character of the accused, like the opinion as to reasonable grounds for believing his involvement in the commission of the offence, is of tentative nature, and is thus open to reexamination and final determination on conclusion of the trial.

Moundar v. State PLD 1990 SC 934; Sher Ali v. State 1998 SCMR 190; Jalal v. Allahyar 1993 SCMR 525; Umar Draz v.

State 1997 SCMR 885; Muhammad Hanif v. State PLD 1986 Kar. 437; Hussain v. State 1991 PCr.LJ 26; Sultan Ali v. State 1999 MLD 454; Omair Ahmed v. State 1996 PCr.LJ 22; Ghulam Rasool v. State

1998 MLD 1344; Muhammad Asif v. State PLD 1996 Kar. 385; Shahnawaz v. State 2000 PCr.LJ 630 and Anwar Beg v. State 1999 PCr.LJ 1450 ref.

The words "hardened, desperate or dangerous" point towards a person who is likely to seriously injure and hurt others without caring for the consequences of his violent act and can pose a serious threat to the society if set free on bail, and such tentative opinion as to the character of the accused is to be formed by the court upon careful examination of the facts and circumstances of the case. The court may also refer to any previous criminal record, if available, for forming such opinion but it matters little if the accused does not have a previous criminal record. The very gravity and severity of the act alleged to have been committed by the accused, even though for the first time, may be sufficient to attract the fourth proviso to section 497(1) Cr.P.C. in the peculiar facts and circumstances of a case and may lead the court to form opinion that the accused is a hardened, desperate or a dangerous criminal.

Shakeel Shah v. State 2022 SCMR 1 and Nadeem Samson v. State PLD 2022 SC 112 ref.

**(b) Criminal Procedure Code (V of 1898)---**

----S. 497(1), third & fourth proviso---Penal Code (XLV of 1860), Ss. 336, 334, 367, 354, 342, 148 & 149---Constitution of Pakistan, Art. 185(3)---Cutting of a person's nose--- Bail, refusal of---Delay in conclusion of trial---"Hardened, desperate or dangerous criminal"---In the present case, the nature and manner of the

commission of offence and the role attributed to the accused of cutting the nose of his sister-in-law and her alleged paramour were the circumstances which described him as a person who could be harmful and dangerous for the society if released on bail and thus made him to fall within the scope of the expression of "a hardened, desperate or dangerous criminal" as used in the fourth proviso to Section 497(1), Cr.P.C.---Accused was therefore not entitled to the benefit of bail on statutory ground of delay in conclusion of his trial, under the third proviso to Section 497(1), Cr.P.C.---Petition for leave to appeal was dismissed, and accused was refused bail.

M. Usman Sharif Khosa, Advocate Supreme Court for Petitioner.

Ch. M. Sarwar Sandhu, Addl. P.G., Punjab, Muhammad Ijaz, D.S.P. and Ali Abbas, S.I. for the State.

Complainant in person.

Date of hearing: 22nd June, 2022.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The petitioner seeks leave to appeal against the order dated 24.11.2021, whereby post-arrest bail was denied to him in case FIR No. 180/2020, dated 20.07.2020, registered at Police Station, Shah Saddar Din, District, Dera Ghazi Khan for offences punishable under Sections 336, 334, 367, 354, 342, 148 and 149 of P.P.C.

2. Briefly, the allegation as per the crime report is that the petitioner cut the nose of his bhabi, namely, Haseena Bibi, as well as, Abdul Rasheed, her alleged paramour. Unable to convince us on the merits of the case, the learned counsel mainly sought bail on the statutory ground of delay in conclusion of the trial, under the third proviso to Section 497(1), Cr.P.C. He submitted that the petitioner was arrested on 20.07.2020 and more than two years have passed but the trial has not yet been concluded for no fault of the petitioner. The learned State counsel opposed the grant of bail to the petitioner on this ground with the submission that the petitioner is a hardened, desperate and dangerous criminal and is therefore not entitled to the grant of bail, as per the fourth proviso to Section 497(1), Cr.P.C. Learned counsel for the petitioner, in rebuttal, submitted that the petitioner has no previous criminal record, therefore, he cannot be treated as a hardened, desperate or dangerous criminal.

3. We have heard the learned counsel for the parties and have examined the record of the case with their able assistance.

4. The sole question that needs consideration and determination by us, in the present case, is: whether an accused person may be treated as a hardened, desperate or dangerous criminal, within the meaning of that expression as used in the fourth proviso to Section 497(1), Cr.P.C., on the basis of the facts and circumstances of the case, when he applies for bail on the statutory ground of delay in conclusion of the trial, or there must necessarily be some previous criminal record of the accused to form such an opinion by the court about him.

5. In order to determine the above question, it is important to revisit the fourth proviso to section 497(1), Cr.P.C., which is reproduced hereunder for ready reference:

497. When bail may be taken in case of nonbailable offence. (1)

Provided .....

Provided .....

Provided ....

Provided further that the provisions of the foregoing proviso shall not apply to a previously convicted offender for an offence punishable with death or imprisonment for life or to a person who, in the opinion of the court, is a hardened, desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life.

The third proviso to Section 497(1) thus does not apply to an accused who is:

(i) a previously convicted offender for an offence punishable with death or imprisonment for life; or

(ii) a hardened, desperate or dangerous criminal, in the opinion of the Court; or

(iii) an accused of an act of terrorism punishable with death or imprisonment for life.

Condition (i) denies the relief of statutory bail to the accused because of his previous conviction for an offence punishable with death or life imprisonment. Condition (iii) is also self-explanatory and is attracted when the petitioner is accused of an act of terrorism punishable with death or imprisonment for life. So while condition (i) is about the past conviction of the accused and condition (iii) deals with the specific act of terrorism, it is condition (ii) which allows the court to make a contemporary assessment of the character of the accused to arrive at an opinion whether he is a hardened, desperate or dangerous criminal.

6. The word "criminal" in the phrase "hardened, desperate or dangerous criminal" of the fourth proviso to Section 497(1), Cr.P.C., as held by a five member bench of this Court in Moundar v. State,[1] is not to be construed in the technical sense for a person who has been adjudged guilty of a charge in a Court of law, i.e., a convicted person; it has rather been used in its ordinary sense for a person who violates the law of the land and is accused of committing a crime. Further, the fourth proviso to section 497(1), Cr.P.C. deals with the previously convicted offenders separately. Therefore, in order to bring an accused within the compass of a hardened, desperate or dangerous criminal, it is not necessary to prove that he has a previous criminal record of conviction.[2] It is thus obvious that the previous criminal record of convictions or of pendency of other criminal cases, though may be taken into consideration as a supporting material, is not an exclusive deciding factor to form an opinion as to whether the accused is a hardened, desperate or dangerous criminal. Such an opinion is to be formed by the court mainly on basis of the facts and circumstances of the case, borne out from the material available on record, wherein the bail is applied on the ground of delay in conclusion of the trial,[3] by considering inter alia, the nature of the offence involved,[4] its effects on the victims or the society at large,[5] the role attributed to the accused,[6] the manner in which the offence was committed[7] and the conduct of the accused.[8] Needless to mention that the formation and recording of such opinion as to the character of the accused, like the opinion as to reasonable grounds for believing his involvement in the commission of the offence, is of tentative nature, and is thus open to re-examination and final determination on conclusion of the trial.

7. The meaning and scope of the phrase "hardened, desperate or dangerous criminal" have also been explained in Shakeel Shah,[9] wherein this Court held that the words "hardened, desperate or dangerous" point towards a person who is likely to seriously injure and hurt others without caring for the consequences of his violent act and can pose a serious threat to the society if set free on bail, and such tentative opinion as to the character of the accused is to be formed by the court upon careful examination of the facts and circumstances of the case. We are of the considered view that the court may also refer to any previous criminal record, if available, for forming such opinion but it matters little if the accused does not have a previous criminal record. The very gravity and severity of the act alleged to have been committed by the accused, even though for the first time, may be sufficient to attract the fourth proviso to section 497(1) Cr.P.C. in the peculiar facts and circumstances of a case and may lead the court to form opinion that the accused is a hardened, desperate or a dangerous criminal.

8. In the present case, the nature and manner of the commission of offence and the role attributed to the petitioner of cutting the nose of his bhabi and her alleged paramour are the circumstances which, in our opinion, describe him as a person who can be harmful and dangerous for the society if released on bail and thus makes him to fall within the scope of the expression of "a hardened, desperate or dangerous criminal" as used in the fourth proviso to Section 497(1), Cr.P.C. He is therefore not entitled to the benefit of the third proviso to Section 497(1), Cr.P.C. Hence, we are not inclined to interfere in the impugned order. Leave to appeal is declined and the petition is dismissed. We, however, direct the trial court to expedite the proceedings of the case and conclude the trial at the earliest.

MWA/A-29/SC Bail refuse

**P L D 2022 Supreme Court 551**

**Present: Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ**

**KHAWAR KAYANI---Petitioner**

**Versus**

**The STATE and others---Respondents**

Criminal Petition No.345 of 2022, decided on 20th June, 2022.

(Against the Judgment of Islamabad High Court, Islamabad dated 17.02.2022 passed in Crl. Misc. No. 113-B of 2022).

**(a) Juvenile Justice System Act (XXII of 2018)---**

----S. 6(5)---Criminal Procedure Code (V of 1898), S. 497---Bail---Delay in conclusion of trial---Juvenile aged more than sixteen years accused of a heinous offence and detained for a continuous period exceeding six months without conclusion of trial---Whether section 6(5) of the Juvenile Justice System Act, 2018 ('the 2018 Act') applied to such a juvenile---Held, that Section 6(5) of the 2018 Act does apply, rather solely applies, to a case involving a "heinous offence", irrespective of the age of the juvenile---Section 6(5) in effect works as a proviso to section 6(4) and appears to have no other purpose under the scheme of the 2018 Act.

**(b) Criminal Procedure Code (V of 1898)---**

----S. 497(1), third proviso---Bail---Delay in conclusion of trial---Period of delay in the conclusion of the trial is to be counted from the date of the detention of the accused in the case.

Nadeem Samson v. State PLD 2022 SC 112 and Shakeel Shah v. State 2022 SCMR 1 ref.

**(c) Juvenile Justice System Act (XXII of 2018)---**

----S. 6(5)---Juvenile accused---Bail---Delay in conclusion of trial---Juvenile accused detained for a continuous period exceeding six months without conclusion of trial---Period of six months mentioned in section 6(5) of the Juvenile Justice System Act, 2018 is to be counted from the date of arrest of the juvenile, after determination of his age and not from the date of such determination or adjudication by the Court.

Saleem Khan v. State PLD 2020 SC 356 ref.

**(d) Juvenile Justice System Act (XXII of 2018)---**

----S. 2(a) & Preamble---Constitution of Pakistan, Arts. 25(3) & 35---Concept of juvenile justice system explained.

The conceptual framework of juvenile justice system has been carved out of the general criminal justice system. Juvenile justice system is not retributive in character, it is primarily rehabilitative and restorative. Restorative justice is a theory of justice that emphasizes repairing the harm caused by criminal behavior. It rests on the best interest of the child and ensures fulfillment of his basic rights and needs, identity, social well-being, physical, emotional and psychological development. This therapeutic underpinning is the central theme of Juvenile Justice System. Juvenile courts, by their very nature, were designed to be more therapeutic than the adult criminal justice system as juveniles differ from adults in their development and their needs.

Restorative Justice, OFF. OF JUV. JUST. & DELINQ. PREVENTION 1 (Nov. 2010) ref.

The juvenile justice system also finds its ideological roots in the Constitution. Article 25(3) of the Constitution empowers the State to make special provisions for the protection of children even if such protection discriminates against the adults (reverse discrimination). Article 35 of the Constitution provides that the State shall protect the child. Furthermore, the State of Pakistan is a signatory to the United Nations Convention on the Rights of Child (UNCRC) and is thus under an international obligation to take special measures for the protection and rehabilitation of the juveniles who come in conflict with law. It was for the compliance of this constitutional mandate and for the fulfilment of this international obligation that the Juvenile Justice System Act, 2018 was enacted by the legislature of Pakistan. The main object of the enactment of the 2018 Act is to modify and amend the law relating to criminal justice system for juveniles by providing special focus on disposal of their cases through diversion and social integration for their rehabilitation.

Raja Rizwan Abbasi, Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Petitioner.

Agha Muhammad Ali, Advocate Supreme Court for Respondent.

Fakhar Abbas, I.O. for the State.

Date of hearing: 20th June, 2022.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**Petitioner seeks leave to appeal against the order dated 17.02.2022 ("impugned order") whereby post-arrest bail was denied to the petitioner by the High Court in case FIR No. 12 of 2021, registered at P.S. Nilore, Islamabad, for the commission of offence of Qatl-i-amd punishable under Section 302/34 of the Pakistan Penal Code, 1860 ("P.P.C.").

2. Briefly, the allegation against the petitioner in the crime report is that he and his co-accused fired at the brother of the complainant and caused his death. In this background, the petitioner was arrested by the Police on 18.03.2021, he remained in police custody on physical remand till 24.03.2021 and after that he was remanded to judicial custody.

3. The petitioner, who was adjudged to be a juvenile by the trial court vide its order dated 15.11.2021, applied for post arrest bail on merits, as well as, on the ground of delay in conclusion of the trial, but both the trial court and the High Court dismissed his applications. Before us, the learned counsel for the petitioner has pressed only the ground of delay. He contended that the petitioner, a juvenile, is to be released on bail, as of right, under Section 6(5) of the Juvenile Justice System Act, 2018 ("Act") as he has been detained for a continuous period exceeding six months without the trial having been completed and the delay in completion of the trial has not been occasioned by an act or omission of the petitioner or any other person acting on his behalf. Learned State counsel, on the other hand, maintained that Section 6(5) of the Act is not applicable to a case involving a "heinous offence".

4. We have heard the learned counsel for the parties and examined the record of the case. The question of law involved in the present case is whether Section 6(5) of the Act is applicable to a case where the juvenile, including a juvenile over sixteen years of age, is involved in a "heinous offence." Under the Act, offences have been categorized into (i) minor offences,[1] (ii) major offences[2] and (iii) heinous offences.[3] The offence of Qatl-i-amd involved in the present case, being serious in character and punishable with death or imprisonment for life under Section 302, P.P.C., is admittedly a "heinous offence" as defined in Section 2(g) of the Act. Section 6 of the Act, for ease of reference, is reproduced as follows:

> 6. Release of a juvenile on bail---(1) Notwithstanding anything contained in the Code, a juvenile accused of bailable offence shall, if already not released under section 496 of the Code, be released by the Juvenile Court on bail with or without surety unless it appears that there are reasonable grounds for believing that the release of such juvenile may bring him in association with criminals or expose him to any other danger. In this situation the juvenile shall be placed under the custody of a suitable person or Juvenile Rehabilitation Centre under the supervision of probation officer. The juvenile shall not under any circumstances be kept in a police station under police custody or jail in such cases.
>
> (2) The Juvenile Court shall, in a case where a juvenile is not released under subsection (1), direct the police for tracing guardian of such juvenile and where guardian of such juvenile is traced out, the Juvenile Court may immediately handover custody of the juvenile to his guardian.
>
> (3) Where a juvenile is arrested or detained for commission of a minor or a major offence for the purposes of this Act, he shall be treated as if he was accused of commission of a bailable offence.
>
> (4) Where a juvenile of more than sixteen years of age is arrested or detained for a heinous offence, he may not be released on bail if the Juvenile Court is of the opinion that there are reasonable grounds to believe that such juvenile is involved in commission of a heinous offence.
>
> (5) Where the Juvenile Court is of the opinion that the delay in the trial of a juvenile has not been occasioned by an act or omission of such juvenile or any other person acting on his behalf or in exercise of any right or privilege under any law for the time being in force, such juvenile shall be

released on bail if he has been detained for a continues period exceeding six months and whose trial has not been completed.

Section 6 of the Act deals with the release of a juvenile on bail falling under different categories of offences. Section 6(3) provides for treating the "minor offences" and "major offences" as bailable, while the provisions for release on bail of a juvenile accused of bailable offences are contained in subsection (1) thereof. These provisions though provide for placing a juvenile accused of a bailable offence under the custody of a suitable person or Juvenile Rehabilitation Centre under the supervision of probation officer if there are reasonable grounds for believing that the release of such juvenile may bring him in association with criminals or expose him to any other danger, but categorically prohibit his detention in a police station under police custody or in a jail. Therefore, a juvenile cannot be detained in a police station or a jail in bailable offences, which include minor offences and major offences as defined under the Act.

5. Section 6(4) of the Act provides that where a juvenile is more than sixteen years of age and is arrested or detained for a heinous offence, he may not be released on bail if the Juvenile Court is of the opinion that there are reasonable grounds to believe that such juvenile is involved in commission of a heinous offence. While Section 6(4) deals with the bail of juveniles under a heinous offence on merits, a separate provision provides for bail to the same juveniles where they have been detained for a continuous period exceeding six months and whose trial has not been completed. Under the Act, only in a case involving "heinous offence" can a juvenile be detained in a police station or a jail. Thus, it can safely be concluded that Section 6(5) of the Act does apply, rather solely applies, to a case involving a "heinous offence", irrespective of the age of the juvenile. Section 6(5) in effect works as a proviso to Section 6(4) and appears to have no other purpose under the scheme of the Act. The approach of the trial court, in the present case, to decline benefit of Section 6(5) of the Act to the petitioner merely by observing that the offence is "heinous" is not legally correct; this subsection is meant for, and only applies to, a case involving "heinous offence". To hold otherwise will render Section 6(5) redundant and unnecessary.

6. In the present case, the petitioner was arrested on 18.03.2021 and he had been detained for a continuous period exceeding six months since his detention and his trial had not been completed when he applied for the relief of bail before the trial court and the High Court. The trial court declined the relief of bail to the petitioner without discussing the fact who was at fault for the delay in completion of the trial. While the High Court noted that the delay occurred due to failure of the Investigating Officer in timely submission of the final report under Section 173 of the Code of Criminal Procedure 1898. In the latest report submitted by the trial court, dated 25.05.2022, on requisition of this Court, it has been reported that the delay has occurred due to filing of a private complaint by the complainant. The delay in completion of the trial is thus not attributable to any act or omission of the petitioner or any other person acting on his behalf, and the petitioner is therefore entitled to be released on bail, as of right, under Section 6(5) of the Act.

7. What is more disquieting is that the High Court has declined the relief under Section 6(5) of the Act to the petitioner, by holding in the impugned order that period of six months is to be counted from 15.11.2021 when the petitioner was determined by the trial court to be a juvenile and not from 18.03.2021 when he was arrested. We think that attention of the High Court was not invited to the judgments of this Court delivered in the cases of Nadeem Samson,[4] and Shakeel Shah[5] relating to 3rd proviso to Section 497(1) Cr.P.C., which contains similar provisions, and of Saleem Khan[6] relating to Section 6(5) of the Act; this Court has held in these cases that the period of delay in the conclusion of the trial is to be counted from the date of the detention of the accused in the case. The period of six months mentioned in Section 6(5) of the Act is therefore to be counted from the date of arrest of the juvenile, after determination of his age and not from the date of such determination or adjudication by the Court.

8. It is important to keep in mind the conceptual framework of juvenile justice system which has been carved out of the general criminal justice system. Juvenile justice system is not retributive in character, it is primarily rehabilitative and restorative[7]. Restorative justice is "a theory of justice that emphasizes repairing the harm caused by criminal behavior."[8] It rests on the "best interest of the child"[9] and ensures

fulfillment of his basic rights and needs, identity, social well-being, physical, emotional and pschological development. This therapeutic underpinning is the central theme of Juvenile Justice System. Juvenile courts, by their very nature, were designed to be more therapeutic than the adult criminal justice system as juveniles differ from adults in their development and their needs.

9. The juvenile justice system also finds its ideological roots in the Constitution of the Islamic Republic of Pakistan 1973 ("Constitution"). Article 25(3) empowers the State to make special provisions for the protection of children even if such protection discriminates against the adults (reverse discrimination[10]). Article 35 of the Constitution provides that the State shall protect the child. Furthermore, the State of Pakistan is a signatory to the United Nations Convention on the Rights of the Child ("UNCRC") and is thus under an international obligation to take special measures for the protection and rehabilitation of the juveniles who come in conflict with law. It was for the compliance of this constitutional mandate and for the fulfilment of this international obligation that the Act was enacted by the legislature of Pakistan. The main object of the enactment of the Act is to modify and amend the law relating to criminal justice system for juveniles by providing special focus on disposal of their cases through diversion and social integration for their rehabilitation.[11]

10. Article 37(b) of the UNCRC provides that the process of arrest, detention or imprisonment of a juvenile is to be used only as a measure of last resort and for the shortest appropriate period of time, while para 28 of the General Comments of the Committee on the Rights of the Child (CRC)[12], which interprets Article 37(b), says that the use of deprivation of liberty, and in particular pre-trial detention, is to be strictly limited. Section 6 of the Act that deals with release of juvenile on bail pending his trial actualizes Article 37 (b) of the UNCRC.

11. In the present case, the courts below have failed to appreciate the scheme of the Act and in particular that of Section 6(5) of the Act, which has been enacted to counter the negative effects of long term detention of the juveniles in jail. The courts below have thus committed a patent error of law by not allowing the benefit of Section 6(5) of the Act to the petitioner, when the delay in completion of the trial was not attributable to any act or omission or of any other person acting on his behalf. The petition is therefore converted into appeal and the same is allowed. The impugned order is set aside and the application for post arrest bail of the petitioner is accepted under Section 6(5) of the Act on the ground of delay in completion of the trial exceeding a period of six months since the date of his arrest in the case. The petitioner is admitted to post arrest bail subject to his furnishing bail bond in the sum of Rs.500,000/- with two sureties in the like amount to the satisfaction of the trial court. The trial court shall conclude the trial of the petitioner expeditiously as undertaken by it in the report submitted to this Court.

MWA/K-13/SC Bail granted.

**P L D 2022 Supreme Court 562**

**Present: Umar Ata Bandial, C.J., Syed Mansoor Ali Shah and Mrs. Ayesha A. Malik, JJ**

Civil Petition No. 620 of 2021

(Against the judgment of High Court of Sindh, Karachi, dated 08.1.2021, passed in C.P. No.D-4519 of 2019).

Civil Petition No. 444 of 2022.

(Against the judgment of High Court of Sindh, Karachi, dated 08.1.2021, passed in C.P No.D-91 of 2022).

**ABBAS HAIDER NAQVI and another---Petitioners**

**Versus**

**FEDERATION OF PAKISTAN and others (in both cases)---Respondents**

Civil Petitions Nos. 620 of 2021 and 444 of 2022, decided on 25th May, 2022.

**(a) Criminal Procedure Code (V of 1898)---**

----S. 265-K---Power of court to acquit accused at any stage---Scope of Section 265-K, Cr.P.C. stated.

When the trial is near completion, the fate of the case should not ordinarily be decided under section 265-K of the Cr.P.C. There may however be such exceptional circumstances which may justify departure from the said rule, as there is hardly any rule of practice which does not admit exception(s). Even otherwise, section 265-K of the Cr.P.C. provides that the trial court can make an order of acquittal at any stage of the case, and such stage may be an initial stage of the case on taking cognizance before recording of the prosecution evidence, or it may be a later stage of the case after recording of some evidence of the prosecution. No absolute bar, in derogation of the law, can therefore be put on the statutory power of the trial court to entertain an application under section 265-K, Cr.P.C. and decide upon its merits at a later stage of the trial if the exceptional circumstances of the case call for so doing to prevent the abuse of the process of court or to secure the ends of justice.

Yaqub Ali v. State 1981 PCr.LJ 542; Subjally v. Hamid 1999 MLD 1645; State v. Ashiq Bhutto 1993 SCMR 523; Badar-Ud-Din v. Ahmad Raza PLD 1993 SC 399; Muhammad Sharif v. State PLD 1999 SC 1063 and State v. Asif Ali Zardari 1994 SCMR 798 ref.

Ordinarily, an accused, who invokes section 265-K, Cr.P.C. for his acquittal, pleads that there is no probability of his being convicted of any offence in the case on any of the following four grounds: (i) that even if the facts alleged by the prosecution are taken to be true on their face value, they do not make out/constitute the commission of any offence by the accused; (ii) that there is no evidence or incriminating material on record of the case in support of the commission of the alleged offence by the accused; (iii) that the evidence or incriminating material collected during investigation in support of the commission of the alleged offence and proposed to be produced during trial is insufficient and, even if recorded, will not sustain conviction of the accused, of any offence in the case; and (iv) that the prosecution evidence so far recorded does not make out a case for conviction of the accused, of any offence in the case and the remaining prosecution evidence, even if recorded, will not improve the prosecution case against the accused in any manner. It is this fourth ground that attracts the application of the rule of practice and priority that when the trial is near completion, the fate of the case should not ordinarily be decided under section 265-K of the Cr.P.C., and, that too, when the trial is near completion, that is, when almost the whole of the prosecution evidence has been recorded. The wisdom behind the rule is that the appraisal of almost the whole prosecution evidence, when the trial is near completion, for deciding the application under Section 265-K, Cr.P.C. amounts to prejudging the case before the final judgment which not only reduces the sanctity and strength of the final judgment, but may also prejudice the case of the other accused, if any, undergoing trial. Any such exercise does not, therefore, serve the ends of justice. This rule thus has no relevancy or application to the first three grounds, which do not involve the appraisal of the prosecution evidence recorded during trial.

Muhammad Ashraf v. State 1990 PCr.LJ 347; Muhammad Taqi v. State 1991 PCr.LJ 963; Yasin Khan v. State 1995 PCr.LJ 142; Abdul Sattar v. State 1992 PCr.LJ 2054; Muhammad Sharif v. Muhammad

Hussain 1993 PCr.LJ 2053; Ghafooran v. Muhammad Bashir 1977 SCMR 292; Ghulam Habib v. State 1980 PCr.LJ 754; Sheroo Khan v. Kaloo Khan 1992 PCr.LJ 110; Muhammad Sharif v. State PLD 1999 SC 1063; State v. Asif Ali Zardari 1994 SCMR 798 and Din Muhammad v. Muhammad Sharif 1979 PCr.LJ 59 ref.

**(b) Penal Code (XLV of 1860)---**

----S. 405---Criminal breach of trust---Entrustment of property---Scope of Section 405, P.P.C. stated.

Although the "entrustment" of property within the meaning of section 405, P.P.C. does not envisage the creation of a formal trust with all the technicalities of the law of trust, it does contemplate that to constitute entrustment the accused must have held the property in a fiduciary capacity. The word "trust" has been used in section 405 in the ordinary sense of that word, and covers not only the relationship of trustee and beneficiary but also that of bailer and bailee, master and servant, pledger and pledgee, guardian and ward, and all other relations that postulate the existence of a fiduciary relationship between the complainant and the accused. The entrustment of property implies that the ownership of the entrusted property vests in a person other than the one who is entrusted with it. If the property belongs to and is owned by the accused in his own right, it cannot be said that he was entrusted with that property and that by using or disposing of that property he committed the offence of criminal breach of trust. "Entrustment" is an essential ingredient of the offence of criminal breach of trust as defined in section 405, P.P.C.; therefore, where there is no entrustment of property, there can be no criminal breach of trust.

State v. Jage Ram AIR 1951 Punj. 103 ref.

**(c) Penal Code (XLV of 1860)---**

----S. 405---National Accountability Ordinance (XVIII of 1999), Ss. 9(a)(x) & 9(a)(xi)---Criminal breach of trust---Corruption and corrupt practices---In a case where the primary offence of criminal breach of trust under section 405, P.P.C. is not made out, the charge for the offences under section 9(a)(x) & (xi) of the National Accountability Ordinance, 1999 cannot sustain.

Hashmat Ullah v. State 2019 SCMR 1730; Rafiq Haji v. Chairman, NAB 2015 SCMR 1575 and Shahid Imran v. State 2011 SCMR 1614 ref.

**(d) Constitution of Pakistan---**

----Art. 18---Regulation of trade---Scope---In a welfare State, the legislature enacts laws in public interest for the regulation of some trades or businesses by statutory bodies or Government functionaries---Such regulation may involve obtaining of licenses and permits to conduct a certain trade or business; impose reasonable terms and conditions as to how that trade or business is to be conducted; and control the production, distribution and consumption of any commodity during the conduct of that trade or business---Control on the production, distribution and consumption of some commodity, however, does not affect any change in the legal relationship between the contracting parties, nor does it alter the legal character, substance and consequence of the commercial transactions---Such regulation does not change the private nature of the trade or business.

Ghasiram v. State AIR 1967 Cal 568 ref.

Makhdoom Ali Khan, Senior Advocate Supreme Court for Petitioners (in both cases).

Sattar Awan, Spl. Prosecutor NAB for NAB.

Nemo for the Federation.

Date of hearing: 25th May, 2022.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**This judgment decides both the above-captioned petitions as they arise out of the same NAB Reference No. 16 of 2018.

2. Briefly stated, as per the NAB Reference the allegation against Abbas Haider Naqvi and Yasser ul Haq Effendi ("Petitioners"), who are the employees of Shell Pakistan Limited ("SPL"), is that they, in connivance with the other co-accused who are the CEO and Directors of Aerolube Pakistan Limited ("APL"), illegally sold the aviation fuel, also called Jet Propulsion ("JP-I"), as Super Kerosene Oil ("SKO")

in the open market instead of supplying the same to aviation customers only, during the years 2013-2016. And thereby they caused a loss of Rs.2.37 billion to the public exchequer, as certain duties/taxes did not

apply to the sale of JP-I but were levied on the sale of SKO. The NAB Reference states that by doing the said act, the Petitioners and their co-accused persons committed the offence of corruption and corrupt practices as defined under Section 9(a)(x)(xi)&(xii), and punishable under Section 10 of the National Accountability Ordinance 1999 ("NAB Ordinance").

C.P. No. 620 of 2021

3. The Petitioners seek, through this petition, leave to appeal against the order dated 08.01.2021 passed by the High Court of Sindh, dismissing their constitutional petition filed under Article 199 of the Constitution of the Islamic Republic of Pakistan 1973 ("Constitution") against the order of the Accountability Court, dated 15.04.2019, whereby the Accountability Court had dismissed their application under Section 265-K of the Code of Criminal Procedure, 1898 ("Cr.P.C.").

4. The Petitioners, in their application under Section 265-K, Cr.P.C., prayed for acquittal mainly on the grounds that no offence cognizable under the NAB Ordinance, 1999 is made out against them, that the matter complained of does not spell out any offence, that the allegation levelled against them relates to an activity regulated under the Oil and Gas Regulatory Authority Ordinance, 2002 ("OGRA Ordinance") and thus falls within the exclusive domain of the Oil and Gas Regulatory Authority ("OGRA"), and that there is no probability of their conviction of any offence under the NAB Reference.

5. The Accountability Court dismissed their application, with the observations that the act of the Petitioners as alleged in the NAB Reference constitutes the offence as defined under Section 9 of the NAB Ordinance, that the recording of the prosecution evidence is underway and the evaluation of the evidence collected by the Investigating Officer at this stage may prejudice the case of either side, and that the object and purpose of the NAB Ordinance and the OGRA Ordinance are different, therefore, the contention that the OGRA Ordinance has an overriding effect does not have any substance.

6. The High Court dismissed the constitutional petition of the Petitioners and maintained the order of the Accountability Court, with the reasons that the contention of the Petitioners that no offence punishable under the NAB Ordinance is made out, can only be decided after deep appreciation of the prosecution evidence which is not permissible under the constitutional jurisdiction, that the trial of the Petitioners is near completion and expressing an opinion on merits of the case at this stage would prejudice the case of the parties and defeat the ends of justice, and that the proceedings against the Petitioners under the NAB Ordinance and the imposition of fine-penalty on SPL[1], the employer-company of the Petitioners, under the OGRA Ordinance do not attract the protection against double jeopardy guaranteed by Article 13 of the Constitution and Section 403 of the Cr.P.C. Hence, the present petition is for leave to appeal.

C.P. No. 444 of 2022

7. Through this petition, the Petitioners seek leave to appeal against the order dated 11.02.2022 passed by the High Court of Sindh, dismissing their constitutional petition filed under Article 199 of the Constitution against the order of the Accountability Court, dated 27.11.2021, whereby the Accountability Court had dismissed their application for transfer of the case to the Court of Special Judge (Customs and Taxation).

8. The Petitioners, in their application, prayed for transfer of their case from the Accountability Court to the Court of Special Judge (Customs and Taxation) on the ground that the allegation made in the NAB Reference relates to the alleged evasion of petroleum levy and sale tax payable on the sale of SKO, which falls within the domain of the Court of Special Judge (Customs and Taxation). The Petitioners relied, in this regard, on the amendments made in the NAB Ordinance by the NAB (Second and Third Amendments) Ordinances 2021, under which substituted Section 4(2)(a) of the NAB Ordinance provides that the provisions of the NAB Ordinance shall not be applicable to all the matters pertaining to federal, provincial or local taxation, other levies or imposts, including refunds, or loss of exchequer pertaining to taxation, and substituted Section 4(3) of the NAB Ordinance provides that all pending inquiries, investigations, trials

or proceedings under the NAB Ordinance relating to such matters shall stand transferred to the concerned authorities, departments and Courts under the respective laws.

9. The Accountability Court dismissed the said application, with the observation that the allegation against the Petitioners of illegal sale of the JP-I in the open market, does not fall within the ambit of substituted Section 4(2)(a) and Section 4(3) of the NAB Ordinance. The High Court maintained the order of the Accountability Court and dismissed the constitutional petition of the Petitioners, with the reason that the Petitioners by their alleged act of illegally selling the JP-I in the open market committed the breach of trust which is an offence under Section 9(a)(x)&(xi) of the NAB Ordinance, and that the case is not of tax evasion, in essence. Hence, this petition is for leave to appeal.

10. We have heard the arguments of the learned counsel for the parties and perused the record of the case with their able assistance.

11. First of all, we would like to state that there can be no cavil to the rule of practice and propriety, referred to by the High Court, that when the trial is near completion, the fate of the case should not ordinarily be decided under Section 265-K of the Cr.P.C.[2] There may however be such exceptional circumstances which may justify departure from the said rule, as there is hardly any rule of practice which does not admit exception(s). Even otherwise, Section 265-K of the Cr.P.C. provides that the trial court can make an order of acquittal at any stage of the case, and such stage may be an initial stage of the case on taking cognizance before recording of the prosecution evidence,[3] or it may be a later stage of the case after recording of some evidence of the prosecution.[4] No absolute bar, in derogation of the law, can therefore be put on the statutory power of the trial court to entertain an application under Section 265-K, Cr.P.C. and decide upon its merits at a later stage of the trial if the exceptional circumstances of the case call for so doing to prevent the abuse of the process of court or to secure the ends of justice. The High Court has, however, failed to appreciate that the said rule has no application to a ground pleaded by an accused for his acquittal under Section 265-K of the Cr.P.C., which does not require appraisal of the prosecution evidence recorded during trial, such as, the ground pleaded by the Petitioners in the present case.

12. Ordinarily, an accused, who invokes Section 265-K[5] Cr.P.C. for his acquittal, pleads that there is no probability of his being convicted of any offence in the case on any of the following four grounds: (i) that even if the facts alleged by the prosecution are taken to be true on their face value, they do not make out/constitute the commission of any offence by the accused;[6] (ii) that there is no evidence or incriminating material on record of the case in support of the commission of the alleged offence by the accused;[7] (iii) that the evidence or incriminating material collected during investigation in support of the commission of the alleged offence and proposed to be produced during trial is insufficient and, even if recorded, will not sustain conviction of the accused, of any offence in the case;[8] and (iv) that the prosecution evidence so far recorded does not make out a case for conviction of the accused, of any offence in the case and the remaining prosecution evidence, even if recorded, will not improve the prosecution case against the accused in any manner.[9] It is this fourth ground that attracts the application of the rule of practice and priority referred to by the High Court and, that too, when the trial is near completion, that is, when almost the whole of the prosecution evidence has been recorded. The wisdom behind the rule is that the appraisal of almost the whole prosecution evidence, when the trial is near completion, for deciding the application under Section 265-K, Cr.P.C. amounts to prejudging the case before the final judgment which not only reduces the sanctity and strength of the final judgment, but may also prejudice the case of the other accused, if any, undergoing trial. Any such exercise does not, therefore, serve the ends of justice. This rule thus has no relevancy or application to the first three grounds, which do not involve the appraisal of the prosecution evidence recorded during trial.

13. In the present case, the Petitioners have pleaded ground (i) for maintaining their application under Section 265-K of the Cr.P.C. They have argued that the matter complained of does not make out any cognizable offence under the NAB Ordinance, 1999, even if the alleged facts are taken to be correct on their face value. The trial court, i.e., the Accountability Court, and the High Court have rejected this ground with the findings that the Petitioners' alleged act of illegally selling JP-I in the open market constitutes the

commission of a criminal breach of trust which is an offence under Section 9(x) and (xi) of the NAB Ordinance. The Petitioners have impugned before us these findings, contending that the same are not legally correct.

14. We, therefore, proceed to examine the legality of the said findings of the Accountability Court and the High Court. For this purpose, we reproduce here the provisions of Section 9(a)(x) and (xi) of the NAB Ordinance:

> 9 Corruption and corrupt practices: (a) A holder of a public office, or any other person, is said to commit or to have committed the offence of corruption and corrupt practices-
>
> (x) if he commits the offence of criminal breach of trust as defined in section 405 of the Pakistan Penal Code, 1860 (Act XLV of 1860) with regard to any property including money or valuable security entrusted to him by members of the public at large;
>
> (xi) if he, in his capacity as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust as provided in section 409 of the Pakistan Penal Code, 1860 (Act XLV of 1860) in respect of property entrusted to him or over which he has dominion;
>
> (Emphasis added)

The above provisions of the NAB Ordinance refer to Sections 405 and 409 of the Pakistan Penal Code 1860 ("P.P.C."); therefore, the provisions of these Sections of the P.P.C. are also cited here for ease of reference:

> 405. Criminal breach of trust: Whoever, being in any manner entrusted with property or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".
>
> 409. Criminal breach of trust by public servant, or by banker, merchant or agent: Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
>
> (Emphasis added)

The bare reading of Section 9(a)(x) of the NAB Ordinance shows that it applies only to the commission of the offence of criminal breach of trust with regard to a property entrusted to the accused by members of the public at large, while Section 9(a)(xi) of the NAB Ordinance relates to the commission of the offence of criminal breach of trust in respect of a property which was entrusted to the accused in his capacity as a banker, merchant, factor, broker, attorney or agent.

15. In the present matter, it is not the case of the prosecution (NAB) that JP-I, allegedly sold by the Petitioners in the open market illegally, was entrusted to them or their employer-company, SPL, by members of the public at large or entrusted to SPL by the Oil Refinery Companies in the capacity as a banker, merchant, factor, broker, attorney or agent. There was no "entrustment" of property (i.e., JP-I) in the present case at all that could have made the case against the Petitioners fall within the scope of the provisions of Section 405, P.P.C. and consequently constituted an offence under Section 9(a)(x)&(xi) of the NAB Ordinance.

16. Although the "entrustment" of property within the meaning of Section 405, P.P.C. does not envisage the creation of a formal trust with all the technicalities of the law of trust, it does contemplate that to constitute entrustment the accused must have held the property in a fiduciary capacity. The word "trust" has been used in Section 405 in the ordinary sense of that word, and covers not only the relationship of trustee and beneficiary but also that of bailer and bailee, master and servant, pledger and pledgee, guardian and ward, and all other relations that postulate the existence of a fiduciary relationship between the

complainant and the accused.[10] The entrustment of property implies that the ownership of the entrusted property vests in a person other than the one who is entrusted with it. If the property belongs to and is owned by the accused in his own right, it cannot be said that he was entrusted with that property and that by using or disposing of that property he committed the offence of criminal breach of trust. "Entrustment" is an essential ingredient of the offence of criminal breach of trust as defined in Section 405, P.P.C.; therefore, where there is no entrustment of property, there can be no criminal breach of trust.

17. In the present case, SPL, the employer-company of the Petitioners, purchased JP-I from the Oil Refinery Companies, in its own right. The Oil Refinery Companies had not entrusted SPL with JP-I in its capacity of their banker, merchant, factor, broker, attorney or agent. Having purchased JP-I from the Oil Refinery Companies, SPL had become the owner thereof and there was no entrustment. Thus the act of selling JP-I owned by their employer-company, SPL, in the open market by the Petitioners, even if accepted to be true, does not constitute the offence either under Section 405 or under 409 of the P.P.C. When the primary offence of criminal breach of trust under section 405, P.P.C. is not made out, the charge for the offences under Section 9(a)(x)&(xi) of the NAB Ordinance cannot sustain.[11]

18. The prosecution (NAB) has, however, in disregard of the scope and extent of Sections 405 and 409 of the P.P.C., based its case against the Petitioners on the minutes of a Product Review Meeting, dated 04.08.2010, wherein the Director (L&M) of the Ministry of Petroleum and Natural Resources, Government of Pakistan, which reiterated the "directives/priority of JP-I supplies" and instructed the Oil Marketing Companies (which include SPL) to follow that "directives/ priority" and to make the supply of JP-I to Defence, local carriers (PIA, Shaheen, etc) and scheduled carriers. The Accountability Court and the High Court have also relied on the same. The prosecution (NAB) has referred to Rule 43C of the Pakistan Petroleum (Refining, Blending and Marketing) Rules 1971 ("1971 Rule"). This Rule provides that the Authority may, if it is of the opinion that public interest so requires, by order in writing, direct any refinery, marketing company or its agent or dealer, or a blending plant (or reclamation plant) to supply such quantity of any petroleum product to such person as may be specified in the order. As per Rule 2(b) of the 1971 Rules, the "Authority" referred to in Rule 43C means the Director General of Oil, and not the Director (L&M). As the Director (L&M) is mentioned to have reiterated the "directives/priority of JP-I supplies", in the minutes of a Product Review Meeting, dated 04.08.2010, and not to have issued the said "directives/priority" by himself, any such "directives/priority" issued by the Director General (Oil), is neither available on the record of the case nor has it been otherwise produced before us. Irrespective of the said "directives/ priority", if any, it will not make the case against the Petitioners to fall within the definition of the offence of criminal breach of trust under Sections 405 and 409 of the P.P.C., or of the offence of corruption and corrupt practices under Section 9(a)(x)&(xi) of the NAB Ordinance. Any such directives have no bearing on the transfer of ownership of the sold JP-I from the seller (Oil Refinery Companies) to the purchaser (SPL) and does not make the contract of sale, a contract of trust. A violation of such directive, if any, may entail some other legal consequences, but cannot constitute an offence of criminal breach of trust under Section 405 of the P.P.C.

19. In a welfare State, the legislature enacts laws in public interest for the regulation of some trades or businesses by statutory bodies or Government functionaries.[12] Such regulation may involve obtaining of licenses and permits to conduct a certain trade or business; impose reasonable terms and conditions as to how that trade or business is to be conducted; and control the production, distribution and consumption of any commodity during the conduct of that trade or business. The control on the production, distribution and consumption of some commodity, however, does not affect any change in the legal relationship between the contracting parties, nor does it alter the legal character, substance and consequence of the commercial transactions.[13] Such regulation does not change the private nature of the trade or business.

20. No offence under Section 9(a)(x)&(xi) of the NAB Ordinance is thus made out of the Petitioners' alleged act of illegally selling JP-I in the open market, even if the same is taken to be true on its face value. The findings of the Accountability Court and the High Court, having been made without examining the

essential ingredients of the offence under Sections 405 and 409 of the P.P.C. and of the offence under Section 9(a)(x)&(xi) of the NAB Ordinance, are found legally incorrect.

21. Since no offence under Section 9(a)(x)&(xi) or any other part of that Section of the NAB Ordinance is made out of the facts alleged in the NAB Reference against the Petitioners, there is no probability of their conviction for any offence in the NAB Reference. The Accountability Court had legally erred in dismissing the application of the Petitioners under Section 265-K of the Cr.P.C. and the High Court wrongly declined to correct that legal error in the exercise of its constitutional jurisdiction under Article 199 of the Constitution. We, therefore, convert Civil Petition No.620 of 2021 into appeal and allow the same. The impugned order of the High Court is set aside and the constitutional petition of the Petitioners is allowed: while setting aside the order of the Accountability Court and accepting the application of the Petitioners under Section 265- K, they are acquitted of the charge in NAB Reference No. 16 of 2018.

22. The Petitioners have prayed also for quashment of the NAB Reference in their constitutional petition before the High Court, in addition to challenging the order of the Accountability Court passed on their application under Section 265-K of the Cr.P.C. We have found that no offence cognizable by the NAB and triable by the Accountability Court under the NAB Ordinance is involved in the present case. In this background, Civil Petition No.620/2021 is converted into appeal and allowed. Resultantly, the proceedings pending before the Accountability Court in NAB Reference No.16 of 2018, are hereby quashed being without jurisdiction.

23. Alleged violation of "directives/priority", if any, may entail its own consequences and having quashed the proceedings of NAB Reference No.16 of 2018, the Civil Petition No.444 of 2022 has become infructuous and is therefore disposed of accordingly.

MWA/A-25/SC Order accordingly.

**P L D 2022 Supreme Court 675**

**Present: Syed Mansoor Ali Shah, J**

**QAUSAIN FAISAL---Appellant**

**Versus**

**FEDERATION OF PAKISTAN through Secretary,Ministry of Interior and others---Respondents**

C. M. Appeal No. 87 of 2022 in Const. Petition No. Nil of 2022, decided on 18th July, 2022.

(Against the order dated 06.07.2022 of the Registrar, declining to register the Constitution Petition of the Appellant).

**Supreme Court Rules, 1980---**

----O.III, R. 10(a), O. V, R.1(6) & O.VII, R. 7---Constitution of Pakistan, Art. 184(3)---Constitutional petition under Article 184(3) filed before the Supreme Court---Maintainability, question of---Registrar (Supreme Court), powers of---No provision in the Supreme Court Rules, 1980 empowered the Registrar to touch upon the maintainability of a constitutional petition filed under Article 184(3) of the Constitution, other than ensuring its proper form and presentation as per the practice and procedure of the Court provided in the Rules---Maintainability and the merits of a petition were justiciable issues, and fell within the domain of the Court.

Under the Supreme Court Rules, 1980 ('the Rules'), the Registrar of the Supreme Court is to perform certain functions that are mostly administrative and ministerial in nature. In performing the administrative function of "registration of petitions, appeals, suits and other matters" under Rule 1(6) of Order V of the Rules, the Registrar has been conferred: (i) the power under Rule 10(a) of Order III "to require any plaint, petition of appeal, petition for leave to appeal or other matters" presented to the Court, to be amended in accordance with the practice and procedure of the Court, and (ii) the power under Rule 7 of Order VII to "decline to receive any document" which is presented otherwise than in accordance with the Rules. The powers of the Registrar under Rule 10 of Order III along with Rule 7 of Order VII of the Rules are purely administrative in character, which allow him to enforce the practice and procedure of the Court in relation to presentation of cases and ensure that the form of the pleadings and the documents filed therewith is as per the Rules. The justiciability of the legal and factual questions raised in the petitions is a matter for the Court to deal with and decide upon. Registrar enjoying administrative powers under the Rules cannot assume the core adjudicatory role of the Court under the Constitution. There is no provision in the Rules that empowers the Registrar to touch upon the maintainability of a petition, other than ensuring its proper form and presentation as per the practice and procedure of the Court provided in the Rules. The maintainability and the merits of a petition are justiciable issues, and fall within the domain of the Court.

Farman Ali v. Muhammad Ishaq PLD 2013 SC 392 and P. Surendran v. State 2019 SCC Online SC 507 ref.

Certain miscellaneous matters, that are also essentially procedural in character, regarding which the Registrar can exercise the powers of the Court are listed in Rule 1 of Order V of the Rules, but the matters listed there (sub-rules 1 to 31) do not authorize the Registrar to decide upon the maintainability of a constitution petition filed under Article 184(3) of the Constitution. Objections raised by the Registrar, which touch upon the questions of maintainability and merits of the case, can only be examined by the Court through a judicial determination and not by the Registrar or a Judge hearing an appeal-in-chambers, against the order of the Registrar, on the administrative side.

Hassan Raza Pasha, Advocate Supreme Court for Appellant.

Nemo for Respondents.

Date of hearing: 18th July, 2022.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**Through this appeal under Order V, Rule 3 of the Supreme Court Rules, 1980 ("Rules"), the appellant has challenged the order of the Registrar of this Court, dated 06.7.2022, whereby the constitution petition filed by the appellant under Article 184(3) of the Constitution of the Islamic Republic

of Pakistan, 1973 ("Constitution") has not been entertained and registered by the Registrar on the following grounds:

a. That the petitioner is invoking the extraordinary jurisdiction of the Supreme Court under Article 184(3) of the Constitution for the redressal of an individual grievance, which is not permissible in terms of judgment reported as 1998 SCMR 793 titled as "Zulfiqar Mehdi v. PIA, etc."

b. That notice issued to the respondent is not properly drawn as it is neither mentioned therein that for what purpose this Constitution Petition is being filed before this Court nor copy of petition has been provided to the respondent.

c. That the petitioner has not pointed out as to what questions of public importance in the instant case are involved with reference to enforcement of any of the Fundamental Rights guaranteed under the Constitution, so as to directly invoke jurisdiction of the Supreme Court under Article 184(3) of the Constitution.

d. That the petitioner has not approached any other appropriate forum available under the law for the same relief and has also not provided any justification for not doing so.

e. That ingredients for invoking extra ordinary jurisdiction of this Court under Article 184(3) of the Constitution have not been satisfied.

f. That the certificate provided at page 32 of this Constitution Petition does not fulfill the requirements of Rule 6 of Order XXV of the Supreme Court Rules, 1980. Moreover, the same contains over writing/cuttings.

2. I have heard the learned counsel for the appellant and have carefully examined the impugned order and the Rules. Under the Rules, the Registrar is to perform certain functions that are mostly administrative and ministerial in nature. In performing the administrative function of "registration of petitions, appeals, suits and other matters" under Rule 1(6) of Order V of the Rules, the Registrar has been conferred: (i) the power under Rule 10(a) of Order III "to require any plaint, petition of appeal, petition for leave to appeal or other matters" presented to the Court, to be amended in accordance with the practice and procedure of the Court, and (ii) the power under Rule 7 of Order VII to "decline to receive any document" which is presented otherwise than in accordance with the Rules. It is in exercise of these powers that the Registrar has made the impugned order. The powers of the Registrar under Rule 10 of Order III along with Rule 7 of Order VII of the Rules are purely administrative in character, which allow him to enforce the practice and procedure of the Court in relation to presentation of cases and ensure that the form of the pleadings and the documents filed therewith is as per the Rules. The justiciability of the legal and factual questions raised in the petitions is a matter for the Court to deal with and decide upon. Registrar enjoying administrative powers under the Rules cannot assume the core adjudicatory role of the Court under the Constitution of the Islamic Republic of Pakistan, 1973. There is no provision in the Rules that empowers the Registrar to touch upon the maintainability of a petition, other than ensuring its proper form and presentation as per the practice and procedure of the Court provided in the Rules. The maintainability and the merits of a petition are justiciable issues, and fall within the domain of the Court.[1]

3. Certain miscellaneous matters, that are also essentially procedural in character, regarding which the Registrar can exercise the powers of the Court are listed in Rule 1 of Order V of the Rules, but the matters listed there (sub-rules (1) to (31) do not authorize the Registrar to decide upon the maintainability of a constitution petition filed under Article 184(3) of the Constitution. Therefore, grounds/objections (a), (c), (d) and (e) of the impugned order of the Registrar, which touch upon the questions of maintainability and merits of the case, can only be examined by the Court through a judicial determination and not by the Registrar or a Judge hearing an appeal-in-chambers, like the present one against the order of the Registrar, on the administrative side. Such an exercise of power by the Registrar falls outside his domain under the Rules. Grounds (a), (c), (d) and (e) of the impugned Order of the Registrar are, therefore, overruled. They may be determined by the Court on the judicial side. As far as grounds (b) and (f) are concerned, they fall within the administrative powers exercised by the Registrar and are found justified, therefore sustained. The appellant shall meet these objections, to the satisfaction of the Registrar, within two weeks. Once the needful is done, the office shall register the constitution petition of the appellant and fix it before an appropriate Bench on the judicial side. The appeal is partly allowed in these terms. MWA/Q-2/SC Order accordingly.

**P L D 2022 Supreme Court 686**

**Present: Umar Ata Bandial, Sajjad Ali Shah and Syed Mansoor Ali Shah, JJ**

**HASEEN ULLAH---Petitioner**

**Versus**

**Mst. NAHEED BEGUM and others---Respondents**

Civil Petition No. 1289 of 2020, decided on 23rd November, 2021.

(Against the orders of Peshawar High Court, Peshawar dated 09.03.2020 passed in W.P. No.3215-P of 2018)

**(a) Family Courts Act (XXXV of 1964)---**

----S. 5, Sched.---Muslim Family Laws Ordinance (VIII of 1961), Ss.9 & 10---Dower (mehr)---Entries in columns Nos.13 and 16 of the Nikahnama---Entries in said columns are to be interpreted on the basis of the intention between the parties rather than the headings of the columns, in particular when there is a dispute between the value of the dower and items.

Respondent (wife) instituted a suit in the Family Court wherein amongst other things she sought recovery of her dower i.e. agriculture land (mentioned in column No. 16 of her Nikahnama). Family Court observed that the dower mentioned in column No.16 of the Nikahnama was payable only if the dower specified in column No.13 i.e. seven tolas of gold worth Rs. 1,60,000/- had not been paid, and as the respondent admitted to have received the dower of seven tola gold ornaments specified in column No.13, she was not entitled to claim the dower mentioned in column No.16 of the Nikahnama. The District Court, in appeal, endorsed this finding with the observation that agriculture land mentioned in column No.16 was to be given only in lieu of seven tola gold ornaments specified as dower in column No.13 of the Nikahnama, which the respondent had admittedly received. The High Court held that the facts and circumstances of the case clearly showed that the dower mentioned in column No.16 was in addition to, not in lieu of, the one specified in column No.13 of the Nikahnama.

Family Court and District Court acted on what the heading of column 16 prima facie suggested, i.e., the mentioning of any property that is given "in lieu of the whole or any portion of the dower", without ascertaining the intent of the parties. This approach of the said Courts is not in consonance with the settled principles of construction of contracts. Nikahnama is a deed of marriage-contract entered into between the parties, husband and wife, and the contents of its clauses/columns, like clauses of other contracts, are to be construed and interpreted in the light of intention of parties. The High Court rightly ascertained the intent of the parties for mentioning four Kanal agriculture land in column No.16 of the Nikahnama, irrespective of its placement in a particular column.It is a matter of common knowledge that the persons who solemnize Nikah or the Nikah Registrars are mostly laymen, not well-versed of legal complications that may arise from mentioning certain terms agreed to between the parties in any particular column of the Nikahnama. Therefore, it becomes the foremost duty of courts dealing with disputes arising out of the terms entered in the Nikahnama, to ascertain the true intent of the parties and give effect thereto accordingly, and not be limited and restricted by the form of the heading of the particular columns wherein those terms are mentioned.

Abdul Haq v. WAPDA 1991 SCMR 1436; HBFC v. Shahinshah Humayun 1992 SCMR 19 and Sandoz Limited v. Federation 1995 SCMR 1431 ref.

The figures (1) and (2) mentioned in columns Nos.13 and 16 respectively leave little room to guess what the true intention of the parties was; they clearly show that both (1) seven tola gold ornaments mentioned as dower in column No.13 and (2) four Kanal agriculture land mentioned in column No.16 were the dower. The figures (1) and (2) need not be mentioned if only one of them was to be payable as dower. Further, seven tola gold ornaments and four Kanal agriculture land have no parity of value to be agreed as an alternate of each other. Petition for leave to appeal filed by husband was dismissed with costs throughout.

Asma Ali v. Masood Sajjad PLD 2011 SC 221 and Yasmeen Bibi v. Ghazanfar Khan PLD 2016 SC 613 ref.

**(b) Family Courts Act (XXXV of 1964)---**

----S. 5, Sched.---Maintenance of wife---Obligation of husband---Under Islamic law a wife's right to be maintained by her husband is absolute so long as she remains faithful to him and discharges, or is willing to discharge, her own matrimonial obligations---Muslim husband is bound to maintain his wife even if no term in

this regard is agreed to between them at the time of marriage or she can maintain herself out of her own resources---Wife who is willing to, but cannot, discharge her marital obligations for no fault of her own, rather is prevented to do so by any act or omission of her husband is legally entitled to receive her due maintenance from her husband, and the latter cannot benefit from his own wrong.

Azizah Mohd, et al., Muslim Wifes Rights To Maintenance: Husbands Duty To Maintain A Working Wife In Islamic Law (2010) 18 IIUMLJ 103; Al-Quran, Chapter 4 verses 34; Imam Muslim, Sahih Muslim, Translation by Abdal Hamid Saddiqi, Kitab al-Haj, Vol. II, pp. 615-616 and Al-Mubarakpuri, Tuhfat al-Ahwadhi bi Sharh Jamia Altarmidhi, Second Edition, Vol. 4, Maktabat al-Salafiyyah, Medina (1965), p. 326 ref.

**(c) Family Courts Act (XXXV of 1964)---**

----S. 5, Sched.---Dower, payment of---Obligation of husband---In Islam, the payment of dower to bride at marriage is an obligation that is imposed by Allah Almighty, and is thus an intrinsic and integral part of a Muslim marriage---Dower is considered an obligatory bridal gift offered by the bridegroom to the bride graciously as a manifestation of his love and respect for her---Some Muslim men compliment the obligatory bridal gift, dower, with other gifts and presents as per their financial capacity.

Tirkey, S., A critical analysis of dower (mahr) in theory and practice in British India through court records from 1800 to 1939 [Master's Thesis, the American University in Cairo]. AUC Knowledge Fountain (2020). ref.

Attaullah Khan Tangi, Advocate Supreme Court for Petitioner.

Nemo for Respondents.

Date of hearing: 23rd November, 2021.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---"**This is a male-dominated society; men since ages have always been more concerned about their rights by using religion for their own convenience, especially in matrimonial matters, but forget religion when it comes to their duty and obligation towards their women"[1], this seems to hold true in the present case. This case where a husband disputes the payment of maintenance and dower to his wife, provides an occasion to underline the principles, duties and obligations of a husband towards his wife under the Islamic law with regard to maintenance and dower.

2. The respondent, Naheed Begum, instituted a suit, in the Family Court, Tangi Charsadda, for recovery of her dower i.e., 1-Jarab[2] of agriculture land (mentioned in column No. 16 of her Nikahnama) and maintenance for herself and her five minor children (three daughters and two sons) against the petitioner, her husband, who had contracted a second marriage and was living with his second wife. The Family Court decreed the suit to the extent of her claim for maintenance of her minor children, but rejected her claims for recovery of her dower and maintenance. The District Court dismissed her appeal, maintaining the judgment of the Family Court. She then invoked the constitutional jurisdiction of the Peshawar High Court, under Article 199 of the Constitution of Pakistan, for redress of her grievance against the judgments of the Courts below. The High Court allowed her constitution petition, reversed the judgments of the Courts below, and decreed
her claims of dower and maintenance, vide its judgment dated 09.03.2020. It is against this judgment of the High Court that the petitioner, Haseen Ullah, has filed the present petition for leave to appeal.

3. We have heard the learned counsel for the petitioner in detail and with his able assistance, perused the record of the case minutely.

4. The High Court and the Courts below have differed on interpreting the entries of columns Nos. 13 to 16 of the Nikahnama of the parties, which are reproduced hereunder for ready reference:

English translation:

| | | |
|---|---|---|
| 13 | Amount of dower: | 7-tola gold ornaments valuing Rs.1,60,000/- |
| 14 | How much of the dower is mu'ajjal (prompt) and how much is ghair mu'ajjal (deferred): | [blank] |

| | | |
|---|---|---|
| 15 | Whether any portion of the dower was paid at the time of marriage, If so, how much: | Almost [all] |
| 16 | Whether any property was given in lieu of the whole or any portion of the dower, if so, its specification and price agreed to between the parties: | (2) 1-Jarab land in Kashmirabad near Khadi Kalay |

The Family Court observed that the dower mentioned in column No. 16 of the Nikahnama was payable only if the dower specified in column No. 13 had not been paid, and as the respondent admitted to have received the dower of seven tola gold ornaments specified in column No.13, she was not entitled to claim the dower mentioned in column No.16 of the Nikahnama. The District Court, in appeal, endorsed this finding with the observation that four Kanal agriculture land mentioned in column No. 16 was to be given only in lieu of seven tola gold ornaments specified as dower in column No. 13 of the Nikahnama, which the respondent had admittedly received. The High Court has held that the facts and circumstances of the case clearly show that the dower mentioned in column No. 16 was in addition to, not in lieu of, the one specified in column No. 13 of the Nikahnama.

5. We find that the Family Court and District Court have acted on what the heading of column 16 prima facie suggest, i.e., the mentioning of any property that is given "in lieu of the whole or any portion of the dower", without ascertaining the intent of the parties. This approach of the said Courts is not in consonance with the settled principles of construction of contracts. Needless to say that Nikahnama is a deed of marriage-contract entered into between the parties, husband and wife, and the contents of its clauses/ columns, like clauses of other contracts, are to be construed and interpreted in the light of intention of parties.[3] The High Court has rightly ascertained the intent of the parties for mentioning four Kanal agriculture land in column No. 16 of the Nikahnama, irrespective of its placement in a particular column. It is a matter of common knowledge that the persons who solemnize Nikah or the Nikah Registrars are mostly laymen, not well-versed of legal complications that may arise from mentioning certain terms agreed to between the parties in any particular column of the Nikahnama. Therefore, it becomes the foremost duty of courts dealing with disputes arising out of the terms entered in the Nikahnama, to ascertain the true intent of the parties and give effect thereto accordingly, and not be limited and restricted by the form of the heading of the particular columns wherein those terms are mentioned.

6. We, on our own independent appraisal of the facts and circumstances of the case, agree with the finding of the High Court, which is not only supported by the contents of the compromise deed dated 18.12.2012 executed by both the petitioner and the respondent, but also by the contents of the entries of columns Nos. 13 and 16 of the Nikahnama. The figures (1) and (2) mentioned in columns Nos. 13 and 16 respectively leave little room to guess what the true intention of the parties was; they clearly show that both (1) seven tola gold ornaments mentioned as dower in column Nos. 13 and (2) four Kanal agriculture land mentioned in column No. 16 were the dower. The figures (1) and (2) need not be mentioned if only one of them was to be payable as dower. Further, seven tola gold ornaments and four Kanal agriculture land have no parity of value to be agreed as an alternate of each other. Therefore, the finding of the High Court on the issue of dower is perfectly correct and is in consonance with the principles of law enunciated by this Court in the cases of Asma Ali[4] and Yasmeen Bibi.[5]

7. As for the claim of the respondent for her maintenance, the Family Court and the District Court held that since the respondent is not residing with the petitioner she is not entitled to maintenance. The High Court has overturned these findings and held the respondent entitled to receive maintenance from the petitioner, while observing that the respondent showed her willingness to go with the petitioner during hearing the petition, but the petitioner, who had contracted second marriage, flatly refused to take her to his house. We find nothing wrong in the decision of the High Court. A wife who is willing to, but cannot, discharge her marital obligations for no fault of her own, rather is prevented to do so by any act or omission of her husband is legally entitled to receive her due maintenance from her husband, and the latter cannot benefit from his own wrong.

8. As per Section 2 of the West Pakistan Muslim Personal Law (Shariat) Application Act 1962, the questions regarding dower are to be decided, subject to the provisions of any enactment for the time being in force, in accordance with Muslim Personal Law (Shariat) in cases where the parties are Muslims. It hardly needs reiterating that the Holy Quran and the Sunnah of the Prophet of Islam (pbuh) are the primary sources of Muslim Personal Law (Shariat) in Islam. The payment of dower (mahr) at the time of marriage was a customary practice in Arabia before the advent of Islam, but it was paid to the guardians of the bride, such as, her father or other male relative, as bride-price and the bride herself did not receive a penny of it. This practice of paying dower as bride-price to the male guardians of the bride was reformed by the Islam through the Quranic commands[6] of paying dower as the bride-wealth to the bride herself, who becomes the sole owner of it. The Holy Quran also forbids the Believers to take back anything from their wives out of the paid dower even it be a great sum.[7] In Islam, the payment of dower to bride at marriage is an obligation that is imposed by the God Almighty, and is thus an intrinsic and integral part of a Muslim marriage. It is considered an obligatory bridal gift offered by the bridegroom to the bride graciously as a manifestation of his love and respect for her. Some Muslim men compliment the obligatory bridal gift, dower, with other gifts and presents as per their financial capacity.[8]

9. Under the Islamic law a wife's right to be maintained by her husband is absolute so long as she remains faithful to him and discharges, or is willing to discharge, her own matrimonial obligations. A Muslim husband is bound to maintain his wife even if no term in this regard is agreed to between them at the time of marriage or she can maintain herself out of her own resources[9]. The Holy Quran[10] enunciates that men are the protectors and maintainers of women because the God Almighty has given the one more strength than the other and because they support them from their money. And the Holy Prophet of Islam (pbuh) has instructed Muslim men to provide their wives with maintenance in a fitting manner[11] and declared it to be the right of the women[12].

10. We note that the petitioner, instead of paying the maintenance and giving the dower to the respondent willingly and graciously, has been evading his legal as well as moral obligation on one and the other pretext, as he first totally denied to have agreed to, and mentioning in Nikahnama, the term of giving four Kanal agriculture land as dower to the respondent, in his written statement, and later started opposing it with the argument that it was an alternate to be given only if seven tola gold ornaments mentioned in column No. 13 had not been paid. It is regrettable that the petitioner, an educated person who belongs to the noble profession of teaching, does not realize his obligation to pay the dower agreed upon by him at the time of marriage with the respondent, not only under the law of the land but also under the commandments of the God Almighty given in the Holy Quran to persons who proclaim to be Muslim. He has by his such conduct forced his wife to fight for her right to receive her maintenance and dower in four courts, from the Family Court to the Supreme Court. His such conduct is highly deplorable.

11. For the above reasons, we find the present petition baseless and vexatious and therefore dismiss it with costs throughout.

MWA/H-8/SC Petition dismissed.

**P L D 2022 Supreme Court 694**

**Present: Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ**

**MUHAMMAD RAFIQUE---Petitioner**

**Versus**

**The STATE and others---Respondents**

Crl. P. No. 301 of 2022, decided on 22nd June, 2022.

(Against the order of Lahore High Court, Lahore, dated 21.02.2022, passed in Crl. Misc. No.68979-B of 2021).

**(a) Criminal Procedure Code (V of 1898)---**

----S. 497(2)---Bail---Cross-version FIRs---Further inquiry---Scope and meaning of "cross-version" in a bail matter.

Mere existence of a cross-version is not a valid ground for holding the case one of further inquiry to grant bail under Section 497(2), Cr.P.C., unless it is supported by the material available on record of the case and on tentative assessment of that material, the court either finds it prima facie true or remains unable to determine even tentatively which one of the two versions is prima facie true. It is in the latter situation where the court remains unable to determine even tentatively, which one of the parties is aggressor and which one is aggressed upon, that the case against both parties falls within the scope of further inquiry under Section 497(2), Cr.P.C. The determination of "the aggressor and the aggressed upon", whether tentatively at bail stage or finally on conclusion of trial, is relevant to decide culpability of a party for the occurrence as this determination consequently decide which one of the parties was assailant and which one acted in self-defence. When a court cannot decide even tentatively, at bail stage, such culpability of a party on the basis of material on record of the case, it leaves this matter for determination on conclusion of the trial after recording the prosecution evidence and the defence evidence, if produced, and gives the benefit of the requisite further inquiry to both parties by granting them bail under Section 497(2), Cr.P.C. If the courts start considering every case involving a cross-version as one of further inquiry without any tentative assessment of the worth of the cross-version, it can encourage an accused to concoct a false or fabricated cross-version so as to bring his case within the ambit of further inquiry and thereby get bail. That is why the courts are to make a tentative assessment of the material, if any, available on record of the case in support of the cross-version at bail stage and should not readily accept it as a valid ground to treat the case one of further inquiry under Section 497(2), Cr.P.C.

Usman v. State 1975 SCMR 391; Nasir v. State 1992 SCMR 501; Arif v. Amil 2005 SCMR 1402; Hameed v. Zahid 2011 SCMR 606; Liaqat v. State 2013 SCMR 1527 and Abbas v. State 2017 SCMR 1730 ref.

**(b) Criminal Procedure Code (V of 1898)---**

----Ss. 497(5) & 497(2)---Penal Code (XLV of 1860), Ss. 302, 324, 337-F(v), 337-F(i), 337-A(i), 337-A(ii), 341, 148 & 149---Constitution of Pakistan, Art. 185(3)---Murderous assault---Bail, cancellation of---Cross-version prima facie not true---Cross-version pleaded in the present case by the accused and his co-accused was prima facie found not to be true on the basis of the tentative assessment of the material available on record---Cross-version of accused party that the complainant party had abducted the accused was not supported by any cogent material available on record of the case---Accused and his co-accused had gone over to the place of the complainant party and the occurrence had admittedly taken place there---Further, the version of the complainant party was supported by the statements of the injured witnesses and other witnesses recorded under Section 161, Cr.P.C. as well as by the medical evidence and recoveries of the alleged weapons of offence---Tentative assessment of the said and other material available on record of the case prima facie showed that it was the accused party that were the aggressor---Version of the complainant party thus prima facie appeared to be true---Fire shot that proved fatal for the deceased was attributed to the accused and the incriminating material available on record of the case provided reasonable grounds for believing that accused had committed the offence of Qatl-i-amd punishable under section 302, P.P.C., which fell within the prohibitory clause of Section 497(1), and there were no sufficient grounds for further inquiry into his guilt as envisaged by Section 497(2), Cr.P.C.---High Court had erred in law while placing reliance upon the cross-version of the accused party for holding the case against accused to be one of further inquiry, without referring to any material available on

record of the case supporting it---Petition for leave to appeal was converted into appeal and allowed, and bail granted to accused by the High Court was cancelled.

**(c) Criminal Procedure Code (V of 1898)---**

----S. 497(5) ---Constitution of Pakistan, Art. 185(3)---Bail granted by the High Court---Grounds upon which the Supreme Court may set-aside such bail granting order---Although the Supreme Court ordinarily refrains from interfering with bail granting orders of the High Courts, it does not shy away to perform its constitutional obligation to set the matter right for the safe administration of criminal justice when a High Court has made such an order in derogation of some settled principle of law, or when the order is found to be perverse or arbitrary.

Gulzar v. Murtaza PLD 1970 SC 335; Bashiran v. Nisar PLD 1990 SC 83; Riaz v. State 2001 SCMR 1779; Nazir v. Ismail 2004 SCMR 1160; State v. Khalid 2006 SCMR 1265; Ehsan v. State 2007 SCMR 482; Ilyas v. Shahid PLD 2009 SC 146 and Sidra v. State 2020 SCMR 2089 ref.

Mushtaq Ahmad Mohal, Advocate Supreme Court (Video link - Lahore Registry) for Petitioner.

Ch. M. Sarwar Sandhu, Addl. P.G., Shabbir, S.I. for the State.

Rana M. Shahid Mehmood, Advocate Supreme Court along with Respondent No.2 (Muhammad Farooq) (Video link - Lahore Registry).

Date of hearing: 22nd June, 2022.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The petitioner (complainant) seeks leave to appeal against the order dated 21.02.2022 of the Lahore High Court, whereby post arrest bail was granted to respondent No.2 (accused Muhammad Farooq) in case FIR No.498/2020 dated 09.08.2020 registered at Police Station, Saddar Hafizabad, for offences punishable under Sections 302, 324, 337 F(v), 337 F(i), 337-A(i), 337 A(ii), 341, 148 and 149, P.P.C. The petitioner seeks cancellation of the same through the present petition.

2. Briefly stated, as per the crime report the allegation against respondent No.2 is that he along with other co-accused launched a murderous attack on the complainant party by going over to their place, where he made a fire shot which hit Atiq-ur-Rehman on his head and proved fatal. On the other side, respondent No.2 and his co-accused presented a cross-version of the occurrence during investigation that the complainant party had abducted the accused Hussain, and they had gone to the place of the complainant party to rescue him. Though the Police found the cross-version false, the High Court has granted the relief of post arrest bail to respondent No.2 on the basis thereof, with the observation that "it will be determined by the learned trial court after recording of evidence that as to who was aggressor and who was aggressed upon and at present the case of the prosecution against the petitioner is one of further inquiry".

3. We have heard the learned counsel for the parties and examined the record of the case.

4. The well-settled principle of law as to the effect of a cross-version of the occurrence involved in a case, at bail stage, is that mere existence of a cross-version is not a valid ground for holding the case one of further inquiry to grant bail under Section 497(2), Cr.P.C.,[1] unless it is supported by the material available on record of the case and on tentative assessment of that material, the court either finds it prima facie true or remains unable to determine even tentatively which one of the two versions is prima facie true. It is in the latter situation where the court remains unable to determine even tentatively, which one of the parties is aggressor and which one is aggressed upon, that the case against both parties falls within the scope of further inquiry under Section 497(2), Cr.P.C.[2] The determination of "the aggressor and the aggressed upon", whether tentatively at bail stage or finally on conclusion of trial, is relevant to decide culpability of a party for the occurrence as this determination consequently decide which one of the parties was assailant and which one acted in self-defence. When a court cannot decide even tentatively, at bail stage, such culpability of a party on the basis of material on record of the case, it leaves this matter for determination on conclusion of the trial after recording the prosecution evidence and the defence evidence, if produced, and gives the benefit of the requisite further inquiry to both parties by granting them bail under section 497(2), Cr.P.C. If the courts start considering every case involving a cross-version as one of further inquiry without any tentative assessment of the worth of the cross-version, it can encourage an accused to concoct a false or fabricated cross-version so as to bring his case within

the ambit of further inquiry and thereby get bail.[3] That is why the courts are to make a tentative assessment of the material, if any, available on record of the case in support of the cross-version at bail stage and should not readily accept it as a valid ground to treat the case one of further inquiry under Section 497(2), Cr.P.C.

5. The cross-version pleaded in the present case by the accused party (respondent No.2 and his co-accused), when examined in the light of the above principle, is prima facie found not to be true on the basis of the tentative assessment of the material available on record of the case. Their version that the complainant party had abducted the accused Hussain is not supported by any cogent material available on record of the case. The petitioner and his co-accused had gone over to the place of the complainant party and the occurrence had admittedly taken place there. Further, the version of the complainant party is supported by the statements of the injured witnesses and other witnesses recorded under Section 161, Cr.P.C. as well as by the medical evidence and recoveries of the alleged weapons of offence. The tentative assessment of the said and other material available on record of the case prima facie shows that it is the accused party that were the aggressor. The version of the complainant party thus prima facie appears to be true. The shot that proved fatal for the deceased is attributed to respondent No.2 and the incriminating material available on record of the case provides reasonable grounds for believing that respondent No.2 has committed the offence of Qatl-i-amd punishable under Section 302, P.P.C., which falls within the prohibitory clause of Section 497(1), and there are no sufficient grounds for further inquiry into his guilt as envisaged by Section 497(2), Cr.P.C. The High Court has erred in law while placing reliance upon the cross-version of the accused party for holding the case against respondent No.2 to be one of further inquiry, without referring to any material available on record of the case supporting it.

6. Although this Court ordinarily refrains from interfering with bail granting orders of the High Courts, it does not shy away to perform its constitutional obligation to set the matter right for the safe administration of criminal justice when a High Court has made such an order in derogation of some settled principle of law, or when the order is found to be perverse or arbitrary.[4] In the present case, while allowing the bail petition of respondent No.2 and making the impugned order the High Court has acted against the above said settled principle of law, and its finding recorded on the basis of an unsubstantiated cross-version is perverse, that is, against the weight of the material available on record of the case. Therefore, we convert this petition into appeal and allow the same: the impugned bail granting order is set aside and the bail petition of respondent No.2 is dismissed. Respondent No.2 shall surrender before the trial court.

7. Needless to mention that the observations made and findings recorded in this order are of tentative nature, which shall have no effect upon final determination of the case by the trial court on conclusion of the trial.

MWA/M-50/SC Bail cancelled.

**P L D 2022 Supreme Court 712**

**Present: Syed Mansoor Ali Shah, J**

**MUHAMMAD AHSAN ABID---Appellant**

**Versus**

**MAKHDOOM KHUSRU BAKHTIAR and others---Respondents**

C.M. Appeals Nos.39 and 41 of 2021 in Civil Appeals No. Nil of 2021, decided on 10th August, 2022.

(Against the order dated 22.03.2021 of the Registrar, declining to entertain and register the Civil Appeals of the Appellant).

**Supreme Court Rules, 1980---**

----O.III, R.10, O.V, R. 1(6), O.VII, R. 7 & O.XVII, Rr. 5 & 12---Constitution of Pakistan, Art. 191---Registrar Supreme Court, powers of---Scope---Supreme Court Rules, 1980 ('the Rules') empower the Registrar to ensure that the form and presentation of the petitions or the appeals are in order according to the Rules---Registrar does not enjoy any power under the Rules to decide upon the maintainability of a petition or an appeal---Even if a petition or an appeal is prima facie non-maintainable under the provisions of the Constitution, a law or the Rules referred to by the petitioner or appellant for filing the same, still the question of maintainability of the petition or the appeal under the referred provisions is to be adjudicated by the Court on the judicial side and not by the Registrar on the administrative side.

Under the Supreme Court Rules, 1980 ('the Rules'), the powers of the Registrar are primarily covered under Order III, Rule 10, Order V, Rule 1(6), Order VII, Rule 7 and Order XVII, Rule 5, which simply regulate the practice and procedure of the Court and are merely administrative in character. The Rules empower the Registrar to ensure that the form and presentation of the petitions or the appeals are in order according to the Rules. The Registrar does not enjoy any power under the Rules to decide upon the maintainability of a petition or an appeal. The question of maintainability of a petition or an appeal is a justiciable issue that calls for adjudication, which is solely the prerogative of the Court in the exercise of its judicial power. A limited exception is, however, provided under Order V Rule 1 of the Rules where the Registrar enjoys the powers of the Court in deciding certain applications, etc., in pending cases. The power to deal with these applications, also appears to be procedural in nature and prima facie do not impinge upon the judicial power of the Court so as to decide upon the substantive justiciable issue(s) involved in the petitions or appeals.

Farman Ali v. Muhammad Ishaq PLD 2013 SC 392; P. Surendran v. State 2019 SCC Online SC 507 and Qausain Faisal v. Federation of Pakistan (Civil Miscellaneous Appeal No. 87 of 2022) ref.

Issue as to the maintainability of an appeal cannot be decided by the Registrar in the exercise of its administrative powers under the Rules nor can it be decided by a Judge hearing an administrative appeal against an administrative order of the Registrar.

A.P.N.S. v. Federation of Pakistan PLD 2004 SC 600 ref.

Order XVII, Rule 5 of the Rules provides that the Registrar may refuse to receive a petition on the ground that it is "frivolous". Frivolity of the petition is to be viewed by the Registrar in the overall constitutional construct of the Rules under Article 191 of the Constitution and within the administrative scheme of the Rules. A "frivolous" petition within the meaning of this Rule is limited to its form and presentation and no more. A petition whose form and presentation falls short in material particulars or which fails to refer to any provision of the Constitution, the law or the Rules under which it is purportedly filed will pass as "frivolous". The Registrar in such a case can refuse to receive the petition unless the petitioner fixes the form and presentation of the petition. The said Rule, however, does not vest judicial power in the Registrar to adjudicate the justiciable issue of maintainability of a petition or appeal on the ground of it being frivolous.

Fazal Muhammad v. State PLD 1987 SC 273 ref.

Even if a petition or an appeal is prima facie non-maintainable under the provisions of the Constitution, a law or the Rules referred to by the petitioner or appellant for filing the same, still the question of maintainability of the petition or the appeal under the referred provisions is to be adjudicated by the Court on the judicial side and not by the Registrar on the administrative side. Mere, prima facie non-maintainability of a petition or an appeal does not vest the jurisdiction in the Registrar to adjudicate upon the question of maintainability of such a petition

or an appeal. Nor can the administrative powers of the Registrar under the Rules be employed to refuse receiving and registering such petitions or appeals which appear to him as non-maintainable. However, the (Supreme) Court can discourage the filing of outright non-maintainable, frivolous and vexatious, petitions or appeals by imposing costs on the unscrupulous petitioners or appellants under Order XVII, Rule 12 of the Rules.

Appellant in person.

Nemo for Respondents.

Date of hearing: 10th August, 2022.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**Both the listed civil miscellaneous appeals are being disposed of through this consolidated order as common questions of law and facts are involved therein.

2. Through these appeals under Order V, Rule 3 of the Supreme Court Rules, 1980 ("Rules"), the appellant has challenged the objection orders of the Registrar of this Court, dated 22.3.2021, whereby the appeals filed by the appellant under Article 63-A(5) of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution") have been returned being not entertainable on the ground that appeal under Article 63-A(5) of the Constitution only lies before this Court in a case where the Election Commission decides upon the declaration made by the Party Head, under Article 63-A of the Constitution, regarding the defection of a Member of Parliament or Provincial Assembly. However, the present cases pertain to disqualification of the Members of the Parliament and Provincial Assembly under Article 63 of the Constitution, as they arise out of the orders of the Election Commission dated 05.01.2021 passed on the Election Petitions filed by the appellant under Articles 63(1) and 225 of the Constitution seeking disqualification of the respondents as Members of the Parliament and Provincial Assembly, on the ground of alleged concealment of their assets.

3. I have heard the appellant, who has appeared in person, and have examined the record of the cases.

4. Article 191 of the Constitution provides that the Supreme Court may make rules regulating the practice and procedure of the Court. The rules made under the said Article by the Supreme Court are called the Supreme Court Rules 1980 ("Rules"). Under the said Rules, the powers of the Registrar are primarily covered under Order III Rule 10, Order V Rule 1(6), Order VII Rule 7 and Order XVII Rule 5, which simply regulate the practice and procedure of the Court and are merely administrative in character. The Rules empower the Registrar to ensure that the form and presentation of the petitions or the appeals are in order according to the Rules. The Registrar does not enjoy any power under the Rules to decide upon the maintainability of a petition or an appeal. The question of maintainability of a petition or an appeal is a justiciable issue that calls for adjudication[1], which is solely the prerogative of the Court in the exercise of its judicial power.[2] A limited exception is, however, provided under Order V Rule 1 of the Rules where the Registrar enjoys the powers of the Court in deciding certain applications, etc., in pending cases. The power to deal with these applications, which though not under examination in the present cases, also appears to be procedural in nature and prima facie do not impinge upon the judicial power of the Court so as to decide upon the substantive justiciable issue(s) involved in the petitions or appeals.

5. In the present cases, the Registrar has decided that the appeals filed by the appellant are not maintainable under the provisions of Article 63-A(5) of the Constitution, while the appellant argues that they are maintainable under the said provisions of the Constitution. This issue as to the maintainability of the appeals of the appellant could not have been decided by the Registrar in the exercise of its administrative powers under the afore-referred rules nor can it be decided by a Judge hearing an administrative appeal against an administrative order of the Registrar.[3]

6. Order XVII, Rule 5 of the Rules provides that the Registrar may refuse to receive a petition on the ground that it is "frivolous". Frivolity of the petition is to be viewed by the Registrar in the overall constitutional construct of the Rules under Article 191 of the Constitution and within the administrative scheme of the Rules. A "frivolous"

petition within the meaning of this Rule is limited to its form and presentation and no more. A petition whose form and presentation falls short in material particulars or which fails to refer to any provision of the Constitution, the law or the Rules under which it is purportedly filed will pass as "frivolous."[4] The Registrar in

such a case can refuse to receive the petition unless the petitioner fixes the form and presentation of the petition. The said Rule, however, does not vest judicial power in the Registrar to adjudicate the justiciable issue of maintainability of a petition or appeal on the ground of it being frivolous.

7. It is underlined that even if a petition or an appeal is prima facie non-maintainable under the provisions of the Constitution, a law or the Rules referred to by the petitioner or appellant for filing the same, still the question of maintainability of the petition or the appeal under the referred provisions is to be adjudicated by the Court on the judicial side and not by the Registrar on the administrative side. Mere, prima facie non-maintainability of a petition or an appeal does not vest the jurisdiction in the Registrar to adjudicate upon the question of maintainability of such a petition or an appeal. Nor can the administrative powers of the Registrar under the Rules be employed to refuse receiving and registering such petitions or appeals which appear to him as non-maintainable. However, the Court can discourage the filing of outright non-maintainable, frivolous and vexatious, petitions or appeals by imposing costs on the unscrupulous petitioners or appellants under Order XVII, Rule 12 of the Rules.

8. In this background, without touching upon the question of maintainability of the main appeals filed by the appellant under Article 63-A(5) of the Constitution, these miscellaneous appeals against the administrative orders of the Registrar are allowed, and the objection orders of the Registrar dated 22.3.2021 are set aside. The office shall register the main appeals of the appellant and fix them before the appropriate Bench on the judicial side.

9. The appellant has further submitted that he had filed the main appeals on 02.02.2021 and since then a year and a half has passed but the matter is still lingering on the administrative side and prayed that his appeals may be fixed for an early date. The prayer appears genuine and justified, and is therefore allowed. The office shall fix the appeals of the appellant immediately after the summer vacations.

MWA/M-53/SC Appeals allowed.

**P L D 2022 Supreme Court 743**

**Present: Syed Mansoor Ali Shah and Jamal Khan Mandokhail, JJ**

**Syed RAZA HUSSAIN BUKHARI---Petitioner**

**Versus**

**The STATE through D.A.G. and others---Respondents**

Criminal Petition No. 636 of 2022, decided on 10th August, 2022.

(Against the order of the Lahore High Court, Lahore, dated 28.04.2022 passed in Crl. Misc. No.20132-B of 2022).

**(a) Criminal Procedure Code (V of 1898)---**

----Ss. 497(1), third proviso, 497(2) & 561-A---Offences in Respect of Banks (Special Courts) Ordinance (IX of 1984), Ss. 5(6) & 12---Constitution of Pakistan, Arts. 9, 10A, 14 & 199---Scheduled offences under the Offences in Respect of Banks (Special Courts) Ordinance, 1965---Bail---Delay in conclusion of the trial---Principles relating to grant of post arrest bail on the ground of delay in the conclusion of trial in respect of offences falling under the Offences in Respect of Banks (Special Courts) Ordinance, 1984 ('the Ordinance') and the Constitutional jurisdiction of the High Court to grant bail stated.

Section 5(6) of the Offences in Respect of Banks (Special Courts) Ordinance, 1984 ('the Ordinance') has borrowed the language of the second part of Section 497(1), Cr.P.C., which extends to offences falling under the prohibitory clause, and has made it applicable to all the scheduled offences under the Ordinance. However, the exceptions of prohibitory clause of Section 497(1), Cr.P.C. have not been so adopted and made applicable to the scheduled offences under the Ordinance. Therefore, the only ground for grant of bail in a schedule offence under the Ordinance is that which is provided in Section 497(2) Cr.P.C., that is, if the court finds that there are no reasonable grounds for believing that the accused has committed the Scheduled Offence and that there are sufficient grounds for further inquiry into his guilt.

Allied Bank of Pakistan v. Khalid Farooq 1991 SCMR 599 and Chaudhry Shujat Hussain v. State 1995 SCMR 1249 ref.

Delay in the conclusion of a criminal trial is antithetic to the very concept of a fair trial and due process guaranteed by Article 10A of the Constitution. Conclusion of trial within a reasonable time is an essential component of the right to a fair trial. The prolonged pre-trial detention of the accused also defies the presumption of innocence, another essential element of the right to a fair trial.

Chairman, NAB v. Nasar Ullah PLD 2022 SC 497 ref.

In appropriate cases, a High Court can grant bail on the ground of delay in conclusion of the trial, similar to that which is available under the third proviso to section 497(1), Cr.P.C., under its inherent powers under section 561-A, Cr.P.C. to secure the ends of justice or to prevent the abuse of the process of court, but going further, a High Court also enjoys constitutional jurisdiction under Article 199(1)(c) of the Constitution for the enforcement of fundamental rights. This constitutional jurisdiction of High Courts cannot be abridged by any sub-constitutional legislation. So, while section 5(6) of the Ordinance is binding on the Special Court, it is not so on a High Court which fashions its jurisdiction on the basis of the enforcement of the fundamental rights under the Constitution. Undue delay in the trial of the accused infringes his fundamental rights to liberty, fair trial and dignity under Articles 9, 10A and 14 of the Constitution, if the delay cannot be attributed to him.

Chaudhry Shujat Hussain v. State 1995 SCMR 1249 ref.

If a High Court observes that the conclusion of the trial has been unduly delayed for no fault of the accused, thereby depriving the accused of his fundamental rights to liberty, fair trial and due process, it may, rather should, interfere to enforce these fundamental rights of the accused. In order to assess the reasonable time for the conclusion of the trial, the High Court may be guided by, and structure its discretion on the basis of, the statutory timeframe provided in the third proviso to section 497(1), Cr.P.C.

**(b) Criminal Procedure Code (V of 1898)---**

----Ss. 497 & 498---Constitution of Pakistan, Arts. 9, 10A, 14 & 199---Bail---Constitutional jurisdiction of the High Court to grant bail---Scope---High Court while hearing a bail petition under Sections 497/ 498, Cr.P.C, other than possessing inherent jurisdiction under Section 561-A, Cr.P.C., also enjoys its constitutional

jurisdiction as a guardian of the fundamental rights of the accused---Such protective constitutional jurisdiction of the High Courts cannot be circumscribed by any sub-constitutional legislation---If a High Court while hearing a bail petition is of the view that the facts and circumstances of the case offend and impair the fundamental rights of the accused, it can grant bail in exercise of its constitutional jurisdiction without being limited by the legislation that regulates the grant of bail in the offence.

Ahmad Khan Gondal, Advocate Supreme Court (Through video link - Lahore Registry) and Ch. Akhtar Ali, Advocate-on-Record for Petitioner.

Iftikhar Hussain Shah, Advocate Supreme Court and Anis Muhammad Shahzad, Advocate-on-Record for Respondent No.2.

Syed Nayab Hussain Gardezi, D.A.G. for the State.

Date of hearing: 10th August, 2022.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**Petitioner seeks leave to appeal against the order dated 28.04.2022 passed by the Lahore High Court, whereby the second post-arrest bail petition of the petitioner, based on the ground of delay in the conclusion of the trial was dismissed in case FIR No.52/2019 dated 30.01.2019, offences under sections 420, 468, 471, 409 P.P.C. read with Section 5(2) of the Prevention of Corruption Act, 1947 registered at Police Station FIA, Gujranwala.

2. Briefly, as per the crime report, it is alleged that the petitioner while posted as an officer (OG-II) at the National Bank of Pakistan, Main Branch, Hafizabad, Punjab, misappropriated a large sum of money from the Bank. The first post-arrest bail petition of the petition was declined on merits on 24.03.2021. The second bail petition on the basis of the statutory ground under the third proviso to section 497(1), Cr.P.C. was rejected through the impugned order.

3. Learned D.A.G. and the learned counsel for respondent Bank at the outset raised a preliminary objection that the grant of bail on the ground of delay in the conclusion of the trial under the third proviso to section 497(1) of the Cr.P.C. is not available to the petitioner under the Offences in respect of Banks (Special Courts) Ordinance, 1984 ("Ordinance"). Referring to sections 5(6) and 12 of the Ordinance, they pointed out that a limited ground of bail is provided under the Ordinance and the petitioner cannot claim bail on the ground of delay in conclusion of the trial under the third proviso to section 497(1), Cr.P.C. They relied on the cases of Khalid Farooq[1] and Chaudhry Shujat Hussain[2] in support of their contention. Learned counsel for the petitioner submitted that the High Court enjoys the power to grant bail under the third proviso to section 497(1), Cr.P.C. using its inherent powers under section 561-A, Cr.P.C. to secure the ends of justice and also relied on Allied Bank[3] for this contention. He further contended that the petitioner has been behind bars for almost two years now and the undue delay in the conclusion of the trial cannot be attributed to the conduct of the petitioner.

4. The Ordinance provides for speedy trial of certain offences committed in respect of banks and for matters connected therewith or incidental thereto.[4] A Special Court has been established under the Ordinance to try Scheduled Offences, which are offences specified in the First Schedule of the Ordinance and alleged to have been committed in respect of or in connection with the business of a bank.[5] The offences involved in the present case punishable under sections 420, 468, 471, 409, P.P.C. and section 5(2) of the Prevention of Corruption Act, 1947 form part of the Scheduled Offences under the Ordinance.[6]

5. For attending to the preliminary objections raised by the respondents, we examine the relevant provisions of the Ordinance. section 5(6) of the Ordinance and section 497(1) of the Cr.P.C. are reproduced hereunder in a comparative chart for ease of reference and convenience of understanding:

| Section 497(1) of the Cr.P.C: 497. When bail may be taken in cases of non-bailable offence. (1) When any person accused of any non-bailable offence is arrested or detained without warrant by an officer-in-charge of a police station, or appears or is brought before | Section 5(6) of the Ordinance: 5(6) An accused person shall not be released on bail by a Special Court, or by any other Court, if there appear reasonable grounds for believing that he has been guilty of a scheduled offence; nor shall an accused |
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| a Court, he may be released on bail, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life or imprisonment for ten years: Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail: Provided further that a person accused of an offence as aforesaid shall not be released on bail unless the prosecution has been given notice to show cause why he should not be so released: Provided further that the Court shall, except where it is of the opinion that the delay in the trial of the accused has been occasioned by an act or omission of the accused or any other person acting on his behalf, direct that any person shall be released on bail--- (a) Who, being accused of any offence not punishable with death, has been detained for such offence for a continuous period exceeding one year or in case of a woman exceeding six months and whose trial for such offence has not concluded; or (b) Who, being accused of an offence punishable with death, has been detained for such offence for a continuous period exceeding two years and in case a woman exceeding one year and whose trial for such offence has not concluded. Provided further that the provisions of the foregoing proviso shall not apply to a previously convicted offender for an offence punishable with death or imprisonment for life or to a person who, in the opinion of the Court, is a hardened, desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life. | person be so released unless the prosecution has been given notice to show cause why he should not be so released. |

The first part of section 497(1), Cr.P.C. provides that if a person accused of a non-bailable offence is arrested, he may be released on bail. Because of the enabling expression, "may be released on bail", used in this part, read with the basic principles of criminal justice,[7] the grant of bail in a non-bailable offence that does not fall within the second part of section 497(1), Cr.P.C. is said to be a rule and refusal, an exception. The second part of section 497(1), Cr.P.C. provides that an accused shall not be released on bail if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life or imprisonment for ten years. This part of section 497(1), Cr.P.C. which prohibits the grant of bail in certain offences is popularly known as the prohibitory clause of section 497(1), Cr.P.C.

6. Bail in offences that fall within the prohibitory clause of section 497(1), Cr.P.C. may be granted under section 497(2), Cr.P.C. if there are no reasonable grounds for believing that the accused committed the offence, but there are sufficient grounds for further inquiry into his guilt. The other grounds of bail in such offences is available under the first and third provisos to section 497(1), Cr.P.C., on the grounds of being a minor, or a woman or a person who is sick or infirm and undue delay in the conclusion of the trial.

7. Section 5(6) of the Ordinance has borrowed the language of the second part of section 497(1), Cr.P.C., which extends to offences falling under the prohibitory clause, and has made it applicable to all the scheduled offences under the Ordinance. However, the exceptions of prohibitory clause of section 497(1), Cr.P.C. have not been so adopted and made applicable to the scheduled offences under the Ordinance. Therefore, the only ground for grant of bail in a schedule offence under the Ordinance is that which is provided in section 497(2), Cr.P.C., that is, if the court finds that there are no reasonable grounds for believing that the accused has committed the Scheduled Offence and that there are sufficient grounds for further inquiry into his guilt. In Khalid Farooq, this Court held:

Section 5(6) of the Ordinance clearly states that an accused shall not be released if there appear reasonable grounds for believing that he has been guilty of a scheduled offence. The provisions of this section have effect, notwithstanding, anything contained in the Code. The first and third provisos to subsection (1) of section 497 of the Code, which create exceptions to the rule contained in that subsection, cannot be read into subsection (6) of section 5 of the Ordinance. Where the law-maker wanted to provide an exception or departure to the rule contained in section 5(6) of the Ordinance, he did so by adding such words akin to the second proviso to subsection (1) of section 497 of the Code. Where the law-maker did not desire to provide further exceptions to the rule, such as those akin to the first and the third provisos to the same subsection, he did not add specific words similar to those provisos in subsection (6) of section 5. ... Therefore, whilst the provisions of the first and third provisos to subsection (1) of section 497 of the Code may be treated as not available to the Special Court or the High Court, such a situation would not apply to subsections (2) to (5) of section 497 of the Code, as they do not affect the rule stated in subsection (6) of section 5 of the Ordinance.

This view was reiterated by this Court in Chaudhry Shujat Hussain. However, dealing with the third proviso to Section 497(1), Cr.P.C, this Court in Khalid Farooq held:

...The position of the third proviso to subsection (1) of section 497 of the Code is somewhat nebulous. Though its provisions provide an exception to the rule contained in subsection (1) of section 497, it is founded in public policy, namely, that an accused shall not be made to suffer for the long delay arising out of the commencement of his trial, unless the same has been occasioned by his own conduct, and assuming that the same is also not available, the possibility of its application through section 561-A of the Code to prevent an abuse of the process of the Court or otherwise to secure the ends of justice, cannot be totally excluded.

Thus, in appropriate cases, a High Court can grant bail on the ground of delay in conclusion of the trial, similar to that which is available under the third proviso to section 497(1), Cr.P.C., under its inherent powers under section 561-A, Cr.P.C. to secure the ends of justice or to prevent the abuse of the process of court as held in Khalid Farooq but going further, a High Court also enjoys constitutional jurisdiction under Article 199(1)(c) of the Constitution for the enforcement of fundamental rights. This constitutional jurisdiction of High Courts cannot be abridged by any sub-constitutional legislation.[8] So, while section 5(6) of the Ordinance is binding on the Special Court, it is not so on a High Court which fashions its jurisdiction on the basis of the enforcement of the fundamental rights under the Constitution. Undue delay in the trial of the accused infringes his fundamental rights to liberty, fair trial and dignity under Articles 9, 10A and 14 of the Constitution, if the delay cannot be attributed to him.

8. "Delay in the conclusion of a criminal trial is antithetic to the very concept of a fair trial and due process guaranteed by Article 10A of the Constitution. The right to a fair trial is a cardinal requirement of the rule of law. If an accused cannot be tried fairly for an offence, he should not be tried for it at all. Conclusion of trial within a reasonable time is an essential component of the right to a fair trial. The prolonged pre-trial detention of the accused also defies the presumption of innocence, another essential element of the right to a fair trial, for an accused is presumed innocent until he is proven guilty by proof beyond reasonable doubt. Even before the

addition of Article 10A in the Constitution, the right to a fair trial and due process was well-entrenched in our jurisprudence and considered to be a part of the right of access to justice enshrined in the constitutional right to be dealt with in accordance with law guaranteed by Article 4 and the fundamental right to life and liberty guaranteed by Article 9 of the Constitution."[9]

9. It is therefore underlined that a High Court while hearing a bail petition under sections 497/498, Cr.P.C., other than possessing inherent jurisdiction under section 561-A, Cr.P.C., also enjoys its constitutional jurisdiction as a guardian of the fundamental rights of the accused. This protective constitutional jurisdiction of the High Courts cannot be circumscribed by any sub-constitutional legislation, including section 5(6) of the Ordinance. If a High Court while hearing a bail petition is of the view that the facts and circumstances of the case offend and impair the fundamental rights of the accused, it can grant bail in exercise of its constitutional jurisdiction without being limited by the legislation that regulates the grant of bail in the offence. If a High Court observes that the conclusion of the trial has been unduly delayed for no fault of the accused, thereby depriving the accused of his fundamental rights to liberty, fair trial and due process, it may, rather should, interfere to enforce these fundamental rights of the accused. In order to assess the reasonable time for the conclusion of the trial, the High Court may be guided by, and structure its discretion on the basis of, the statutory timeframe provided in the third proviso to section 497(1), Cr.P.C.

10. Under clause (a) of the third proviso to section 497(1), Cr.P.C., an accused is entitled to bail if there is a delay in the conclusion of the trial, for no fault of the accused, for a period exceeding one year, in cases of offences not punishable with death. In the present case, according to the latest report of the Special Court, the petitioner was arrested on 20.11.2020, the trial commenced on 28.06.2021 and the last date of hearing was 26.07.2022. In this span of almost two years, out of 22 prosecution witnesses only 12 witnesses have been recorded so far. A close perusal of the Report shows that the conduct of the petitioner is not the reason for the delay in the conclusion of the trial. He was, therefore, entitled to be released on bail by the High Court in exercise of its inherent powers under section 561-A, Cr.P.C. to secure the ends of justice or to prevent the abuse of the process of court, as well as in exercise of its constitutional jurisdiction under Article 199 of the Constitution to enforce his fundamental rights. However, the High Court has not exercised both the jurisdictions vested in it.

11. For above reasons, we converted this petition into appeal and allow the same: the impugned order of the High Court is set aside and the bail petition of the petitioner is allowed. He is admitted to bail subject to his furnishing bail bond in the sum of Rs.100,000/- with two sureties in the like amount to the satisfaction of the trial court.

MWA/R-9/SC Bail granted.

**P L D 2022 Supreme Court 764**

**Present: Qazi Faez Isa and Syed Mansoor Ali Shah, JJ**

**TAHIRA BATOOL---Petitioner**

**Versus**

**The STATE and another---Respondents**

Criminal Petition No. 910 of 2022, decided on 19th August, 2022.

(Against the order of Islamabad High Court, Islamabad dated 14.06.2022 passed in Crl. Misc. No. 733-B of 2022).

**(a) Criminal Procedure Code (V of 1898)---**

----S. 497(1), first proviso---Non-bailable offence---Bail---Female accused---Scope and extent of the first proviso to section 497(1), Cr.P.C. stated.

The first part of section 497(1), Cr.P.C. provides that if a person accused of a non-bailable offence is arrested, he may be released on bail. Because of the enabling expression, "may be released on bail", used in this part, read with the basic principles of criminal justice, the grant of bail in a non-bailable offence that does not fall within the second part of section 497(1), Cr.P.C. is said to be a rule and refusal, an exception. The second part of section 497(1), Cr.P.C. provides that an accused shall not be released on bail if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life or imprisonment for ten years. This part of section 497(1), Cr.P.C. which prohibits the grant of bail in certain offences is popularly known as the prohibitory clause of section 497(1), Cr.P.C.

However, the first proviso to section 497(1), Cr.P.C. provides that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail. The expression "such an offence" used in this proviso refers to the offence mentioned in the second part (prohibitory clause) of section 497(1), Cr.P.C., as for all other non-bailable offences the Court is already empowered to release the accused on bail under the first part of section 497(1), Cr.P.C. The first proviso has thus made equal the power of the Court to grant bail in the offences of prohibitory clause alleged against an accused under the age of sixteen years, a woman accused and a sick or infirm accused, to its power under the first part of section 497(1), Cr.P.C. This means that in cases of women, etc., as mentioned in the first proviso to Section 497(1), irrespective of the category of the offence, bail is to be granted as a rule and refused as an exception in the same manner as it is granted or refused in offences that do not fall within the prohibitory clause of section 497(1), Cr.P.C.

Fazal Elahi v. Farah Naz 1979 SCMR 109; Liaquat Ali v. Bashiran Bibi 1994 SCMR 1729 and Zakir Jaffer v. State 2021 SCMR 2084 ref.

The exceptions for refusing bail in offences that do not fall within the prohibitory clause of section 497(1), Cr.P.C. are therefore also applicable to the accused who pray for bail under the first proviso to section 497(1), Cr.P.C. in an offence falling within the prohibitory clause. These exceptions are well settled. They are likelihood of the accused: (a) to abscond to escape trial; (b) to tamper with the prosecution evidence or influence the prosecution witnesses to obstruct the course of justice; or (c) to repeat the offence keeping in view his previous criminal record, nature of the offence or the desperate manner in which he has prima facie acted in the commission of offence.

Tariq Bashir v. State PLD 1995 SC 34; Zafar Iqbal v. Muhammad Anwar 2009 SCMR 1488; Muhammad Tanveer v. State PLD 2017 SC 733 and Iftikhar Ahmad v. State PLD 2021 SC 799 ref.

**(b) Criminal Procedure Code (V of 1898)---**

----S. 497(1), first proviso---Penal Code (XLV of 1860), Ss. 395 & 412---Constitution of Pakistan, Art. 185(3)---Dacoity---Female accused---Bail, grant of---In cases of women as mentioned in the first proviso to section 497(1), Cr.P.C, irrespective of the category of the offence, bail was to be granted as a rule and refused as an exception---Persons involved in the commission of offences of robbery or dacoity were usually professional criminals and there was a likelihood that they would repeat the offence if enlarged on bail, but the case of the present female-accused was distinguishable as she was working as a maid in the house of the complainant as per his own version, therefore, she did not appear to be a professional robber or dacoit and the Court did not

find likelihood of her repeating the offence if released on bail---Petition for leave to appeal was converted onto appeal and allowed, and accused was admitted to post-arrest bail.

Muhammad Shahzad Siddiqui, Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Petitioner.

Jahangir Khan Jadoon, Advocate General Islamabad along with S.I. Asif Ali for the State.

Date of hearing: 19th August, 2022.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**Petitioner seeks leave to appeal against the order of the Islamabad High Court, dated 14.06.2022, whereby post-arrest bail has been denied to her in case FIR No.795, dated 16.12.2021, registered at P.S. Lohi Bher, Islamabad, for offences punishable under sections 395 and 412, P.P.C.

2. Briefly, the allegations in the crime report are that five unknown accused entered the house of the complainant, forcibly detained the complainant and his family member along-with their maid (allegedly, the petitioner). They robbed the family of cash, jewellery, mobiles, etc., and also took the maid with them. Subsequently, through a supplementary statement made on the same day, the complainant implicated the petitioner to be a partner of the said five unknown accused who had committed dacoity in his house.

3. Learned counsel for the petitioner submits that in the crime report one Sidra is mentioned as being the maid in the house of the complainant and detained along with the family of the complainant. There is no material on the record to show that the petitioner was the said maid. Further, according to the crime report the maid Sidra has not been ascribed any role in the commission of dacoity. The petitioner being a woman is also entitled to the relief of bail. Conversely, learned Advocate General, Islamabad submits on behalf of the prosecution that the petitioner was in league with the other co-accused who had committed dacoity in the house of the complainant and some items of the stolen property, i.e., artificial jewellery and two mobiles, have also been recovered from her.

4. We have heard the learned counsel for the parties and examined the record of the case. The point that has attracted our attention is that the petitioner being a woman her prayer for post arrest bail should have been examined under the first proviso to section 497(1), Cr.P.C. also, if she was not found entitled to bail under section 497(2), Cr.P.C. The courts below have not adverted to it. Thus, the interest of justice requires us to examine it. For this purpose, we need to see first what is the scope and extent of the said proviso. Section 497(1) and its first proviso are reproduced hereunder for convenience of reference:

497. When bail may be taken in cases of non-bailable offence.

(1) When any person accused of any non-bailable offence is arrested or detained without warrant by an officer-in-charge of a police station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life or imprisonment for ten years:

Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.

(Emphasis added)

The first part of section 497(1), Cr.P.C. provides that if a person accused of a non-bailable offence is arrested, he may be released on bail. Because of the enabling expression, "may be released on bail", used in this part, read with the basic principles of criminal justice,[1] the grant of bail in a non-bailable offence that does not fall within the second part of section 497(1), Cr.P.C. is said to be a rule and refusal, an exception. The second part of section 497(1), Cr.P.C. provides that an accused shall not be released on bail if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprison-ment for life or imprisonment for ten years. This part of section 497(1), Cr.P.C. which prohibits the grant of bail in certain offences is popularly known as the prohibitory clause of section 497(1), Cr.P.C.

5. However, the first proviso to section 497(1), Cr.P.C. provides that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail. The expression "such an offence" used in this proviso refers to the offence mentioned in the second part (prohibitory clause) of section 497(1), Cr.P.C., as for all other non-bailable offences the Court is already

empowered to release the accused on bail under the first part of section 497(1), Cr.P.C. The first proviso has thus made equal the power of the Court to grant bail in the offences of prohibitory clause alleged against an accused under the age of sixteen years, a woman accused and a sick or infirm accused, to its power under the first part of section 497(1), Cr.P.C. This means that in cases of women, etc., as mentioned in the first proviso to section 497(1), irrespective of the category of the offence, bail is to be granted as a rule and refused as an exception[2] in the same manner as it is granted or refused in offences that do not fall within the prohibitory clause of section 497(1), Cr.P.C.

6. The exceptions for refusing bail in offences that do not fall within the prohibitory clause of section 497(1), Cr.P.C. are therefore also applicable to the accused who pray for bail under the first proviso to section 497(1), Cr.P.C. in an offence falling within the prohibitory clause. These exceptions are well settled by several judgements[3] of this Court. They are likelihood of the accused: (a) to abscond to escape trial; (b) to tamper with the prosecution evidence or influence the prosecution witnesses to obstruct the course of justice; or (c) to repeat the offence keeping in view his previous criminal record, nature of the offence or the desperate manner in which he has prima facie acted in the commission of offence.

7. We have examined the record of the case and do not find any material that would attract any of the above exceptions in order to refuse bail to the present petitioner. We are cognizant of the fact that the persons involved in the commission of offences of robbery or dacoity are usually the professional criminals and there is a likelihood that they would repeat the offence if enlarged on bail. But the case of the present petitioner is distinguishable as she was working as a maid in the house of the complainant as per his own version, therefore, she does not appear to be a professional robber or dacoit and we do not find a likelihood of her repeating the offence if released on bail. The impugned order passed by the High Court is, thus, not sustainable under the law and calls for interference by this Court. This petition is, therefore, converted into appeal and the same is allowed: the impugned order is set aside and the petitioner is admitted to post-arrest bail subject to her furnishing bail bond in the sum of Rs.50,000/- with two sureties in the like amount to the satisfaction of the trial court.

8. Needless to mention that this concession of bail may be cancelled by the competent court under section 497(5), Cr.P.C., if the petitioner misuses it in any manner, including causing delay in the expeditious conclusion of the trial.

MWA/T-5/SC Bail granted.

**P L D 2022 Supreme Court 783**

**Present: Umar Ata Bandial, C.J. and Syed Mansoor Ali Shah, J**

**UZMA NAVEED CHAUDHARY and others---Petitioners**

**Versus**

**FEDERATION OF PAKISTAN and others---Respondents**

Civil Petitions Nos. 1347 and 1655 of 2019, decided on 27th July, 2022.

(Against the judgment of Islamabad High Court, Islamabad, dated 08.02.2019, passed in Writ Petition No.289 of 2017).

**(a) Constitution of Pakistan---**

----Art. 199---Constitutional jurisdiction of the High Court---Scope---Interference in findings of fact---High Court cannot interfere, in its constitutional jurisdiction, with findings of fact recorded by the competent courts, tribunals or authorities unless such findings are the result of misreading or non-reading of the material evidence or based on no evidence, which amounts to an error of law and thus justifies, rather calls for, interference.

Mohibullah & Co. v. Bahauddin 1990 SCMR 1070; Mahmooda Begum v. Taj Din 1992 SCMR 809; Muhammad Suleman v. Zubaida Bibi 1996 SCMR 1965; Haider Khan v. Mustareen PLD 2001 SC 207; Lehrasab Khan v. Aqeel-Un-Nisa 2001 SCMR 338; Arshad Mahmood v. Additional District Judge 2001 SCMR 516; Muhammad Sadiq v. Elahi Bakhsh 2006 SCMR 12; Allies Book Corporation v. Sultan Ahmad 2006 SCMR 152; Shajar Islam v. Muhammad Siddique PLD 2007 SC 45; S.L.I.C. v. Jaffar Hussain PLD 2009 SC 194 and Waqar Haider v. JFC 2009 SCMR 1243 ref.

**(b) Protection against Harassment of Women at the Workplace Act (IV of 2010)---**

----Ss. 8(5) & 9---Conviction and punishment---Reasons provided by the Federal Ombudsperson or President---Reasons for imposing a particular penalty (punishment), after the determination of culpability (conviction), though are distinct and separate from the proof of the allegation (charge), but they need not bear a separate heading or be narrated in a listed or compact form (in the order of the President or Ombudsperson)---Such reasons may, and ordinarily do, form part of the discussion on the overall facts and circumstances of the case.

**(c) Protection against Harassment of Women at the Workplace Act (IV of 2010)---**

----S. 9---Controller Incharge of Pakistan Television Corporation (PTV) News---Allegation of molesting and sexually harassing female anchorpersons---Minor penalty of censure and payment of compensation imposed by the Federal Ombudsperson---President enhancing said penalty to major penalty of removal from service---Legality---In the facts and circumstances of the case, the enhancement of punishment by the President, of the respondent (accused) who had a previous service record involving moral turpitude and had caused harassment, in the present case, to the female employees working under his supervision and control, at different times, was completely justified for creating a safe working environment for women and for fulfilling the objectives of the Protection against Harassment of Women at the Workplace Act, 2010---High Court had wrongly interfered with and set aside the President's order.

For enhancing the penalty of the respondent, the President had observed that the respondent (accused) was involved in the molestation and harassment of the petitioners (female victims); that the petitioners had no grudge to falsely implicate the respondent in such heinous allegation; that the petitioners were respectable women, working for several years in PTV, and had never lodged any complaint of sexual harassment against any of their colleagues or superiors; that the petitioners were well-educated women and leading happy family lives, and it was not expected from them to level such allegations against the respondent without substance; that the respondent was in habit of using filthy and threatening language for his subordinates and colleagues; that the conduct of the respondent had remained immoral throughout his service career; and that the purpose of punishment was not only reformatory but also creating deterrence against heinous crimes, such as, the sexual harassment at the workplace. High Court in its impugned order failed to appreciate that the President had given due and judicious consideration to the facts and circumstances of the case for enhancing the punishment of the respondent. In view of the said observations of the President, the ground furnished by the High Court for setting aside the President's order was legally not sustainable.

Respondent had meanwhile retired from service and stayed mostly out of the country. In view of this development, and in order to effectively implement the punishment awarded to the respondent and to recover the compensation from the pension of the respondent in case he failed to pay it, Supreme Court converted his punishment from 'removal from service' into 'compulsory retirement' along with payment of Rs.500,000/ as compensation to be paid by him to each of the petitioners, including a pro forma respondent, who was also his victim, to best serve the ends of justice in the present case. Supreme Court directed that amount of compensation shall be recovered from arrears of pay (if any), pension emoluments or any other source (property) of the respondent.

**(d) Protection against Harassment of Women at the Workplace Act (IV of 2010)---**

----S. 8(1)---Complaint filed before the Ombudsperson---Delay in filing complaints for incidents of harassment---Such delay is not material due to social taboos---Courts, tribunals and authorities concerned must take a lenient view on the delay in filing the complaint by the victim and decide the case on merits.

Delay in lodging complaints for incidents of harassment is understandable. In our social and cultural setting where prevailing notions of family honour and taboos play a dominant role, it is not easy for a woman to speak up about such deeply disturbing incidents. There is also the apprehension of counter allegations hurled against her character by the delinquent. For these and other reasons, many cases of sexual harassment remain unreported. Victims of sexual harassment who exhibit the courage to report the matter against all odds should not, therefore, be turned away on the ground of delay in lodging the complaint. The courts, tribunals and authorities concerned must take a lenient view on the delay in filing the complaint by the victim and decide the case on merits. This will encourage victims to come forward to seek justice. The principle enunciated by the Supreme Court in several criminal cases involving sexual assault, that delay in reporting the incident to the police in such cases is not material, equally applies to the complaints of sexual harassment made under the Protection against Harassment of Women at the Workplace Act, 2010.

Irfan Ali v. State PLD 2020 SC 295; Zahid v. State 2020 SCMR 590; Nasreen Bibi v. Farrukh Shahzad 2015 SCMR 825; Yasmin v. Majid 2008 SCMR 1602; Muhammad Abbas v. State PLD 2003 SC 863; Mehboob Ahmad v. State 1999 SCMR 1102 and Nasreen v. Fayyaz Khan PLD 1991 SC 412 ref.

**(e) Protection against Harassment of Women at the Workplace Act (IV of 2010)---**

----Preamble---Constitution of Pakistan, Art. 34---Objectives of the Protection against Harassment of Women at the Workplace Act 2010, highlighted.

As evident from its Statement of Objects and Reasons, Preamble and substantive provisions, the objective of the Protection against Harassment of Women at the Workplace Act, 2010 ('the Act') is to actualize the right of women to join a profession or occupation of their choice, where they are treated as an equal with dignity and honour, and feel safe that their working environment is free of harassment, abuse and intimidation. The Act gives effect to Article 34 of the Constitution which provides that "steps shall be taken to ensure full participation of women in all spheres of national life". The Act opens pathways for women to participate more fully in the development of the country at all levels, and ensures equal opportunity for them to earn their livelihood in a safe working environment. The Act also promotes the standards set by international commitments of Pakistan under the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the ILO Discrimination (Employment and Occupation) Convention.

**(f) Protection against Harassment of Women at the Workplace Act (IV of 2010)---**

----S. 2(h)(ii) [as substituted by the Protection against Harassment of Women at the Workplace (Amendment) Act (V of 2022)]---Harassment---Scope---Gender-based discrimination---Any conduct that is rooted in gender-based discrimination and creates an abusive and hostile working environment is harassment under the Protection against Harassment of Women at the Workplace Act, 2010, which is not restricted only to conduct that is related to the act of sex---Many forms of pervasive harassment in the workplace, including denial of equal opportunities as well criticism of one's abilities on the basis of gender, also comes within the ambit of harassment.

**(g) Protection against Harassment of Women at the Workplace Act (IV of 2010)---**

----S. 2(e) [as substituted by the Protection against Harassment of Women at the Workplace (Amendment) Act (V of 2022)]---Transgender person---Scope of the Protection against Harassment of Women at the Workplace Act, 2010 is not restricted to women only but it protects everyone - male, female and transgender persons.

**(h) Protection against Harassment of Women at the Workplace Act (IV of 2010)---**

----Preamble---Constitution of Pakistan, Arts. 9, 14, 18 & 25---Constitutional foundations of rights to 'gender equality' and 'safe working environment', explained.

Viewing the Protection against Harassment of Women at the Workplace Act, 2010 ('the Act') on a constitutional plane, the right to a safe working environment for all genders including male, female and transgender, free of harassment, abuse and intimidation draws its real strength from the fundamental rights guaranteed under the Constitution: right to life includes the right to livelihood, and thus assumes the right to a safe working environment for everyone, especially women, for earning such a livelihood; intimidating, hostile, abusive and offensive workplace environment offends the right to livelihood and the right to life of a person; right to liberty includes the right to agency, choice and freedom to join any profession or occupation of ones choice; right to enter upon any lawful profession or occupation, carries an inbuilt protection to make and execute such a choice. Any act of harassment done by any person that affects the free choice to enter and continue any lawful profession or occupation would amount to threatening the safety of the working environment. Only a safe working environment meets the constitutional standard of fundamental rights guaranteed under Articles 9 and 18 of the Constitution. These rights read with the rights to dignity, equality and protection against discrimination on the basis of sex under Articles 14 and 25 construct the constitutional foundations of 'gender equality' which ensures safe working environment for all genders, free from all forms of harassment, including sexual harassment.

Province of Punjab v. Kanwal Rashid 2021 SCMR 730; Imran Sajid v. Managing Director 2015 SCMR 1257; Abdul Wahab v. HBL 2013 SCMR 1383; SMC No.13 of 2009 PLD 2011 SC 619 and Abid Iqbal v. Secretary Prosecution PLD 2010 SC 841 ref.

**(i) Constitution of Pakistan---**

----Art. 14---Right to dignity---Meaning and scope of right to 'dignity', stated.

Dignity is an inherent and inseparable right of a human being and has thus been guaranteed by the Constitution as an absolute, non-negotiable and inviolable fundamental right that is not subject to any qualification, restriction or regulation. Dignity values the worth of each person and requires the recognition of each person's worth to be held in equal measure for all. It is harmed when individuals are marginalized, ignored or devalued, and is enhanced when the full place of all individuals within the society is recognized. The universal value of human dignity provides that "all human beings are born free and equal in dignity and rights. It shuns patriarchy, misogyny and the age-old archaic and dogmatic social norms, and nurtures progressive and forward-looking constitutional ideals of liberty, equality and social justice.

Erin Daly et al, Dignity law: Global Recognition, Cases, and Perspectives (2020) p. 191; Law v. Canada (Minister of Employment and Immigration) [1999] 1 SCR 497 and The Universal Declaration of Human Rights 1948, Article 1 ref.

Sardar M. Ashfaq Abbasi, Advocate Supreme Court for Petitioners (in C.P. No.1655 of 2019).

Dr. G.M. Chaudhary, Advocate Supreme Court, Syed Rifaqat Hussain Shah, Advocate-on-Record for Petitioner (in C.P. No.1347 of 2019).

Nazir Jawwad, Advocate Supreme Court for PTV.

Date of hearing: 27th July, 2022.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---"**Our lives begin to end the day we become silent about things that matter."[1] In this case, a few brave women decided to break the silence by coming forward to speak up about sexual harassment they faced at their workplace, praying that the perpetrator be taken to task. This reminds us of our celebrated revolutionary poet, Faiz, who said: "Speak, for your lips are free; Speak, your tongue is still yours, Your upright body is yours-Speak, your life is still yours."[2]

2. Briefly stated, the facts of the case are that Ms. Uzma Naveed Chaudhary and four other female anchorpersons of PTV ("Petitioners")[3] lodged a complaint, on 15.06.2016, against Mr. Ather Buttar ("Respondent"), the Controller Incharge of the PTV News Centre Islamabad, under the Protection against Harassment of Women at Workplace Act, 2010 ("Act"), before the Federal Ombudsman. They alleged in the complaint that the respondent had been continuously harassing them individually at their workplace over a long period of time. The alleged sexual advances made to the petitioners included comments and acts like: she is looking hot and offering her to book a room in a hotel, winking at her and making indecent gestures, sending a phone message expressing his love for her, visiting her at her house uninvited, asking her out for dinner and upon her refusal threatening her to suffer the consequences, promising to make her a star if she would have friendship with him, and attempting physical assault on her in his office.

3. The respondent filed his written reply to the complaint, denying the allegations levelled against him. The Federal Ombudsman, after recording evidence of both the parties, held the respondent liable for harassing the petitioners and by allowing the complaint, imposed upon him the minor penalties of censure and payment of compensation Rs.250,000/- to the petitioners, vide her decision dated 20.10.2016.

4. Both the petitioners and the respondent filed their representations to the President of Pakistan against the decision of the Federal Ombudsman: the petitioners prayed for enhancement of the punishment and the respondent, for his exoneration from the allegations. The President rejected the representation of the respondent and accepted that of the petitioners, vide his order dated 30.12.2016, and thereby modified and converted the punishment of the respondent into that of major penalty of removal from service instead of the minor penalties imposed by the Federal Ombudsman.

5. The respondent challenged the order of the President before the Islamabad High Court by invoking its constitutional jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan 1973 ("Constitution") through a writ petition. The High Court partially accepted the writ petition of the respondent, and set aside the order of the President but maintained the decision of the Federal Ombudsman, vide the impugned judgment. Hence, the present petitions have been filed by both the petitioners and the respondent. The petitioners pray for restoration of the order of the President and the respondent, for setting aside the decision of the Federal Ombudsman.

6. We have heard the learned counsel for the parties at some length and with their able assistance have perused the record of the case.

7. We have gone through the decision of the Federal Ombudsman and the order of the President, and found that both have minutely examined and thoroughly discussed the evidence of the parties. We find no misreading or non-reading of any material evidence of the parties that could have constituted an error of law to justify interference with the said findings of facts by the High Court in its constitutional jurisdiction. Needless to state that a High Court cannot interfere, in its constitutional jurisdiction, with findings of fact recorded by the competent courts, tribunals or authorities unless such findings are the result of misreading or non-reading of the material evidence or based on no evidence, which amounts to an error of law and thus justifies, rather calls for, interference.[4] In absence of any misreading or non-reading of the material evidence, the High Court has rightly not interfered with the concurrent findings of facts recorded by the Federal Ombudsman and the President, regarding the culpability of the respondent.

8. However, we find that the observation of the High Court for setting aside the order of the President as to the enhancement of the punishment, on the ground that no reason was provided by the President for enhancing the punishment, is against the record. The High Court has quoted para 28 of the order of the President in the impugned judgment, which is the operative part of the order, and has missed to note that para 27 thereof contains: (i) the discussion on the evidence of the parties for confirming the finding of fact as to the culpability of the respondent, and (ii) the reasons for enhancement of the punishment. As the High Court has maintained the concurrent findings of facts recorded by the Ombudsman and the President on the culpability of the respondent, we do not find it necessary to rediscuss and reappraise the evidence of the petitioners. The reasons for imposing a particular penalty (punishment), after the determination of culpability (conviction), though are distinct and separate from the proof of the allegation (charge), but they need not bear a separate heading or be

narrated in a listed or compact form. Such reasons may, and ordinarily do, form part of the discussion on the overall facts and circumstances of the case, as has been done by the President in the present case in para 27 of his order. For enhancing the penalty of the respondent, the President has observed that the respondent was involved in the molestation and harassment of the petitioners; that the petitioners have no grudge to falsely implicate the respondent in such heinous allegation; that the petitioners are respectable women, working for several years in PTV, and have never lodged any complaint of sexual harassment against any of their colleagues or superiors; that the petitioners are well-educated women and leading happy family lives, and it is not expected from them to level such allegations against the respondent without substance; that the respondent was in habit of using the filthy and threatening language for his subordinates and colleagues; that the conduct of the respondent has remained immoral throughout his service career; and that the purpose of punishment is not only reformatory but also creating deterrence against heinous crimes, such as, the sexual harassment at the workplace. The High Court has failed to appreciate that the President has given due and judicious consideration to the facts and circumstances of the case for enhancing the punishment of the respondent. In view of the said observations of the President, the ground furnished by the High Court for setting aside the President's order is found legally not sustainable.

9. So far as the objection of the respondent that there is a long delay in lodging the complaint by the petitioners against him after the alleged incidents of harassment is concerned, the President has rightly rejected the same and observed that delay in such cases is understandable. In our social and cultural setting where prevailing notions of family honour and taboos play a dominant role, it is not easy for a woman to speak up about such deeply disturbing incidents. There is also the apprehension of counter allegations hurled against her character by the delinquent. For these and other reasons, many cases of sexual harassment remain unreported. Victims of sexual harassment who exhibit the courage to report the matter against all odds should not, therefore, be turned away on the ground of delay in lodging the complaint. The courts, tribunals and authorities concerned must take a lenient view on the delay in filing the complaint by the victim and decide the case on merits. This will encourage victims to come forward to seek justice. The principle enunciated by this Court in several criminal cases[5] involving sexual assault, that delay in reporting the incident to the police in such cases is not material, equally applies to the complaints of sexual harassment made under the Act.

10. As evident from its Statement of Objects and Reasons, Preamble and substantive provisions, the objective of the Act is to actualize the right of women to join a profession or occupation of their choice, where they are treated as an equal with dignity and honour, and feel safe that their working environment is free of harassment, abuse and intimidation. The Act gives effect to Article 34 of the Principles of Policy under our Constitution which provides that "steps shall be taken to ensure full participation of women in all spheres of national life". The Act opens pathways for women to participate more fully in the development of the country at all levels, and ensures equal opportunity for them to earn their livelihood in a safe working environment. The Act also promotes the standards set by international commitments of Pakistan under the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the ILO Discrimination (Employment and Occupation) Convention.

11. Lately, the Parliament of Pakistan has further enlarged the scope of the Act, to realize its objective more effectively, by enacting the Protection against Harassment of Women at the Workplace (Amendment) Act 2022 ("Amendment Act"). The Amendment Act has extended the application of the Act by adding in the definition of "employee" the informal workers without a contract, freelancers, domestic workers, interns, trainees, apprentices, students, performers, artists, sportspersons, etc., and by extending the definition of "workplace" to anyplace where services are rendered or performed by professionals, including educational institutions, gigs, concerts, studios, performance facilities, courts, highways, sporting facilities, gymnasiums etc. The Amendment Act has also redefined the expression "harassment" and has included therein "discrimination on the basis of gender, which may or may not be sexual in nature, but which may embody a discriminatory and prejudicial mindset or notion, resulting in discriminatory behavior on basis of gender against the complainant". Although it is evident from the words, "demeaning attitude", that the expression "sexually demeaning attitude"

used in the definition of "harassment" means demeaning attitude on the basis of sex, the Amendment Act has further clarified it by providing that it includes "any gesture or expression conveying derogatory connotation" that causes "interference with work performance or creating an intimidating, hostile or offensive work environment", and covers conduct that discriminates against persons because of their gender and creates an intimidating or hostile working environment. Any conduct that is rooted in gender-based discrimination and creates an abusive and hostile working environment is harassment under the Act, which is not restricted only to conduct that is related to the act of sex. Many forms of pervasive harassment in the workplace, including denial of equal opportunities as well criticism of one's abilities on the basis of gender, also comes within the ambit of harassment.

12. The Amendment Act has substituted the expression "a woman or man" with "any person" in the definition of "complainant" and has thus made applicable the protection of the Act to transgender persons also. The scope of the Act is not restricted to women only but it protects everyone - male, female and transgender persons. This change in the Act is commendable, as it would now extend the protection to transgender persons also, who are often the most vulnerable to different forms of harassment. The amendments introduced in the Act, we hope, would play an important role to realize the constitutional ideals and values of liberty, dignity, equality and social justice for women and transgender persons in Pakistan.[6]

13. Viewing the Act on a constitutional plane, we note that the right to a safe working environment for all genders including male, female and transgender, free of harassment, abuse and intimidation draws its real strength from the fundamental rights guaranteed under the Constitution: right to life includes the right to livelihood,[7] and thus assumes the right to a safe working environment for everyone, especially women, for earning such a livelihood; intimidating, hostile, abusive and offensive workplace environment offends the right to livelihood and the right to life of a person; right to liberty includes the right to agency, choice and freedom to join any profession or occupation of ones choice; right to enter upon any lawful profession or occupation, carries an inbuilt protection to make and execute such a choice. Any act of harassment done by any person that affects the free choice to enter and continue any lawful profession or occupation would amount to threatening the safety of the working environment. Only a safe working environment meets the constitutional standard of fundamental rights guaranteed under Articles 9 and 18 of the Constitution. These rights read with the rights to dignity, equality and protection against discrimination on the basis of sex under Articles 14 and 25 construct the constitutional foundations of 'gender equality' which ensures safe working environment for all genders, free from all forms of harassment, including sexual harassment.

14. It is underlined that dignity is an inherent and inseparable right of a human being and has thus been guaranteed by our Constitution as an absolute, non-negotiable and inviolable fundamental right that is not subject to any qualification, restriction or regulation.[8] Dignity values the worth of each person and requires the recognition of each person's worth to be held in equal measure for all.[9] It is harmed when individuals are marginalized, ignored or devalued, and is enhanced when the full place of all individuals within the society is recognized.[10] The right to dignity under Article 14 and the construct of "gender equality" turns "sexual harassment" on its head and buries it deep underground. The universal value of human dignity provides that "all human beings are born free and equal in dignity and rights."[11] It shuns patriarchy, misogyny and the age-old archaic and dogmatic social norms, and nurtures progressive and forward-looking constitutional ideals of liberty, equality and social justice. It is time to bid farewell to gender biases and prejudices, and pave the way towards the actualization of these robust and unwavering constitutional ideals and values by embracing the participation of women in all spheres of life with honour and dignity. "No nation can rise to the height of glory", in the words of the Founder of our Nation, Muhammed Ali Jinnah, "unless your women are side by side with you. We are victims of evil customs. It is a crime against humanity that our women are shut up within the four walls of the houses as prisoners. There is no sanction anywhere for the deplorable condition in which our women have to live."[12]

15. Reverting to the merits of the present case, we find that in the facts and circumstances of the case, the enhancement of punishment by the President, of the respondent who had a previous service record involving moral turpitude and had caused harassment, in the present case, to the female employees working under his

supervision and control, at different times, was completely justified for creating a safe working environment for women and for fulfilling the objectives of the Act. The High Court has wrongly interfered with and set aside the President's order. We have also been informed that the respondent has meanwhile retired from service and stays mostly out of the country (currently, in Canada). In view of this development, and in order to effectively implement the punishment awarded to the respondent and to recover the compensation from the pension of the respondent in case he fails to pay it, we convert his punishment from 'removal from service' into 'compulsory retirement' along with payment of Rs.500,000/ as compensation to be paid by him to each of the petitioners including Ms. Qurat-ul-Ain, the pro forma respondent No.6, to best serve the ends of justice in the present case.

16. We, therefore, convert the Civil Petition No.1655/2019 of the petitioners into appeal and allow the same in the said terms, by setting aside the impugned judgment of the High Court, while the Civil Petition No.1347/2019 of the respondent is dismissed. The amount of compensation shall be recovered from arrears of pay (if any), pension emoluments or any other source (property) of the respondent as per section 4(i)(d) of the Act.

MWA/U-1/SC Order accordingly.

**P L D 2022 Supreme Court 806**

**Present: Qazi Faez Isa and Syed Mansoor Ali Shah, JJ**

**GHULAM RASOOL---Petitioner**

**Versus**

**The STATE---Respondent**

Jail Petition No.249 of 2018, decided on 1st September, 2022.

(Against the order of Lahore High Court, Multan Bench dated 31.01.2018 passed in Crl. A. No. 235 of 2012 and Crl. R. No.125 of 2012).

**(a) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Re-appraisal of evidence---Prevalent practice in rural areas of referring to persons by their nicknames (aliases)---Discrepancy in the name of accused mentioned in the FIR and the name of the convict---Whether there was doubt as to identity of accused---Counsel for the petitioner submitted that one "Rasool Bakhsh" was mentioned in the FIR to have caused the injury to the deceased and there was no explanation on record of the case that the present accused, "Ghulam Rasool", was the same person mentioned in the FIR, therefore, it created a reasonable doubt as to the involvement of the accused in the commission of the alleged offence, which entitles him to be acquitted---Validity---Complainant and the accused were residents of the same vicinity, and throughout the proceedings of the case from the arrest of the accused till his conviction, no question as to the identity of the accused was ever raised---In rural areas of the province, where the occurrence took place, it was a matter of common knowledge that people were usually known by their nicknames (aliases), and their exact names were often not known to others---Alias of accused i.e. "Rasoola", was also mentioned in the FIR together with name "Rasool Bakhsh"---Accused, in the present jail petition, had himself mentioned his name as "Ghulam Rasool" alias "Rasoola"; his name, "Ghulam Rasool" alias "Rasoola", was mentioned in the investigation proceedings including the recovery memos, in the Challan, in the statements of the prosecution witnesses and in his own statement recorded under Section 342, Cr.P.C.---Contention as to doubt of the identity of the accused was therefore found baseless---Petition for leave to appeal was dismissed and leave was declined.

**(b) Constitution of Pakistan---**

---Art. 185(3)---Discretionary jurisdiction vested in the Supreme Court under Article 185(3) of the Constitution, exercise of---Scope---In the matter of granting leave to appeal, the Supreme Court does not function as an ordinary court of appeal, and in order to justify the grant of leave to appeal it must be shown that the case involves some important question of law or the impugned finding of fact is the result of gross misreading or non-reading of the material evidence or is so shocking or improbable that no reasonable person could have arrived at it on the basis of the evidence available on the record of the case.

Syeda B.H. Shah, Advocate Supreme Court for Petitioner.

Mirza Abid Majeed, Addl.P,G, Punjab for the State.

Sardar Usman Sharif Khosa, Advocate Supreme Court for the Complainant.

Date of hearing: 1st September, 2022.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**Through the present jail petition for leave to appeal, the petitioner impugns the judgment dated 31.01.2018 of the Lahore High Court, whereby the appeal of the petitioner filed against the judgment of the trial court has been dismissed. The trial court had convicted the petitioner for the offence of committing murder of the complainant's son, Muhammad Ilyas, and sentenced him to imprisonment for life, under section 302(b), P.P.C.

2. Learned counsel for the petitioner submits that one Rasool Bakhsh, not Ghulam Rasool, was mentioned in the FIR to have caused the injury to the deceased (Muhammad Ilyas) and there is no explanation on record of the case that the petitioner, Ghulam Rasool, is the same person mentioned in the FIR as Rasool Bakhsh. Therefore, she contends, it creates a reasonable doubt as to the involvement of the petitioner in the commission of the alleged offence, which entitles the petitioner to be acquitted while giving him the benefit of this doubt. We are not impressed by this contention. The complainant and the petitioner are residents of the same vicinity,

and throughout the proceedings of the case from the arrest of the petitioner till his conviction, no question as to the identity of the petitioner was ever raised. It is a matter of common knowledge that in rural areas of Punjab, people are usually known by their nicknames (aliases), and their exact names are often not known to others. The petitioner's alias, Rasoola, was also mentioned in the FIR together with name Rasool Bakhsh. The petitioner, in the present jail petition[1], has himself mentioned his name as Ghulam Rasool alias Rasoola. His name, Ghulam Rasool alias Rasoola, is mentioned in the investigation proceedings including the recovery memos, in the Challan, in the statements of the prosecution witnesses and in his own statement recorded under section 342, Cr.P.C. The contention as to doubt of the identity of the petitioner is therefore found baseless.

3. The next contention of the learned counsel for the petitioner is that the injury on the neck of the deceased, which led to his death, could not have been caused by a simple knife (churri) allegedly recovered from the petitioner. Dr. Abdul Rehman (PW-12), who conducted the post-mortem examination of the deceased, deposed in cross-examination that any sharp-edged weapon might cause the injury found on the neck of the body of the deceased. In view of the statement of PW-12, this contention of the learned counsel for the petitioner does not detract from the prosecution's case that the recovered churri was the weapon of offence.

4. Having heard the learned counsel for the parties at some length and examined the record of the case, we find that both the trial court and the High Court have concurrently recorded their findings of fact as to the culpability of the petitioner, after a thorough examination of the prosecution evidence. It is a well-settled principle[2] in regard to the exercise of discretionary jurisdiction vested in this Court under Article 185(3) of the Constitution of the Islamic Republic of Pakistan 1973, that in the matter of granting leave to appeal, this Court does not function as an ordinary court of appeal, and in order to justify the grant of leave to appeal it must be shown that the case involves some important question of law or the impugned finding of fact is the result of gross misreading or non-reading of the material evidence or is so shocking or improbable that no reasonable person could have arrived at it on the basis of the evidence available on the record of the case. The learned counsel for the petitioner has not been able to point out any misreading or non-reading of the material evidence that could justify interference with the concurrent findings of fact, nor does the case involve any important question of law for determination by this Court. The leave to appeal is therefore declined and the petition, dismissed.

MWA/G-16/SC Petition dismissed.

**2023 S C M R 50**

**[Supreme Court of Pakistan]**

**Present: Umar Ata Bandial, C.J., Qazi Faez Isa and Syed Mansoor Ali Shah, JJ**

Civil Appeal No.630 of 2010

(Against the judgment of Peshawar High Court, Peshawar dated 03.3.2009, passed in Tax Ref. No.8/2008)

and

Civil Appeals Nos. 159 to 161 of 2013

(Against the judgment of Peshawar High Court, Peshawar dated 15.2.2012, passed in ITRs Nos. 92 to 94/2008)

and

Civil Appeals Nos. 162 and 163 of 2013

(Against the judgment of Peshawar High Court, Peshawar dated 07.4.2011, passed in ITRs Nos. 116 and 117/2010)

and

Civil Appeals Nos. 164 to 167 of 2013

(Against the judgment of Peshawar High Court, Peshawar dated 03.3.2011, passed in ITRs Nos. 86 to 89/2010)

and

Civil Appeals Nos. 168 to 175 of 2013

(Against the judgment of Peshawar High Court, Peshawar dated 30.6.2011, passed in ITRs Nos. 41 to 48/2011)

and

Civil Appeals Nos. 176 to 178 of 2013

(Against the judgment of Peshawar High Court, Peshawar dated 27.9.2011, passed in ITRs Nos. 127 to 129/2010)

and

Civil Appeals Nos. 300 to 306 of 2013

(Against the judgment of Peshawar High Court, Peshawar dated 26.10.2011, passed in ITRs Nos. 54 to 60/2011)

and

Civil Appeals Nos. 529 to 531 of 2013

(Against the judgment of Peshawar High Court, Peshawar dated 18.1.2012, passed in ITRs Nos. 83 to 85/2010)

and

Civil Appeals Nos. 1211 to 1214 of 2014

(Against the judgment of Peshawar High Court, Peshawar dated 28.5.2014, passed in ITRs Nos. 115, 111, 112 and 122/2010)

and

Civil Appeals Nos. 1414 to 1418 of 2014

(Against the judgment of Peshawar High Court, Peshawar 10.7.2014, passed in ITRs Nos. 113/2010, 05, 08, 09 and 10/2011)

and

Civil Petitions Nos. 1152 and 1153 of 2017

(Against the judgment of Peshawar High Court, Peshawar dated 24.1.2017, passed in ITRs Nos. 06/2011 and 39-P/2013)

**COMMISSIONER OF INCOME TAX---Appellant/Petitioner**

**Versus**

**Messrs DYE CHEMICAL INDUSTRIES (PVT.) LTD. and others---Respondents**

Civil Appeals Nos. 630 of 2010, 159 to 178, 300 to 306, 529 to 531 of 2013, 1211 to 1214, 1414 to 1418 of 2014 and Civil Petitions Nos. 1152, 1153 of 2017, decided on 6th September, 2022.

**Income Tax Ordinance (XXXI of 1979) [since repealed]---**

----S. 80D & Second Sched. Pt. I, Cl. 122C---Protection of Economic Reforms Act (XII of 1992), Ss. 2(b), 3 & 6---Exemption from payment of minimum tax---Whether the respondent taxpayers enjoyed exemption from the payment of minimum tax charged under section 80D of the repealed Income Tax Ordinance, 1979 ("Ordinance") by virtue of section 6 of the Protection of Economic Reforms Act, 1992 ("Act") read with clause 122C, Part-I of the Second Schedule to the Ordinance---Held, that section 80D of the Ordinance introduced in the year 1991, much after the insertion of Clause 122C, was a non obstante provision and therefore overrode the other provisions of the Ordinance including any tax exemption granted under the Ordinance prior to the introduction of section 80D---Additionally, the industrial undertakings in the present case were set up after 07.11.1990 which was after the timeframe provided in clause 122C---"Economic reforms" which were protected under the Act were the ones that were announced, promulgated or implemented by the Government on or after the 7th day of November, 1990---"Economic reforms" also included "fiscal incentives for industrialization"---Section 6 of the Act, simply protected the "economic reforms" already introduced for a specified term and mandated that they shall not be altered to the disadvantage of the taxpayer---Fiscal incentives (part of the "economic reforms") that were protected under section 6 were the fiscal incentives that were announced, promulgated and implemented by the Government on or after 07.11.1990---Thus, the two notifications mentioned in the Schedule to the Act were tax incentives announced in December 1990---Section 6 also protected other fiscal incentives notified under the statutes mentioned in section 3 of the Act but the condition precedent for the "economic reforms" (including the fiscal incentives) to enjoy the protection of the Act was that they must have been announced, promulgated or implemented by the Government on or before 07.11.1990---In the present case, the fiscal incentive under clause 122C of Part-I of the Second Schedule was promulgated in 1987---Argument of the counsel for the taxpayer that the industrial undertaking set up by the respondents was after 07.11.1990 was immaterial; it was the promulgation of the fiscal incentive by the Government that had to be on or before 07.11.1990 and not the actual setting up of the industrial undertaking---Even otherwise, if the industrial undertaking was setup after 07.11.1990 then clause 122C does not apply as it only applied to industrial undertaking setup between January 1987 to June, 1988---Appeals were allowed.

Elahi Cotton Mills Ltd v. Federation of Pakistan PLD 1997 SC 582 distinguished.

Ghulam Shoaib Jally, Advocate Supreme Court for Appellants/ Petitioners (in all cases except C.As. Nos. 529 - 531 of 2013).

Jamroz Khan Afridi, Advocate Supreme Court for Appellants/ Petitioners (in C.As. Nos. 529 - 531 of 2013).

Ch. Akhtar Ali, Advocate-on-Record for Appellants/Petitioners (in C.A. No. 630 of 2010).

Syed Rifaqat Hussain Shah, Advocate-on-Record for Appellants/ Petitioners (in C.As. Nos. 159 - 178 of 2013).

Bahadur Sher Afridi, Additional Commissioner FBR.

Amjad Hameed Ghori, Advocate Supreme Court for Respondents (in C.As. Nos. 161, 300-306 of 2013 and 1416-1418 of 2014).

Abdul Rauf Rohaila, Advocate Supreme Court (through video-link) (in C.As. Nos. 162 - 163 of 2013).

Aftab Alam Yasir, Advocate Supreme Court for Respondents (in C.As. Nos. 168 - 175 of 2013).

Sh. Mehmood Ahmed, Advocate-on-Record for Respondents (in C.As. Nos. 176 - 178 of 2013).

Date of hearing: 6th September, 2022.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J**.---The question of law before us is whether the respondent taxpayers enjoyed exemption from the payment of minimum tax charged under section 80D of the repealed Income Tax Ordinance, 1979 ("Ordinance") by virtue of section 6 of the Protection of Economic Reforms Act, 1992 ("Act") read with clause 122C, Part-I of the Second Schedule to the Ordinance.

2. Briefly the common facts are that the respondent taxpayers were assessed for minimum tax on income under section 80D of the Ordinance by the tax officer. The said assessment order was approved by the CIT (Appeals). However, upon appeal the Tribunal set aside the said assessment and deleted the amount of minimum tax on

income on the ground that the respondents enjoyed exemption from tax under section 6 of the Act read with clause 122C, Part-I of the Second Schedule to the Ordinance. The Department agitated the matter before the High Court by filing Tax References which were decided against the Department on different dates through separate orders on the ground that the industrial undertakings of the respondents having been setup after 07.11.1990 were entitled to the relief under section 6 of the Act. The listed civil appeals, with the leave of the court, challenge these orders of the High Court.

3. Learned counsel for the Department submits that the respondents are not entitled to exemption from minimum tax on income under section 80D of the Ordinance by virtue of section 6 of the Act as it does not grant cover to fiscal incentives under clause 122C of Part-I of the Second Schedule to the Ordinance. He adds that date of setting up of the plant by the taxpayer is not relevant but what is relevant is the date of the announcement, promulgation and implementation of the fiscal incentive by the Government. On the other hand, learned counsel for the respondent taxpayers relying on Elahi Cotton Mills[1] and Zaman Cotton Mills[2] submitted that the respondent taxpayers were entitled to the exemption from the levy of minimum tax on income under section 80D of the Ordinance by virtue of section 6 of the Act read with clause 122C of Part-I of the Second Schedule to the Ordinance.

4. We have heard the learned counsel for the parties at some length and have examined the case record and the law on the subject. Examining the relevant provisions of law in a chronological order helps understand the scheme of the law.

5. The Second Schedule to the Ordinance deals with "Exemptions from Total Income" under section 14(1) of the Ordinance. One such exemption was introduced under Clause 122C of the Second Schedule on 22.01.1987[3] which provided as under: -

(122C) Profits and gains derived by an assessee from an industrial undertaking set up between the first day of January, 1987 and the thirtieth day of June, 1988, both days inclusive, for a period of ten years beginning with the month in which the undertaking is set up for commercial production is commenced, whichever is later. (emphasis supplied)

Subsequently, section 80D (minimum tax on income) was introduced through Finance Ordinance, 1991 and is reproduced hereunder:

80D. Minimum tax on income of certain persons. (1) Not-withstanding anything contained in this Ordinance or any other law for the time being in force, where no tax is payable or paid by a company or a registered firm, an individual, an association of persons, an unregistered firm or a Hindu undivided family which, not being a company, does not qualify for assessment under the self assessment scheme under subsection (1) of section 59 resident in Pakistan or the tax payable or paid is less than on-half per cent of the amount representing its turnover from all sources, the aggregate of the declared turnover shall be deemed to be the income of the said company or a registered firm, an individual, an association of persons, an unregistered firm or a Hindu undivided family which, not being a company, does not qualify for assessment under the self assessment scheme under subsection (1) of section 59 and tax thereon shall be charged in the manner specified in subsection (2).

Explanation.- For the removal of doubt, it is declared that the expression "where no tax is payable or paid" and "or the tax payable or paid" apply to all cases where tax is not payable or paid for any reason whatsoever including any loss of income, profits or gains or set off of loss of earlier years, exemption from tax, credits or rebates in tax, and allowances and deductions (including depreciation) admissible under any provision of this Ordinance or any other law for the time being in forced.

...

...

(emphasis supplied)

Section 80D of the Ordinance introduced in the year 1991[4], much after the insertion of Clause 122C, is a non-obstante provision and therefore overrides the other provisions of the Ordinance including any tax exemption granted under the Ordinance prior to the introduction of section 80D[5]. Additionally, according to the learned counsel for the appellant the industrial undertakings were set up after 07.11.1990 which is after the timeframe provided in clause 122C.

6. Now let us see if the promulgation of the Protection of Economic Reforms Act, 1992[6] on 28.07.1992 provides any additional protection to clause 122C by diluting the effect of section 80D of the Ordinance. Sections 2(b), 3, 6 and the Schedule to the Act require examination and are, thus, reproduced hereunder:-

Section 2(b)

"economic reforms" means economic policies and programmes, laws and regulations announced, promulgated or implemented by the Government on and after the seventh day of November, 1990, relating to privatization of public sector enterprises, and nationalized banks, promotion of savings and investments, introduction of fiscal incentives for industrialization and deregulation of investment, banking, finance, exchange and payments systems, holding and transfer of currencies; and

**Section 3**

Act to override other laws.--This Act shall have effect notwithstanding anything contained in the Foreign Currency Accounts (Protection) Ordinance, 2001 (L of 2001).

**Section 6**

Protection of fiscal incentives for setting up of industries.---The fiscal incentives for investment provided by the Government through the statutory orders listed in the Schedule or otherwise notified shall continue in force for the term specified therein and shall not be altered to the disadvantage of the investors.

**The Schedule (See section 6)**

1. Notification No. SRO 1283(I)/90, dated the 13th December, 1990, issued under subsection (2) of section 14 of the Income Tax Ordinance, 1979 (XXXI of 1979)

2. Notification No. SRO 1284(I)/90, dated the 13th December, 1990, issued under section 19 of the Customs Act, 1969 (IV of 1969).

The purpose of the Act as per its preamble is to provide legal protection to economic reforms that have already been introduced and are in the process of being introduced in order to create confidence in the establishment and continuity of the liberal economic environment created by these economic reforms. Collective reading of the above re produced provisions show that "economic reforms" which are protected under the Act are the ones that were announced, promulgated or implemented by the Government on or after the 7th day of November, 1990. "Economic reforms" also include "fiscal incentives for industrialization"[7]. Section 6, simply protects the "economic reforms" already introduced for a specified term and mandates that they shall not be altered to the disadvantage of the taxpayer. The fiscal incentives (part of the "economic reforms") that are protected under section 6 are the fiscal incentives that were announced, promulgated and implemented by the Government on or after 07.11.1990. Therefore, the two notifications mentioned in the Schedule to the Act are tax incentives announced in December 1990. Section 6 also protects other fiscal incentives notified under the statutes mentioned in section 3 of the Act but the condition precedent for the "economic reforms" (including the fiscal incentives) to enjoy the protection of the Act is that they must have been announced, promulgated or implemented by the Government on or before 07.11.1990. In this case the fiscal incentive under clause 122C of Part-I of the Second Schedule was promulgated in 1987. The argument of the learned counsel for the taxpayer that the industrial undertaking set up by the respondents was after 07.11.1990 is immaterial. It is the promulgation of the fiscal incentive by the Government that has to be on or before 07.11.1990 and not the actual setting up of the industrial undertaking. Even otherwise, if the industrial undertaking was setup after 07.11.1990 then clause 122C does not apply as it only applied to industrial undertaking setup between January 1987 to June, 1988.

7. The reliance by the learned counsel for the respondents on Elahi Cotton and Zaman Cotton is also misconceived. The relevant finding of this Court in Elahi Cotton for the purpose of this case, which was simply followed by Zaman Cotton, is as follows:

54. In our view, since the provisions of Act XII of 1992 are subsequent in time and as they are contained in a special statute, they shall prevail over the provisions of section 80-D of the Ordinance, which was enacted through Finance Act, 1991, which was an earlier statute and which was part of general statute. In this view of the matter, assesses who fulfil the conditions of the notifications referred to in the Schedule to section 6 of Act XII of 1992, are entitled to the protection.

The above shows that protection of the Act was extended to the notification under the Schedule of the Act which was dated 13.12.1990 and therefore met the requirement of the relevant date i.e., 07.11.1990. There is no cavil with the law settled by Elahi Cotton that the Act protects fiscal incentives otherwise taken away by section 80D provided the fiscal incentives in question must have been announced, promulgated or implemented by the Government on or after 07.11.1990, which is not so in the present case.

8. For the above reasons, the impugned orders are set aside and these appeals are allowed. The connected civil petitions are also converted into appeals and allowed in the same terms.

MWA/C-22/SC Appeals allowed.

**2023 S C M R 198**

**[Supreme Court of Pakistan]**

**Present: Umar Ata Bandial, Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ**

**AINA HAYA---Petitioner**

**Versus**

**PRINCIPAL PESHAWAR MODEL GIRLS HIGH SCHOOL-I, PESHAWAR and others---Respondents**

Civil Petition No. 2824 of 2019, decided on 20th January, 2022.

(Against the judgment dated 18.06.2019 of the Peshawar High Court, Peshawar passed in W.P No. 1447-P of 2019)

**(a) Educational institution---**

----Policy, disciplinary and administrative matters of an educational institution---Interference by Courts---Courts must sparingly interfere in the affairs of academic institutions, therefore, it is best to leave the disciplinary, administrative and policy matters of educational institutions to the professional expertise of the people running them, unless of course there is a blatant violation of any of the fundamental rights or the law.

Khyber Medical College v. Raza Hassan 1999 SCMR 965; Muhammad Ilyas v. Bahauddin Zakariya University 2005 SCMR 961; Muhammad Arif v. University of Balochistan, PLD 2006 SC 564 and Secretary Economic Affairs Division, v. Anwarul Haq Ahmed 2013 SCMR 1687 ref.

**(b) Administration of justice---**

----Compassion and hardship cases---Judges are to decide disputes before them in accordance with the Constitution and the law and not on the basis of their whims, likes and dislikes or personal feelings or mere humanitarian grounds---While justice is tempered with mercy but not at the expense of overriding the clear letter of the law---Compassion and hardship, therefore, may be considered by courts for providing relief to an aggrieved person, but only when there is scope in the relevant law to do so, not in breach of the law.

D.G., National Savings v. Balqees Begum PLD 2013 SC 174 ref.

Muhammad Amjad Khan, Advocate-on-Record along with Amina Rafique, mother of Petitioner for Petitioner (through video-link from Peshawar).

Mansoor Tariq, Advocate Supreme Court for Respondent No. 1 (through video-link).

Nazirullah Khan, Chairman Peshawar Board for Respondents Nos. 3 - 4.

Date of hearing: 20th January, 2022.

**ORDER**

**SYED MANSOOR ALI SHAH, J**.---Brief facts of the case are that petitioner was a student of Peshawar Girls Model High School No.1, Warsak Road, Peshawar and after passing her 9th class, she started her 10th class. In the new academic year,[1] as the petitioner remained absent for a fortnight from 05.11.2018, she was expelled from school vide letter dated 23.11.2018. The Letter stated two grounds for her expulsion: (i) non-payment of fee since June, 2018 and (ii) for being continuously absent from school w.e.f 5th November, 2018. The petitioner did not attend the classes for the remaining academic year. Subsequently, the request of the petitioner to send her name for the final examination of the 10th class was refused by the school. Aggrieved, the petitioner challenged the said refusal before the Peshawar High Court through a constitutional petition. Initially interim relief was granted to the petitioner and she sat the examination, which she subsequently passed. Later on the constitutional petition was dismissed by the High Court on the ground that petitioner failed to meet the requirement of 66% attendance required by a female student to qualify to sit the examination.

2. We have heard the learned counsel for the parties and have gone through the case record. According to the learned counsel for the school, as well as, the representative of the Board of Intermediate and Secondary Education, Peshawar ("Board"), the attendance of a female student must be 66% to be allowed to sit the examination as per Explanation (a) to Rule-2 of Chapter-IV of the Calendar of the Board of Intermediate and Secondary Education NWFP, 1995. In the case of the petitioner her attendance during the academic year was 45% as per the record. Learned counsel for the petitioner vehemently agitated that the petitioner got married during the academic year and hence missed some of her classes and asserted that the petitioner still had an

attendance of 67.46%. In support of this he referred to letter dated 16.12.2021 issued by the Principal of the school. He also urged the Court to examine the case of the petitioner on humanitarian grounds. Learned counsel representing the school submitted that the letter dated 16.12.2021 is not in accordance with the record and also seriously disputed the veracity of the said document. We have gone through the attendance sheets placed on the record by the petitioner, which support the contention of the learned counsel for the school. There is nothing on the record that the petitioner wanted to resume her classes after 5th November, 2018 and she was not allowed to do so by the school. The rule regarding 66% attendance for female students under the Calendar of the Board of Intermediate and Secondary Education NWFP, 1995 is clear and carries no ambiguity.

3. Courts must sparingly interfere in the affairs of academic institutions[2]. Hamoodur Rahman, J. speaking for this Court in Zakir Ahmed case[3] held that "...we are not unmindful of the necessity of maintaining discipline in educational institutions... where the maintenance of discipline is essential for the orderly conduct of the institution... nor are we unmindful of the fact that persons in charge particularly of educational institutions must be given the fullest authority to correct those placed in their charge in the same manner as a parent or guardian would be able to do." It is, therefore, best to leave the disciplinary, administrative and policy matters of educational institutions to the professional expertise of the people running them, unless of course there is a blatant violation of any of the fundamental rights or the law.

4. Learned counsel for the petitioner, as an alternate plea, urged before us that the petitioner be treated on humanitarian grounds with compassion. No humanitarian ground has been urged before us except that the petitioner was married off during the academic year and that she passed the final examination under the interim order passed by the High Court, therefore her result of the 10th class be accepted. It is important to highlight that judges are to decide disputes before them in accordance with the Constitution and the law and not on the basis of their whims, likes and dislikes or personal feelings or mere humanitarian grounds. While justice is tempered with mercy but not at the expense of overriding the clear letter of the law. Compassion and hardship, therefore, may be considered by courts for providing relief to an aggrieved person, but only when there is scope in the relevant law to do so, not in breach of the law[4]. The requirement of 66% attendance of classes to be entitled to sit for the final examination under the Calendar of the Board is a requirement of law which does not provide any margin of relaxation. Therefore, no court enjoys the power or jurisdiction to ignore or sidetrack the clear letter of the law at the altar of compassion.

5. For the above reasons, we see no reasons to interfere with the impugned order of the High Court. Leave is, therefore, refused and this petition is dismissed.

MWA/A-44/SC Petition dismissed.

**2023 S C M R 233**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, Ayesha A. Malik and Athar Minallah, JJ**

**KANWAR ARIF ALI KHAN and another---Petitioners**

**Versus**

**DANISH ALI and others---Respondents**

Civil Petitions Nos. 3509 and 1494-K of 2021, decided on 1st December, 2022.

(Against judgments dated 27.05.2021 and 02.06.2021 passed by the High Court of Sindh Bench at Sukkur in Const. Ps. Nos. D-1110 of 2020, D-1538 of 2017)

**Supreme Court Rules, 1980---**

----O. XXXIII, R. 7---Inherent powers of the Supreme Court---Scope---Application by a person who is not a party in the proceedings before the High Court---Person who is not a party to a suit or a proceeding in the court below (the Supreme Court) should file a separate application for obtaining leave from the appellate court to appeal the judgment, decree or order of which he feels aggrieved, along with the memorandum of appeal filed by him.

Longstanding and consistent practice of the Supreme Court is that any person who challenges the judgment of the High Court through a petition or appeal, but has not been a party to the proceedings before the High Court, first prefers a separate application seeking leave of the Court to maintain such a petition or appeal. The wisdom behind the said practice is; firstly, that it ensures that the Court is put on notice that the petitioner was not a party in the proceedings before the High Court; and secondly, the petitioner, before addressing the merits of the case, has to establish before the Court that he is aggrieved of the impugned judgment. Once these conditions are met and the application is allowed, by the Court, the petition or appeal is duly numbered and fixed to be heard on merits. Such practice has been tacitly a part of Order XXXIII, Rule 7 of the Supreme Court Rules, 1980 for a long time and promotes transparency, openness and good judicial governance. Supreme Court endorsed such practice and reiterated the principle to such effect laid down in the case of H. M. Saya & Co. v. Wazir Ali Industries Ltd. PLD 1969 SC 65.

H. M. Saya & Co. v. Wazir Ali Industries Ltd. PLD 1969 SC 65 ref.

Hassan Rasheed Qamar, Advocate Supreme Court and Muhammad Haseeb Jamali, Advocate Supreme Court (through video link, Karachi) for Petitioners.

Rai Muhammad Nawaz Khan Kharal, Advocate Supreme Court for Respondents.

Date of hearing: 1st December, 2022.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**

Civil Petition No.3509 of 2021: The main case has been decided by the Sindh High Court vide order dated 02.06.2021, therefore, the instant matter arising out of an interim order has become infructuous and is disposed of accordingly.

Civil Petition No.1494-K of 2021: We have noticed that the petitioner was not a party before the High Court as his application for impleadment was dismissed vide order dated 27.5.2021 and subsequently the main petition was decided on 02.6.2021, which has been challenged before us by the said petitioner.

Application by a person who was not a party in the proceedings before the High Court:

2. This Court in H.M. Saya[1] has held in 1969 that "a person who is not a party to a suit or a proceeding may prefer an appeal if he is affected by the judgment, decree or order of the trial Court provided he obtains leave from the Court of appeal". Since then it has been a longstanding and consistent practice of this Court that any person who challenges the judgment of the High Court through a petition or appeal, but has not been a party to the proceedings before the High Court, first prefers a separate application seeking leave of the Court to maintain such a petition or appeal. The wisdom behind the said practice is; firstly, that it ensures that the Court is put on notice that the petitioner was not a party in the proceedings before the High Court; and secondly, the petitioner, before addressing the merits of the case, has to establish before the Court that he is aggrieved of the impugned judgment. Once these conditions are met and the application is allowed, by the Court, the petition or appeal is

duly numbered and fixed to be heard on merits. This practice has been tacitly a part of Order XXXIII, Rule 7 of the Supreme Court Rules, 1980 for a long time and promotes transparency, openness and good judicial governance. We, therefore, reiterate the principle in H.M. Saya and endorse the said practice of the Court.

3. In the instant case, learned counsel for the petitioner has frankly pointed out that he wishes to prefer such an application. Let the same be done. However, the office shall de-number the petition and first entertain the aforesaid application, which shall be put up before the Court for appropriate orders.

4. Office shall also submit a report for our perusal in chambers as to how the petition was entertained and numbered in absence of any application seeking permission to file this civil petition in the wake of such a long standing practice of this Court.

MWA/K-17/SC Order accordingly.

**2023 S C M R 301**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Muhammad Ali Mazhar, JJ**

**MUHAMMAD NAEEM---Petitioner**

**Versus**

**FEDERATION OF PAKISTAN and others---Respondents**

C. P. No. 4294 of 2019, decided on 25th November, 2022.

(Against the judgment of Peshawar High Court, Peshawar dated 01.10.2019, passed in W.P. No. 4666-P of 2018)

**(a) Civil Servants Act (LXXI of 1973)---**

----S. 2(1)(b)---Government Servants (Efficiency and Discipline) Rules 1973, R. 2(1)--- Government Servants (Conduct) Rules 1964, R. 3(1)(b)---Penal Code (XLV of 1860), Ss. 21 & 161---Term 'public servant' as provided in sections 21 & 161 of P.P.C.---Scope---Definition of "public servant" as provided in section 21 of the P.P.C. is only for the purpose of application of the provisions of that substantive criminal law, as well as of the related procedural criminal law, the Code of Criminal Procedure 1898, and the extended definition of that term as given in Explanation of section 161, P.P.C.---Said definitions do not confer any civil status, capacity or position on the persons falling in the scope thereof.

Terms "civil servant" and "government servant", having almost the same meaning and scope, are commonly used interchangeably in the civil service laws of the country. The term "public servant" as defined in section 21 of the P.P.C. for the purpose of application of that law is, however, of wide import and scope than those terms. It cannot, therefore, be referred to or used as an equivalent or synonym of them, in the context of a person's civil status, capacity or position. In the ordinary English language, the words "civil servant" and "public servant" may have the same meaning, but this is not so in the legal language as commonly used in the laws of the country (Pakistan). It may be said that in legal parlance, particularly of the service and criminal laws, all civil servants are public servants as defined in section 21 of the P.P.C., but not all such public servants are civil servants.

The definition of "public servant" as provided in section 21 of the P.P.C. is only for the purpose of application of the provisions of that substantive criminal law, as well as of the related procedural criminal law, the Code of Criminal Procedure 1898, and the extended definition of that term as given in Explanation of section 161 (which brings the employees of any corporation or other body or organisation set up, controlled or administered by, or under the authority of, the Federal Government, within the ambit of the term "public servant") is only for the purpose of application of that section and sections 162, 163, 164, 165, 166, 167, 168, 169 and 409 of the P.P.C. These definitions do not confer any civil status, capacity or position on the persons falling in the scope thereof. The reference to the definition of "public servant" as provided in a criminal law, the P.P.C., for claiming the civil status of being a government servant/officer is therefore misconceived.

Professor Alaud Din v. Government of Punjab PLD 1979 Lah. 324 ref.

**(b) National Bank of Pakistan Ordinance (XIX of 1949)---**

----S. 3(2)---Civil Servants Act (LXXI of 1973), S. 2(1)(b)---Employees of National Bank of Pakistan (NBP)---As per section 3(2) of the National Bank of Pakistan Ordinance, 1949, NBP is a body corporate, and its employees are employees of a statutory corporation, not of the Federal Government---Employees of NBP are therefore not "government servants" or "civil servants" as defined in the Civil Servants Act, 1973.

Deedar Bhayo v. NBP 2013 SCMR 894 and Mubeen-Us-Salam v. Federation PLD 2006 SC 602 ref.

**(c) National Bank of Pakistan Ordinance (XIX of 1949)---**

----S. 3(2)---Civil Servants Act (LXXI of 1973), S. 2(1)(b)---Constitution of Pakistan, Art. 199---Employees of National Bank of Pakistan (NBP)---Recourse to writ jurisdiction of the High Court in service matters---National Bank of Pakistan (NBP), being a statutory corporation, is amenable to the writ jurisdiction of the High Courts under Article 199 of the Constitution, and its employees when are governed or proceeded against under the statutory rules can also avail the recourse to the writ jurisdiction for the redressal of their grievances in respect of their service matters---However, such legal position does not merge the NBP, a separate juristic person, into

the Federal Government, nor in any manner blurs the distinction between NBP, a statutory corporation, and the Federal Government, a constitutional body, or in any manner turn the employees of the NBP into the employees of the Federal Government.

Deputy Managing Director, NBP v. Ata-ul-Haq PLD 1965 SC 201; Salah-ud-Din v. Frontier Sugar Mills PLD 1975 SC 244; University of Dacca v. Zakir Ahmed PLD 1965 SC 90; Deedar Bhayo v. NBP 2013 SCMR 894; Mubeen-Us-Salam v. Federation PLD 2006 SC 602; K.D.A. v. Wali Ahmed 1991 SCMR 2434; Principal, Cadet College v. Shoab Qureshi PLD 1984 SC 170 and State of Assam v. Barak Upatyaka (2009) 5 SCC 694 ref.

Amjad Ali, Advocate Supreme Court for Petitioner.

Nemo for Respondents.

Date of hearing: 25th November, 2022.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The present case stems from a Notification dated 30.12.2015 ("Notification") issued by the Finance Division (Internal Finance Wing), with the concurrence of the Law Division, Government of Pakistan, whereby it has been clarified that National Bank of Pakistan ("NBP") is a body corporate and its employees are not "civil servants" nor have they been declared as "public servants" within the meaning of section 21 the Pakistan Penal Code, 1860 ("P.P.C."). Pursuant to the said Notification, the Head Office of the NBP informed this legal position to all employees of the NBP through an Information Circular, dated 15.01.2016 ("Circular"), and asked the employees having passports with an entry of their occupation as a "Government Officer", to get changed the same immediately to prevent the liability of any offence under the Passports Act, 1974.

2. The petitioner, an employee of the NBP, challenged the said Notification and Circular in the Peshawar High Court through a writ petition, asserting that the employees of the NBP are government servants/officers as they fall within the scope of the definition of "public servant" provided in clause ninth of section 21 and Explanation of section 161 of the P.P.C. The High Court dismissed the writ petition, vide its judgment dated 01.10.2019 ("impugned judgment"), by holding that the NBP is a statutory body and its employees are not civil servants or government servants. The petitioner has sought leave to appeal against this judgment of the High Court, through the present petition.

3. We have heard the arguments of the learned counsel for the petitioner and examined the record of the case.

4. First of all, it would be appropriate to make it clear that the terms "civil servant" and "government servant", having almost the same meaning and scope, are commonly used interchangeably in the civil service laws of Pakistan.[1] The term "public servant" as defined in section 21 of the P.P.C. for the purpose of application of that law is, however, of wide import and scope than those terms. It cannot, therefore, be referred to or used as an equivalent or synonym of them, in the context of a person's civil status, capacity or position. In the ordinary English language, the words "civil servant" and "public servant" may have the same meaning, but this is not so in the legal language as commonly used in the laws of Pakistan. It may be said that in legal parlance, particularly of the service and criminal laws, all civil servants are public servants as defined in section 21 of the P.P.C., but not all such public servants are civil servants.

5. The definition of "public servant" as provided in section 21 of the P.P.C. is only for the purpose of application of the provisions of that substantive criminal law, as well as of the related procedural criminal law, the Code of Criminal Procedure, 1898, and the extended definition of that term as given in Explanation of section 161 (which brings the employees of any corporation or other body or organisation set up, controlled or administered by, or under the authority of, the Federal Government, within the ambit of the term "public servant") is only for the purpose of application of that section and sections 162, 163, 164, 165, 166, 167, 168, 169 and 409 of the P.P.C.[2] These definitions do not confer any civil status, capacity or position on the persons falling in the scope thereof. In the present case, the matter relates to the civil status of the employees of the NBP to be mentioned in their passports, not to the application of certain provisions of the criminal laws to them or to the functions performed by them. The reference by the petitioner to the definition of "public servant" as provided in a criminal law, the P.P.C., for claiming the civil status of being a government servant/officer is therefore misconceived.[3] The NBP, as per section 3(2) of the National Bank of Pakistan Ordinance, 1949, is a body

corporate, and its employees are employees of a statutory corporation, not of the Federal Government. They are therefore not "government servants" or "civil servants" as defined in the Civil Servants Act, 1973.[4]

6. We are cognizant of the legal position that the NBP, being a statutory corporation, is amenable to the writ jurisdiction of the High Courts under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973,[5] and its employees when are governed or proceeded against under the statutory rules can also avail the recourse to the writ jurisdiction for the redressal of their grievances in respect of their service matters.[6] However, this legal position does not merge the NBP, a separate juristic person, into the Federal Government, nor in any manner blur the distinction between NBP a Statutory Corporation and the Federal Government, a constitutional body or in any manner turn the employees of the NBP into the employees of the Federal Government.[7]

7. For the above reasons, we agree with the conclusion of the impugned judgment. The petition is meritless. It is, therefore, dismissed and the leave to appeal is declined.

MWA/M-78/SC Petition dismissed.

**2023 S C M R 394**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, Jamal Khan Mandokhail and Ayesha A. Malik, JJ**

**MUHAMMAD YASIN and another---Petitioners**

**Versus**

**The DIRECTOR GENERAL, PAKISTAN POST OFFICE, ISLAMABAD and another---Respondents**

Civil Petitions Nos. 688 and 689 of 2020, decided on 9th January, 2023.

(Against the judgment of the Federal Service Tribunal, Islamabad dated 10.01.2020, passed in Appeals Nos. 2061 and 2062 (R)CS of 2019)

**Constitution of Pakistan---**

----Arts. 4, 5 & 25---Civil service---Right to equality---Scope---Appointment---Eligibility criteria---Any unlawful act cannot be made a standard for enforcing the right to equality guaranteed by the Constitution---Any person aspiring for the appointment to a post has to pass the eligibility criteria prescribed in the relevant law for that post and cannot be absolved from fulfilling those criteria on the ground that some other person who was allowed to compete for or appointed to such post also did not meet the prescribed criteria.

Article 25 of the Constitution guarantees the equal protection of law, not the equal protection of lawlessness, by declaring that all citizens are equal before law and are entitled to equal protection of law. An unlawful act, therefore, cannot be made a standard for enforcing the right to equality guaranteed by the Constitution. One illegality cannot be allowed to be compounded by applying the right to equality. The extension of the right to equality to the acts done in violation of law would amount to perpetuating previous unlawful acts and motivating the commission of further illegalities. Article 25 of the Constitution has no application to a claim based upon other unlawful acts and illegalities. It comes into operation when some persons are granted a benefit in accordance with law but others, similarly placed and in similar circumstances, are denied that benefit. Such other persons cannot be discriminated against to deny the same benefit, in view of their right to equality before law and equal protection of law guaranteed by Article 25 of the Constitution. But where a person gains, or is granted, a benefit illegally, other persons cannot plead, nor can the court accept such a plea, that the same benefit must be allowed to them also in violation of law.

Abdul Wahid v. C.B.R. 1998 SCMR 882; Government of Punjab v. Zafar Iqbal 2011 SCMR 1239; Yar Muhammad v. Government of Punjab 2011 SCMR 1537; Shahid Ahmed v. O.G.D.C. 2014 SCMR 1008 and Government of Khyber Pakhtunkhwa v. Hidayat Ullah 2021 SCMR 1904 ref.

One wrongdoing cannot be permitted, defended or condoned by citing the example of another wrongdoing. If unlawful acts are allowed or acknowledged on the basis of the right to equality and non-discrimination, it would negate the rule of law mandated by Articles 4 and 5 of the Constitution. The one who wants the court to grant him the relief prayed for must base his claim on his own legal right, not on the wrongful gains of others. Any person aspiring for the appointment to a post has to pass the eligibility criteria prescribed in the relevant law for that post and cannot be absolved from fulfilling those criteria on the ground that some other person who was allowed to compete for or appointed to such post also did not meet the prescribed criteria.

Malik Matee Ullah, Advocate Supreme Court for Petitioners (in both cases).

Nemo for Respondents.

Date of hearing: 9th January, 2023.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The petitioners seek leave to appeal against a consolidated judgment of the Federal Service Tribunal, dated 10.01.2020 ("impugned judgment"), whereby their appeals filed against the decisions of the departmental authority have been dismissed. The departmental authority had declined the petitioners' request for permission to appear in the departmental competitive exam for appointment to the posts of Assistant Superintendent.

2. Briefly, the facts of the case are that the petitioners, Muhammad Yasin and Mehboob Khan, are serving in the Pakistan Post Office Department as Clerk and Postmaster, respectively. They applied to the departmental

authority for permission to appear in the departmental competitive exam for appointment to the posts of Assistant Superintendent, which was declined to them on the ground that they were above 45 years of age and as such were not eligible for appointment to the said post under the relevant rules. The petitioners made appeals in the Tribunal, which were dismissed by the impugned judgment. Hence, they have filed these petitions for leave to appeal.

3. The petitioners concede that as per the relevant rules, which prescribe the method, qualifications and other conditions for appointment to the posts of Assistant Superintendent, the officials applying for that appointment must not be more than 45 years of age on the last date fixed for receipt of the applications. Their only contention, before us, is that some other official was allowed to appear in an earlier exam for the same post, despite that he was also above 45 years of age at that time; therefore, they are entitled to equal treatment and same relief as per Article 25 of the Constitution of the Islamic Republic of Pakistan 1973 ("Constitution").

4. We have considered the contention of the petitioners, read the relevant rules and examined the record of the case.

5. Article 25 of the Constitution guarantees the equal protection of law, not the equal protection of lawlessness, by declaring that all citizens are equal before law and are entitled to equal protection of law. An unlawful act, therefore, cannot be made a standard for enforcing the right to equality guaranteed by the Constitution. One illegality cannot be allowed to be compounded by applying the right to equality. The extension of the right to equality to the acts done in violation of law would amount to perpetuating previous unlawful acts and motivating the commission of further illegalities. Article 25 of the Constitution has no application to a claim based upon other unlawful acts and illegalities. It comes into operation when some persons are granted a benefit in accordance with law but others, similarly placed and in similar circumstances, are denied that benefit. Such other persons cannot be discriminated against to deny the same benefit, in view of their right to equality before law and equal protection of law guaranteed by Article 25 of the Constitution. But where a person gains, or is granted, a benefit illegally, other persons cannot plead, nor can the court accept such a plea, that the same benefit must be allowed to them also in violation of law.

6. If some other person ineligible for the appointment to the post of Assistant Superintendent, whose case is not before us, had been permitted to appear in an earlier exam for the said post in violation of law (the relevant rules), this fact does not confer any right on the petitioners to claim the similar permission by repeating the violation of law. As the proverb goes: "Two wrongs don't make a right". One wrongdoing cannot be permitted, defended or condoned by citing the example of another wrongdoing. If unlawful acts are allowed or acknowledged on the basis of the right to equality and non-discrimination, it would negate the rule of law mandated by Articles 4 and 5 of the Constitution. The one who wants the court to grant him the relief prayed for must base his claim on his own legal right, not on the wrongful gains of others. Any person aspiring for the appointment to a post has to pass the eligibility criteria prescribed in the relevant law for that post and cannot be absolved from fulfilling those criteria on the ground that some other person who was allowed to compete for or appointed to such post also did not meet the prescribed criteria. The petitioners, thus, cannot dispute the decision of the departmental authority, declining to them the permission sought, on the ground of their right to equal treatment and non-discrimination.

7. For the above reasons, we find that the contention of the petitioners is absolutely misconceived. The departmental authority and the Tribunal have correctly decided the present matter in accordance with law. These petitions are meritless; they are, therefore, dismissed and the leave to appeal, declined.

MWA/M-4/SC Petitions dismissed.

**2023 S C M R 459**

**[Supreme Court of Pakistan]**

**Present: Umar Ata Bandial, C.J., Syed Mansoor Ali Shah and Ayesha A. Malik, JJ**

**PROVINCE OF SINDH through Chief Minister and others---Petitioners**

**Versus**

**SARTAJ HYDER and others---Respondents**

Civil Petitions Nos. 943 to 954-K of 2022, decided on 21st October, 2022.

(Against orders dated 01.09.2022 and 06.09.2022 passed by the High Court of Sindh, Bench at Sukkur and Circuit Court Larkana in C.Ps. Nos.D-1064, D-1068, D-1072, D-1075, D-1077, D-1080, D-1081, D-1083, D-1084, S-790, S-797 and S-792 of 2022)

Per Ayesha A. Malik, J; Umar Ata Bandial, CJ and Syed Mansoor Ali Shah, J. agreeing (Majority view)

**(a) Constitution of Pakistan---**

----Art. 185(3)---Interim orders passed by High Court impugned before the Supreme Court---Supreme Court normally does not interfere with the interim orders of the High Court except in exceptional circumstances. Federation of Pakistan through Secretary, Ministry of Energy (Power Division), Islamabad and others v. Shafiq ul Hassan and others 2021 PLC (C.S.) 292 and Dossani Travels Pvt. Ltd and others v. Messrs Travels Shop (Pvt.) Ltd. and others PLD 2014 SC 1 ref.

**(b) National Disaster Management Act (XXIV of 2010)---**

----Ss. 3(2)(p), 6, 8, 13 & 18---Flood management in Province of Sindh---Citizens Committee in every Taluka of flood affected Division---Said Committees were constituted on orders of the High Court with the direction that such Committees be headed by a Civil Judge and that the said committees work under the supervision of the concerned District and Sessions Judge---Constitutionality---Role assigned to the judicial officers of overseeing the work of the executive by heading the Citizens Committees essentially meant that the judicial officers were performing executive functions which was against the principle of separation of powers---Inclusion of the members of the District Judiciary in the said Committees was not required given that there was an entire legal framework under the National Disaster Management Act, 2010.

The issue before the Court essentially is the exercise of jurisdiction by the High Court while creating the citizens committees and placing judges from the District Judiciary on these committees to oversee the work, being done by the committees. The role assigned to the judicial officers of overseeing the work of the executive by heading the citizens committees essentially means that the judicial officers are performing executive functions which is against the principle of separation of powers. The Constitution does not contemplate assumption of functions by one organ that essentially belongs to another. Moreover planning and strategy, coordination, monitoring and implementation are the functions of the executive and is best left for them to fulfil their duty and obligations in this regard. Furthermore, the work of these committees is a fulltime job which will require the judicial officers to spend time on these committees which in turn take them away from their judicial work that is also not practical nor expedient.

The relevant law on the subject is the National Disaster Management Act, 2010 ('the Act'), which establishes a National Disaster Management Commission (Commission) for the purposes of policy making. This Commission not only lays down the policy on disaster management but also approves a National Plan and Guidelines to be followed by the Federal and Provincial authorities in the event of a natural disaster.

Formation of the citizens committees by the High Court, in principle, was to facilitate relief efforts in different areas within the Province, however, the inclusion of the members of the District Judiciary was not required given that there is an entire legal framework under the Act to ensure relief work right down to the district level. Supreme Court modified the impugned orders of the High Court to the extent that the Citizens Committee shall no more be headed by a Civil Judge notified by the District Judge concerned and the citizens committee shall no more work under the supervision of the concerned District and Sessions Judge.

**(c) National Disaster Management Act (XXIV of 2010)---**

----Ss. 3(2)(p), 6, 8, 13 & 18---Flood management in Province of Sindh---Citizens Committee in every Taluka of flood affected Division constituted on orders of the High Court---Participation of public and civil society in the National Disaster Management Authority (Authority), the Provincial Disaster Management Authority (PDMA), the District Disaster Management Authority (DDMA), and the National Disaster Management Commission (Commission)---Significance and benefits---Community participation is not only necessary for planning disaster management but also for implementing and monitoring purposes as it gives people the right to participate in the decisions that affect their lives; this creates more awareness and a sense of ownership and responsibility which is required, particularly in disaster management so to enhance effectiveness and engage the people with their communities to provide rescue, relief and rehabilitation efforts---Importance of inclusion of civil society in disaster management stated.

As per the scheme of the National Disaster Management Act, 2010, members of the civil community which include volunteers, NGOs, doctors and others can be made part of the Provincial and District Management Authorities to help relief efforts.

Participation by the public in the Provincial Disaster Management Authority (PDMA) and District Disaster Management Authority (DDMA) and even at the National Disaster Management Commission (Commission) level ensures that the flood affectees are able to bring first hand their vulnerabilities and priorities, which results in a more measured response and proper allocation of resources where required. It also gives the National Disaster Management Authority (Authority) greater insight into the affected communities enabling them to work more effectively and produce better result. Community participation is not only necessary for planning disaster management but also for implementing and monitoring purposes as it gives people the right to participate in the decisions that affect their lives. This creates more awareness and a sense of ownership and responsibility which is required, particularly in disaster management so to enhance effectiveness and engage the people with their communities to provide rescue, relief and rehabilitation efforts. Hence, citizens' participation in the PDMA and DDMA can improve coordination and response which will enable the government authorities to provide relief work in a more effective and efficient manner. It is fundamental to the composition of the Commission, the Authority, the PDMA and the DDMA that members of civil society are included in it.

To deal with the issue in hand, the Citizens Committees can work with DDMA to the extent of monitoring, coordination efforts and ensure that relief work reaches the affectees, who do not have sufficient assistance at the moment. The committees can also facilitate the PDMA and the DDMA of the Province in providing necessary information and data with reference to relief work and what is required which will improve the Authority's coordination with affected areas and communication with affected areas especially due to the challenges of accessibility and communication failure. The Citizens Committee can, therefore, monitor the efforts of the PDMA and the DDMA which will not only lead to better results in the relief work but will also create awareness within the affectees as to the manner in which the relief effort is being carried out and will encourage them to participate. This participatory approach to a natural disaster humanizes the work of the authorities so that affectees are provided with real time relief that they need and not what the paperwork suggests.

Supreme Court directed that the Citizens Committees shall oversee the work of the government authorities and provide necessary information and data to facilitate the work of the authorities; that the Citizens Committee itself shall not engage in directing or controlling the relief work being undertaken but shall participate in the process put in place by the DDMA to make it more effective and inclusive.

**(d) National Disaster Management Act (XXIV of 2010)---**

----Ss. 6, 8 & Chapts. III, IV---National Policy Guideline on Vulnerable Groups in Disasters 2014 (Policy Guidelines)---Flood management in Province of Sindh---Inclusion of women in disaster management, importance of---Citizens Committee in every Taluka of flood affected Division constituted on orders of the High Court---National Policy Guideline on Vulnerable Groups in Disasters 2014 (Policy Guidelines) requires the participation of women in disaster management plan at all levels to ensure integration of the gender perspective---Importance of inclusion of women in disaster management stated.

National Policy Guideline on Vulnerable Groups in Disasters 2014 (Policy Guidelines)requires the participation of women in disaster management plan at all levels to ensure integration of the gender perspective. As per the Policy Guidelines, women are at a greater risk from natural disasters than men. They are vulnerable and victims in natural disasters but also play a significant role throughout the disaster management cycle, without being adequately recognized and included in the decision making. Therefore, in line with the policies formulated, it is imperative that the citizens committees include women, older persons and persons with disabilities so that the required response is ensured and provided and that the Policy Guidelines formulated be implemented real time. In this context, the affected areas require maternity and healthcare for women so there is an increased need for female doctors, trainers and caretakers to attend to the health concerns. Women are often subjected to gender-based violence and harassment in times of such calamities, therefore safety and security concerns are also of significance for which appropriate response is also required. In this context, although the framework exists, an effort must go into ensuring that it actually functions and fulfils its mandate. Accordingly, the Citizens Committee should ensure the representation of the vulnerable groups, particularly of women, in order to strengthen its perspective.

Supreme Court directed that the Citizens Committees shall continue to operate with the given composition including that of vulnerable groups, particularly women for monitoring the relief work and provide necessary information to the District Disaster Management Authority (DDMA) to improve their efforts.

Per Syed Mansoor Ali Shah, J; Umar Ata Bandial, CJ and Ayesha A. Malik, J; agreeing (Majority view)

**(e) National Disaster Management Act (XXIV of 2010)---**

----Ss. 6(2)(g), 10(3)(a) & 17(3)(b)---Constitution of Pakistan, Arts. 9 & 14---Climate change adaptation plan ---- Observations and directions recorded by the Supreme Court regarding importance of a climate change adaptation plan stated.

In view of the unprecedented damage (due to floods) and the likelihood of its recurrence, it is imperative that serious and practical efforts are undertaken for prevention and adaptation against such disasters induced by climate change. It is expected that existing policies or mechanisms catering to food insecurity etc. are mobilized as soon as possible and if no such policies or mechanisms exist, then the respective State functionaries should take urgent action to formulate such policies and create such mechanisms to prevent further exacerbation of the losses and damage already suffered due to the floods and for sustainable rehabilitation.

Climate justice was an important consideration at the 27th Conference of the Parties to the United Nations Framework Convention on Climate Change ("COP27") which concluded with a significant and positive development through the formation of a loss and damage fund for climate-vulnerable developing countries. Soon funds will be allocated to countries that have suffered loss and damage due to climate change. It is high time to develop a mechanism for the allocation of these funds and the identification of key adaptation infrastructural projects that will help build national climate resilience, especially against floods in the years to come. It is expected that the Ministry of Climate Change, Government of Pakistan shall drive this initiative and frame a policy and set up a mechanism to effectively and efficiently utilize such funds. It is therefore essential that these global funds are invested in building national climate resilience so that climate induced disasters can be minimized.

Climate Change is perhaps the most serious threat to the fundamental rights of the people in Pakistan. In order to protect their right to life and above all their right to dignity under Articles 9 and 14 of the Constitution, a climate resilient adaptation plan including a detailed mechanism for utilization of financial support coming to Pakistan from the loss and damage fund, is the need of the hour. Having failed to learn from the past floods, as has become apparent from the magnitude of the destruction caused by the recent floods, it is pivotal that effective steps are taken to prevent such catastrophes in the future.

Hassan Akbar, A.G., Sindh (via video link from Karachi), Iqbal Memon, Commissioner Karachi and Maqsood Soomro (PDMA Sindh) (via video link from Karachi) for Petitioners.

Ghulam Shabbir Sher, Advocate Supreme Court for Respondents (in C.P. No. 943-K of 2022).

Nemo for Respondents (in remaining cases).

Faisal Siddique, Advocate Supreme Court Amicus Curiae.

Date of hearing: 21st October, 2022.

**JUDGMENT**

**AYESHA A. MALIK, J.---**The instant Civil Petition (C.P. No.943-K of 2022) along with connected Petitions impugns interim orders dated 01.09.2022 and 06.09.2022, passed by the High Court of Sindh, Bench at Sukkur and Circuit Court Larkana (High Court). The orders have been passed in petitions filed by the Respondents in relation to the relief work carried out by the Petitioners in the flood affected areas of Sindh, mainly Khairpur, Ghotki and Naushahro Feroze.

2. The Petitioners before the Court are the Province of Sindh and Director General, Provincial Disaster Management Authority (PDMA), amongst others, whose grievance against the impugned orders is that the Court has directed the relevant Commissioners to constitute a citizens committee in every Taluka of Sukkur Division, Larkana Division, Shaheed Benazirabad Division and Naushahro Feroze District and directed that such citizens committee be headed by a Civil Judge and that the said committees work under the supervision of the concerned District and Sessions Judge. The Petitioners are also aggrieved with the directions given that the citizens committees are to look after the affairs of the tent city. Mr. Hassan Akhtar, Advocate General Sindh, argued that the impugned orders have placed the Provincial and District administration, responsible for disaster management including the provision of relief work under the control of the citizens committees which are headed by Civil Judges. Consequently, the Court has exceeded its jurisdiction as it has directed judges to enter the domain of the executive by requiring them to oversee relief work. He adds that the orders were beyond the court's jurisdiction and have placed relief efforts in the hands of the citizens committee. He explained that the Petitioners are striving hard to ensure that adequate relief is provided to the affected areas and that any lapse or deficiencies in the same are not on account of negligence or ineffective management by the Petitioners but are due to vastness of the area which is affected by the flooding coupled with the lack of resources. He elaborates that access to these areas is also an issue as roads, railway lines, bridges have been damaged or destroyed and large parts of these areas are under water. Despite these challenges, he states, that best efforts are being made and that these committees will hamper progress. He explained that distribution of relief items to the calamity affected areas is the responsibility of the District Disaster Management Authority (DDMA) and the PDMA coordinates all relevant departments for actions required in response to the floods. As per the record of the Government of Sindh, there has been an unprecedented amount of rainfall in the month of July and August 2022 with 307% and 561% over and above the annual average, respectively. He stated that the recent spell of rain has impacted the entire Province of Sindh such that 30 districts are under water which has led to loss of infrastructure and resources and has brought about a humanitarian crisis. He further submits that there is a legal framework in place under the National Disaster Management Authority Act, 2010 (Act) whereby the PDMA and the DDMA are functional and are carrying out relief work. He added that as per notification dated 24.06.2014 issued by the Government of Sindh, Services, General Administration and Coordination Department, two representatives from the business community, three representatives from the civil society organisations and two representatives from the agriculture sector are nominated as members of the DDMA. Hence, he states, that civil society is already a part of the existing framework and so there was no reason to make a citizens committee.

3. On behalf of the Respondents, who are affectees of the calamity affected areas of districts of the Province of Sindh, it is stated that no relief work is being provided in their area, hence, petitions were filed seeking directions that the Petitioners take immediate action to provide food and shelter to the residents of the area and also to drain out the water from the lands of the Respondents so that they are able to inhabit and cultivate their lands once again. Discriminatory acts of the PDMA Sukkur have been highlighted by the Respondents; one of them, has also stated that the government hierarchy is only saving the lands of the political elite by diverting water towards the villagers' land; that half of the draining disposal machines are out of order; that proper evaluation of loss of the affected areas is also required for rehabilitation purposes. Ghulam Shabbir, Advocate High Court, one of the residents of Dadu District, has filed C.M.A. No.7960 of 2022 for impleading him as party to bring on record the destruction of his district and failure of the government in its rehabilitation. He adds that there is

no presence of the PDMA or the DDMA in his district despite the fact they have prepared documents relating to contingency plan and disaster management plan yet nothing has been implemented in this area.

4. Mr. Faisal Siddiqui, ASC was appointed as amicus curiae by the Court vide order dated 05.10.2022 to assist on the issue of the courts' jurisdiction to establish citizens committee. He has submitted his report and argued that the issue raised by the Petitioners is the role assigned to judicial officers in the impugned orders and the controlling powers given to the District and Sessions Judge to supervise the citizens committees as well as the work of the tent city/relief camp. He states that the courts are always reluctant to interfere in ad interim orders except in exceptional circumstances. As per his opinion, the citizens committees are in the nature of commissions which this Court has established as was seen in cases reported as Marvi Memon v. Federation of Pakistan (PLD 2011 SC 854) where a commission was established, following the floods of 2010, for fact finding and submitting recommendations for relief efforts; Petition regarding miserable condition of the schools: in re C.P. No.37 of 2012 (2013 SCMR 764) where multiple commissions were established to carry out surveys of school functioning for fact finding purposes in order to assess the conditions and workings of the said schools; Dr. Akmal Saleemi and others v. Federal Government and others (2013 SCMR 103) where a commission was established for fact finding in a matter concerning extra judicial killings in the premises of Lal Masjid and Jamia Hafsa; and Suo Motu Case No.16 of 2011 along with C.M.As. (PLD 2013 SC 443) where a commission was constituted for fact finding purposes in order to assess if the lease agreements were legally sound. He stated that commissions are used for fact finding purposes, for putting together technical experts and also to propose sustainable solutions in environmental issues. He stated that commissions help build capacity to deal with extraordinary circumstances, as in the present case, and it will only facilitate relief work and not hamper it. He further stated that the directions of this Court vide its order dated 05.10.2022 requiring the citizens committee to continue their oversight of relief work should continue both with reference to relief efforts and the management of the tent cities as doing so will not only improve coordination efforts in this time of crisis but will also ensure that the ground-level issues are raised before the relevant authorities.

5. We have heard all parties at length. The orders impugned are interim orders and this Court normally does not interfere with the interim orders of the High Court except in exceptional circumstances, as held in the cases reported as Federation of Pakistan through Secretary, Ministry of Energy (Power Division), Islamabad and others v. Shafiq ul Hassan and others [2021 PLC (C.S.) 292] and Dossani Travels Pvt. Ltd and others v. Messrs Travels Shop (Pvt.) Ltd. and others (PLD 2014 SC 1). Without a doubt, it is noted that, these are exceptional circumstances. While the interim orders exceed the jurisdiction of the Court to the extent of the role assigned to the judicial officers, the plight of the affectees of the 2022 floods needs attention in order to meet the needs of the flood affected population in Sindh. The biggest hindrance appears to be coordination and time frames for relief work as notwithstanding efforts made, it is neither sufficient nor is it effectively managed. The issue before the Court essentially is the exercise of jurisdiction by the High Court while creating the citizens committees and placing judges from the District Judiciary on these committees to oversee the work, being done by the committees. The role assigned to the judicial officers of overseeing the work of the executive by heading the citizens committees essentially means that the judicial officers are performing executive functions which is against the principle of separation of powers. The Constitution of the Islamic Republic of Pakistan, 1973 does not contemplate assumption of functions by one organ that essentially belongs to another. Moreover planning and strategy, coordination, monitoring and implementation are the functions of the executive and is best left for them to fulfil their duty and obligations in this regard. Furthermore, the work of these committees is a fulltime job which will require the judicial officers to spend time on these committees which in turn take them away from their judicial work that is also not practical nor expedient.

6. We are informed that the relevant law on the subject is the Act, which establishes a National Disaster Management Commission (Commission) for the purposes of policy making. This Commission not only lays down the policy on disaster management but also approves a National Plan and Guidelines to be followed by the Federal and Provincial authorities in the event of a natural disaster. The Act also establishes a National Disaster Management Authority (NDMA) which is responsible for implementing, co-ordinating and monitoring the National Plan and Policy. As per section 13 of the Act, a Provincial Disaster Management Commission

(PDMC) is established in each of the provinces, which lays down the Provincial Disaster Management Policy and also establishes the PDMA for the implementation, co-ordination and monitoring of the national as well as provincial plan in the event of a natural disaster. Section 18 of the Act constitutes the DDMA which works at the district level and is responsible for the preparation of Disaster Management Plan for the district, as well as implementing, coordinating and monitoring the National, Provincial and District plans at the district level. As per the powers and functions of the DDMA, they are required to provide relief to the community in response to any disaster, which includes shelter, food, drinking water and essential provisions, healthcare and services. They are also required to establish emergency communication systems and carry out relief efforts along with rescue operations in the area. Subsequent to the creation of the NDMA, a National Disaster Risk Reduction Policy was passed in 2013, which seeks to reduce vulnerabilities and increase resilience in the event of a natural disaster. It also provides guidelines for timely intervention and for reducing disaster risk. Additionally, a Disaster Management Strategy (2015 to 2022) was framed and a National Policy Guideline on Vulnerable Groups in Disasters 2014 (Policy Guidelines) was framed which stresses on the importance of dealing with vulnerable members of the community in the face of a natural disaster.

7. Despite the legal framework formed under the Act, the real issue is the lack of coordination and information with respect to the relief efforts being made by the Petitioners. It was argued before us that there are many parts of the Province of Sindh where relief efforts have not reached and where there is no food or drinkable water, nor any health care. Some of the causes of concern voiced by the Respondents was that roads, drainage, irrigation systems and sanitation systems are damaged or destroyed by the heavy rains and flooding. The supply of provisions and drinkable water is not enough; families have been evacuated but face diseases in the tent cities such as dengue, malaria and gastroenteritis. The Petitioners have admitted that there is difficulty not only on account of accessibility but also on account of resources including human resources to deal with the unprecedented floods. In this background, we find that the formation of the citizens committees by the High Court, in principle, was to facilitate relief efforts in different areas within the Province of Sindh, however, the inclusion of the members of the District Judiciary was not required given that there is an entire legal framework under the Act to ensure relief work right down to the district level. As per the scheme of the Act, members of the civil community which include volunteers, NGOs, doctors and others can be made part of the Provincial and District Management Authorities to help relief efforts. The record shows that they have been included in the DDMA vide notification dated 24.06.2014, however, there is no information on whether they actually participated. Section 3(2)(p) of the Act provides that National Commission shall also consist of representatives of civil society or any person appointed by the Prime Minister. As this is the policy making body, the inclusion of members of civil society on this Commission is imperative because for effective and efficient disaster management the inclusion of people likely to be affected is necessary not only for coordination, data collection and creating awareness but also to combine the efforts of the community and the authority in the event of a natural disaster. This gives civil society an opportunity to become part of the implementation, co-ordination and monitoring plan which only makes the work of the authority more effective. The Act also provides under Section 8 that the NDMA shall consist of members as may be prescribed by its chairperson. This Authority is headed by the Prime Minister, who can include any member as he deems appropriate. Similarly, at the provincial as well as the district level, the Act provides in its sections 13 and 15 that members to the PDMA and DDMA may be nominated by the Chief Minister and by the District Authority to include any member as they deem appropriate. Under these provisions, members of civil society can be included not only on the Commission but also in the Authorities to ensure that relief work is carried out where required and to help in mitigating the effects of the natural disaster as well as work on rehabilitation of the affectees. Hence, inclusion of civil society is necessary.

8. These are unprecedented times, as per the United Nations Office for the Coordination of Humanitarian Affairs, more than 33 million people have been affected by the floods of which 14.5 million are in Sindh alone (ECHO Daily Flash of 25 October 2022 - Pakistan). Furthermore, despite the fact that the Act has provided its framework since 2010, the efficiency and effectiveness of the PDMA and DDMA is questioned by affectees. There is merit in this argument as there appears to be no monitoring system in place. In this context, participation

by the public in the PDMA and DDMA and even at the Commission level ensures that the affectees are able to bring first hand their vulnerabilities and priorities, which results in a more measured response and proper allocation of resources where required. It also gives the Authority greater insight into the affected communities enabling them to work more effectively and produce better result. Community participation is not only necessary for planning disaster management but also for implementing and monitoring purposes as it gives people the right to participate in the decisions that affect their lives. This creates more awareness and a sense of ownership and responsibility which is required, particularly in disaster management so to enhance effectiveness and engage the people with their communities to provide rescue, relief and rehabilitation efforts. Hence, citizens' participation in the PDMA and DDMA can improve coordination and response which will enable the government authorities to provide relief work in a more effective and efficient manner. Moving forward, it is fundamental to the composition of the Commission, the NDMA, the PDMA and the DDMA that members of civil society are included in it.

9. At present to deal with the issue in hand, the citizens committees can work with DDMA to the extent of monitoring, coordination efforts and ensure that relief work reaches the affectees, who do not have sufficient assistance at the moment. The committees can also facilitate the PDMA and the DDMA of Sindh in providing necessary information and data with reference to relief work and what is required which will improve the Authorities' coordination with affected areas and communication with affected areas especially due to the challenges of accessibility and communication failure. The citizens committee can, therefore, monitor the efforts of the PDMA and the DDMA which will not only lead to better results in the relief work but will also create awareness within the affectees as to the manner in which the relief effort is being carried out will encourage them to participate. This participatory approach to a natural disaster humanizes the work of the authorities so that affectees are provided with real time relief that they need and not what the paperwork suggests.

10. In this regard, we also note that the impugned orders have directed that the citizens committees should comprise of medical superintendents of the Taluka Hospital, Mukhtiarkar, focal person of PDMA and the President of the Taluka Bar Association. In this context, we find that the Policy Guidelines requires the participation of women in disaster management plan at all levels to ensure integration of the gender perspective. As per the Policy Guidelines, women are at a greater risk from natural disasters than men. They are vulnerable and victims in natural disasters but also play a significant role throughout the disaster management cycle, without being adequately recognized and included in the decision making. The Policy Guidelines also emphasizes on ensuring equal access to relief opportunities for victims without any discrimination which requires the needs of vulnerable groups to be targeted to ensure that their needs are attended, safeguarded and protected. As per the Policy Guidelines, women, children, older persons, persons with disabilities are all defined as vulnerable groups in disaster. The NDMA and National Disaster Risk Reduction Policy all emphasize on reducing risks and vulnerabilities of those who are marginalized which include women, children, older person, persons with disabilities and minorities, however, there is no report available on the actual efforts made during the last six months. A National Gender and Child cell framework was also formulated in 2013 to work towards the disaster preparedness and disaster risk reduction for which again there is no information on its working in the 2022 floods. Therefore, in line with the policies formulated, it is imperative that the citizens committees include women, older persons and persons with disabilities so that the required response is ensured and provided and that the Policy Guidelines formulated be implemented real time. In this context, we note that the affected areas require maternity and healthcare for women so there is an increased need for female doctors, trainers and caretakers to attend to the health concerns. Women are often subjected to gender-based violence and harassment in times of such calamities, therefore safety and security concerns are also of significance for which appropriate response is also required. In this context, although the framework exists, an effort must go into ensuring that it actually functions and fulfils its mandate. Accordingly, we find that the citizens committee should ensure the representation of the vulnerable groups, particularly of women, in order to strengthen its perspective.

11. In view of the aforesaid, the impugned orders are modified to the extent that the citizens committee shall no more be headed by a Civil Judge notified by the District Judge concerned and the citizens committee shall

no more work under the supervision of the concerned District and Sessions Judge. However, the citizens committees shall continue to operate with the given composition including that of vulnerable groups, particularly women for monitoring the relief work and provide necessary information to the DDMA to improve their efforts. Furthermore, the direction given in the impugned orders that the citizens committee shall look after the affairs of tent cities is modified in the manner that the citizens committees shall oversee the work of the government authorities and provide necessary information and data to facilitate the work of the authorities. In this regard, we clarify that the citizens committee itself shall not engage in directing or controlling the relief work being undertaken but shall participate in the process put in place by DDMA to make it more effective and inclusive. The requirement of filing reports before the High Court by the PDMA and DDMA with respect to the work and progress of the relief work shall be filed bi-weekly to ensure efficiency. Further, the requirement of filing reports before this Court with respect to the composition of the citizens committee shall be filed within three weeks to ensure necessary compliance.

12. The petitions are disposed of in the above terms.

I have read the additional note by my brother Justice Syed Mansoor Ali Shah and agree also with the environmental aspects of the case dealt with therein.

Sd/-

Umar Ata Bandial, C.J.,

Sd/-

Syed Mansoor Ali Shah, J

I agree with the additional note as well.

Sd/-

Ayesha A. Malik, J

**SYED MANSOOR ALI SHAH, J.---**I have read the judgment authored by my learned colleague, Mrs. Justice Ayesha A. Malik and I am in complete agreement with the same. However, I would be remiss if the dimension of climate change is not highlighted in the backdrop of the recent floods. Climate change is undoubtedly the most serious existential threat faced by Pakistan and the major cause of the recent floods. Therefore, any post-floods strategy must first and foremost propose a national strategy to deal with climate change today and tomorrow. The primary responsibility falls on the shoulders of the Ministry of Climate Change, Government of Pakistan, as well as, the National Disaster Management Authority (NDMA) to propose a national adaptation plan to avert the horrific devastation caused by floods this year and also to safeguard and protect the fundamental rights of the people from the wrath of climate change. I, therefore, feel compelled to append this additional note in public and national interest.

2. Pakistan was ranked in the top 10 most vulnerable countries on the "Global Climate Risk Index 2021"[1] and the devastation caused by the recent floods in 2022 is distressing proof of the same. Research has found that the 5-day maximum rainfall over Sindh and Balochistan (Provinces of Pakistan) had become 75% more intense than it would have been had the climate not warmed by 1.2 C, thereby directly connecting global warming to be a major cause of the recent floods of 2022 and the likelihood of its recurrence in the years to come[2]. The probability of such heatwaves has now substantially increased due to climate change, with future heatwaves being even more hotter compared to 2022[3], therefore, chances of similar extreme rainfall have also become more likely. According to the "Pakistan Floods 2022 Post-Disaster Needs Assessment" prepared by the Ministry of Planning Development and Special Initiatives, Government of Pakistan with the assistance of other international bodies such as the World Bank etc., the total damage from the floods is evaluated to be at PKR 3.2 trillion (US$14.9 billion), total loss at PKR 3.3 trillion (US$15.2 billion), and total needs for recovery and reconstruction at PKR 3.5 trillion (US$16.3 billion)[4]. The resulting food and health insecurity, the risk of food shortage and diseases pose challenges that need serious and urgent attention[5]. In view of this unprecedented damage and the likelihood of its recurrence, it is imperative that serious and practical efforts are undertaken for prevention and adaptation against such disasters induced by climate change. It is also expected that existing policies or mechanisms catering to food insecurity etc. are mobilized as soon as possible and if no such policies or mechanisms exist, then the respective State functionaries should take urgent action to formulate such policies

and create such mechanisms to prevent further exacerbation of the losses and damage already suffered due to the floods and for sustainable rehabilitation.

3. The existing climate change framework of Pakistan indicates that the Ministry of Climate Change, Government of Pakistan has formulated a National Climate Change Policy, updated in 2021, devising policy measures for climate change adaptation and mitigation. Furthermore, the Climate Change Act of 2017 ("Climate Change Act") has established the Pakistan Climate Change Council and the Pakistan Climate Change Authority. The latter has been empowered to formulate adaptation and mitigation policies, plans etc., including the National Adaptation Plan, which the former shall approve and monitor. However, it seems that no substantial policies or plans have been formulated or implemented under the Climate Change Act. It is apparent that the measures in place are insufficient to cater to rapidly changing climate and its dire effects, therefore, there is a need for a coordinated joint effort in this regard. The National Disaster Management Act, 2010 ("Act") itself does not expressly cater to climate change, nonetheless, the Act does provide for taking measures for prevention of disasters and mitigation. Section 6(2)(g) of the Act provides that the National Disaster Management Commission ("Commission") may 'take such other measures for the prevention of disaster or the mitigation or for preparedness as it may consider necessary'. Prevention and mitigation have also been provided under provisions stipulating powers and functions of the Provincial Disaster Management Commission, the Provincial Disaster Management Authority and the District Disaster Management Authority established under the Act. Similarly, section 10(3)(a) stipulates that the National Plan shall include 'measures to be taken for the prevention of disasters or the mitigation of their effects' and section 17(3)(b) of the Act stipulates that the Provincial Plan shall include "the measures to be adopted for prevention and mitigation of disasters". Although the National Disaster Management Plan, 2012 does refer to the increase in climate-related natural disasters, however, it falls short of devising any meaningful steps/directions to suggest adaptation measures to address and guard against the changing climate. Similarly, one of the policy objectives of the National Disaster Risk Reduction Policy, 2013 includes promoting development planning that considers and addresses risks alongside environmental and climate change concerns but there appears to be no plan or strategy on the ground that has been formulated and put out in the public domain that deals with adaptation measures to be taken by the Government or the respective authorities in order to ensure that the floods of 2022 are not repeated next year. The rehabilitation work has to be climate resilient and it must be a part of a master adaptation plan. The Pakistan Climate Crises Charter 2022 ("Charter") published by the WWF provides a roadmap with the following actions:

i. Advocate for loss and damage financing internationally
ii. Address institutional governance issues
iii. Develop an effective local government system
iv. Map climate risks and vulnerabilities
v. Prioritize and mainstream local level adaptation
vi. Incorporate nature-based solutions in the development paradigm
vii. Address vulnerabilities in disadvantaged communities
viii. Mainstream crisis response across local communities
ix. Address population management concerns

The said Charter has been prepared in consultation with some of the following:-

a) National Disaster Risk Management Fund
b) Ministry of Planning, Development and Special Initiatives
c) Ministry of Climate Change
d) Pakistan Council for Research in Water Resources
e) Centre for Disaster Management, University of Management and Technology, Lahore
f) Population Council
g) International Union for Conservation of Nature (Pakistan)
h) World Wide Fund for Nature Pakistan
i) Sustainable Development Policy Institute
j) International Water Management Institute

k) Global Water Partnership

l) Pakistan Academy of Sciences

m) Sustainable Development Policy Institute

n) Global Change Impact Studies Centre

Yet there is no policy or directive from the concerned Ministry supporting the said Charter or moving in this direction.

4. Climate justice was an important consideration at the recent 27th Conference of the Parties to the United Nations Framework Convention on Climate Change ("COP27") which concluded with a significant and positive development through the formation of a loss and damage fund for climate-vulnerable developing countries[6]. Soon funds will be allocated to countries that have suffered loss and damage due to climate change. It is high time to develop a mechanism for the allocation of these funds and the identification of key adaptation infrastructural projects that will help build national climate resilience, especially against floods in the years to come. It is expected that the Ministry of Climate Change, Government of Pakistan shall drive this initiative and frame a policy and set up a mechanism to effectively and efficiently utilize such funds. Additionally, under section 11 of the Act, subject to the directions of the Commission, the National Disaster Management Authority ("NDMA") is to lay down guidelines for minimum standards of relief to be provided to persons affected by disaster. The NDMA has formulated guidelines under this provision, such as the NDMA Guidelines for Minimum Ex-Gratia Assistance to the Persons Affected by Natural and Man-Made Disasters, 2016, and State functionaries, while operating under the said guidelines, are expected to promptly formulate a mechanism for provisioning of immediate relief to persons affected by climate-related disasters. It is therefore essential that these global funds are invested in building national climate resilience so that climate induced disasters can be minimized. Climate Change is a perhaps the most serious threat to the fundamental rights of the people in Pakistan. In order to protect their right to life and above all their right to dignity under Articles 9 and 14 of the Constitution of Islamic Republic of Pakistan, 1973, a climate resilient adaptation plan including a detailed mechanism for utilization of financial support coming to Pakistan from the loss and damage fund, is the need of the hour. Having failed to learn from the floods in 2010, as has become apparent from the magnitude of the destruction caused by the recent floods, it is pivotal that effective steps are taken to prevent such catastrophes in the future. I hope the Federal Government will act with speed in this regard because in the words of Greta Thunberg,[7] "our house is on fire."

5. This additional note be placed before the other members of the bench for their perusal.

Sd/-

Syed Mansoor Ali Shah, J

MWA/P-1/SC Order accordingly.

**2023 S C M R 485**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, Jamal Khan Mandokhail and Shahid Waheed, JJ**

**Mst. JAMEELA BIBI (DECEASED) through LRs---Petitioner**

**Versus**

**Mst. FATIMA BIBI (DECEASED) through LRs---Respondent**

C.P. No. 3125 of 2020, decided on 19th January, 2023.

(Against the order dated 29.09.2020 of the Lahore High Court, Lahore, passed in Civil Revision No. 160480 of 2018)

**Limitation Act (IX of 1908)---**

----First Sched. & Art. 181---Civil Procedure Code (V of 1908), S. 115---Application for restoration of civil revision dismissed in default---Limitation period---Three years---Period of limitation for filing an application for restoration of a civil revision (dismissed in default) is three years under Article 181 of the First Schedule to the Limitation Act, 1908--- Petition for leave to appeal was converted into appeal and allowed with the Supreme Court expressing its concern that for applications for restoration of a suit and an appeal, the period of limitation under the Limitation Act, 1908 is 30 days, whereas the period for filing an application for restoration of a civil revision is three years; that the logic for such differentiation is not clear and may be taken up in some appropriate case for consideration.

Ghulam Qadir and others v. Sh. Abdul Wadood and others PLD 2016 SC 712 ref.

Ch. Amir Hussain, Advocate Supreme Court (through video link from Lahore) for Petitioner.

M. Afzal Janjua, Advocate Supreme Court for Respondent.

Date of hearing: 19th January, 2023.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The civil revision filed by the petitioner before the High Court was dismissed for non- prosecution on 30.03.2019. The petitioner filed an application for restoration of the said revision on 15.10.2019. The said application was dismissed by the High Court through the impugned order dated 29.09.2020 passed in C.Ms. Nos.1 and 2 of 2019 on the ground that it was barred by time.

2. We have heard the learned counsel for the parties and examined the record of the case. The application for restoration of the civil revision of the petitioner was dismissed on the basis of Article 168 (mistakenly mentioned in the impugned order as Article 169) of the Third Division of the First Schedule of the Limitation Act, 1908 ("The Act"), which provides for a period of thirty days for maintaining such an application in case of an appeal. Perusal of the First Schedule of the Act reveals that Article 163 deals with application for restoration of the suits dismissed for non-prosecution and provides for a period of thirty days from the date of dismissal for filing such an application, while Article 168 provides for readmission of an appeal dismissed for want of prosecution and provides a period of limitation of thirty days from the date of dismissal for filing an application for restoration. There is, however, no specific article, which deals with the application for restoration of civil revision dismissed in default, therefore, reliance has to be placed on Article 181 of the First Schedule to the Act, which provides that for an application for which no period of limitation is provided elsewhere in the Schedule the period of limitation is three years from the date when the right to apply accrues. In the present case Article 181 is attracted and a period of three years is available to the petitioner to make an application for restoration of the civil revision. See Ghulam Qadir and others v. Sh. Abdul Wadood and others (PLD 2016 SC 712).

3. In this background of the matter, the impugned order is set aside. This petition is converted into appeal and allowed.

4. We, however, express our concern that for applications for restoration of a suit and an appeal, the period of limitation under the Act is 30 days, whereas the period for filing an application for restoration of a civil revision is three years. The logic for such differentiation is not clear and may be taken up in some appropriate case for consideration as this distinction has not been questioned in the instant case.

MWA/J-1/SC Appeal allowed.

**2023 S C M R 501**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Ayesha A. Malik, JJ**

**ATTIQ UR REHMAN---Petitioner**

**Versus**

**Sh. TAHIR MEHMOOD and others---Respondents**

Civil Petition No. 600 of 2020, decided on 26th January, 2023.

(Against the order of Lahore High Court, Lahore dated 04.02.2020 passed in W.P. No. 67 of 2020)

**Constitution of Pakistan---**

----Art. 185(3)---Interim orders passed by the High Court---Interference in such orders by the Supreme Court---Scope and exception---Settled policy of the Supreme Court is not to readily interfere in the interim orders passed by the High Court---Desirable course of action is that the court hearing the case finally decides the same before it is brought before the Supreme Court as piecemeal adjudication is not desirable---Only exception is when the interim relief granted by the High Court is arbitrary or unreasonable or reflects abuse of power or wanton exercise of discretion resulting in miscarriage of justice.

Muhammad Sadiq v. Bashir Ahmad PLD 1966 SC 717; Multan Development Authority v. Muhammad Ramzan PLD 1989 SC 629; Salah-Ud-Din v. Mst. Zia Farhat 1996 SCMR 1528 and Federation of Pakistan v. Shafiq Ul Hassan 2020 SCMR 2119 ref.

Dr. G.M. Choudhary, Advocate Supreme Court for Petitioner.

Nemo for Respondents.

Date of hearing: 26th January, 2023.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**Respondent No.1 through a constitutional petition challenged the initiation of inquiry against him on the charges of which he already stood exonerated in three previous inquiries. He contended before the High Court that the Chief Minister's Inspection Team has no authority to initiate the said inquiry against him. On the basis of these submissions the High Court issued notices to other side and granted interim relief to respondent No.1 on 03.1.2020 to the effect that no adverse orders be passed against him. The said interim relief was further extended vide order dated 04.2.2020.

2. It is the settled policy of this Court not to readily interfere in the interim orders passed by the High Court. It is desirable that the court hearing the case finally decides the same before it is brought before this court as piecemeal adjudication is not desirable. The only exception is when the interim relief granted by the High Court is arbitrary or unreasonable or reflects abuse of power or wanton exercise of discretion resulting in miscarriage of justice[1]. We have examined the impugned interim order and find that it does not suffer from any grave illegality or abuse of process or gross injustice. We are, therefore, not inclined to interfere in the impugned order. Accordingly, this petition is dismissed and leave refused.

MWA/A-4/SC Petition dismissed.

**2024 S C M R 741**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, Jamal Khan Mandokhail and Athar Minallah, JJ**

**COMMISSIONER INLAND REVENUE, ZONE-IV, KARACHI---Appellants**

**Versus**

**Messrs A.P. MOLLER MAERSK and another---Respondents**

C.Ps. Nos. 560-K to 589-K of 2019, decided on 12th February, 2024.

(Against the consolidated judgment of High Court of Sindh at Karachi dated 31.05.2019, passed in ITRAs No.22 of 2014, etc.).

**(a) Income Tax Ordinance (XLIX of 2001)---**

----S.107---Treaties for the avoidance of double taxation, interpretation of---Scope---International tax treaties, conventions or agreements, given their unique nature, require a distinct interpretive approach compared to the one used while interpreting domestic legislation---These agreements being international treaties are governed by the rules of interpretation outlined in the Vienna Convention on the Law of Treaties---Tax treaties differ from domestic tax laws in language, application, and purpose---These treaties are relieving in nature and seek to avoid double taxation, while domestic tax law imposes tax in specific situations---Tax treaties require a broad purposive interpretation, and their interpretation may be more liberal than domestic law---Treaty interpretation is a separate subject from statutory interpretation, accentuating the need to interpret tax treaties independently of domestic law---Role of a State in a bilateral agreement is more of implementing the terms of such agreement rather than that of interpreting the same and that too in a unilateral manner---Given that the primary purpose of tax treaties is to avoid and relieve double taxation through equitable and acceptable distribution of tax claims between the countries, it is important that the provisions of these treaties are interpreted in a common and workable manner, taking into account international tax language, legal decisions of other countries, model treaties, along with their commentaries, developed by the Organization for Economic Cooperation and Development ("OECD") and the United Nations ("UN"), and scholarly academic works where appropriate.

Snamprogetti Engineering B.V. v. Commissioner of Inland Revenue 2023 SCMR 1055 ref.

**(b) Income Tax Ordinance (XLIX of 2001)---**

----S. 107---Convention between the Islamic Republic of Pakistan and the Kingdom of Denmark for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, Art. 8---Convention between the Kingdom of Belgium and the Islamic Republic of Pakistan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, Art. 8---Income arising from container detention charges ("CDC"), container service charges ("CSC") and terminal handling charges ("THC")---Such income falls within the category of "profits from the operation of ships in international traffic" in the context of double taxation conventions concluded between Pakistan and Denmark, as well as between Pakistan and Belgium.

The Commentary on Article 8 of the OECD Model Convention ("OECD MC") provides guidance about qualifying activities and related profits with respect to income falling under the head of "profits from the operation of ships in international traffic". The expression "profits from the operation of ships in international traffic" also covers profits from activities directly connected with such operations as well as profits from activities which are not directly connected with the operation of the enterprise's ship in international traffic as long as they are ancillary to such operation – activities that the enterprise does not need to carry on for the purposes of its own operation of ships in international traffic but which make a minor contribution relative to such operation and are so closely related to such operation that they should not be regarded as a separate business or source of income of the enterprise should be considered to be ancillary to the operation of ships in international traffic.

The objective scope of Article 8 of the OECD MC and the UN Model Convention ("UN MC") with its reference to "profits from the operation of ships in international traffic" covers not only profits directly obtained by the enterprise from the transportation of passengers or cargo by ships that it operates in international traffic, but also, profits from activities directly connected with such operations as well as profits from activities which are not directly connected with the operation of the enterprise's ships in international traffic as long as they are ancillary to such operation. Activities are to be considered ancillary to the operation of ships in international traffic if (i) the enterprise does not need to undertake them for the purposes of its own operation of ships in international traffic but which otherwise (ii) make a minor contribution relative to such

operation and (iii) are so closely related to such operation that they should not be regarded as a separate business or source of income. Article 8 OECD and UN MC therefore applies not only to profits directly obtained in international traffic e.g. transport of passengers or cargo, sales of tickets of the enterprise, leasing of ships, but also to profits directly connected with international traffic and to profits ancillary to international traffic e.g. inland transport, interest, code sharing and slot chartering, haulage services and catering services, provision of goods and services to other enterprises, sales of tickets on behalf of other enterprises, advertising on behalf of other enterprises, letting of immovable property, rental of containers.

Georg Kofler, in Reimer and Rust (eds), Klaus Vogel on Double Taxation Conventions (5th edn 2021) vol 1, art 8, paras 33, 35 ref.

Profits arising from short-term storage of containers or from detention charges for the late return of containers, are covered within the purview of “profits from the operation of ships in international traffic”. Further, special remuneration for services ancillary to container operations are covered within the ambit of shipping income from international traffic. Income derived from services provided for cargo handling is also considered part of shipping income from international traffic when directly connected or ancillary to the operation of ships in international traffic.Thus, profits arising from container detention charges (“CDC”), container service charges (“CSC”) and terminal handling charges (“THC”) are connected with and ancillary to the operation of ships in international traffic. Consequently, these profits squarely fall within the purview of the expression “profits from the operation of ships in international traffic”. Therefore, CDC, CSC, and THC collected by the respondents (non-resident cargo shipping companies incorporated in Denmark and Belgium) are part of the revenue earned in shipping in international traffic and are to be dealt with in accordance with the provisions of the Pakistan-Denmark Double Taxation Convention and the Pakistan-Belgium Double Taxation Convention, as the case may be.

Dr. Shahnawaz, Advocate Supreme Court and Abdul Wahid, Addl. Commissioner, FBR for Petitioner (in all cases).

Khalid Javed Khan, Advocate Supreme Court for Respondents (Through V.L. Karachi Registry) (In all cases).

Date of hearing: 12th January, 2024.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The question before us is whether income arising from container detention charges ("CDC"), container service charges ("CSC") and terminal handling charges ("THC") falls within the category of "profits from the operation of ships in international traffic" in the context of double taxation conventions concluded between Pakistan and Denmark, as well as between Pakistan and Belgium.

2. The respondents are non-resident companies, one incorporated in Denmark and the other in Belgium. They are involved in cargo shipping activities, conducting their business operations within Pakistan through the authorized agent, M/s Maersk Pakistan (Private) Limited. The respondents filed income tax returns, accounting for income derived from freight charges, CDC, CSC and THC. They claimed entitlement to tax benefits under Article 8 of the Convention between the Islamic Republic of Pakistan and the Kingdom of Denmark for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income ("Pakistan-Denmark Convention"), and similarly, under Article 8 of the Convention between the Kingdom of Belgium and the Islamic Republic of Pakistan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income ("Pakistan-Belgium Convention"), as the case may be.

3. The Deputy Commissioner Inland Revenue disagreed with the aforementioned assessment, asserting that CDC, CSC, and THC were not eligible under the beneficial provisions of the Pakistan-Denmark Convention and the Pakistan-Belgium Convention. The Deputy Commissioner reasoned that these charges were not explicitly covered under Article 8 of either Convention, which addresses beneficial taxation in relation to "profits from the operation of ships in international traffic". The respondents remained unsuccessful both in the appeal before the Commissioner Inland Revenue (Appeals) and in the subsequent appeal before the Appellate Tribunal Inland Revenue. Nevertheless, the High Court, in its decision given in Income Tax References filed by the respondents, concluded that profits arising from CDC, CSC, and THC fell within the scope of the term "profits from the operation of ships in international traffic" as stipulated in Article 8 of the two Conventions. Consequently, such profits were deemed eligible for the benefit of favourable taxation. The Department is now seeking leave to appeal the High Court's determination, challenging the inclusion of CDC, CSC, and THC under the umbrella of "profits from the operation of ships in international traffic" and their eligibility for beneficial taxation envisaged in Article 8 of the two Conventions.

4. We have heard the arguments of the learned counsel for the parties and have carefully gone through the record.

5. The respondents, being tax residents of Denmark and Belgium, are entitled to the benefits and concessions under the Pakistan-Denmark Convention and the Pakistan-Belgium Convention, as the case may be, in line with the provisions of Section 107 of the Income Tax Ordinance 2001 ("Ordinance"). Under subsection 2(c) of Section 107 of the Ordinance, the taxability of the respondents' income is to be determined under the provisions contained in the two Conventions which override the Ordinance. These Conventions provide for allocation of taxing jurisdiction to the contracting States in respect of different heads of income. With respect to the income falling under the head of "profits from the operation of ships in international traffic" which is dealt with under Article 8 in both the Conventions, the allocation of jurisdiction to the contracting States is not identical. The Pakistan-Belgium Convention assigns the sole right to tax profits from operating ships in international traffic to the residence State. In contrast, the Pakistan-Denmark Convention permits the source State to tax these profits, but only to the extent derived from sources within that State, in accordance with its domestic law. However, this difference is not relevant for the purposes of the dispute before us. The issue before us, common to both the Conventions, relates to the nature of profits arising from CDC, CSC, and THC: whether these profits fall within the scope of the term "profits from the operation of ships in international traffic" or not. If this question is decided in the affirmative, the respondents' profits resulting from CDC, CSC, and THC will be subjected to taxing provisions contained in Article 8 of the respective Conventions. Otherwise, profits resulting from CDC, CSC, and THC will not be considered as shipping income eligible to be dealt with under Article 8 of the two Conventions.

6. Notably, the matter at hand involves the interpretation of international tax conventions. Recently, this Court in Snamprogetti[1] emphasized the distinctiveness of international tax treaties, their specific interpretive framework, and the importance of equitable outcomes in cross-border taxation. International tax treaties, conventions or agreements, given their unique nature, as held in Snamprogetti, require a distinct interpretive approach compared to the one used while interpreting domestic legislation. These agreements being international treaties are governed by the rules of interpretation outlined in the Vienna Convention on the Law of Treaties. Tax treaties differ from domestic tax laws in language, application, and purpose. These treaties are relieving in nature and seek to avoid double taxation, while domestic tax law imposes tax in specific situations. Tax treaties require a broad purposive interpretation, and their interpretation may be more liberal than domestic law. Treaty interpretation is a separate subject from statutory interpretation, accentuating the need to interpret tax treaties independently of domestic law. The role of a State in a bilateral agreement is more of implementing the terms of such agreement rather than that of interpreting the same and that too in a unilateral manner. Given that the primary purpose of tax treaties is to avoid and relieve double taxation through equitable and acceptable distribution of tax claims between the countries, it is important that the provisions of these treaties are interpreted in a common and workable manner, taking into account international tax language, legal decisions of other countries, model treaties[2], along with their commentaries, developed by the Organization for Economic Cooperation and Development ("OECD")[3] and the United Nations ("UN")[4], and scholarly academic works where appropriate.

7. We see that the operation of ships in international traffic has been given special tax treatment in Pakistan-Denmark Convention and the Pakistan-Belgium Convention in accord with the OECD Model Convention ("OECD MC") and the UN Model Convention ("UN MC"). The general policy underlying the special rule for international shipping and the deviation from the allocation of taxing rights based on the permanent establishment principle has its roots at the very beginning of tax treaty law. Maritime shipping was viewed as an activity that warrants a special rule. Having regard to the distinct nature of activities carried on by shipping (air transport was also added to this category later) entities which operate across different routes spread across several countries and the complexity of apportioning profits arising from such business across numerous countries, it was felt that general provisions dealing with business profits would result in taxation of fragmented profits in numerous countries, thereby possibly leading to double taxation. Accordingly, it was considered necessary to introduce a separate provision in the OECD MC, and also in the UN MC, to specifically deal with profits from operations of shipping and air transport business in international traffic. The provision relating to shipping and air transport takes precedence over the general rule relating to business profits and the permanent establishment principle is not applied to profits falling within its scope of application i.e. profits arising from the operation of ships and aircraft in international traffic. More importantly, this provision also takes into account the fact that shipping and air transport enterprises invariably carry on a large variety of activities to permit, facilitate or support their international traffic operations.[5]

8. The issue before us pertains to the characterization of income arising from CDC, CSC, and THC. Let us have a look at the meaning of CDC, CSC, and THC in order to understand the nature of these incomes. The High Court has observed, and there exists no contention between the parties on this point, that CDC is the amount collected on account of rent of container, which is charged if a customer holds the said container beyond the stipulated time required to discharge the goods at the intended port of disembarkation; CSC is collected by shipping lines on account of services in respect of containers which may be required due to discharge of goods at the destination; and THC is collected by shipping lines on account of terminal charges incurred at the port of disembarkation. With this understanding of the aforementioned sources of income viz. CDC, CSC and THC, we proceed to examine whether such income aligns with the expression "profits from the operation of ships in international traffic".

9. The Commentary on Article 8 of the OECD MC provides guidance about qualifying activities and related profits with respect to income falling under the head of "profits from the operation of ships in international traffic". It provides that the profits covered consist in the first place of the profits directly obtained by the enterprise from the transportation of passengers or cargo by ships that it operates in international traffic such as any activity carried on primarily in connection with the transportation, by the enterprise, of passengers or cargo by ships that it operates in international traffic. It is then recognized that with the evolution of international transport, shipping enterprises invariably carry on a large variety of activities to permit, facilitate or support their international traffic operations. The expression "profits from the operation of ships in international traffic" therefore also covers profits from activities directly connected with such operations as well as profits from activities which are not directly connected with the operation of the enterprise's ship in international traffic as long as they are ancillary to such operation - activities that the enterprise does not need to carry on for the purposes of its own operation of ships in international traffic but which make a minor contribution relative to such operation and are so closely related to such operation that they should not be regarded as a separate business or source of income of the enterprise should be considered to be ancillary to the operation of ships in international traffic.[6] We also note that since 2017, the UN MC Commentary fully reproduces the OECD guidance.

10. The objective scope of Article 8 of the OECD MC and the UN MC with its reference to "profits from the operation of ships in international traffic" covers not only profits directly obtained by the enterprise from the transportation of passengers or cargo by ships that it operates in international traffic, but also, profits from activities directly connected with such operations as well as profits from activities which are not directly connected with the operation of the enterprise's ships in international traffic as long as they are ancillary to such operation. Activities are to be considered ancillary to the operation of ships in international traffic if (i) the enterprise does not need to undertake them for the purposes of its own operation of ships in international traffic but which otherwise (ii) make a minor contribution relative to such operation and (iii) are so closely related to such operation that they should not be regarded as a separate business or source of income. Article 8 OECD and UN MC therefore applies not only to profits directly obtained in international traffic e.g. transport of passengers or cargo, sales of tickets of the enterprise, leasing of ships, but also to profits directly connected with international traffic and to profits ancillary to international traffic e.g. inland transport, interest, code sharing and slot chartering, haulage services and catering services, provision of goods and services to other enterprises, sales of tickets on behalf of other enterprises, advertising on behalf of other enterprises, letting of immovable property, rental of containers.[7]

11. The issue in question concerns income arising from three sources: CDC, CSC, and THC. Notably, two of these sources involve charges imposed for services related to containers, whereas the third pertains to charges associated with terminal services for cargo handling. In the context of such income sources, Vogel, a recognized authority, emphasizes the widespread use of containers in international transport. Profits arising from short-term storage of containers or from detention charges for the late return of containers, according to Vogel, are covered within the purview of "profits from the operation of ships in international traffic". Further, special remuneration for services ancillary to container operations are covered within the ambit of shipping income from international traffic. Income derived from services provided for cargo

handling is also considered part of shipping income from international traffic when directly connected or ancillary to the operation of ships in international traffic.[8]

12. We thus reach the conclusion that profits arising from CDC, CSC and THC are connected with and ancillary to the operation of ships in international traffic. Consequently, these profits squarely fall within the purview of the expression "profits from the operation of ships in international traffic". Therefore, CDC, CSC, and THC collected by the respondents are part of the revenue earned in shipping in international traffic and are to be dealt with in accordance with the provisions of the Pakistan-Denmark Double Taxation Convention and the Pakistan-Belgium Double Taxation Convention, as the case may be. As a result, we do not feel inclined to interfere with the judgment of the High Court. These petitions are therefore dismissed.

MWA/C-1/SC Petitions dismissed.

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1 Snamprogetti Engineering B.V. v Commissioner of Inland Revenue, 2023 SCMR 1055.

2 Model treaties provide standard frameworks of guidance for treaty negotiation and are of high persuasive value in terms of de fining the parameters of double taxation treaties and have world-wide recognition as basic documents of reference in the negotiation, application and interpretation of multilateral or bilateral tax conventions.

3 OECD Model Tax Convention on Income and on Capital.

4 United Nations Model Double Taxation Convention between Developed and Developing Countries.

5 Georg Kofler, in Reimer and Rust (eds), *Klaus Vogel on Double Taxation Conventions* (5th edn 2021) vol 1, art 8, paras 7, 33. See also Shefali Goradia, 'Taxation of Services' in Guglielmo Maisto (ed), *Current Tax Treaty Issues,* vol 18 (IBFD EC and International Tax Law Series 2020) 535-536; Ola Ostaszewska and Belema Obuoforibo (eds), *Roy Rohatgi on International Taxation*, vol 1 (IBFD 2018) 187.

6 OECD MC Commentary, art 8.

7 Georg Kofler, in Reimer & Rust (eds), Klaus Vogel on Double Taxation Conventions (5th edn 2021) vol 1, art 8, paras 33, 35.

8 ibid, paras 44-46.

**2023 S C M R 518**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, Muhammad Ali Mazhar and Shahid Waheed, JJ**

**MUBARIK ALI BABAR---Petitioner**

**Versus**

**PUNJAB PUBLIC SERVICE COMMISSION through its Secretary and others---Respondents**

Civil Petition No. 2045 of 2019, decided on 18th November, 2022.

(Against the judgment of Lahore High Court, Lahore dated 08.03.2019, passed in W.P. No. 20429 of 2016)

**(a) Constitution of Pakistan---**

----Arts. 9, 14, 18, 20, 22, 26, 27, 36, 37(a), 38(b), 38(d) & Preamble---Constitutional protections for minorities and persons with disabilities (PWDs) stated.

The Preamble of the Constitution provides that it is the "will of the people" of Pakistan to establish an "Order". The term "will of the people of Pakistan" is an inclusive term signifying all citizens irrespective of religion, caste, creed, race, sex, place of birth or personal abilities. Therefore, such a "will" is incomplete without including the will of the minorities and persons with disabilities ("PWDs").

The word "minorities" signifies merely a statistical number, representing a class of people in the country who are Non-Muslims and in no manner does it imply that they are lesser citizens or in any manner less entitled to the fundamental rights under the Constitution.

The minimum right to dignity of the minorities and PWDs is that they ought to be considered equally with the rest of the majority of Muslims and the majority of persons with fuller abilities. Under the Constitution there is no distinction and therefore, the fundamental rights are fully available to the minorities and PWDs in the country as they are available to all other citizens of Pakistan.

The Constitution uplifts PWDs, gives them additional protection so that every effort (reasonable accommodation) is made to bring differently-abled persons at par with fully-abled persons. Similarly, it mandates that minorities are equal citizens of Pakistan and must be protected from all kinds and forms of discrimination. The Constitution, therefore, not only caters to minorities and PWDs as equal citizens of Pakistan, having equal rights and safeguards, it also provides extra protection to them.

People with disabilities are segregated from community life and face discrimination due to pervasive attitudinal and systemic barriers that the law, policy and practice frameworks have failed to remove, such as inaccessible or unequal facilities of housing, transport and education, segregated settings, barriers in accessing justice and legal systems, and employment and health discrimination. The effects of such discrimination are further expounded when intersecting with sexism, ageism, racism and other forms of inequality.

Disabled People's Organization Australia, Segregation of People with Disability is Discrimination and Must End, Position Paper (September, 2020). https://dpoa.org.au/wp-content/uploads/2020/11/ Segregation-of-People-with Disability_Position-Paper.pdf ref.

Lower rates of employment are persistently observed for PWDs. Lower education levels coupled with discrimination, stigma, negative attitudes, inaccessible transport and workplaces, and limited availability of accommodations for PWDs, play a significant role in limiting job opportunities. Due to these reasons, PWDs are pushed backwards and depressed at the hands of an unfriendly and unaccommodating ecosystem, making them fall under the rubric of the backward and depressed classes, as recognized by the Constitution. Under the Constitution, it is the obligation of the State to attend to the legitimate interests of these classes. Legitimate interests are all those interests which can help PWDs actualize their fundamental rights under the Constitution and enable them to become effective members of the society.

UN Department of Economic and Social Affairs, Disability and Development Report - Realizing the Sustainable Development Goals by, for and with persons with disabilities (2018). https://social.un.org/ publications/UN-Flagship-Report-Disability-Final.pdf; Indra Sawhney v. Union of India, AIR 1993 SC 477 and Muhammad Yousaf v. Chairman, FPSC PLD 2017 Lah. 406 ref.

In order to safeguard the rights of the minorities and PWDs and to provide equality of status and opportunities, the State has to endeavor to bridge the gap and ensure that the differently-abled persons and the Non-Muslim minority in our country get to enjoy their fundamental rights under the Constitution with the same fervour and force as enjoyed by the Muslim majority and majority of persons with fuller abilities.

**(b) Disabled Persons (Employment and Rehabilitation) Ordinance (XL of 1981)---**

----S. 10---Constitution of Pakistan, Arts. 14 & 36---Persons With Disabilities (PWDs)---Minorities---Seats reserved for PWDs and minorities in the Combined Competitive Examination conducted by the Punjab Public Service Commission---Constitutional right of PWDs and minorities---Other than the general seats, the additional provision of quota for the PWDs and the minorities reaffirms the constitutional commitment---In case the seats reserved for PWDs and the Non-Muslim minority are not filled by PWDs and the non-Muslim minority in a particular year, it was not permissible to open and make the said seats available to general quota as it would offend constitutional values, fundamental rights and the Principles of Policy---Seats earmarked for minorities or PWDs must be retained and carried forward; this quota is their constitutional right and cannot be reversed or made available to other citizens---Petition for leave to appeal was dismissed and leave was refused with the direction to respective governments that they shall ensure that the employment quota of the minorities is maintained at all levels and to strictly avoid discriminatory and demeaning advertisements (for posts) flouting the dignity and self-respect of the minorities.

**(c) Disabled Persons (Employment and Rehabilitation) Ordinance (XL of 1981)---**

----S. 10---Constitution of Pakistan, Art. 14---Persons With Disabilities (PWDs)---Combined Competitive Examination conducted by the Punjab Public Service Commission (PPSC) --- Use of the word 'disabled' in advertisements for posts---Supreme Court directed that the word "disabled" has already been put to disuse in the judgment reported as Malik Ubaidullah v. Government of Punjab and others (PLD 2020 SC 599) and, therefore, the PPSC shall ensure that the word "disabled" is not used and instead persons with disabilities or persons with different abilities is put to use---Supreme Court observed that it was hopeful that in the future these terms will be incorporated in the official correspondence as well as relevant notifications, including public advertisements, issued by the Government.

PLD 2020 SC 599 ref.

Petitioner in person.

Nemo for Respondents.

Date of hearing: 18th November, 2022.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The petitioner has challenged the seats reserved for minorities and persons with disabilities ("PWDs") in the Combined Competitive Examination, 2015 ("CCE") conducted by the Punjab Public Service Commission, Lahore ("PPSC"). In the advertisement issued by the PPSC for the post in the Provincial Management Service (BS-17) ("PMS") under the Services and General Administration Department, Government of the Punjab ("S&GAD"), out of 62 posts, 53 posts were on open merit, 06 posts for PWDs and 03 posts for minorities. The petitioner challenges the legality of the allocation and reservation of seats for the above two classes of persons and also prays that if this quota remains unfilled in a particular year, the seats reserved against this special quota be made available to other deserving candidates applying under the general quota on open merit. The said claim of the petitioner was dismissed by the High Court through the impugned judgment dated 08.03.2019. Hence this petition.

2. We have heard the petitioner and have gone through the record of the case. It is important to begin with the constitutional scheme. The preamble of our Constitution[1] provides that it is the "will of the people" of Pakistan to establish an "Order". The term "will of the people of Pakistan" is an inclusive term signifying all citizens irrespective of religion, caste, creed, race, sex, place of birth or personal abilities. Therefore, such a "will" is incomplete without including the will of the minorities and PWDs. The "Order" is a result of our collective vision and aspirations. The "Order" established by the "will of the people" is pillared on principles which form our constitutional values, providing for freedom, equality, tolerance, social justice and democracy; adequate provision for the minorities to freely profess and practice their religions and develop their cultures; safeguards

to protect the legitimate interests of minorities, backward and depressed classes; fundamental rights including equality of status and opportunity, social, economic and political justice; freedom of thought, expression, belief, faith, worship and association, subject to law and public morality. Tolerance, freedom, equality, social justice and democracy are central to our constitutional values which promote inclusion and abhor apartheid, exclusion, apartness, racism, bias and bigotry. These constitutional principles and values form an integral part of the Objectives Resolution which is a substantive part of the Constitution under Article 2-A and is to be given effect accordingly. The Constitution is, therefore, a shared voice of its citizenry.

3. The Constitutional values specifically provide for "equality of status, of opportunity," which means that every person in Pakistan has equal human status and worth and enjoys equal access to opportunities without discrimination based on caste, creed, race, sex, place of birth, etc. Undeniably, equality of status and opportunity includes access to employment to earn a decent livelihood.

4. Fundamental rights under the Constitution actualize these constitutional values; Article 9 provides that every person shall have a right to life and liberty subject to law. "Life" includes all the attributes of a healthy and a meaningful life, while the right to "liberty" provides freedom, agency and choice to a person to be able to design his or her life in any manner he or she wants. Life and liberty of any person in Pakistan is protected and there is no distinction between persons on the basis of religion, sex or creed; Article 14 provides that the dignity of a person is inviolable; Article 18 provides that everyone has a right to a lawful profession or occupation. Articles 20, 22, 26 and 27 of the Constitution provide further safeguards for minorities. Amongst fundamental rights, the right to dignity stands at the top, like a jewel in the crown of fundamental rights. This unique place is because the right to dignity is an absolute right, is non-negotiable and is not subject to any law. Therefore, the minimum right to dignity of the minorities and PWDs is that they ought to be considered equally with the rest of the majority of Muslims and the majority of persons with fuller abilities. Under the Constitution there is no distinction and therefore, these fundamental rights are fully available to the minorities and PWDs in the country as they are available to all other citizens of Pakistan. Article 36 of the Principles of Policy under the Constitution provides that the State shall safeguard the legitimate rights and interests of minorities including their due representation in the Federal and Provincial services. Article 37(a) proves that the State shall promote with special care the educational and economic interest of backward classes. Article 38(b) of the Constitution provides that all citizens (which undoubtedly includes minorities and PWDs) to be provided within the available resources of the country, facilities for work and adequate livelihood. Article 38(d) provides that the State shall provide basic necessities of life to all citizens (which once again undoubtedly includes PWDs) who are unable to earn their livelihood on account of infirmity or sickness. Review of the above constitutional scheme unfolds that the Constitution uplifts PWDs, gives them additional protection so that every effort (reasonable accommodation) is made to bring differently-abled persons at par with fully-abled persons. Similarly, it mandates that minorities are equal citizens of Pakistan and must be protected from all kinds and forms of discrimination. The Constitution, therefore, not only caters to minorities and PWDs as equal citizens of Pakistan, having equal rights and safeguards, it also provides extra protection to them.

5. "Backward" and "depressed" classes are not defined in the Constitution, therefore going by their simple meaning, they include any class of people who are marginalized, underprivileged, disadvantaged, lacking choice, agency, autonomy, level-playing field and opportunity. The marginalization and discrimination experienced by PWDs is arguably considered to be similar to the apartheid system in terms of segregation and discrimination based on a particular characteristic, leading to limited access to education, employment, and other opportunities, as well as social and economic marginalization, thereby, marginalizing individuals and communities. People with disabilities are segregated from community life and face discrimination due to pervasive attitudinal and systemic barriers that the law, policy and practice frameworks have failed to remove, such as inaccessible or unequal facilities of housing, transport and education, segregated settings, barriers in accessing justice and legal systems, and employment and health discrimination.[2] The effects of such discrimination are further expounded when intersecting with sexism, ageism, racism and other forms of inequality.[3] Albie Sachs, the celebrated South African Judge writes: "If there is one thing that the struggle against apartheid has taught us, it is how important it is to manage difference in society. Difference was used

as the basis for apartheid. Difference became an instrument of domination and control. What if we can turn difference around to become a source of vitality, of variability, of richness?"[4] The United Nations, Department of Economic and Social Affair's flagship "Disability and Development Report"[5] highlights that the professional potential of PWDs is often misunderstood and remains untapped due to misconceptions, negative societal attitudes and inaccessibility of workplaces, training and vocational skills centers. Lower rates of employment are persistently observed for PWDs. Lower education levels coupled with discrimination, stigma, negative attitudes, inaccessible transport and workplaces, and limited availability of accommodations for PWDs, play a significant role in limiting job opportunities.[6] Due to these reasons, PWDs are pushed backwards and depressed at the hands of an unfriendly and un accommodating ecosystem, making them fall under the rubric of the backward and depressed classes, as recognized by the Constitution. Under the Constitution, it is the obligation of the State to attend to the legitimate interests[7] of these classes. Legitimate interests are all those interests which can help PWDs actualize their fundamental rights under the Constitution and enable them to become effective members of the society.[8]

6. The word "minorities" on the other hand, signifies merely a statistical number, representing a class of people in the country who are Non-Muslims and in no manner does it imply that they are lesser citizens or in any manner less entitled to the fundamental rights under the Constitution. 96.5 % of Pakistan's population is Muslim. Minorities make up approximately 3% of the population.[9] Our national flag, our badge of honour and national unity, shows the minorities in the white along with the green signifying the majority Muslim population. The majority (Muslims) and the minority (Non-Muslims) of Pakistanis together constitute the paradigm of Pakistan. Our national flag stands higher because it represents both the Muslims and the Non-Muslims. Moving towards an inclusive society is getting closer to realizing our constitutional values. "If society is intolerant, embarrassed, exclusionary, its own imaginative heart is being restricted. Its capacity for human empathy is being denied. Exclusion damages the way we understand and characterize the world we live in. Inclusion enhances our humanity."[10]

7. Quaid-e-Azam, Muhammad Ali Jinnah repeatedly affirmed that as a foundational principle of Pakistan, rights of all minorities shall be safeguarded and all citizens of Pakistan are equal and have equal rights irrespective of their religion, colour, caste or creed. He assured and asserted that "minorities to whichever community they may belong, will be safeguarded. Their religion or faith or belief will be secure. There will be no interference of any kind with their freedom of worship. They will have their protection with regard to their religion, faith, their life, their culture. They will be, in all respects, the citizens of Pakistan without any distinction of caste or creed".[11] At the time of the inception of Pakistan, while asserting the above said principle as the first President of the Constituent Assembly of Pakistan, Quaid-e-Azam unequivocally stated that "you are free; you are free to go to your temples, you are free to go to your mosques or to any other place of worship in this State of Pakistan. You may belong to any religion or caste or creed - that has nothing to do with the business of the State ... we are starting with this fundamental principle that we are all citizens and equal citizens of one State".[12] He was conscious of the fact that equal treatment of minorities was not only important for the prosperity and growth of Pakistan, it was a duty cast upon all Muslims by Islam as "the tenets of Islam enjoin on every Musalman to give protection to his neighbours and to the minorities regardless of caste and creed[13] ... in Islam there is no difference between man and man. The qualities of equality, liberty and fraternity are the fundamental principles of Islam."[14]

8. In order to actualize the constitutional mandate and the vision of our founding father, we have the Disabled Persons (Employment and Rehabilitation) Ordinance, 1981 ("Ordinance") which, post 18th amendment, has translated into provincial laws.[15] Provisions of the Ordinance are pari materia to the Punjab Law. Section 10 of the Ordinance, as applicable in Punjab, provides that not less than three percent (3%) of the total number of persons employed by an establishment at any time shall be PWDs in the manner and procedure provided under the said Ordinance. Similarly, notification dated 27.3.2010, issued under section 23 of the Punjab Civil Servants Act, 1974 by the S&GAD (Regulations Wing), 5% quota has to be reserved for minorities (Non-Muslims) against the total number of posts advertised in the future, including posts to be filled on the basis of competitive examination to be conducted by the PPSC. Later on through an amendment[16] brought about in the said

notification, the vacancies reserved for minorities for which qualified candidates are not available at the time of a particular recruitment process, shall be carried forward and filled through appointment of persons belonging to minorities (Non- Muslims). We have noted with concern that according to the fact finding report titled "Unequal Citizens, Ending Systemic Discrimination against Minorities" ("Report")[17] published in May, 2022 by the National Commission of Human Rights ("NCHR") established under the National Commission for Human Rights Act, 2012 with the mandate to promote and protect human rights as provided for in the Constitution and the various international instruments to which Pakistan is a State party or shall become a State party, advertisements published in major newspapers all over the country show that religious minorities have been recruited exclusively for sanitary work. The Report shows that in the advertisements, under eligibility requirements, there is often a clause that states 'Only Non-Muslims Apply.' Such discriminatory advertisements and employment selection process limiting the job quota only for low level posts is offensive to the constitutional values, the fundamental rights of the minorities and the notification mentioned above. The Report recommends ending discrimination against minorities in the employment quota, ending the practice of publishing discriminatory advertisements and ensuring public transparency in the number of minority posts filled across each level of the government.[18] We fully support the said recommendations of the NCHR in the Report and accordingly direct that the respective governments shall ensure that the employment quota of the minorities is maintained at all levels and to strictly avoid discriminatory and demeaning advertisements flouting the dignity and self-respect of the minorities.

9. In order to safeguard the rights of the minorities and PWDs and to provide equality of status and opportunities, the State has to endeavor to bridge the gap and ensure that the differently-abled persons and the Non-Muslim minority in our country get to enjoy their fundamental rights under the Constitution with the same fervour and force as enjoyed by the Muslim majority and majority of persons with fuller abilities. Hence other than the general seats, the additional provision of quota for the PWDs and the minorities reaffirms the constitutional commitment.

10. The argument of the petitioner that in case the said seats are not filled by PWDs and the Non-Muslim minority in a particular year, the said seats should be opened and made available to general quota. This is not permissible as it would offend constitutional values, fundamental rights and the Principles of Policy as discussed above. The seats earmarked for minorities or PWDs must be retained and carried forward. This quota is their constitutional right and cannot be reversed or made available to other citizens.

11. For the above reasons we agree with the final conclusion arrived at by the High Court in the impugned judgment and for the reasons given above, this petition is accordingly dismissed and leave is refused.

12. It is also pointed out that the word "disabled" has already been put to disuse in Malik Ubaidullah[19] and, therefore, the PPSC is directed to ensure that the word "disabled" is not used and instead persons with disabilities or persons with different abilities is put to use. We are hopeful that in the future these terms will be incorporated in the official correspondence as well as relevant notifications, including public advertisements, issued by the Government. A copy of this order shall be dispatched to the Chief Secretary, Government of the Punjab as well as the Chief Secretaries of other provinces to ensure that this order is complied with in letter and spirit at the national level.

13. Before parting with this order, we would like to appreciate and commend the valuable assistance provided to us by Muhammad Hassan Ali, Law Clerk in rendering this order.

MWA/M-6/SC Petition dismissed.

**2023 S C M R 549**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, Muhammad Ali Mazhar and Shahid Waheed, JJ**

**WAQAS ASLAM and others---Petitioners**

**Versus**

**LAHORE ELECTRIC SUPPLY COMPANY LIMITED and others---Respondents**

Civil Petition No. 4806 of 2019, decided on 7th December, 2022.

(Against the judgment of the Lahore High Court, dated 21.11.2019, passed in I.C.A. No.1412 of 2016)

**Civil service---**

----Appointment---Eligibility criteria---Judicial review by Courts---Overqualified candidates---Autonomy, agency and free choice of the employing institution must be respected and be allowed to recruit according to the criteria advertised and anyone overqualified for the said post, if not entertained by the employing institution, the same being an institutional policy, the Court must refrain from interfering in the internal governance of institutions.

While prescribing qualifications for a post and determining eligibility criteria, the employing institution is best suited to assess its needs based on the function and nature of the post; the aptitude or suitability to fulfill such requirements and the qualification required for the post. Where one of the policy decisions of the recruiting company is that a candidate must possess a specific qualification and anyone overqualified will not be inducted, this being an internal policy decision of the company, judicial review must tread warily and must not be extended to expand the ambit of the prescribed eligibility criteria.

Zahoor Ahmad Rather v. Imtiyaz Ahmad (2019) 2 SCC 404; Asaf Fasihuddin v. Government of Pakistan 2014 SCMR 676 and Abdul Hameed v. WAPDA 2021 SCMR 1230 ref.

In the absence of any such stipulation in the advertisement or the recruitment policy of the employing company, it is not possible for the Court to draw an inference that a higher qualification presupposes the acquisition of a lower qualification or that a candidate having a higher qualification is better suited for the post as opposed to a candidate possessing the requisite qualification that has been expressly prescribed in the advertisement according to the nature of the post and the requirement of the employer. It is not for the Court to examine the qualification and eligibility in a recruitment process. The Court, at best, can look into the legality of the recruitment process but cannot delve deeper into the design and need of the employing institution or second guess their selection criteria and job requirement. It is also not open to the Courts to embark upon comparing various degrees held by the applicants/candidates with the advertised qualifications and carry out the function of an employer by carrying out the comparison of the said qualifications. The power of judicial review by the Courts cannot be extended to determine equivalence or comparison of academic qualifications for a post or assume the role of a human resource department of an employing institution. It is a specific expert area and can be best resolved by the institution itself according to the suitability and requirements of a certain post as designed and desired by the employer. It is an area for which the Courts are not best suited.

Zahoor Ahmad Rather v. Imtiyaz Ahmad (2019) 2 SCC 404 and P.M. Latha v. State of Kerala (2003) 3 SCC 541 ref.

Furthermore, inducting candidates possessing a higher qualification than the advertised criteria would also have a social impact as it would deprive people with lesser education of employment opportunities and encourage people with higher qualification. It will cause injustice to those applicants who possessed a lower prescribed qualification in the advertisement, because applicants with a higher qualification would seek automatic preference based on their qualification even when such qualification is not prescribed in the advertisement. It will also disrupt the working of the institution by having overqualified people and affect their hierarchy in the organization. The Court must take into account socio-economic perspectives in order to ensure that employment opportunities are created for at all tiers of the society.

Sakhawat Ali v. Deputy Commissioner/Chairman Recruitment Committee, Narowal, 1998 PLC (C.S.) 19 and Zahoor Ahmad Rather v. Imtiyaz Ahmad (2019) 2 SCC 404 ref.

The autonomy, agency and free choice of the employing institution must be respected and be allowed to recruit according to the criteria advertised and anyone overqualified for the said post, if not entertained by the employing institution, the same being an institutional policy, the Court must refrain from interfering in the internal governance of institutions.

Afnan Karim Kundi, Advocate Supreme Court and Ch. Akhtar Ali, Advocate-on-Record for Petitioners.

Munawar-us-Salam, Advocate Supreme Court and M. Sohaib Rashid, Advocate Supreme Court assisted by Muhammad Hassan Ali, Law Clerk for Respondents.

Date of hearing: 7th December, 2022.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**Brief facts of the case are that the petitioners applied for the post of Line Superintendent Grade-I (BPS-15) ("LS") at LESCO in pursuance of an advertisement in 2015. The petitioners were not considered for the said post on the ground that they did not meet the eligibility criteria/ selection requirement as per the advertisement. The refusal on behalf of the respondent company was challenged by the petitioners through a constitutional petition, which was allowed by the learned Single Judge and the respondent company was directed to appoint the petitioners to the said post. The respondents challenged the same before the Division Bench of the High Court through an Intra Court Appeal, which was allowed through the impugned judgment dated 21.11.2019 by holding that the petitioners did not meet the requirement of the advertisement and secondly that the petitioners being overqualified for the post were not suitable for the said position. Petitioners have assailed the said judgment through this petition.

2. The learned counsel for the petitioners submits that the petitioners hold a BS in Electrical Engineering ("BS degree") and are overqualified for the post advertised as the required qualification for the post is a Diploma in Associate Engineering (Electrical) ("DAE") with "B" Grade from any Government Poly Technical Institute. He submits that being overqualified does not debar them from applying for the said post and the policy of the respondent company as well as the impugned judgment are, therefore, not sustainable.

3. The learned counsel for the respondent company on the other hand submits that respondent company clearly specified the eligibility criteria and qualification for the post of LS. The requirement being Matric with 3-years DAE with "B" Grade from any Government Poly Technical Institute plus 3-years' experience of trade in any supervisory post in any electric concern. As far as the qualification is concerned, he submits that it is not within the domain of the Court to compare the BS degree with the DAE and further that the petitioners do not have the three years' experience of trade of any supervisory post in any electric concern. Therefore, having failed to meet the criteria advertised, the petitioners are not entitled to be appointed to the post of LS. He submits that it is not within the purview of the Court to judge equivalence of a higher degree and carry out comparison with the qualification advertised for the post. He further submits that the said posts are for people with less qualification and, therefore, the respondent company does not encourage persons who are overqualified to apply for the said job. He further submits that it is an internal policy matter of the respondent company to attract and target a specific set of people for the post of LS and anyone having qualification over and above that what is advertised for the post is considered not suitable by the company. The learned counsel for the respondents relied on Sakhawat Ali[1], P.M Latha[2], Yogesh Kumar[3], Anita[4] and Zahoor Ahmad Rather[5] in support of his contentions.

4. Learned counsel for the respondent company, however, submits that the petitioners have an unblemished service record of six years with the respondent company, therefore, he does not now oppose their appointments at this stage, but supports the impugned judgment in principle and prays that the impugned judgment be maintained by this Court for future appointments.

5. We have heard the learned counsel for the parties and have examined the record and the case law submitted by the learned counsel. We have noticed that the respondent company, publically advertised various posts, including 89 posts of LS, clearly specifying the eligibility criteria/ qualification requirement for the said posts. The eligibility criteria settled by the respondent company and duly advertised in the public advertisement represents a policy decision of the respondent company. While prescribing qualifications for a post and determining eligibility criteria, the employing institution is best suited to assess its needs based on the function and nature of the post; the aptitude or suitability to fulfill such requirements and the qualification required for

the post. One of the policy decisions of the respondent company is that a LS must be a DAE holder and anyone overqualified will not be inducted. This being an internal policy decision of the respondent company, judicial review must tread warily and must not be extended to expand the ambit of the prescribed eligibility criteria, as has been rightly held in the impugned judgment[6].

6. It is also important to note that in the absence of any such stipulation in the advertisement or the recruitment policy of the respondent company, it is not possible for the Court to draw an inference that a higher qualification presupposes the acquisition of a lower qualification or that a candidate having a higher qualification is better suited for the post as opposed to a candidate possessing the requisite qualification that has been expressly prescribed in the advertisement according to the nature of the post and the requirement of the employer[7]. As stated above, it is not for the Court to examine the qualification and eligibility in a recruitment process. The Court, at best, can look into the legality of the recruitment process but cannot delve deeper into the design and need of the employing institution or second guess their selection criteria and job requirement. It is also not open to the Courts to embark upon comparing various degrees held by the applicants with the advertised qualifications and carry out the function of an employer by carrying out the comparison of the said qualifications. The power of judicial review by the Courts cannot be extended to determine equivalence or comparison of academic qualifications for a post or assume the role of a human resource department of an employing institution. It is a specific expert area and can be best resolved by the institution itself according to the suitability and requirements of a certain post as designed and desired by the employer. It is an area for which the Courts are not best suited[8]. Therefore, there is no force in the contention that since the petitioners possess a higher qualification than what has been advertised, they are to be necessarily considered eligible for the post.

7. Furthermore, inducting candidates possessing a higher qualification than the advertised criteria for LS would also have a social impact as it would deprive people with lesser education of employment opportunities and encourage people with higher qualification[9]. It will cause injustice to those applicants who possess a DAE, the prescribed qualification in the advertisement, because applicants with a higher qualification would seek automatic preference based on their qualification even when such qualification is not prescribed in the advertisement. It will also disrupt the working of the institution by having overqualified people as LS and affect their hierarchy in the organization. The Court must take into account socio-economic perspectives in order to ensure that employment opportunities are created for at all tiers of the society[10]. The Division Bench of the High Court has, therefore, rightly repelled the contention of discrimination by placing reliance on judgments of this Court[11]. The eligibility criteria, advertised in accordance with the recruitment policy of the respondent company, creates a distinct class of persons who are DAE holders and are eligible to apply for the post of LS. Whereas, the petitioners who do not hold such qualification do not belong to the said class of candidates. As such, there is no discrimination if the employing institution decides to only consider candidates who hold the prescribed qualification of DAE instead of the petitioners who do not possess the same and are over or differently qualified. Consequently, it cannot be held that the respondent company's policy of not inducting applicants with a higher qualification to the post of LS is discriminatory or arbitrary. Infact such an internal policy provides social justice by opening up employment at different tiers.

8. Recruitments, therefore, are to be made strictly in accordance with the criteria in the advertisement and the recruitment policy of the respondent company, and any deviation therefrom, would allow entry to ineligible persons and deprive many eligible candidates. The employing institution could have prescribed a BS degree as the qualifying criteria, however, the fact that it did not, indicates that the candidates with the prescribed qualification criteria i.e. DAE were required and would be deemed as eligible to apply[12]. The prescribed qualification in the advertisement being a DAE is an essential requirement which cannot be dispensed with. Applicants not possessing such qualification, albeit possessing some other higher qualification, are ineligible unless the employing institution's recruitment policy catered for applicants that possessed a higher qualification.

9. In this view of the matter, we hold that the autonomy, agency and free choice of the employing institution must be respected and be allowed to recruit according to the criteria advertised and anyone overqualified for the said post, if not entertained by the employing institution, the same being an institutional policy, the Court must refrain from interfering in the internal governance of institutions.

10. In the present case, the petitioners also do not have three years working experience and on this score alone do not meet the advertised criteria. However, the learned counsel for the respondent company have been gracious enough and have stated that the petitioners having worked for the institution for the last six years with an unblemished service record, they do not oppose their appointment at this stage of their career. Learned counsel for the respondents, however, pray that this is to be considered as a one-time concession and is not to be considered as a precedent in future as long as the impugned judgment is maintained.

11. In the above background, this petition is disposed of with the observation that the impugned judgment for the reasons given in this judgment, is upheld. However, this shall not affect the appointment of the petitioners who shall continue to work as per the terms and conditions of their appointment as agreed by the respondent company. Disposed of in the above terms.

MWA/W-1/SC Order accordingly.

**2023 S C M R 584**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Ayesha A. Malik, JJ**

**Civil Appeals Nos. 1172 to 1178 of 2020 and Civil Petitions Nos. 3789 to 3796, 2260-L to 2262-L and C.P. 3137-L of 2020**

**(Against the judgment dated 30.11.2018, passed by the Punjab Service Tribunal, Lahore in Appeals Nos. 3780, 3779, 3852, 3778, 3425,**

**3851 of 2015, 3160 of 2014 and 214 of 2017) and C.M. Appeals Nos.23 and 33 of 2021 (Applications for impleadment in C.As. 1172 and 1178 of 2020 respectively)**

**Syed HAMMAD NABI and others---Appellants/Petitioners**

**Versus**

**INSPECTOR GENERAL OF POLICE PUNJAB, LAHORE and others---Respondents**

Civil Appeals Nos. 1172 to 1178, Civil Petitions Nos. 3789 to 3796, 2260-L to 2262-L and C.P. No. 3137-L of 2020 and C.M. Appeals Nos. 23 and 33 of 2021, decided on 2nd November, 2022.

**(a) Police Rules, 1934---**

----R. 12.2(3)---Inspectors serving in (Punjab) Police---Seniority---Final seniority list of Inspectors will be reckoned from the date of confirmation of the officers and not from the date of appointment.

Rule 12.2(3) of the Police Rules, 1934 ('the Rules') provides for two stages for determining the seniority, one is prior to the probationary period and is to be reckoned from the first appointment and the final seniority is settled from the date of confirmation which is once the period of probation is successfully completed. Period of probation is important as the officers have to undergo various courses (A, B, C and D) and qualify the same. Once police officer has successfully undergone the said courses he stands confirmed at the end of the probationary period. The seniority is once again settled, this being the final seniority from the date of confirmation. The said rule is, therefore, very clear that final seniority list of Inspectors will be reckoned from the date of confirmation of the officers and not from the date of appointment.

1999 SCMR 1594; PLD 1985 SC 159 and Muhammed Yousaf and others v. Abdul Rashid and others 1996 SCMR 1297 ref.

**(b) Constitution of Pakistan---**

----Art. 185(3)--- Leave refusing order of the Supreme Court---Precedential value---Leave-refusing order which neither decides any question of law nor enunciates any principle of law in terms of Article 189 of the Constitution does not constitute binding precedent---Impression that a leave-refusing order endorses the statements of law made in the impugned orders and thus enhances the status of those statements as that of the Supreme Court is fallacious---Such impression is based on inference drawn from the leave-refusing orders, while 'a case is only an authority for what it actually decides' and cannot be cited as a precedent for a proposition that may be inferred from it.

Muhammad Salman v. Naveed Anjum 2021 SCMR 1675; Tariq Badr v. NBP 2013 SCMR 314; Quinn v. Leathem 1901 AC 495; Trustees of the Port of Karachi v. Muhammad Saleem 1994 SCMR 2213; SHCBA v. Federation PLD 2009 SC 879 and Khairpur Textile Mills v. NBP 2003 CLD 326 ref.

**(c) Police Order (22 of 2002)---**

----Preamble---Police Rules, 1934---Service matters relating to police---Interference by Courts in limited circumstances only---Disputes, if any, amongst the police officers must first be resolved by the Inspector General of Police or his representatives---Only in case of any legal interpretation or blatant abuse of the process provided under the Police Order or Rules should the courts interfere in the working of the Police force so that the force can maintain its functioning, autonomy, independence and efficiency.

It is best if the Police force is allowed to be regulated by its statutory framework i.e. the Police Order, 2002 and the Police Rules which provide a complete code of internal governance. Disputes, if any, amongst the police officers must first be resolved by the Inspector General of Police or his representatives. Only in case of any legal interpretation or blatant abuse of the process provided under the Police Order or Rules should the courts

interfere in the working of the Police force so that the force can maintain its functioning, autonomy, independence and efficiency which is essential for Police which is charged with the onerous responsibility of maintaining law and order and with the onerous obligation to protect the life and property of the citizens of the country. More than any other organization, it is imperative that the Police must function as a rule based organization which is fully autonomous and independent in regulating its internal governance. Strong and smart Police force requires organizational justice firmly entrenched in the institution so that its officers are assured that they work for an institution that firmly stands for rules, fairness, transparency and efficiency. This upholds the morale of the police officers, especially junior police officers who are required to undertake dangerous and strenuous assignments on a daily basis and also uplifts the institution by making it more vibrant and progressive. The issues of posting, transfer and seniority must be settled within the department strictly in accordance with the Rules and only matters requiring legal interpretation may come up before the Courts. Several junior officers approaching the courts for redressal of their grievance reflects poorly on the internal governance of the Police department when the elaborate Police Rules and the Police Order provide for such eventualities in detail.

Supreme Court observed that it was sanguine that in future the Police department will take charge of its internal governance strictly in accordance with law and will restore a Rule-based approach in addressing the grievances of the police officers so that courts are not unduly burdened.

**(d) Constitution of Pakistan---**

----Arts. 4(1), 14(1), 18, 25, 37 & 38---Civil service---Organizational justice---Concept of organizational justice and its importance stated.

Organizational justice focuses on how employees judge the behavior of the organization and how this behavior is related to employees' attitudes and behaviors regarding the organization. The employees are sensitive to decisions made on a day-to-day basis by their employers, both on the small and large scale, and will judge these decisions as unfair or fair. Decisions judged as unfair, lead to workplace deviance. Employees also believe procedures are fair when they are consistent, accurate, ethical, and lack bias. Organizational justice is concerned with all matters of workplace behaviour, from treatment by superiors to pay, access to training and gender equality. Ensuring organizational justice should be a priority for any organization - it can reduce the incidence of workplace deviance, absence, disengagement and counterproductive workplace behaviours and also encourage positive attributes like trust and progressive communication.

Dr. Annette Towler, The benefits of organizational justice and practical ways how to improve it CQNet ref.

Organizational justice stands firmly on the constitutional values and fundamental rights ensured to any person under the Constitution. The constitutional principle of social and economic justice read with due process and right to dignity, non-discrimination and right to a carry out a lawful profession and the right to livelihood are basic ingredients of organizational justice.

**(e) Police Order (22 of 2002)---**

----Preamble---Police force---Promotion and career progression---Organizational justice---Importance of organizational justice in the police force stated.

Organizational justice is necessary for the police officers to perform their duties with complete commitment, dedication and fidelity, because they must perceive that the institution is fair and just towards them. Police officers who have such perceptions of fairness would demonstrate less cynicism towards the job and are also likely to have a more amiable attitude towards the public. Uncertainty in the promotion structure and delay in promotions weakens such perceptions of serving police officers, resulting in inefficiency, likelihood of misconduct and low morale, thereby, also adversely impacting the trust of the public in the police. Therefore, for an efficient and effective police force, it is necessary to ensure the provision of organizational justice in the police as an institution, especially with regards to career progression and promotion. As such, there must be no ambiguity in the promotion structure and any grievance with regards to career progression/promotion must be redressed expeditiously under the law.

Volkov, M. "The Importance of Organizational Justice, Corruption, Crime and Compliance", 2015; Wolfe, Scott E., Justin Nix, and Justin T. Pickett. "The Measurement of Organizational Justice Matters: A Research

Note", July 16, 2020 and Weimer, C. "How would Organizational Justice Shape Police Officer's Attitudes in the Workplace?", 2019 ref.

Mian Bilal Bashir, Advocate Supreme Court, Syed R.H. Shah, Advocate-on-Record, Ch. Zulifqar Ali, Advocate Supreme Court (through V.L. Lahore Registry), Maqbool Hussain Sh. Advocate Supreme Court and Talaat Farooq Sh. Advocate Supreme Court (through V.L. Lahore Registry) for Appellants/Petitioners.

Safdar Shaheen Pirzada, Advocate Supreme Court for Applicants (in C.M.A. 8616 of 2022).

Muddasar Khalid Abbasi, Advocate Supreme Court, Muhammad Ramzan Khan, Advocate Supreme Court, M. Sharif Janjua, Advocate-on-Record, Kaleem Ilyas, Advocate Supreme Court, Raja Muhammad Khan, Advocate Supreme Court for Respondents and Atta Muhammad-respondent-in-person.

Ashfaq Ahmad Kharral, Additional A.G. along with Kamran Adil, DIG (Legal), Sh. Asif, S.P., Amir Khalil Syed, S.P. and Kashif Butt, A.D. for the Government of Punjab.

Date of hearing: 2nd November, 2022.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**There are three sets of police officers before us: (i) Appellants (Hammad Nabi and others); (ii) Respondents (Atta Muhammad and others); (iii) Impleaders through applications (CMAs) (Jaseem Ahmad, Shujaat Ali Babar and others).

2. Appellants belong to a batch of direct Sub-Inspectors ("SI") who were selected in BS-14 through the Punjab Public Service Commission ("Commission") in October, 1997. The order of appointment of Hammad Nabi (appellant) was issued in Multan Region on 30-10-1997. He was subjected to probation[1] for three years and after successful completion of probationary courses[2] (A, B, C and D), he was confirmed in the same rank i.e., Sub-Inspector with effect from 28.11.2000 by DIG/Multan vide order dated 29.11.2000. By this time, this Court in Qayyum Nawaz[3] held that the date of confirmation is the same as the date of appointment. The Inspector General of Police ("IGP") in order to implement Qayyum Nawaz issued circular dated 10-03-2004 that stated that date of appointment and confirmation shall be the same. In consequence thereof, Hammad Nabi was confirmed as SI from the date of his appointment i.e. 30-10-1997 vide order dated 07-04-2004 passed by the DIG/Multan. In addition, Hammad Nabi was admitted to Seniority List F (that is maintained for the promotion to the post of Inspectors)[4] with effect from 21-11-2002 and was also promoted to the rank of Inspector with effect from 07-01-2003 vide order dated 14-01-2005. The officer was kept at Seniority List F and his name was notified in the List regularly. Before the implementation of the impugned judgment of Punjab Service Tribunal ("Tribunal"), the Seniority List of Inspectors was displayed on 07-02-2019 showing Hammad Nabi at Seniority No. 281 of the Seniority List F. However, after the implementation of the impugned judgment of the Tribunal, the Seniority List F notified on 13-03-2020 placed the Appellant at Seniority No. 323. This relegation of Hammad Nabi from Seniority No. 281 to Seniority No. 323 is a result of the implementation of impugned judgment of the Tribunal which is under challenge before us. Accordingly, the Appellant has prayed to set aside the impugned judgment dated 30-11-2018 passed by the Tribunal.

3. Respondent Atta Muhammad, along with other officers arrayed as respondents, belongs to a batch of officers which were selected as direct Assistant Sub-Inspectors (ASIs) in BS-9 by the Commission on 10-11-1993. He was assigned to the Punjab Constabulary (PC), a reserve police unit within the Punjab Police that was treated at par with a Range for legal purposes. The officer was subjected to three years probationary period[5] and after successful completion of his training courses (A, B, C and D)[6], he was confirmed on 16-03-1999 and his name was placed on Seniority List E maintained by DIG/Commandant/Range/Regional Police Officer with effect from 18-11-1996. Later on, due to administrative arrangements within the Punjab Police, the officer was assigned to Rawalpindi Range/Region by the IGP vide order dated 13-08-2002. He was promoted as an Officiating Sub-Inspector in Rawalpindi Range/ Region on 27-08-2003. Atta Muhammad obtained his revised confirmation with effect from 10-11-1993 (his date of appointment) as a result of implementation of Qayyum Nawaz (supra). Thereafter, he agitated that he stood senior to the promotee ASI Muhammad Arshad (who had by now reached to the rank of Inspector). His argument was that he was senior to Muhammad Arshad due to his date of appointment/confirmation which was 10-11-1993 as compared to the date of appointment/confirmation of Muhammad Arshad on 13-11-1993. The legal requirements of three years

probationary period and completion of training courses (A, B, C and D) for direct ASIs was not appreciated by any fora while comparing cases of Atta Muhammad and Muhammad Arshad. His claim on the basis of Muhammad Arshad was accepted and his standing on List E was revised with effect from 01-02-1996. Based on this revision of his standing at List E, he was granted revised promotion to the rank of SI with effect from 22-12-1996 by the Commandant PC on 07-08-2006. He was admitted to Seniority List F with effect from 21-11-2002 and promoted to the rank of Inspector with effect from 07-01-2003. As a result, whereas before implementation of impugned judgment, he was not listed on Seniority List and was treated as a SI, after implementation of the impugned judgment of the Tribunal, he was placed at Seniority No. 241 of the Seniority List of Inspectors dated 13-03-2020. Amongst the Impleaders some support the case of the Appellants while the others support the case of the Respondents. The Comparative Table hereunder gives a tabular representation of the service record of the parties for better understanding the dispute in hand.

COMPARATIVE TABLE

| PARTIES TO LITIGATION | Date of appoint-ment as ASI | Initial Date of confirm ation as ASI | Revised date of confirm ation as ASI | Date of appoint ment as SI | Initial Date of Promot-ion as SI | Revised promot-ion as SI | Initial date of confir-mation as SI | Revised date of confir mation as SI |
|---|---|---|---|---|---|---|---|---|
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 |
| Hammad Nabi etc. (Group-a) | - | - | - | 30.10.97 | - | - | 28.11.00 | 30.10.97 |
| Atta Muhammad etc. (Group-b) | 10.11.93 | 18.11.96 | 10.11.93 | - | 27.08.03 | 22.12.96 | 27.08.03 | 22.12.96 |
| Jaseem Ahmad (Group-c) | 30.09.90 | 11.03.96 | 30.09.90 | - | 25.09.01 | 25.09.01 | 25.09.01 | 25.09.01 |
| Shujaat Ali Babar etc (Group-d) | 08.06.88 | 01.07.93 | 08.06.88 | - | 01.04.99 | - | 01.04.99 | 01.04.99 |

4. We have heard the learned counsel for the parties and Mr. Kamran Adil, DIG (Legal) at some length and have carefully gone through the case law[7] cited at the bar, as well as, the Police Rules, 1934 ("Police Rules") and Police Order, 2002. The question before us is the mode of determination of seniority of a police officer holding the post of Inspector in the Punjab Police under the Police Rules. The answer to the said question is clearly provided under Rule 12.2(3) of the Police Rules, which is reproduced hereunder for convenience:

12.2. Seniority and probation.---(1) The seniority of Assistant Superintendents of Police is regulated by the orders passed from time to time by the Secretary of State and the Central Government.

No Probationary Assistant Superintendent of Police shall be permanently appointed as an Assistant Superintendent of Police until he has passed the prescribed departmental examinations.

A Probationary Assistant Superintendent of Police who does not qualify by passing these examinations within two years, or at the first examination after two years, from the date of his joining the service, will be removed from Government service; provided that the Provincial Government shall have power to relax this rule in special cases, when the Probationary Assistant Superintendent of Police is likely to make a good police officer.

(2) The rules governing the probation and seniority of Deputy Superintendents of Police are contained in Appendix 12.1.

(3) All appointments of enrolled police officers are on probation according to the rules in this chapter applicable to each rank.

Seniority in the case of upper subordinates[8], will be reckoned in the first instance from date of first appointment, officers promoted from a lower rank being considered senior to persons appointed direct on the same date, and the seniority of officers appointed direct on the same date being reckoned according to age. Seniority shall, however, be finally settled by dates of confirmation, the seniority inter se of several officers confirmed on the same date being that allotted to them on first appointment. Provided that any officer whose promotion or confirmation is delayed by reason of his being on deputation outside his range or district shall, on being promoted or confirmed, regain the seniority which he originally held vis- -vis any officers promoted or confirmed before him during his deputation.

The seniority of lower subordinates shall be reckoned from dates of appointment, subject to the conditions of rule 12-24 and provided that a promoted officer shall rank senior to an officer appointed direct to the same rank on the same date.

(emphasis supplied)

Rule 12.2(3) provides that in the first instance the seniority of the upper subordinates shall be reckoned from date of first appointment, officers promoted from a lower rank being considered senior to persons appointed direct on the same date, and the seniority of officers appointed direct on the same date being reckoned according to age. The sub-Rule further provides that seniority shall be finally settled by dates of confirmation, the seniority inter se of several officers confirmed on the same date being that allotted to them on first appointment. Rule 12.2(3) provides for two stages for determining the seniority, one is prior to the probationary period and is to be reckoned from the first appointment and the final seniority is settled from the date of confirmation which is once the period of probation is successfully completed.[9] Period of probation is important as the officers have to undergo various courses (A, B, C and D)[10] and qualify the same. Once police officer has successfully undergone the said courses he stands confirmed at the end of the probationary period. The seniority is once again settled, this being the final seniority from the date of confirmation. The above rule is, therefore, very clear that final seniority list of Inspectors will be reckoned from the date of confirmation of the officers and not from the date of appointment.

5. The Appellants in this case had a probationary period of three years while the probationary period of the Respondents was two years[11] and their dates of confirmation are different. It is submitted that the clarity of the said Rule has been muddled over the years due an earlier pronouncement of this Court in Qayyum Nawaz.[12] We have gone through Qayyum Nawaz and find that it is a leave-refusing order (described as a judgment), which has neither decided any question of law nor enunciated any principle of law in terms of Article 189 of the Constitution. Such leave-refusing orders do not constitute binding precedents.[13] The impression that a leave-refusing order endorses the statements of law made in the impugned orders and thus enhances the status of those statements as that of the apex court is fallacious. This impression is based on inference drawn from the leave-refusing orders, while 'a case is only an authority for what it actually decides' and cannot be cited as a precedent for a proposition that may be inferred from it.[14] The judgment of the Tribunal in Qayyum Nawaz totally ignores Rule 12.2(3) of the Rules as well as the earlier pronouncement of this Court in Mushtaq Warriach[15] which underlines the difference between the date of appointment and the date of confirmation. Therefore, reliance on Qayyum Nawaz to hold that there is no difference between the date of appointment and date of confirmation under the Police Rules is absolutely misconceived and strongly dispelled.

6. The impugned judgment of the Tribunal before us also relies on Qayyum Nawaz when the said judgment does not pass as a precedent and settles no principle of law. The impugned judgment has misread Rule 12.2(3) and has ignored its substantive part which clearly deals with the formulation of the final seniority list which is to be settled from the date of confirmation of the Police Officers. The Tribunal through the impugned judgment has without any justification dismissed from consideration M. Yousaf[16] which holds that seniority must be determined in accordance with the rules. For these reasons the impugned judgment is not sustainable.

7. It is also underlined that much water has flown under the bridge since Qayyum Nawaz. This Court has put an end to out of turn promotions in Contempt Proceedings Against the Chief Secretary, Sindh and others[17] followed by Ali Azhar Khan Baluch[18]. The practice of ante dated confirmations and promotions have

been put down in Raza Safdar Kazmi[19] and delay in confirmations after the probationary period have been regulated in Gul Hasan Jatoi[20].

8. It is best if the Police force is allowed to be regulated by its statutory framework i.e. the Police Order, 2002 and the Police Rules which provide a complete code of internal governance. Disputes, if any, amongst the police officers must first be resolved by the Inspector General of Police or his representatives. Only in case of any legal interpretation or blatant abuse of the process provided under the Police Order or Rules should the courts interfere in the working of the Police force so that the force can maintain its functioning, autonomy, independence and efficiency which is essential for Police which is charged with the onerous responsibility of maintaining law and order and with the onerous obligation to protect the life and property of the citizens of this country. More than any other organization, it is imperative that the Police must function as a rule based organization which is fully autonomous and independent in regulating its internal governance. Strong and smart Police force requires organizational justice firmly entrenched in the institution so that its officers are assured that they work for an institution that firmly stands for rules, fairness, transparency and efficiency. This upholds the morale of the police officers, especially junior police officers who are required to undertake dangerous and strenuous assignments on a daily basis and also uplifts the institution by making it more vibrant and progressive.

9. The importance of organizational justice cannot be undermined. It focuses on how employees judge the behavior of the organization and how this behavior is related to employees' attitudes and behaviors regarding the organization. The employees are sensitive to decisions made on a day-to-day basis by their employers, both on the small and large scale, and will judge these decisions as unfair or fair. Decisions judged as unfair, lead to workplace deviance. Employees also believe procedures are fair when they are consistent, accurate, ethical, and lack bias[21]. Organizational justice is concerned with all matters of workplace behaviour, from treatment by superiors to pay, access to training and gender equality[22]. Ensuring organizational justice should be a priority for any organization - it can reduce the incidence of workplace deviance, absence, disengagement and counterproductive workplace behaviours and also encourage positive attributes like trust and progressive communication.[23]

10. Organizational justice is necessary for the police officers to perform their duties with complete commitment, dedication and fidelity, because they must perceive that the institution is fair and just towards them[24]. Police officers who have such perceptions of fairness would demonstrate less cynicism towards the job and are also likely to have a more amiable attitude towards the public[25]. Uncertainty in the promotion structure and delay in promotions weakens such perceptions of serving police officers, resulting in inefficiency, likelihood of misconduct and low morale, thereby, also adversely impacting the trust of the public in the police[26]. Therefore, for an efficient and effective police force, it is necessary to ensure the provision of organizational justice in the police as an institution, especially with regards to career progression and promotion. As such, there must be no ambiguity in the promotion structure and any grievance with regards to career progression/ promotion must be redressed expeditiously under the law. Organizational justice, therefore, stands firmly on the constitutional values and fundamental rights ensured to any person under the Constitution[27]. The constitutional principle of social and economic justice read with due process and right to dignity, non-discrimination and right to a carry out a lawful profession and the right to livelihood are basic ingredients of organizational justice.

11. Given the primacy of Police in the criminal justice system, organization justice must be ensured in the Police service. The issues of posting, transfer and seniority must be settled within the department strictly in accordance with the Rules and only matters requiring legal interpretation may come up before the Courts. Several junior officers approaching the courts for redressal of their grievance reflects poorly on the internal governance of the Police department when the elaborate Police Rules and the Police Order provide for such eventualities in detail. We are sanguine that in future the Police department will take charge of its internal governance strictly in accordance with law and will restore a Rule-based approach in addressing the grievances of the police officers so that courts are not unduly burdened.

12. In this background, all the parties before us are in agreement that their seniority be worked out according to Rule 12.2(3) of the Police Rules and submit that the competent authority be directed to follow the said Rule in letter and spirit and make necessary amendments in the seniority list of the police officers before us. We,

therefore, direct the IGP to constitute a committee to look into the question of seniority of the parties before us in terms of Rule 12.2(3) and in the light of this judgment. The said committee shall also address the grievance(s) of other Police Officers, if any, who are not before us but belong to the same batch of officers as the parties before us.

13. It is also noted that the Inspector General of Police, Punjab ("IGP") enjoys administrative powers over the Police organization under Article 10 of the Police Order, 2022 read with Rule 12.1 of the Police Rules, therefore, he is under an obligation to exercise his legal powers within the organization to ensure that the police officers are dealt with in accordance with law within the statutory timelines. In case there is any unexplained delay in following the timeline the concerned Police Officers be held accountable and any action taken or penalty imposed upon them be duly reflected in their performance evaluation reports. The IGP may also consider constituting a standing committee headed by an Additional Inspector General of Police or any appropriate officer to regularly address the concerns of junior police officers with respect to their inter se seniority so that a police officer feels empowered that there is organizational justice in his organization. This will lead to developing a more robust, efficient and strong police force in the country.

14. For the above reasons, the impugned judgment is set aside and the listed appeals are allowed in the above terms. The connected listed Civil Petitions are also converted into appeals and allowed in the same terms.

MWA/H-1/SC Appeals allowed.

**2023 S C M R 636**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, Amin-ud-Din Khan and Ayesha A. Malik, JJ**

**IMRAN AHMAD KHAN NIAZI---Petitioner**

**Versus**

**Main MUHAMMAD SHAHBAZ SHARIF---Respondent**

C. P. 3436-L/2022 and C. P. 3437-L/2022, decided on 29th December, 2022.

(Against the consolidated order of the Lahore High Court, Lahore, dated 07.12.2022, passed in C.Rs. Nos.76624 and 76628 of 2022)

Per Syed Mansoor Ali Shah, J; Amin-ud-Din Khan, J agreeing; Ayesha A. Malik, J dissenting. (Majority view)

**(a) Constitution of Pakistan---**

----Art. 185(3)---Jurisdiction of the Supreme Court under Article 185(3) of the Constitution to grant leave to appeal---Such jurisdiction is discretionary---Conduct of a petitioner has a substantial bearing on the question of granting or declining such leave to him.

Noora v. State PLD 1973 SC 469; Pakistan v. Faizan 1983 SCMR 413; Bilqis v. Fazal 1987 SCMR 1441; Haider v. Manzur 1989 SCMR 1133; Amir v. Dad PLD 1990 SC 1078; State v. Akbar 1992 SCMR 964; Nawaz v. Hameed 1993 SCMR 1902; Seamlen Pipe Industries v. Security Leasing Corporation 2002 SCMR 1419; Sharif v. Hamayun 2003 SCMR 1221; Bank of Punjab v. Shahzad 2006 SCMR 1023; Ilahi v. Altaf 2011 SCMR 513; Ghulam Rasool v. State PLD 2022 SC 806; Tilawatunnisa v. Settlement Commissioner 1978 SCMR 225; Noor Khan v. M.B.R. 1984 SCMR 681; Zahida v. State 1984 SCMR 687; Deen Carpets v. I.T.O. PLD 1989 SC 516; Hassan Bano v. Mumtaz PLD 1989 SC 346; British Biscuits Company v. Atlas Investment Bank 2005 CLD 674; Ali Shan v. Essem Hotel 2007 SCMR 741 and Kamal v. Govt. of N.W.F.P. 2010 SCMR 1377 ref.

**(b) Civil Procedure Code (V of 1908)---**

----O. XI, R. 21---Party failing to comply with any order to answer interrogatories, or for discovery or inspection of documents---Effect---Conduct of party---Scope---Conduct of a party is material for the purpose of exercising the court's discretion under Rule 21 of Order XI, C.P.C.: the court takes the penal action of dismissing the suit of the plaintiff or striking out the defence of the defendant when the party concerned is guilty of contumacious conduct by disregarding the specific order of the court, for compliance of which the court has granted a reasonable time and a sufficient opportunity---However, it is not only a deliberate failure to comply with a specific order of the court by a party that is regarded as his contumacious conduct but a series of separate inordinate delays caused by him at different stages of the proceedings of the case is also a convincing proof of such conduct.

Babbar Sewing Machine Company v. Trilok Nath AIR 1978 SC 1436; U.B.L. v. Yousuf 1988 SCMR 82; Culbert v. Stephen G. Westwell & Co [1993] PIQR 54; Grovit v. Doctor [1997] 1 All ER 417; Arbuthnot Latham Bank v. Trafalgar Holdings [1998] 2 All ER 181 and Choraria v. Sethia [1998] EWCA Civ 24 = [1998] Lexis Citation 20 ref.

**(c) Civil Procedure Code (V of 1908)---**

----O. XI, Rr. 7 & 21---Defamation Ordinance (LVI of 2002) S. 14---Constitution of Pakistan, Art. 10A---Defamation---Suit for damages---Contumacious conduct of defendant---Defendant failing to comply with order to answer interrogatories and prolonging the proceedings---Effect---Striking out of the right of defence---[Per Syed Mansoor Ali Shah, J. (Majority view): Proceedings of the case were prolonged by the petitioner (defendant) at every stage of the case in the Trial Court to delay the decision of the case---During proceedings for delivering and answering the interrogatories by the parties under Order XI, C.P.C., the petitioner showed the same delaying tactics by which he had been hindering the progress of the suit earlier---Trial Court had provided the petitioner with more than sufficient opportunities to submit his answers to the interrogatories of the respondent, before taking the penal action under Rule 21 of Order XI, C.P.C.---Conduct of the petitioner had remained willfully contumacious and disobedient throughout the proceedings of the case in the Trial Court---Trial Court had not committed any illegality or material irregularity in the exercise of its jurisdiction by

dismissing the objections (application) of the petitioner for rejection of the interrogatories of the respondent and directing him to submit the answers to those interrogatories and subsequently by striking out the right of defence of the petitioner due to non-submission of the answers to the said interrogatories]---[Per Ayesha A. Malik, J. (Minority view): In the present case the order of the Trial Court whereby the right of the petitioner's defence was struck out, the facts of the case did not establish that the petitioner committed willful default or intentionally and deliberately disobeyed an order of the Court---Effect of striking out the defence was that it deprived the party of its ability to defend itself in the case which was a serious matter---In the present case the Court had other alternatives, at its disposal, to regulate the pace of the proceedings as well as the conduct of the petitioner, one of which was to impose costs which would not only serve as a form of deterrence but would also lay the foundation for expeditious justice---Trial Court proceeded in a mechanical manner with the case, and granted numerous adjournments without so much as imposing cost so as to discourage the same---Order by which the right of defence of the petitioner was struck out, did not state that it was based on the history of the case or the overall conduct of the petitioner in the case---Petitioner's recent public shooting and injury at a political rally justified the grant of an adjournment for a reasonable time under the circumstances---Right to defence could not be struck out without considering all relevant factors---Impugned order of the Trial Court, whereby right of defence of petitioner was struck out, was set aside, and the case was remanded to the Trial Court to grant reasonable opportunity to the petitioner to file answers to the interrogatories and thereafter to proceed with the case in accordance with law]

Per Syed Mansoor Ali Shah, J. (Majority view)

Respondent instituted a suit for recovery of damages against the petitioner alleging the commission of his defamation by the petitioner. The petitioner filed his written statement. After the close of the pleadings, the trial court fixed the case for pre-trial proceedings of discovery and inspection under Order XI of the Code of Civil Procedure 1908 ("C.P.C."). Both the parties delivered their respective interrogatories. The respondent later withdrew some questions and delivered the amended interrogatories, with permission of the trial court. The respondent filed the answers to the interrogatories of the petitioner. The petitioner, however, filed objections (application) for rejection of the interrogatories of the respondent, instead of filing the answers thereto. The trial court observed that an application for rejection of the interrogatories could be filed under Rule 7 of Order XI, C.P.C. within seven days after service of the interrogatories, while the petitioner had first sought several adjournments for submitting the answers to the interrogatories and then filed such application (objections) after the lapse of about two months without any lawful justification and without seeking condonation of the delay. With these observations, the trial court overruled the objections of the petitioner and directed him to submit his answers to the interrogatories of the respondent, vide its order dated 20.10.2022. The petitioner was, thereafter, provided with several opportunities to file the answers to the interrogatories, but he failed to avail them. Consequently, the trial court struck out the right of defence of the petitioner under Rule 21 of Order XI, C.P.C., vide its order 24.11.2022, due to his non-submission of the answers to the said interrogatories. The petitioner challenged both the orders of the trial court by filing two revision petitions in the High Court, which petitions were dismissed by the impugned order and order of trial court was upheld.

Suit was instituted by the respondent, on 07-07-2017. The petitioner appeared in the suit through his counsel, on 09-09-2017. Petitioner and respondent filed several applications during proceedings of the case, wherein the petitioner was given warnings of "last and final" and "absolute last and final" opportunities to advance his arguments. Petitioner was provided with nine opportunities to file his written statement, again with warnings of "last and final" and "absolute last and final" opportunities. At last, the petitioner filed his written statement on 27-07-2021 after a period of about four (4) years since his appearance in the suit on 09-09-2017, which should have been filed by him till 09.10.2017 within a period of thirty days from the day of his appearance in the suit. Summary of the proceedings of the case in the trial court made during a period of four years, from the date of appearance of the petitioner on 09-09-2017 till 22-09-2021, gave credence to the contention of the respondent that the conduct of the petitioner had remained contumacious throughout the proceedings of the case in the trial court. The way the proceeding was prolonged by the petitioner at every stage of the case in the trial court, to delay the decision of the case, was more than evident.

Survey of the proceedings of the trial court as to delivering and answering the interrogatories by the parties under Order XI, C.P.C., from 05-01-2022 to 20-10-2022, showed the same delaying tactics of the petitioner by which he had been hindering the progress of the suit earlier.

Trial court had provided the petitioner with more than sufficient opportunities to submit his answers to the interrogatories of the respondent, before taking the penal action under Rule 21 of Order XI, C.P.C.

Overall conduct of the petitioner showed that he had protracted the proceedings of the case at every stage in the trial court, to delay the decision of the case.

Conduct of the petitioner had remained willfully contumacious and disobedient throughout the proceedings of the case in the trial court. Trial court had not committed any illegality or material irregularity in the exercise of its jurisdiction by dismissing the objections (application) of the petitioner for rejection of the interrogatories of the respondent and directing him to submit the answers to those interrogatories and subsequently by striking out the right of defence of the petitioner due to non-submission of the answers to the said interrogatories. Petitions for leave to appeal were dismissed and leave was refused.

Per Ayesha A. Malik, J. (Minority view)

The basic question in the present case was to determine whether there was willful default on the part of the petitioner whereby he deliberately and intentionally disobeyed the order of trial court requiring him to file answers to the interrogatories. Present case was not a case of willful default and the failure on the part of the petitioner to file his answers was due to circumstances beyond his control. On 03-11-2022, the petitioner, while leading a political rally, was shot at and was taken to the hospital where he was operated upon. This fact was shown on all national news channels and covered by the print media and was not denied by the respondent. The trial court itself accepted the reason of hospitalization and injury on 08-11-2022 as well as 17-11-2022 which was evident from its orders. Under the circumstances, there was sufficient cause for seeking the adjournment and the Court acted in haste by issuing a warning on 17-11-2022 and thereafter incorrectly recorded in its order of 24-11-2022 that there was no lawful justification for the grant of adjournments especially since it accepted these reasons on 08.11.2022 and 17-11-2022. Accordingly, there was sufficient ground to give the adjournment, and the default was not willful. Under these circumstances, it could not be said that there was willful default and it also could not be said that the conduct of the petitioner was willfully contumacious, obstinate and disobedient. Further it also could not be said that during the period from 08-11-2022 to 24-11-2022, the adjournments were sought with the intent to delay the proceedings.

Power for striking out of the defence under Order XI, Rule 21, C.P.C. can be exercised where the defaulting party fails to attend the hearing or is guilty of prolonged or inordinate and inexcusable delay which may cause substantial or serious prejudice to the opposite party; however, it is expected that before making an order for striking out of defence, the court must consider all the reasons given for the default which merits due consideration and assessment of facts. This is because the effect of striking out of the defence is that it will deprive the party of its ability to defend itself in the case which is a serious matter. In the present case, the court had other alternatives, at its disposal, to regulate the pace of the proceedings as well as the conduct of the petitioner, one of which was to impose costs which would not only serve as a form of deterrence but would also lay the foundation for expeditious justice and promote a smart legal system.

Qazi Naveed ul Islam v. District Judge 2023 SCP 32 ref.

In this case the trial court exercised its power mechanically and more importantly, the order by which the right of defence of the petitioner was struck out, did not state that it was based on the history of the case or the overall conduct of the petitioner in the case. In the event that the trial court was of the opinion that the conduct of the party suggested that there was willful disobedience or deliberate attempt to delay the proceedings then it had to record its findings accordingly. The trial court focused on the dates subsequent to the order by which it dismissed the objections (application) of the petitioner for rejection of the interrogatories of the respondent and directed him to submit the answers to those interrogatories, and not on the overall conduct of the petitioner, and reasoned that the adjournments were sought without cause and sufficient opportunities had been granted, i.e. the adjournments from 08-11-2022 to 24-11-2022. However, the order sheet did show that there were many

adjournments, it also showed that oftentimes, the court had proceeded in a routine manner without much focus on the reasons for the adjournments.

The petitioner's recent public shooting and injury at a political rally justified the grant of an adjournment for a reasonable time under the circumstances. The right to defence could not be struck out without considering all relevant factors, and the court must weigh the balance between a fair trial and the circumstances at hand. The order sheet showed that the court proceeded in a mechanical manner with the case, and granted numerous adjournments without so much as imposing cost so as to discourage the same.

The striking out of the petitioner's right to defence, at present stage, while ignoring the legitimate factors in play, would be a gross injustice. The balancing act of justice must be upheld, and under these circumstances, the right to a fair defence must prevail. Accordingly, the impugned order of the trial court, whereby right of defence of petitioner was struck out, was set aside; and the case was remanded to the trial court to grant reasonable opportunity to the petitioner to file answers to the interrogatories and thereafter to proceed with the case in accordance with law.

Per Syed Mansoor Ali Shah, J [Majority view]

**(d) Civil Procedure Code (V of 1908)---**

----O. XVII--- Constitution of Pakistan, Arts. 10A & 37(d)---Adjournments---Scope---Conclusion of litigation process within reasonable time period---Significance---Leniency shown on part of judges of Trial Court in the matter of accommodating unjustified requests for adjournment, even at the cost of disregarding the timelines provided in the relevant laws, is unwarranted---Peremptory order of the court, which specifies a time to do a certain act in the proceedings of the case with a warning of last opportunity, must be followed by the legal consequences prescribed by the relevant law for its non-compliance---Orders granting repetitive adjournments with warnings of "last and final" and "absolute last and final" opportunity become meaningless and shatter the confidence of the litigant public in the court orders and consequentially weaken the authority and fiat of the court---Toothless court is the worst form of injustice---Radical approach is required to tackle the problem of delay in the litigation process by enforcing a court-controlled case management system, which should ensure that once a litigant has entered the litigation process, his case proceeds in accordance with a timetable as prescribed by rules of court---Rules containing time limits for doing the specified acts necessary for the progress of a case are intended to accomplish the constitutional goal of fair trial and expeditious dispensation of justice by concluding the litigation process within a reasonable timeframe---Such rules should, therefore, be observed. Moon Enterpriser v. SNGPL 2020 SCMR 300; Department of Transport v. Chris Smaller Transport [1989] 1 All ER 897 and Arbuthnot Latham Bank v. Trafalgar Holdings [1998] 2 All ER 181 ref.

**(e) Administration of justice---**

----Procedural law--- Timeframes provided in procedural law---Interpretation---Procedural rule prescribing the timeframe for doing a certain act in the course of the proceedings of a case should be followed as a rule and the departure therefrom can be made only as an exception in exceptional circumstances beyond the control of the party concerned.

The provisions of a procedural law are ordinarily directory in nature and are construed liberally to advance the cause of justice, as their main purpose is to facilitate the administration of justice. The same purposive approach is to be adopted while construing and applying a procedural provision which provides a timeframe for doing a certain act necessary to the further progress of the case. The main purpose of providing a timeframe in procedural rules is to expedite the hearing and conclusion of the case and to avoid unnecessary adjournments. Such rules are, therefore, to be adhered to for giving effect to the purpose of their making, else the non-compliance therewith would frustrate the objective of expeditious decision of the cases sought to be achieved by the legislature or the rule-making authority, as the case may be. The procedural rule prescribing the timeframe for doing a certain act in the course of the proceedings of a case should, therefore, be followed as a rule and the departure therefrom can be made only as an exception in exceptional circumstances beyond the control of the party concerned. The court may also ask for the filing of an affidavit or the necessary documents, depending on the facts and circumstances of the case, in support of those exceptional circumstances.

Kailash v. Nanhku AIR 2005 SC 2441 ref.

**(f) Civil Procedure Code (V of 1908)---**

----O. XI, Rr. 1, 2, 6 & 7---Interrogatories submitted to the Court---Power of the Trial Court under Rules 1 and 2 of Order XI, C.P.C.---Scope---Power of the Trial Court under Rule 1 of Order XI, C.P.C. to examine the interrogatories before delivering the same to the party concerned under Rule 2 and reject any irrelevant interrogatory at that stage, is permissive, not obligatory; the non-exercise of which does not vitiate the order of the court delivering the interrogatories to the party concerned under Rule 2 for submitting the answers---Since Trial Courts are overburdened with high pendency of cases, they cannot be expected, in the prevailing circumstances, to make such examination of the interrogatories in every case, under Rule 1---Rather, it is more practicable in the prevailing circumstances and in our system of administration of civil justice, which is primarily adversarial, that the party concerned should invite the attention of the Trial Court for such examination, either (i) by making an application under Rule 7 of Order XI if all or most of the interrogatories delivered appear to be irrelevant by specifying the particular objection taken to each of such interrogatories separately, or (ii) by answering those interrogatories which he thinks are relevant and taking objection to those which he thinks are irrelevant as per Rule 6 of Order XI, C.P.C.

**(g) Civil Procedure Code (V of 1908)---**

----O. XI, R. 21---Process of delivering interrogatories and requiring their answers---Non-compliance with order for discovery---Suo motu power of Trial Court to take penal action---Scope---Penal action under Rule 21 of Order XI, C.P.C. can be taken by a court not only on an application of the party, but also suo motu---Trial Court does have the power to take the penal action on its own if its order is not complied with despite giving the warning of last opportunity for compliance.

Abdul Aziz v. Raj Chhabra AIR 1968 All 119 and Namita Dhar v. Amalendu Sen AIR 1977 Cal 187 not relevant.

**(h) Civil Procedure Code (V of 1908)---**

----O. XI, R. 21---Process of delivering interrogatories and requiring their answers---Non-compliance with order for discovery---Application under Rule 21 of Order XI, C.P.C.---Form---Expression "apply" used in Rule 21 includes oral application (request) also, and the application need not be in the written form necessarily.

Abdul Aziz v. Raj Chhabra AIR 1968 All 119 ref.

**(i) Civil Procedure Code (V of 1908)---**

----O. XVII, R. 1---Adjournments---Scope---Power of the trial court under Rule 1 of Order XVII of the C.P.C. to grant an adjournment on being shown the sufficient cause is discretionary; therefore, an appellate court cannot interfere with the order of the Trial Court, either granting or refusing adjournment, unless it is found that the discretionary power has been exercised perversely or arbitrarily.

**(j) Civil Procedure Code (V of 1908)---**

----O. XI, Rr. 1 & 2---Interrogatories---Significance---Interrogatories serve as a useful tool to shorten litigation and reduce expenses of litigation---However, the process of interrogatories should not be abused and misused to prolong the trial and add to the expenses---Such an abuse of the process of interrogatories has to be curbed with a heavy hand---Fair use of the process of interrogatories should be encouraged, for it would result in considerable saving of time and money and thus be beneficial to the parties of the case as well as to the administration of justice in general.

J&LS Goodbody v. Clyde Shipping Company and McCabe v. Irish Life Assurance [2015] 1 IR 346 ref.

Per Ayesha A. Malik, J; dissenting with Syed Mansoor Ali Shah, J. (Minority view)

**(k) Civil Procedure Code (V of 1908)---**

----O. XI, R. 21---Party failing to comply with any order to answer interrogatories, or for discovery or inspection of documents---Effect---Consequence of noncompliance with an order of the Court directing for answers to the interrogatories, discovery or inspection is grave which is why the law is settled on this point that penal provisions should be strictly construed and used with caution where circumstances mandate the same---What the Court is essentially looking for under Order XI, Rule 21, C.P.C. is a default on the part of the plaintiff or defendant to comply with its order to file its answer to the interrogatories or for discovery, or for inspection of documents---Test to ascertain whether there has been a default in compliance with an order of the Court is to

see whether such default was done willfully---Act of being willful means that it is done deliberately and intentionally and cannot be something that is done by accident or inadvertently or for reasons beyond the control of the party---Essentially, it goes directly to the conduct of a person with reference to the order for filing the answers to interrogatories, or for discovery or inspection and the intent behind such conduct.

Messrs United Bank Limited v. Yousuf Haji Noor Muhammad Dhadhi 1988 SCMR 82 and Messrs Babar Sewing Machine Company v. Tirlok Nath Mahajan (1978) 4 SCC 188 ref.

**(l) Administration of justice---**

----Procedural law, compliance with---Penal provisions, interpretation of---Exercise of discretion by court---Scope---Compliance with rules of procedure is fundamental to the pace and course of the litigation---When construing penal provisions, the exercise of judicial discretion by the Court has to be based on sound reasons that the circumstances justify---Judicial discretion in itself has inbuilt restraint which means that the Court cannot ignore facts and circumstances prevailing at the time and where such error can be corrected or condoned for adequate reasons, the court can condone the non-compliance in furtherance of justice because there has been no deliberate attempt to ignore an order of the court---Further penal provisions do not mandate that they be applied in a mechanical way in every case rather it must be a thoughtful step, based on circumstances, that indicates willful failure, deliberate default and intentional non-performance.

Asha Rani Gupta v. Vineet Kumar 2022 SCC OnLine SC 829; Miss Santosh Mehta v. Om Prakash and others (1980) 3 SCC 610 and Bilmal Chand Jain v. Sri Gopal Agarwal (1981) 3 SCC 486 ref.

Syed Ali Zafar, Advocate Supreme Court, Mian Muhammad Kashif, Advocate Supreme Court assisted by Imran Iqbal, Advocate for Petitioner (in both cases).

Mustafa Ramday, Advocate Supreme Court assisted by Ms. Zoe K. Khan, Akbar Khan, Saad Sibghatullah, Asfand Mir, Ms. Mahnoor Ahmed and Bakhtayar Malik, Advocates for the Respondent (in both cases).

Date of hearing: 29th December, 2022.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---(**For himself and Amin-ud-Din Khan, J.) Through the present petitions, the petitioner seeks leave to appeal against a consolidated order of the Lahore High Court, dated 07.12.2022 ("impugned order"), whereby his two revision petitions filed against the orders of the trial court, dated 20.10.2022 and 24.11.2022, have been dismissed. The trial court had, by its order dated 20.10.2022, dismissed the objections (application) of the petitioner for rejection of the interrogatories of the respondent and directed him to submit the answers to those interrogatories and by its order dated 24.11.2022, struck out the right of defence of the petitioner due to non-submission of the answers to the said interrogatories.

2. Briefly, the facts of the case are that the respondent instituted a suit for recovery of damages against the petitioner, on 07.07.2017, alleging the commission of his defamation by the petitioner. The petitioner filed his written statement, on 27.07.2021. After the close of the pleadings, the trial court fixed the case for pre-trial proceedings of discovery and inspection under Order XI of the Code of Civil Procedure 1908 ("C.P.C."). Both the parties delivered their respective interrogatories: the respondent, on 02.02.2022 and the petitioner, on 03.02.2022. The respondent later withdrew some questions and delivered the amended interrogatories, with permission of the trial court, on 08.03.2022. The respondent filed the answers to the interrogatories of the petitioner, on 16.03.2022. The petitioner, however, filed objections (application) for rejection of the interrogatories of the respondent, on 09.05.2022, instead of filing the answers thereto.

3. The trial court observed that an application for rejection of the interrogatories could be filed under Rule 7 of Order XI, C.P.C. within seven days after service of the interrogatories, while the petitioner had first sought several adjournments for submitting the answers to the interrogatories and then filed such application (objections) after the lapse of about two months without any lawful justification and without seeking condonation of the delay. With these observations, the trial court overruled the objections of the petitioner and directed him to submit his answers to the interrogatories of the respondent, vide its order dated 20.10.2022. The petitioner was, thereafter, provided with several opportunities to file the answers to the interrogatories, but he failed to avail them. Consequently, the trial court struck out the right of defence of the petitioner under Rule 21 of Order XI, C.P.C., vide its order 24.11.2022, due to his non-submission of the answers to the said

interrogatories. The petitioner challenged both the orders of the trial court by filing two revision petitions in the Lahore High Court. After examining the record of the proceedings of the trial court, the High Court observed that the petitioner had failed to point out any illegality or material irregularity, or any jurisdictional defect, calling for interference in the orders passed by the trial court, in the exercise of its revisional jurisdiction. With these findings, the High Court dismissed both the revision petitions by the impugned order and upheld the orders of the trial court. Hence, the petitioner has filed these petitions for leave to appeal.

4. The learned counsel for the petitioner has mainly contended that the trial court did not perform its duty, under Rule 1 of Order XI, C.P.C., to examine the interrogatories of the respondent for determining whether or not they were relevant to the case; that the time of seven days mentioned in Rule 7 of Order XI, C.P.C. for making an application for setting aside the interrogatories is not mandatory; that the trial court had itself been extending the time for submitting the answers to the interrogatories, therefore, it could not have penalised the petitioner for its own acts; that before taking any penal action under Rule 21 of Order XI, there must be an order of the court, under Rule 11 of Order XI, requiring answers to the interrogatories, but no such order had been passed by the trial court in the present case; that the penal action of striking out the right of defence for non-submission of the answers to the interrogatories can be taken by a court only on an application of a party, not suo motu, and no such application had been filed by the respondent in the present case; that the penal provisions of Rule 21 of Order XI are not to be invoked lightly and before applying them an opportunity should be granted to do the needful, but no such opportunity was granted by the trial court to the petitioner in the present case; and that the technicalities should not be allowed to defeat justice, therefore, the petitioner may be provided with an opportunity to file the answers to the interrogatories of the respondent, in the interest of justice.

5. On the other hand, in addition to refuting the contentions of the petitioner, the learned counsel for the respondent has taken us through the record of the proceedings of the trial court, to submit that the conduct of the petitioner had remained contumacious throughout every stage of the proceedings, as much as he filed the written statement on 27.07.2021, after a period of about four years since his appearance in the suit on 09.09.2017, which was otherwise to be filed within thirty days from such appearance under Rule 1 of Order VIII, C.P.C.; that in the proceedings so far conducted in the trial court, the petitioner has sought eighty (80) adjournments; that the trial court had committed no illegality or material irregularity in making the orders dated 20.10.2022 and 24.11.2022, as has been observed by the High Court in the impugned order, and the revision petitions of the petitioner have rightly been dismissed by the High Court.

6. We have considered the contentions of the learned counsel for the parties, read the cases cited by them and examined the record of the case.

7. As the jurisdiction of this Court under Article 185(3) of the Constitution of the Islamic Republic of Pakistan 1973 to grant the leave to appeal is discretionary,[1] the conduct of a petitioner has a substantial bearing on the question of granting or declining such leave to him.[2] The conduct of a party is also material for the purpose of exercising the court's discretion under Rule 21 of Order XI, C.P.C. the court takes the penal action of dismissing the suit of the plaintiff or striking out the defence of the defendant when the party concerned is guilty of contumacious conduct by disregarding the specific order of the court, for compliance of which the court has granted a reasonable time and a sufficient opportunity.[3] However, it is not only a deliberate failure to comply with a specific order of the court by a party that is regarded as his contumacious conduct but a series of separate inordinate delays caused by him at different stages of the proceedings of the case is also a convincing proof of such conduct.[4]

8. In light of the above principles, we have gone through the copies of the complete order sheet of the trial court submitted on behalf of the respondent in support of the contention that the conduct of the petitioner has remained willfully contumacious and disobedient throughout the proceedings of the case in the trial court. We have noted that the suit was instituted by the respondent, on 07.07.2017. The petitioner appeared in the suit through his counsel, on 09.09.2017 and was provided with two opportunities, on his request, to submit the written statement within a period of thirty days as per Rule 1 of Order VIII, C.P.C. On 09.10.2017, when the case was fixed for filing of written statement as a second opportunity within the permissible time limit of thirty days, the petitioner instead of presenting his written statement filed an application under Rule 10 of Order VII, C.P.C. for returning

the plaint to the respondent on the ground of lack of territorial jurisdiction of the trial court. The respondent filed his written reply to that application on the very next date, i.e., on 19.10.2017. Thereafter, several opportunities were given to the petitioner for arguments on the said application till 29.09.2018 during the period of about one year; many of them were with warnings of "last and final" and "absolute last and final" opportunities. On 29.09.2018, instead of advancing arguments on his application under Rule 10 of Order VII, the petitioner made another miscellaneous application under Rule 16 of Order XI, C.P.C. for the production of certain documents by the respondent. In the next seven months, the petitioner was provided with several opportunities to advance arguments on the said applications, again with warnings of "last and final" and "absolute last and final" opportunities; which were not advanced and after protracting the proceedings of the case for about seven months, the application under Rule 10 of Order VII was withdrawn by the petitioner on 04.05.2019. Thereafter, the hearing of the case was adjourned on several dates for arguments on the application of the petitioner under Rule 16 of Order XI, C.P.C., for a period of about six months. On 30.10.2019, the respondent filed two applications: the one under Rule 10 of Order VIII, C.P.C. for closing the right of the petitioner to file his written statement and the second under section 151, C.P.C. read with section 14 of the Defamation Ordinance, 2002 for the early decision of the suit. Again, the petitioner was provided with several opportunities to file written replies to the said two applications of the respondent, with warnings of "last and final" and "absolute last and final" opportunities, which were filed on 18.02.2020 after delaying the proceedings of the case on this matter for a period of about four months. After this, the petitioner was provided with several opportunities to advance arguments on the said applications of the respondent as well as on his own application under Rule 16 of Order XI, C.P.C. till 24.04.2021, again with warnings of "last and final" and "absolute last and final" opportunities. The arguments on the application of the petitioner under Rule 16 of Order XI, C.P.C. were heard on 24.04.2021 and the said application was dismissed by the trial court on 26.04.2021. In the next about three months, the petitioner was provided with nine opportunities to file his written statement, again with warnings of "last and final" and "absolute last and final" opportunities. At last, the petitioner filed his written statement on 27.07.2021 after a period of about four (4) years since his appearance in the suit on 09.09.2017, which should have been filed by him till 09.10.2017 within a period of thirty days from the day of his appearance in the suit as per Rule 1 of Order VIII, C.P.C. After filing the written statement, the petitioner first pressed before the trial court to decide upon his objection taken in the written statement as to the territorial jurisdiction on three dates of hearing, and then on the fourth date, i.e., 22.09.2021, his counsel made the statement that the said objection may be decided after recording evidence. The trial court, on the said date, also disposed of the above-mentioned two applications of the respondent, with the observations that as the petitioner had filed his written statement, the application for closing his right to file the written statement became infructuous and that from then onward, short dates would be fixed in the case to decide it expeditiously.

9. The above summary of the proceedings of the case in the trial court made during a period of four years, from the date of appearance of the petitioner on 09.09.2017 till 22.09.2021, gives credence to the contention of the respondent that the conduct of the petitioner has remained contumacious throughout the proceedings of the case in the trial court. The way the proceeding was prolonged by the petitioner at every stage of the case in the trial court, to delay the decision of the case, is more than evident.

10. Before proceeding further to examine the conduct of the petitioner during the proceeding of delivering and answering the interrogatories under Order XI, C.P.C., we think it appropriate to observe here that although we are cognizant of the fact that the judges of the trial courts perform the onerous task of dispensing justice at the grassroots in the stressful and challenging conditions and in a difficult and demanding environment,[5] the leniency shown on their part in the matter of accommodating unjustified requests for adjournment, even at the cost of disregarding the timelines provided in the relevant laws, is unwarranted. No doubt, all judges including the trial court judges should be courteous and polite while interacting with the members of the bar and the litigant public appearing before them but at the same time, they must be firm in conducting the proceedings of the cases in accordance with law. A "peremptory order"[6] of the court, which specifies a time to do a certain act in the proceedings of the case with a warning of last opportunity, must be followed by the legal consequences prescribed by the relevant law for its non-compliance. Orders granting repetitive adjournments with warnings

of "last and final" and "absolute last and final" opportunity become meaningless and shatter the confidence of the litigant public in the court orders and consequentially weaken the authority and fiat of the court. Toothless court is the worst form of injustice. A court, no matter how high or low in the pyramidical court system, is still a court of law and must not shy away from exercising its authority under the law. Effective and efficient court house is the basic foundation of rule of law in any constitutional democracy. In this regard, we fully agree and endorse the following observations of a two-member bench of this Court made in the Moon Enterpriser case[7] in regard to an order for producing evidence and are of the view that these observations apply not only to the orders of producing evidence but also to all types of the court orders:

In our view it is important for the purpose of maintaining the confidence of the litigants in the court systems and the presiding officers that where last opportunity to produce evidence is granted and the party has been warned of the consequences, the court must enforce its order unfailingly and unscrupulously without exception. Such order would in our opinion not only put the system back on track and reaffirm the majesty of the law but also put a check on the trend of seeking multiple adjournments on frivolous grounds to prolong and delay proceedings without any valid or legitimate rhyme or reason. Where the Court has passed an order granting the last opportunity, it has not only passed a judicial order but also made a promise to the parties to the lis that no further adjournments will be granted for any reason. The Court must enforce its order and honour its promise. There is absolutely no room or choice to do anything else. The order to close the right to produce evidence must automatically follow failure to produce evidence despite last opportunity coupled with a warning. The trend of granting (Akhri Mouqa) then (Qatai Akhri Mouqa) and then (Qatai Qatai Akhri Mouqa) make a mockery of the provisions of law and those responsible to interpret and implement it. Such practices must be discontinued, forthwith.

The inordinate delay in the conclusion of cases is the main challenge faced by the judiciary, which has a devastating effect on the credibility of the justice system and the public confidence reposed in it. A radical approach is required, as said by Lord Griffiths,[8] to tackle the problem of delay in the litigation process by enforcing a court-controlled case management system, which should ensure that once a litigant has entered the litigation process, his case proceeds in accordance with a timetable as prescribed by rules of court. Litigants and their legal advisors must recognise that any delay, which occurs due to non compliance with the prescribed timetables, is assessed not only from the point of view of the prejudice caused to a particular litigant in whose case it occurs but also in relation to the negative effect it has on the overall administration of justice. It is in the interests of litigants as a whole that the court's time is not unnecessarily absorbed in dealing with "satellite litigation" which failure to comply with the prescribed timetables creates.[9] The rules containing time limits for doing the specified acts necessary for the progress of a case are intended to accomplish the constitutional goal of fair trial and expeditious dispensation of justice by concluding the litigation process within a reasonable timeframe.[10] These rules should, therefore, be observed.

11. To tackle the problem of delay in the process of civil litigation, the Lahore High Court, in the exercise of its rule-making power under section 122 of the C.P.C., has made substantial changes in the rules of civil procedure contained in the First Schedule to the C.P.C. in 2018, on several matters including the process of interrogatories. "Interrogatories", i.e., the written questions, are delivered by one party to his opponent party for answering them on oath in the form of an affidavit. The interrogatories differ from the pleadings: the object of the pleadings is to ascertain what the issues are, while the main object of the interrogatories is to save time and expense by enabling a party to obtain an admission of certain facts from his opponent, which narrows down the issues for trial and thus reduces the burden of proof.[11] However, as a party need not mention in his pleading the evidence by which he is to prove the facts asserted by him for making his claim or defence, a party cannot ask through an interrogatory his opponent party as to what evidence the latter would produce in support of his claim or defence.[12] The interrogatories when delivered by the parties to each other at a pretrial stage of the case, on the facts which are directly in issue or on such facts the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue, can obviate the expensive and time-consuming process of proving certain facts, dispose of some issues even before trial and lessen the number of witnesses to be recorded in the case.[13] The fair use of the process of interrogatories, therefore, ultimately results in an overall

shortening of the trial and thus helps achieve the constitutional goal of the inexpensive and expeditious dispensation of justice. Interrogatories therefore play a vital role in making the civil trial court system more effective and efficient.

12. Turning to the examination of the conduct of the petitioner during the proceeding of delivering and answering the interrogatories under Order XI, C.P.C. in the present case, we find it appropriate to first cite here the relevant Rules of Order XI, C.P.C.:

Rule 1. Discoveries by interrogatories.

The Court shall direct the parties to deliver interrogatories in writing for the examination of the opposite parties or any one or more of such parties stating clearly which of such interrogatories each of such person is required to answer, provided that the Court may reject an interrogatory or part thereof which, in its opinion, is not relevant to the case.

(as amended by the Lahore High Court in 2018)

Rule 2. Communication of interrogatories.

On receipt of the interrogatories under rule 1, the Court shall deliver the interrogatories to the concerned person for submitting the answer within such time as the Court may specify.

(as amended by the Lahore High Court in 2018)

Rule 6. Objections to interrogatories by answer.

Any objection to answering any interrogatory on the ground that it is scandalous or irrelevant or not exhibited bona fide for the purpose of the suit, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer.

Rule 7. Setting aside and striking out interrogatories.

Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary or scandalous; and any application for this purpose may be made within seven days after service of the interrogatories.

Rule 8. Affidavit.

The interrogatories shall be answered by an affidavit to be filed within the time specified by the Court.

(as amended by the Lahore High Court in 2018)

Rule 11. Order to answer or answer further.

Where any person interrogated submits an insufficient or an evasive answer, the Court may require him to submit the proper answer within the time specified by the Court.

(as amended by the Lahore High Court in 2018)

Rule 21. Non-compliance with order for discovery.

Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly.

The perusal of the order sheet of the trial court shows that on 05.01.2022, the trial court directed the parties to deliver their interrogatories, in accordance with Rule 1 of Order XI, C.P.C. Both the parties delivered their respective interrogatories: the respondent, on 02.02.202 and the petitioner, on 03.02.2022. The respondent later withdrew some questions and delivered the amended interrogatories, with permission of the trial court, on 08.03.2022 and the hearing was adjourned to 16.03.2016 for filing answers by the parties to the interrogatories of each other. The respondent filed the answers to the interrogatories of the petitioner, on 16.03.2022, while the petitioner requested another opportunity, which was granted and the hearing of the case was adjourned to 26.03.2022. The petitioner did not file his answers to the interrogatories till that date and the hearing was adjourned to 09.04.2022. On 09.04.2022, 20.04.2022 and 26.04.2022, the petitioner requested further opportunities for filing the answers to the interrogatories, which were accordingly granted to him and in the order dated 26.04.2022, the trial court also made a warning of last opportunity to file the answers to the interrogatories and adjourned the hearing to 09.05.2022. On 09.05.2022, instead of filing the answers for which

the petitioner had earlier been requesting opportunities, the petitioner filed the objections (application) for rejection of the interrogatories of the respondent. The respondent filed his written reply to the said objections (application) of the petitioner, on 14.05.2022. On 21.05.2022, 30.05.2022, 08.06.2022, 05.07.2022, 27.07.2022 and 05.10.2022, the hearing of the case was adjourned on request of the petitioner for arguments on the said objections (application). The arguments were heard on 19.10.2022 and vide its order dated 20.10.2022, the trial court overruled the objections of the petitioner and directed him to submit his answers to the interrogatories of the respondent, with the observations that an application for rejection of the interrogatories could be filed under Rule 7 of Order XI, C.P.C. within seven days after service of the interrogatories, while the petitioner had first sought several adjournments for submitting the answers to the interrogatories and then filed such application (objections) after the lapse of about two months without any lawful justification and without seeking condonation of the delay.

13. The above survey of the proceedings of the trial court as to delivering and answering the interrogatories by the parties under Order XI, C.P.C., from 05.01.2022 to 20.10.2022, shows the same delaying tactics of the petitioner by which he had been hindering the progress of the suit earlier. The learned counsel for the petitioner has contended that the time of seven days mentioned in Rule 7 of Order XI, C.P.C. is not mandatory rather it is directory, and that strict compliance is required only of a mandatory provision while substantial compliance with a directory provision is sufficient.

14. It is true that the provisions of a procedural law are ordinarily directory in nature and are construed liberally to advance the cause of justice, as their main purpose is to facilitate the administration of justice. The same purposive approach is to be adopted while construing and applying a procedural provision which provides a timeframe for doing a certain act necessary to the further progress of the case. The main purpose of providing a timeframe in procedural rules is to expedite the hearing and conclusion of the case and to avoid unnecessary adjournments. Such rules are, therefore, to be adhered to for giving effect to the purpose of their making, else the non-compliance therewith would frustrate the objective of expeditious decision of the cases sought to be achieved by the legislature or the rule-making authority, as the case may be. The procedural rule prescribing the timeframe for doing a certain act in the course of the proceedings of a case should, therefore, be followed as a rule and the departure therefrom can be made only as an exception in exceptional circumstances beyond the control of the party concerned. The court may also ask for the filing of an affidavit or the necessary documents, depending on the facts and circumstances of the case, in support of those exceptional circumstances.[14]

15. In the present case, no request was made by the petitioner under section 148, C.P.C. seeking an extension of the time for filing his objections (application), or condonation of the delay as observed by the trial court in its order dated 20.10.2022.

16. As for his contention that the trial court did not perform its duty of determining the relevancy of the interrogatories under Rule 1 of Order XI before delivering the same under Rule 2 for submitting the answers, we find that there is nothing on record from which it can be inferred that the trial court did not make such examination of the interrogatories of the parties before delivering the same to each other and requiring them to submit the answers thereto. The presumption of regularity is attached to judicial proceedings; therefore, in absence of the contrary material, it is to be presumed that the trial court delivered the interrogatories and required submission of their answers after making such examination. Secondly, if it is assumed that the trial court did not make such examination of the interrogatories, even then it has no legal effect and consequences as the parties still had ample opportunity to raise objections to the interrogatories of each other under Rule 6 or 7. The power of the trial court under Rule 1 to examine the interrogatories before delivering the same to the party concerned under Rule 2 and to reject any irrelevant interrogatory at that stage, is permissive, not obligatory. The non-exercise of which does not vitiate the order of the court delivering the interrogatories to the party concerned under Rule 2 for submitting the answers. It is a matter of common knowledge that our trial courts are overburdened with high pendency of cases and therefore cannot be expected, in the prevailing circumstances, to make such examination of the interrogatories in every case, under Rule 1. Rather, it appears to us to be more practicable in the prevailing circumstances and in our system of administration of civil justice,

which is primarily adversarial, that the party concerned should invite the attention of the trial court for such examination, either (i) by making an application under Rule 7 of Order XI if all or most of the interrogatories delivered appear to be irrelevant by specifying the particular objection taken to each of such interrogatories separately, or (ii) by answering those interrogatories which he thinks are relevant and taking objection to those which he thinks are irrelevant as per Rule 6 of Order XI, C.P.C. In the present case, the petitioner opted for the first mode but not in a bona fide, proper and prescribed manner, as he first lingered on the matter by requesting several opportunities to submit the answers to the interrogatories and then instead of submitting the answers filed objections (application) for rejection of the interrogatories after a period of about two months instead of the prescribed period of seven days, and that too without seeking an extension of the time under section 148 of the C.P.C. by showing sufficient reason (exceptional circumstance), nor did he specify the particular objection to each of the interrogatories separately rather made general objections to all of them jointly, though he attempted to fill up the lacuna in his written arguments submitted on 05.07.2022 which too were after the lapse of the prescribed time under Order XI, Rule 7, C.P.C. The adjournments sought by the petitioner for advancing arguments on his own objections (application) also strengthen the impression that in making the said objections he was acting in furtherance of his design to prolong the proceedings of the case on one pretext or another. Thus, we do not see any illegality or material irregularity in the exercise of its jurisdiction by the trial court in overruling the objections of the petitioner and directing him to submit the answers to the interrogatories of the respondent vide its order dated 20.10.2020, which may have called for interference by the High Court in its revisional jurisdiction under section 115, C.P.C.

17. Proceeding further to the examination of the conduct of the petitioner after the order of the trial court, dated 20.10.2022, we have noted that vide its order dated 20.10.2022, the trial court directed the petitioner to submit his answers to the interrogatories of the respondent till 26.10.2022. On 26.10.2022, 08.11.2022 and 17.11.2022, three further opportunities were given to the petitioner, on requests of his counsel, to submit the answers to the interrogatories of the respondent. In its order dated 17.11.2022, the trial court made a clear warning of the last opportunity and also specified the consequence of non-compliance with the court order, thus:

At request of learned counsel for the defendant, one more adjournment is hereby granted to submit replies by the defendant regarding concerned interrogatories of the plaintiff's side. File be put up on 24.11.2022 for submission of requisite replies by the defendant's side regarding concerned interrogatories of the plaintiff in the form of one more opportunity. It is hereby clarified that in case of non-submission of requisite replies by the defendant's side regarding concerned interrogatories of the plaintiff's side on the next date, the right of defence of the defendant shall be struck out.

Despite the above warning of the trial court, the petitioner did not submit his answers to the interrogatories of the respondent on 24.11.2022, rather he made an application for further adjournment this time on the ground that he intended to file a revision petition against the order of the trial court dismissing his objections (application) for rejection of the interrogatories. The ground pleaded for seeking adjournment was misconceived and untenable, as on the last four dates, the petitioner had been seeking adjournments for filing his answers to the interrogatories. The conduct of the petitioner was the same as it had been throughout the proceedings of the case and as was his previous conduct when at an earlier stage, he had filed the objections (application) for rejection of the interrogatories after seeking several opportunities for submitting his answers. The trial court rejected the application of the petitioner for further adjournment and struck out his right of defence, under Rule 21 of Order XI, vide its order dated 24.11.2022. In view of the noted facts and circumstances, we do not find any illegality or material irregularity in the exercise of its jurisdiction by the trial court in making the said order.

18. The learned counsel for the petitioner has contended that before taking any penal action under Rule 21 of Order XI, there must be an order of the court under Rule 11 requiring answers to the interrogatories, but no such order had been passed by the trial court in the present case. We are afraid, this contention is oblivious of the substitution of Rules 2 and 11 of Order XI, C.P.C. by the Lahore High Court amendments made in 2018, and the cases cited in support of the said contention are also not relevant, for the same reason. The expression, "any order to answer interrogatories", used in Rule 21 of Order XI includes both orders of the court: (i) the order of the court made under the substituted Rule 2, requiring the first submission of the answer to the

interrogatories, and (ii) the order of the court made under the substituted Rule 11, requiring submission of the proper answer, in case the first submitted answer is found insufficient or evasive. In the present case, the petitioner did not submit any answer to the interrogatories of the respondent in compliance with the order of the trial court made under Rule 2; therefore, there was no occasion for the trial court to make an order directing the petitioner under Rule 11 for submitting the "proper answer."

19. As far as the contention of the learned counsel for the petitioner that the penal action under Rule 21 of Order XI can be taken by a court only on an application of the party, not suo motu, and his reference to two judgments[15] of the High Courts of the neighbouring jurisdiction are concerned, we are of the considered view that the said contention is untenable and the said reference is inapt as the learned counsel has made the same without appreciating the changes made by the Lahore High Court in the rules contained in Order XI on the process of delivering interrogatories and requiring answers thereto. Through the Lahore High Court amendments, the role and importance of interrogatories in a civil trial has been enhanced by empowering the trial court to be more active and controlling in the matter of interrogatories: the newly inserted Rule 1 of the Order IX-A mandates the trial court to fix a day, after the close of the pleadings, for the proceedings of discovery and inspection under Order XI; the substituted Rules 1 and 2 of Order XI require the trial court to direct the parties to deliver their interrogatories and on receipt thereof, to deliver the same to the party concerned for submitting the answers within such time as it may specify. In the wake of this paradigm shift in the civil procedure code, interrogatories have to be viewed as an essential constituent of civil trial. These amendments would be rendered useless if the trial court enjoys no power to enforce its order by first issuing the warning of the proposed penal action and then to take the said action if its order is not complied with despite that warning, without an application of the party. The trial court, in our opinion, does have the power to take the penal action on its own if its order is not complied with despite giving the warning of last opportunity for compliance. The interpretation put to the provisions of Rule 21 by the High Courts of the neigbouring jurisdiction is no more relevant in the Province of Punjab where the Lahore High Court has amended the overall scheme of the process of delivering interrogatories and requiring their answers.

20. Even otherwise, it has been held in one[16] of the cases referred to by the learned counsel for the petitioner, that the expression "apply" used in Rule 21 includes oral application (request) also, and the application need not be in the written form necessarily. In the present case, the respondent had opposed on several occasions the requests of the petitioner seeking adjournments for submitting answers to the interrogatories. Such opposition of the respondent amounts to his oral request (application) for taking penal action against the petitioner under Rule 21 for non-submission of the answers to the interrogatories, else there remains no meaning of that opposition of the respondent to the requests made by the petitioner for adjournments. The recording of the warning in its order dated 17.11.2022 by the trial court to strike out the right of defence of the petitioner in case he failed to submit his answers to the interrogatories of the respondent till the next date also shows the making of an oral request on behalf of the respondent for such penal action against the petitioner.

21. The contention of the learned counsel for the petitioner that the penal provisions of Rule 21 of Order XI are not to be invoked lightly and before applying them an opportunity should be granted to do the needful, but no such opportunity was granted by the trial court to the petitioner before applying them in the present case, is absolutely unsustainable, as the trial court had provided the petitioner with more than sufficient opportunities to submit his answers to the interrogatories of the respondent, before taking the penal action under Rule 21 of Order XI, C.P.C. Similarly, his contention that the trial court had itself been extending the time for submitting the answers to the interrogatories, therefore, it could not have penalised the petitioner for its own acts, appears to us to be completely untenable, as the trial court had been granting the adjournments on request of the petitioner, not because of its own reasons.

22. Lastly, the learned counsel for the petitioner has submitted that the technicalities should not be allowed to defeat justice, therefore, the petitioner may be provided with an opportunity to file the answer to the interrogatories of the respondent, in the interest of justice. We have thought over this submission deeply and come to the considered opinion that it cannot be entertained, especially in view of the overall conduct of the petitioner by which he had protracted the proceedings of the case at every stage in the trial court, to delay the

decision of the case. The power of the trial court under Rule 1 of Order XVII of the C.P.C. to grant an adjournment on being shown the sufficient cause is discretionary; therefore, an appellate court cannot interfere with the order of the trial court, either granting or refusing adjournment, unless it is found that the discretionary power has been exercised perversely or arbitrarily. We see no perversity or arbitrariness in the order of the trial court, dated 24.11.2022, rejecting the application of the petitioner for a further adjournment, rather find it completely reasonable and justified, as the ground pleaded for seeking adjournment was legally untenable and thus did not constitute a "sufficient cause" within the meaning of that term as used in Rule 1 of Order XVII and as more than sufficient opportunities (adjournments) had already been granted to the petitioner. Further, by accepting such a submission, we would be doing the same thing for which this Court has deprecated the trial courts in the Moon Enterpriser case[17] for granting further adjournments even after recording the warning of the last opportunity, by first giving last opportunity (Akhri Mouqa) then final last opportunity (Qatai Akhri Mouqa) and then absolute final last opportunity (Qatai Qatai Akhri Mouqa). This Court has observed in the said case that the practice of granting adjournments in this manner amounts to making a mockery of the law and the court orders, and that such practice must be discontinued. We cannot, by accepting the submission, create a double standard: one for this Court and the other for the trial courts.

23. Having examined the contentions of the parties in the light of the record of the case, we find that the contentions of the learned counsel for the respondent are correct, that the conduct of the petitioner has remained willfully contumacious and disobedient throughout the proceedings of the case in the trial court, and that the trial court had not committed any illegality or material irregularity in the exercise of its jurisdiction by making the orders dated 20.10.2022 and 24.11.2022, therefore, the High Court has rightly declined to interfere with them in its revisional jurisdiction under section 115, C.P.C. In addition to the said conduct of the petitioner that disentitles him for the indulgence of this Court in its discretionary jurisdiction under Article 185(3) of the Constitution, we find his petitions are without substance on merits as well. The present petitions are, therefore, dismissed and the leave to appeal, declined.

24. Before parting with the order, we find it necessary to observe that interrogatories serve as a useful tool to shorten litigation and reduces litigational expenses, However, the process of interrogatories has unfortunately been abused in the present case and infact misused to prolong the trial and add to the expenses. Such an abuse of the process of interrogatories has to be curbed with a heavy hand. The fair use of the process of interrogatories, as said by Justice Walsh,[18] should be encouraged, for it would result in considerable saving of time and money and thus be beneficial to the parties of the case as well as to the administration of justice in general. It is high time that our civil courts prove Justice Walsh right!

25. This is the majority view, on the basis whereof short order dated 29.12.2022 was passed, which, for completion of record, is reproduced hereunder:-

For the reasons to be recorded later these petitions are dismissed and leave refused by a majority of two-to-one (Ayesha A. Malik, J., dissenting).

Sd/-

Syed Mansoor Ali Shah, J

Sd/-

Amin-ud-Din Khan, J

**AYESHA A. MALIK, J.---**I have had the opportunity of going through the majority judgment authored by Syed Mansoor Ali Shah, J., and agree with the conclusion drawn with respect to Civil Petition No.3436-L of 2022. However, after having perused the facts and record of Civil Petition No.3437 of 2022, I find myself in disagreement with the conclusion reached therein which finds that the conduct of the Petitioner was willfully contumacious and disobedient throughout the proceedings of the case in the trial and, therefore, warranted action under Order XI Rule 21 of the Code of Civil Procedure, 1908 (C.P.C.) and further that the Lahore High Court, Lahore (High Court) rightly declined to interfere with the order of 24.11.2022 in its revisional jurisdiction.

2. The basic facts of the case have been narrated in paragraphs 2 to 5 of the majority's opinion, however, for the sake of easy reference, the essential facts are reiterated and divided into three parts.

(i) A suit for recovery of rupees ten billion as damages for defamation under sections 4 and 9 of the Defamation Ordinance, 2002 (Ordinance) was filed by the Respondent against the Petitioner on 07.07.2017. The Petitioner entered appearance on 09.09.2017 and the case was fixed for filing of the written statement on 25.09.2017 and 09.10.2017. The written statement was not filed on either date. The Respondent objected to the fact that the Petitioner had not filed his written statement on 09.10.2017 within the 30 days requirement, instead the court granted time for submission of the written statement on 09.10.2017. From 09.10.2017 until 26.04.2021 there is no direction by the trial court to file the written statement. On 26.04.2021, 17.05.2021, 31.05.2021, 05.06.2021, 16.06.2021, 26.06.2021, 29.06.2021, 06.07.2021 and 16.07.2021 directions were given to file the written statement. On 17.05.2021 and 05.06.2021, the last and final opportunity was granted to the Petitioner for filing the written statement. It was eventually filed on 27.07.2021 after a delay of four years.

(ii) During this four-year period, the Petitioner filed applications under Order VII, Rule 10, C.P.C. and Order XI, Rule 16, C.P.C. The Respondent filed two applications; one, under section 151, C.P.C. read with section 14 of the Ordinance for early decision in the suit, and second, under section 151, C.P.C. read with Order VIII, Rules 1 and 10, C.P.C., for closing the Petitioner's right to file his written statement, respectively. The trial court proceeded on the various applications pending before it until 04.05.2019 when the application under Order VII, Rule 10, C.P.C. was withdrawn and then on 26.04.2021, the application under Order XI, Rule 16, C.P.C. was dismissed. On 22.09.2021, the Respondent's applications were disposed of. From 06.10.2021 to 16.11.2021, the case proceeded in the case management conference. On 16.11.2021 to 18.12.2021, the case proceeded for submission of Form No. 13 and for examination of parties under Order X, C.P.C. On 18.12.2021, the case was fixed for discovery and inspection under Order XI, C.P.C. and on 05.01.2022 the parties were directed to file their interrogatories.

(iii) The interrogatories were filed by the Petitioner and the Respondent, on 02.02.2022 and 03.02.2022, respectively. On 11.02.2022, the Respondent sought time to amend his interrogatories which amendment was allowed and consequently on 08.03.2022 the amended interrogatories were filed by the Respondent on which date the Petitioner was directed to file his reply to the interrogatories. After the first direction, the Petitioner sought three adjournments for filing his reply on 09.04.2022, 20.04.2022 and 26.04.2022, and filed objections to the interrogatories on 09.05.2022. The objections were overruled on 20.10.2022 on which date, the Petitioner was directed to file his reply to the interrogatories. The Petitioner sought adjournments on 26.10.2022, 08.11.2022 and 17.11.2022 and his right to defence was struck out on 24.11.2022 under Order XI, Rule 21, C.P.C.

3. Civil Petition No.3436 of 2022 was filed with respect to the order of 20.10.2022 whereby the objections of the Petitioner were overruled by the trial court. The trial court rejected the objections as the same were filed after the seven days period prescribed under Order XI, Rule 7, C.P.C. I agree with the majority judgment regarding this matter to the extent that the Petitioner's objections were time barred, and therefore, the same were rightly dismissed.

4. The issue before the Court in Civil Petition No.3437 of 2022 is whether the trial court was justified in striking out the defence of the Petitioner under Order XI, Rule 21, C.P.C., based on the non-compliance with its direction in the order dated 20.10.2022 to file answers to the interrogatories.

5. The impugned order dated 07.12.2022 of the High Court finds that the trial court has jurisdiction to strike out the right of defence of a defaulting party for non-compliance with the provisions of the law or the orders of the court and that such orders are necessary to prevent substantial or serious prejudice to the opposite party due to negligence or inexcusable delay. The argument of the counsel for the Petitioner is that the provisions of Order XI, Rule 21, C.P.C. are penal and before invoking the same, the court should satisfy itself that punitive action is necessary as the party has willfully disobeyed an order of the Court. That failure to comply with an order in genuine circumstances where adequate reasons are given does not amount to being willful and cannot be construed as a default under Order XI, Rule 21, C.P.C. Further that the Court can condone the non-compliance simpliciter or else impose costs if need be and is not obligated to take penal action. He argued that since penal provisions contemplate severe consequences, discretion should be exercised cautiously as it affects the Petitioner's constitutional rights to due process and fair trial. In support of this contention, reliance is placed on

the case reported as Mirza Ali Khan v. Mst. Shahida Parveen and others (1992 SCMR 2112). The counsel also argued that penalty for non compliance with an order as per Order XI, Rule 21, C.P.C. must be strictly construed to be applied only in extreme cases where there is obstinacy, contumacy or a willful attempt to disregard the orders of the court. In the present case, there was a sufficient cause for the non-compliance which was neither intentional nor willful and was beyond the control of the Petitioner. He stated that the Petitioner on 03.11.2022, while leading a political rally, was shot at and was taken to the hospital where he was operated upon. The counsel further stated that this fact was shown on all national news channels and covered by the print media and was stated as the reason by the counsel of the Petitioner for the adjournments on 08.11.2022, 17.11.2022 and 24.11.2022. Learned counsel submitted that there was no willful attempt on the part of the Petitioner to disregard the order of the court as he was hospitalized and due to security reasons, his counsel was unable to contact him and obtain the reply and affidavit for filing answers to the interrogatories. He argued that these were genuine grounds for seeking the adjournments which were also accepted by the trial court, however, it gave insufficient time in circumstances, within which the reply could not be filed (from 08.11.2022 to 24.11.2022). He stated that striking out the right of defence of the Petitioner vide the order of 24.11.2022 which has been upheld by the High Court, amounts to a wrongful exercise of discretion as the settled principle of law is that lis should be decided on its merits and technicalities should not stand in the way of administration of justice.

6. The Respondent's counsel relied on the conduct of the Petitioner throughout the suit stating that the Petitioner resorted to delaying tactics by not filing the written statement within the prescribed 30 days and instead filed frivolous applications and sought unnecessary adjournments over a period of four years; that he changed his lawyers several times and thereby hampered the case from proceeding as per law. He argued that the Petitioner was obligated to file a reply to the interrogatories and was given sufficient opportunity to file his answers after which the court was well within its discretion to regulate its proceedings and strike out the defence of the Petitioner for non-compliance with its orders.

7. Rule 21 of Order XI, C.P.C. is reproduced hereunder:

"21. Non-compliance with order for discovery. Where any party fails to comply with any order to answer interrogatories or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery of inspection may apply to the Court for an order to that effect and an order may be made accordingly."

The said Rule prescribes penal consequences where a party fails to comply with an order to answer interrogatories, or for discovery or inspection of documents. This provision has two requirements: firstly, an order for the discovery of documents or the filing of answers to interrogatories must be made, and secondly, such an order must not be complied with. The provisions of this Rule impose a penalty for non-compliance with a court order such that the suit can be dismissed if it is the plaintiff or the defence can be struck out if it is the defendant. The consequence of non- compliance with an order of the Court directing for answers to the interrogatories, discovery or inspection is grave which is why the law is settled on this point that penal provisions should be strictly construed and used with caution where circumstances mandate the same (Messrs United Bank Limited v. Yousuf Haji Noor Muhammad Dhadhi (1988 SCMR 82). What the Court is essentially looking for under Order XI, Rule 21, C.P.C. is a default on the part of the plaintiff or defendant to comply with its order to file its answer to the interrogatories or for discovery, or for inspection of documents. The test to ascertain whether there has been a default in compliance with an order of the Court is to see whether such default was done willfully. In this respect in the case reported as Messrs Babar Sewing Machine Company v. Tirlok Nath Mahajan ((1978) 4 SCC 188) the court elaborates that an order under Order XI, Rule 21, C.P.C. ought not to be made unless the court is satisfied that the party was willfully withholding information by refusing to answer interrogatories. The act of being willful means that it is done deliberately and intentionally and cannot be something that is done by accident or inadvertently or for reasons beyond the control of the party. Essentially, it goes directly to the conduct of a person with reference to the order for filing the answers to interrogatories, or for discovery or inspection and the intent behind such conduct. The underlying consideration

for the Court before invoking Rule 21 of Order XI, C.P.C. is to satisfy itself that non-compliance with its order was willful, deliberate and intentional, being contumacious. This Court in the case reported as Messrs United Bank Limited (supra) stated that the provisions of Order XI, Rule 21, C.P.C. being penal in nature are to be strictly construed and the same can only be invoked and penalty imposed on a party only if such party has failed to file an affidavit in spite of an order passed by the court to that effect. Thus, to invoke Order XI, Rule 21, C.P.C. there must be an order for compliance and there must be willful default in its compliance.

8. In the case before us, for the purposes of order 24.11.2022 where the right of the Petitioner's defence was struck out, the facts of the case do not establish that the Petitioner committed willful default or intentionally and deliberately disobeyed an order of the Court. The facts of the case make this position apparent. On 20.10.2022, the objections filed by the Petitioner against the interrogatories were dismissed and vide this order the Petitioner was directed to file his answers to the interrogatories. The next date of hearing was 26.10.2022 on which date the Petitioner sought an adjournment which was granted by the Court. The next date of hearing was 08.11.2022 on which date again an oral request for adjournment was made on the ground that the Petitioner was injured on account of the incident of 03.11.2022 and was hospitalized. This fact is recorded in the order of 08.11.2022 as being a ground for the grant of adjournment, in the following term:

The next date of hearing was fixed for 17.11.2022 when again a request for adjournment was made on the ground that the counsel for the Petitioner was not able to establish contact with the Petitioner due to his hospitalization and security concerns. Therefore, once again answers to the interrogatories could not be filed. This fact is also recorded in the order of 17.11.2022 in the following terms:

"Learned counsel for the defendant has requested for one more adjournment to submit replies of the concerned interrogatories of the plaintiff's side due to his non contact with the defendant. Learned counsel for the plaintiff has vehemently opposed the said request for adjournment with the submission that costs be imposed upon the defendant in case of adjournment. This court does not deem it proper to impose costs upon the defendant regarding adjournment sought by learned counsel for the defendant today. At request of learned counsel for the defendant one more adjournment is hereby granted to submit replies by the defendant regarding concerned interrogatories of the plaintiff's side. File be put up on 24.11.2022 for submission of requisite replies by the defendant's side regarding concerned interrogatories of the plaintiff in the form of one more opportunity. It is hereby clarified that in case of non submission of requisite replies by the defendant's side regarding concerned interrogatories of the plaintiff's side on the next date, the right of defence of the defendant shall be struck out."

It is noted that on this date Respondent's counsel opposed the adjournment and requested that cost be imposed on account of the adjournment, however, the Court did not deem it proper to impose costs and instead gave the Petitioner an opportunity to submit his reply by 24.11.2022 with a warning that in case of failure, the right of defence of the Petitioner would be struck out. On 24.11.2022 once again the counsel appeared to state that he could not file the reply for the same reasons. On this date, an application for adjournment was also filed in which they stated that they were going to assail the dismissal of the objection petition by way of filing a civil revision before the High Court. As per the arguments made the counsel stated that the hospitalization of the Petitioner, his injury and security issues were all informed orally to the court. The trial court, however, did not grant time and instead held that no lawful justification existed for a further grant of adjournment as a reasonable number of opportunities have been provided to the Petitioner to submit his answer to the interrogatories which he has failed to do. Consequently, the defence of the Petitioner was struck out in terms of Order XI, Rule 21, C.P.C.

9. The basic question is to determine whether there was willful default on the part of the Petitioner whereby he deliberately and intentionally disobeyed the order of 20.10.2022 requiring him to file answers to the interrogatories. The answer here would be that this is not a case of willful default and that the failure on the part of the Petitioner to file his answers was due to circumstances beyond his control. The incident of 03.11.2022 was widely shown on national news channels and covered by the print media and was not denied by the

Respondent. The Court itself accepted the reason of hospitalization and injury on 08.11.2022 as well as 17.11.2022 which is evident from its orders. Under the circumstances, there was sufficient cause for seeking the adjournment and the Court acted in haste by issuing a warning on 17.11.2022 and thereafter incorrectly recorded in its order of 24.11.2022 that there was no lawful justification for the grant of adjournments especially since it accepted these reasons on 08.11.2022 and 17.11.2022. Accordingly, there was sufficient ground to give the adjournment, and the default was not willful. Under these circumstances, it cannot be said that there was willful default and it also cannot be said that the conduct of the Petitioner was willfully contumacious, obstinate and disobedient and it also cannot be said that during the period from 08.11.2022 to 24.11.2022, the adjournments were sought with the intent to delay the proceedings.

10. Compliance with rules of procedure is fundamental to the pace and course of the litigation. When construing penal provisions, the exercise of judicial discretion by the Court has to be based on sound reasons that the circumstances justify. Judicial discretion in itself has inbuilt restraint which means that the Court cannot ignore facts and circumstances prevailing at the time and where such error can be corrected or condoned for adequate reasons, the court can condone the non-compliance in furtherance of justice because there has been no deliberate attempt to ignore an order of the court (Asha Rani Gupta v. Vineet Kumar (2022 SCC OnLine SC 829)). The court should recognize that this is an exceptional step which should be invoked after due consideration of the facts (Miss Santosh Mehta v. Om Prakash and others (1980) 3 SCC 610). Further penal provisions do not mandate that they be applied in a mechanical way in every case rather it must be a thoughtful step, based on circumstances, that indicates willful failure, deliberate default and intentional non-performance. The Indian Supreme Court in the case reported as Bilmal Chand Jain v. Sri Gopal Agarwal ((1981) 3 SCC 486) has held that serious responsibility rests on the court where the power to strike out defence is concerned and that it will always be a matter for the judgment of the court to decide whether on the material before it, notwithstanding absence of a representation defence should or should not be struck out. What this means is that the provision merely vests power with the court to strike out the defence and does not oblige it to do so in every case. In the case of Miss Santosh Mahta (supra), the Indian Supreme Court concluded that the deliberate failure or willful default is necessary in order to invoke penal provisions and that the power to strike out defence should not be used where, despite default, there are good and adequate reasons. Order XI, Rule 21, C.P.C. is penal in nature and does not mandate a mechanical consequence for failure to comply with an order, rather it leaves it to the discretion of the court to decide if penal consequences should follow. This power for striking out of the defence under Order XI, Rule 21, C.P.C. can be exercised where the defaulting party fails to attend the hearing or is guilty of prolonged or inordinate and inexcusable delay which may cause substantial or serious prejudice to the opposite party; however, it is expected that before making an order for striking out of defence, the court must consider all the reasons given for the default which merits due consideration and assessment of facts. This is because the effect of striking out of the defence is that it will deprive the party of its ability to defend itself in the case which is a serious matter. In this case, the court had other alternatives, at its disposal, to regulate the pace of the proceedings as well as the conduct of the Petitioner, one of which is to impose costs which would not only serve as a form of deterrence but would also lay the foundation for expeditious justice and promote a smart legal system which view was taken by this Court in its recent judgment rendered in the case reported as Qazi Naveed ul Islam v. District Judge (2023 SCP 32).

11. In the case before us, this power was exercised mechanically and more importantly, the order of 24.11.2022 itself does not state that it is based on the history of the case or the overall conduct of the Petitioner in the case. In the event that the trial court is of the opinion that the conduct of the party suggests that there is willful disobedience or deliberate attempt to delay the proceedings then it has to record its findings accordingly. The trial court focused on the dates subsequent to the order of 20.10.2022 and not on the overall conduct of the Petitioner, and reasoned that the adjournments were sought without cause and sufficient opportunities had been granted being the adjournments from 08.11.2022 to 24.11.2022. However, the order sheet does show that there were many adjournments, it also shows that oftentimes, the court had proceeded in a routine manner without much focus on the reasons for the adjournments.

12. In a case plagued by adjournments since 2017, the court must weigh the balance between a fair trial and the legitimate grounds for the latest request for adjournment. The courts are entrusted with the responsibility to dispense justice, for which they are under a duty to ensure a timely trial, which duty may have been overlooked in some of the previous instances of adjournment where requests were granted mechanically and without due consideration. However, the Petitioner's recent public shooting and injury at a political rally justified the grant of an adjournment for a reasonable time under the circumstances. The right to defence cannot be struck out without considering all relevant factors, and the court must weigh the balance between a fair trial and the circumstances at hand. The order sheet shows that the court proceeded in a mechanical manner with the case, and granted numerous adjournments without so much as imposing cost so as to discourage the same. No doubt that the courts are overburdened with work and judges are faced with the daunting task of handling a vast number of cases every day, nevertheless, it is the court's responsibility to manage each case before it diligently by applying the provisions of the procedural law. The striking out of the Petitioner's right to defence, at this stage, while ignoring the legitimate factors in play, would be a gross injustice. The balancing act of justice must be upheld, and under these circumstances, the right to a fair defence must prevail.

13. Accordingly, the impugned order dated 07.12.2022 of the High Court and order dated 24.11.2022 of the trial court are set aside; the case is remanded to the trial court to grant reasonable opportunity to the Petitioner to file answers to the interrogatories in compliance with the order of 20.10.2022 and thereafter to proceed with the case in accordance with law.

Sd/-

Ayesha A. Malik, J

MWA/I-3/SC Petitions dismissed.

**2023 S C M R 711**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Ayesha A. Malik, JJ**

**MUHAMMAD AKHTAR ALI---Petitioner**

**Versus**

**ADDITIONAL SESSIONS JUDGE, KOT ADDU, DISTRICT MUZAFFARGARH and others---Respondents**

C.P. No. 2337 of 2019, decided on 16th January, 2023.

(Against the order of Lahore High Court, Multan Bench dated 12.04.2019, passed in W.P. No. 1574 of 2019)

**Criminal Procedure Code (V of 1898)---**

----S. 516-A---Superdari of vehicle---Registered owner of a vehicle is prima facie entitled to the temporary custody (superdari) of that vehicle unless the dispute as to the title to the vehicle is decided by a court of competent jurisdiction.

Petitioner lodged an FIR for an offence under section 406, P.P.C. alleging therein that he handed over the subject car to a car dealer, for sale, who allegedly sold the car to respondent/alleged purchaser but did not pay the consideration amount to the petitioner nor was he returning his car to him. Thereafter, the petitioner, as well as, respondent (the alleged purchaser of the car) filed their respective applications for superdari of the said car, which was allowed by the Magistrate in favour of respondent.

Sindh Motor Vehicle Registration Authority ("Authority") placed on record report along with documents, which disclosed that the petitioner was the registered owner of the vehicle and there was no application for transfer of ownership of the vehicle in the name of respondent. The original papers of the vehicle had been sent to the petitioner as per report of the Authority. The argument that respondent had in his possession the original registration book of the vehicle was not sufficient to show that he was the lawful purchaser of the vehicle because the very allegation of the petitioner was that he had given the car for sale to the car dealer, who had not paid the consideration amount of the vehicle to the petitioner and had thus committed criminal breach of trust, therefore, any sale made by the car dealer in favour of respondent without a valid transfer deed executed by the petitioner, the registered owner, was prima facie of no consequence in respect of transferring the ownership of the vehicle. A registered owner of the vehicle was prima facie entitled to the temporary custody (superdari) of that vehicle unless the dispute as to the title to the vehicle was decided by a court of competent jurisdiction.

Petition for leave to appeal was converted into appeal and allowed, with the direction that the vehicle shall be handed over on superdari to the petitioner, subject to his furnishing surety bonds in the sum of Rs.2,000,000/ - (rupees two millions) with one surety in the like amount to the satisfaction of the trial court.

M. Arshad Hussain Yousafzai, Advocate Supreme Court for Petitioner.

Aftab Alam Yasir, Advocate Supreme Court and Fozi Zafar, Additional A.G., Sindh for Respondents.

Date of hearing: 16th January, 2023.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**This case relates to superdari of Car Registration No.AZM-722 Maker Toyota Model 2013 Engine No.Y-806335 Chassis No.NZE-140-2166732.

2. Brief facts are that the petitioner lodged an FIR No.269/2018 dated 19.04.2018 for an offence under section 406, P.P.C. registered at Police Station Kot Addu, District Muzaffargarh alleging therein that he handedover the aforesaid car to Haji Azhar Habib, a car dealer, for sale, who allegedly sold the car to Rana Abdul Jabbar but did not pay the consideration amount to the petitioner nor was he returning his car to him. Thereafter, the petitioner, as well as, respondent No.4 (the alleged purchaser of the car) filed their respective applications for superdari of the said car, which was allowed by the Magistrate in favour of respondent No.4 on 31.01.2018. The revision petition against the said order filed by the petitioner was dismissed on 20.11.2018 and the same order was upheld by the High Court through impugned order dated 12.04.2019.

3. We have heard the learned counsel for the parties and examined the record. On 01.11.2022 we had issued notice to the Sindh Motor Vehicle Registration Authority ("Authority") to verify who is the registered owner of the vehicle as per its record. Through C.M.A. No.87/2022, the said Authority has placed on record report

along with documents, which discloses that the petitioner is the registered owner of the vehicle and there is no application for transfer of ownership of the vehicle in the name of respondent No.4. The original papers of the vehicle have been sent to the petitioner as per report of the Authority. The argument that respondent No. 4 has in his possession the original registration book of the vehicle is not sufficient to show that he is the lawful purchaser of the vehicle because the very allegation of the petitioner is that he had given the car for sale to the accused person mentioned above, who has not paid the consideration amount of the vehicle to the petitioner and has thus committed criminal breach of trust, therefore, any sale made by the said accused in favour of respondent No.4 without a valid transfer deed executed by the petitioner, the registered owner, is prima facie of no consequence in respect of transferring the ownership of the vehicle. Needless to say that a registered owner of the vehicle is prima facie entitled to the temporary custody (superdari) of that vehicle unless the dispute as to the title to the vehicle is decided by a court of competent jurisdiction.

4. Learned counsel for respondent No.4 submits that duplicate book of the vehicle has been obtained through fraud by the petitioner and submits that respondent No.4 may be allowed to initiate proceedings against the petitioner in this regard. Needless to say that respondent No.4 is free to avail any remedy, in accordance with law and does not require the blessing of this Court. It is, however, noted that any observations made in this order other than reliance on the record of the Authority, will not influence any such proceedings, if initiated by the said respondent.

5. For the above reasons, the impugned orders are set aside and this petition is converted into appeal and the same is allowed. The vehicle shall be handed over on superdari to the petitioner, subject to his furnishing surety bonds in the sum of Rs.2,000,000/- (rupees two millions) with one surety in the like amount to the satisfaction of the trial court.

MWA/M-7/SC Appeal allowed.

**2023 S C M R 742**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Ayesha A. Malik, JJ**

**Peerzada WAQAR ALAM---Petitioner**

**Versus**

**NATIONAL ACCOUNTABILITY BUREAU (NAB) through Chairman, Islamabad and others---Respondents**

C.P. No. 4729 of 2019, decided on 5th December, 2022.

(Against the judgment of Islamabad High Court, Islamabad dated 17.10.2019, passed in Writ Petition No.218 of 2016)

**(a) Disabled Persons (Employment and Rehabilitation) Ordinance (XL of 1981)---**

----S. 10--- United Nations Convention on Rights of Persons with Disabilities (CRPD), Art. 27---Persons With Disabilities (PWDs)---National Accountability Bureau (NAB)---Quota for Persons with Disability---Under section 10 of the Disabled Persons' (Employment and Rehabilitation) Ordinance, 1981 establishments (including NAB) are to employ persons with disabilities "not less than 3% of the total number" of persons employed at any time by the said establishment, and there is no limitation or distinction of grade in allocating 3% quota for persons with disabilities in any organization---Quota of 3% for persons with disability applies across the board in an organization, covering all tiers of posts in an organization and goes upto to the highest post including that of the Chairman, NAB---Said quota for PWDs must co-exist alongside the general category of posts---Given the variety of posts with different qualifications, skill sets, and descriptions it is only appropriate that the disability quota be apportioned and allocated against the sanctioned strength of various categories which have a separate selection criterion---Supreme Court directed NAB to immediately comply with the provisions of the Disabled Persons (Employment and Rehabilitation) Ordinance, 1981 and earmark posts representing 3% quota for PWDs across the institution at all tiers.

Malik Ubaidullah v. Government of Punjab and others PLD 2020 SC 599 = PLC 2021 (C.S.) 65 ref.

**(b) Disabled Persons (Employment and Rehabilitation) Ordinance (XL of 1981)---**

----S. 10---Constitution of Pakistan, Arts. 9, 18 & 25---United Nations Convention on Rights of Persons with Disabilities (CRPD), Art. 27---Persons With Disabilities (PWDs)---Employment quota---Employment of PWDs is not a charity but a right---Constitutional values of equality and social justice, the fundamental rights to life, to carrying out a profession and to non-discrimination also extend to PWDs and make no distinction between PWDs and others--- Any law or policy relating to PWDs is rights-based and is not to be viewed as charity or pity or mercy---Universality, indivisibility, interdependence and interrelatedness of constitutional values and fundamental rights fully encompass the persons with disabilities and discrimination guarantees them full protection without discrimination.

Dr. G.M. Chaudhary, Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Petitioner.

Sattar Awan, DPG, NAB, Hafiza Mehnaz Nadeem Abbasi, S.P., NAB, Imran Sohail, Director (HRM) NAB Hqrs. and Adnan Nadeem, Dy. Director, NAB for Respondents.

Respondent No. 2 in person.

Date of hearing: 5th December, 2022.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**Brief facts of the case are that petitioner, pursuant to the public advertisement dated 10th February 2015, applied for the post of Assistant Director (BPS-17) at the National Accountability Bureau (NAB). The petitioner (a wheelchair user) participated in the selection process and was successfully appointed to the post vide offer letter dated 16.07.2015 and assumed the charge on 10.08.2015. The appointment of the petitioner was subject to the condition that he be declared medically fit by the Civil Surgeon of the Federal Government[1]. After joining the petitioner submitted his Medical Fitness Certificate issued by the Civil Surgeon, Federal Government Poly Clinic, Postgraduate Medical Institute, Islamabad. The Certificate stated that the petitioner was found "fit for office job". The Certificate, additionally recorded that

the petitioner is "fit against disable quota, if any, otherwise as department likes". In the wake of the Certificate, NAB vide letter dated 12.08.2015 informed the petitioner that he has "not so far provided an unequivocal medical fitness certificate (conditional medical certificate is not acceptable)" therefore the petitioner was asked to report back to the parent department. The petitioner preferred a departmental appeal which was also turned down on 28.10.2015, however, on a new ground that as the Medical Certificate described the petitioner to be "fit against disable quota," and as there is no "disabled quota" in NAB against the post of Assistant Director, therefore the appeal of the petitioner could not succeed. The petitioner challenged the same through constitutional petition before the Islamabad High Court but was not successful and has challenged the judgment of the High Court through this petition.

2. We have heard the learned Counsel for the parties and have gone through the record of the case. The appointment of the petitioner was subject to being declared medically fit by the Civil Surgeon. The Medical Certificate issued by the Civil Surgeon found the petitioner FIT FOR OFFICE JOB. The jurisdiction of the Civil Surgeon is to declare a person fit or otherwise for a job in the Government Service. Having declared the petitioner to be "fit for office job", the additional observation that the petitioner is "fit against disable quota" is totally inconsistent to the earlier evaluation. "Fit for office job" does not fall under the disability quota and the petitioner could have been easily considered against any office job. The additional comment made by the Civil Surgeon being unnecessary has no legal value. The petitioner having been found medically fit by the Civil Surgeon for an office job had to be considered as a regular candidate for appointment and his appointment could not have been withdrawn on the ground that the petitioner has "not provided an unequivocal medical fitness certificate (conditional medical certificate is not acceptable)." Even otherwise there is no requirement of an "unequivocal medical fitness certificate". A person being medically fit for an office job fully qualifies to be considered against an office job as a fit and a regular candidate. National Accountability Bureau enjoys no authority to second guess the validity of the medical declaration and unilaterally label it to be short of an unequivocal medical fitness certificate. Without prejudice to the above, even if the additional comments made in the Certificate to the effect that the petitioner was "fit against disable quota" are considered to be valid, still the respondents were under an obligation to consider him against the quota earmarked for persons with disabilities (PWDs).

3. The contention of the respondent NAB that a person has to be fully fit to be appointed to NAB and a person who is a user of wheel chair does not fit the job description of an Assistant Director is belied by the record. We called upon the Director, Human Resource, NAB to explain the job description of an Assistant Director. He elaborated that NAB has several departments where a newly appointed Assistant Director can be assigned. These departments include Investigation, Human Resource Management, Budget and Finance, Awareness and Prevention, Training and Research, and Prosecution. He also placed before us the job descriptions of Assistant Directors in these departments which include scrutiny and submission of documents, examination of budgets, proposals, and coordination of office work which are purely desk/office assignments and could be easily performed by a person using a wheelchair, therefore, the petitioner could have been easily allocated to one of these departments as an Assistant Director as per the medical fitness certificate.

4. Letter dated 12.08.2015 issued by NAB relieving the petitioner from his job on the ground that the petitioner does not have an unequivocal medical fitness certificate is not only insensitive and harsh but also deprives the petitioner to earn a livelihood and carry out a lawful profession, offending the fundamental rights guaranteed to the petitioner under Articles 9 and 18 of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution"). By denying petitioner, a user of wheelchair and a person fit for an office job, the right to such a job on the pretext that he uses a wheelchair also offends the right to dignity of the petitioner. It is underlined that right to dignity is a non-negotiable constitutional right guaranteed under Article 14 of the Constitution.

5. While initially NAB withdrew the offer of appointment of the petitioner on the ground that the petitioner was not medically fit but while dismissing the departmental appeal of the petitioner, the ground urged by NAB was that there was no disability quota against the post of Assistant Director in NAB. Under section 10 of the Disabled Persons' (Employment and Rehabilitation) Ordinance, 1981[2] establishments (including NAB) are to employ persons with disabilities "not less than 3% of the total number" of persons employed at any time by the

said establishment. Learned Counsel for NAB referred to an opinion sought from the Establishment Division of the Federal Government which states that the disability quota shall be for posts BS-15 and below. The said letter clearly offends the provisions of the Ordinance. There is no limitation or distinction of grade in allocating 3% quota for persons with disabilities in any organization. The 3% quota for persons with disability applies across the board in an organization, covering all tiers of posts in an organization and goes upto to the highest post including that of the Chairman, NAB. The letter issued by the Establishment Division besides being without jurisdiction is blatantly against the law and therefore has no legal sanctity. Persons with disabilities (PWDs) are an integral part of society and their importance in the workforce must be understood and never understated.

7. At present, we are informed that NAB has 741 sanctioned posts for Assistant Director. Under the Ordinance, 3% of these posts are to be earmarked for PWDs which comes out to 22 posts. The 3% quota for PWDs must co-exist alongside the general category of posts. Given the variety of posts with different qualifications, skillsets, and descriptions it is only appropriate that the disability quota be apportioned and allocated against the sanctioned strength of various categories which have a separate selection criterion.[3] National Accountability Bureau is directed to immediately comply with the provisions of the Ordinance and earmark posts representing 3% quota for PWDs across the institution at all tiers and submit a compliance report with the Additional Registrar (Judicial) of the this Court within a month. In case the said report is not filed, the officer shall fix this case before the Court for appropriate orders against the Chairman NAB.

8. It is important for the public and private sector institutions (including NAB) to understand that within Pakistan, the population of persons with disabilities (PWDs) varies between 3.3 million to 27 million.[4] The World Health Organization (WHO) has stated that an estimated 16% of the global population experiences significant disabilities today,[5] most of whom are of working age.[6] As such, it remains pivotal to consider the importance of PWDs towards human capital development, particularly towards employment. Should inclusion and accessibility be made towards employment there would be improvements at the societal level and for the families of PWDs.[7] Employment is important to all persons, without which inclusion in society and economic freedom would not be possible. Without employment, there is a greater risk of detrimental effects to the physical and mental health of the individual.[8] Work and contribution to society has been central to human society and holds great power over the self-esteem of those participating in society. For PWDs this would be greater given the stigmatization typically associated with them. The social model views disability in the context of systematic barriers, social exclusions, and negative societal attitudes leading to the loss or limitation of opportunities to participate in political, economic, and social activities on equal footing with those who do not have disability.[9]

9. Employment of PWDs is not a charity but a right. Our constitutional values of equality and social justice, the fundamental rights to life, to carrying out a profession and to non-discrimination also extend to PWDs and make no distinction between PWDs and others. Therefore, any law or policy relating to PWDs is rights-based and is not to be viewed as charity or pity or mercy. The universality, indivisibility, interdependence and interrelatedness of constitutional values and fundamental rights fully encompass the persons with disabilities and guarantees them full protection without discrimination.

10. Further, the United Nations Convention on Rights of Persons with Disabilities (CRPD), to which Pakistan is a party, protects the right of PWDs, in particular, their right to employment. It states that employment and career advancement of PWD's is to be promoted, and discrimination based on disability in all forms of employment is prohibited.[10] It is high time that public and private sector institutions in Pakistan wake up to this realization and protect the constitutional and legal rights of the persons with the disabilities in the country and extend them the care, sensitivity and priority they deserve in their policies and executive decisions.

11. For the above reasons, the impugned judgment as well as the departmental orders are set aside with the direction to NAB to appoint the petitioner as per the offer letter w.e.f. 16.07.2015 as an Assistant Director in an appropriate wing of NAB that is fit for an office job. For the above reasons this petition is converted into an appeal and allowed.

12. Office shall dispatch a copy of this judgment to Chairman NAB and heads of all the public sector institutions to ensure that the disability quota is maintained in their institution as per law and that the internal polices of the institution are sensitized to fully recognize the presence and the rights of persons with disabilities (PWDs). MWA/W-2/SC Appeal allowed.

**2023 S C M R 761**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, Ayesha A. Malik and Athar Minallah, JJ**

**DIVISIONAL SUPERINTENDENT, PAKISTAN RAILWAYS and another---Petitioners**

**Versus**

**UMAR DARAZ---Respondent**

Civil Petition No. 4618 of 2019, decided on 28th November, 2022.

(Against the judgment of Federal Service Tribunal, Islamabad dated 30.09.2019, passed in Appeal No. 1503(R) of 2016)

**(a) Civil service---**

----Incapacitated employee of Pakistan Railways---Visual impairment---Adjustment in another suitable and appropriate post keeping in view the degree and level of incapacitation---Perusal of Clauses 510 and 512 of the Personnel Manual of the Pakistan Railways reveals that in order to protect and safeguard the interest and right to employment of an officer who has been incapacitated during service, such an employee can be transferred or accommodated against a post in the organization which is more suitable and appropriate to his condition or disability---Under the said Manual efforts are to be made to ensure that the employee gets transferred to a post in an equivalent grade---In the present case the respondent-employee developed visual impairment and as a result was transferred to a post of lower grade against which the respondent agitated and finally the Tribunal transferred him to a post of an equivalent grade i.e. Ticket Collector Grade-I ("TCR")---In terms of the UN Convention on the Rights of Persons with Disabilities ("CRPD"),to which Pakistan is a party, it is the duty of an employer to ensure that reasonable accommodation is provided to persons with disabilities ("PWDs") and that those with disabilities are not discriminated against---Perusal of job description of the TCR provided in clause 6.18 of the Commercial Manual of Pakistan Railways revealed that a visual impaired officer could carry out the duties of TCR, as provided in the said Manual---Supreme Court directed Pakistan Railways to revisit the Personnel Manual in the light of the fundamental rights and principles of policy enshrined in the Constitution, as well as, the CRPD, in particular Article 27 thereof, so that the Personnel Manual was constitution compliant and met the international standards when dealing with persons with disabilities---Petition for leave to appeal was dismissed and leave was refused.

**(b) Constitution of Pakistan---**

----Arts. 9 & 38(d)--- Civil service--- Incapacitated employee---Adjustment in another suitable and appropriate post keeping in view the degree and level of incapacitation---In case an officer develops physical incapacitation the department has to reach out to said officer to ensure the best possible option available for the officer in his condition to continue to serve the department---Said transfer to another suitable post of the respondent is as a special case and is over and above the regular process of transfer, appointment or promotion---Such a special transfer is to provide "reasonable accommodation" to an employee who has been incapacitated during service and for no fault of his own suffers from a disability---Any such "reasonable accommodation" is a priority action item for the department and must be addressed at the earliest---Suitability of the new post must factor in the earlier job description as well as the grade so that the employee is not worse off in financial terms---Such reasoning finds support from Article 9 and 38(d) of the Constitution which provide for right to life, which includes right to a meaningful livelihood as an integral part of life and policies must be made by the State to safeguard the interest of persons suffering from infirmity or sickness.

Jawad Mehmood Pasha, Advocate Supreme Court (through video-link from Lahore) for Petitioners.

Nemo for Respondent.

Date of hearing: 28th November, 2022.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**Brief facts of the case are that respondent was appointed as Pointsman in BS-5 by the Pakistan Railways in the year 2001. During his service he was incapacitated and suffered from visual impairment and was declared unfit to serve as a Pointsman. According to the Pakistan Railways

Personnel Manual if an officer in service is incapacitated he is to be adjusted to another post which is most suitable and appropriate keeping in view the degree and level of his incapacitation. In the present case the respondent was adjusted in a lower grade of BS-3 against which he filed departmental representation and finally an appeal before the Federal Service Tribunal ("Tribunal"). His appeal was allowed vide impugned judgement dated 30.9.2019. The Tribunal considering the clauses of Pakistan Railways Personnel Manual moved the respondent to an equivalent grade of BS-5 against the post of Ticket Collector Grade-I ("TCR"). The petitioner, Pakistan Railways, is aggrieved of the said order on the ground that post of TCR is a selection post and the respondent had to go through the process of promotion to be entitled to the said post.

2. Clauses 510 and 512 of the Personnel Manual of the Pakistan Railways specifically deal with the incapacitation of officers in service, particularly, the incapacitation relating to vision. The relevant portions of the said clauses are reproduced here under:-

510. (a) Men incapacitated for service in any class by accident, ill health, failure of eyesight, etc., may be transferred to another class but no guarantee can be given of their employment as this must depend on vacancies. Endeavours will, however, be made to find for them posts for which they, in their incapacitated state, may be suitable and in which they can be usefully and efficiently employed without risk of injury to themselves, their fellow-workers and the travelling public and with due regard to the following considerations:-

(i) The appointment made does not in any way deprive an efficient and deserving employee who can reasonable (sic) look forward to advancement in that line.

(ii) The pay of an employee when appointed to a lower grade shall be fixed on the maximum of the grade or at a stage in that grade equivalent to or not below the rate of pay he is actually in receipt of, whichever is less.

(iii) ...

(iv) ...

(v) ...

512. (1) The absorption of vision failed staff should not be left to chance vacancies but every endeavor should be made to find suitable alternative appointments for such staff with due regard to the interests of deserving men who may be looking forward to advancement in their own line. Thus if a Driver is working temporarily as a Shedmen, he should revert to the foot plate to provide a Shedman's vacancy for a suitable member of the Loco Running Staff failing in the vision test.

(2)-(5) ...

Perusal of these clauses reveals that in order to protect and safeguard the interest and right to employment of an officer who unfortunately has been incapacitated during service, such an employee can be transferred or accommodated against a post in the organization which is more suitable and appropriate to his condition or disability. Under the said Manual efforts are to be made to ensure that the employee gets transferred to a post in an equivalent grade. In the instant case the respondent developed visual impairment (the degree of his visual impairment has not been brought on record by the Pakistan Railways) and as a result was transferred to a post of lower grade against which the respondent agitated and finally the Tribunal transferred him to a post of an equivalent grade i.e. TCR.

3. The UN Convention on the Rights of Persons with Disabilities ("CRPD"), to which Pakistan is a party, recognizes and protects the "inherent dignity, worth, equality and inalienable rights of all members of human family as the foundation of freedom, justice and peace in the world".[1] The convention seeks to ensure the protection and promotion of full and equal enjoyment of all human rights by persons with disabilities ("PWDs"). CRPD defines "Discrimination on the basis of disability" to be a distinction, exclusion or restriction on the basis of disability which would hinder enjoyment of equal human rights and fundamental freedoms. Further, the Convention defines "Reasonable accommodation" as necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. CRPD in Article 27 provides that the work and employment of a person suffering from disability must be protected and reasonable accommodation required to make the said adjustment must be ensured by the State. Article 27, "prohibits discrimination on the basis of disability" concerning "all forms of employment"

including "continuance of employment, career advancement and safe and healthy working conditions". Further it emphasizes the necessity to provide on "equal basis with others, just and favorable conditions of work" and to promote employment opportunities and advancements. As such it is the duty of an employer to ensure that reasonable accommodation is provided to PWDs and that those with disabilities are not discriminated against.

4. We have also gone through the job description of the TCR provided in clause 6.18 of the Commercial Manual of Pakistan Railways and do not see any reason why the visual impaired officer cannot carry out the duties of TCR, as provided in the said Manual. Even otherwise it is important that in case an officer develops physical incapacitation the department has to reach out to said officer to ensure the best possible option available for the officer in his condition to continue to serve the department. The said transfer to another suitable post of the respondent is as a special case and is over and above the regular process of transfer, appointment or promotion. Such a special transfer is to provide "reasonable accommodation" to an employee who has been incapacitated during service and for no fault of his own suffers from a disability. Any such "reasonable accommodation" is a priority action item for the department and must be addressed at the earliest. Suitability of the new post must factor in the earlier job description as well as the grade so that the employee is not worse off in financial terms. This finds support from Articles 9 and 38(d) of the Constitution of Islamic Republic of Pakistan ("Constitution") which provide for right to life, which includes right to a meaningful livelihood as an integral part of life and policies must be made by the State to safeguard the interest of persons suffering from infirmity or sickness.

5. Learned counsel for the petitioners has not been able to point out as to why the post of TCR is inappropriate for the respondent. He has also failed to place on record the medical fitness certificate to highlight the degree of visual impairment suffered by the respondent. We are, therefore, not inclined to interfere in the impugned judgement. We also direct Pakistan Railways to revisit the Personnel Manual in the light of the fundamental rights and principles of policy enshrined in the Constitution, as well as, the CRPD, in particular Article 27 thereof, so that the Personnel Manual is constitution compliant and meets the international standards when dealing with persons with disabilities.

6. In view of the foregoing, leave is refused, and this petition is dismissed.

MWA/D-1/SC Petition dismissed.

**2023 S C M R 774**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ**

**PROVINCE OF PUNJAB through Secretary Agriculture Department, Lahore---Petitioner**

**Versus**

**SALEEM IJAZ and others---Respondents**

C.P. No. 1336-L of 2021 to C.P. 1340-L of 2021, decided on 6th January, 2023.

(Against the consolidated order of Lahore High Court, Lahore dated 14.04.2021, passed in W.P. No. 121 of 2021/BWP, etc.)

**(a) Agricultural Pesticides Ordinance (II of 1971)---**

----Ss. 13, 16 & 17---Pakistan National Accreditation Council Act (VI of 2017), Ss. 4(a) & 4(d)---Punjab Agricultural Pesticides Rules, 2018, R. 22---Pesticide laboratory---Accreditation and certification---Rule 22 of the Punjab Agricultural Pesticides Rules, 2018 ('the 2018 Rules'), vires of---Laboratories (in Pakistan) can only be accredited or certified by Pakistan National Accreditation Council ("PNAC")---Rule 22 of the 2018 Rules to the extent where it requires that the pesticide laboratory shall be duly certified by ISO is not reconcilable with Section 13 of the Agricultural Pesticides Ordinance, 1971, and section 4 of the Pakistan National Accreditation Council Act, 2017 ('the 2017 Act')---Applying the principle of reading down, the Supreme Court saved the legality of Rule 22 of the 2018 Rules by directing that that the phrase "the pesticide laboratory shall be duly certified by International Organizations for Standardization (ISO)" is to be read down to mean that the pesticide laboratory shall follow the national and international standards as accredited by Pakistan National Accreditation Council ("PNAC") under 2017 Act.

Rule 22 of the Punjab Agricultural Pesticides Rules, 2018 ('the 2018 Rules') provides that the pesticide laboratory has to be duly certified by the International Organization for Standardization (ISO).However, under the Pakistan National Accreditation Council Act, 2017 ('the 2017 Act') the conformity assessment bodies or laboratories in the country, including pesticide laboratories, have to be accredited and certified by the Pakistan National Accreditation Council ("PNAC") to follow and implement national and international standards. Thus, Rule 22 of the 2018 Rules requiring the certification to be done by ISO is offensive to the provisions of the 2017 Act. In Pakistan laboratories can only be accredited or certified by PNAC.

Muhammad Asghar and 3 others v. Station House Officer and 2 others PLD 2020 Lah. 87 distinguished.

International Organization for Standardization (ISO) only sets standards, which are then adopted by the national accreditation body. Under the 2017 Act, PNAC establishes internationally recognized accreditation system inline with national and international standards. ISO does not perform certification of laboratories. ISO only develops international standards and is not involved in their certification and does not issue certificates. Thus a company or organization cannot be certified by ISO.

Rule 22 of the 2018 Rules to the extent where it requires that the pesticide laboratory shall be duly certified by ISO is not reconcilable with section 13 of the Agricultural Pesticides Ordinance, 1971 ('the Ordinance'), and section 4 of the 2017 Act, and in such a situation rule being a subordinate provision must give way.

Maxwell, Interpretation of Statutes, 11 ed, p 50 ref.

Applying the principle of reading down, the Supreme Court saved the legality of Rule 22 of the 2018 Rules by directing that that the phrase "the pesticide laboratory shall be duly certified by International Organizations for Standardization (ISO)" is to be read down to mean that the pesticide laboratory shall follow the national and international standards as accredited by PNAC under 2017 Act. Supreme Court further directed the Provincial Government to review Rule 22 of the 2018 Rules, and bring the same in conformity with the provisions of the Ordinance and 2017 Act. Petitions for leave to appeal were partly allowed.

**(b) Interpretation of statutes---**

----Rules made under a statute---Reconciling Rules with the parent statute---Scope---No rule can be framed so as to be in conflict with or in derogation from the statute under which it is framed or in conflict with any other statute, which is not inconsistent with the parent statute under which the rule is framed---However, before

declaring so, the court should endeavour to reconcile the rule, that is to say, the rule may be so read, if the phraseology permits it, as to make it consistent with the provisions of the statute.

NS Bindra, Interpretation of Statutes, 10th edition, p.560 ref.

**(c) Interpretation of statutes---**

----Reading down a provision in a statute or a Rule---Concept of reading down stated.

The golden rule behind the rule of reading down is to recognize and respect the wisdom of the legislature and assume that legislature would never have intended to legislate an invalid law. The same principle applies to subordinate legislation as it is not expected that the subordinate legislating authority will frame rules in violation to the parent Act or any other statute. Rule of reading down a statutory provision is now well recognized rule of interpretation. This rule avoids striking down of statute or rule which carries curable constitutional or legal vice and instead by reading them down achieves to harmonize the statute or the rule with the general scheme of the Act and the Rules. It is a rule of harmonious construction under a different name. It is generally used to straighten the crudities or ironing out the creases to make a statute or a rule workable. The rule of reading down is used for a limited purpose of making a particular provision workable and to bring it in harmony with other provisions of the statues.

J. K. Udaipur Udyog Ltd v. State of Gujarat (Full Bench of High Court of Gujarat at Ahmedabad) - MANU/GJ/0499/2001 and Union of India v. Ind-Swift Laboratories Ltd, (2011) 4 SCC 635 ref.

Rana Shamshad Khan, Additional A.G., Asif Mehmood Cheema, Additional A.G., Zafar Zulqarnain Sahi, Additional A.G. along with Javed Iqbal, Law Officer, Faqeer Ahmed D.G. Pest Warning and Dr. M. Akram Director Soil Fertility Lahore for Petitioner.

M. Afzal Awan, Advocate Supreme Court assisted by Malik Ali Muhammad Dhol, Advocate for Respondents.

Date of hearing: 6th January, 2023.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**This consolidated judgment shall decide Civil Petitions Nos. 1336-L of 2021 to 1340-L of 2021 as these petitions involve common questions of law and facts.

2. Brief facts of the case are that the respondents are

pesticide[1] dealers duly registered under "The Agricultural Pesticides Ordinance, 1971" ("Ordinance"). As per sections 16 and 17 of the Ordinance, sample of the pesticide distributed by the respondents can be collected by the Agriculture Department and sent for examination to the pesticide laboratory for analysis. Exercising their power under the aforesaid provisions samples of pesticides namely Acephate and Sulphate of Potassium ("SOP") were collected by the Agricultural Department from the respondents and sent for analysis to the pesticide laboratory. The Report of the pesticide laboratory dated 30.09.2020 declared the aforesaid products to be "sub standard and fake". The said Report was challenged by the respondents before the High Court through writ petitions on different grounds. The jurisdictional ground taken by the respondents was that the pesticide laboratory in question was not duly certified by the International Organization for Standardization ("ISO") as per Rule 22 of the Punjab Agricultural Pesticides Rules, 2018 ("Rules"), as a consequence the Report of the said pesticide laboratory can neither be relied upon by the Agriculture Department nor criminal proceedings can be initiated against the respondents, under Chapter IV of the Ordinance. In support of their claim respondents relied upon Muhammad Asghar[2]. The High Court allowed the said writ petitions relying on Muhammad Asghar to hold that the pesticide laboratories had to be certified by the ISO and in the absence thereof their Reports cannot be relied upon or form basis of any criminal proceedings against the respondents, hence the instant civil petitions.

3. We have heard the learned counsel for the parties and examined the record. It is noticed that the High Court has only decided the jurisdictional question regarding the competence of the pesticide laboratory to carry out the analysis and test of pesticides under Rule 22 of the Rules and has not adverted to the other grounds raised in the writ petitions. Therefore, the only question of law before us is whether the pesticide laboratory established under section 13 of the Ordinance is required to be certified by the ISO as prescribed in Rule 22 of the Rules.

4. We have examined the provisions of the Ordinance[3], the Rules and the Pakistan National Accreditation Council Act, 2017 ("Act, 2017"). The Ordinance regulates the import, manufacture, sale, distribution and use

of pesticides, which are duly registered under the Ordinance. Section 13 of the Ordinance provides for the establishment of pesticide laboratories. Section 13 is reproduced hereunder for convenience:-

"S. 13. Pesticide Laboratory.---(1) As soon as may be after the commencement of this Ordinance, the Government shall set up a Pesticide Laboratory or, in consultation with the provincial government, declare a provincial laboratory as pesticide laboratory which may be suitably equipped to carry out the functions entrusted to it by or under this Ordinance.

(2) The functions of the Pesticide Laboratory and the mode of submission of samples for analysis or test to the Laboratory shall be such as may be prescribed.

(3) The secrecy of the formula of pesticides, samples of which are submitted to the Pesticide Laboratory for analysis or test, shall be duly safeguarded in the manner prescribed."

The above shows that the pesticide laboratory is to be set up by the Provincial Government, which is to carry out its functions entrusted to it by or under the Ordinance. Section 13(2) provides that the functions of the pesticide laboratory and the mode of submissions of samples for analysis or test to the Laboratory shall be such as may be "prescribed". The word "prescribed" under section 3(o) means as prescribed under the Rules. Under section 13(2) of the Ordinance Rules can only provide the procedure for the functions of the pesticide laboratory and the mode of submissions of samples for analysis or tests, while the laboratory is set up as a pesticide laboratory under section 13 by the Provincial Government. Rules enjoy no power to set up or establish the pesticide laboratory, which is the sole prerogative of the Provincial Governments under section 13(1) of the Ordinance. The power to make Rules under section 29 of the Ordinance also does not authorise the Provincial Government to make Rules regarding the setting up of the pesticide laboratory. Rule 22 provides as follows:-

"Rule 22. Pesticide laboratory.---(1) The pesticide laboratory shall be duly certified by international organization for standardization (ISO) and perform the following functions: (a) analyze and test samples of pesticides; and (b) carry out such duties as may be, entrusted by the Secretary Agriculture;" (emphasis supplied)

The above Rule shows that the pesticide laboratory has to be duly certified by the International Organization for Standardization (ISO). Certification of the pesticide laboratory is a matter relating to its setting up and cannot be regulated by the Rules as the prerogative of setting up the pesticide laboratory is that of the Provincial Government under section 13. Further, under the Act, 2017 the Pakistan National Accreditation Council ("PNAC") has been established for providing accreditation/certification of Conformity Assessment Body (Laboratories) across the country in order to enable the laboratories to assure the quality of products, services and management system in accordance with national and international standards for sustainable socio economic development. Two main functions of the PNCA under section 4(a) and (d) of Act, 2017 are to establish an internationally recognized accreditation system and accredit the conformity assessment bodies. Therefore, under the Act, 2017 the conformity assessment bodies or laboratories in the country have to be accredited and certified by the PNAC. Rule 22 requiring the certification to be done by ISO is offensive to the provisions of Act, 2017. In Pakistan laboratories can only be accredited or certified by PNAC. Reliance on Muhammed Asghar is also misplaced as the said opinion revolves around the mandatory and directory nature of Rule 22 and does not discuss the vires of the Rule when compared with the provisions of the Ordinance and the Act, 2017. The said opinion is also silent regarding the fact that ISO is not a certifying or a conformity assessment organization but an organization that only develops standards as discussed hereunder.

5. Another important dimension of the case is that the Director General, PNAC who appeared before us on 12.08.2021 stated that the ISO is based in Switzerland and is not a certification organization, therefore, it does not certify or accredit any laboratory anywhere in the world. ISO only sets standards, which are then adopted by the national accreditation body. Under the Act, 2017, PNAC establishes internationally recognized accreditation system inline with national and international standards.

6. We have also gone through the website[4] of ISO and have found that ISO does not perform certification of laboratories. ISO only develops international standards and is not involved in their certification and does not issue certificates. Thus according to the website of ISO, a company or organization cannot be certified by ISO.[5]

7. Rule 22 of the Rules to the extent where it requires that the pesticide laboratory shall be duly certified by ISO is not reconcilable with section 13 of the Ordinance and section 4 of the Act, 2017 in such a situation rule being

a subordinate provision must give way[6]. No rule can be framed so as to be in conflict with or in derogation from the statute under which it is framed or in conflict with any other statute, which is not inconsistent with the parent statute under which the rule is framed. However, before declaring so, the court should endeavour to reconcile the rule, that is to say, the rule may be so read, if the phraseology permits it, as to make it consistent with the provisions of the statute[7]. Therefore, in order to ensure that the harmonious functionality of the Ordinance, Act, 2017 and the Rules is maintained, we propose to read down Rule 22. The golden rule behind the rule of reading down is to recognize and respect the wisdom of the legislature and assume that legislature would never have intended to legislate an invalid law. The same principle applies to subordinate legislation as it is not expected that the subordinate legislating authority will frame rules in violation to the parent Act or any other statute. Rule of reading down a statutory provision is now well recognized rule of interpretation. This rule avoids striking down of statute or rule which carries curable constitutional or legal vice and instead by reading them down achieves to harmonize the statute or the rule with the general scheme of the Act and the Rules.[8] It is a rule of harmonious construction under a different name. It is generally used to straighten the crudities or ironing out the creases to make a statute or a rule workable. The rule of reading down is used for a limited purpose of making a particular provision workable and to bring it in harmony with other provisions of the statues[9]. In this case the object of Rule 22(1) is to ensure that the pesticide laboratory follows international standards set by ISO, which is admittedly being achieved through PNAC, the accrediting organization in the country under the Act, 2017. Therefore, applying the principle of reading down, we save the legality of Rule 22 to the extent that the phrase "the pesticide laboratory shall be duly certified by International Organizations for Standardization (ISO)" is to be read down to mean that the pesticide laboratory shall follow the national and international standards as accredited by PNAC under Act, 2017. Additionally, we direct the Provincial Government to review the said Rule and bring the same in conformity with the provisions of the Ordinance and Act, 2017. Admittedly, the pesticide laboratories in these cases are duly certified by PNAC and function under an internationally recognized accreditation system, therefore the analysis and test reports issued by the said laboratories can be relied upon by the Agriculture Department to take further proceedings under the law. The other factual and legal grounds challenging the veracity and validity of the Reports other than the jurisdictional ground have not been addressed by the High Court. Therefore, we hold that the pesticide laboratories in these cases are duly certified under the law as a result the impugned judgment of the High Court is set aside and the cases are remanded to the High Court. The writ petitions of the respondents shall be deemed to be pending before the High Court which shall decide the same after addressing all the other grounds of law and facts raised by the petitioners before it.

8. In this background the impugned orders are set aside and the titled petitions are partly allowed in the above terms. It is clarified and reiterated that pesticide laboratories are to be accredited and certified by PNAC under Act, 2017 to follow and implement national and international standards.

MWA/P-3/SC Order accordingly.

**2023 S C M R 803**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Ayesha A. Malik, JJ**

**DIVISIONAL SUPERINTENDENT, POSTAL SERVICES, D.G. KHAN---Petitioner**

**Versus**

**NADEEM RAZA and another---Respondents**

Civil Petition No. 3855 of 2022, decided on 17th January, 2023.

(Against the judgment of Federal Service Tribunal, Islamabad dated 30.8.2022, passed in Appeal No.384(R)CS of 2022)

**(a) Service Tribunals Act (LXX of 1973)---**

----S. 5---Constitution of Pakistan, Art. 212(3)---Factual questions---Service Tribunal, jurisdiction of---Scope---Tribunal is the final forum for the purpose of determination of facts and the Supreme Court cannot go into the reappraisal of the said facts.

Secretary Revenue Division v. Iftikhar Ahmed Tabbasam PLD 2019 SC 563 ref.

**(b) Civil service---**

----Misappropriation--- Removal from service--- Duration of misappropriation and amount misappropriated nor relevant---Embezzlement or misappropriation constitutes misconduct and the duration of such embezzlement or misappropriation has little relevance---In the present case, the respondent admittedly misappropriated a sum of Rs. 1,24,305/- on account of electricity bills he collected from consumers before depositing the same in the Government exchequer after almost 23 days without any remorse---Tribunal approved the inquiry report which contains conceding statements on behalf of the respondent admitting that he had retained the said amount as he needed it because he was constructing a house, and therefore, did not deposit the same on time---Duration of this misappropriation, or the amount involved, is irrelevant as the act itself is sufficient to constitute misconduct---Tribunal has not given any reasons or explanation to examine the penalty imposed by the department on the touchstone of proportionality and with a stroke of a pen reduced the said penalty from "Removal from Service" to "reduction to three stages lower in pay scale for two years"---Such casual interference by the Tribunal in the penalty imposed by the department cannot be sustained---Even otherwise, in the facts and circumstances of the case, the penalty imposed by the department does not offend the law or the test of proportionality---Petition for leave to appeal was converted into an appeal and allowed, impugned judgment of the Tribunal was set-aside and order passed by the department awarding major penalty of "Removal from Service" was restored.

Divisional Superintendent, Postal Services v. Muhammad Arif Butt 2021 SCMR 1033 and Divisional Superintendent v. Siddique Ahmed 2021 SCMR 1398 ref.

**(c) Service Tribunals Act (LXX of 1973)---**

----S. 5---Service Tribunal, powers of---Scope---Under Section 5 of the Service Tribunals Act, 1973 ("Act") the Tribunal is empowered to confirm, set aside, vary or modify the order appealed before it, however, such powers are to be exercised carefully, judiciously and after recording reasons for the same--- Tribunal has no jurisdiction to grant arbitrary relief to any person as the powers of the Tribunal under section 5 of the Act are neither unqualified and nor unlimited.

Chief Postmaster Faisalabad v. Muhammad Afzal 2020 SCMR 1029; Divisional Superintendent v. Muhammad Zafarullah, 2021 SCMR 400; Divisional Superintendent v. Muhammad Arif Butt 2021 SCMR 1033; Chairman Dr. A.Q. Khan, Research Laboratories v. Malik Muhammad 2010 SCMR 302 and Central Board of Revenue v. Shafiq Muhammad 2008 SCMR 1666 ref.

**(d) Service Tribunals Act (LXX of 1973)---**

----S. 5---Service Tribunal, powers of---Limited power of the Service Tribunal to reduce penalty imposed by the department on a civil servant---Scope---Test of proportionality for interfering in quantum of penalty/punishment---Scope---Only in exceptional circumstances, i.e. where it is against the law or is unreasonable or fails the test of proportionality, that the Tribunal can interfere in the penalty imposed by the department and that too supported by detailed reasons---Where the Tribunal or the Court interferes in the quantum or nature of the penalty imposed by the competent authority by terming the same as unreasonable,

perverse or harsh, or by exercising leniency, such interference is, in effect, only made when the Tribunal or the Court concludes that the penalty is disproportionate to the misconduct proved by employing the test of proportionality---Only where the penalty imposed by the department is so shockingly disproportionate to the misconduct or inefficiency proved that to let it stand would be unfair, unjust and inequitable, that the same would justify interference based on the test of proportionality.

Imposition of punishment under the law is primarily the function and prerogative of the competent authority and the role of the Tribunal or the Court is secondary unless it is found to be against the law or is unreasonable. This is because the department/competent authority, being the fact finding authority, is best suited to decide the particular penalty to be imposed keeping in view a host of factors such as the nature and gravity of the misconduct, past conduct, the nature and the responsibility of the duty assigned to the delinquent, previous penalty, if any, and the discipline required to be maintained in the department, as well as any extenuating circumstances. The question of interference with relation to the quantum or the nature of the penalty imposed by the department only arises when the Tribunal or the Court, in consonance with the decision of the competent authority, has also found the delinquent guilty of the same or some form misconduct or inefficiency. It is, therefore, only in the above exceptional circumstances, i.e. where it is against the law or is unreasonable, that the Tribunal or the Court can interfere in the penalty imposed by the department. The imposition of the penalty being against the law would entail that it cannot be held as legally sustainable, such as, when misconduct or inefficiency for which the penalty has been imposed has not been proved and a lesser form of misconduct or inefficiency, in the opinion of the Tribunal or the Court, is proved, or the procedure provided under the law for imposing the penalty has not been followed or the penalty imposed has not been provided for in the law or rules applicable, and therefore, the imposition of the penalty itself is not sustainable under the law, thereby, justifying interference. However, where the Tribunal or the Court comes to the conclusion that the misconduct or inefficiency, for which the penalty has been imposed by the department, has been proved, the procedure under the law has been followed and the penalty imposed is provided for under the law amongst other penalties for the like misconduct or inefficiency, interference in the discretion exercised by the department in imposing a certain penalty would only be possible if the penalty imposed is considered to be starkly unreasonable.

Government of Khyber Pakhtunkhwa v. Nargis Jamal 2022 SCMR 2114; Postmaster General Sindh Province v. Syed Farhan 2022 SCMR 1154; Secretary, Government of Punjab v. Khalid Hussain 2013 SCMR 817; Deputy Commissioner v. J. Hussain (2013) 10 SCC 106; B.C. Chaturvedi v. Union of India (1995) 6 SCC 749; Noor Muhammad v. Registrar, Lahore High Court 2008 PLC (C.S.) 1188; Muhammad Ali v. FOP 2008 PLC (C.S.) 428; Senior Superintendent v. Shahid Nazir 2022 SCMR 327; Muhammad Idris Khan v. Secretary/Chairman, Ministry of Railways 2007 PLC (C.S.) 247 and Member (ACE & ST), FBR v. Muhammad Ashraf 2008 PLC (C.S.) 1161 ref.

Where the Tribunal or the Court interferes in the quantum or nature of the penalty imposed by the competent authority by terming the same as unreasonable, perverse or harsh, or by exercising leniency, such interference is, in effect, only made when the Tribunal or the Court concludes that the penalty is disproportionate to the misconduct proved by employing the test of proportionality. However, the application threshold of the proportionality test remains high and interference in the penalty imposed by the department cannot be based on mere conjectures or surmises. Interference with the penalty imposed by the department has to be exercised cautiously and with circumspection where the order imposing the penalty is wholly perverse or ex facie so demonstrably disproportionate and excessive for the misconduct, that to let it stand would be unfair, unjust and inequitable. Merely observing that the penalty imposed is not commensurate with the offence is not enough and constitutes arbitrary capricious and unstructured exercise of jurisdiction on part of the Tribunal. The order must show that the Tribunal has applied its mind to the facts and circumstances of the case and exercised its discretion in a structured, lawful and regulated manner, duly supported by legally sustainable reasoning. Therefore, it is only where the penalty imposed by the department is so shockingly disproportionate to the misconduct or inefficiency proved that to let it stand would be unfair, unjust and inequitable, that the same would justify interference based on the test of proportionality.

Akhtar Ali v. Director, Federal Government 2011 PLC (C.S.) 808; Shibli Farooqui v. FOP 2009 SCMR 281; Muhammad Ali v. Federation of Pakistan 2008 SCMR 214; Muhammad Ali v. FOP 2008 SCMR 214; Commissioner Faisalabad Division v. Allah Bakhsh 2020 SCMR 1418; Government of Khyber Pakhtunkhwa v. Nargis Jamal 2022 SCMR 2114; Chairman v. Goparaju (2008) 5 SCC 569; B.C. Chaturvedi v. Union of India (1995) 6 SCC 749; Pravin Kumar v. Union of India, (2020) 9 SCC 471; Director General Federal Directorate v. Tanveer Muhammad 2021 SCMR 345; Deputy Postmaster General v. Habib Ahmed 2021 PLC (C.S.) 531 and Government of Pakistan v. Nawaz Ali Sheikh 2020 SCMR 656 ref.

**(e) Civil service---**

----Penalty, quantum of---Test of proportionality---Reasonableness for the purposes of assessing the quantum or nature of a penalty imposed by the department is to be gauged by applying the test of proportionality---Penalty imposed must be commensurate with the misconduct or inefficiency that has been proved.

Sabir Iqbal v. Cantonment Board PLD 2019 SC 189; Postmaster General Sindh Province v. Syed Farhan 2022 SCMR 1154; Government of Punjab v. Muhammad Arshad 2021 PLC (C.S.) 47 and Inspector-General (Prisons) v. Syed Jaffar Shah 2009 PLC (C.S.) 47 ref.

**(f) Civil service---**

----Misappropriation or embezzlement of public funds---Moral turpitude---Scope---Misappropriation or embezzlement of public funds while in Government service would be considered as gross misconduct involving moral turpitude.

Imtiaz Ahmed Lali v. Returning Officer 2008 PLC (C.S.) 934 and Ghulam Hussain v. Chairman, P.O.F. Board 2002 SCMR 1691 ref.

**(g) Service Tribunals Act (LXX of 1973)---**

----S. 5---Service Tribunal, powers of---Moral turpitude---Punishment, quantum of---Test of proportionality for interfering in quantum of penalty/punishment imposed by department/competent authority---Scope---Notion of proportionality requires that the punishment ought to reflect the degree of moral culpability associated with the offence for which it is imposed---In order to render punishment compatible with justice, it is not enough to restrict punishment to the deserving, but also to restrict the degree of punishment to the degree that is deserved---Degree of wrongfulness is described variously as the "moral culpability", "gravity" or "depravity" associated with the offence---Therefore, along with the gravity of the misconduct, interference on the grounds of proportionality in the penalty imposed for misconduct is also assessed in view of the depravity or moral culpability associated with the same---Test of proportionality is, therefore, more stringent in cases of misconduct involving moral turpitude in view of the depravity or moral culpability involved.

Burgh, Richard W. Do the guilty deserve punishment? Journal of Philosophy 79 (4):193-210 (1982) and Ian P. Farrell, Gilbert and Sullivan and Scalia: Philosophy, Proportionality, and the Eighth Amendment, 55 Vill. L. Rev. 321 (2010). https://digitalcommons.law.villanova.edu/vlr/vol55/iss2/2 ref.

Hassan Nawaz Makhdoom, Additional A.G.P. and Ali, Assistant Superintendent for Petitioner.

M. Ramzan Khan, Advocate Supreme Court for Respondent No. 1.

Assisted by: Muhammad Hassan Ali, Law Clerk.

Date of hearing: 17th January, 2023.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The question that has come up for determination before us is with regards to the power of the Federal Service Tribunal ("Tribunal") of reducing the penalty imposed by the department on a civil servant.

2. The brief facts of the case are that respondent No. 1, a Mail Peon working for the Postmaster General, was proceeded against departmentally on the charge of misappropriation of government money amounting to Rs. 1,24,305/- that he collected, while he was working as an officiating Counter Clerk Utility Bills Collection, on account of electricity bills from the consumers but did not deposit the same with the Government exchequer. The said misappropriation surfaced after receipt of complaints from the consumers. The record shows that respondent No.1 collected the said amount on 28.7.2018 and 30.7.2018 and retained the same before depositing it on 18.8.2018 and 20.8.2018. For the said misappropriation, the department imposed a major penalty of

"Removal from Service" on respondent No.1 vide order dated 31.10.2019 against which he preferred a departmental appeal, which was rejected on 17.2.2020. Thereafter, on an appeal filed by respondent No.1 before the Tribunal, the penalty was reduced from "Removal from Service" to "reduction to three stages lower in pay scale for two years" vide the impugned judgment dated 30.8.2022. The Tribunal held that the respondent had committed misappropriation/ embezzlement but termed the same as "temporary misappropriation" and declared that the punishment of "Removal from Service" was too harsh. The instant petition has been filed seeking leave to appeal from the said impugned judgment.

3. The learned Additional Attorney General appearing on behalf of the petitioner submits that the Tribunal, once holding that the respondent had committed misappropriation, could not have reduced and converted the penalty of "Removal from Service" to that of "reduction to three stages lower in pay scale for two years" without giving any reason. He relied on Syed Farhan[1], Muhammad Afzal[2] and Allah Bakhsh[3] to submit that such a reduction in penalty was without lawful authority.

4. The learned counsel for the respondent took pains to explain the merits of the case to us and pointed out that the respondent never admitted to the charges against him; that the inquiry was not conducted in accordance with law; and that the respondent never collected or deposited the money.

5. We have heard the learned counsel for the parties and have also perused the record with their assistance. We are afraid we cannot go into the facts of the case as far as the determination of the question of embezzlement/misappropriation is involved as the respondent has not challenged the impugned judgment of the Tribunal which affirms this fact, thereby, acquiescing to the said findings. Besides, this Court has already held that the Tribunal is the final forum for the purpose of determination of facts and this Court cannot go into the reappraisal of the said facts.[4] We, therefore, proceed to examine the legal question regarding reduction of penalty by the Tribunal. For the said purposes, it would be useful to reproduce the following excerpt from the impugned judgment wherein the Tribunal has held that:-

"7. ... Only temporary embezzled amount of Rs. 123,405/-[5] was not deposited in the Government Accounts which was subsequently made good by him ... There is no doubt that there is no loss to the department and that the impugned amount was deposited on two dates i.e. 18.08.2018 and 20.08.2018, which shows a kind of temporary misappropriation which is clear as per impugned and appellate impugned orders as per record. The basic question is of breach of trust of the public and the department. He received Wapda electricity bill amounts from several consumers but did not deposit in time rather they did late, so was imposition of embezzled amount for quite some time. This also amounts to misconduct and inefficiency as rightly pointed out in impugned orders. Though the procedure is fraught with lacunas and false as pointed out by the learned counsel for the appellant but this cannot mitigate his commission of breach of trust and misconduct. However, proportion of punishment is too harsh as compared to commission of this act."

At the outset, we are surprised by the use of the term "temporary misappropriation" by the Tribunal. We understand that embezzlement or misappropriation constitutes misconduct and the duration of such embezzlement or misappropriation has little relevance. In this case, as per the record, the respondent misappropriated a sum of Rs. 1,24,305/- on account of electricity bills he collected from consumers on 28.7.2018 and 30.7.2018 before depositing the said amount on 18.8.2018 and 20.8.2018 after almost 23 days. The Tribunal has approved the inquiry report which contains conceding statements on behalf of the respondent dated 18.8.2018 and 20.8.2018, admitting that he had retained the said amount as he needed it because he was constructing a house, and therefore, did not deposit the same on time. The duration of this misappropriation, or the amount involved, is irrelevant as the act itself is sufficient to constitute misconduct.[6]

6. The Tribunal, after holding that the respondent had committed embezzlement/ misappropriation, proceeded to modify the punishment of "Removal from Service" to "reduction to three stages lower in pay scale for two years". We hereunder examine the exercise of powers of the Tribunal to reduce penalties in a particular case.

7. Under section 5 of the Service Tribunals Act, 1973 ("Act") the Tribunal is empowered to confirm, set aside, vary or modify the order appealed before it, however, such powers are to be exercised carefully, judiciously and after recording reasons for the same.[7] This Court has repeatedly held that the Tribunal has no jurisdiction to grant arbitrary relief to any person as the powers of the Tribunal under section 5 of the Act are neither

unqualified and nor unlimited.[8] It is also settled law that the imposition of punishment under the law is primarily the function and prerogative of the competent authority and the role of the Tribunal or the Court is secondary unless it is found to be against the law or is unreasonable.[9] This is because the department/competent authority, being the fact finding authority, is best suited to decide the particular penalty to be imposed keeping in view a host of factors such as the nature and gravity of the misconduct, past conduct, the nature and the responsibility of the duty assigned to the delinquent, previous penalty, if any, and the discipline required to be maintained in the department, as well as any extenuating circumstances.[10] The question of interference with relation to the quantum or the nature of the penalty imposed by the department only arises when the Tribunal or the Court, in consonance with the decision of the competent authority, has also found the delinquent guilty of the same or some form misconduct or inefficiency. It is, therefore, only in the above exceptional circumstances, i.e. where it is against the law or is unreasonable, that the Tribunal or the Court can interfere in the penalty imposed by the department.

8. The imposition of the penalty being against the law would entail that it cannot be held as legally sustainable, such as, when misconduct or inefficiency for which the penalty has been imposed has not been proved and a lesser form of misconduct or inefficiency, in the opinion of the Tribunal or the Court, is proved[11], or the procedure provided under the law for imposing the penalty has not been followed[12] or the penalty imposed has not been provided for in the law or rules applicable[13], and therefore, the imposition of the penalty itself is not sustainable under the law, thereby, justifying interference. However, where the Tribunal or the Court comes to the conclusion that the misconduct or inefficiency, for which the penalty has been imposed by the department, has been proved, the procedure under the law has been followed and the penalty imposed is provided for under the law amongst other penalties for the like misconduct or inefficiency, interference in the discretion exercised by the department in imposing a certain penalty would only be possible if the penalty imposed is considered to be starkly unreasonable.

9. Reasonableness for the purposes of assessing the quantum or nature of a penalty imposed by the department is to be gauged by applying the test of proportionality. In Sabir[14] it was held that proportionality is a standard that examines the relationship between the objective the executive branch wishes to achieve, which has the potential of infringing upon a human right, and the means it has chosen in order to achieve that infringing objective. It was also observed that a more sophisticated version of proportionality provided for a structured test, whereby it will firstly be assessed whether the measure taken is suitable in attaining the identified ends (the test of suitability, which includes the notion of "rational connection" between the means and ends) and then whether the measure is necessary or if a less restrictive or onerous method could have been adopted (the test of necessity). In essence, an administrative decision must not be more drastic than necessary and therefore, it follows that the penalty imposed must be commensurate with the misconduct or inefficiency that has been proved.[15] Where the Tribunal or the Court interferes in the quantum or nature of the penalty imposed by the competent authority by terming the same as unreasonable, perverse or harsh, or by exercising leniency[16], such interference is, in effect, only made when the Tribunal or the Court concludes that the penalty is disproportionate to the misconduct proved by employing the test of proportionality.

10. However, the application threshold of the proportionality test remains high and interference in the penalty imposed by the department cannot be based on mere conjectures or surmises. Interference with the penalty imposed by the department has to be exercised cautiously and with circumspection where the order imposing the penalty is wholly perverse or ex facie so demonstrably disproportionate and excessive for the misconduct, that to let it stand would be unfair, unjust and inequitable.[17] Merely observing that the penalty imposed is not commensurate with the offence is not enough and constitutes arbitrary capricious and unstructured exercise of jurisdiction on part of the Tribunal. The order must show that the Tribunal has applied its mind to the facts and circumstances of the case and exercised its discretion in a structured, lawful and regulated manner[18], duly supported by legally sustainable reasoning.[19] Therefore, it is only where the penalty imposed by the department is so shockingly disproportionate to the misconduct or inefficiency proved that to let it stand would be unfair, unjust and inequitable, that the same would justify interference based on the test of proportionality.

11. Being relevant to the instant case, another question that arises is with regards to the applicability of the test of proportionality to interfere with a penalty imposed for misconduct which involves moral turpitude. "Moral turpitude" was defined in Imtiaz Ahmed[20] as "the act of baseness, vileness or the depravity in private and social duties which man owes to his fellow man, or to society in general contrary to accepted and customary rule of right and duty between man and man." In Ghulam Hussain[21], it was held that moral turpitude includes anything which is done contrary to the good principles of morality, any act which runs contrary to justice, honesty, good moral values or established judicial norms of a society. Therefore, for all intents and purposes, misappropriation or embezzlement of public funds while in Government service would be considered as gross misconduct involving moral turpitude.

12. The modern notion of proportionality requires that the punishment ought to reflect the degree of moral culpability associated with the offence for which it is imposed.[22] In order to render punishment compatible with justice, it is not enough to restrict punishment to the deserving, but also to restrict the degree of punishment to the degree that is deserved.[23] The degree of wrongfulness is described variously as the "moral culpability", "gravity" or "depravity" associated with the offence.[24] Therefore, along with the gravity of the misconduct, interference on the grounds of proportionality in the penalty imposed for misconduct is also assessed in view of the depravity or moral culpability associated with the same. The test of proportionality is, therefore, more stringent in cases of misconduct involving moral turpitude in view of the depravity or moral culpability involved.

13. We, therefore, hold that the Tribunal exercising its powers under section 5 of the Act to reduce the penalty imposed by the department on a civil servant can only do so if the said penalty is either against the law or fails the test of proportionality and that too supported by detailed reasons. In the instant case, the respondent admittedly misappropriated public funds for almost a period of 23 days i.e. from 28.7.2018 to 20.8.2018 before depositing the same in the Government exchequer without any remorse. The Tribunal has not given any reasons or explanation to examine the penalty imposed by the department on the touchstone of proportionality and with a stroke of a pen has reduced the said penalty from "Removal from Service" to "reduction to three stages lower in pay scale for two years". Such casual interference by the Tribunal in the penalty imposed by the department cannot be sustained. Even otherwise, in the facts and circumstances of the case, we are of the view that the penalty imposed by the department does not offend the law or the test of proportionality.

14. In view of the above, we set aside the impugned judgment and restore the order passed by the department dated 31.10.2019 whereby the major penalty of "Removal from Service" was awarded to respondent No. 1. This petition is converted into an appeal and allowed accordingly.

MWA/D-3/SC Appeal allowed.

**2023 S C M R 842**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, Jamal Khan Mandokhail and Shahid Waheed, JJ**

**IJAZ AKBAR---Petitioner**

**Versus**

**The DIRECTOR GENERAL (EXT.) L&DD, PUNJAB, LAHORE and others---Respondents**

C.P. No. 4835 of 2019, decided on 30th January, 2023.

(Against the judgment of the Punjab Service Tribunal (at Rawalpindi), dated 21.10.2019, passed in Appeal No. 3087 of 2019)

**Civil service---**

----Period of absence from duty after imposition of penalty---Such period has no bearing on the penalty and it does not undo the penalty imposed.

In view of the legal consequence of the absence from duty, a disciplinary authority, or an appellate authority, tribunal or court, when imposes a penalty lesser than dismissal or removal from service on a delinquent civil servant for his misconduct of being absent from duty, it has to make an incidental order as to what treatment should be given to the period of his absence for the purpose of giving continuity to his service; otherwise, the whole past service of the civil servant will stand forfeited, which would be the imposition of an additional penalty neither prescribed by the law nor imposed by the authority. The best possible incidental order, which may be made in such a situation, is therefore to make a fictional arrangement to account for such period of absence from duty in the service record of the civil servant by treating (deeming) the same as an extraordinary leave without pay, rather than any other kind of leave; as in case of treating the said period as a leave of some other kind of leave (even if found due), the delinquent civil servant may claim pay of that period also, which would amount to awarding him a benefit rather than awarding a penalty for his fault. Thus, after imposing a penalty other than dismissal or removal from service, the making of an incidental order as to treating (deeming) the period of absence from duty as an extraordinary leave without pay, in no way, washes out the misconduct committed.

LDA v. Nadeem Kachloo 2006 SCMR 434; Director-General, I.B. v. Muhammad Javed 2012 SCMR 165 and Sharif Abbasi v. WAPDA 2013 SCMR 903 over ruled.

NAB v. Muhammad Shafique 2020 SCMR 425 agreed with.

Imtiaz Lali v. Returning Officer PLD 2008 SC 355; Muhammad Ali Bukhari v. Federation of Pakistan 2008 SCMR 214; Federation of Pakistan v. Mamoon Malik 2020 SCMR 1154 and NBP v. Zahoor Mengal 2021 SCMR 903 ref.

Where the civil servant who is unauthorizedly absent does not resume duty and offer any satisfactory explanation, or where the explanation offered by him is not satisfactory, the departmental authority is to initiate the disciplinary proceedings and impose an appropriate penalty, which may range from a major penalty of dismissal or removal from service to a minor penalty of censure or withholding of increment for a specific period, mainly depending upon the nature of service, the position (duty) of the civil servant in that service, the period of absence and the cause for the absence. Where the penalty imposed on the delinquent civil servant is dismissal or removal from service, it may not be necessary to pass any incidental order relating to the period of absence, unless it is deemed necessary to recover any amount of pay, or other service benefits, received by the civil servant during the period of his absence from duty; but where any other penalty is awarded for the unauthorized absence from duty, it will be necessary to pass some incidental order as to how the period of absence should be accounted for and dealt with in the service record of the civil servant. If the unauthorized absence from duty remains unaccounted for, it will result in an interruption in service of the civil servant, thereby forfeiting his whole past service and affecting his seniority, pension etc. Such incidental order directing how the period of absence should be treated in the service record of the civil servant is thus an administrative arrangement, which does not affect or supersede the order imposing the penalty.

State of Punjab v. P.L. Singla AIR 2009 SC 1149 ref.

M. Bashir Khan, Advocate Supreme Court for Petitioner.

Sanaullah Zahid, Additional A.G., Punjab, Dr. Farooq, Additional Director, L&DD, Punjab and Wasim Ahmed, Superintendent, L&DD, Punjab for Respondents.

Date of hearing: 30th January, 2023.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The petitioner seeks leave to appeal against a judgment of the Punjab Service Tribunal, dated 21.10.2019 ("impugned judgment"), whereby the Tribunal while maintaining the findings of the departmental authorities as to his guilt on the charge of willful absence from duty, has partly allowed his appeal by reducing his penalty from forfeiture of two-year service to forfeiture of one year service.

2. Briefly, the facts of the case are that the petitioner was a Junior Clerk in the Department of Livestock and Dairy Development (L&DD), Government of Punjab, and posted in the office of the District Officer Livestock, Chakwal. He remained absent from his duty from 02.02.2016 to 11.06.2016. Upon report of the inquiry officer holding the petitioner guilty of the charge of willful absence from duty and recommending for the imposition of a major penalty, the departmental competent authority imposed the major penalty of dismissal from service on the petitioner under section 4(b)(vi) of the Punjab Employees Efficiency, Discipline and Accountability Act, 2006 ("PEEDA Act"). The departmental appellate authority, however, on appeal of the petitioner converted the penalty of his dismissal from service into forfeiture of his past two-year service and reinstated him in service. The departmental appellate authority also ordered that the intervening period from the starting date of his absence from duty, i.e., 02.02.2016, to the date of his rejoining service upon reinstatement would be treated as an extraordinary leave without pay. The petitioner preferred a service appeal to the Tribunal, which was partly allowed to the extent of reducing his penalty from forfeiture of two-year service into forfeiture of one-year service, by maintaining the findings of the departmental authorities as to his guilt on the charge of willful absence from duty. The petitioner, being not satisfied with the judgment of the Tribunal, has filed the present petition for leave to appeal.

3. The sole contention made before us by the learned counsel for the petitioner is that as the departmental appellate authority had ordered to treat the period of absence of the petitioner from duty as an extraordinary leave without pay, therefore, the petitioner could not have been held guilty of misconduct and punished for the said absence from duty. He has placed reliance, in support of his contention, on LDA v. Nadeem Kachloo (2006 SCMR 434), Director-General, I.B. v. Muhammad Javed (2012 SCMR 165) and Sharif Abbasi v. WAPDA (2013 SCMR 903).

4. On the other hand, the learned counsel for the respondents submits that once the departmental appellate authority had converted the penalty of dismissal for service into that of forfeiture of his two-year past service and had thus reinstated the petitioner into service, the period of his absence from duty had to be given some treatment for the purpose of regularizing his reinstatement in service, and such treatment does not wash out the guilt of the petitioner. In this regard, he has relied upon DIG, NH&MP v. Ghulam Mustafa (2019 SCMR 95) and NAB v. Muhammad Shafique (2020 SCMR 425).

5. We have considered the contentions of the learned counsel for the parties, read the cases cited by them and examined the record of the case.

6. The unauthorized absence of a civil servant from his duty is an act which is prejudicial to 'good order' and 'service discipline', and thus constitutes misconduct for taking disciplinary action against him.[1] section 2(n)(vii) of the PEEDA Act has explicitly included the act of 'absence from duty without prior approval of leave' in the definition of 'misconduct' for the purpose of application of that Act. And, as per Rule 2.11 of the Punjab Civil Services Pension Rules, 1955, a Government servant forfeits his past service in case of his absence from duty without leave. Similarly, Article 420 of the Civil Service Regulations states that an interruption in the service of an officer entails forfeiture of his past service subject to certain exceptions mentioned therein. In view of this legal consequence of the absence from duty, a disciplinary authority, or an appellate authority, tribunal or court, when imposes a penalty lesser than dismissal or removal from service on a delinquent civil servant for his misconduct of being absent from duty, it has to make an incidental order as to what treatment should be given to the period of his absence for the purpose of giving continuity to his service; otherwise, the whole past service of the civil servant will stand forfeited, which would be the imposition of an additional penalty neither

prescribed by the law nor imposed by the authority. The best possible incidental order, which may be made in such a situation, is therefore to make a fictional arrangement to account for such period of absence from duty in the service record of the civil servant by treating (deeming) the same as an extraordinary leave without pay, rather than any other kind of leave; as in case of treating the said period as a leave of some other kind of leave (even if found due), the delinquent civil servant may claim pay of that period also, which would amount to awarding him a benefit rather than awarding a penalty for his fault. Thus, after imposing a penalty other than dismissal or removal from service, the making of an incidental order as to treating (deeming) the period of absence from duty as an extraordinary leave without pay, in no way, washes out the misconduct committed. It may be underlined here that although section 4(b)(iii) of the PEEDA Act provides for the penalty of forfeiture of past service for a specific period, it has also limited the same to a maximum of five year period and thus does not permit the forfeiture of the whole past service exceeding a period of five years. In the present case, had the departmental appellate authority not ordered to treat the period of absence of the petitioner from his duty as an extraordinary leave without pay, his whole past service would have been forfeited, instead of the imposed penalty of forfeiture of past service of two years (reduced to one year by the Tribunal).

7. In case of an unauthorized absence of a civil servant from his duty, two courses are open to the departmental authority: (i) to condone the unauthorized absence by accepting his explanation (if found justified) and sanction the ex-post facto leave under the relevant leave rules, or (ii) to initiate the disciplinary proceedings against him and impose a penalty for the misconduct. Therefore, a civil servant who remains absent from his duty may apply for condonation of the absence by offering an explanation and seek the sanction of ex -post facto leave for that period. If the departmental authority is satisfied that there was a sufficient cause for his absence, it may condone the absence and sanction the leave ex-post facto. If leave is so sanctioned, then the departmental authority cannot initiate disciplinary proceedings against the civil servant for that absence from duty. However, where the civil servant who is unauthorizedly absent does not resume duty and offer any satisfactory explanation, or where the explanation offered by him is not satisfactory, the departmental authority is to initiate the disciplinary proceedings and impose an appropriate penalty, which may range from a major penalty of dismissal or removal from service to a minor penalty of censure or withholding of increment for a specific period, mainly depending upon the nature of service, the position (duty) of the civil servant in that service, the period of absence and the cause for the absence. Where the penalty imposed on the delinquent civil servant is dismissal or removal from service, it may not be necessary to pass any incidental order relating to the period of absence, unless it is deemed necessary to recover any amount of pay, or other service benefits, received by the civil servant during the period of his absence from duty; but where any other penalty is awarded for the unauthorized absence from duty, it will be necessary to pass some incidental order as to how the period of absence should be accounted for and dealt with in the service record of the civil servant. If the unauthorized absence from duty remains unaccounted for, it will result in an interruption in service of the civil servant, thereby forfeiting his whole past service and affecting his seniority, pension etc. Such incidental order directing how the period of absence should be treated in the service record of the civil servant is thus an administrative arrangement, which does not affect or supersede the order imposing the penalty.[2]

8. The learned two-member benches of this Court in Nadeem Kachloo, Muhammad Javed and Sharif Abbasi referred to by the learned counsel for the petitioner have, it is most respectfully observed, mistakenly mingled the two distinct concepts of: (i) the grant of ex-post facto leave to the civil servant who remained absent from his duty, by accepting his explanation (if found justified), and (ii) the fictional treatment given to the period of his absence from duty after holding him guilty of the misconduct for that absence and imposing a penalty other than his dismissal or removal from service, for continuity of his service. The statement of law made therein, that by treating the period of absence from duty as an extraordinary leave without pay, the ground of unauthorized absence no more remains available for awarding any penalty, does not state the correct legal position. These cases, so as far as they make the said statement of law either expressly or impliedly, are overruled, while the contra view of a three-member bench of this Court in Muhammad Shafique is respectfully agreed to. Muhammad Shafique has differentiated between the retrospective grant of extraordinary leave without pay for the absence under Rule 9(3) of the Revised Leave Rules, 1980 and the treatment given to the

period of absence after imposition of the appropriate penalty for the misconduct of being absent from duty, and rightly held that treating the period of absence in the latter case as extraordinary leave without pay does not undo the penalty imposed.[3]

9. In view of the above legal position, the contention of the learned counsel for the petitioner is found meritless. The impugned judgment does not call for any interference. The petition is therefore dismissed and the leave to appeal, declined.

MWA/I-1/SC Petition dismissed.

**2023 S C M R 877**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, Jamal Khan Mandokhail and Shahid Waheed, JJ**

**DIRECTOR GENERAL, INTELLIGENCE BUREAU---Petitioner**

**Versus**

**RIAZ-UL-WAHAB and others---Respondents**

C.Ps. Nos. 3447 to 3450 of 2022, decided on 7th February, 2023.

(Against four judgments of Federal Service Tribunal, Islamabad all dated 16.06.2022, passed in Appeals Nos. 62(R)CS, 417(R)CS, 114(R)CS and 115(R)CS of 2022)

**(a) Civil service---**

----Performance Evaluation Report---Scope and significance---Countersigning Officer and Reporting Officer---Significance of Performance Evaluation Report (PER) and the obligations of Countersigning Officer and Reporting Officer in preparation of the same stated.

Performance Evaluation Reports (PERs) are the most important documents in the service record of civil servants. They help the competent authorities in making informed decisions with regards to personnel administration matters, such as, selections for training, appointments/transfers, promotions, confirmations or screening of civil servants. An officer's promotion and retention in service mostly depends on what has been recorded in his/her PER. It is, therefore, essential that the PERs are written by the Reporting and Countersigning Officers most carefully and responsibly. The PER forms that elaborate the criteria against which the performance of a subordinate officer is to be evaluated, and the instructions issued with regards to properly recording the PERs, are designed to ensure reporting on an officer's strong and weak points more objectively, as only objective reporting can effectively serve the true purpose of such reports. If the Reporting or the Countersigning Officer is partial, his opinion is likely to cause incalculable damage to the officer reported upon, and if a PER is ambiguous or carelessly written, it would not serve the true purpose of recording PERs. Therefore, the Reporting and Countersigning Officers should evaluate the performance of the officer reported upon in a detached and objective manner, in accordance with the instructions issued on the subject.

A Guide to Performance Evaluation (Edition 2004), Establishment Division, Government of Pakistan, SECTION 1 and Government of Punjab v. Ehsanul Haq Sethi PLD 1986 SC 684 ref.

Recording of PERs must be undertaken with complete objectivity and fairness, and with a view to improve individual and organizational productivity.

https://openknowledge.worldbank.org/bitstream/handle/10986/35921/Performance Management-in-the-Public-Administration-Seven-Success-Factors.pdf ref.

**(b) Civil service---**

----Performance Evaluation Report---Assessment by Countersigning Officer and Reporting Officer---Interference by Service Tribunal or Supreme Court---Grounds---Evaluation of the performance of a subordinate officer by his Reporting or Countersigning Officer, primarily being a matter of personal assessment based on the direct observation of the work of the officer concerned, is not to be usually interfered with by the Tribunal or the Supreme Court unless mala fide with full particulars, or the gross violation of the instructions, on the part of the Reporting or Countersigning Officer, as the case may be, is shown.

I.G.P. v. Altaf Majid 1994 SCMR 1348 and Noor Elahi v. Director of Civilian Personnel 1997 SCMR 1749 ref.

**(c) Civil service---**

----Performance Evaluation Report---Countersigning Officer and Reporting Officer---Prior counseling of subordinate officer---Requirement of prior counselling of subordinate officer before recording adverse remarks against him in his PER elaborated.

According to clauses 2.13(i)(ii) and 3.3(ii)(iv) of the Instructions contained in "A Guide to Performance Evaluation" (Edition 2004) published by the Establishment Division, as a general rule, an officer is to be apprised if his Reporting or Countersigning Officer is dissatisfied with his work, and the communication of such dissatisfaction with advice or warning should be prompt so that the officer may eradicate the fault and improve his performance. That is why it is emphasised that the Reporting or Countersigning Officers should

not ordinarily record adverse remarks as to the performance of an officer without prior counselling. They are thus expected to apprise the officer concerned about his weak points and advise him/her how to improve, and to record the adverse remarks in the PER when the officer fails to improve despite counselling. The supervisory officers under whose supervision other officers work, must realise that the supervision does not mean cracking the whip on finding a fault in their performance, rather the primary purpose of the supervision is to guide the subordinates officers in improving their performance and efficiency, and that their role is more like a mentor rather than a punishing authority. As the purpose of counselling is to improve the performance of the officer and not to insult or intimidate him, the supervisory officers are also to see, having regard to the temperament of the officer concerned, whether the advice or warning given orally or in written form, or given publically in a general meeting of the officers or privately in a separate meeting with the concerned officer only, would be beneficial for the officer in improving his performance. The directions contained in the instructions, in this regard, on paying great attention to the manner and method of communicating advice or warning should be adhered to.

A Guide to Performance Evaluation (Edition 2004), Establishment Division, Government of Pakistan, SECTION 1 ref.

Raja M. Shafqat Khan Abbasi, D.A.G., Mrs. Ayesha Wani, Joint Secretary, Amin Tareen, Deputy Secretary and Sajid-ul-Hassan, Section Officer, Establishment Division, GOP for Petitioner.

Respondents in person.

Date of hearing: 7th February, 2023.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The petitioner seeks leave to appeal against four judgments of the Federal Service Tribunal, all dated 16.06.2022 ("impugned judgments"), whereby the Tribunal, while allowing the appeals of the respondents, has expunged the adverse remarks recorded by the Countersigning Officer in their Performance Evaluation Reports ("PERs") of certain periods and restored the assessment of their performance made by the Reporting Officers.

2. Briefly, the facts of the case are that the respondents, Riaz-ul-Wahab and Surkharu Khan, joined the Intelligence Bureau as Assistant Directors (BS-17) in 2001 and 2003 respectively, and having an unblemished and meritorious service record, they were promoted as Deputy Director (BS-18) and Director (BS-19) in due course. In the PERs of the respondent, Riaz-ul-Wahab, for the periods of about three months of 2019 and of about nine months of 2020, his Reporting Officer evaluated his performance as "very good" and "outstanding" and also recorded him as "fit for promotion"; and in the PERs of the respondent, Surkharu Khan, for the periods of about three months of 2018 and of about six months of 2019, his Reporting Officer evaluated his performance as "good" and "very good" and also recorded him as "fit for promotion". However, their Countersigning Officer downgraded their performance evaluation as "average" and also declared them "unfit for promotion". The respondents preferred departmental appeals against the remarks of the Countersigning Officer. The appeals of the respondent, Riaz-ul-Wahab, were not responded to while that of the respondent, Surkharu Khan, were rejected. They, therefore, filed appeals before the Tribunal, which were allowed through the impugned judgments and the remarks recorded by the Countersigning Officer were expunged while the assessments of their performance made by the Reporting Officers were restored. Hence, the petitioner has filed the present petitions for leave to appeal.

3. During the hearing, we called the representative of the Establishment Division, Government of Pakistan, to explain to the Court the obligations of a Countersigning Officer in the matter of recording adverse remarks in the PER of a subordinate officer, especially when he disagrees with the evaluation recorded by the Reporting Officer. Mrs. Ayesha Wani, Joint Secretary, Establishment Division has appeared and referred us to clauses 2.13(i)(ii) and 3.3(ii)(iv) of the Instructions contained in "A Guide to Performance Evaluation" (Edition 2004) published by the Establishment Division. She explained that as per the said instructions, if the Countersigning Officer disagrees with the evaluation of the Reporting Officer, he has to give reasons for the same, and before recording adverse remarks in the PER, the Reporting Officer and the Countersigning Officer, as the case may be, should, as a general rule, first do counselling of the officer concerned by either giving advice or

administering a warning to the officer. The instructions referred to by her are reproduced here for ready reference:

2.13. Instructions for the Countersigning Officers-

(i) The Countersigning Officers should weigh the remarks of the RO against their personal knowledge of the officer under report and then give their assessment in Part V. In case of disagreement, the Countersigning Officers should give specific reasons in Part V. Similarly, if the Countersigning Officers differs with the grading or remarks given by the Reporting Officer in Part III they should score it out and give their own grading by initialing the appropriate box.

(ii) The Countersigning Officers should make an unbiased evaluation of the quality of performance evaluation made by the RO by categorizing the reports as exaggerated, fair or biased. This would evoke a greater sense of responsibility from the reporting officers.

Instructions Regarding Adverse Remarks-

3.3 The following principles are laid down for guidance:

(ii) as a general rule in no case should an officer be kept in total ignorance for any length of time that his superiors after sufficient experience of his work are dissatisfied with him; in cases where a warning might eradicate or help to eradicate a particular fault, the advantages of prompt communication are obvious; where criticism is proposed to be withheld, the final authority to consider the report should record instructions, with reasons, according to the nature of the defects discussed as to the period for which communication is to be kept back;

(vi) great attention should be paid to the manner and method of communication in order to ensure that the advice given and the warning or the censure administered, having regard to the temperament of the officer concerned, may be most beneficial to him. The adverse remarks may be communicated in writing or verbally. In the latter case, the fact of communication should be recorded on the evaluation report and, if the officer so requests, the remarks should be given in writing;

(Emphasis added)

The respondents have asserted that no advice or warning was ever given to them by the Countersigning Officer before recording the adverse remarks, and there is nothing on the record of the case to controvert their said assertion.

4. We have heard the learned counsel for the petitioner and the respondents in person, read the cases cited by them and the relevant instructions on the subject, and have also examined the record of the case.

5. PERs are the most important documents in the service record of civil servants. They help the competent authorities in making informed decisions with regards to personnel administration matters, such as, selections for training, appointments/transfers, promotions, confirmations or screening of civil servants. An officer's promotion and retention in service mostly depends on what has been recorded in his/her PER. It is, therefore, essential that the PERs are written by the Reporting and Countersigning Officers most carefully and responsibly. The PER forms that elaborate the criteria against which the performance of a subordinate officer is to be evaluated, and the instructions issued with regards to properly recording the PERs, are designed to ensure reporting on an officer's strong and weak points more objectively, as only objective reporting can effectively serve the true purpose of such reports.[1] If the Reporting or the Countersigning Officer is partial, his opinion is likely to cause incalculable damage to the officer reported upon, and if a PER is ambiguous or carelessly written, it would not serve the true purpose of recording PERs. Therefore, the Reporting and Countersigning Officers should evaluate the performance of the officer reported upon in a detached and objective manner, in accordance with the instructions issued on the subject.[2]

6. According to "Performance Management in the Public Administration - Seven Success Factors" published in 2021,[3] the seven success factors to enhance performance management in the public sector include; improving manager judgment and diversifying the sources of evaluation for performance appraisals to ensure objectivity and fairness in assessment, such as through 360-degree evaluations[4] and by acknowledging and addressing bias; and enabling staff performance through adequate opportunities for growth and development, such as through regular feedback and coaching. Therefore, much importance is extended to proper and effective performance

appraisals and assessment of employees in public administration, which in Pakistan is mainly undertaken through recording PERs, for successful performance management in public administration as a means to increase public sector productivity. This further necessitates that recording of PERs must be undertaken with complete objectivity and fairness, and with a view to improve individual and organizational productivity.

7. It is true that the evaluation of the performance of a subordinate officer by his Reporting or Countersigning Officer, primarily being a matter of personal assessment based on the direct observation of the work of the officer concerned, is not to be usually interfered with by the Tribunal or this Court unless mala fide with full particulars, or the gross violation of the instructions, on the part of the Reporting or Countersigning Officer, as the case may be, is shown.[5] In the present case, the Tribunal has interfered with and expunged the remarks recorded by the Countersigning Officer mainly on the ground of gross violation of the instructions on the subject of recording adverse remarks in PERs.

8. According to the relevant instructions cited above, as a general rule, an officer is to be apprised if his Reporting or Countersigning Officer is dissatisfied with his work, and the communication of such dissatisfaction with advice or warning should be prompt so that the officer may eradicate the fault and improve his performance. That is why it is emphasised that the Reporting or Countersigning Officers should not ordinarily record adverse remarks as to the performance of an officer without prior counselling.[6] They are thus expected to apprise the officer concerned about his weak points and advise him/her how to improve, and to record the adverse remarks in the PER when the officer fails to improve despite counselling. The supervisory officers under whose supervision other officers work, must realise that the supervision does not mean cracking the whip on finding a fault in their performance, rather the primary purpose of the supervision is to guide the subordinates officers in improving their performance and efficiency, and that their role is more like a mentor rather than a punishing authority. As the purpose of counselling is to improve the performance of the officer and not to insult or intimidate him, the supervisory officers are also to see, having regard to the temperament of the officer concerned, whether the advice or warning given orally or in written form, or given publically in a general meeting of the officers or privately in a separate meeting with the concerned officer only, would be beneficial for the officer in improving his performance. The directions contained in the instructions, in this regard, on paying great attention to the manner and method of communicating advice or warning should be adhered to. It must also be pointed out that such guidance, through counselling, for improving the performance and efficiency of a subordinate officer, can ultimately benefit the organization as it enables identifying and addressing performance issues before they become major problems, thereby, leading to increased productivity and better performance so that the organization's goals and objectives are effectively achieved.[7]

9. In the present case, the Countersigning Officer did not mention in the PERs that he had counselled the respondents for improving their performance nor did he justify his departure from the above general rule of making prior counselling before recording the adverse remarks. He has also not given the required specific reasons for his disagreement with the evaluation of the Reporting Officers. There was, thus, a gross violation of the instructions by the Countersigning Officer in recording the adverse remarks in the PERs of the respondents. The Tribunal has rightly expunged the same.

10. For the above reasons, we find no legal flaw in the impugned judgments of the Tribunal. The present petitions are meritless. They are, therefore, dismissed and the leave to appeal, declined.

MWA/D-4/SC Petitions dismissed.

**2023 S C M R 887**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Ayesha A. Malik, JJ**

**Mst. GHAZALA---Petitioner**

**Versus**

**The STATE and another---Respondents**

Criminal Petition No. 54 of 2023, decided on 22nd February, 2023.

(Against the judgment of the Peshawar High Court, Peshawar dated 19.12.2022, passed in Bail Petition No.3875-P of 2022)

**(a) Criminal Procedure Code (V of 1898)---**

----S. 497(1), first proviso---Female accused---Offence falling within prohibitory clause of section 497, Cr.P.C.---Bail---Principles of law regulating the discretion of courts, under section 497(1), Cr.P.C., in the matter of granting post arrest bail to a women accused stated.

First proviso to section 497(1), Cr.P.C. makes the power of the court to grant bail in the offences of prohibitory clause of section 497(1) alleged against an accused under the age of sixteen years, a woman accused and a sick or infirm accused, equal to its power under the first part of section 497(1), Cr.P.C. It means that in cases of women accused etc. as mentioned in the first proviso to section 497(1), irrespective of the category of the offence, the bail is to be granted as a rule and refused only as an exception in the same manner as it is granted or refused in offences that do not fall within the prohibitory clause of section 497(1), Cr.P.C. The exceptions that justify the refusal of bail are the likelihood of the accused, if released on bail: (i) to abscond to escape trial; (ii) to tamper with the prosecution evidence or influence the prosecution witnesses to obstruct the course of justice; and (iii) to repeat the offence.

Tahira Batool v. State PLD 2022 SC 764; Tariq Bashir v. State PLD 1995 SC 34; Zafar Iqbal v. Muhammad Anwar 2009 SCMR 1488; Muhammad Tanveer v. State PLD 2017 SC 733 and Iftikhar Ahmad v. State PLD 2021 SC 799 ref.

**(b) Criminal Procedure Code (V of 1898)---**

----Ss. 497(1) & 497(2)---Bail---Grant of bail under section 497(1) and under section 497(2), Cr.P.C.---Distinction explained.

Grant of bail to the accused under section 497(2), Cr.P.C., is granted as of right if it appears to the court that there are no reasonable grounds for believing that the accused has committed the offence alleged against him rather there are sufficient grounds for further inquiry into his guilt. For the purpose of deciding the prayer for grant of bail in exercise of the discretionary power of the court under section 497(1), Cr.P.C., the availability of a sufficient incriminating material to connect the accused with the commission of the offence alleged against him is not a relevant consideration.

Syed Rifaqat Hussain Shah, Advocate Supreme Court/Advocate-on-Record for Petitioner.

Arshad H. Yousafzai, Advocate Supreme Court for the Complainant.

Zahid Yousaf Qureshi, Additional A.G., Faqir Gul, DSP and Sabr Ali, I.O. for the State.

Date of hearing: 22nd February, 2023.

**ORDER**

**SYED MANSOOR ALI SHAH, J.-** The petitioner seeks leave to appeal against an order of the Peshawar High Court, dated 19.12.2022, ("impugned order") whereby the High Court while dismissing the bail application of the petitioner has denied to her the post arrest bail in case FIR No.968 registered at Police Station Sher Garh, District Mardan, for the offences under sections 302, 325, 200, 201, 182, 109 and 34 of the Pakistan Penal Code, 1860 ("P.P.C.") and the offence under section 15 of the Khyber Pakhtunkhwa Arms Act, 2013.

2. Briefly stated, the allegation against the petitioner is that she in connivance with the co-accused, Imran Ullah, has caused death of her husband, Muhammad Arif.

3. We have heard the learned counsel for the parties and examined the record of the case.

4. No doubt, the offence of Qatl-i-amd (intentional murder) punishable under section 302, P.P.C. alleged against the petitioner falls within the prohibitory clause of section 497(1) of the Code of Criminal Procedure, 1898

("Cr.P.C.") but being a women, the petitioner's case is covered by the first proviso to section 497(1), Cr.P.C. The said proviso, as held in Tahira Batool case,[1] makes the power of the court to grant bail in the offences of prohibitory clause of section 497(1) alleged against an accused under the age of sixteen years, a woman accused and a sick or infirm accused, equal to its power under the first part of section 497(1), Cr.P.C. It means that in cases of women accused etc. as mentioned in the first proviso to section 497(1), irrespective of the category of the offence, the bail is to be granted as a rule and refused only as an exception in the same manner as it is granted or refused in offences that do not fall within the prohibitory clause of section 497(1), Cr.P.C. The exceptions that justify the refusal of bail are also well settled by several judgments of this Court.[2] They are the likelihood of the accused, if released on bail: (i) to abscond to escape trial; (ii) to tamper with the prosecution evidence or influence the prosecution witnesses to obstruct the course of justice; and (iii) to repeat the offence.

5. That being the legal position, we have asked the learned Additional Advocate General and the learned counsel for the complainant to show how the petitioner's case falls in any of the said three well-established exceptions. They, however, could not explain and satisfy the Court as to which one of the said exceptions is attracted to the petitioner's case. Their only response was that there is a sufficient incriminating material available on record of the case to connect the petitioner with the commission of the alleged offence. We are afraid, the response is misconceived. The Court is not considering the grant of bail to the petitioner under section 497(2), Cr.P.C., under which the bail is granted to an accused as of right if it appears to the court that there are no reasonable grounds for believing that the accused has committed the offence alleged against him rather there are sufficient grounds for further inquiry into his guilt. For the purpose of deciding the prayer for grant of bail in exercise of the discretionary power of the court under section 497(1), Cr.P.C., the availability of a sufficient incriminating material to connect the accused with the commission of the offence alleged against him is not a relevant consideration.

6. In view of the facts and circumstances of the case, we do not find that there is a likelihood that the petitioner if released on bail, after securing sufficient sureties, would abscond to escape trial, or tamper with the prosecution evidence or influence the prosecution witnesses to obstruct the course of justice, or repeat the offence. Her case, thus, does not fall within any of the three well-established exceptions that may have justified refusing bail to her.

7. For the above reasons, we find that the High Court has passed the impugned order while disregarding the settled principles of law regulating the discretion of the courts in regard to the grant of bail to women accused. The present petition is, therefore, converted into appeal and the same is allowed. The bail application of the petitioner is accepted and she is admitted to bail subject to her furnishing bail bond in the sum of Rs.100,000/- with two sureties in the like amount to the satisfaction of the trial court.

8. Needless to mention that this concession of bail may be cancelled by the trial court in the exercise of its power under section 497(5), Cr.P.C. if the petitioner misuses it in any manner, including the causing of delay or otherwise hindering the expeditious conclusion of the trial.

MWA/G-2/SC Bail granted.

**2023 S C M R 960**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Ayesha A. Malik, JJ**

**ZAKIR MEHMOOD---Petitioner**

**Versus**

**SECRETARY, MINISTRY OF DEFENCE (D.P), PAKISTAN SECRETARIAT, RAWALPINDI and others---Respondents**

C.P. No. 2712 of 2020, decided on 12th April, 2023.

(Against the order of Federal Service Tribunal, Islamabad, dated 28.07.2020, passed in M.P. No.464/2020 in Appeal No.1872(R)CS of 2005)

**(a) Service Tribunals Act (LXX of 1973)---**

----S. 5(2)---Appeals filed before the Service Tribunal---Principles governing first appeals under the C.P.C. apply to appeals before the Tribunal, and the powers of the first appellate court under the C.P.C. are available to it.

Ali Muhammad v. Commissioner Afghan Refugees 1995 SCMR 1675 and Shakeel Ahmed v. E.M.E., Rawalpindi 1998 SCMR 1970 ref.

**(b) Service Tribunals Act (LXX of 1973)---**

----S. 5(2)---Civil Procedure Code (V of 1908), Ss. 35, 151 & O. XLI, R. 35(3)---Appeal filed before the Federal Service Tribunal ("Tribunal")---'Actual costs' and 'special costs'---Tribunal can impose actual costs and special costs while deciding the service appeal of a civil servant---First appellate court can award the actual costs incurred in appeal as per provisions of Rule 35(3) of Order XLI, C.P.C. and can also impose special costs in the exercise of its inherent powers under section 151, C.P.C. if the facts and circumstances of the case necessitate the making of such an order to secure the ends of justice or to prevent the abuse of the process of the court---Both these powers are also available to the Service Tribunal while deciding an appeal under the Service Tribunals Act, 1973.

**(c) Service Tribunals Act (LXX of 1973)---**

----S. 5(2)---Civil Procedure Code (V of 1908), Ss. 12(2), 35, 35A, 141, 151 & O. XLI, R. 35(3)---Application under section 12(2), C.P.C. filed before the Federal Service Tribunal ("Tribunal")---'Actual costs' and 'compensatory costs'---First appellate court can award not only the actual costs incurred on an application under section 12(2), C.P.C. by virtue of section 35 read with section 141, C.P.C. but also compensatory costs under section 35A, C.P.C. or special costs under section 151, C.P.C.---Tribunal can also exercise these powers in awarding costs while deciding an application under section 12(2), C.P.C. or any other application.

**(d) Service Tribunals Act (LXX of 1973)---**

----S. 5(2)---Civil Procedure Code (V of 1908), Ss. 12(2), 35B, 141, 151 & O. XLI, R. 35(3)---Costs of Litigation Act (XVII of 2017), Preamble---Appeal/application filed before the Federal Service Tribunal---'Special costs'---No upper limit---While deciding an appeal under the Service Tribunals Act, 1973 or an application under section 12(2) of the C.P.C., the Federal Service Tribunal ("Tribunal") has the powers to impose special costs, without any upper limit of amount, on a party to that appeal or application as the case may be, keeping in view the peculiar facts and circumstances of a particular case---Determining the appropriate amount of special costs has been left to the discretion of the court concerned---Tribunal is to exercise this discretion, like all other discretions, on the principles of fairness, equity and justice, not arbitrarily or perversely, while keeping in view the peculiar facts and circumstances of a particular case.

**(e) Practice and procedure---**

----Costs---Frivolous and vexatious cases---Unscrupulous litigants---Purpose and benefits of imposing costs on litigants stated.

Courts and tribunals should regularly exercise their powers to impose reasonable costs to curb the practice of instituting frivolous and vexatious cases by unscrupulous litigants, which has unduly burdened their dockets with a heavy pendency of cases, thereby clogging the whole justice system. The possibility of being made liable to pay costs is a sufficient deterrence to make a litigant think twice before putting forth a false or vexatious

claim or defence before court. The imposition of these costs plays a crucial role in promoting fairness, deterring frivolous lawsuits, encouraging settlement, and fostering efficient use of resources: (i) promoting fairness: imposing costs in litigation helps to create a level playing field for both plaintiffs and defendants. By requiring both parties to bear the financial burden of litigation, the system encourages parties to consider the merits of their case before initiating legal action. This helps to ensure that only those with legitimate grievances pursue legal recourse, reducing the possibility of abuse; (ii) deterring frivolous lawsuits: imposing costs can discourage parties from filing baseless or frivolous claims, as the risk of incurring significant financial losses may outweigh any potential gains. This helps to protect defendants from having to defend themselves against meritless claims, reducing strain on the court system and preserving judicial resources; (iii) encouraging settlement: when parties are aware of the potential costs associated with litigation, they may be more inclined to engage in settlement negotiations or alternative dispute resolution methods. This can result in more efficient resolution of disputes, lower costs for all involved, and a reduced burden on the court system; (iv) fostering efficient use of resources: imposing costs in litigation incentivizes parties to focus on the most relevant and important aspects of their case, as both parties will want to minimize their expenses. This can lead to more efficient use of legal resources, including court time and the expertise of legal professionals, and may result in more focused and streamlined proceedings. The practice of imposing costs would thus cleanse the court dockets of frivolous and vexatious litigation, encourage expeditious dispensation of justice, and promote a smart legal system that enhances access to justice by taking up and deciding genuine cases in the shortest possible timeframe.

Qazi Naveed ul Islam v. District Judge PLD 2023 SC 298 ref.

Aftab Alam Yasir, Advocate Supreme Court for Petitioner.

Nemo for Respondents.

Date of hearing: 12th April, 2023.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The sole question that has come up for our consideration in the present case is: whether the Federal Service Tribunal ("Tribunal") while deciding an appeal under the Service Tribunals Act, 1973 ("Act"), or any application including an application under section 12(2) of the Code of Civil Procedure 1908 ("C.P.C."), can award costs.

2. Briefly, the facts are that the petitioner was proceeded against departmentally for misconduct and awarded major penalty of compulsory retirement. Thereafter, the petitioner embarked upon a long journey of unending litigation, which is described hereunder in a tabular form for convenience and clarity as under:

| No. | Nature of proceedings | Court | Decision | Date |
|---|---|---|---|---|
| 1 | Service appeal | Tribunal | Dismissed | 09.01.2008 |
| 2 | Petition for leave to appeal | Supreme Court | Dismissed | 08.05.2008 |
| 3 | Review petition | Supreme Court | Dismissed | 01.06.2009 |
| 4 | Writ petition | Islamabad High Court | Dismissed | 26.02.2015 |
| 5 | Intra Court Appeal | Islamabad High Court | Dismissed | 02.04.2015 |
| 6 | Petition for leave to appeal | Supreme Court | Dismissed | 07.10.2015 |
| 7 | Constitution petition under Article 184 (3) | Supreme Court | Returned with office objection | 03.04.2017 |
| 8 | Misc. appeal against office order | Supreme Court | Dismissed as withdrawn | 07.06.2017 |
| 9 | Constitution petition under Article 184(3) | Supreme Court | Returned with office objection | 07.10.2017 |

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|---|---|---|---|---|
| 10 | Misc. appeal against office order | Supreme Court | Dismissed | 30.10.2017 |
| 11 | Application under section 12(2), C.P.C. | Supreme Court | Dismissed as withdrawn | 02.05.2019 |
| 12 | Application under section 12(2), C.P.C. | Tribunal | Dismissed | 13.06.2019 |
| 13 | Application under section 12(2), C.P.C. | Tribunal | Dismissed | 28.07.2020 |

The last mentioned order dated 28.07.2020 is impugned in the present petition for leave to appeal, whereby the Tribunal dismissed the application under section 12(2), C.P.C. of the petitioner with costs of Rs.50,000/-. The said application was filed by the petitioner against the order of the Tribunal, dated 09.01.2008.

3. We have heard the learned counsel for the petitioner and examined the record of the case.

4. Section 5(2) of the Act provides for the powers of the Tribunal and is reproduced hereunder for ease of reference:

5. Powers of Tribunals.

(1) .....

(2) A Tribunal shall, for the purpose of deciding any appeal, be deemed to be a civil court and shall have the same powers as are vested in such court under the Code of Civil Procedure, 1908 (Act V of 1908), including the powers of -

(a) enforcing the attendance of any person and examining him on oath;

(b) compelling the production of documents; and

(c) issuing commission for the examination of witnesses and documents.

A bare reading of the above provision shows that for the purpose of deciding an appeal, the Tribunal is deemed to be a civil court and has the same powers as are vested in a civil court under the C.P.C. Needless to mention that all courts exercising civil jurisdiction (whether original/ trial, appellate or revisional) under the C.P.C. read with the Civil Courts Ordinance, 1962, are referred to as "civil courts." But as the powers of a civil court have been conferred on the Tribunal for the purpose of deciding appeals, the reference in section 5(2) of the Act to the powers of a civil court under the C.P.C. is to be taken as a reference to the powers of an appellate civil court under the C.P.C. And since the Tribunal can interfere with the findings of facts recorded by the departmental authorities, in addition to correcting any legal error committed by them, the appeals filed before it are in the nature of first appeals as provided in the C.P.C. Thus, the principles governing first appeals under the C.P.C. apply to appeals before the Tribunal, and the powers of the first appellate court under the C.P.C. are available to it.[1]

5. A first appellate court can award the actual costs incurred in appeal as per provisions of rule 35(3) of Order XLI, C.P.C. and can also impose special costs in the exercise of its inherent powers under section 151, C.P.C. if the facts and circumstances of the case necessitate the making of such an order to secure the ends of justice or to prevent the abuse of the process of the court.[2] Therefore, both these powers are also available to the Tribunal while deciding an appeal under the Act. Similarly, a first appellate court can award not only the actual costs incurred on an application under section 12(2), C.P.C. by virtue of section 35 read with section 141,[3] C.P.C. but also compensatory costs under section 35A, C.P.C. or special costs under section 151, C.P.C. Thus, the Tribunal can also exercise these powers in awarding costs while deciding an application under section 12(2), C.P.C. or any other application.

6. It may be elaborated that actual costs are awarded by a civil court under section 35 of the C.P.C. to reimburse the successful party the expenses incurred by him in the assertion or defence of his rights before the court and compensatory costs are granted under section 35A to compensate him for undergoing unnecessary litigation due to false or vexatious claim or defence made by his opponent. Whereas special costs are imposed, under section 151, for deterrent purposes on a party who initiates a proceedings, particularly the appellate proceedings,

in complete disregard of the obvious factual or legal position, and thereby wastes the precious court time and abuses the process of the court.

7. In the present case, the Tribunal which has imposed special costs on the petitioner, while dismissing his application under section 12(2) of the C.P.C., is situated in Islamabad and thus has the powers available to the first appellate civil courts in Islamabad, where the amended provisions of sections 35, 35A and 35B, C.P.C. are applicable under the Costs of Litigation Act, 2017. By notification dated 14 March 2018, the Costs of Litigation Act, 2017 has been enforced and made applicable to all courts in Islamabad in respect of all proceedings including suit, appeal, review, revision, execution or any other proceedings and any matter incidental thereto. The 2017 Act has, in fact, consolidated the two types of costs, compensatory and special, in the newly added section 35B under one head of "special costs" by removing the upper limit on the amount of such costs. It has left to the discretion of the court concerned to determine the appropriate amount of special costs. It may be underlined that a civil court or the Tribunal as the case may be, is to exercise this discretion, like all other discretions, on the principles of fairness, equity and justice, not arbitrarily or perversely, while keeping in view the peculiar facts and circumstances of a particular case.

8. In view of the legal position stated above, we find that while deciding an appeal under the Act or an application under section 12(2) of the C.P.C., the Tribunal has the powers to impose special costs, without any upper limit of amount, on a party to that appeal or application as the case may be, keeping in view the peculiar facts and circumstances of a particular case. In the present case, the Tribunal has imposed special costs of Rs.50,000/- on the petitioner for wasting the precious public time of the Tribunal by making a vexatious application under section 12(2), C.P.C. Such exercise of discretion by the Tribunal in imposing the costs is fully justified in the facts and circumstances of the case stated in para 2 above, and in no manner does it tantamount to an arbitrary or perverse exercise of discretion. The present petition is thus found meritless. It is therefore dismissed and the leave to appeal is declined. We may mention here that we have abstained to impose additional costs, in the exercise of powers of this Court under the Supreme Court Rules, 1980, while dismissing the present petition as the petitioner has not pressed the merits of his application under section 12(2), C.P.C. before us and argued his grievance only to the question as to the powers of the Tribunal to impose costs.

9. Before parting with the order, we find it necessary to emphasise that it is high time that courts and tribunals should regularly exercise their powers to impose reasonable costs to curb the practice of instituting frivolous and vexatious cases by unscrupulous litigants, which has unduly burdened their dockets with a heavy pendency of cases, thereby clogging the whole justice system. The possibility of being made liable to pay costs is a sufficient deterrence to make a litigant think twice before putting forth a false or vexatious claim or defence before court. The imposition of these costs plays a crucial role in promoting fairness, deterring frivolous lawsuits, encouraging settlement, and fostering efficient use of resources: (i) promoting fairness: imposing costs in litigation helps to create a level playing field for both plaintiffs and defendants. By requiring both parties to bear the financial burden of litigation, the system encourages parties to consider the merits of their case before initiating legal action. This helps to ensure that only those with legitimate grievances pursue legal recourse, reducing the possibility of abuse; (ii) deterring frivolous lawsuits: imposing costs can discourage parties from filing baseless or frivolous claims, as the risk of incurring significant financial losses may outweigh any potential gains. This helps to protect defendants from having to defend themselves against meritless claims, reducing strain on the court system and preserving judicial resources; (iii) encouraging settlement: when parties are aware of the potential costs associated with litigation, they may be more inclined to engage in settlement negotiations or alternative dispute resolution methods. This can result in more efficient resolution of disputes, lower costs for all involved, and a reduced burden on the court system; (iv) fostering efficient use of resources: imposing costs in litigation incentivizes parties to focus on the most relevant and important aspects of their case, as both parties will want to minimize their expenses. This can lead to more efficient use of legal resources, including court time and the expertise of legal professionals, and may result in more focused and streamlined proceedings. The practice of imposing costs would thus cleanse the court dockets of frivolous and vexatious litigation, encourage expeditious dispensation of justice, and promote a smart legal system that enhances access to justice by taking up and deciding genuine cases in the shortest possible timeframe.[4]

MWA/Z-3/SC Petition dismissed.

**2023 S C M R 1055**

**[Supreme Court of Pakistan]**

**Present: Umar Ata Bandial, C.J., Syed Mansoor Ali Shah and Munib Akhtar, JJ**

**SNAMPROGETTI ENGINEERING B.V. through Special Attorney---Petitioner**

**Versus**

**COMMISSIONER OF INLAND REVENUE ZONE-II, L.T.U, ISLAMABAD and others---Respondents**

Civil Petitions Nos. 3286 to 3289 of 2017, decided on 2nd August, 2022.

(Against the consolidated judgment of Islamabad High Court, Islamabad dated 15.06.2017, passed in ITR Nos. 160 of 2016, etc.)

**(a) Income Tax Ordinance (XLIX of 2001)---**

----S. 107---International tax conventions, agreements or treaties---Interpretation---Reasons as to why treaty interpretation rules differ from domestic tax rules stated.

International tax conventions or agreements or treaties are of a special nature and the role of a state (being party to such a bilateral agreement) is more of implementing the terms of such agreement rather than that of interpreting the same and that too in a unilateral manner. Treaty interpretation rules differ from domestic tax rules for the following among other reasons:

(a) As international treaties, the Vienna Convention on the Law of Treaties of 23rd May 1969 ("VCLT") governs double tax agreements. Therefore, their interpretation is based on the rules of interpretation under customary international law. As these principles and procedures of interpretation of agreements differ from rules applied to domestic legislation, an interpretation under the domestic law as a taxing statute may be misleading and unsuitable;

(b) Unlike the domestic law which contains highly technical legislative language relevant to a specific jurisdiction, tax treaties are based on the mutual understanding among two or more contracting states. Moreover, more than one language may be involved. They must be applied by the tax authorities and the courts in each contracting state in auniform way (common interpretation) that may differ from the domestic laws and practices in each state;

(c) Tax treaties are primarily relieving in nature and do not impose tax, while the domestic tax law seeks to impose tax in specific circumstances. A treaty specifies general taxing principles to avoid double taxation. Moreover, as the life of a treaty can be long it must be flexible enough to adapt to changes in the domestic law while continuing to reflect the original negotiated balance of obligations and concessions;

(d) Tax treaties tend to be less precise and require a broad purposive "substance over form" interpretation. Therefore, they are often interpreted more liberally than domestic law in the context of their object and purpose. On the other hand, in states that prefer a liberal, purposive interpretation of their domestic law, the interpretation of the tax treaties may be stricter under the statutes. In both cases, a neutral interpretation and common understanding requires the use of an international fiscal language, which may not be found in the domestic laws and may provide a definition quite independent from domestic laws;

(e) Treaty interpretation is a subject in itself and not merely an extension of statutory interpretation despite the fact that treaties may be enforceable only when made part of the domestic law under a statute in certain countries. Therefore, tax treaties should be kept as free as possible from the interpretation rules under domestic law, unless specified in the treaty itself.

Roy Rohatgi, Basic International Taxation (Kluwer Law International Second Edition 2001); Commissioner of Taxation v. Lamesa Holdings BV (1997) 77 FCR 597; McDermott Industries (Aust) Pty Ltd. v. Commissioner of Taxation (2005) 142 FCR 134 and A.P. Moller v Taxation Officer of Income Tax 2011 PTD 1460 ref.

**(b) Income Tax Ordinance (XLIX of 2001)---**

----S. 107(2)(c)---Convention between the Kingdom of the Netherlands and the Islamic Republic of Pakistan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income'

("Convention"), Arts. 5 & 7---Non-resident company---Engineering services provided by the petitioner (non-resident company) to a local company---Exemption from tax under the domestic tax regime of Pakistan---Petitioner (non-resident company) and the local company did not have a contractual relationship ascribing any building, construction, installation, assembly project or supervisory activities role to the former---Rather, the role of the petitioner was limited to providing engineering services only---Tax department failed to bring on record any evidence satisfying the threshold requirement of Clause 4 of Article 5 of the Convention that the petitioner had furnished services within Pakistan through employees or other personnel for a period or periods aggregating 'more than four months within any twelve months period', which was necessary for any activity of furnishing services to constitute a permanent establishment---Petitioner was entitled to the exemption provided in the Convention, and the income derived by the petitioner from providing the services to the local company was exempt from income tax in Pakistan because of not fulfilling the conditions necessary to constitute a permanent establishment as set out in Clause 4 of Article 5 of the Convention.

The petitioner-company, being a tax resident of the Netherlands, is entitled to the benefits and concessions under the Convention between the Kingdom of the Netherlands and the Islamic Republic of Pakistan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income' ("Convention"), in line with the provisions of section 107 of the Income Tax Ordinance, 2001 ('Ordinance'). Under subsection (2)(c) of section 107 of the Ordinance, the taxability of the petitioner's income is to be determined under the provisions contained in the Convention which override the Ordinance. The Convention involved in the present case was signed and enforced by Pakistan and the Netherlands in 1982. Its Article 7 provides that the business profits of an enterprise of one of the states shall be taxable in the other state only if the enterprise maintains a permanent establishment in the latter state and only to the extent that the profits are attributable to the permanent establishment.

The contract between the petitioner-company and the local company reflects that the petitioner was hired for the provision of engineering services only. The scope of the petitioner's work consisted of providing engineering services for the plants as well as for the procurement of two years' spare parts. The petitioner's obligations mainly included: (i) carrying out the work exercising due skill, care and diligence in accordance with good and internationally acceptable engineering, design and procurement practices; (ii) furnishing five sets of the final version of the engineering documents to the local company; (iii) providing on an ongoing basis engineering data including computer files to the local company for review of the work being performed by the petitioner; and (iv) witnessing at its own expense at the place of manufacture all such tests and inspections of the equipment and materials and other parts of work, as specified in the contract to ensure that they comply with the engineering developed by the petitioner on the basis of the desired standards. It is expressly clarified in the contract that notwithstanding anything to the contrary, the petitioner shall not be responsible for the construction and the overall management activities of the project which shall be the exclusive responsibility of the local company. The local company was to perform or cause to be performed the construction and erection activities for the implementation of the plants and be responsible for the management and administration of such activities and any associated cost and time schedule. The local company was to use an expert and competent construction contractor and was required to ensure that construction would be performed according to acceptable standards. All work excluded from the petitioner's work was the local company's responsibility to perform or cause to be performed.

The burden of proving the fact that the petitioner had a permanent establishment in Pakistan and must, therefore, suffer tax from the business generated from such permanent establishment was initially on the department. The recitals of the contract adequately show that the petitioner and the local company did not have a contractual relationship ascribing any building, construction, installation, assembly project or supervisory activities role to the former. Rather, the role of the petitioner was limited to providing services only. The Assessing Officer's view about the actual involvement of the petitioner in the construction activity is not supported by any material on record. Clause 3 of Article 5 of the Convention has, therefore, no relevance to the petitioner's case.

Assistant Director of Income Tax v. E-Funds IT Solution Inc. (2018) 13 SCC 294 and DIT (International Taxation), Mumbai v. Morgan Stanley and Co. Inc. (2007) 7 SCC 1 ref.

However, the petitioner's case may fit in the category identified under Clause 4 of Article 5 of the Convention if the petitioner had rendered services through its employees in Pakistan provided the services were rendered for a specified period. Clause 4 of Article 5 of the Convention provides that permanent establishment shall "encompass the furnishing of services including consultancy services, by an enterprise through employees or other personnel, engaged by the enterprise for such purpose, but only where activities of that nature continue (for the same or a connected project) within the country for a period or periods aggregating more than four months within any twelve month period." The view of the Assessing Officer about the impossibility of the implementation of the contract without the physical presence of the petitioner in Pakistan appears irrational and purely assumptive because he failed to take note of the fact that the employees/representatives of the petitioner admittedly stayed in Pakistan for 97 days only.

The language used in Clause 4 of Article 5 of the Convention with respect to calculating the period of four months necessary for any activity of furnishing services to constitute a permanent establishment shows that there may be a number of periods, interspersed with breaks, during which services are furnished by an enterprise. If the aggregate of these periods crosses the threshold of four months within any twelve-month period, a permanent establishment will stand constituted. The department has failed to bring on record any evidence satisfying the threshold requirement of Clause 4 of Article 5 of the Convention that the petitioner had furnished services within Pakistan through employees or other personnel for a period or periods aggregating more than four months within any twelve-month period. The furnishing of services as envisaged under the Convention does not, of itself, create a permanent establishment unless it continues for a period or periods aggregating more than four months within any twelve-month period.

The income derived by the petitioner from the provision of engineering services to the local company being not attributable to a permanent establishment located in Pakistan is not taxable in Pakistan as long as it is not covered by other Articles of the Convention that would allow such taxation. The petitioner is entitled to the exemption provided in the Convention, and the income derived by the petitioner from providing the services to the local company is exempt from income tax in Pakistan because of not fulfilling the conditions necessary to constitute a permanent establishment as set out in Clause 4 of Article 5 of the Convention. Petitions for leave to appeal were converted into appeals and allowed accordingly.

Makhdoom Ali Khan, Senior Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Petitioner (in all cases).

Babar Bilal, Advocate Supreme Court along with Shahid Soomro, Commissioner (Legal) for Respondents (in all cases).

Date of hearing: 2nd August, 2022.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**Snamprogetti Engineering B.V. ("petitioner"), a company incorporated in the Netherlands, entered into an engineering contract dated 14.03.2007 ("contract") with Engro Chemicals Pakistan Limited ("local company"), a company incorporated in Pakistan, to provide "engineering services[1]" for the plants[2] and for the procurement of spare parts[3] regarding the project i.e., construction of a fertilizer complex at Daharki, District Ghotki, Pakistan. The petitioner was a non-resident company under the Income Tax Ordinance, 2001 ("Ordinance").[4] Clause 3.18 of the contract provided that notwithstanding anything to the contrary in the contract, the petitioner would not be responsible for the construction and the overall management activities of the project. Engineering services as agreed to between the parties in the contract were duly provided by the petitioner to the local company.

2. The petitioner filed tax returns for tax years 2007, 2008 and 2009, declaring that the income arising from such engineering services was exempt from being taxed under the domestic tax regime of Pakistan. The tax returns were treated as assessment orders deemed to have been issued in terms of section 120(1) of the Ordinance. The department took exception to the exemption claimed by the petitioner. Show cause notices were issued to the petitioner under section 122(9) read with section 122(5A) of the Ordinance. The Assessing Officer amended the assessment orders under section 122(5A) of the Ordinance. Tax was consequently ordered to be charged on the income which had been declared exempt by the petitioner.

3. The petitioner assailed the said orders in appeal before the Commissioner (Appeals) and the latter set aside the orders passed by the Assessing Officer on the ground that the petitioner did not have a "permanent establishment" in Pakistan in the context of the 'Convention between the Kingdom of the Netherlands and the Islamic Republic of Pakistan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income' ("Convention") so as to be amenable to the jurisdiction of domestic tax regime with regard to their business profits relating to such engineering services. The department successfully challenged the order of the Commissioner (Appeals) before the Appellate Tribunal Inland Revenue ("Tribunal"). The tax references filed by the petitioner remained unsuccessful in the High Court. So, the petitioner seeks leave of this Court to appeal against the decision of the High Court.

4. The sole question that has come up for determination before us is whether the income derived by the petitioner from providing afore- referred engineering services to the local company is exempt from income tax in view of the Convention or is it liable to be taxed under normal tax regime of Pakistan.

5. We have heard the arguments of the learned counsel for the parties on the said question and have carefully gone through the record.

6. International taxation treaties aim to avoid and relieve double taxation through equitable (and acceptable) distribution of tax claims between the countries. The purpose of these treaties has significant relevance as to how their provisions are to be interpreted.[5] The reason is that the efficacy of such treaties depends on common and workable interpretation of the treaty terms.[6] Such an interpretation requires taking into consideration the international tax language and terminology and placing reliance on legal decisions and practices in other countries, where appropriate, because these materials form part of the legal context. Model treaties developed by the Organisation for Economic Co-operation and Development ("OECD")[7] and the United Nations ("UN")[8] to provide standard frameworks of guidance for treaty negotiation, and official commentaries thereon, are of high persuasive value in terms of defining the parameters of double taxation treaties and have world-wide recognition as basic documents of reference in the negotiation, application and interpretation of multilateral or bilateral tax conventions.[9] Most countries accept the common interpretation principles of the Vienna Convention on the Law of Treaties of 23rd May 1969 ("VCLT") under customary international law, and thus the VCLT and not the domestic law of the contracting states, usually governs the interpretation of such treaties.

7. It is perhaps necessary to mention at the outset that international tax conventions or agreements or treaties are of a special nature and the role of a state (being party to such a bilateral agreement) is more of implementing the terms of such agreement rather than that of interpreting the same and that too in a unilateral manner. Treaty interpretation rules[10] differ from domestic tax rules for the following among other reasons:

(a) As international treaties, the VCLT governs double tax agreements. Therefore, their interpretation is based on the rules of interpretation under customary international law. As these principles and procedures of interpretation of agreements differ from rules applied to domestic legislation, an interpretation under the domestic law as a taxing statute may be misleading and unsuitable;

(b) Unlike the domestic law which contains highly technical legislative language relevant to a specific jurisdiction, tax treaties are based on the mutual understanding among two or more contracting states. Moreover, more than one language may be involved. They must be applied by the tax authorities and the courts in each contracting state in a uniform way (common interpretation) that may differ from the domestic laws and practices in each state;

(c) Tax treaties are primarily relieving in nature and do not impose tax, while the domestic tax law seeks to impose tax in specific circumstances. A treaty specifies general taxing principles to avoid double taxation. Moreover, as the life of a treaty can be long it must be flexible enough to adapt to changes in the domestic law while continuing to reflect the original negotiated balance of obligations and concessions;

(d) Tax treaties tend to be less precise and require a broad purposive "substance over form" interpretation. Therefore, they are often interpreted more liberally than domestic law in the context of their object and purpose.[11] On the other hand, in states that prefer a liberal, purposive interpretation of their domestic law, the interpretation of the tax treaties may be stricter under the statutes. In both cases, a neutral interpretation and

common understanding requires the use of an international fiscal language, which may not be found in the domestic laws and may provide a definition quite independent from domestic laws;

(e) Treaty interpretation is a subject in itself and not merely an extension of statutory interpretation despite the fact that treaties may be enforceable only when made part of the domestic law under a statute in certain countries. Therefore, tax treaties should be kept as free as possible from the interpretation rules under domestic law, unless specified in the treaty itself.

8. The petitioner, being a tax resident of the Netherlands, is entitled to the benefits and concessions under the Convention in line with the provisions of section 107 of the Ordinance. Under subsection (2)(c) of section 107 of the Ordinance, the taxability of the petitioner's income is to be determined under the provisions contained in the Convention which override the Ordinance. The Convention involved in the present case was signed and enforced by Pakistan and the Netherlands in 1982. Its Article 7 provides that the business profits of an enterprise of one of the states shall be taxable in the other state only if the enterprise maintains a permanent establishment in the latter state and only to the extent that the profits are attributable to the permanent establishment. The concept of permanent establishment is used in bilateral tax treaties to determine the right of a state to tax the profits of an enterprise of the other state. According to Klaus Vogel, an eminent academic in the field of international taxation and recognized as an authority on the interpretation of double taxation treaties, the permanent establishment threshold has been commonly used since 1920s in double taxation treaties to determine whether a particular kind of income shall or shall not be taxed in the country from which it originates.[12]

9. The term 'permanent establishment' is dealt with under Article 5 of the Convention. The structure of this Article as per the OECD and UN Model Conventions has been explained in Klaus Vogel's treatise, which is regarded as the international gold standard on the law of tax treaties, as a multi-level structure and can be read from more than one starting point. Clause 1 of Article 5 of the Convention gives a general or classic definition of the term permanent establishment as a fixed place of business through which the business of an enterprise is wholly or partly carried on. Clause 2 contains a non-exhaustive list of examples which could be regarded as permanent establishments. Clause 3 expressly provides that a building site, construction, installation, assembly project or supervisory activities constitute a permanent establishment only if they last more than six months. Clause 4 relates to services and provides that the furnishing of services would fall in the ambit of permanent establishment if activities of that nature continue for a period or periods aggregating more than four months within any twelve-month period. Clause 5 lists a number of business activities which are treated as exceptions to the general definition. Clauses 6 and 7 are deeming provisions referring to situations where an enterprise is deemed to have a permanent establishment in one of the states. And, clause 8 provides an instance that a company which is a resident of one of the states and controls or is controlled by a company which is a resident of the other state or which carries on business in the other state shall not of itself constitute either company a permanent establishment of the other.

10. The Assessing Officer while dealing with the question of permanent establishment was of the view that the petitioner's case was covered by clauses 3 and 4 of Article 5 of the Convention. He observed that the petitioner was not only engaged in providing the designing and engineering services but was also performing the construction work at the plant site and that the implementation of the contract was not possible without the physical presence of the petitioner in Pakistan. The decision of the Assessing Officer was set aside by the Commissioner (Appeals) and though the decision of the Commissioner (Appeals) was reversed by the Tribunal which was then maintained by the High Court as well, the latter two forums did not reinstate the Assessing Officer's observation about the petitioner's case being covered by Clause 3 of Article 5 of the Convention.

11. The contract reflects that the petitioner was hired for the provision of engineering services only. The scope of the petitioner's work consisted of providing engineering services for the plants as well as for the procurement of two years' spare parts. The petitioner's obligations mainly included: (i) carrying out the work exercising due skill, care and diligence in accordance with good and internationally acceptable engineering, design and procurement practices;[13] (ii) furnishing five sets of the final version of the engineering documents to the local company;[14] (iii) providing on an ongoing basis engineering data including computer files to the local company

for review of the work being performed by the petitioner;[15] and (iv) witnessing at its own expense at the place of manufacture all such tests and inspections of the equipment and materials and other parts of work, as specified in the contract to ensure that they comply with the engineering developed by the petitioner on the basis of the desired standards.[16] It is expressly clarified in the contract that notwithstanding anything to the contrary, the petitioner shall not be responsible for the construction and the overall management activities of the project which shall be the exclusive responsibility of the local company.[17] The local company was to perform or cause to be performed the construction and erection activities for the implementation of the plants and be responsible for the management and administration of such activities and any associated cost and time schedule.[18] The local company was to use an expert and competent construction contractor and was required to ensure that construction would be performed according to acceptable standards.[19] All work excluded from the petitioner's work was the local company's responsibility to perform or cause to be performed.[20]

12. The burden of proving the fact that the petitioner had a permanent establishment in Pakistan and must, therefore, suffer tax from the business generated from such permanent establishment was initially on the department.[21] The above-referred recitals of the contract adequately show that the petitioner and the local company did not have a contractual relationship ascribing any building, construction, installation, assembly project or supervisory activities role to the former. Rather, the role of the petitioner was limited to providing services only. The Assessing Officer's view about the actual involvement of the petitioner in the construction activity is not supported by any material on record. Clause 3 of Article 5 of the Convention has, therefore, no relevance to the petitioner's case.

13. However, the petitioner's case may fit in the category identified under Clause 4 of Article 5 of the Convention if the petitioner had rendered services through its employees in Pakistan provided the services were rendered for a specified period.[22] Clause 4 of Article 5 of the Convention provides that permanent establishment shall "encompass the furnishing of services including consultancy services, by an enterprise through employees or other personnel, engaged by the enterprise for such purpose, but only where activities of that nature continue (for the same or a connected project) within the country for a period or periods aggregating more than four months within any twelve month period." The view of the Assessing Officer about the impossibility of the implementation of the contract without the physical presence of the petitioner in Pakistan appears irrational and purely assumptive because he failed to take note of the fact that the employees/representatives of the petitioner admittedly stayed in Pakistan for 97 days only.

14. The High Court, the Tribunal and the Commissioner (Appeals) all reckoned that the case of the petitioner was covered by Clause 4 of Article 5 of the Convention. However, they used different approaches to calculate the period of four months, necessary for any activity of furnishing services to be categorized as a permanent establishment. The Commissioner (Appeals), in view of the admitted position that the employees/representatives of the petitioner stayed in Pakistan for 97 days only, came to the conclusion that the stay of the petitioner's employees/representatives in the country was less than four months in each year and, therefore, did not correspond with the profile of permanent establishment given in Clause 4 of Article 5 of the Convention. The Tribunal, however, reasoned that it was not the presence but the activity which mattered; that the whole project was indivisible and taxability of project execution must be taken in entirety; and that the entire period of implementation of the project which was far longer than the prescribed period of four months was to be counted. The High Court recognized that the obligations of the petitioner under the contract were in the nature of furnishing of services and the employees/representatives of the petitioner had indeed stayed in Pakistan for 97 days only. Yet the High Court observed that the furnishing of services described in the contract was not dependent on the number of visits by the employees/representatives of the petitioner or their physical presence at the site. What was relevant, the High Court observed, was the continuation of furnishing of services and the activities relating thereto within Pakistan for a period or periods aggregating more than four months within any twelve-month period. The High Court elaborated that the plants were constructed and commissioned at Daharki, District Ghotki, Pakistan while the engineering services were being rendered by the petitioner in relation thereto and the activities of that nature had definitely continued in Pakistan. The petitioner, therefore, was held to have a permanent establishment within the meaning of Clause 4 of Article 5 of the Convention.

15. We are unable to subscribe to the reasoning provided for calculating the time period by the Tribunal and the High Court. Rather, we believe that the Commissioner (Appeals) had taken a correct and logical approach to calculating the period of four months necessary for any activity of furnishing services to constitute a permanent establishment. The language used in Clause 4 of Article 5 of the Convention with respect to time period shows that there may be a number of periods, interspersed with breaks, during which services are furnished by an enterprise. If the aggregate of these periods crosses the threshold of four months within any twelve-month period, a permanent establishment will stand constituted. What could be the way to separate breaks from periods of activity other than counting the days of the actual physical presence of employees or other personnel engaged in furnishing services by an enterprise in the source country. We agree with the High Court that the engineering services for which the contract was executed were in relation to the construction and installation of fertilizer plants but we disagree with the High Court as regards the finding that the obligations of the petitioner relating to furnishing of services were in respect of the construction of the plants at the site and continued for the entire period of the validity of the contract. We do not see that contracts covering activities other than engineering services were concluded with the petitioner or related persons. The nature of the work involved in engineering services and construction activity could not be said to be the same. It has not been shown that the same employees rendered engineering services and performed construction activities under different contracts. Nor has it been brought on record that engineering services and construction activities would have been covered by a single contract except for tax planning considerations.

16. The department has failed to bring on record any evidence satisfying the threshold requirement of Clause 4 of Article 5 of the Convention that the petitioner had furnished services within Pakistan through employees or other personnel for a period or periods aggregating more than four months within any twelve-month period. The furnishing of services as envisaged under the Convention does not, of itself, create a permanent establishment unless it continues for a period or periods aggregating more than four months within any twelve-month period.

17. The representatives of the petitioner admittedly stayed in Pakistan for 97 days only which falls short of the requirement of continuation of services for four months in each year and, therefore, the provision of engineering services by the petitioner could not be placed in the category of permanent establishment set out in Clause 4 of Article 5 of the Convention. The income derived by the petitioner from the provision of engineering services to the local company being not attributable to a permanent establishment located in Pakistan is not taxable in Pakistan as long as it is not covered by other Articles of the Convention that would allow such taxation. We, therefore, reach the conclusion that the petitioner is entitled to the exemption provided in the Convention, and the income derived by the petitioner from providing the afore-referred services to the local company is exempt from income tax in Pakistan because of not fulfilling the conditions necessary to constitute a permanent establishment as set out in Clause 4 of Article 5 of the Convention.

18. In view of the above answer to the question under consideration, we convert these petitions into appeals and allow the same: the impugned judgment of the High Court and order of the Tribunal are set aside while that of the Commissioner (Appeals) is restored and the bank guarantee dated 14.02.2022 in the sum of Rs. 20 million furnished by the petitioner with the Deputy Registrar of this Court shall be returned to the petitioner.

19. Foregoing are the reasons for our short order dated 02.08.2022, which is reproduced here for convenience:- For reasons to be recorded later, these petitions are converted into appeals and allowed. The bank guarantee dated 14.02.2022 in the sum of Rs.20 million furnished by the petitioner with the Deputy Registrar of this Court shall be returned to the petitioner.

MWA/S-12/SC Appeals allowed.

**2023 S C M R 1087**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Ayesha A. Malik, JJ**

**Dr. SAYYID A. S. PIRZADA---Petitioner**

**Versus**

**The CHIEF SECRETARY, SERVICES AND ADMINISTRATION DEPARTMENT and others---Respondents**

Civil Petition No. 2009 of 2020, decided on 13th April, 2023.

(Against the judgment of the Punjab Service Tribunal, Lahore, dated 10. 12.2019 passed in Appeal No. 243 of 2008)

**Punjab Service Tribunals Act (IX of 1974)---**

----Ss. 4(1)(a) & 5(1)---Appeal filed before the Service Tribunal after departmental authority fails to decide representation within 90 days---Service Tribunal, powers of---Scope---Once the appeal, application of review or representation, as the case may be, of a civil servant is not decided by the departmental authority within a period of 90 days and he has elected to approach the Tribunal through preferring an appeal after lapse of that period, then his appeal has to be decided on merits and the Tribunal cannot dispose of that appeal by issuing direction to the departmental authority to decide the appeal, application for review or representation of the appellant, because the said remedy already stands exhausted by virtue of the lapse of time.

If the departmental appeal, review or representation of a civil servant is not decided within a period of 90 days, the aggrieved civil servant need not endlessly wait for the decision of the departmental appeal, review or representation and can straight away approach the Tribunal by filing an appeal for the redressal of his grievance. The Punjab Service Tribunals Act, 1974 ('the Act') encourages a civil servant to first avail the remedy of departmental appeal, review or representation so that the matter can best be decided at the departmental level. However, if no progress is made on such departmental remedy within 90 days, the Act provides the civil servant with a higher remedy in the shape of an appeal before the Tribunal to agitate his grievance. When the aggrieved civil servant avails the higher remedy of appeal before the Tribunal after lapse of the prescribed period of 90 days, the departmental remedy of appeal, review or representation loses its significance and automatically comes to an end. Once the matter is brought before the Tribunal in accordance with the provisions of section 4 of the Act, the departmental remedy stands exhausted. Under section 5 of the Act, the Tribunal on appeal can only confirm, set aside, vary or modify the order appealed against. The Tribunal has no power under the Act to direct the departmental authorities to decide the departmental appeal, application for review or representation of the civil servant, which remained undecided for a period of 90 days.

Falak Sher v. Government of Punjab 1995 SCMR 962 ref.

Once the appeal, application of review or representation, as the case may be, of a civil servant is not decided by the departmental authority within a period of 90 days and he has elected to approach the Tribunal through preferring an appeal after lapse of that period, then his appeal has to be decided on merits and the Tribunal cannot dispose of that appeal by issuing direction to the departmental authority to decide the appeal, application for review or representation of the appellant, because the said remedy already stands exhausted by virtue of the lapse of time.

Petitioner in person.

Sanaullah Zahid, Additional A.G., Punjab, M. Safdar Abbasi, N.S., Waqar Malik, L.A. and Riaz Ahmed Muazzmi, Law Officer HED for Respondents.

Date of hearing: 13th April, 2023.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**This case has a somewhat chequered history. The petitioner filed a service appeal in the year 2008 under section 4 of the Punjab Service Tribunals Act 1973 ("Act"), agitating the question of his "promotion" before the Punjab Service Tribunal ("Tribunal"). Instead of deciding the appeal of the petitioner on merits, the Tribunal vide its order dated 27.03.2008 directed that the departmental representation filed by the petitioner before the Chief Secretary, Government of Punjab be decided first. The

Tribunal in the same order reserved the right of the petitioner to file a fresh appeal, if any adverse order is passed against him on that representation, and disposed of the appeal as not pressed.

2. As the representation of the petitioner was not decided despite direction of the Tribunal, the petitioner filed an application for restoration of the said appeal, which was allowed by the Tribunal and the appeal was restored vide order dated 29.06.2011. The said order was not challenged by the respondents and attained finality. Thereafter, the appeal remained pending before the Tribunal till 2019 when through the impugned order dated 10.12.2019 the Tribunal held that the service appeal of the petitioner was not maintainable as it stood disposed of in the year 2008 and could not have been restored.

3. We have heard the petitioner and the learned Additional Advocate-General for the respondents, and examined the record of the case.

4. At the very outset, the attention of the learned Additional Advocate-General has been drawn to order dated 29.06.2011 passed by the Tribunal whereby the service appeal of the petitioner was restored. The said order was not challenged by the respondents and therefore had attained finality. Learned Additional Advocate-General has had no plausible explanation to render in defense of the impugned order. He, however, has drawn the attention of the Court to an important legal issue that not only arises in the instant case but also is a matter of concern in many other cases decided by the Tribunal. He submits that under the Act the Tribunal can only decide the service appeals filed before it but instead of deciding the appeals on merits, the Tribunal has, as in the instant case, started directing the departmental authorities to decide the pending departmental appeals, applications for review and representations of the civil servants and with such directions, the appeals are being deposed of. According to the learned Additional Advocate-General, once a civil servant approaches the Tribunal after his departmental appeal, review or representation remains unattended for a period of 90 days, the Tribunal can only decide the appeal and cannot direct the departmental authorities to decide the pending appeal, review or representation, as the case may be. Any such direction, he argues, offends the object of the Act as it delays adjudication of service matters of the civil servants, which the Act in the first instance aims to remedy.

5. Article 212 of the Constitution of the Islamic Republic of Pakistan ("Constitution") authorizes the appropriate legislature to provide for establishing the Administrative Tribunals to exercise exclusive jurisdiction relating to matters pertaining to the terms and conditions of persons in the service of Pakistan. Under the said constitutional provision, the jurisdiction of the regular courts stands barred to entertain such matters. The purpose and object of establishing an Administrative Service Tribunal is to keep the matters of persons in the service of Pakistan out of the regular courts to provide them with a more efficient and specialized forum for the speedy resolution of the disputes arising from the terms and conditions of their service. Efficient dispute resolution system within the civil bureaucracy is a key to good and effective administration. The Tribunals strive to provide an efficient and timely resolution of disputes. They enjoy specialized knowledge and expertise in public service matters, which can lead to quicker and more accurate decision-making. The Tribunals provide an accessible, fair, and efficient system for resolving disputes arising from public service employment. They ensure consistency and transparency, and maintain high standards in the public service sector. Additionally, efficient dispute resolution of civil servants through service tribunals is important for maintaining employee morale and productivity, enhancing government credibility, strengthening institutional capacity, reducing the burden on the judiciary and preventing the escalation of conflicts. These factors collectively contribute to better governance and administration within the Government. Thus, an efficient dispute settlement mechanism through an Administrative Service Tribunal is necessary for civil servants to maintain public trust in the civil service, and ultimately contributes to the overall effectiveness and efficiency of the Government.

6. The constitutional mandate of an Administrative Service Tribunal has been actualized through sections 4 and 5 of the Act, which are reproduced here for ease of reference:

4. Appeal to Tribunals.---(1) Any civil servant aggrieved by any final order, whether original or appellate, made by a departmental authority in respect of any of the terms and conditions of his service may, within thirty days of the communication of such order to him or within six months of the establishment of the appropriate Tribunal, whichever is latter, prefer an appeal to the Tribunal.

Provided that-

(a) where an appeal, review or representation to a departmental authority is provided under the Punjab Civil Servants Act, 1974, or any rules against any such order no appeal shall lie to a Tribunal unless the aggrieved civil servant has preferred an appeal or application for review or representation to such departmental authority and a period of ninety days has elapsed from the date on which such appeal, application or representation was so preferred;

(b) ...

5. Powers of Tribunals.---(1) A Tribunal may, on appeal, confirm, set aside, vary or modify the order appealed against.

(2) ...

As per section 4 of the Act, the right to prefer an appeal to the Tribunal can be invoked subject to the fulfilment of two pre-conditions: (i) in case a departmental appeal, review or representation is provided under the law, no appeal to the Tribunal shall lie unless such a remedy is availed by the aggrieved civil servant; and (ii) a period of 90 days has elapsed since such departmental appeal, review or representation has been preferred. Therefore, if the departmental appeal, review or representation of a civil servant is not decided within a period of 90 days, the aggrieved civil servant need not endlessly wait for the decision of the departmental appeal, review or representation and can straight away approach the Tribunal by filing an appeal for the redressal of his grievance. The Act encourages a civil servant to first avail the remedy of departmental appeal, review or representation so that the matter can best be decided at the departmental level. However, if no progress is made on such departmental remedy within 90 days, the Act provides the civil servant with a higher remedy in the shape of an appeal before the Tribunal to agitate his grievance. When the aggrieved civil servant avails the higher remedy of appeal before the Tribunal after lapse of the prescribed period of 90 days, the departmental remedy of appeal, review or representation loses its significance and automatically comes to an end. Once the matter is brought before the Tribunal in accordance with the provisions of Section 4 of the Act, the departmental remedy stands exhausted. Under section 5 of the Act, the Tribunal on appeal can only confirm, set aside, vary or modify the order appealed against. The Tribunal has no power under the Act to direct the departmental authorities to decide the departmental appeal, application for review or representation of the civil servant, which remained undecided for a period of 90 days. We are fortified by an earlier view of this Court in Falak Sher[1].

7. We, therefore, hold that once the appeal, application of review or representation, as the case may be, of a civil servant is not decided by the departmental authority within a period of 90 days and he has elected to approach the Tribunal through preferring an appeal after lapse of that period, then his appeal has to be decided on merits and the Tribunal cannot dispose of that appeal by issuing direction to the departmental authority to decide the appeal, application for review or representation of the appellant, because the said remedy already stands exhausted by virtue of the lapse of time.

8. In the present case, the appeal of the petitioner which was filed in the year 2008, was illegally disposed of by the Tribunal vide its order dated 27.03.2008 by issuing a direction to the departmental authority to decide his representation. Despite that direction of the Tribunal, the representation of the petitioner was not decided and his appeal before the Tribunal was therefore restored in the year 2011 on his application. The order of restoration of appeal was not challenged by the respondents and thus attained finality. The restored appeal remained pending before the Tribunal since 2011 to 2019 and through the impugned order dated 10.12.2019, the Tribunal dismissed the appeal as not maintainable on the ground that it had been disposed of in the year 2008 without considering its earlier order of restoration of the appeal. In these facts and circumstances of the case, and the legal position stated above, the impugned order cannot be legally sustained. We, therefore, set aside the impugned order dated 10.12.2019 and direct the Tribunal to decide the appeal of the petitioner on merits within three months from the date of receipt of copy of this judgment. This petition is converted into an appeal and the same is allowed in the said terms.

MWA/A-16/SC Appeal allowed.

**2023 S C M R 1103**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Ayesha A. Malik, JJ**

**NATIONAL HIGHWAY AUTHORITY through Chairman, Islamabad---Petitioner**

**Versus**

**Messrs SAMBU CONSTRUCTION CO. LTD. ISLAMABAD and others---Respondents**

Civil Petition No. 3767 of 2020, decided on 13th February, 2023.

(Against the judgment of Islamabad High Court, Islamabad dated 21.09.2020 passed in F.A.O. No. 16 of 2014)

**(a) Arbitration Act (X of 1940)---**

----S. 30---Arbitration award---Interference by Courts---Scope---Limited scope of judicial review of an Award announced by an Arbitrator stated.

The arbitrator alone is the judge of the quality as well as the quantity of the evidence. He is the final arbiter of dispute between the parties. He acts in a quasi-judicial manner and his decision is entitled to utmost respect and weight. Court is not supposed to sit as a court of appeal and make a roving inquiry and look for latent errors of law and facts in the Award. The arbitration is a forum of the parties' own choice its decision should not be lightly interfered by the court, until a clear and definite case within the purview of the section 30 of the Arbitration Act, 1940 is made out.

Mian Corporation v. Messers Lever Brothers of Pakistan Ltd. PLD 2006 SC 169 ref.

An arbitration Award is a final determination of the dispute between the parties. The grounds for challenging an Award are very limited. There are three broad areas on which an arbitration Award is likely to be challenged i.e. firstly, jurisdictional grounds (non-existence of a valid and binding arbitration agreement); secondly, procedural grounds (failure to observe principles of natural justice) and thirdly, substantive grounds (arbitrator made a mistake of law).

Nigel Blackaby and Constantine Partasides QC, Redfern and Hunter On International Arbitration (6th edn, Oxford University Press, United Kingdom 2015), 569-573 ref.

The review of an arbitration Award cannot constitute a re-assessment or reappraisal of the evidence by the court. An over-intrusive approach by courts in examination of the arbitral Awards must be avoided. The court is not supposed to sit as a court of appeal and must confine itself to the patent illegalities in the Award, if any.The jurisdiction of the Court under the Arbitration Act, 1940 is supervisory in nature. Where two findings are possible the Court cannot interfere with the Award by adopting its own interpretation. Interference is only possible if there exists any breach of duty or any irregularity of action which is not consistent with general principles of equity and good conscience.

Tony Cole and Pietro Ortolani, Understanding International Arbitration (1st edn., Routledge, New York 2020), Chapter-7, 216; Federation of Pakistan v. Messrs Joint Venture Kocks K.G./Rist, PLD 2011 SC 506; Gerry's International (Pvt.) Ltd v. Aeroflot Russian International Airlines 2018 SCMR 662 and Shahin Shah v. Government of Khyber Pakhtunkhwa 2022 SCMR 1810 ref.

**(b) Arbitration Act (X of 1940)---**

----S. 30(a)---Arbitration award---Grounds for setting aside Award---Misconduct by Arbitrator---Meaning---Misconduct of an Arbitrator in the judicial sense means failure to perform his essential duty or any conduct inconsistent with his duties, resulting in substantial miscarriage of justice between the parties.

Brooke Bond (Pakistan) Ltd. v. Conciliator Appointed by the Government of Sindh PLD 1977 SC 237 ref.

**(c) Supreme Court Rules, 1980---**

----O. XXVIII, R. 3---Arbitration Act (X of 1940), S. 30---Frivolous and vexatious litigation---Abusing process of the Court---Costs, imposition of---Petitioner had dragged the Award in the courts for over 10 years, which passed for vexatious litigation; wasting the time of all courts below as well as the Supreme Court---Such frivolous litigation clogged the pipelines of justice causing delay in deciding genuine claims pending before the Supreme Court; and added to the pendency of cases which over-burdened the Court dockets and slowed down the engine of justice---Such vexatious and frivolous litigation must be dealt with firmly and strongly

discouraged---Supreme Court imposed costs on the petitioner in the sum of Rs. 300,000/- with the direction that the same shall be paid to the respondent within a month and in case of its failure to pay the said costs, the same shall be recoverable as a money decree---Petition for leave to appeal was dismissed and leave was refused. President of Islamic Republic of Pakistan v. Syed Tasneem Hussain Naqvi 2004 SCMR 590; Muhammad Ramzan v. Additional District Judge, Multan 2005 SCMR 1542 and Province of Punjab v. Messrs Sufi Construction Company 2005 SCMR 1724 ref.

Zahid Idris Mufti, Advocate Supreme Court for Petitioner.

Barrister Muhammad Mumtaz Ali, Advocate Supreme Court and Anis Muhammad Shahzad, Advocate-on-Record for Respondents.

Date of hearing: 13th February, 2023.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The sole question before us is to examine whether the Arbitrators in granting the Award dated 20.2.2010 ("Award") misconducted themselves in terms of section 30(a) of the Arbitration Act, 1940 ("Act").

2. Brief facts of the case are that parties entered into a Contract Package No. 07 ("Contract") regarding "Rehabilitation of National Highway N-5 from Mian Channu to Sahiwal 46 Km Road". During the execution of the Contract, the Engineer instructed the respondent/ company Messrs Sambu for construction of New Jersey Barriers and provision of Kerb Stones in some sections of the project, which was not part of the original scope of work. As a result, respondent claimed Rs.65,40,226/- for this new/additional work, which was done in pursuance of the instructions of the Engineer. The dispute arose when the said work was considered by the petitioner/National Highway Authority ("NHA") as part of the original scope of work and refused to pay any additional amount for this work to respondent. The matter was referred to Arbitrators; one nominated by each party. Through the unanimous Award dated 20.2.2010, the Arbitrators awarded Rs.65,40,226/- plus eight percent simple interest in favour of the respondent. The civil court decreed the said amount without interest and thereafter executed the decree and respondent received the said amount on 08.10.2018. Petitioner filed an FAO against the order of the civil court, which was dismissed by the Islamabad High Court on 21.9.2020 against which the instant petition has been filed by the petitioner.

3. The contentions raised by the learned counsel for petitioner are that minutes of the pre-bid meeting do not form part of the Contract and, therefore, the Arbitrators wrongly relied on pre-bid meeting in which petitioner had clarified that the Kerb Stones are not included in scope of the work. He also submitted that New Jersey Barriers were also included in the outline drawing. Learned counsel for the respondent submitted that the minutes of the pre-bid meeting formed part of the Contract document and referred to Contract dated 24.6.2005 along with the list of documents and submitted that petitioner vide letter dated 29.6.2005 issued signed Contract documents. The said Contract documents included pre-bid minutes of the meeting; hence the minutes of the pre-bid meeting are part of Contract. He submitted that the Arbitrators rightly noted that pre-bid minutes of meeting are part of Contract as mentioned in para-5 of Award. He submitted that petitioner also admitted that pre-bid minutes of meeting formed part of documents and filed before the Civil Court. He submitted that petitioner made a wrong statement before this Court on the basis of which notices were issued to respondent. He submitted that reference to clause 19.4 of the Contract by petitioner is misplaced and addendum to bid documents is only necessary if clarification given in pre-bid meeting requires any change in the bidding documents. Since no addition was required to be made, petitioner only clarified and confirmed in the pre-bid meeting that Kerb Stones is not part of original scope of work, hence there was no need for any addendum and, therefore, clause 14.2 referred by the petitioner is also misplaced. Further, since Kerb Stones or New Jersey Barriers were not mentioned in the schedule of pricing in bid document, hence no price was ever paid and it was never mentioned in the scope of work.

4. The arguments have been heard and the record perused. The record reveals that the main thrust of the argument of the parties have been on the moot point; whether the minutes of the pre-bid meeting dated 14.02.2005 are to be considered as an integral part of the Contract? It is pertinent here to mention that the minutes of pre-bid meeting and the addendum No. 2 were issued by the petitioner vide its letter No. 2(4)

GM(P&CA)/NHA/05/292, dated 1.03.2005. The minutes of pre-bid meeting and addendum No. 2 had several contractual cross-references. For instance, the whole concept of pricing the Contract was based on the information provided in item 7(a) and 7(1) of the minutes of pre-bid meeting. The pre-bid meeting and its minutes thereof were a natural corollary of the Instructions to the Bidders/Tenderer (ITB) which formed an important part of the Contract documents. Therefore, it is obvious that the minutes of pre-bid meeting are an integral part of the Contract Document, which fact is further duly established by including the same as a part of 327 certified pages of Contract Document duly signed by both the parties under the Contract. The question by the respondent under item 14 of the minutes of pre-bid meeting was "On Contract-7 (Mian Channu to Sahiwal) has no Kerb Stone shown on the drawing". The response by the petitioner was "It is clarified that this is not included in the scope of work under the package". Relying on the premise as claimed by the respondent they did not factor in the cost for these items presuming that these items were not required under the Contract. The minutes of the pre-bid meeting very clearly stated that Kerb Stone was not included under the scope of the works under the Contract. The cost of the same could not, therefore, had been catered for under the Contract. Additionally, nowhere in the Contract documents, the provision of Kerb Stone, retaining wall topped with New Jerssey Barrier was mentioned.

5. We have also examined the Award with the help of the learned counsel for the parties and find that the contentions of the petitioner are misplaced. The Award clearly deals with all the contentions raised by the petitioner and rightly holds that the pre-bid meeting forms part of the Contract document. Besides, we agree with the interpretation of clauses 19.4 and 14.2 as given by the Arbitrators. We are also mindful of the fact that there is a limited scope of judicial review of the 'Award' announced by an Arbitrator. An arbitration Award is a final determination of the dispute between the parties. The grounds for challenging an Award are very limited. There are three broad areas on which an arbitration Award is likely to be challenged i.e. firstly, jurisdictional grounds (non-existence of a valid and binding arbitration agreement); secondly, procedural grounds (failure to observe principles of natural justice) and thirdly, substantive grounds (arbitrator made a mistake of law).[1] The review of an arbitration Award cannot constitute a re-assessment or reappraisal of the evidence by the court. An over-intrusive approach by courts in examination of the arbitral Awards must be avoided.[2] The court is not supposed to sit as a court of appeal and must confine itself to the patent illegalities in the Award, if any.[3] The jurisdiction of the Court under the Act is supervisory in nature. Where two findings are possible the Court cannot interfere with the Award by adopting its own interpretation. Interference is only possible if there exists any breach of duty or any irregularity of action which is not consistent with general principles of equity and good conscience.[4] The arbitrator alone is the judge of the quality as well as the quantity of the evidence. He is the final arbiter of dispute between the parties. He acts in a quasi-judicial manner and his decision is entitled to utmost respect and weight.[5] By applying the afore-noted principles of law on the subject and considering the petitioner's objections within the limited scope of court's jurisdiction in testing the validity of Award this court is not supposed to sit as a court of appeal and make a roving inquiry and look for latent errors of law and facts in the Award. The arbitration is a forum of the parties' own choice its decision should not be lightly interfered by the court, until a clear and definite case within the purview of the section 30 of the Act is made out. We do not find any jurisdictional, procedural or substantive error patently floating on the record that could justify interference by this Court.

6. As far as the question of misconduct by Arbitrators is concerned, it would not be out of place to mention here that a misconduct of an Arbitrator in the judicial sense means failure to perform his essential duty or any conduct inconsistent with his duties, resulting in substantial miscarriage of justice between the parties.[6] We have gone through the objection petition filed by the petitioner against the Award and find that all the objections substantially relate to the merits of the case. Even the particulars and other necessary details of any misconduct were not given by the petitioner in their objection petition. Also, the petitioner failed to point out any conduct of the Arbitrators that was inconsistent with their essential duty or any breach of duty resulting in substantial miscarriage of justice between the parties. The allegations against the Arbitrators are vague and nebulous. No substantial grounds with precision are pleaded which could be construed to be misconduct by the Arbitrators to the satisfaction of this Court.[7] We find no illegality in the Award or misconduct on the part of the Arbitrators

in deciding the issues. The decision of the Arbitrators on all the issues are logical, convincing, based on cogent evidence and supported by reasons. The Contract and its documents have been examined by the Arbitrators and interpreted by them and this Court has no jurisdiction to substitute the evaluation done by the Arbitrators. Since the petitioner had failed to make out a case of misconduct before learned trial and High Court on the part of the Arbitrators, and so is the case before this Court; hence, we are also not inclined to examine the factual controversy under Article 185(3) of the Constitution of Islamic Republic of Pakistan. In these circumstances, leave is refused and this petition is dismissed. We, however, highlight that the arbitration falls within the domain of alternate dispute resolution ("ADR") and the parties having once recoursed to out of court dispute resolution, they must abide by the decision of the Arbitrators rather than challenging the same in the court of law, as it defeats the purpose of ADR. In this case, the petitioner challenged the Award in the civil court thereafter in the High Court and now before us. The Award was announced in the year 2010 and the petitioner is still litigating the matter in 2023, totally undermining the purpose of ADR. Such practice must be strictly curbed.

7. Before parting with this order, we have observed that the petitioner has dragged the Award in the courts for over last 10 years, which passes for vexatious litigation; wasting the time of all courts below as well as this Court. Such frivolous litigation clogs the pipelines of justice causing delay in deciding genuine claims pending before us. Such vexatious and frivolous petitions add to the pendency of cases which over-burdens the Court dockets and slows down the engine of justice. Such vexatious and frivolous litigation must be dealt with firmly and strongly discouraged.[8] We, therefore, are minded to impose costs on the petitioner in the sum of Rs. 300,000/- which shall be paid to the respondent within a month and in case of its failure to pay the said costs, the same shall be recoverable as a money decree.

MWA/N-6/SC Petition dismissed.

**2023 S C M R 1128**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Ayesha A. Malik, JJ**

**FAKHAR NAWAZ---Petitioner**

**Versus**

**ADMINISTRATIVE SECRETARY/SENIOR MEMBER BOARD OF REVENUE, PESHAWAR and others---Respondents**

C.M.A. 10945 of 2022 in C.P. 3884 of 2019, decided on 20th March, 2023.

(Restoration Application against the order dated 12.10.2022, passed in C.P. No.3884 of 2019)

**Supreme Court Rules, 1980---**

----O. IV, Rr. 6, 15, 23 & 24---Application for restoration of Civil Petition dismissed for non-prosecution---Violation of the Supreme Court Rules, 1980---Change of Advocate on Record (AOR) and Advocate Supreme Court (ASC) without consent of the earlier AOR or permission of the Court---Contents of the present restoration application, as well as, the submissions made by the counsel fail to meet the requirement of the Supreme Court Rules, 1980---Restoration application is not only silent regarding the legal requirements mentioned in the Supreme Court Rules, 1980 but is also in violation of the same---Restoration application fails to show how the present ASC has appeared in this case without the instructions of the earlier AOR as required under Rule 6 of Order IV of the Supreme Court Rules; the application does not disclose as to why the application was not filed by the earlier AOR as per Rule 15; how did the petitioner authorize and how did the new AOR file his power of attorney without the consent of the earlier AOR or without the leave of the Court as required under Rule 23; it is also not clear as to how the earlier AOR has been removed as no AOR can withdraw from the case without the leave of the Court as provided under Rule 24---Neither the petitioner, the AOR nor the ASC have bothered to pay any heed to the Supreme Court Rules, 1980 before filing the present application---Application being in flagrant disregard of the Supreme Court Rules, 1980 was not maintainable, and therefore, was dismissed with costs of Rs.20,000/- for being frivolous and having wasted the time of the Court.

Syed Amjad Ali Shah, Advocate Supreme Court for Petitioner.

Nemo for Respondents.

Date of hearing: 20th March, 2023.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The main Civil Petition (CPLA No.3884/2019) was filed by Muhammad Sahrif Janjua, AOR and drawn by Muhammad Ramzan Khan, ASC. It was dismissed for non-prosecution vide order dated 12.10.2022. The instant restoration application has been filed by Ahmed Nawaz Chaudhry, AOR and drawn by Syed Amjad Shah, ASC. Both of them have been newly appointed by the petitioner for filing the instant restoration application.

2. We have heard the learned counsel for the petitioner, and examined the record and the Supreme Court Rules, 1980 ("SC Rules"). We have noticed that the instant application is barred by 46 days and application for condonation of delay does not disclose any sufficient cause. Additionally, we have also noticed that the instant application has not been filed by the original AOR or drawn by the original ASC but by the newly appointed AOR and ASC. We have drawn the attention of the learned counsel to Rules 6, 15, 23 and 24 of Order IV of the SC Rules, which are reproduced hereunder for ready reference.

6. No Advocate other than an Advocate-on-Record shall appear or plead in any matter unless he is instructed by an Advocate-on Record.

15. No Advocate other than an Advocate-on-Record shall be entitled to act for a party in any proceedings in the Court.

23. No person having an Advocate-on-Record shall file a power of attorney authorizing another Advocate-on-Record to act for him in the same case save with consent of the former Advocate-on-Record or by leave of the Court, unless the former Advocate-on-Record is dead, or is unable by reason of infirmity of mind or body to continue to act.

24. No Advocate-on-Record shall without leave of the Court withdraw from the conduct of any case by reason only of non-payment by his client of fees, costs and other charges.

The contents of the restoration application, as well as, the submissions made by the learned counsel fail to meet the requirement of the above SC Rules. The restoration application is not only silent regarding the legal requirements mentioned in the SC Rules but is also in violation of the same. The application fails to show how the present ASC (Syed Amjad Shah, ASC) has appeared in this case without the instructions of the earlier AOR (Muhammad Sharif Janjua) as required under Rule 6; the application does not disclose as to why the application was not filed by the earlier AOR as per Rule 15; how did the petitioner authorize and how did the new AOR file his power of attorney without the consent of the earlier AOR or the without the leave of the Court as required under Rule 23; it is also not clear as to how the earlier AOR has been removed as no AOR can withdraw from the case without the leave of the Court as provided under Rule 24. The above shows that the instant application has been filled in violation of the SC Rules and neither the Petitioner, the AOR nor the ASC have bothered to pay any heed to the SC Rules before filing this application. This is most disconcerting especially because the new AOR (Ahmed Nawaz Chaudhry) has totally overlooked and bypassed the SC Rules. This restoration application being in flagrant disregard of the SC Rules is not maintainable. It is, therefore, dismissed with costs of Rs.20,000/- in terms of Order XXVIII, Rule 3 of the Supreme Court Rules, 1980 for being frivolous and having wasted the time of the Court. The costs shall be deposited with the Deputy Registrar (Judicial) of this Court within a fortnight from today, which shall then be paid to the respondents.

4. We, however, in the interest of justice, allow the petitioner to move an application for restoration of the aforesaid Civil Petition, if so advised, strictly in accordance with the SC Rules, which if filed, will be taken up on its own merits including the question of limitation. Copy of this order shall be dispatched to the respondents for information and shall also be placed on the record of this case so that it is available when any fresh restoration application is filed by the petitioner.

MWA/F-10/SC Application dismissed.

**2023 S C M R 1166**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Syed Hasan Azhar Rizvi, JJ**

**ALLIED BANK LIMITED---Petitioner**

**Versus**

**The COMMISSIONER OF INCOME TAX, LAHORE and others---Respondents**

Civil Petition No. 6-L of 2023, decided on 23rd May, 2023.

(Against the judgment dated 20.10.2022, passed by the Lahore High Court, Lahore in ITR No. 63041 of 2022)

**(a) Income Tax Ordinance (XLIX of 2001)---**

----Ss. 2(13), 122(5A), 210 & 211---Amendment of assessments---Commissioner (Inland Revenue)---Delegation of power under section 122(5A) of the Income Tax Ordinance, 2001 ('the Ordinance')---Scope---Powers exercised by the Commissioner under section 122(5A) of the Ordinance to amend or further amend an assessment order, if he considers that the assessment order is erroneous in so far as it is prejudicial to the interest of the revenue, could be delegated to the Additional Commissioner Inland Revenue under section 210 of the Ordinance.

The Bank of Punjab v. The Commissioner Inland Revenue, C.As. Nos. 1669 to 1692 of 2013, decided on 06.02.2019; Pak Telecom v. FBR, 2013 PTD 2151; Pakistan Tabacco v. Additional Commissioner 2013 PTD 747 and Shell (Pakistan) v. Pakistan 2013 PTD 1012 ref.

**(b) Interpretation of statutes---**

----Fiscal statute---Literal approach of interpretation---Literal approach is to be adopted while interpreting fiscal or taxing statutes, and the Court cannot read into or impute something when the provisions of a taxing statute are clear---While interpreting a taxing statute, the Court must look to the words of the statute and interpret it in light of what is clearly expressed therein, and it cannot imply something which is not expressed or import provisions in the statute so as to support any assumed deficiency.

Pearl Continental Hotel v. Government of NWFP 2010 PTD 2018; Commissioner of Income Tax v. Khurshid 2016 PTD 1393 and Hirjina v. Commissioner of Sales Tax 1971 PTD 200 ref.

**(c) Words and phrases---**

----Maxim "delegatus non potest delegare"---Scope and meaning---Delegation of power---It is a general principle of public law that where the legislature vests powers in a person, indicating that trust is being placed in his individual judgment and discretion, that person is prima facie required to exercise that power personally, however, the said principle is not absolute and yields to the language, scope and object of the statute conferring the said powers---Legislation may expressly provide for a statutory procedure to delegate such powers vested in an administrative authority, after the exercise of which, the delegate can then exercise the delegated power in their own right.

De Smith's Judicial Review 304-314 (Sweet and Maxwell, 6th ed. 2007) and Legal briefing - Delegations, authorisations and the Carltona principle, Australian Government Solicitor (June 16, 2022), https://www.ags.gov.au/publications/legal-briefing/lb-20220616#fn4 ref.

Dr. Ikram ul Haq, Advocate Supreme Court for Petitioner.

Ch. Muhammad Shakeel, Advocate Supreme Court and Naveed Akhtar, DC for Respondents.

Assisted by Muhammad Hassan Ali, Law Clerk, Supreme Court.

Date of hearing: 23rd May, 2023.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The legal question before us is as to whether the powers of the Commissioner under section 122(5A) of the Income Tax Ordinance, 2001 ("Ordinance") can be delegated to the Additional Commissioner Inland Revenue under section 210 of the Ordinance.

2. Brief facts of the case are that the petitioner furnished its income tax return for the tax year 2013, which was deemed as an assessment order under section 120 of the Ordinance. Subsequently, a show cause notice was issued to the petitioner on 16.01.2014 by the Additional Commissioner Inland Revenue under section 122(5A)

of the Ordinance, along with notice dated 16.04.2014 under section 122(9) of the Ordinance. The deemed assessment order was then amended vide order dated 28.02.2014. Aggrieved of the same, the petitioner filed an appeal before the Commissioner Inland Revenue, Appeal-I, Lahore which was partly allowed vide order dated 16.06.2014, however, with regards to the legal question before us, it was dismissed. Both the petitioner and the department then filed cross appeals before the Appellate Tribunal Inland Revenue, Lahore, which were disposed of on merits vide order dated 09.06.2022, however, on the legal question mentioned above, the appeal of the petitioner was again dismissed. The petitioner then filed an Income Tax Reference under section 133 of the Ordinance and articulated the above legal question in the following manner:

I. Whether the Tribunal was correct in law in endorsing assumption of jurisdiction by [the] Additional Commissioner under section 122(5A) of the Income Tax Ordinance?

II. Whether [the] legal obligation of "consideration" imposed by the legislature on [the] Commissioner in section 122(5A) of [the] Income Tax Ordinance, 2001 can be delegated to any other authority below the rank of a Commissioner?

The Income Tax Reference was decided against the petitioner vide the impugned judgment dated 20.10.2022, hence, the instant petition for leave to appeal.

3. The learned counsel for the petitioner has argued that the deemed assessment is made under section 120 of the Ordinance by the Commissioner and the amendment under section 122(5A) of the Ordinance is based on the said assessment if it is considered that it is erroneous or prejudicial to the interest of revenue, and therefore, only the Commissioner could amend the said order in terms of section 122(5A) of the Ordinance and the said power cannot be delegated to the Additional Commissioner. He further submits that the discretion of the Commissioner to "consider" that the assessment order is erroneous in so far as it prejudicial to the interest of revenue cannot be delegated.

4. On the other hand, the learned counsel for the department submits that the authority to delegate the powers of the Commissioner under section 122(5A) is specifically provided for under section 210(1A) of the Ordinance and further refers to section 211 of the Ordinance to point out that the powers and functions of the Commissioner delegated under section 210 of the Ordinance shall be treated as having been exercised and performed by the Commissioner. He also referred to the definition of "Commissioner" provided in section 2(13) of the Ordinance which includes any other authority vested with all or any of the powers or functions of the Commissioner. Therefore, according to the learned counsel, under section 210 of the Ordinance the powers of the Commissioner can be delegated to the Additional Commissioner Inland Revenue, the exercise of which would be treated as having been exercised and performed by the Commissioner.

5. We have heard the learned counsel for the parties and have gone through the impugned judgment of the High Court and the record of the case. The only question that requires determination is as to whether the powers exercised by the Commissioner under section 122(5A) of the Ordinance to amend or further amend an assessment order, if he considers that the assessment order is erroneous in so far as it is prejudicial to the interest of the revenue, could be delegated to the Additional Commissioner under section 210 of the Ordinance. The answer to the said question can be ascertained simply through a conjunctive reading of sections 2(13), 122(5A), 210 and 211 of the Ordinance.

6. Section 122(5A) of the Ordinance stipulates that subject to subsection (9), which requires that the taxpayer must be provided with an opportunity to be heard, the Commissioner may amend, or further amend, an assessment order if he considers the assessment order as erroneous is so far as it is prejudicial to the interest of revenue. Section 210(1) of the Ordinance specifically empowers the Commissioner to delegate all or any of the powers or functions conferred upon or assigned to the Commissioner under the Ordinance to any officer of Inland Revenue subordinate to the Commissioner, except the power of delegation. Importantly, section 210(1A) removes any ambiguity as to the power of the Commissioner to delegate his powers provided under section 122(5A) by stipulating that the Commissioner shall not delegate the powers of the amendment of assessment contained in section 122(5A) to an officer of Inland Revenue below the rank of Additional Commissioner Inland Revenue. Section 211(1) of the Ordinance then further fortifies that where by virtue of an order under Section 210 of the Ordinance, an officer of the Inland Revenue exercises a power or performs a function of the

Commissioner, such power or function shall be treated as having been exercised or performed by the Commissioner. This is further aided by section 2(13) of the Ordinance which defines "Commissioner" as a person appointed as such under section 208 and includes any other authority vested with all or any of the powers and functions of the Commissioner.

7. The learned counsel for the petitioner has attempted to interpret and read the above provisions in isolation and has argued that as a general principle of propriety, the Additional Commissioner, being junior to the Commissioner, cannot revise an order passed by the Commissioner. We are afraid that we cannot agree with the said submission of the counsel in view of the above clear provisions of the Ordinance. The legislature has specifically empowered the Commissioner under Section 210 of the Ordinance to delegate all or any of the powers or functions conferred upon him under the Ordinance, other than the power of delegation, to any officer of Inland Revenue subordinate to him. Any ambiguity regarding delegation of the powers provided under section 122(5A) is clearly dealt with under section 210(1A) of the Ordinance which specifically provides that the said powers to amend an assessment order cannot be delegated to an officer of Inland Revenue below the rank of Additional Commissioner Inland Revenue. Section 211(1) of the Ordinance then declares and affirms that where an officer of Inland Revenue exercises or performs such delegated powers or functions, such power or function shall be treated as having been performed by the Commissioner himself. This is further supported by the definition of "Commissioner" provided in section 2(13), as pointed out above. It is well settled that a literal approach is to be adopted while interpreting fiscal or taxing statutes, and the Court cannot read into or impute something when the provisions of a taxing statute are clear. While interpreting a taxing statute, the Court must look to the words of the statute and interpret it in light of what is clearly expressed therein, and it cannot imply something which is not expressed or import provisions in the statute so as to support any assumed deficiency.[1]

8. According to De Smith's Judicial Review[2], even though, based on the maxim delegatus non potest delegare[3], it is a general principle of public law that where the legislature vests powers in a person, indicating that trust is being placed in his individual judgment and discretion, that person is prima facie required to exercise that power personally, however, the said principle is not absolute and yields to the language, scope and object of the statute conferring the said powers. A legislation may expressly provide for a statutory procedure to delegate such powers vested in an administrative authority, after the exercise of which, the delegate can then exercise the delegated power in their own right. The above express provisions in the Ordinance clearly allow the Commissioner to delegate his functions and powers, which includes the power to "consider" and decide, under section 122(5A) to the Additional Commissioner, and consequently, they must be read as such. Therefore, the argument of the learned counsel for the petitioner with regards to delegation of the discretion of the Commissioner is devoid of force.

9. We have also observed that the question of law raised in the instant petition has also already been dealt with by a 3-Member Bench of this Court in an unreported judgment rendered in The Bank of Punjab[4], wherein the assumption of jurisdiction by the Additional Commissioner under section 122(5A), through delegation, has been affirmed. The said judgment upholds the view taken by the various High Courts in Pak Telecom[5], Pakistan Tobacco[6] and Shell[7]. It was also noted therein that a redressive remedy against an order passed by the Additional Commissioner under section 122(5A) is available under section 127 of the Ordinance before the Commissioner (Appeals), therefore, there is no prejudice caused to an aggrieved party. Consequently, the said judgment, being binding, also settles the matter and must be adhered to, including for the reasons provided for therein.

10. In view of the above, we see no reason to interfere in
the well-reasoned order of the High Court. Therefore, leave is refused and this petition is dismissed.

MWA/A-19/SC Petition dismissed.

**2023 S C M R 1174**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Syed Hasan Azhar Rizvi, JJ**

**MEHTAB PUBLICATION (PVT.) LTD.---Applicant**

**Versus**

**PAKISTAN ELECTRONIC MEDIA REGULATORY AUTHORITY (PEMRA) and others---Respondents**

C.M.A No. 9009/2022 in Civil Petition No.361 of 2020, decided on 26th May, 2023.

(Application for recall of order dated 04.10.2022 and restoration of C.P. No.361/2020)

**Supreme Court Rules, 1980---**

----O. IV, R. 19 & O. III, R. 9---Mode and manner of informing the Advocates regarding fixation of the cases by the Supreme Court stated.

The process of informing the Advocates regarding fixation of case is through the supply of the cause list to the respective Advocate-on-Records (AORs) under Order IV, Rule 19 of the Supreme Court Rules, 1980 ("Rules"). Otherwise, informally as a matter of tradition and by way of standing practice, the cause lists are also put up in the Bar Rooms and SMS messages are also sent to the Advocates by the Court. However, the procedure covered by the Rules is the supply of cause list to the AORs. In case of a petitioner in person, notices are served to the petitioner under Order III, Rule 9 of the Rules.

The present application for restoration of Civil Petition, which was dismissed for non-prosecution, does not agitate that the above mentioned procedure was not followed. In addition, copy of the cause list has not been placed on record to show that the case or the name of counsel did not appear therein. Further, the application states that the AOR failed to inform the counsel, as well as, the petitioner about fixation of the case, however, it does not furnish any reason as to why the AOR, who had knowledge of the fixation of the case, failed to appear in the case himself. There is no affidavit filed by the AOR affirming the facts mentioned in the application. There is no sufficient ground for allowing the present application, which is accordingly dismissed.

Syed Rifaqat Hussain Shah, Advocate-on-Record for Applicant.

Ahmad Peraiz Malik, Advocate Supreme Court (through V.L. Lahore Registry), Tahir Farooq Tarar (Head Legal PEMRA), Mohsin Hameed Dogar, (Dir. Regulations) and Barrister Syed Ali Asghar (Law Officer) for Respondents.

Date of hearing: 26th May, 2023.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**This is an application for restoration of the titled petition, which was dismissed for non-prosecution on 04.10.2022. The sole ground taken in the application is that the petitioner, as well as, the learned counsel for the petitioner did not receive any information regarding the fixation of the case on 04.10.2022.

2. It is clarified that the process of informing the Advocates regarding fixation of case is through the supply of the cause list to the respective Advocate-on-Records (AORs) under Order IV, Rule 19 of the Supreme Court Rules, 1980 ("Rules"). Otherwise, informally as a matter of tradition and by way of standing practice, the cause lists are also put up in the Bar Rooms and SMS messages are also sent to the learned Advocates by the Court. However, the procedure covered by the Rules is the supply of cause list to the AORs. In case of a petitioner in person, notices are served to the petitioner under Order III, Rule 9 of the Rules.

3. The instant application does not agitate that the above procedure was not followed. In addition, copy of the cause list has not been placed on record to show that the case or the name of learned counsel did not appear therein. Further, the application states that the AOR failed to inform the learned counsel, as well as, the petitioner about fixation of the case, however, it does not furnish any reason as to why the AOR, who had knowledge of the fixation of the case, failed to appear in the case himself. There is no affidavit filed by the AOR affirming the facts mentioned in the application.

4. For the above reasons, there is no sufficient ground for allowing the titled application, which is accordingly dismissed.

MWA/M-23/SC Application dismissed.

**2023 S C M R 1182**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Syed Hasan Azhar Rizvi, JJ**

**HILAL KHATTAK---Petitioner**

**Versus**

**The STATE and another---Respondents**

Criminal Petition No. 461 of 2023, decided on 24th May, 2023.

(Against the order of Islamabad High Court, Islamabad, dated 28.03.2023 passed in Criminal Misc. No. 326-B of 2023)

**(a) Criminal Procedure Code (V of 1898)---**

----S. 497---Penal Code (XLV of 1860), Ss. 302, 311, 324, 452, 365, 337-A(ii), 148 & 149---Qatl-i-amd, house-trespass, kidnapping or abducting with intent secretly and wrongfully to confine person, rioting armed with deadly weapons, unlawful assembly---Bail, refusal of---Allegations against the accused as to his involvement in the crime were supported by the statements of witnesses recorded by the investigating officer under section 161 of the Code of Criminal Procedure 1898 ("Cr.P.C."), which included the statements of the injured witness, and three female residents of the house where the incident took place, in addition to the statement of the complainant whose son had died in the incidence---Incident was further supported by the footage recorded on the CCTV camera of a neighbouring house---Sufficient incriminating material was thus available on the record of the case to connect the accused with the commission of the alleged offences---Accused, therefore, had no case for grant of bail under subsection (2) of section 497, Cr.P.C.---In the facts and circumstances of the case the accused was not entitled to the relief of bail even if the question of his vicarious liability for the offence of qatl-i-amd was left to be determined in trial---Petition for leave to appeal was dismissed, leave was refused, and accused was refused bail.

**(b) Criminal Procedure Code (V of 1898)---**

----S. 497---Bail---Vicarious liability, question of---Although the question of vicarious liability of an accused can also be looked into at the bail stage and it is not an absolute rule that it must always be left to be determined in trial.

Nazar Muhammad v. State PLD 1978 SC 236; Muhammad Rashid v. State 1979 SCMR 92; Asandas v. State 1975 SCMR 237 and Ghulam Nabi v. State 1996 SCMR 1023 ref.

**(c) Criminal Procedure Code (V of 1898)---**

----S. 497(1)---Bail---Offences that do not fall within the prohibitory clause of section 497(1), Cr.P.C.---Exceptions to grant of bail in such offences---It is true that in such offences, bail is to be granted as a rule, but not as of right---Bail can be refused in such offences when the case of the accused falls within any of the three well established exceptions: (i) likelihood to abscond to escape trial; (ii) likelihood to tamper with the prosecution evidence or influence the prosecution witnesses to obstruct the course of justice; and (iii) likelihood to repeat the offence.

Tariq Bashir v. State PLD 1995 SC 34; Zafar Iqbal v. Muhammad Anwar 2009 SCMR 1488; Muhammad Tanveer v. State PLD 2017 SC 733 and Iftikhar Ahmad v. State PLD 2021 SC 799 ref.

**(d) Criminal Procedure Code (V of 1898)---**

----S. 497(1)---Penal Code (XLV of 1860), Ss. 302, 311, 324, 452, 365, 337-A(ii), 148 & 149---Qatl-i-amd, house-trespass, kidnapping or abducting with intent secretly and wrongfully to confine person, rioting armed with deadly weapons, unlawful assembly---Bail, refusal of---Possibility of accused absconding or causing harm to alleged abductee---In the present case, the accused being the father of the alleged abductee appeared to have had the real motive for the commission of the alleged offences while the others abetted him in his cause---Most of the other accused persons were absconders, and the police had so far only succeeded to bring the accused and a co-accused person to justice---Thus there was a likelihood that the accused may also abscond if he was released on bail---Further, and more importantly, the alleged abductee had not yet been recovered---No one knew whether she was alive or not---There was a possibility that the accused may cause her harm or may coerce her to influence her evidence concerning the facts of the present case if he was released on bail---Two of the

exceptions to grant of bail in offences not falling within prohibitory clause of section 497(1) Cr.P.C., i.e, likelihood of repeating the offence and influencing the witness were attracted in the present case---Case of the accused, therefore, attracted not one but almost all the three exceptions which justified the declining of bail even in offences that did not fall within the prohibitory clause of section 497(1), Cr.P.C.---Petition for leave to appeal was dismissed, leave was refused, and accused was refused bail with the directions that the concerned Inspector General of Police, shall personally look into the matter and depute a police officer not below the rank of Superintendent of Police to supervise the investigation of the case and to ensure recovery of the alleged abductee at the earliest; that on recovery of the alleged abductee, she may be lodged in Dar-ul-Aman (or some other similar institution) for at least two days before recording her statement as to the facts of the case, so that she may be in a position to make her statement voluntarily without the undue influence of anyone, and her statement should preferably be recorded by the Magistrate concerned under section 164, Cr.P.C.

**(e) Criminal Procedure Code (V of 1898)---**

----S. 497---Penal Code (XLV of 1860), Ss. 445, 446, 452 & 458---Lurking house-trespass or housebreaking by night after preparation for hurt, assault or wrongful restraint---Bail, refusal of---Facts alleged in the FIR prima facie constituted the offence of house-breaking by night after preparation for causing hurt, punishable under section 458 of the P.P.C., instead of section 452 of the P.P.C.---Accused and his accomplices allegedly committed house-breaking, that is, trespassed into the complainants' house by scaling over the wall of the house, as defined in clause (2) of section 445 and that housebreaking was also committed by night, that is, after sunset and before sunrise, as defined in section 446, P.P.C.---Offence under section 458 of the P.P.C. being punishable with imprisonment upto fourteen years fell within the prohibitory clause of section 497(1) of the Cr.P.C.---Therefore, even, if the actual role of the accused was considered, his case also fell within the prohibitory clause---Petition for leave to appeal was dismissed, leave was refused, and accused was refused bail.

**(f) Penal Code (XLV of 1860)---**

----Ss. 455 & 458---Constitution of Pakistan, Art. 14---Sanctity and privacy of home---Scope---Offences of house-breaking committed after having made preparation for causing hurt or fear of hurt---Categorization as grave offences---It is the sanctity and privacy of home, as guaranteed by Article 14 of the Constitution, that the offences of house-breaking committed after having made preparation for causing hurt or fear of hurt have been categorised by the legislature as grave offences under section 455, P.P.C. (when committed at daytime) and section 458, P.P.C. (when committed at night), punishable with imprisonment upto ten years and fourteen years respectively---House of everyone is to him as his castle and fortress as well as for his defence against injury and violence as for his repose---It would be the worst position of a society if its people do not feel safe and secure even within their houses---Failure to provide protection to its citizens in their houses would amount to the failure of the State---All the organs of the State, including the judiciary, should therefore enforce the laws protecting the privacy of home strictly in letter and spirit.

Semayne case (1604) 5 Coke 91 ref.

Khalid Anwar Afridi, Advocate Supreme Court for Petitioner.

DSP Khalid Mehmood Awan, Inspector and Ashiq Shah, I.O. for the State.

Complainant in person.

Date of hearing: 24th May, 2023.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The petitioner seeks leave to appeal against an order of the Islamabad High Court, dated 28.03.2023, whereby the High Court has dismissed his application for post-arrest bail in case FIR No. 01/2023 registered at Police Station Aabpara, Islamabad, for the offences punishable under sections 302, 311, 324, 452, 365, 337-A(ii), 148 and 149 of the Pakistan Penal Code 1860 ("P.P.C.").

2. Briefly, the facts as alleged in the crime report (FIR) are that the petitioner, Hilal Khattak, and the complainant, Akbar Ali, are paternal cousins. The petitioner's daughter, Rabia Khattak, married the complainant's son, Talha Akbar, without the consent of the petitioner. On 1st January 2023 in the early hours of the morning at about 06:45, the petitioner along with some other persons, all armed with pistols, trespassed into the complainant's house by scaling over the wall of the house. Some of them besieged the complainant and

his family members at gunpoint. The petitioner and another person (allegedly Tufail Khattak, brother of the petitioner) dragged Rabia Khattak into the street by grabbing her hair. Talha Akbar attempted to rescue her, but was shot in his left ribs by the other person. He fell down injured and later on succumbed to his injury. The petitioner made a fire at the complainant, which however did not hit him. Another person, accompanying the petitioner, injured the complainant's younger son, Huzaifa, on his head. The petitioner and other persons then took Rabia Khattak with them.

3. On making a tentative assessment of the material collected during the investigation, the courts below found that sufficient incriminating material was available on record to connect the petitioner with the commission of the alleged offences and thus declined the relief of post-arrest arrest bail.

4. It has been argued by the learned counsel for the petitioner that there is no sufficient incriminating material against the petitioner to connect him with the commission of the alleged offences. In the alternative, he argued that the offence of qatl-i-amd (intentional homicide) punishable under section 302 of the P.P.C. is not attributed to the petitioner, and his vicarious liability under section 149 of the P.P.C. for that offence can only be determined after recording evidence in the trial. And since the other offences punishable under sections 452 and 365 of the P.P.C. do not fall within the prohibitory clause, he submitted, the petitioner may be allowed post-arrest bail under subsection (1) of section 497, Cr.P.C.

5. We have heard the learned counsel for the petitioner, as well as the complainant and the investigating officer, and examined the record of the case.

6. The allegations against the petitioner as to his involvement in the crime are supported by the statements of witnesses recorded by the investigating officer under section 161 of the Code of Criminal Procedure, 1898 ("Cr.P.C."), which include the statements of the injured witness, Huzaifa, and three female residents of the house where the incident took place, in addition to the statement of the complainant whose son has died in the incidence. The incident is further supported by the footage recorded on the CCTV camera of a neighbouring house. Sufficient incriminating material is thus available on the record of the case to connect the petitioner with the commission of the alleged offences. The findings of the courts below in this regard are not perverse or arbitrary, which could have justified interference by this Court. The petitioner, therefore, has no case for grant of bail under subsection (2) of section 497, Cr.P.C.

7. Although the question of vicarious liability of an accused can also be looked into at the bail stage[1] and it is not an absolute rule that it must always be left to be determined in trial, we find that in the facts and circumstances of the case the petitioner is not entitled to the relief of bail even if the question of his vicarious liability for the offence of qatl-i -amd is left to be determined in trial.

Exceptions to rule of granting bail in non -prohibitory clause offences

8. The argument of the learned counsel for the petitioner, we find, is based on a mistaken understanding of the legal position regarding grant of bail in offences that do not fall within the prohibitory clause of section 497(1), Cr.P.C. It is true that in such offences, bail is to be granted as a rule, but not as of right. Bail can be refused in such offences when the case of the accused falls within any of the three well-established exceptions: (i) likelihood to abscond to escape trial; (ii) likelihood to tamper with the prosecution evidence or influence the prosecution witnesses to obstruct the course of justice; and (iii) likelihood to repeat the offence.[2]

9. In the present case, the petitioner being the father of the alleged abductee appears to have had the real motive for the commission of the alleged offences while the others abetted him in his cause. Most of the other accused persons are absconders, and the police have so far only succeeded to bring the petitioner and another accused person to justice. There is thus a likelihood that the petitioner may also abscond if he is released on bail. Further, and more importantly, the alleged abductee Rabia Khattak has not yet been recovered. No one knows whether she is alive or not. There is a possibility that the petitioner may cause her harm or may coerce her to influence her evidence concerning the facts of this case if he is released on bail. The exceptions of likelihood of repeating the offence and influencing the witness are thus also attracted. The case of the petitioner, therefore, attracts not one but almost all the three exceptions which justify the declining of bail even in offences that do not fall within the prohibitory clause of section 497(1), Cr.P.C.

Applicability of section 458, P.P.C. and gravity of the offence of house breaking by night

10. Even otherwise, we are of the view that the facts alleged in the FIR prima facie constitute the offence of house-breaking by night after preparation for causing hurt, punishable under section 458 of the P.P.C., instead of section 452 of the P.P.C. The petitioner and his accomplices allegedly committed house-breaking, that is, trespassed into the complainants' house by scaling over the wall of the house, as defined in clause 2 of section 445 and that housebreaking was also committed by night, that is, after sunset and before sunrise, as defined in section 446, P.P.C.. The offence under section 458 of the P.P.C. being punishable with imprisonment upto fourteen years falls within the prohibitory clause of section 497(1) of the Cr.P.C. Therefore, even, if the actual role of the petitioner is considered, his case also falls within the prohibitory clause.

11. We may observe here that it is the sanctity and privacy of home, as guaranteed by Article 14 of the Constitution of Pakistan, that the offences of house-breaking committed after having made preparation for causing hurt or fear of hurt have been categorised by the legislature as grave offences under section 455 (when committed at daytime) and section 458 (when committed at night), punishable with imprisonment upto ten years and fourteen years respectively. It is said that 'the house of everyone is to him as his castle and fortress as well as for his defence against injury and violence as for his repose'[3]. It would be the worst position of a society if its people do not feel safe and secure even within their houses. Failure to provide protection to its citizens in their houses would amount to the failure of the State. All the organs of the State, including the judiciary, should therefore enforce the laws protecting the privacy of home strictly in letter and spirit.

12. For the above reasons, we find no legal fault in the order of the High Court declining post-arrest bail to the petitioner in the present case. The petition is found meritless. It is, therefore, dismissed and the leave to appeal is refused. However, it is clarified that the observations and findings made in this order as well as in the orders of the lower courts are of tentative nature, which shall have no effect upon final determination of the case by the trial court on conclusion of the trial.

13. Before parting with the order, we feel constrained to observe that the non-recovery of the alleged abductee, Rabia Khattak, despite the lapse of a period of about five months since the day of occurrence, is a serious matter, which demands the immediate attention of the superior police officers of the Islamabad Police. We, therefore, direct the Inspector-General, Islamabad Police, to personally look into the matter and depute a police officer not below the rank of Superintendent of Police to supervise the investigation of the case and to ensure recovery of the alleged abductee at the earliest. On recovery of the alleged abductee, she may be lodged in Dar-ul-Aman (or some other similar institution) in Islamabad for at least two days before recording her statement as to the facts of the case. So that she may be in a position to make her statement voluntarily without the undue influence of anyone, and her statement should preferably be recorded by the Magistrate concerned under section 164, Cr.P.C. Copy of this order be dispatched to the Inspector General, Islamabad Police for necessary action.

MWA/H-4/SC Bail refused.

**2023 S C M R 1292**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Syed Hasan Azhar Rizvi, JJ**

**SALMAN ASHRAF---Petitioner**

**Versus**

**ADDITIONAL DISTRICT JUDGE, LAHORE and others---Respondents**

Civil Petition No. 2000-L of 2020, decided on 26th May, 2023.

(Against the order of the Lahore High Court, Lahore, dated 08.12.2020, passed by in Writ Petition No.64232 of 2020)

**(a) Administration of justice---**

----Concurrent civil and criminal proceedings---Stay of criminal proceedings---Principles---Object of a civil proceeding is to enforce civil rights and obligations while that of a criminal proceeding is to punish the offender for the commission of an offence---Therefore, both the civil proceeding and criminal proceeding relating to one and the same matter can be instituted and ordinarily proceeded with simultaneously---Although there is no bar to the simultaneous institution of both proceedings, the trial in the criminal proceeding may be stopped in certain circumstances---Guiding principle in this regard is that where the criminal liability is dependent upon or intimately connected with the result of the civil proceeding and it is difficult to draw a line between a bona fide claim and the criminal act alleged, the trial in the criminal proceeding may be postponed till the conclusion of the civil proceeding---Thus, where either of these two conditions is not fulfilled, i.e., where the subject matter of civil proceeding and that of criminal proceeding are distinct, not intimately connected, or where the civil proceeding is instituted mala fide to delay the criminal prosecution, not bona fide, the criminal proceeding may not be stayed.

Aslam Zaheer v. Shah Muhammad 2003 SCMR 1691; Rafique Bibi v. Muhammad Sharif 2006 SCMR 512; Khalid Saleem v. Muhammad Ashraf 2006 SCMR 1192; Seema Fareed v. State 2008 SCMR 839; Sikandar Ali v. SHO 2021 SCMR 1486; Muhammad Akbar v. State PLD 1968 SC 281; Manak Ji v. Fakhar Iqbal 1969 PCr.LJ 411; Muhammad Tufail v. State 1979 SCMR 437; Abdul Haleem v. State 1982 SCMR 988; Habib Ahmed v. M.K.G. Scott Christian PLD 1992 SC 353; Muhammad Anwar v. Badshah Begum 1999 SCMR 1475; Sheraz Ahmad v. Fayyaz-ud-Din 2005 SCMR 1599; Abdul Ahad v. Amjad Ali PLD 2006 SC 771; Zafar v. Umar Hayat 2010 SCMR 1816; Muhammad Azam v. Muhammad Iqbal PLD 1984 SC 95; Muhammad Aslam v. State 2017 SCMR 390 and Mohammad Ahmad v. State 1972 SCMR 85 ref.

**(b) Civil Procedure Code (V of 1908)---**

----S. 9 & O. VII, R. 11---Civil Court---Bar of jurisdiction---Scope---Rejection of plaint, application for---Bar on the jurisdiction of the civil court to try a suit of civil nature or on the maintainability of a suit envisaged by section 9 or clause (d) of Rule 11 of Order VII, C.P.C. is that which is created either expressly or impliedly by some statutory law enacted by the legislature---Courts in Pakistan, cannot import an implied bar from another country's jurisprudence.

Akram v. Farman Bi PLD 1990 SC 28 ref.

**(c) Administration of justice---**

----Concurrent civil and criminal proceedings---Scope---Standard of proof required in civil and criminal proceedings is different---In the former, a mere preponderance of probability is sufficient to decide the disputed fact but in the latter, the guilt of the accused must be proved beyond any reasonable doubt---Therefore, there are chances of giving divergent judgments by the civil and criminal courts on the facts that give rise to both civil and criminal liabilities.

Zakaullah Khan v. Muhammad Aslam 1991 SCMR 2126; Richard Benjamin v. Ismail 1980 PCr.LJ 1172 and Aijaz v. Karachi Transport Corporation 2004 MLD 491 ref.

Hafeez Saeed Akhtar, Advocate Supreme Court for Petitioner.

Ch. Zulfiqar Ali, Advocate Supreme Court (via video link from Lahore) and Syed Rifaqat Hussain Shah, Advocate-on-Record for Respondents.

Dates of hearing: 25th and 26th May, 2023.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The petitioner seeks leave to appeal against an order of the Lahore High Court, dated 08.12.2020, whereby the High Court has dismissed his writ petition and upheld the order of the revisional court, dated 20.11.2020. By its order, the revisional court had dismissed the revision petition of the petitioner filed against the order of the trial court, dated 27.10.2020, dismissing the application of the petitioner for rejection of the plaint in a suit filed by respondent No.3, Ch. Muhammad Ashiq, ("respondent"). All three courts below have thus decided the matter against the petitioner.

2. Briefly, the factual background of the case is that on 2 June 2007, the petitioner filed a suit for recovery of the amount of Rs.174,406,250/- against the respondent. In his suit, the petitioner asserted that he and his late father paid the said amount to the respondent, vide agreements dated 06.08.2003, 26.05.2004 and 13.07.2004 and certain receipts, to purchase for them some land and plots in different phases of DHA, Lahore; but the respondent did not fulfil the commitment nor did he return the said amount. Meanwhile, the National Accountability Bureau ("NAB") also took cognizance of the alleged commission of the offence by the respondent, of defrauding the members of the public and inducing them to deliver him a huge amount of money on the pretext of procuring plots for them in DHA, Lahore. The affectees of the alleged offence included the petitioner; therefore, in the trial of that offence the petitioner appeared as a witness and also tendered the said agreements and receipts allegedly executed by the respondent, in the prosecution evidence. While relying on the prosecution evidence, which included the testimony of the respondent as well as the said agreements and receipts, the Accountability Court convicted the respondent vide its judgment dated 27.11.2012. The respondent preferred an appeal against the judgment of the Accountability Court before the Lahore High Court, which is pending adjudication.

3. In addition to that appeal, the respondent also instituted a suit for declaration on 7 June 2013 against the petitioner, wherein he asserted that the agreements and receipts on the basis of which the petitioner had instituted the suit for recovery of the amount against him are forged, fabricated and fictitious. In the suit, he prayed that the said agreements and receipts may be declared to be so and thus ineffective against his rights. The trial court consolidated the proceedings of the suit of the respondent with the suit of the petitioner and framed consolidated issues. The respondent produced his evidence on the consolidated issues, and the hearing of the case was fixed for evidence of the petitioner when he filed on 2 September 2020 an application under Rule 11 of Order VII of the Code of Civil Procedure, 1908 ("C.P.C."), for rejection of the plaint in the suit of the respondent.

4. The application of the petitioner for rejection of the plaint was mainly based upon two grounds: (i) the suit of the respondent is time-barred, and (ii) the suit is not maintainable in view of the judgment of the Accountability Court, wherein the agreements and receipts have been relied upon for convicting the respondent. The trial court dismissed the application on 27 October 2020 by holding that in the circumstances of the case, the question of limitation could not be decided without recording evidence, and that the scope of the jurisdiction of a civil court and that of a criminal court in regard to the documents in question (agreements and receipts) was different. The revision petition filed by the petitioner was dismissed by the District Court on 20 November 2020. And by the impugned judgment passed on 8 December 2020 in the writ petition of the petitioner, the High Court upheld the orders of the courts below. The High Court observed that in the present case, the question of limitation was a mixed one of law and facts, which was not to be decided summarily but rather after recording evidence of the parties, and that the civil and criminal proceedings regarding the veracity of the documents could be conducted simultaneously.

5. Before us, the learned counsel for the petitioner pressed onlythe second ground and contended that once a matter (validity of the agreements and receipts) is decided by a criminal court, the same cannot be re-agitated in a suit before a civil court. Such a suit, he contended, is barred by law. In support of his contention, he placed reliance on three judgments: Olas Khan v. Chairman NAB (PLD 2018 SC 40), Zahida Sattar v. Federation of Pakistan (PLD 2002 SC 408) and Hunter v. Chief Constable of West Midlands ([1981] 3 All ER 727).

6. On the other hand, the learned counsel for the respondent submitted that civil proceedings are distinct from criminal proceedings and can be conducted simultaneously, and that civil courts have plenary jurisdiction to decide upon all matters of civil nature unless it is shown that their jurisdiction is either expressly or impliedly barred. He relied upon Jan Muhammad v. Nazir Ahmad (2004 SCMR 612), Province of Punjab v. Yaqoob Khan (2007 SCMR 554), Nazir Khan v. Ahmad (2008 SCMR 539), Hashmat Ullah v. State (2019 SCMR 1730) and SNGPL v. Noor CNG Filling Station (2022 SCMR 1501).

7. We have considered the arguments of the learned counsel for the parties, read the cases cited by them and examined the record of the case.

8. It hardly needs reiteration that the object of a civil proceeding is to enforce civil rights and obligations while that of a criminal proceeding is to punish the offender for the commission of an offence. It is, therefore, a well-established legal position in our jurisdiction that both the civil proceeding and criminal proceeding relating to one and the same matter can be instituted and ordinarily proceeded with simultaneously.[1] Although there is no bar to the simultaneous institution of both proceedings, the trial in the criminal proceeding may be stopped in certain circumstances.[2] And the guiding principle in this regard is also well-defined. It is that where the criminal liability is dependent upon or intimately connected with the result of the civil proceeding and it is difficult to draw a line between a bona fide claim and the criminal act alleged, the trial in the criminal proceeding may be postponed till the conclusion of the civil proceeding.[3] Thus, where either of these two conditions is not fulfilled, i.e., where the subject matter of civil proceeding and that of criminal proceeding are distinct, not intimately connected,[4] or where the civil proceeding is instituted mala fide to delay the criminal prosecution, not bona fide,[5] the criminal proceeding may not be stayed.

9. It is notable that the whole jurisprudence on the subject, as briefly stated above, has developed while dealing with the question of staying criminal proceeding till the conclusion of the connected civil proceeding. Not a single case is brought to our notice wherein the question of staying civil proceeding till the culmination of the criminal proceeding had been raised. The reason is not far to see. The decision of a civil court as to any right, title or status, which only that court can finally decide, may have a substantial bearing upon a constituent ingredient of the offence being tried by the criminal court.[6] On the other hand, any finding of a criminal court on a fact constituting the offence tried by that court is irrelevant in a civil proceeding to decide the same fact in the course of adjudicating upon and enforcing civil rights and obligations.[7] The petitioner has even gone a step farther than that. As he has not prayed that the civil proceeding may be stayed till a final decision in the criminal proceeding but rather for quashing the civil proceeding by rejecting the plaint therein, on the basis of some findings of facts recorded in the criminal proceeding by the criminal trial court.

10. Section 9, C.P.C., provides that the civil courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. And as per clause (d) of Rule 11 of Order VII, C.P.C., a plaint can be rejected where the suit appears to be barred by any law. Thus, to succeed in his plea for rejection of the plaint in the suit of the respondent, the petitioner is to show under which law the suit of the respondent is either expressly or implied barred. The petitioner has pointed out no such law.

11. The reliance of the petitioner on the case of Zahida Sattar is misconceived. In that case, this Court upheld the order of the civil court rejecting the plaint by observing that Section 13 of the National Accountability Ordinance 1999 ("NAB Ordinance") conferred exclusive jurisdiction on the Accountability Court to adjudicate upon the matter that was agitated in the civil suit and the jurisdiction of the civil court to try that matter was impliedly barred. Section 13 of the NAB Ordinance has no application to the matter involved in the suit filed by the respondent.

12. Similarly, the reliance of the petitioner on the case of Olas Khan is misplaced. In that case, the Court was dealing with the question on the jurisdiction of the High Court to grant bail to an accused arrested for an offence under the NAB Ordinance. The question of any express or implied bar on the jurisdiction of the civil court to try a matter was neither raised nor decided therein. Nothing turns out of a passing remark made in that case, and referred to by the learned counsel for the petitioner, that the NAB Ordinance is a special statute hybrid in nature and is a fusion of criminal liability and civil obligations. The learned counsel for the

petitioner did not pinpoint any provision of the NAB Ordinance, which confers exclusive jurisdiction on the Accountability Court to enforce civil obligations. He only referred to section 33-E of the NAB Ordinance, which provides that any fine or other sum due under the Ordinance, or as determined to be due by a Court, shall be recoverable as arrears of land revenue. Similar provisions are contained in section 544-A(2) of the Code of Criminal Procedure, 1898 ("Cr.P.C.") for recovery of the compensation awarded under subsection (1) of that Section. It has never been urged that a criminal court enforces civil obligations by taking proceedings to recover the amount of compensation as an arear of land revenue under section 544-A. Rather, section 546, Cr.P.C. envisages the institution of a civil suit relating to the same matter, despite the recovery of the compensation under section 544-A.

13. The third case relied upon by the learned counsel for the petitioner is that of Hunter decided by the U.K. House of Lords. In Hunter, the House of Lords essentially held that a civil action by a person to prove that the confession on the basis of which he was convicted in the criminal trial had been procured by force, in the disguise of a claim for damages, is an abuse of the process of the court and such a civil action is liable to be struck out. The learned counsel for the petitioner, by taking an analogy from that case, argued that as a piece of evidence (confessional statement) found valid and relied upon in the criminal proceeding was not allowed to be challenged in a civil action in Hunter, the evidence of the agreements and receipts found valid and relied upon by the Accountability Court in the present case cannot be challenged in a civil suit by the respondent. We find the analogy to be in correct. While certain agreements and receipts, such as those involved in the present case, may give rise to civil rights and obligations, a confessional statement made in a criminal case does not. Therefore, the suit that challenges the validity of such agreements and receipts is a suit of a civil nature within the meaning and scope of section 9, C.P.C., but the suit challenging the validity of such a confessional statement is not. Further, the bar on the jurisdiction of the civil court to try a suit of civil nature or on the maintainability of a suit envisaged by section 9 or clause (d) of Rule 11 of Order VII, C.P.C. is that which is created either expressly or impliedly by some statutory law enacted by the legislature. The courts in Pakistan, as held by this Court in Akram v. Farman Bi,[8] cannot import an implied bar from another country's jurisprudence.

14. Needless to mention that the standard of proof required in civil and criminal proceedings is different. In the former, a mere preponderance of probability is sufficient to decide the disputed fact but in the latter, the guilt of the accused must be proved beyond any reasonable doubt.[9] There are, therefore, chances of giving divergent judgments by the civil and criminal courts on the facts that give rise to both civil and criminal liabilities.[10] The contention made in the present case by the petitioner appears surprising to us in that it has the potential of causing detriment to his claim. The judgment of the Accountability Court on which the petitioner is now relying is under judicial scrutiny of the first appellate court, i.e., the High Court, and any judgment passed by the High Court may further be challenged in this Court. What if the High Court or this Court comes to a conclusion contrary to that of the trial court and acquits the respondent of the charge giving him the benefit of any reasonable doubt? Would the claim of the petitioner against the respondent for recovery of the amount come to an end? Not, in our view. The petitioner will still have the chance of success in his claim in the civil proceeding if the civil court finds that the preponderance of probability tilts in his favour.

15. For the above reasons, we find no legal error in the concurrent orders of the three courts below. This petition is found meritless. It is therefore dismissed and the leave to appeal is declined.

MWA/S-19/SC Petition dismissed.

**2023 S C M R 1311**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Syed Hasan Azhar Rizvi, JJ**

**Prof. Dr. MANZOOR HUSSAIN and others---Petitioners**

**Versus**

**ZUBAIDA CHAUDHRY and others---Respondents**

Civil Petition No. 1942 of 2022, decided on 26th May, 2023.

(Against the judgment dated 03.03.2022, passed by the Islamabad High Court, Islamabad in W.P. No. 3563 of 2017)

**Federal Ombudsmen Institutional Reforms Act (XIV of 2013)---**

----S. 14(4)---Federal Ombudsmen Institutional Reforms (Processing of Representations) Rules, 2014, Rr. 2(1)(b) & 8(3)---Officer nominated by the President under section 14(4) of the Federal Ombudsmen Institutional Reforms Act, 2013, powers of---Such officer only processes the representations filed before the President---Decision-making powers of the President are not delegated to the said officer as the final decision on the representation is taken only by the President.

The nominated officer under section 14(4) of the Federal Ombudsmen Institutional Reforms Act, 2013 ('the Act') only processes the representation before sending the case to the President for his decision. Processing the representation comprises of the actions or steps towards achieving the required objective i.e. a decision on the representation by the President. The views so expressed by the nominated officer in the form of recommendations/proposals form part of the procedure to process the representation before the case is sent to the President and the final decision thereon is taken only by the President.

President is specifically authorized to nominate an officer to process a representation by preparing the case and giving his/her views on the said representation, which are likely to be only in the shape of recommendations/proposals, and in no manner can it be stated that the nominated officer is deciding the representation. The case is then placed before the President for decision thereon and the power to decide the representation resides solely with and is exercised only by the President after due application of mind.

Power to process a representation, by preparing the case, and the power to decide that representation, after due application of mind, are inherently distinct functions and cannot be equated or conflated. The function of processing a representation by the nominated officer is only ancillary to the main objective of decision on the representation by the President.

For practical purposes, the role of the nominated officer is only to consolidate and simplify the record, and prepare the case before him so that it can be presented before the President for his decision. This in no manner dilutes the decision-making powers of the President because the discretion to accept or reject a representation is retained and vested entirely in the President himself, who, while deciding the representation, may agree with the recommendations/proposals so forwarded by the nominated officer, by adopting the reasons given by the nominated officer and/or also for his own reasons, or disagree with them for his own reasons and decide the representation after assessing the available record and independently applying his mind to the matter. Consequently, the power of the President to decide the representation himself remains intact and cannot be said to have been delegated to any other officer nominated by him under section 14(4) of the Act.

United Woollen Mills Ltd. Workers' Union v. United Woollen Mills 2010 SCMR 1475; Mollah Ejahar v. Government of East Pakistan PLD 1970 SC 173; Gouranga v. The Controller of Import and Export PLD 1970 SC 158; Government of Pakistan v. Farheen 2009 PLC (C.S.) 966 and Razia Jafar v. Government of Balochistan 2007 SCMR 1256 ref.

Sabir Hussain Tanoli, Advocate Supreme Court along with Muhammad Zahid, Assistant Registrar for Petitioners.

Respondent No. 1 in person along with Ruqia Samee, Advocate Supreme Court.

Raja Shafqat Abbasi, D.A.G. and Muhammad Saleem, Dir. Legal (President House) for Government of Pakistan.

Assisted by Muhammad Hassan Ali, Law Clerk, Supreme Court.

Date of hearing: 26th May, 2023.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**The matter involved in the instant case is with regards to the interpretation of section 14(4) of the Federal Ombudsmen Institutional Reforms Act, 2013 ("Act of 2013"), which provides that a representation made to the President shall be "processed" in the office of the President by a person who has been or is qualified to be a Judge of the Supreme Court or has been a Wafaqi Mohtasib or Federal Tax Ombudsman. This raises the question whether, in the absence of any specific power to delegate decision-making powers of the President under the Act of 2013, the word "processed" means that the decision-making powers of the President have been delegated to the said officer under section 14(4) and the President stands divested of the said powers.

2. Briefly, the facts of the case are that respondent No. 1, an Associate Professor of Botany at the Hazara University, Mansehra, alleged harassment at her workplace by the petitioners. After her departmental complaint was not processed, she filed a complaint before the Federal Ombudsman under section 8(1) of the Protection against Harassment of Women at the Workplace Act, 2010 ("Act of 2010"). The complaint was allowed on 20.03.2017 by imposing a minor penalty of censure on the petitioners along with a fine of Rs. 1,00,000/- each payable by the petitioners to respondent No.1. Against the said order of the Ombudsman, petitioners Nos. 2 and 3, and respondent No.1 filed their respective representations before the President under section 9 of the Act of 2010, with the former seeking setting aside of the order of the Ombudsman and the latter seeking enhancement of the minor penalties to major penalties. Vide order dated 17.07.2017, the President accepted the representations of the petitioners and dismissed the representation of respondent No. 1. Respondent No. 1 then filed a writ petition before the High Court assailing the order of the President. The writ petition was disposed of vide the impugned judgment dated 03.03.2022 whereby, without adverting to the merits of the case, it was held that the President could not have delegated his decision-making authority to any other person or official, therefore, the order of the President dated 17.07.2017 was set aside and the matter was remanded with the directions that after the representation has been processed, it shall be placed before the President for his consideration and decision.

3. We have heard the learned counsel for the parties and respondent No.1 in person, and have perused the record with their able assistance. We have noted that the representations made to the President were processed by the Consultant (Legal Affairs), who forwarded the case, along with his recommendation/proposal regarding the representations, to the President on 06.06.2017 for decision of the President. Thereafter, the President, after examining the recommendation/proposal and the record of the case, approved the said recommendation/proposal on 13.07.2017, thereby, deciding the representations by accepting the representations of the petitioners and dismissing the representation filed by respondent No. 1, which was communicated to the parties vide order dated 17.07.2017.

4. We have gone through section 14 of the Act of 2013. Section 14(1) stipulates that any person aggrieved by a decision, order, findings or recommendations of an Ombudsman may file a representation to the President within 30 days of the decision, order, findings or recommendations. Section 14(4) of the Act of 2013 provides that the representation shall be "processed" in the office of the President by a person who had been or is qualified to be a Judge of the Supreme Court or has been a Wafaqi Mohtasib or Federal Tax Ombudsman. For the purposes of "processing" representations, as provided for under section 14(4) of the Act of 2013, the Federal Government has notified the Federal Ombudsmen Institutional Reforms (Processing of Representations) Rules, 2014 ("Rules") which stipulate the procedure of processing a representation.[1]

5. Under Rule 3(1) of the Rules, a person who fulfills the conditions provided in section 14(4) of the Act of 2013 and is nominated by the President as such, shall process the representations. Rule 4 provides that this nominated officer may authorize an officer from amongst his supporting staff to correspond with the offices of the Federal Ombudsman and agencies, complainants and other organizations for processing representations, including summoning of record, inviting comments, communicating the decision of the President and other allied matters.[2] Under Rule 6, this authorized officer shall summon the relevant record

from the concerned office of the Ombudsman, which includes the complaint, reply thereto etc. Under Rule 7(1), the authorized officer shall provide a copy of the representation with annexures, if any, to the other party, inviting its comments thereon. Rule 7(2) provides that where no such comments are received, the matter shall be processed and decided on the basis of the available record. Therefore, the above rules indicate that before the representation is processed, it is initially dealt with on the administrative side.

6. Rule 8(1) then provides that on receipt of the record, the authorized officer shall pass on the same to the nominated officer for processing the representation. Under Rule 8(2), the nominated officer may seek assistance from experts and other officers to reach at the right conclusion for decision on merit by the President. Importantly, Rule 8(3) stipulates that after processing the representation, the nominated officer shall, "expressing his views" thereon, send the case to the Secretary to the President for decision by the President. As per the language of the Rule 8(3), it is mandatory on the nominated officer to express his views on the representation, which naturally would include the reasons upon which the said views are based. Rule 9(1) then further fortifies that the Secretary to the President shall then place the case before the President "for his decision" under the Act of 2013 and the relevant legislation.

7. In view of the above, it is apparent that the nominated officer only processes the representation before sending the case to the President for his decision. "Process" is defined as "a series of actions or steps towards achieving a particular end"[3] or "a mode, method, or operation, whereby a result or effect is produced"[4]. Processing the representation therefore comprises of the actions or steps towards achieving the required objective i.e. a decision on the representation by the President. The views so expressed by the nominated officer in the form of recommendations/proposals form part of the procedure to process the representation before the case is sent to the President and the final decision thereon is taken only by the President. For this purpose, even though not being necessary, the President may also give a personal hearing to the parties, if required, as can be inferred from section 15 of the Act of 2013.

8. It is important to note that the power to process a representation, by preparing the case, and the power to decide that representation, after due application of mind, are inherently distinct functions and cannot be equated or conflated. The function of processing a representation by the nominated officer is only ancillary to the main objective of decision on the representation by the President. According to De Smith's Judicial Review[5], Courts have even conceded that an authority has an implied power to entrust to a group of its own members with the authority to investigate, to hear evidence and make recommendations in a report, provided that (a) it retains the power to make decisions in its own hands[6] and receives a report full enough to enable it to comply with its duty to "hear" before deciding, and (b) the context does not indicate that it must perform the entire adjudicatory process itself. Where there are express statutory provisions to this effect, the Court has to consider whether the Minister or Governor or, as in this case, the President, had to act "judicially" in some respect and has failed to do so. The respect in which he has to observe judicial procedure or act judicially will depend on the statutory or other provisions under which the matter arises.[7] For the purposes of the question raised in the instant matter, it is apparent from the provisions noted above that the President is specifically authorized to nominate an officer to process a representation by preparing the case and giving his/her views on the said representation, which are likely to be only in the shape of recommendations/ proposals, as in the instant case, and in no manner can it be stated that the nominated officer is deciding the representation. The case is then placed before the President for decision thereon and the power to decide the representation resides solely with and is exercised only by the President after due application of mind.

9. It is also evident that the object of the requirement of the nominated officer, a person of high legal standing who has acted or is qualified to act in a judicial or quasi-judicial capacity, to process the representation, which might involve significant substantive and technical legal questions, and to express his views on the said representation before sending the case to the President for decision thereon, is only to assist the President in deciding the representation. The President may or may not be a person with a legal background[8] and, along with deciding representations filed under other diverse laws,[9] has various other overbearing and important functions and duties as head of State, which include the functions, powers and duties of the President under the Constitution[10], and under other laws.[11] As such, in view of the demanding

and arduous position that the President holds, and, therefore, for practical purposes, the role of the nominated officer is only to consolidate and simplify the record, and prepare the case before him so that it can be presented before the President for his decision. This in no manner dilutes the decision-making powers of the President because the discretion to accept or reject a representation is retained and vested entirely in the President himself, who, while deciding the representation, may agree with the recommendations/ proposals so forwarded by the nominated officer, by adopting the reasons given by the nominated officer and/or also for his own reasons, or disagree with them for his own reasons and decide the representation after assessing the available record and independently applying his mind to the matter.

10. To this effect, two decisions of the President have also been placed on the record for reference purposes by the representative of the President's office. In the first decision[12] the President had disagreed with the recommendations of the nominated officer, gave a personal hearing to the parties, and decided the representations giving detailed reasons for the same. The second decision[13] indicates that even though the President had agreed with the recommendations of the nominated officer, he also gave his own reasons for deciding the representation in the said manner, indicating due application of mind while deciding the matter. As such, it is apparent that even though the views of the nominated officer in the form of such recommendations/proposals may assist the President in coming to a decision regarding the representation, however, it is only the President who decides the representation after conscious application of independent mind on the strength of tangible and material evidence, as is required under the law.[14] Consequently, the power of the President to decide the representation himself remains intact and cannot be said to have been delegated to any other officer nominated by him under section 14(4) of the Act of 2013.

11. In view of the above, we cannot agree with the High Court that the processing of the representation, as provided under section 14(4) of the Act of 2013 and supplemented and explained through the Rules, amounts to delegation of the decision-making powers of the President while deciding a representation. Therefore, the impugned judgment, having failed to take into account the provisions mentioned above, and premised on the ground that the representation had been decided by the nominated officer, who had processed the representation, instead of the President, cannot be sustained.

12. Resultantly, this petition is converted into an appeal and is disposed of in the terms that the impugned judgment is set aside and the matter is remanded to the High Court to decide the writ petition of respondent No.1 on merits.

MWA/M-26/SC Order accordingly.

**2023 S C M R 1676**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, Jamal Khan Mandokhail and Ayesha A. Malik, JJ**

**The STATE---Petitioner**

**Versus**

**Chaudhry MUHAMMAD USMAN---Respondent**

Criminal Petition No. 112 of 2020, decided on 15th June, 2023.

(Against the judgment of the Islamabad High Court, dated 15.01.2020 passed in Criminal Revision No.84 of 2019)

**Criminal Procedure Code (V of 1898)---**

----Ss. 94 & 265-C---Summons to produce documents---Powers of Trial Court under section 94, Cr.P.C.---Scope--- Even before the commencement of the trial, an accused can apply to the Trial Court to exercise its power under section 94, Cr.P.C., and direct the prosecution or the complainant to produce a document, in its or his possession or power, which is not covered under section 265-C, Cr.P.C., if the production of that document is necessary or desirable for the purposes of the inquiry or trial---Even before entering on his defence, an accused can make an application for the production of a document under section 94, Cr.P.C. despite the provisions of section 265-F(7), Cr.P.C., which provides a similar opportunity to him at the stage of defence evidence.

A bare reading of section 94, Cr.P.C. shows that there is no limitation as to the stage of the inquiry or trial when a court can, in the exercise of its power under this Section, make an order for the production of any document. The only condition for the exercise of the power under section 94 is that the production of the document must be necessary or desirable for the purposes of the inquiry or trial before the court. The word 'whenever' in section 94 clearly indicates that a court can exercise the power of requiring the production of any document under this section at any stage of the inquiry or trial.

Further, section 94 does not restrict as to whose point of view, whether of the prosecution or the accused, the required document may be necessary or desirable for the purposes of the inquiry or trial. A court being a neutral arbiter does not act for either the prosecution or the accused but for the dispensation of justice. And for the dispensation of justice, the court is to ascertain the truth in respect of the matter under inquiry or trial before it. The production of a document that would facilitate the court in this regard is to be considered necessary or desirable for the purposes of the inquiry or trial. It is immaterial whether the production of such a document would support the prosecution case or the defence of the accused. Therefore, any party may at any stage of the inquiry or trial apply to the court, under section 94, for the production of a document and is entitled to its production if it satisfies the court that the production of that document is necessary or desirable for the purposes of such inquiry or trial.

Muhammad Rahim v. Emperor AIR 1935 Sindh 13 ref.

There may be cases in which owing to dishonesty, negligence or any other reason, the prosecution does not produce certain documents with the police report, which may establish that there is no probability of the accused being convicted of any offence or the charge against the accused is groundless, and the production thereof is thus necessary or desirable for the purposes of the inquiry or trial. But because such documents are not filed with the police report, the same will not be supplied to the accused under section 265-C, Cr.P.C. In such cases, it would not be just and fair to the accused to reject his application for the production of such documents and to let him undergo the ordeal of protracted trial proceedings and wait for the stage of defence evidence. Similarly, the documents which are not produced by the prosecution with the police report but are relevant to the matter under the inquiry or trial and to use them for his defence, the accused is legally required to confront the prosecution witnesses with those documents in their cross-examination. In such a circumstance also, it would be in the interest of justice that the application of the accused made under section 94 for their production is allowed. Otherwise, it would incur unnecessary delay, expense and inconvenience to recall the prosecution witnesses at the stage of defence evidence only for the purpose of confronting them with such documents.

The provision of subsection (7) of section 265-F, Cr.P.C., under which the accused, after entering on his defence, can apply to the trial court to issue any process for compelling the production of any document, does not in any way affect the power of the trial court under section 94(1), Cr.P.C. The provisions of section 94(1) have not been made subordinate by the legislature by the use of the expression, 'Subject to the other provisions of this Code', nor have the provisions of section 265-F(7) been given any overriding effect by using therein the expression, 'Notwithstanding anything contained in other provisions of this Code'. Section 265-F(7), therefore, neither controls nor limits the power of a court under section 94(1). In essence, the provisions of these two Sections differ from each other in their extent and scope. They are not opposed to each other. Section 94(1) affords both the parties to an inquiry or trial (not to the accused alone) the opportunity of causing the production of any document at any stage of such inquiry or trial, with the condition that the party applying for it must satisfy the court that the production of the required document is necessary or desirable for the purposes of the inquiry or trial. Section 265-F(7), on the other hand, only gives the accused another similar opportunity at the stage of his defence subject to a lesser condition, which is that his application should not be for the purpose of vexation or delay or defeating the ends of justice.

Tanveer Iqbal, Advocate Supreme Court, Raja Muhammad Shahfqat Abbasi, D.A.G., Hafiz Bilal Bin Akbar, Deputy Director, DRAP and Ms. Sidra Fatima Hashmi, Assistant Director, FIA for Petitioner.

Khawaja Muhammad Farooq Mehta, Senior Advocate Supreme Court for Respondent.

Date of hearing: 15th June, 2023.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**The petitioner seeks leave to appeal against a judgment of the Islamabad High Court, dated 15.01.2020, (impugned judgment) whereby the High Court has accepted the revision petition of the respondent filed against an order of the trial court, dated 14.05.2019. The trial court had, by its order, dismissed an application of the respondent filed under section 265-C read with section 94 of the Code of Criminal Procedure, 1898 (Cr.P.C.) for the production of certain documents. By the impugned judgment, the High Court has set aside the order of the trial court and allowed the said application of the respondent.

2. Briefly, the facts necessary to be stated for the decision of the present petition are that the respondent, along with other accused persons, was facing trial for certain offences punishable under the Drug Regulatory Authority of Pakistan Act, 2012 and the Drugs Act, 1976. The trial court delivered to the accused persons, including the respondent, the copies of the documents relied upon by the prosecution as mandated by section 265-C, Cr.P.C., and adjourned the hearing for framing of the charge. However, before the charge was framed, the respondent made an application under section 265-C read with section 94 of the Cr.P.C., for directing the Drug Regulatory Authority of Pakistan, on whose complaint the criminal proceedings had been initiated, to produce 23 documents mentioned in the application. The respondent asserted in the application that the Drug Regulatory Authority of Pakistan Act and the Drugs Act provided a legal mechanism for launching any prosecution thereunder, and that the said documents were necessary for the purpose of forming an opinion by the court as to whether the prosecution was lawful under the said Acts.

3. By its order dated 14.05.2019, the trial court dismissed the application of the respondent with the observation that in compliance with section 265-C, Cr.P.C., the copies of the documents relied upon by the prosecution had been supplied to all the accused persons and that it was the prosecution which had to lead its evidence at first and thereafter the accused persons would be provided an opportunity to adduce or summon the evidence required for their defence. The respondent challenged the order of the trial court in the High Court invoking its revisional jurisdiction. The High Court observed that the trial court had not given any valid justification for withholding the production of the documents mentioned in the application, which were necessary to enable the respondent to ask the relevant questions to the prosecution witnesses in their cross-examination. The High Court, thus, allowed the revision petition of the respondent and accepted his application for the production of the documents by the impugned judgment. Hence, the State, i.e., the prosecution, filed the present petition.

4. We have heard the learned counsel for the parties and examined the record of the case.

5. The questions of law that have fallen for our consideration are: (i) whether before the commencement of the trial, an accused can apply to the trial court to exercise its power under section 94, Cr.P.C., and direct the prosecution or the complainant to produce any document, in its or his possession or power, which is not covered under section 265-C, Cr.P.C. and (ii) whether before entering on his defence, an accused can make an application for the production of any document under section 94 despite the provisions of section 265-F(7), Cr.P.C., which provides a similar opportunity to him at the stage of defence evidence.

6. Before embarking upon the discussion on these questions, we find it appropriate to reproduce the relevant provisions of sections 94(1) and 265-F(7), Cr.P.C., for the convenience of reference:

94. Summons to produce document or other thing: (1) Whenever any Court, or, any officer incharge of a police-station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it or to produce it, at the time and place stated in the summons or order: .....

265-F. Evidence for prosecution: .....

(7) If the accused, or any one of several accused, after entering on his defence, applies to the Court to issue any process for compelling the attendance of any witness for examination or the production of any document or other thing, the Court shall issue such process unless it considers that the application is made for the purpose of vexation or delay or defeating the ends of justice, such ground shall be recorded by the Court in writing.

A bare reading of section 94 shows that there is no limitation as to the stage of the inquiry or trial when a court can, in the exercise of its power under this Section, make an order for the production of any document. The only condition for the exercise of the power under section 94 is that the production of the document must be necessary or desirable for the purposes of the inquiry or trial before the court. The word 'whenever' in section 94 clearly indicates that a court can exercise the power of requiring the production of any document under this Section at any stage of the inquiry or trial.

7. Further, section 94 does not restrict as to whose point of view, whether of the prosecution or the accused, the required document may be necessary or desirable for the purposes of the inquiry or trial. A court being a neutral arbiter does not act for either the prosecution or the accused but for the dispensation of justice. And for the dispensation of justice, the court is to ascertain the truth in respect of the matter under inquiry or trial before it. The production of a document that would facilitate the court in this regard is to be considered necessary or desirable for the purposes of the inquiry or trial. It is immaterial whether the production of such a document would support the prosecution case or the defence of the accused. Therefore, any party may at any stage of the inquiry or trial apply to the court, under section 94, for the production of a document and is entitled to its production if it satisfies the court that the production of that document is necessary or desirable for the purposes of such inquiry or trial.

8. There may be cases in which owing to dishonesty, negligence or any other reason, the prosecution does not produce certain documents with the police report, which may establish that there is no probability of the accused being convicted of any offence or the charge against the accused is groundless, and the production thereof is thus necessary or desirable for the purposes of the inquiry or trial. But because such documents are not filed with the police report, the same will not be supplied to the accused under section 265-C, Cr.P.C. In such cases, it would not be just and fair to the accused to reject his application for the production of such documents and to let him undergo the ordeal of protracted trial proceedings and wait for the stage of defence evidence. Similarly, the documents which are not produced by the prosecution with the police report but are relevant to the matter under the inquiry or trial and to use them for his defence, the accused is legally required to confront the prosecution witnesses with those documents in their cross-examination. In such a circumstance also, it would be in the interest of justice that the application of the accused made under section 94 for their production is allowed. Otherwise, it would incur unnecessary delay, expense and inconvenience to

recall the prosecution witnesses at the stage of defence evidence only for the purpose of confronting them with such documents.

9. The provision of subsection (7) of section 265-F, Cr.P.C., under which the accused, after entering on his defence, can apply to the trial court to issue any process for compelling the production of any document, does not in any way affect the power of the trial court under section 94(1), Cr.P.C. The provisions of section 94(1) have not been made subordinate by the legislature by the use of the expression, 'Subject to the other provisions of this Code', nor have the provisions of section 265-F(7) been given any overriding effect by using therein the expression, 'Notwithstanding anything contained in other provisions of this Code'. Section 265-F(7), therefore, neither controls nor limits the power of a court under section 94(1). In essence, the provisions of these two Sections differ from each other in their extent and scope. They are not opposed to each other. Section 94(1) affords both the parties to an inquiry or trial (not to the accused alone) the opportunity of causing the production of any document at any stage of such inquiry or trial, with the condition that the party applying for it must satisfy the court that the production of the required document is necessary or desirable for the purposes of the inquiry or trial. Section 265-F(7), on the other hand, only gives the accused another similar opportunity at the stage of his defence subject to a lesser condition, which is that his application should not be for the purpose of vexation or delay or defeating the ends of justice.

10. We thus answer both the questions in affirmative and conclude on question (i) that even before the commencement of the trial, an accused can apply to the trial court to exercise its power under section 94, Cr.P.C., and direct the prosecution or the complainant to produce a document, in its or his possession or power, which is not covered under section 265-C, Cr.P.C., if the production of that document is necessary or desirable for the purposes of the inquiry or trial and on question (ii) that even before entering on his defence, an accused can make an application for the production of a document under section 94 despite the provisions of section 265-F(7), Cr.P.C., which provides a similar opportunity to him at the stage of defence evidence.

11. When we examine the order of the trial court and the judgment of the High Court in the light of the above legal position, we find that the trial court erred in principle in dismissing the application of the respondent without correctly understanding the scope of the provisions of section 94, Cr.P.C., whereas the High Court though correctly understood the scope of these provisions but fell into an error in applying the same to the facts of the case by allowing the application of the respondent without first determining how the production of each of the 23 documents mentioned in the application was necessary or desirable for the purposes of the inquiry or trial. The respondent has asserted in the application that the Drug Regulatory Authority of Pakistan Act and the Drugs Act provide a legal mechanism for launching any prosecution thereunder, and that the said documents are necessary for the purpose of forming an opinion by the court as to whether the prosecution was launched lawfully under the said Acts. The order allowing or dismissing the application of the respondent, either in part or in toto, must address these assertions of the respondent in respect of each of the documents sought to be produced with reference to the relevant provisions of the said Acts. As this has not been done in the impugned judgment, the same is not legally sustainable. Further, we find that after explaining the scope of the provisions of section 94, Cr.P.C. and pointing out the error in the approach of the trial court, the High Court should have directed the trial court to decide the application of the respondent afresh instead of proceeding to decide the same by itself as there was no finding of the trial court whether or not the production of the documents, or any of them, sought to be produced is necessary or desirable for the purposes of the inquiry or trial.

12. For the above reasons, we convert this petition into an appeal and partly allow the same. The impugned judgment of the High Court is partly maintained and partly set aside: the part whereby it set aside the order of the trial court is maintained while the part allowing the application of the respondent is set aside, and the trial court is directed to decide the application of the respondent afresh.

MWA/S-21/SC Order accordingly.

**2023 S C M R 1709**

**[Supreme Court of Pakistan]**

**Present: Umar Ata Bandial, C.J., Syed Mansoor Ali Shah and Ayesha A. Malik, JJ**

**The STATE through Deputy Director Law, Regional Directorate Anti-Narcotics Force, Punjab---Petitioner**

**Versus**

**TASNIM JALAL GORAYA (DECEASED) through LRs.---Respondent**

Criminal Review Petition No. 5 of 2020, decided on 24th March, 2022.

(Against the judgment of this Court dated 15.01.2020 passed in Criminal Appeal No. 01-L of 2015)

**(a) Control of Narcotic Substances Act (XXV of 1997)---**

----S.37---Dangerous Drugs Act (II of 1930) [since repealed], S.35-C---Constitution of Pakistan, Arts. 12 & 188---Protection against retrospective punishment---Scope---Conviction and sentence recoded by a foreign court for possessing and distributing heroin---Forfeiture of property in Pakistan---By way of judgment under review, the Supreme Court declared the forfeiture of the properties of deceased-respondent (represented through his legal heirs) to be unlawful and hence set it aside---Plea on behalf of the Anti-Narcotics Force (ANF) was that the assets of the respondent could also have been forfeited under the provisions of Dangerous Drugs Act, 1930 ("1930 Act") [since repealed] and it did not matter that section 37 of the Control of Narcotic Substances Ordinance, 1995 ('the Ordinance') [since enacted as the Control of Narcotics Substances Act, 1997] was promulgated on 07.8.1995 after the conviction and sentence against the respondent in the USA in the year 1993---Validity---Said submission was absolutely misconceived---Section 35-C of the 1930 Act did not envisage foreign conviction, which was for the first time introduced in section 37 of the Ordinance in 1995, hence the offence committed in the USA in the year 1993 could not possibly attract section 37 of the Ordinance of 1995---Such aspect had been dealt with in the judgment under review in great detail and the petitioner (ANF) could not be allowed to re-argue the case in review jurisdiction---No ground was made out for the review of the impugned judgment.

**(b) Supreme Court Rules, 1980---**

----O. XVII, R. 12 & O. XXVIII, R. 3---Counsel misleading the Court---Misrepresentation---Costs, imposition of---Counsel for the review petitioner tried to mislead the Court not once but twice by claiming that present matter had earlier been decided by the Supreme Court in earlier round of litigation---Such claim was not only incorrect but amounted to misrepresentation before the court---Supreme Court dismissed the review petition, subject to costs in the sum of Rs.10,000/- imposed under Order XVII, Rule 12 and Order XXVIII, Rule 3 of the Supreme Court Rules, 1980---Supreme Court directed that the costs shall be deposited by the counsel for the petitioner with any approved, recognized and well-known Charitable Organization and receipt thereof be submitted with the Deputy Registrar (Judicial) of the Supreme Court within a fortnight from the release of the present order, and that in case of failure to deposit the said amount within the stipulated period, the file of the case shall be put up before the Bench, on the administrative side, for appropriate orders.

Zafar Iqbal Chohan, Advocate Supreme Court for Petitioner.

Waqar Hassan Mir, Advocate Supreme Court for Respondent.

Date of hearing: 24th March, 2022.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The petitioner seeks review of our judgment dated 15.01.2020 passed in Criminal Appeal No.01-L of 2015. The main ground for review pressed by the learned counsel for the petitioner before us is that the instant matter stood dismissed by this Court vide order dated 24.08.2009 and thereafter Criminal Appeal No.01-L of 2015 could not have been decided through judgment under review dated 15.01.2020.

2. Taken aback by this submission, we perused the entire record of the case minutely. Examination of the record reveals that the High Court vide judgment dated 31.07.2002 confiscated the properties of Tasneem Jalal under section 37 of the Control of Narcotic Substances Ordinance, 1995 ("Ordinance") on the ground that he stood

convicted and sentenced by the District Court of New Jersey, USA on 26.09.1993 for the offence of possessing and distributing heroin.

3. Against the judgment of the High Court dated 31.07.2002, Criminal P. No.722-L/2002 was filed before this Court by Tasneem Jalal. During the pendency of the said petition, Tasneem Jalal was murdered in the year 2003. As a result the criminal petition stood abated vide order dated 22.06.2004.

4. On the other hand ANF approached the High Court in the light of the judgment dated 31.07.2002 for the possession of the forfeited properties of Tasneem Jalal, this petition was allowed vide judgment dated 15.03.2006. The legal heirs of Tasneem Jalal filed a Criminal Petition No. 288-L/2006 before this Court against the said judgment.

5. The legal heirs of Tasneem Jalal also filed a review petition (C.R.P. No. 6-L/2004) against order of abatement dated 22.06.2004. The review was allowed vide order dated 26.07.2006 and both the criminal petitions (722-L/2002 and 288-L/2006) were allowed to be fixed for hearing.

6. Both the criminal petitions were dismissed on 24.08.2009. Against the same review was filed (C.R.P. No. 41-L/2009) which was allowed on 10.6.2013 and the Criminal Petition No. 722-L/2002 was revived. It appears that review was not filed in Criminal Petition No. 288-L/2006, which arose from a subsequent order of the High Court dated 15.03.2006. As the legal heirs were duly represented in Criminal P. No.722-L/2002, hence non filing of the review in Criminal P. 288-L/2006 as agitated by the learned counsel is immaterial.

7. Criminal Petition No. 722-L/2002 came up for hearing on 26.01.2015 when leave was granted in the matter and thereafter the appeal (Appeal No. 1-L/2015) came up for hearing on 15.01.2020 when the judgment under review was passed, declaring the forfeiture of the properties of Tasneem Jalal (represented through his legal heirs) to be unlawful and hence set-aside.

8. In this background the contention of the petitioner that this matter had earlier been decided is not only incorrect but amounts to misrepresentation before the court. We are saddened by the fact that learned counsel for the petitioner repeatedly misled the Court; first, on 01.03.2022 when notices were issued to the respondents and for the second time, today.

9. Having failed to convince the Court on the factual front, learned counsel moved on to the legal argument by submitting that the assets of the respondents could also have been forfeited under the provisions of Dangerous Drugs Act, 1930 ("Act") and it did not matter that section 37 of the Ordinance was promulgated on 07.8.1995 after the conviction and sentence against Tasnim Jalal in the USA in the year 1993. This submission is absolutely misconceived. Section 35-C of the Act does not envisage foreign conviction, which was for the first time introduced in section 37 of the Ordinance in 1995, hence the offence committed in the USA in the year 1993 could not possibly attract section 37 of the Ordinance of 1995. This aspect has been dealt with in the judgment under review in great detail and the petitioner cannot be allowed to re-argue the case in review jurisdiction.

10. For the above reason, we see no merit in the instant petition. We also find with regret that the learned counsel for the petitioner tried to mislead the Court not once but twice. We find that there is no ground made out for the review of the impugned judgment, hence this petition is dismissed, subject to costs in the sum of Rs.10,000/-, imposed under Order XVII, Rule 12 and Order XXVIII, Rule 3 of the Supreme Court Rules, 1980. The costs shall be deposited by the learned counsel for the petitioner with any approved, recognized and well-known Charitable Organization and receipt thereof be submitted with the Deputy Registrar (Judicial) of this Court within a fortnight from the release of this order. In case of failure to deposit the aforesaid amount within the stipulated period, the file of the case shall be put up before the Bench, on the administrative side, for appropriate orders.

MWA/S-24/SC Petition dismissed.

**2023 S C M R 1732**

**[Supreme Court of Pakistan]**

**Present: Umar Ata Bandial, C.J., Qazi Faez Isa, Sardar Tariq Masood, Ijaz ul Ahsan, Syed Mansoor Ali Shah, Munib Akhtar, Yahya Afridi, Sayyed Mazahar Ali Akbar Naqvi and Ayesha A. Malik, JJ**

**CONSTITUTION PETITIONS NOS. 24 TO 26 OF 2023**

**(Trials of Civilian under the Army Act, 1952 is violative of Constitution)**

**AND**

**C.M. APPEAL NO. 80 OF 2023 IN CONST. PETITION NIL OF 2023**

**(Declaration of trial of civilians under the Army Act, 1952 as unconstitutional, void and of no legal effect]**

**JAWWAD S. KHAWAJA and others---Petitioners**

**Versus**

**FEDERATION OF PAKISTAN and others---Respondents**

Constitutional Petitions Nos. 24 to 26 of 2023 and C.M. Appeal No. 80 of 2023 in Constitutional Petition Nil of 2023.

**Supreme Court (Practice and Procedure) Act (XVII of 2023)---**

----Ss. 2, 3 & 5---Constitution of Pakistan, Art. 184(3)---Pakistan Army Act (XXXIX of 1952), S. 2(1)(d)---Code of Conduct for Judges of the Supreme Court and High Courts (framed by the Supreme Judicial Council under Article 209(8) of the Constitution), Art. IV---Trials of civilians under the Pakistan Army Act, 1952---Constitutionality---Judicial impartiality, principle of---Formation of Bench to hear present petitions---Chief Justice of the Supreme Court not consulting two senior most Judges of the Supreme Court before forming the Bench---Delay in deciding the petitions challenging the Supreme Court (Practice and Procedure) Act, 2023---Pattern in the Supreme Court of constituting Special Benches of some Judges (and not Full Court Bench) in cases of immense public importance---Recusal of a Judge from the Bench due to his relation with one of the petitioners---Observations, objections and notes recorded by certain Members of the Bench on different dates of hearing to the very constitution of the Bench hearing the present petitions provided.

**Per Qazi Faez Isa, J**

**Per Sardar Tariq Masood, J**

I was also not consulted by the Chief Justice before putting me on the present Bench. Surprisingly, present petitions in this Bench have been fixed when just a day earlier one of the petitioners himself along with his counsel met the Chief Justice in his Chamber and thereafter on the next day these petitions have been fixed without any consultation or ascertaining my availability. If this practice is allowed then question is whether every petitioners/appellants whose petitions/appeals are lying in the Supreme Court since years can be allowed to meet the Chief Justice in the Chamber for getting fixed their cases on the very next day.

I was awaiting the decision in the petitions through which the Supreme Court (Practice and Procedure) Act, 2023 ( the Act') has been challenged and expected that they would be decided soon as interim ex-parte stay order was issued which had suspended the operation of the then bill and the proposed Act. Section 3 of the Act stipulates that "any matter invoking exercise of original jurisdiction under clause (3) of Article 184 of the Constitution shall be first placed before the Committee constituted under section 2 for examination and if the Committee is of the view that a question of public importance with reference to enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II of the Constitution is involved, it shall constitute a Bench comprising not less than three Judges of the Supreme Court of Pakistan which may also include the members of the Committee, for adjudication of the matter . However, the present matter was not referred to the Committee, of which I am a member. Only by presuming that the Act will be struck down, the mechanism provided in section 3 of the Act has been disregarded.

Surprisingly present nine Members Bench was constituted on the assumption that the Act will be struck down because if it is not, than any party who is not satisfied with its decision, their right to appeal under section 5 of the Act would be made redundant because such an appeal is to be heard by a larger bench of the Supreme Court. Presently, the Supreme Court comprises of fifteen Judges and the Chief Justice, which makes a total of sixteen

Judges. However, if the full court comprising of sixteen judges and the Chief Justice is available i.e. seventeen judges then an appeal would be heard by minimum of ten Judges which is not possible in the present situation, so the appeal if filed by either party would not be heard.

I have not recused from the Bench, hence there was no question to sign the purported order in which it has been mentioned that new Bench will be constituted whereas my point of view was that present petitions be heard after the decision of the petitions which have been filed against the Act.

**Per Syed Mansoor Ali Shah, J**

In the recent past there has been a consistent pattern and reluctance of not constituting the Full Court Bench (but instead Special Benches of some Judges) in cases of immense public importance that have far-reaching impact on the political, social and economic life of the people of Pakistan and their fundamental rights. The non-formation of the Full Court Bench has severely undermined the authority of the Court and the legitimacy of its judgments. The constitutional significance of the matter involved in the present case and its potential ramifications, call for the highest level of judicial scrutiny. Collective deliberations and diverse insights by all the judges in cases of public importance helps the Court arrive at a sound judgment and reinforces public confidence and trust in the Supreme Court.

Additionally until the Supreme Court decides the constitutionality of the Supreme Court (Practice and Procedure) Act, 2023, Section 3 of which prescribes the procedure for invoking the original jurisdiction of the Supreme Court under Article 184(3) of the Constitution, all such matters under this jurisdiction must be heard by the Full Court Bench of the Supreme Court.

**Per Yahya Afridi, J**

The entire edifice of a credible justice system is based on public trust. What is most serious and cannot be disregarded is that there are objections in writing from within the members of the Bench, to the very constitution of the Bench hearing the present petitions. In this regard, the Senior Puisne Judge has recorded in writing his said objections, and the same are by now in the public domain. Thus, the matter of the present composition of the Bench warrants urgent attention and reconsideration by the Chief Justice, lest it may dampen public trust in the justice system.

As a first step, the appropriate measure, would be that a Full Court Bench of the Supreme Court should be constituted to hear the present petitions. Without taking such a measure, any judgment rendered in present petitions by the present Bench may lead to the diminishing of the deference the decision requires and deserves. It is, therefore, most earnestly urged that the Chief Justice may consider the reconstitution of the present Bench, and refer the present petitions to a Full Court Bench.

**Per Syed Mansoor Ali Shah, J**

Although in a constitutional court, it is only for the judge concerned to decide according to his own conscience whether to recuse himself from hearing a case or not, he must in so deciding consider that his decision should not undermine the public trust in the impartiality of the court. For the appearance of his partiality would not only demean his reputation but also that of the institution of which he is a part. The insistence on the appearance of impartiality in the dispensation of justice is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself. Judicial impartiality upholds public trust, engenders predictability in the law, ensures fair trial, upkeeps the rule of law, and safeguards democracy. The principle of judicial impartiality, therefore, is not merely a moral imperative but a practical necessity to ensure justice, uphold democratic values, protect citizens' rights, and maintain societal order.

Williams v. Pennsylvania 579 U.S. 1 (2016) per Justice Anthony Kennedy (Majority view) ref.

Judges should not readily accede to the request for their recusal from hearing a case and decide the matter of their recusal after properly weighing the ground agitated for making such request. Where it is apparent that the perception of impartiality is being created for some ulterior motive without any sound basis, the judge must not yield to such strategy and abdicate performance of his duty. But if such a request is based on some reasonable ground which may genuinely raise doubt in the mind of a common person about the impartiality of the judge,

the safest course for the judge is to accept such request in the larger interest of upholding public trust in the integrity and impartiality of the Court. In the present case, as one of the petitioners is admittedly my relative, a common person may not understand the difference between a petition filed in the public interest and a petition filed for personal interest. I, therefore, in the present case, find it preferable to accept the request and recuse myself from hearing the case. In order to safeguard the public trust in the integrity and impartiality of the Court, I recuse myself from hearing these petitions.

Kh. Ahmad Hosain, Advocate Supreme Court for Petitioners (in Constitutional Petition No. 24 of 2023).

Sardar Muhammad Latif Khan Khosa, Senior Advocate Supreme Court for Petitioners (in Constitutional Petition No. 25 of 2023).

Faisal Siddiqi, Advocate Supreme Court for Petitioners (in Constitutional Petition No. 26 of 2023).

Shoaib Shaheen, Advocate Supreme Court, Ajmal Ghaffar, Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Petitioners (in C.M. Appeal No. 80 of 2023).

Mansoor Usman Awan, Attorney General for Pakistan and Ch. Aamir Rehman, Additional A.G.P. for the Federation.

Date of hearing: 22nd June, 2023.

**ORDER**

At the start of the hearing today, two of us, Mr. Justice Qazi Faez Isa and Mr. Justice Sardar Tariq Masood, have made statements in the open Court declining to hear these matters. Consequently, the Bench that has to hear these matters is to be reconstituted by the Hon ble Chief Justice.

Sd/-

Umar Ata Bandial, C.J.

| | |
|---|---|
| **Sd/-**<br>**Qazi Faez Isa, J** | **Sd/-**<br>**Sardar Tariq Masood, J** |
| **Sd/-**<br>**Ijaz ul Ahsan, J** | Sd/-<br>Syed Mansoor Ali Shah, J<br>(I have attached my separate note) |
| **Sd/-**<br>**Munib Akhtar, J** | Sd/-<br>Yahya Afridi, J |
| **Sd/-**<br>**Sayyed Mazahar Ali Akbar Naqvi, J** | Sd/-<br>Ayesha A. Malik, J |

[*]

Regarding Suo Motu Case No. 4 of 2022

Mr. Ishrat Ali

1. Mr. Ishrat Ali, a Federal Government employee, who was sent on deputation to the Supreme Court to work as Registrar, was `withdrawn' by the Federal Government vide notification dated 3 April 2023[1] and 'directed to report to the Establishment Division, with immediate effect.' But, Mr. Ishrat Ali refuses to abide by the order of the Federal Government.

2. On 4 April 2023, Mr. Ishrat Ali mis-described himself as Registrar , and purported to sign and issue 'Court Roster for Tuesday 4th April, 2023' in Suo Motu Case No. 4/2022 ( Case No. 4') and further purported to constitute a 'Larger Bench' at 2:00 p.m.' This was stated to have been done 'By Order of HCJ , that is, Hon'ble Chief Justice.

The illegal Circular

3. Case No. 4 was fixed before a three-member Bench[2] on 15 March 2023 and an order was announced on 29 March 2023.[3] Rather than complying with the order of the Supreme Court, Mr. Ishrat Ali (when he was still the Registrar) did something out of the ordinary; he issued a Circular,[4] stating that any observation made in this order of the Supreme Court 'is to be disregarded'. I wrote to Mr. Ishrat Ali that his Circular 'purports to negate,

undo, disobey and violate order dated 29 March 2023 of a three-member Bench of the Supreme Court, passed in Suo Motu Case No. 4 of 2022'. He was also informed that, The Registrar does not have the power or authority to undo a judicial order, and the Chief Justice cannot issue administrative directions with regard thereto'. The letter was also copied to the Hon'ble Chief Justice. Till date no reply has been received to my letter.

What constitutes the Supreme Court

4, The Constitution of the Islamic Republic of Pakistan ( the Constitution ) establishes the Supreme Court, and defines it as consisting of the Chief Justice of Pakistan and Judges of the Supreme Court.[5] Order dated 29 March 2023 which was passed in Case No. 4 had pointed out the constitutional and legal position, and that the Chief Justice could not unilaterally assume all the powers of the Supreme Court. It would be appropriate to reproduce paragraphs 27 and 28 of the order dated 29 March 2023:

27. The Supreme Court is empowered to make makes rules attending to the aforesaid matters. The Supreme Court comprises of the Chief Justice and all Judges. The Constitution does not grant to the Chief Justice unilateral and arbitrary power to decide the above matters. With respect, the Chief Justice cannot substitute his personal wisdom with that of the Constitution. Collective determination by the Chief Justice and the Judges of the Supreme Court can also not be assumed by an individual, albeit the Chief Justice.

28. The interest of citizens therefore will be best served to postpone the hearing of this case, and of all other cases under Article 184(3) of the Constitution, till the matters noted hereinabove are first attended to by making requisite rules in terms of article 191 of the Constitution.'

The purported Larger Bench was presumably constituted when it was realized that the Circular was patently unconstitutional and illegal, and that the Chief Justice could not have given legal instructions to issue it.

Jurisdiction of the Supreme Court

5. The Constitution stipulates that, 'No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.'[6] The Constitution does not bestow unlimited jurisdiction on the Supreme Court, let alone on its Chief Justice. The Constitution confers only the following jurisdictions on the Supreme Court: (1) original jurisdiction,[7] (2) appellate jurisdiction,[8] (3) advisory jurisdiction,[9] (4) power to transfer cases jurisdiction,[10] (5) review jurisdiction,[11] (6) contempt jurisdiction[12] and (7) appellate jurisdiction with regard to decisions of administrative courts and tribunals.[13]

Clarifying further the constitutional position

6. To further clarify the above vital point about jurisdiction, let it be assumed that the Supreme Court conducts a murder trial, and then convicts or acquits the accused. This would be of no legal effect, because neither the Constitution nor any law bestows jurisdiction on the Supreme Court to conduct a criminal trial. However, such a trial could be conducted by a Sessions Judge, who is two-steps below Judges of the Supreme Court. And, to cite a civil law example, a Family Judge presiding over a Family Court, can decide family law matters, a jurisdiction which does not vest in the Supreme Court.

Larger Bench and order dated 4 April 2023

7. The Constitution does not confer jurisdiction on a bench or on Judges of the Supreme Court (no matter how many in number) to sit in appeal over an order of the Supreme Court. Therefore, the so called Larger Bench was wrongly constituted purportedly to hear Case No. 4. The Larger Bench did not constitute a (constitutional) court; it did not possess any of the abovementioned jurisdictions, and could not pass an order. The purported 'order' dated 4 April 2023 cannot be categorized as an order of the Supreme Court; it is of no constitutional or legal effect. It would be legally incorrect to refer to it as an order; therefore, it shall be referred to as the 4 April Note .

Could the order dated 29 March 2023 be reviewed?

8. Can then the 4 April Note be construed as an order reviewing order dated 29 March 2023? The answer is that the said Larger Bench could not do so. If the review jurisdiction was to be invoked then Case No. 4 would have to be listed for hearing before the same Judges who had earlier heard it on 15 March 2023[14] but this was not done.

Procedural Irregularities

9. In addition to disregarding the abovementioned constitutional provisions the following procedural irregularities were also committed:

(1) The roster was issued for the same day, which is only done when there is an extraordinary emergency, but in the instant matter there was none;

(2) The very day the case roster was issued the matter was also listed, and after court-time;

(3) No prior notice of the listing of the matter was issued;

(4) Notice was not issued to the Attorney-General for Pakistan as per Order XXVIIA of the Code of Civil Procedure, 1908;

(5) Notice to the Attorney-General had not been issued, yet the April 4 Note records that the Additional Attorney-General was 'On Court's Notice'; and

(6) The counsel of PMDC[15] was in attendance (without prior notice), which meant he was verbally or telephonically sent for, contrary to usual practice.

Responsibility of senior Judges

10. Six Judges were hurriedly assembled. The learned Judge heading the bench and the next senior Judge[16] concluded the matter within a few minutes. Immediately, on the very same day, the 4 April Note, comprising of 8 pages, was issued. If the matter had been listed for hearing in the ordinary course as per normal procedure, sufficient notice had been given, and it was properly deliberated upon, then the four Hon'ble junior Judges may have realized that what their seniors were doing did not accord with the Constitution and the law.

The Note relies on yet another earlier note

11. Paragraph 7 of the 4 April Note refers to what three of the same Judges had earlier done in a similar situation.[17] Then, I had written a 15 page note[18] trying to explain to my distinguished colleagues the different jurisdictions of the Supreme Court and that the Constitution did not grant them unlimited jurisdiction. However, and unfortunately, the 4 April Note overlooks what was pointed out earlier and the very same mistake was again committed. We learn from each other, but the authors of the 4 April Note disregarded a 15 page explanatory note that would have been helpful. Despite practicing law (as an advocate and Judge) for 40 years I still consider myself a student of law. Hubris destroys institutions.

The reasoning applied in the 4 April Note

12. The Note designates the Chief Justice of Pakistan as the `Master of Rolls',[19] a term not found in the Constitution, in any law or even in the Supreme Court Rules, 1980. And, on the pretext that the Chief Justice is the Master of Rolls and empowered to do as he pleases the 4 April Note proceeds to rely on an earlier note (authored by Munib Akhtar, J), stating that it 'clearly and categorically lays down the rule that the suo motu jurisdiction of this Court can only and solely be invoked by the HCJP. The majority order also appears to be in violation of the well settled rule of law, which is axiomatic, that Chief Justice is the master of the roster.' With respect, the Hon'ble Justice Munib Akhtar's earlier note was not a legal precedent. In any event the said reasoning is without a constitutional or legal foundation. The stated rule of law was not enacted pursuant to a law nor can it by its own self-serve itself to be categorized as rule of law, particularly when it contravenes the Constitution, which does not grant to the Chief Justice such powers.

13. The reasoning, with respect, is otherwise flawed too. The order dated 29 March 2023 had noted the lack of procedural rules with regard to cases filed or taken notice of under article 184(3) of the Constitution. However, in Case No. 4 notice under Article 184(3) of the Constitution had already been taken (with regard to the matter of grant of additional marks). Ironically, in a matter in which the so called Larger Bench had wrongly assumed jurisdiction the 4 April Note stated that order dated 29 March 2023 'was therefore both without and beyond jurisdiction'. The 4 April Note has no constitutional or legal validity as it seeks to supplant the Constitution.

The Constitution

14. The Constitution was unanimously passed with the votes of 196 members out of 200 of the National Assembly fifty years ago, on 10 April 1973.[20] Not a single vote was cast against it.[21] The Constitution's credibility and longevity rests on its democratic foundations, and it is the document which holds the Federation together.

The Judicature

15. The Constitution establishes the Judicature.[22] The Constitution also established the trichotomy of powers; the Legislature, Executive and Judiciary. The Judiciary is given the responsibility to decide cases in accordance with the Constitution and the law[23] and by applying due process[24] requirements. Every Judge before entering office takes oath: 'I will discharge my duties, and perform my functions, honestly, to the best of my ability, faithfully in accordance with the Constitution of the Islamic Republic of Pakistan and the law.' Judges also swear to 'preserve, protect and defend the Constitution'. The Constitution alone grants jurisdiction and empowers courts to decide cases, therefore, if non- existing jurisdiction is assumed then the oath to act in accordance with the Constitution is violated.

Islamic Injunctions

16. The Chief Justice is deserving of respect but he is not a master; such servitude is also alien to Islam, and the Constitution stipulates that all laws must be brought in conformity with the Injunctions of Islam,[25] the State religion of Pakistan.[26] The Constitution opens with two of the most beautiful names of the Almighty Allah (Ar-Rahman, the most Beneficent, and Ar-Rahim, the most Merciful) and stipulates that, 'sovereignty over the entire Universe belongs to Almighty Allah alone' and the exercise of authority is a sacred trust.[27] Order dated 29 March 2023 required that rules in respect of the stated matters be made by Supreme Court through consultation. The Holy Qur'an also mandates consultation, 'Do that which is in agreement amongst the people'.[28] Qur'anic exegetes[29] down the ages are unanimous in the interpretation of this verse, and say that consultation is obligatory in respect of all matters pertaining to more than one person. Because: (a) no one should impose their will on others, (b) imposing one's will on others either means that one does not give importance to others or that one deems oneself to be more intelligent, both of which are morally evil and (c) deciding an issue that pertains to the people is a serious thing and one should fear Allah. They derive the following principles from this verse: (1) all requisite information be provided, (2) appointments should not be made on the basis of fear or favour, (3) leaders should seek advice from advisors, (4) advisors must give their honest and well considered opinion and (5) matters should preferably be resolved consensually, failing which through majority opinion.

17. That even Almighty Allah's prophet, Muhammad (peace and blessings be upon him), was ordained to consult the people in their affairs.[30] And, it is reported by his companion, 'None was more apt to seek council of his companions than the Messenger of Allah'.[31]

Absolute Power

18. The world has also been moving away from the days when monarchs and dictators wielded absolute power. The Kingdom of Bhutan, until recently, was one of the few remaining countries ruled by a monarchy having absolute power. However, the enlightened King Wangchuk voluntarily gave up his powers, saying, 'I do not believe that a system of absolute monarchy, wholly dependent on one individual is a good system for the people in the long run... the destiny of the nation lies in the hands of the people, we cannot leave the future of the country in the hands of one person.'[32] Bhutan now is governed by a constitution.[33] History witnesses, that when in an individual power is concentrated, disastrous consequences invariably follow.

Dangers and pitfalls

19. Irreparable damage will be caused to the Judiciary and to the people of Pakistan if the legitimacy, integrity and credibility of the Judiciary is undermined, because without it the people (who it serves) will lose their trust. The surest way for this to happen is when cases are not decided in accordance with the Constitution. Pakistan was first ravaged when a bureaucrat Governor-General unconstitutionally dismissed the Constituent Assembly and the unanimous judgment of the Chief Court of Sindh[34] was set aside by the Federal Court.[35] The Federal Court's decision enabled future dictators to overthrow civilian governments. Regretfully more than once Chief Justice and Judges of the Supreme Court facilitated dictators. The country with the largest Muslim population broke apart because constitutional deviations were justified.

Conclusion

20. Since the gathering in a court of six distinguished judges was not permissible under the Constitution or under any law, the Supreme Court's order dated 29 March 2023 passed in Case No. 4 could not have been set aside by the 4 April Note. Decisions emanating from a courtroom overcast with the shadow of autocracy cannot displace the Constitution.

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| Islamabad,<br>Dated: 8 April 2023. | Sd/-<br>Senior Puisne Judge |

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1. A note has been put up to me by the 'Registrar' dated 16 May 2023 which states that the Hon'ble Chief Justice has enquired how long 1 would 'like to remain on Chamber work'. This is a question which is better answered by the Hon'ble Chief Justice. Let me proceed to state why.

2. Constitutional Petitions Nos. 6 to 8 of 2023, filed on 12 April 2023, sought to set aside the Supreme Court (Practice and Procedure) Bill, 2023 ( the Bill'). The petitions were filed under Article 184(3) of the Constitution, which stipulates that 'the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II is involved, have the power to make an order of the nature mentioned in the said Article' (199 of the Constitution).

3. The first petition (C.P. No. 6 of 2023) was filed by two Lahore based lawyers represented by Messrs Khawaja Ahmad Tariq Rahim and Imtiaz Rashid Siddiqui. The Office of the Supreme Court had noted five legal objections. The first two are reproduced hereunder:

a. That the petitioners have not pointed out as to what questions of public importance in the instant case are involved with reference to enforcement of any of the Fundamental Rights guaranteed under the Constitution, so as to directly invoke jurisdiction of the Supreme Court under Article 184(3) of the Constitution.

b. That ingredients for invoking extra ordinary jurisdiction of this Court under Article 184(3) of the Constitution have not been satisfied.'

An eight-member bench proceeded to hear these petitions. However, none of the three orders passed till date (Orders dated 13 April 2023, 2 May 2023 and 8 May 2023) attend to the office objections, nor state that the petitions are maintainable under Article 184(3) of the Constitution,

4. The order dated 13 April 2023, which is an ad-interim ex-parte order, reads as a final decision. With respect, it is most unusual, if not unprecedented, to give categorical findings on legislation which does not exist, and to do so without hearing the other side. The seven-page order holds:

'Prima facie, this approach is a serious encroachment upon, interference with and intrusion into the independence of the judiciary'.

'Any intrusion in the practice and procedure of the Court, even on the most tentative of assessments, would appear to be inimical to the independence of the judiciary, no matter how innocuous, benign or even desirable the regulation may facially appear to be.'

'Prima facie therefore, when the Bill and the Act that is soon to come into being, is examined on the anvil of the most fundamental principles that underpin the Constitution, it can be regarded as seriously wanting in constitutional competence.'

...there is a substantial, immediate and direct interference with the independence of the judiciary in the form of multiple intrusions, in the guise of regulating the practice and procedure of this Court and conferring upon it a jurisdiction that appears not to be permissible under any constitutional provision.'

Notice under Order XXVIIA of the Code of Civil Procedure, 1908, was issued to the Attorney-General but notices were not issued to the Advocates-General of the Provinces, even though the law under challenge applies throughout Pakistan. However, notices were issued to eight political parties despite the Bill not affecting any of their rights/privileges.

5. On 21 April 2023 the Bill became the Supreme Court (Practice and Procedure) Act, 2023 ( the Act'). Section 2 of the Act stipulates that:

(1) Every cause, appeal or matter before the Supreme Court shall be heard and disposed of by a bench constituted by the Committee comprising the Chief Justice of Pakistan and two most senior judges, in order of seniority.

(2) The decisions of the Committee shall be by majority.'

Section 3 of the Act attends to the original Jurisdiction of the Supreme Court under Article 184(3) of the Constitution. Section 4 stipulates that wherever the interpretation of a constitutional provision is involved, the case should be heard by not less than five judges of the Supreme Court. Section 5 provides for an appeal against a decision of the Supreme Court under Article 184(3). Section 6 enables any Advocate of the Supreme Court to file a review petition (under Article 188 of the Constitution). Section 7 requires that urgent cases should be fixed no later than 14 days from the date of filing. And, section 8 is in the nature of a non obstante clause.

6. Another three petitions (Constitutional Petitions Nos. 10 to 12 of 2023) were filed, seeking the same relief, and when all six petitions came up for hearing on 2 May 2023, it was ordered 'That injunction continues and shall continue to be enforced against the Act till further orders'. On 8 May 2023, the petitions were adjourned to 1 June 2023, that is, after 24 days.

7. Leaving aside:

(1) Whether the said petitions seek the enforcement of any Fundamental Right (none has been mentioned in any order);

(2) Whether a law not yet enacted, can be suspended under Article 184(3), and it be further ordered that when the Bill becomes the Act it too shall stand suspended;

(3) Whether at the very outset (through an ad-interim ex-parte order) the operation of a law can be suspended;

(4) Whether independence of the judiciary was threatened merely because the burden of responsibility on the Honourable Chief Justice was henceforth to be shared with two other senior judges;

(5) Why the petitions, which were taken to be of such utmost importance and urgency, and which necessitated the passing of an ad interim ex-parte order were then not listed for day-to-day hearing, but with a delay of 24 days;

(6) Whether it was appropriate for the Hon'ble Chief Justice to hear cases pertaining to his own powers;

(7) Whether Article IV of the Judges Code of Conduct - 'A Judge must decline resolutely to act in a case involving his own interest', was attracted; and

(8) If the petitions were to be dismissed, what will happen in the interregnum when section 2 of the Act was not complied with.

8. In paragraph 11 of the order dated 13 April 2023, Article 191 of the Constitution was 'explained by adopting for present purposes a dictum from one of the most famous cases of American constitutional law (McCulloch v Maryland 17 US 316 (1119)): the power to regulate involves the power to destroy'. However, the actual quote is - 'That the power to tax involves the power to destroy'. The power to tax is altogether different from the power to regulate. In any event the US Supreme Court in that case was concerned with clashing sovereignty of the legislative powers of Congress with that of a state legislature, and it held that the state legislature by taxing could not 'pull down what there is an acknowledged right in another [Federal Congress] to build up'. The US Supreme Court confirmed the supremacy of Congress:

The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the central government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.'

9. The oath of office of a Chief Justice and of every Judge requires them to discharge their duties and perform their functions 'in accordance with the Constitution of the Islamic Republic of Pakistan and the law' [emphasis added]. And, Article 189 of the Constitution stipulates that the decisions of the Supreme Court are 'binding on all other courts of Pakistan' [emphasis added]. The Constitution does not give pre eminence to an ad-interim order of the Supreme Court over the oath of office, and as noted Article 189 stipulates that decisions of the Supreme Court are only binding on other courts.

10. On the one hand section 2 of the Act requires compliance, but on the other hand this Court has suspended the operation of the Act. The petitions will either be allowed or dismissed. If the petitions were to be dismissed wouldn't conducting court in the interregnum be a violation of section 2 of the Act?

11. The Hon'ble Chief Justice and my distinguished colleagues have placed me in a quandary, which can now only be resolved when the said six petitions are decided. It is prudent to await the Court's decision. It is not for

me to decide, let alone 'like' whether to continue with Chamber work. The Hon'ble Chief Justice is much better placed to answer the question he has posed to me, since he knows better when the petitions will be decided.

12. Lest it be misconstrued, throughout the period of Chamber work I have been working; writing judgments in Civil Appeal No. 2015/2022, in Civil Appeal No. 1139-L/2019 and in 41 Customs cases being Civil Appeals No. 565/2011, etc. I have also decided Suo Motu Review Petition No. 3203/2017. I now only have one case to write a judgment in (CPLA No. 3203/2017) and in another to consider whether I agree with Hon'ble Syed Mansoor Ali Shah, J. I have also attended to the meetings concerning appointments with regard to the Federal Shariat Court, have worked from morning till night to attend to the hundreds of long pending applications of advocates seeking enrolment as ASCs, and attended to all other matters assigned to me.

13. In conclusion, let me categorically state that how my distinguished colleagues decide the pending petitions is their discretion. All that I look for, and which the country undoubtedly expects, is the earliest possible determination of the matter. I have been compelled to write this note in response to the aforesaid query of the Hon'ble Chief Justice. Since a number of my colleagues have enquired why I am not sitting in Court, I shall also be sharing this note with them.

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| 17 May 2023 | Sd/-<br>Qazi Faez Isa, J |

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**2023 S C M R 1803**

**[Supreme Court of Pakistan]**

**Present: Umar Ata Bandial, CJ, Qazi Faez Isa and Syed Mansoor Ali Shah, JJ**

**Civil Appeals Nos. 94 to 106/2008**

**(On appeal against the judgment dated 12.10.2007 passed by the High Court of Sindh, Karachi in ITRAs Nos. 71/1997, 99/2006, 274/1997, 275 to 281/1998, 514 to 516/2006)**

**And**

**Civil Appeal No. 550/2011**

**(On appeal against the judgment dated 11.11.2010 passed by the High Court of Sindh, Karachi in I.T.R. No. 229/2005)**

**The COMMISSIONER OF INCOME TAX---Appellant**

**Versus**

**Messrs INTER QUEST INFORMATICS SERVICES---Respondent**

Civil Appeals Nos. 94 to 106/2008 and Civil Appeal No. 550/2011, decided on 8th September, 2023.

Per Qazi Faez Isa, J.; Umar Ata Bandial, CJ. agreeing; Syed Mansoor Ali Shah, J. dissenting

**Income Tax Ordinance (XLIX of 2001)---**

----Ss. 107 & 133(1)---Income Tax Ordinance (XXXI of 1979) [since repealed], Ss. 163 & 136(1)---Convention Between the Kingdom of the Netherlands and the Islamic Republic of Pakistan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, 1982, Arts.7, 12, paras. (3)(a), (3)(b), 22, 23 & 24---Concept of "Royalties"--- Scope--- Business profits---Non-resident foreign company---Exemption from income tax---Income/royalties earned by the non-resident company in Pakistan for the lease of certain software---Whether such income was business profits and thus exempt from payment of income tax in Pakistan under Article 7 of the Convention Between the Kingdom of the Netherlands and the Islamic Republic of Pakistan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income ('the Convention'), or the same constituted "royalties" as defined in paragraph 3 of Article 12 of the Convention and was liable to tax.

**Per Qazi Faez Isa, J. (Majority view)**

The respondent, a company incorporated in the Netherlands and thus a non-resident for Pakistan income tax purposes, and another company ('SSI'), which had a place of business in Pakistan, entered into an 'Agreement for Lease of FLIC Tapes' dated 1 February 1986 and a 'Software Rental Agreement' dated 1 January 1995 (respectively 'the 1986 Agreement', 'the 1995 Agreement' and collectively 'the Agreements'). In the 1986 Agreement 'SSI' is described as the lessee and in the 1995 Agreement it is described as the customer. The tax returns filed by the respondent claimed that the said receipts were business profits and exempt from payment of income tax in Pakistan under Article 7 of the Convention Between the Kingdom of the Netherlands and the Islamic Republic of Pakistan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income ('the Convention'). However, the appellant's (tax department's) case was that the receipts were royalties under Article 12 of the Convention and the respondent was liable to pay income tax thereon at the rate of fifteen percent. The Income Tax Officer, Commissioner of Income Tax (Appeals) and the Income Tax Appellate Tribunal unanimously determined that the receipts of payments by the respondent constituted royalties in terms of paragraph 3 (a) and (b) of Article 12 of the Convention and were liable to income tax. The respondent then assailed the assessment orders, the appellate orders and the judgments of the Tribunal before the High Court by filing references. The High Court decided in favour of the respondent, and held that the amounts received by the respondent for leasing FLIC tapes (software programs) did not fall within the definition of income arising from royalties.

The respondent did not clearly set out its case and did not provide the following information, documents and facts or provided misleading information:

(1) The respondent did not explain what each Agreement dealt with, which was necessary in view of their technical nature and as the language used therein was not self-evident, particularly the terms mentioned in the schedules thereto;
(2) The respondent did not state that the 1986 Agreement, the duration of which was for four years, still subsisted, yet referred to FLIC tapes which were only mentioned therein (FLIC tapes were not mentioned in the 1995 Agreement);
(3) The respondent did not itemize the nature of the receipts and then on the basis thereof claim that they did not constitute royalties (under Article 12 of the Convention) and that the same constituted business profits (under Article 7 of the Convention);
(4) The respondent in its reply to the notices sent by the Income Tax Officer did not deny certain components of royalties (mentioned in paragraph 3 of Article 12 of the Convention);
(5) The respondent did not specifically state under which Agreement it had received payment, and for what; and
(6) The respondent had relied upon Article 12 of the 'Organization for Economic Co-operation and Development Model Convention' ('OECD MC'), its Commentary and textbook explanation/interpretation thereof, and did so despite the fact that the Convention's Article 12 had applied Article 12 of the 'United Nations Model Double Taxation Convention between Developed and Developing Countries' ('UN MC'), and not Article 12 of the OECD MC.
There were also the following drawbacks and legal shortcomings in the respondent's case:
(1) The respondent did not present its case to the competent authority of its country (the Netherlands) under Article 24 of the Convention, and thus its point of view did not come forth and could not be considered;
(2) If the respondent had presented its case (as stated above) and if the competent authority of the Netherlands had supported the respondent's contention there was the possibility of the two countries resolving the matter and/or making regulation/s with regard thereto in terms of the Convention;
(3) That by foregoing (1) and (2) (above) a very technical matter came before the High Court, which the High Court proceeded to determine without having the requisite technical expertise and without being provided it; and
(4) The respondent had invoked the jurisdiction of the High Court under section 136(1) of the Income Tax Ordinance, 1970 ('ITO 1979') and section 133(1) of the Income Tax Ordinance, 2001 ('ITO 2001') which was restricted to questions of law, however, factual determination of whether the receipts constituted royalties was considered despite three forums (below) concurrently deciding the same against the respondent.
The High Court erred with regard to the following:
(1) The High Court overlooked the fact that the High Court's jurisdiction under section 136(1) of the ITO 1979 and section 133(1) of the ITO 2001 was limited to considering and deciding questions of law, however, the instant cases were filed to overturn the factual determination made by three qualified forums (below) which had determined that the receipts were not royalties in terms of Article 12 of the Convention;
(2) The High Court did not appreciate, as probably it was not explained to by the respondent, that there was no mention of FLIC tapes in the 1995 Agreement, and presumed that the receipts were payment for temporary use of FLIC tapes, which were only mentioned in the 1986 Agreement;
(3) The High Court proceeded on an incorrect assumption that Article 12 of the Convention was based on Article 12 of the OECD MC, whereas in fact it was based on Article 12 of the UN MC, whereunder royalties earned in Pakistan were taxable;
(4) The High Court did not consider the matter and the Convention holistically, including comprehensively considering Articles 7 and 12 thereof, and overlooked its Articles 22, 23 and 24;
(5) The High Court without setting out the nature of the receipts, let alone doing so in detail, assumed that they did not constitute royalties in terms of Article 12 of the Convention, and did so without analogizing the receipts against the definition of royalties in paragraph 3 (a) and (b) of Article 12 of the Convention;
(6) The High Court failed to appreciate that the Convention was a complete document, each term whereof had to be considered, and instead proceeded to interpret it in the light of precedents and textbook explanations of

general terms (which were not so used in the Convention), and also did so without appreciating that the Convention's Article 12 was based on Article 12 of the UN MC and not on Article 12 of the OECD MC;

(7) The High Court also (apparently) failed to appreciate that if the respondent was taxed in Pakistan under paragraph 2 of Article 12 of the Convention its tax liability to such extent would have been accordingly adjusted in the Netherlands, and the respondent would not have been double taxed;

(8) The High Court appears not to have considered that the receipts that were taxed were the respondent's earnings in Pakistan, and to have kept this under consideration when considering the applicability of Article 12 of the Convention; and

(9) The High Court did not abide by the recognized principle of interpretation that the State in which payment is made (under the Convention) is generally entitled to tax such payment.

A. P. Moller v Commissioner of Income Tax 2012 SCMR 557 ref.

Impugned Judgments of the High Court in all appeals are not sustainable nor are the reasons given by the High Court to set aside the assessment orders, the appellate orders and the Tribunal's judgments, which are accordingly restored. Consequently, present appeals are allowed by setting aside the impugned Judgments of the High Court.

**Per Syed Mansoor Ali Shah, J. (Minority view)**

The character of payments received in transactions involving the transfer of computer software depends on the nature of the rights that the transferee acquires under the particular arrangement regarding the use and exploitation of the program. For a payment to constitute royalty under the Convention, it must fall at least in one of the three categories provided in Article 12(3) of the Convention. One can start by narrowing down the possibilities envisaged in Article 12(3) of the Convention. The agreement for the use of FLIC tapes (software programs) concluded between the respondent and the lessee on 1 February 1986 ("Agreement") did not involve payments made for the use of or the right to use any patent, trademark or trade name, design or model, or cinematograph films and tapes for television and broadcasting. The next issue is whether the Agreement involved payments made for the use of or the right to use any industrial, commercial or scientific equipment. 'Equipment' consists of tangible movable objects and since the software itself is only comprised of instructions and is pure intangible information, it is not covered by the equipment clause. It follows that the Agreement also did not involve payments made for the use of or the right to use any industrial, commercial or scientific equipment.

Matthias Valta and Stella Langner, in Reimer and Rust (eds), Klaus Vogel on Double Taxation Conventions (5th edn 2021) vol 1, art. 12, paras 160-162, 173-174 ref.

As regards the remaining possibilities envisaged in Article 12(3) of the Convention, insofar as the present case is concerned, with the payments made for the use of or the right to use secret formula or process, information concerning industrial, commercial or scientific experience or a copyright of a literary, artistic or scientific work. A secret formula or process comprises all kinds of company secrets, also known as industrial or trade secrets. The key element here is secrecy. This information must be confidential, meaning it is not widely known or easily accessible to those who typically deal with such information. It should have commercial value because of its secrecy and should be actively protected by the person who rightfully controls it through reasonable efforts. In the Agreement under the definition clause, the term 'FLIC tapes' means the full set of the respondent's proprietary software programs developed for use in oilfield data processing and log interpretation, including the software programs set out in the schedule attached to the Agreement, together with the related FLIC/VAX Handbook. Notably, however, what is not included is "any other related documentation such as, but not limited to, source code listings, program specifications, system flow charts, logic diagrams, system manuals or other documentation underlying and supporting the FLIC tapes". The reason for this exclusion is the respondent's intention that users shall have no knowledge of how FLIC tapes operate. It shows that the Agreement did not envisage supplying of information about the ideas and principles underlying the program, such as logic, algorithms or programming languages or techniques. The transaction between the respondent and the lessee cannot, therefore, be said to be a transfer of secret formulas or process behind the software.

Concerning the question of information regarding industrial, commercial or scientific experience which is also known as know-how, it is seen that it is legally unprotected, not-secret-but-undisclosed knowledge that has been attained through experience. Such experience knowledge must go beyond the pure technical progress; it is related to persons having gained the knowledge by their activities. Such experience cannot be obtained simply by using the goods and services that are produced with the knowledge. Experience-based knowledge extends beyond mere technical progress and is tied to individuals who have acquired it through their activities. No such experience was shared between the parties under the Agreement. When know-how is shared, it cannot be taken back and its use cannot be prohibited. The transfer of the use cannot be distinguished from a transfer of full ownership. However, in this case, the lessee, on termination of the Agreement, and the lease granted under it, was bound to deliver up the FLIC tapes to the respondent together with all copies of any part of the FLIC tapes held or made by the lessee. Moreover, know-how beyond software can only be the specific programming design and structure such as algorithms and not the program itself. This means that the chance of the Agreement to involve payments for the use of or the right to use information concerning industrial, commercial or scientific experience is also eliminated.

Matthias Valta and Stella Langner, in Reimer and Rust (eds), Klaus Vogel on Double Taxation Conventions (5th edn 2021) vol 1, Art. 12, paras 163-168 and Matthias Valta and Stella Langner, in Reimer and Rust (eds), Klaus Vogel on Double Taxation Conventions (5th edn. 2021) vol 1, art 12, para 175 ref.

Finally it has to be determined if the case falls under the last possibility: whether the payments were made to the respondent in consideration for the use of or the right to use a copyright of a literary, artistic or scientific work. The Agreement between the respondent and the lessee did not contemplate any licence to reproduce and distribute to the public software incorporating the copyrighted program, or to modify and publicly display the program. Therefore, there wasn't any transfer of rights to use the program in a manner that would, without such licence, constitute an infringement of copyright. Nor was there any transfer of the full ownership of the rights in the FLIC tapes. The rights acquired by the lessee comprised of partial rights in the copy of the program. Income from the renting out of software is not covered by Article 12 but by Article 7 of the UN Model Convention ("UN MC") and OECD Model Convention ("OECD MC"). In view of this, what follows is that no copyrights were leased out to the lessee which merely acquired a program copy of FLIC tapes for its operations. Matthias Valta and Stella Langner, in Reimer and Rust (eds), Klaus Vogel on Double Taxation Conventions (5th edn 2021) vol 1, art. 12, para 174; Geoquest Systems B.V. Gevers Deyootweg v. Director of Income Tax (2010) 327 and Engineering Analysis Centre of Excellence Private Limited v The Commissioner of Income Tax 2022 (3) SCC 321 ref.

The reliance placed by the High Court on the OECD MC and its Commentary, in order to decipher the true nature of payments received by the respondent and to understand the concept of royalties in the context of double taxation makes no material difference to the adjduciation of the case in hand. Notably, the UN MC Commentary on paragraph 3 of Article 12 includes the entire extract of the OECD MC Commentary on the question whether payments received as consideration for computer software are to be classified as royalties or not.

The majority judgment (of the present case) without definitively addressing whether the amounts received by the respondent constitute royalties, instead embarks upon a discussion which was not in contention between the parties. Thus the remark (in the majority judgment) that if the respondent was not taxed in Pakistan, it might still be subject to taxation in the Netherlands, is not a pertinent consideration for a court tasked with adjudicating a legal dispute. Once it is established that the income earned by the respondent non-resident Dutch company for leasing software in Pakistan does not qualify as royalty, delving into irrelevant factors serves no useful purpose. Furthermore, the majority asserts that the High Court's jurisdiction in this case was limited to addressing and deciding questions of law. It is worth noting that the sole point of contention between the parties revolved around whether the amounts received by the respondent constituted royalties or not, a matter which is a question of law squarely within the purview of the High Court.

The majority judgment suggests that the respondent had an alternative remedy under Article 24 of the Convention to present its case to the competent authority in its own country. It is said that if the competent

authority in the respondent's country agreed, it could then take up the matter with the competent authority in Pakistan. However, this provision of the Convention neither precludes the respondent from pursuing a remedy available under the laws of Pakistan, nor does it prevent the Supreme Court from adjudicating a question coming before it in its lawful jurisdiction.

Respondent is correct in claiming that there is distinction between the use of copyright and the use of copyright product. No copyrights were leased out to the lessee which merely acquired a program copy of FLIC tapes (software programs) for its operations. Further, the transaction of lease of FLIC tapes software programs between the respondent and the lessee did not involve payments made for the use of or the right to use secret formula or process, or information concerning industrial, commercial or scientific experience. Income resulting from the lease of FLIC tapes amounts to business profits and cannot be treated as income arising from royalties. Therefore, Article 12 of the Convention is not applicable to this case. Judgment of the High Court did not warrant any interference.

A.P. Moller v. Commissioner of Income Tax 2012 SCMR 557 distinguished.

Ms. Misbah Gulnar Sharif, Advocate Supreme Court for Appellant (in C.As. Nos. 94 to 106 of 2008).

Ch. Akhtar Ali, Advocate-on-Record for Appellant (in C.A. No. 94 of 2008).

Sh. Mehmood Ahmed, Advocate-on-Record for Appellant (in C.As. Nos. 95 to 106 of 2008).

Hafiz Ahsan Ahmad Khokhar, Advocate Supreme Court and Raja Abdul Ghafoor, Advocate-on-Record for Appellant (in C.A. No. 550 of 2011).

Makhdoom Ali Khan, Senior Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record assisted by Saad Hashmi and Khawaja Aizaz Ahsan, Advocates for Respondent (in all cases).

Date of hearing: 7th September, 2022.

**JUDGMENT**

**Qazi Faez Isa, J.** The High Court of Sindh at Karachi decided fourteen income tax references which had been filed by the respondent respectively under section 136(1) of the Income Tax Ordinance, 1979 and section 133(1) of the Income Tax Ordinance, 2001 ('References', 'ITO 1979', 'ITO 2001' and collectively 'the Ordinances' respectively). A Divisional Bench of the High Court decided thirteen of these references though a common judgment dated 12 October 2007 and one was decided vide judgment dated 11 November 2010, which relied on its earlier judgment.

2. The respondent is a company incorporated in and having its principal place of business in the Netherlands. The respondent has no place of business in Pakistan. The respondent files its income tax returns in Pakistan under national tax number 14-11-069875-7 ('the Returns'). The Returns have different headings and under the heading Income Claimed to be Exempted and not Included in Total Income the respondent sought exemption in respect of its receipts in respect of Rental from Lease FLIC Software computer program which it stated was exempt under article 7 of the Agreement for Avoidance of Double Taxation between Pakistan and Netherlands. However, the Income Tax Officer did not accept the respondent's contention, and was of the opinion that, such income constitute royalty and is assessable under Article 12-3(a)(b) of the Tax Treaty between Pakistan and Netherlands, and called upon the respondent to explain why the same may not be taxed as royalty income @ 15%.

3. The Income Tax Officer sent notices to the respondent and in response the respondent stated that the said income was business profits, and thus exempt under Article 7 of the said tax treaty. And with regard to the contention of the Income Tax Officer that the income (exemption whereof was claimed) were royalties, which were not exempted under Article 12 of the treaty, the respondent straight away proceeded to explain what constitutes royalties without first explaining the nature of the receipts, what they were for, the agreement they were paid under and the particular item of its schedule and what it entailed:

'3. The term 'Royalty' as defined in Article 12 of the Tax treaty is as follows:

Payment of any kind received as consideration for the use of, or the right to use:

i. a patent, trademark or tradename, secret formula or process design or model, or information concerning industrial, commercial or scientific experience;

ii. Industrial, commercial or scientific equipment, cinematograph films and tapes for television and broadcasting;'

'From the above extract, it is clear that the rentals paid for tapes and software by SSI are neither in the nature of patent, trademark, or tradename, secret process or formula, design or model, nor any equipment, films and tapes for television and broadcasting. The Article includes only tapes for television and broadcasting as Royalty. Had the intention been otherwise, the Article would have referred to all sorts of films or tapes. Consequently, the rentals do not come within the ambit of the above definition of "Royalties".'

It is also important to note that software cannot be classified as goods. A similar issue came up for consideration before the Income Tax Appellate Tribunal (ITAT) in a case where the question was whether the software payments are subject to tax withholding under section 50(4) of the repealed 1979 Ordinance applicable on 'supply of goods'. The ITAT after considering the various definition of 'computer software' categorically held that by any definition or connotation of the term, it cannot be treated as "Goods".'

5. Classification of Software payments

5.1 With regard to consideration for computer software, whether the payments are to be classified as 'Royalties' or 'Business Income' or 'Capital Gains' guidelines has to be taken from the Organisation for Economic Co-operation and Development (OECD) commentary on Article 12 of the Tax treaties, as amended in 2000 to refine the principles by which the classification issues of computer software transaction can be resolved.

5.2 We would inform you that the character of payments involving the transfer of computer software mainly depends on the nature of rights the transferee acquires under the particular arrangement regarding the use and exploitation of the programme. Since the software is not in the nature of goods as such the rights in computer programme are in the nature of intellectual property, which are normally protected in most of the countries under copyright laws.

5.3 Transfer of rights in relation to software occur in many different ways ranging from outright alienation of the entire rights in the copyright in a programme to the usage of a product which is subject to restrictions on the use to which it is put. A distinction should, however, be borne in mind between the copyright in the programme and software incorporating a copy of the copyright programme.

The transferee's rights normally, consist of partial or complete rights in:

a) The underlying copyright; or

b) copy of the programme (programme copy), whether or not such a copy is embodied in a tangible medium or provided electronically.'

'6. The payments made for the acquisition of partial rights in (a) above can be treated as Royalty, subject to the condition that the programme should be used in a manner that would, without such authorisation, constitute an infringement of copyright. The examples of such arrangement include:

license to reproduce and distribute to the public, software incorporating the copyrighted programme; or

modification and public display of programme.

In these kind of cases, it is apparent that the consideration would be for the right to use the copyright in the programme, which otherwise would be commercial exploitation i.e. under the copyright laws.'

'7. In other types of transactions covered in (b) above, the rights acquired in relation to the copyright are limited to the extent of enabling the user to operate the programme. This commonly happens in acquisition of a programme copy where the transferee is granted limited right to reproduce the programme e.g. to copy the programme on user's computer hard drive or for archival purpose. Such act is, of course, essential in utilizing the programme, therefore, rights in relation to the act of copying merely for enabling the operation of the programme by the user would not give rise to 'Royalty'. In such cases, the consideration received will retain the character of 'Business Income'.

We submit that all that the company had granted to SSI was the use of its software. Under the Agreement, SSI is not entitled to amend or to make any changes. The income from such activities cannot be treated as Royalty as payment of royalty would have entitled SSI to make amendments/changes in the software according to its specific circumstances. SSI was not given the back-up of the process or the formula used in these software. It was only entitled to apply the same in its business and to obtain the results computed on the basis of inbuilt

formula. It is further submitted that had the software been given to SSI on royalty basis, then SSI would also have gained the back-up information and a right to make amendments or exploit the software i.e. to sub-let it to third parties.'

4. The Income Tax Officer did not accept the aforesaid contention/ explanation of the respondent and maintained that the receipts by the respondent were royalties under paragraph 3(a) and (b) of Article 12 of the treaty between the two countries. Therefore, such receipts were liable to be taxed under paragraph 2(a) and/or (b) of Article 12 at the rate of fifteen percent, and consequently, assessment orders were issued by the Income Tax Officer who called upon the respondent to pay income tax thereon.

5. The respondent challenged the assessment orders by filing appeals before the Commissioner of Income Tax (Appeals), but these appeals were dismissed and the assessment orders issued by the Income Tax Officer were maintained. The respondent then assailed the assessment orders and the Commissioner's appellate orders before the Income Tax Appellate Tribunal ('the Tribunal'), but without success. The Tribunal determined that the receipts of payments by the respondents constituted royalties in terms of paragraph 3(a) and (b) of Article 12 of the treaty and liable to income tax at the rate of fifteen percent. The respondent then assailed the assessment orders, the appellate orders and the judgments of the Tribunal before the High Court by filing references, respectively under section 136(1) of ITO 1979 and section 133(1) of ITO 2001.

6. Two questions were formulated for consideration by the High Court. Firstly, whether the said payment receipts were business profits under Article 7 of the treaty and, secondly, whether the same constituted income from royalties under Article 12 of the treaty, and as such were not business profits under Article 7. The High Court decided the questions in favour of the respondent, and held that the amounts received by the respondent did not constitute royalties. The judgments of the High Court were assailed before this Court under Article 185(3) of the Constitution of the Islamic Republic of Pakistan ('the Constitution') and leave was granted.

7. Through this common judgment fourteen appeals, arising from the said fourteen cases, particulars whereof are as under, are being decided:

| No. | Supreme Court | High Court | Filed under | Agreement | Assessment year/s |
|---|---|---|---|---|---|
| 1 | CA 94/2008 | ITR 71/ 1997 | Section 136(1), Income Tax Ordinance, 1979 | Not mentioned | 1987-1988 1989-1990 |
| 2 | CA 95/2008 | ITR 99/ 2006 | Section 136(1), Income Tax Ordinance, 1979 | Not mentioned | 1998-1999 1999-2000 |
| 3 | CA 96/2008 | ITA 274/ 1998 | Section 136, Income Tax Ordinance, 1979 | Not mentioned | 1990-1991 |
| 4 | CA 97/2008 | ITA 275/ 1998 | Section 136, Income Tax Ordinance, 1979 | Not mentioned | 1991-1992 |
| 5 | CA 98/2008 | ITA 276/ 1998 | Section 136, Income Tax Ordinance, 1979 | Not mentioned | 1992-1993 |

| | | | | | |
|---|---|---|---|---|---|
| 6 | CA 99/2008 | ITA 277/ 1998 | Section 136, Income Tax Ordinance, 1979 | Not mentioned | 1993-1994 |
| 7 | CA 100/ 2008 | ITA 278/ 1998 | Section 136, Income Tax Ordinance, 1979 | Not mentioned | 1994-1995 |
| 8 | CA 101/ 2008 | ITA 279/ 1998 | Section 136, Income Tax Ordinance, 1979 | Not mentioned | 1995-1996 |
| 9 | CA 102/ 2008 | ITA 280/ 1998 | Section 136, Income Tax Ordinance, 1979 | Not mentioned | 1996-1997 |
| 10 | CA 103/ 2008 | ITA 281/ 1998 | Section 136, Income Tax Ordinance, 1979 | Not mentioned | 1997-1998 |
| 11 | CA 104/ 2008 | ITRA 514/ 2006 | Section 133, Income Tax Ordinance, 2001 | 1995 | 2001-2002 |
| 12 | CA 105/ 2008 | ITRA 515/ 2006 | Section 133, Income Tax Ordinance, 2001 | 1995 | 2002-2003 |
| 13 | CA 106/ 2008 | ITRA 516/ 2006 | Section 133, Income Tax Ordinance, 2001 | 1995 | 2003 |
| 14 | CA 550/ 2011 | ITR 229/ 2005 | Section 136(1), Income Tax Ordinance, 1979 | Not mentioned | 2000-2001 |

8. The 'Convention Between the Kingdom of the Netherlands and the Islamic Republic of Pakistan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income' ('the Convention') commences by stating that:

'The Government of the Kingdom of the Netherlands and the Government of the Islamic Republic of Pakistan, desiring to conclude a convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, have agreed as follows.'

Article 12, which the appellant says is applicable and which the respondent says is not, is reproduced:

**'ARTICLE 12**

**ROYALTIES**

1. Royalties arising in one of the States and paid to a resident of the other State may be taxed in that other State.

2. However, such royalties may also be taxed in the State in which they arise and according to the laws of that State, but if the recipient is the beneficial owner of the royalties the tax so charged shall not exceed:

(a) 15 per cent of the gross amount of the payments referred to in paragraph 3(a);
(b) 15 per cent of the gross amount of the payments referred to in paragraph 3(b);
(c) 5 per cent of the gross amount of the payments referred to in paragraph 3(c).
3. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use:
(a) a patent, trademark or tradename, secret formula or process, design or model, or information concerning industrial, commercial or scientific experience;
(b) industrial, commercial or scientific equipment, cinematograph films and tapes for television and broadcasting;
(c) a copyright of a literary, artistic or scientific work, but excluding cinematograph films and tapes for television or broadcasting.
4. The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties, being a resident of one of the States, carries on business in the other State in which the royalties arise, through a permanent establishment situated therein, or performs in that other State independent personal services from a fixed base situated therein, and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment or fixed base. In such case the provisions of Article 7 or Article 14, as the case may be, shall apply.
5. Royalties shall be deemed to arise in one of the States when the payer is that State itself, a political subdivision, a local authority or a resident of that State. Where, however, the person paying the royalties, whether he is a resident of one of the States or not, has in one of the States a permanent establishment or a fixed base in connection with which the contract under which the royalties are paid was concluded, and such royalties are borne by such permanent establishment or fixed base, then such royalties shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.
6. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each State, due regard being had to the other provisions of this Convention.'
9. Section 163 of ITO 1979 (section 107 of ITO 2001) attends to agreements for the avoidance of double taxation and prevention of fiscal evasion which the Government of Pakistan may enter with other countries. The Convention between the Netherlands and Pakistan was duly notified in Pakistan.[1] The appellant does not oppose the applicability of the Convention nor denies that the respondent has no permanent establishment in the territory of Pakistan. The appellant also does not dispute that the Convention excludes the respondent's business profits under Article 7 of the Convention. The respondent contends that the payments received by it from Schlumberger Seaco Inc. ('SSI') were in respect of permitting temporary use of FLIC tapes. The dispute is limited to whether the amounts received by the respondent, which the respondent claims to be exempt, constitute royalties as defined in paragraph 3 of Article 12 of the Convention.
10. The respondent and SSI had entered into an 'Agreement for Lease of FLIC Tapes' dated 1 February 1986 and a 'Software Rental Agreement' dated 1 January 1995 (respectively 'the 1986 Agreement', 'the 1995 Agreement' and collectively 'the Agreements'). In the 1986 Agreement SSI is described as the lessee and in the 1995 Agreement it is described as the customer. The Returns filed by the respondent claimed that the said receipts were business profits and exempt from payment of income tax in Pakistan under Article 7 of the Convention. However, the appellant's case was that the receipts were royalties under Article 12 of the Convention and the respondent was liable to pay income tax thereon at the rate of fifteen percent.
11. The learned Judges of the High Court referred to, and relied upon, the 'Organization for Economic Co-operation and Development Model Convention' ('OECD MC'),[2] its Article 12 and its interpretation by 'Klaus Vogel on Double Taxation Conventions.'[3] However, Article 12 of the Convention was not based on the OECD

MC but on the 'United Nations Model Double Taxation Convention between Developed and Developing Countries' ('UN MC'). Paragraphs 1, 2 and 3 of Article 12 of the UN MC are reproduced hereunder:

'United Nations Model Double Taxation Convention between Developed
and Developing Countries 2017 Update
Article 12 ROYALTIES

1. Royalties arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2. However, such royalties may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the beneficial owner of the royalties is a resident of the other Contracting State, the tax so charged shall not exceed ____ per cent (the percentage is to be established through bilateral negotiations) of the gross amount of the royalties. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this limitation.

3. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, or films or tapes used for radio or television broadcasting, any patent, trademark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment or for information concerning industrial, commercial or scientific experience.'

Therefore, if the High Court had to make a comparison it should have compared Article 12 of the Convention with Article 12 of the UN MC, and its interpretation by Klaus Vogel on Double Taxation Conventions, and not with Article 12 of the OECD MC.

12. The impugned Judgments of the High Court state - 'In the light of the above extracts it is clear that OECD which is the authority which has drafted the Double Taxation Agreements has in respect of Software Transactions categorized....'[4] However, Article 12 of the Convention, as can be seen from the reproduced text (above), adheres to the UN MC, and not to the OECD MC. The High Court therefore had incorrectly assumed the applicability of OECD MC. Not only did the learned Judges of the High Court err in considering the OECD MC and commenting thereon but they also did not consider the UN MC and its commentary.

13. The United Nations explained the scope of Article 12 of the UN MC in the Commentary issued by it which states that Article 12 of the UN MC makes an important departure from Article 12 of the OECD MC because royalties, under the UN MC, may be taxable in the source country as well as in the resident country. Article 12 of the OECD MC does not permit this. Relevant extract from the Commentary on Article 12 of the UN MC is reproduced hereunder:[5]

'B. COMMENTARY ON THE PARAGRAPHS OF ARTICLE 12

Paragraphs 1 and 2

4. Paragraph 1 omits the word "only" found in the corresponding provision of the OECD Model Convention, which provides that "royalties arising in a Contracting State and beneficially owned by a resident of the other Contracting State shall be taxable only in that other State". Paragraph 2 is an addition flowing logically from the premise underlying paragraph 1, which is that royalties may be taxable in the source country as well as the residence country. By providing for taxing rights in respect of royalties to be shared between the State of residence and the State of source, the United Nations Model Convention departs from the principle of exclusive residence State's right to tax provided in the OECD Model Convention. In this context, it should be noted that several member States of OECD have recorded reservations to the exclusive residence State taxation of royalties provided by Article 12 of the OECD Model Convention.'

14. We have examined the files of the High Court and the pleadings of the respondent (who was the applicant before the High Court). The respondent had filed the Commentary on Article 12 of the OECD MC, which was not applicable. The respondent also did not refer to the UN MC, on which the Convention was based. The statement of facts submitted by the respondent before the High Court cursorily rebutted the appellant's contention that, Article 12 of the Convention was applicable, and did so unconvincingly.

15. Klaus Vogel on Double Taxation Conventions discusses Article 12 of both model conventions. The OECD MC is referred to as 'No Source State Taxation' and the UN MC is referred to as 'Source State Taxation' and

that OECD MC 'limits taxation to the beneficial owner's residence, thus excluding source taxation in the State of the payer.' With regard to the Article 12 of the UN MC it states:

'2. UN MC: Source State Taxation

Article 12 UN MC consists of six paragraphs. Paragraph 1 assigns the residence State of the beneficial owner a non-exclusive taxing right. Paragraph 2 is unique and allows for limited source State taxation. Paragraph 3 contains a slightly extended definition of royalties. Paragraph 4 contains the PE [Permanent Establishment] proviso. Paragraph 5, also unique to the UN MC, includes source rules as a necessary addition to paragraph 2. The source State is the residence State of the payer or, perhaps, PE State in which the payment obligation was incurred or borne. Paragraph 6 adds the special arm's length clause for royalties.

In a functional comparison of the UN MC to the OECD MC, paragraph 1 relates to paragraph 1 (the beneficial owner's residence State taxation), paragraph 3 UN MC relates to paragraph 2 OECD MC (definition), paragraph 4 UN MC relates to paragraph 3 OECD MC (the PE proviso) and paragraph 6 UN MC relates to paragraph 4 OECD MC (arm's length rule). Paragraphs 2 and 5 UN MC is unique to the UN MC, as they deal with the source State taxation that is not allowed under the OECD MC.'[6]

And, that the 'Legal Consequence' of Article 12 of the UN MC would be that:

'The royalty payment is subject to source taxation according to domestic law.'[7]

However, if taxed under the UN MC then the country of residence of the supplier must adjust the tax liability accordingly:

'b. UN MC: Shared Taxation

The UN MC provides for taxation by the State of Residence of the payee. The taxation right is not exclusive and is thus open for additional taxation in the source State (payer's residence) as provided for in Article 12(2) and (5) UN MC. However, the State of Residence is obliged to credit the source tax according to Article 23 UN MC.'[8]

16. Therefore, it would not really matter to the respondent if under Article 12 of the Convention it had to pay income tax at the rate of fifteen percent in Pakistan because the respondent could with the tax authority of the Netherlands claim adjustment of the amount paid in Pakistan. The Convention recognized that an entity resident in the Netherlands may be taxed in Pakistan under Article 12, and if it is taxed then the Netherlands will allow deduction from the Netherlands tax so computed. In other words the respondent would not be double taxed. In this regard the Convention specifically stipulates 'Elimination of Double Taxation' in its Article 22 and paragraph 3 of Article 23, respectively reproduced hereunder:

'Elimination of Double Taxation

Article 22

Elimination of Double Taxation

1. The Netherlands, when imposing tax on its residents, may include in the basis upon which such taxes are imposed the items of income which, according to the provisions of this Convention, may be taxed in Pakistan.

2. However, where a resident of Netherlands derives items of income which according to Article 6, Article 7, paragraph 5 of Article 10, paragraph 5 of Article 11, paragraph 4 of Article 12, paragraphs 1, 2 and 5 of Article 13, Article 14, paragraph 1 of Article 15, Article 16 and Article 19 of this Convention may be taxed in Pakistan and are included in the basis referred to in paragraph 1, the Netherlands shall exempt such items by allowing a reduction of its tax. This reduction shall be computed in conformity with the provisions of Netherlands law for the avoidance of double taxation. For that purpose the said items of income shall be deemed to be included in the total amount of the items of income which are exempt from Netherlands tax under those provisions.

3. Further, the Netherlands shall allow a deduction from the Netherlands tax so computed for the items of income which according to paragraph 2 of Article 10, paragraph 2 of Article 11, paragraph 2 of Article 12, Article 17 and paragraph 2 of Article 18 of this Convention may be taxed in Pakistan to the extent that these items are included in the basis referred to in paragraph 1. The amount of this deduction shall be equal to the tax paid in Pakistan on these items of income, but shall not exceed the amount of the reduction which would be allowed if the items of income so included were the sole items of income which are exempt from Netherlands tax under the provisions of Netherlands law for the avoidance of double taxation.

4. Where, by reason of special incentive measures designed to promote economic development in Pakistan, the Pakistan tax actually levied on interest arising in Pakistan, which may be taxed in Pakistan according to sub-paragraphs (a) and (b) of paragraph 2 of Article 11 or on royalties arising in Pakistan, which may be taxed in Pakistan according to sub-paragraph (a) of paragraph 2 of Article 12, is lower than the tax Pakistan may levy according to those provisions, then, for the purposes of paragraph 3, the tax paid in Pakistan on these items of income shall be deemed to be:

(a) with respect to interest to which sub-paragraph (a) of paragraph 2 of Article 11 applies: an amount equal to the amount of tax which Pakistan actually has levied thereon increased by twice the difference between this amount and 10 per cent of the gross amount of such interest;

(b) with respect to interest to which subparagraph (b) of paragraph 2 of Article 11 applies or royalties to which sub-paragraph (a) of paragraph 2 of Article 12 applies: 15 per cent of the gross amount of such interest or royalties.

5. In the case of Pakistan, subject to the provision of the laws of Pakistan regarding the allowance of a credit against Pakistan tax (which shall not affect the general principle hereof), the amount of Netherlands tax payable, under the laws of the Netherlands and in accordance with the provisions of this Convention, whether directly or by deduction, by a resident of Pakistan, in respect of income which is subject to tax both in Pakistan and in the Netherlands, shall, except in the case referred to in paragraph 6 of Article 13, be allowed as a credit against the Pakistan tax payable in respect of such income but in an amount not exceeding that proportion of Pakistan tax which such income bears to the entire income chargeable to Pakistan tax.

6. Where a resident of one of the States derives gains which may be taxed in the other State in accordance with paragraph 6 of Article 13, that other State shall allow a deduction from its tax on such gains to an amount equal to the tax levied in the first-mentioned State on the said gains.'

'Special Provisions

Article 23

3. Except where the provisions of paragraph 1 of Article 9, paragraph 7 of Article 11, or paragraph 6 of Article 12, apply, interest, royalties and other disbursements paid by an enterprise of one of the States to a resident of the other State shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned State.'

17. Paragraphs 1 and 2 of Article 27 of the Convention stipulate that regulations may by mutual agreement be made with regard to the manner in which royalties are taxed, which are reproduced hereunder:

'Article 27

Regulations

1. The competent authorities of the States shall by mutual agreement settle the mode of application of paragraph 2 of Article 10, of paragraphs 2 and 3 of Article 11 and paragraph 2 of Article 12.

2. The competent authorities of each of the States, in accordance with the practices of that State, may prescribe regulations necessary to carry out the other provisions of this Convention.'

18. The matter primarily affected the interest of the two contracting countries (the Netherlands and Pakistan) and whether Pakistan was entitled to tax the respondent on royalties earned by the respondent in Pakistan, under Article 12 of the Convention at the rate of fifteen percent. Therefore, if the respondent was not taxed in Pakistan it may still be taxed in the Netherlands.

19. The learned Judges of the High Court also did not note that the respondent had an alternative remedy under Article 24 of the Convention, which it did not avail. Article 24 is reproduced hereunder:

**'ARTICLE 24**

**MUTUAL AGREEMENT PROCEDURE**

1. Where a person considers that the actions of one or both of the States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the State of which he is a resident or, if his case comes under paragraph 1 of Article 23, to that of the State of which he is a national. The case

must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the States.

3. The competent authorities of the States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention.

4. The competent authorities of the States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs.'

Article 24 of the Convention enabled the respondent to present its 'case to the competent authority' of its own country, the Netherlands, which if it agreed with the respondent, could take up the matter with the competent authority of Pakistan. This the respondent could have done within three years, but the respondent did not present its case within three years, or at all. If the respondent had presented its case to the competent authority of the Netherlands and if such competent authority was of the opinion that the respondent's objection to taxation in Pakistan was justified it would have taken up the matter with the competent authority in Pakistan. The matter could also have been resolved between the countries by 'mutual agreement'. It is possible that the respondent did not submit its case to the competent authority of the Netherlands because it may not have agreed with the respondent's contention, and then the respondent may not have been able to claim exemption.

20. If a treaty or convention provides for a dispute resolution mechanism it is, always, preferable to avail of it, and amicably resolve matters. If this had been done in these cases it would have helped the High Court, and this Court too, to understand the point of view of the competent authority of the Netherlands, and prevent the possible undermining of bilateral relations on account of a misunderstanding. This would be preferable as the exemption claimed in respect of the receipts had not been interpreted, resolved or decided earlier.

21. The respondent instead availed of the remedies provided under the Ordinances. However, three findings of fact were concurrently recorded against the respondent, respectively by the Income Tax Officer, the Commissioner (Appeals) and the Tribunal. Thereafter, the respondent approached the High Court under section 136(1) of ITO 1979 and section 136(1) of ITO 2001, the scope whereunder is restricted to the determination of 'any question of law'. However, it had to be first factually ascertained what the receipts were for and whether the same constituted royalties as defined in paragraph 3 of Article 12 of the Convention. Thereafter, the determination of any question of law may have arisen. The High Court (under the Ordinances) is to decide questions of law, and must not attend to, let alone decide, factual disputes.

22. Admittedly, the respondent had earned the receipts in Pakistan. This Court in the case of A. P. Moller v. Commissioner of Income Tax[9] had approved of the interpretation by the High Court[10] of another double taxation convention as under:

'However, if two reasonable interpretations of Article 8(3) are possible, or if there is any doubt or ambiguity in its interpretation (especially in relation to the expression "profits derived from sources within the other Contracting State") that should be resolved in favour of Pakistan having the right to tax... It is a recognized interpretation that the "source State" is the State in which payment is made, and generally such State is regarded as entitled to tax such payments. Pakistan is clearly the "source State" in the facts and circumstances of the present case since payments are made here by the Pakistani buyers. Thus, the amounts received or receivable in Pakistan by the carriers are "profits derived from sources within" Pakistan and hence can be reasonably regarded as within the taxing right of this country as contemplated by Article 8(3).'

23. Since the matter was not properly enunciated in the impugned judgments by the High Court we have had to consider the submissions and pleadings of the respondent. In response to the notices issued by the Income Tax Officer the respondent stated that the payment receipts were 'rentals paid for tapes by SSI' and were 'neither in the nature of a patent, trademark or tradename, secret formula or process, design or model, nor any equipment, films and tapes for television and broadcasting.' However, the full definition of royalties in paragraph 3(a) of

Article 12 of the Convention included payments for 'information concerning industrial, commercial or scientific experience', which the respondent did not negate.

24. The respondent also did not disclose under which of the two Agreements it had received payments. It also did not particularize the nature of the receipts nor stipulate the components/services which it had provided to SSI, and that the said receipts were not royalties under Article 12 of the Convention. When the benefit of an exemption is sought the person claiming it must clearly set out its case. The respondent had to establish that the receipts were not royalties and thus not liable to income tax under paragraph 2 of Article 12 of the Convention. If the respondent had initially made out a case for exemption then the taxing authority would have examined the documents/proof tendered to it and considered whether the exemption was correctly claimed. Instead, the High Court took it upon itself to determine the nature of the said receipts, and did so without having the benefit of requisite documents, material and information.

25. Only in one appeal, Civil Appeal No. 94/2008 pertaining to assessment years 1987-1988 and 1989-1990, the 1986 Agreement may have been relevant. The remaining thirteen appeals are in respect of assessment years 1998 and later years, which was long after the expiry of the 1986 Agreement, the duration of which was till 31 January 1990.

26. The High Court also did not adequately comprehend the facts. The FLIC tapes were mentioned in the 1986 Agreement. However, the impugned judgments refer to the 1995 Agreement which did not mention FLIC tapes. The High Court had proceeded on the basis of an incorrect premise. The 1986 Agreement's clause 3 stated that the duration of the 1986 Agreement was for four years, that is, till 31 January 1990. Under the 1986 Agreement the respondent would provide to the lessee/SSI software programs 'for use in oilfield data processing and log interpretation, including the software programs set out in Schedule I, together with the related FLIC/VAX Handbook.' Schedule I of the 1986 Agreement is a 'List of Oil Well Interpretation Program Products' spread over nine pages, and its Schedule 2 stipulates the 'Monthly Charge' for their use - 'Price List for FLIC Tapes Lease by Module.' The contents of the 1986 Agreement and the listed programs are technical and not self-evident, yet the High Court interpreted the same, while purportedly deciding questions of law. In our opinion the High Court should not have ventured into an area requiring specialized knowledge, which the learned Judges did not possess. In any event the respondent had not explained the technically complex nature of the Agreements before any forum, nor was the same explained to us. The High Court could not have undertaken a factual determination while exercising powers under section 136(1) of the ITO 1979 and section 133(1) of the ITO 2001 whereunder the High Court could only determine legal questions. Incidentally, there was no material before the High Court, nor was any placed even before this Court, which may have persuaded one to hold that the said receipts were exempt under Article 12 of the Convention.

27. The 1995 Agreement was signed on 1 January 1995, but (unlike the 1986 Agreement) does not stipulate its duration. It also does not mention the 1986 Agreement nor the FLIC tapes. Unlike the 1986 Agreement it has only one schedule, Schedule A, which does not have the same components as those mentioned in the two schedules to the 1986 Agreement. The respondent never explained the nature of the Agreements. The 1986 Agreement and its two Schedules and the 1995 Agreement and its Schedule A, were technical in nature and required expert assistance to comprehend. The Income Tax Officer was of the opinion that payments received by the respondent were royalties. Therefore, to successfully controvert this it was incumbent upon the respondent to explain the nature of the receipts and what were they for. The respondent had every opportunity to offer the requisite information and explanation to the Income Tax Officer, to the Commissioner (Appeals) and then to the Tribunal, but it did not do so; these three forums were legally competent to determine facts. Instead, without establishing the necessary foundation of facts, the respondent proceeded to the High Court on untenable questions of law. It was unwarranted for the High Court to have delved into the nature of the receipts, and that too without the benefit of requisite facts and/or by misconstruing facts and by misapplying the OECD MC, its Commentary and interpretation, instead of applying the UN MC, its Commentary and interpretation.

28. The tax authorities had relied on the Convention and its Article 12, and had not accepted the respondent's contention that the said receipts were business profits. Therefore, the respondent should have explained the nature of the receipts and that they were not royalties in terms of Article 12 of the Convention. The respondent

did not clearly set out its case and did not provide the following information, documents and facts or provided misleading information:

(1) The respondent did not explain what each Agreement dealt with, which was necessary in view of their technical nature and as the language used therein was not self-evident, particularly the terms mentioned in the schedules thereto;

(2) The respondent did not state that the 1986 Agreement, the duration of which was for four years, still subsisted, yet referred to FLIC tapes which were only mentioned therein (FLIC tapes were not mentioned in the 1995 Agreement);

(3) The respondent did not itemize the nature of the receipts and then on the basis thereof claim that they did not constitute royalties (under Article 12 of the Convention) and that the same constituted business profits (under Article 7 of the Convention);

(4) The respondent in its reply to the notices sent by the Income Tax Officer did not deny certain components of royalties (mentioned in paragraph 3 of Article 12 of the Convention);

(5) The respondent did not specifically state under which Agreement it had received payment, and for what; and

(6) The respondent had relied upon Article 12 of the OECD MC, its Commentary and textbook explanation/interpretation thereof, and did so despite the fact that the Convention's Article 12 had applied Article 12 of the UN MC, and not Article 12 of the OECD MC.

There were also the following drawbacks and legal shortcomings in the respondent's case:

(1) The respondent did not present its case to the competent authority of its country (the Netherlands) under Article 24 of the Convention, and thus its point of view did not come forth and could not be considered;

(2) If the respondent had presented its case (as stated above) and if the competent authority of the Netherlands had supported the respondent's contention there was the possibility of the two countries resolving the matter and/or making regulation/s with regard thereto in terms of the Convention;

(3) That by foregoing (1) and (2) (above) a very technical matter came before the High Court, which the High Court proceeded to determine without having the requisite technical expertise and without being provided it; and

(4) The respondent had invoked the jurisdiction of the High Court under section 136(1) of the ITO 1979 and section 133(1) of the ITO 2001 which was restricted to questions of law, however, factual determination of whether the receipts constituted royalties was considered despite three forums concurrently deciding the same against the respondent.

29. The High Court erred with regard to the following:

(1) The High Court overlooked the fact that the High Court's jurisdiction under section 136(1) of the ITO 1979 and section 133(1) of the ITO 2001 was limited to considering and deciding questions of law, however, the instant cases were filed to overturn the factual determination made by three qualified forums which had determined that the receipts were not royalties in terms of Article 12 of the Convention;

(2) The High Court did not appreciate, as probably it was not explained to by the respondent, that there was no mention of FLIC tapes in the 1995 Agreement, and presumed that the receipts were payment for temporary use of FLIC tapes, which were only mentioned in the 1986 Agreement;

(3) The High Court proceeded on an incorrect assumption that Article 12 of the Convention was based on Article 12 of the OECD MC, whereas in fact it was based on Article 12 of the UN MC, whereunder royalties earned in Pakistan were taxable;

(4) The High Court did not consider the matter and the Convention holistically, including comprehensively considering Articles 7 and 12 thereof, and overlooked its Articles 22, 23 and 24;

(5) The High Court without setting out the nature of the receipts, let alone doing so in detail, assumed that they did not constitute royalties in terms of Article 12 of the Convention, and did so without analogizing the receipts against the definition of royalties in paragraph 3(a) and (b) of Article 12 of the Convention;

(6) The High Court failed to appreciate that the Convention was a complete document, each term whereof had to be considered, and instead proceeded to interpret it in the light of precedents and textbook explanations of

general terms (which were not so used in the Convention), and also did so without appreciating that the Convention's Article 12 was based on Article 12 of the UN MC and not on Article 12 of the OECD MC;

(7) The High Court also (apparently) failed to appreciate that if the respondent was taxed in Pakistan under paragraph 2 of Article 12 of the Convention its tax liability to such extent would have been accordingly adjusted in the Netherlands, and the respondent would not have been double taxed;

(8) The High Court appears not to have considered that the receipts that were taxed were the respondent's earnings in Pakistan, and to have kept this under consideration when considering the applicability of Article 12 of the Convention; and

(9) The High Court did not abide by the recognized principle of interpretation that the State in which payment is made (under the Convention) is generally entitled to tax such payment, as was reiterated in the case of A. P. Moller v. Commissioner of Income Tax.[11]

30. Therefore, the impugned Judgments of the High Court in all fourteen appeals are not sustainable nor are the reasons given by the High Court to set aside the assessment orders, the appellate orders and the Tribunal's judgments, which are accordingly restored. Consequently, these appeals are allowed by setting aside the impugned Judgments of the High Court with costs throughout.

Sd/-

Umar Ata Bandial, CJ,

Sd/-

Qazi Faez Isa, J

I have attached my dissenting note.

Sd/-

**Syed Mansoor Ali Shah, J**

**SYED MANSOOR ALI SHAH, J.---**I have read the judgment authored by my learned brother Qazi Faez Isa, J agreed to by the Hon'ble Chief Justice. However, with respect, I am unable to agree with the reasoning as well as the result arrived at by my learned brother. The question before us, as also stated in the leave granting order, is whether the income derived by the respondent non-resident Dutch company for the lease of certain software in Pakistan constitutes "royalties" or not. This precise question has also been aptly articulated in the majority judgment, which states: "The dispute is limited to whether the amounts received by the respondent, which the respondent claims to be exempt, constitute royalties as defined in paragraph 3 of Article 12 of the Convention." Once the majority judgment itself narrows down the dispute which is very much a question of law, to say that the High Court should not have addressed this question is perplexing. Then, without deciding this question, it is later reasoned in the majority judgment, "it would not really matter to the respondent if under Article 12 of the Convention it had to pay income tax at the rate of fifteen percent in Pakistan because the respondent could with the tax authority of the Netherlands claim adjustment of the amount paid in Pakistan" and "if the respondent was not taxed in Pakistan it may still be taxed in the Netherlands." I respectfully disagree from this view, as our duty is to decide the question based on law, not extraneous and utilitarian considerations in disregard of the law. Furthermore, the majority judgment holds, "the full definition of royalties in paragraph 3 (a) of Article 12 of the Convention included payments for 'information concerning industrial, commercial or scientific experience', which the respondent did not negate." On this also, I disagree and hold for the reasons given below that income derived by the respondent non-resident Dutch company does not fall in this category of payments either. And, thus, I set down my dissenting opinion.

2. The respondent, a company incorporated in the Netherlands and thus a non-resident for Pakistan income tax purposes, entered into an agreement to lease certain software programs called "FLIC tapes" developed by it for use in oilfield data processing and log interpretation to another company, in the name and style of Schlumberger Seaco Inc., the lessee, having a place of business in Pakistan. The rentals received in lieu of the lease of FLIC tapes (software programs) were claimed to be exempt from tax in Pakistan by the respondent under Article 7 of the 'Convention between the Kingdom of the Netherlands and the Islamic Republic of Pakistan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income' ("Convention") in the tax returns filed for consecutive assessment years from 1987 to 2003. However, the tax

department imposed tax on the income arising from the lease of FLIC tapes (software programs) by holding that said payments were in the nature of royalty receipts and thus liable to be taxed under Article 12(3)(a) and (b) of the Convention. The appeals filed by the respondent before the Commissioner Income Tax (Appeals) and the Income Tax Appellate Tribunal remained unsuccessful. However, the High Court held that the payments received by the respondent for leasing FLIC tapes (software programs) did not fall within the definition of income arising from royalties.

3. The respondent is a tax resident of the Netherlands and, therefore, taxation in the matter is governed under the Convention which by virtue of section 107(2) of the Income Tax Ordinance 2001 ("Ordinance") enjoys overriding effect.[12] Article 7 of the Convention provides that the business profits of an enterprise of one of the states shall be taxable in the other state only if the enterprise maintains a permanent establishment in the latter state and only to the extent that the profits are attributable to the permanent establishment. Article 12 of the Convention permits that royalties arising in one of the states and paid to a resident of the other state may be taxed up to a specified percentage in the former state. The respondent admittedly did not have a permanent establishment in Pakistan. The entire case, thus, revolves around the nature of the income arising from the lease of FLIC tapes (software programs): is it to be treated as income arising from royalties or income arising from business profits? If the answer to the question is found in the first part of the question i.e., the rentals for the lease of FLIC tapes are treated as income arising from royalties, the respondent's income may be subjected to tax up to a specified percentage as per income tax law of Pakistan. However, in case the second part of the question supplies the answer i.e., the income arising from the lease of FLIC tapes is treated as income arising from business profits, the respondent's income would not be amenable to the domestic income tax regime of Pakistan for the reason that it did not have a permanent establishment in the country.

4. The term "royalties" is defined in paragraph 3 of Article 12 of the Convention as follows:

3. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use:

a) a patent, trademark or tradename, secret formula or process, design or model, or information concerning industrial, commercial or scientific experience;

b) industrial, commercial or scientific equipment, cinematograph films and tapes for television and broadcasting;

c) a copyright of a literary, artistic or scientific work, but excluding cinematograph films and tapes for television or broadcasting.

It could be said that royalties, as per the Convention, are payments for the use of or the right to use certain types of property (intellectual property or equipment) or information concerning industrial, commercial or scientific experience. The income under contention in this case resulted from the rentals received in lieu of the lease of some software programs. The tax department has contended before us that the use of software by the lessee is the use of copyright and the income received by the respondent as consideration for such use is a royalty liable to be taxed under Article 12 of the Convention. The argument of the learned counsel for the respondent is that there is a distinction between the use of copyright and the use of copyright product and, therefore, Article 12 of the Convention is not applicable in the present case.

5. This Court in the recent case of Snamprogetti Engineering B. V. v. Commissioner of Inland Revenue[13] underscored the unique nature of international tax treaties, their distinct interpretation framework, and the importance of achieving equitable outcomes in cross-border taxation through these treaties. It has been held that international tax treaties or conventions or agreements being of a unique nature need to be looked at through a different interpretive lens as compared to the one employed while interpreting domestic legislation. These agreements being international treaties are governed by the rules of interpretation of the Vienna Convention on the Law of Treaties. Tax treaties differ from domestic tax law in language, application, and purpose. Tax treaties are relieving in nature and seek to avoid double taxation, while domestic tax law imposes tax in specific circumstances. Tax treaties require a broad purposive interpretation, and their interpretation may be more liberal than domestic law. Treaty interpretation is a separate subject from statutory interpretation, and tax treaties should be interpreted independently from domestic law. The role of a state (being party to such a

bilateral agreement) is more of implementing the terms of such agreement rather than that of interpreting the same and that too in a unilateral manner. As the primary purpose of tax treaties is to avoid and relieve double taxation through equitable and acceptable distribution of tax claims between the countries, it is important that the provisions of these treaties are interpreted in a common and workable manner, taking into account international tax language, legal decisions of other countries, model treaties[14], along with their commentaries, developed by the Organisation for Economic Co operation and Development ("OECD")[15] and the United Nations ("UN")[16], and scholarly academic works where appropriate.

6. Coming back to the solitary question in hand i.e., whether the payments received by the respondent for leasing FLIC tapes (software programs) fall within the definition of income arising from royalities. It is noted that the character of payments received in transactions involving the transfer of computer software depends on the nature of the rights that the transferee acquires under the particular arrangement regarding the use and exploitation of the program. For a payment to constitute royalty under the Convention, it must fall at least in one of the three categories provided in Article 12(3) of the Convention. One can start by narrowing down the possibilities envisaged in Article 12(3) of the Convention. The agreement for the use of FLIC tapes (software programs) concluded between the respondent and the lessee on 1 February 1986 ("Agreement")[17] did not involve payments made for the use of or the right to use any patent, trademark or tradename, design or model, or cinematograph films and tapes for television and broadcasting. The next issue is whether the Agreement involved payments made for the use of or the right to use any industrial, commercial or scientific equipment. According to Klaus Vogel's highly acclaimed treatise on double taxation treaties, which is regarded as the international gold standard on the law of tax treaties, 'equipment' consists of tangible movable objects and since the software itself is only comprised of instructions and is pure intangible information, it is not covered by the equipment clause.[18] It follows that the Agreement also did not involve payments made for the use of or the right to use any industrial, commercial or scientific equipment.

7. As regards the remaining possibilities envisaged in Article 12(3) of the Convention, one is now left, insofar as the case before us is concerned, with the payments made for the use of or the right to use secret formula or process, information concerning industrial, commercial or scientific experience or a copyright of a literary, artistic or scientific work. A secret formula or process comprises all kinds of company secrets, also known as industrial or trade secrets. The key element here is secrecy. This information must be confidential, meaning it is not widely known or easily accessible to those who typically deal with such information. It should have commercial value because of its secrecy and should be actively protected by the person who rightfully controls it through reasonable efforts.[19] If we advert to the Agreement and have a look at the definition clause, we see that the term 'FLIC tapes' means the full set of the respondent's proprietary software programs developed for use in oilfield data processing and log interpretation, including the software programs set out in the schedule attached to the Agreement, together with the related FLIC/VAX Handbook. Notably, however, what is not included is "any other related documentation such as, but not limited to, source code listings, program specifications, system flow charts, logic diagrams, system manuals or other documentation underlying and supporting the FLIC tapes". The reason for this exclusion is the respondent's intention that users shall have no knowledge of how FLIC tapes operate.[20] It shows that the Agreement did not envisage supplying of information about the ideas and principles underlying the program, such as logic, algorithms or programming languages or techniques. The transaction between the respondent and the lessee cannot, therefore, be said to be a transfer of secret formulas or process behind the software.

8. Concerning the question of information regarding industrial, commercial or scientific experience which is also known as know-how, it is seen that it is legally unprotected, not-secret-but-undisclosed knowledge that has been attained through experience. Such experience knowledge must go beyond the pure technical progress; it is related to persons having gained the knowledge by their activities. Such experience cannot be obtained simply by using the goods and services that are produced with the knowledge. Experience-based knowledge extends beyond mere technical progress and is tied to individuals who have acquired it through their activities.[21] No such experience was shared between the parties under the Agreement. When know-how is shared, it cannot be taken back and its use cannot be prohibited. The transfer of the use cannot be distinguished from a transfer of

full ownership.[22] However, we see that in this case, the lessee, on termination of the Agreement, and the lease granted under it, was bound to deliver up the FLIC tapes to the respondent together with all copies of any part of the FLIC tapes held or made by the lessee.[23] Moreover, know-how beyond software can only be the specific programming design and structure such as algorithms and not the program itself.[24] This means that the chance of the Agreement to involve payments for the use of or the right to use information concerning industrial, commercial or scientific experience is also eliminated.

9. Let us determine if the case falls under the last possibility: whether the payments were made to the respondent in consideration for the use of or the right to use a copyright of a literary, artistic or scientific work. Transfer of rights in relation to software occurs in many different ways ranging from the alienation of the entire rights in the copyright in a program to the sale of a product which is subject to restrictions on the use to which it is put. The Agreement reveals that the lessee was obliged not to modify or reproduce the FLIC tapes or any part thereof, except as required for use on its own computer.[25] The lessee specifically undertook not to supply any of the FLIC tapes or any reproduction thereof to any other person, or to permit the use of any of the FLIC tapes by any third party, even its own subsidiary or related company.[26] The lessee undertook to keep absolutely secret and confidential at all times all knowledge and information in relation to the FLIC tapes (or any correction, update, improvement or modification thereto) supplied by the respondent to the lessee, and the lessee further agreed not to communicate or cause to be communicated any information or knowledge in relation to the FLIC tapes to any other person, firm or company and to use its best endeavours to protect the FLIC tapes from unauthorised disclosure.[27] The provisions of this confidentiality clause were to survive termination of the Agreement.[28] It follows that the arrangement between the respondent and the lessee did not contemplate any licence to reproduce and distribute to the public software incorporating the copyrighted program, or to modify and publicly display the program. Therefore, there wasn't any transfer of rights to use the program in a manner that would, without such licence, constitute an infringement of copyright. Nor was there any transfer of the full ownership of the rights in the FLIC tapes. The rights acquired by the lessee comprised of partial rights in the copy of the program.

10. Vogel explains that software is pure intangible information. The way this information is transmitted is of no relevance - it can be attained through a variety of media, be it data storages or transmission networks. It is expounded that the granted copyright, in most cases, is limited to the extent necessary for the operation and use of one copy or limited number of copies and the software and digital product usually may not be reproduced beyond the allowed number of copies, modified, resold or publicly displayed. In such a case, it is not the intellectual property of the software that is licenced or sold, rather, a product made with the use of intellectual property. Thus, income from the renting out of software is not covered by Article 12 but by Article 7 of the UN Model Convention ("UN MC") and OECD Model Convention ("OECD MC").[29] In view of this, what follows is that no copyrights were leased out to the lessee which merely acquired a program copy of FLIC tapes for its operations.

11. It has been held that the right to reproduce and the right to use computer software are distinct and separate rights.[30] Similarly, ownership of copyright in a work and ownership of the physical material in which the copyrighted work is embodied are two different things. A licence from a copyright owner where no proprietary interest is transferred to the licensee, such as where the core of the transaction is to authorize the end-user to have access to and make use of the licenced computer software product over which the licensee has no exclusive rights, does not amount to parting with any copyright. Copyright is an exclusive and negative right which restricts others from doing certain acts. The right to use a copyrighted product, granted through a non-exclusive and non-transferable licence, being restrictive in nature only allows for specific uses and should not be considered as a licence granting the enjoyment of all or any rights related to the copyright.[31]

12. More importantly in Geoquest Systems B. V. Gevers Deynootweg v. Director of Income Tax[32], is a case on all fours with that before us. The facts and issues were much the same. The applicant was a company incorporated in the Netherlands. It was engaged in the business of supplying special-purpose computer software to be used in the exploration and production of mineral oils. The applicant sold certain software packages to the Oil and Natural Gas Corporation in India. The terms of the agreement between the applicant and the customer

among other things provided that the applicant granted to the customer a right to use the software and its associate proprietary information, and the term 'use' was to be limited to the processing of information and the process of copying, recording or transcribing software. The licensed use of the software was to remain restricted to the processing or interpretation by the customer of geoscience, reservoir, and production-related data owned or licensed by the customer in connection with oil, gas, and other natural resource development ventures where the customer was active as an operator or partner. On termination of the license as per the terms of the agreement, the customer was bound to discontinue all uses of the software and return the software and proprietary information to the applicant including all copies. The question before the Authority for Advance Rulings was if the income coming from the supply of software could be taxable as a royalty in India. Article 12(1) and (2) of the Agreement for Avoidance of Double Taxation concluded between India and the Netherlands, like Article 12(1) and (2) of the Convention, provide that royalties arising in a state and paid to a resident of the other state may be taxed in the other state though such royalties may also be taxed in the state in which they arise according to the laws of that state up to a specified percentage of the gross amount of the royalties. The definition of royalties in the Agreement between India and the Netherlands is similar to that given in the OECD MC. The Revenue contended that the income derived by the applicant for the supply of software could be taxed as a royalty in India. However, the Authority for Advance Rulings held that the amount payable under the agreement to the applicant did not amount to royalty within the meaning of the Agreement for Avoidance of Double Taxation between India and the Netherlands. This view of the Authority for Advance Rulings was accorded express approval by the Supreme Court of India in Engineering Analysis Centre of Excellence Private Limited v. The Commissioner of Income Tax.[33] For what has been discussed above, it is abundantly clear that the income derived by the respondent for the lease of FLIC tapes (software programs) does not constitute royalities within the meaning of Article 12(3) of the Convention.

13. The majority judgment has spent a great deal of time and effort to argue that the High Court incorrectly assumed the applicability of the OECD MC to the case though it should have considered the UN MC. The reason underlying this criticism as suggested in the majority judgment is that royalties under the UN MC may be taxed in the source country as well as in the resident country while the OECD MC does not permit taxation of royalties in the source country. However, nobody has argued before us that the Revenue could not tax royalties arising in Pakistan. The exception taken by the majority judgment to the view of the High Court would hold water if the High Court relying on the OECD MC Commentary had declared that the Revenue could not tax royalties arising in Pakistan. What was overlooked by the majority judgment, with respect, is that the issue is not about the taxing rights of Pakistan over royalties arising in the country. Rather, the dispute is whether the income derived by the respondent non resident Dutch company for the lease of certain software in Pakistan constitutes royalty or not. And in order to understand the concept of royalties, reference could be made to the OECD and UN MCs commentaries and academic treatises. Let us have a look at the definition of royalties provided in the OECD MC and UN MC and see if and to what extent they are at variance with one another and with the definition provided in the Convention. Paragraph 2 of Article 12 of the OECD MC provides:

The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.

Paragraph 3 of Article 12 of the UN MC provides:

The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, or films or tapes used for radio or television broadcasting, any patent, trademark, design or model, plan, secret formula or process, or for the use of, or the right to use, industrial, commercial or scientific equipment or for information concerning industrial, commercial or scientific experience.

One can see that the definition of royalties provided in the Convention is more or less similar to the one provided in the UN MC and is not very different from that provided in the OECD MC. In fact, the only material difference between the definition of royalties provided in the UN MC and OECD MC is that the latter excludes the

payments received as consideration "for the use of, or the right to use, industrial, commercial or scientific equipment" from the definition of royalties. And this exclusion, as explained earlier, is not relevant to the dispute before us because software is not covered by the equipment clause. It may be emphasized that once we are able to eliminate the payments for the use of or the right to use any industrial, commercial or scientific equipment from the definition of royalties, there does not remain any real difference between the definition of royalties provided in the OECD MC and UN MC. Therefore, I am of the view that the reliance placed by the High Court on the OECD MC and its Commentary, in order to decipher the true nature of payments received by the respondent and to understand the concept of royalties in the context of double taxation makes no material difference to the adjduciation of the question in hand. Notably, the UN MC Commentary on paragraph 3 of Article 12 includes the entire extract of the OECD MC Commentary on the question whether payments received as consideration for computer software are to be classified as royalties or not.

14. The majority judgment without definitively addressing whether the amounts received by the respondent constitute royalties, instead embarks upon a discussion which was not in contention between the parties. Thus the remark that if the respondent was not taxed in Pakistan, it might still be subject to taxation in the Netherlands, in my view, is not a pertinent consideration for a court tasked with adjudicating a legal dispute. Once it is established that the income earned by the respondent non resident Dutch company for leasing software in Pakistan does not qualify as royalty, delving into irrelevant factors serves no useful purpose. Furthermore, the majority asserts that the High Court's jurisdiction in this case was limited to addressing and deciding questions of law. It is worth noting that the sole point of contention between the parties revolved around whether the amounts received by the respondent constituted royalties or not, a matter which is a question of law squarely within the purview of the High Court.

15. The majority opinion also takes exception to the absence of any mention of FLIC tapes in the second agreement. I respectfully contend that this detail is inconsequential since both agreements pertain to the leasing or renting of software. The core question remains unaltered: do the payments received for the leasing or renting of software qualify as royalties? Moreover, the majority judgment suggests that the respondent had an alternative remedy under Article 24 of the Convention to present its case to the competent authority in its own country. It is said that if the competent authority in the respondent's country agreed, it could then take up the matter with the competent authority in Pakistan. Does this provision of the Convention preclude the respondent from pursuing a remedy available under the laws of Pakistan, or does it prevent this Court from adjudicating a question coming before it in its lawful jurisdiction? In my humble opinion, the answer to both these questions is a resounding 'no.'

16. The majority judgment has also relied on an earlier decision of
this Court in the case of A.P. Moller v Commissioner of Income Tax 2012 SCMR 557 wherein this Court had approved the interpretation of the High Court of Article 8 of Double Taxation Conventions between Pakistan and Denmark and Pakistan and France in the context of taxation rights between the contracting states concerning profits earned from shipping operations. The question was whether the freight charges received or receivable by the carriers from Pakistani buyers under FOB contracts for inbound cargo could be regarded as resulting in profits "from sources within" Pakistan. The High Court interpreting Article 8(3) held that profits earned by carriers on inbound cargo on account of freight charges received in Pakistan arise "from sources within" Pakistan and, therefore, within the taxing right of Pakistan as contemplated by Article 8(3). It is to be noted that the question before the Court in the said case neither related to business profits nor royalties but to shipping and air transport and, therefore, does not have any material bearing on the present case. This view of mine is accentuated by the fact that the High Court at the end of the paragraph which was quoted with approval by this Court cautions, "we may also note that we need to interpret and apply the expression 'profits derived from sources within the other Contracting State' only to the extent required for purposes of the present proceedings, and we do not regard the foregoing observations as necessarily exhaustive of the meaning of this expression."

17. For the above reasons, I agree with the submission of the respondent that there is distinction between the use of copyright and the use of copyright product. No copyrights were leased out to the lessee which merely acquired a program copy of FLIC tapes (software programs) for its operations. Further, the transaction of lease

of FLIC tapes software programs between the respondent and the lessee did not involve payments made for the use of or the right to use secret formula or process, or information concerning industrial, commercial or scientific experience. Income resulting from the lease of FLIC tapes amounts to business profits and cannot be treated as income arising from royalties. Therefore, Article 12 of the Convention is not applicable to this case. I do not feel inclined to interfere with the judgment of the High Court. As a result, these appeals are dismissed.

Sd/-

Syed Mansoor Ali Shah, J

ORDER OF THE COURT

With a majority of two to one, Justice Syed Mansoor Ali Shah, J. dissenting, these appeals are allowed.

Sd/

Umar Ata Bandial, CJ,

Sd/-

Qazi Faez Isa, J

Sd/-

Syed Mansoor Ali Shah, J

MWA/C-21/SC Appeals allowed.

**2023 S C M R 1843**

**[Supreme Court of Pakistan]**

**Present: Umar Ata Bandial, Syed Mansoor Ali Shah and**

**Muhammad Ali Mazhar, JJ**

**KHALID MEHMOOD---Appellant**

**Versus**

**CHAKLALA CANTONMENT BOARD through C.E.O. and others---Respondents**

C.M. Appeal No. 47 of 2020 in C.M.A. No. Nil of 2020 in C.R.P. No. 664 of 2018 in C.P. No. 130 of 2016, decided on 21st September, 2021.

(Against the order of the Institution Officer dated 17.02.2020).

Per Umar Ata Bandial, J.; Syed Mansoor Ali Shah and Muhammad Ali Mazhar, JJ. agreeing with their own reasons.

**(a) Supreme Court Rules, 1980---**

----O. XXVI, R. 9 & O. X, R.2---Constitution of Pakistan, Art. 188---Second review petition/curative review---Not maintainable---Article 188 of the Constitution and the Supreme Court Rules, 1980 envisage only one review of any judgment pronounced or any order made by the Court---Second review petition, whatever name is given to it including the "curative review", is not maintainable under Article 188 of the Constitution read with the Supreme Court Rules, 1980.

**Per Umar Ata Bandial, J.**

Second review petition was not maintainable in the present case.

**Per Syed Mansoor Ali Shah, J.**

Entertaining a second review petition would amount to vesting the Court with a jurisdiction not conferred on it by the Constitution or by or under any law.

Ahmad v. Abdul Aziz 1991 SCMR 234; Abdul Hameed Dogar v. Federation of Pakistan 2010 SCMR 312; Shabbar Raza v. Federation of Pakistan 2018 SCMR 514; Akhter Lalayka v. Mushtaq Sukhaira 2018 SCMR 1218 and Moinuddin v. State PLD 2019 SC 749 ref.

It is true that the Supreme Court Rules, 1980 bar entertaining the second review petition but are silent on the point whether the Supreme Court can exercise suo motu review jurisdiction to entertain a second review petition under Article 188 of the Constitution. It cannot do so for the reason that the prohibition on entertaining a second review petition is meant to put an end to litigation and ensuring finality of the judgments and orders of the apex court of the land, in the public interest. If this is the substance and purpose of the Supreme Court Rules, the prohibition operates both on the parties in moving the second review petition and on the Court as well, in exercising suo motu review jurisdiction the second time. If we assume that there is no prohibition on the suo motu exercise of its review jurisdiction the second time by the Court regarding a judgment or order, there will be no end to litigation nor will there be any finality of the judgment or orders of the Court as this suo motu review jurisdiction can then be exercisable for unlimited times and not only for the second time. Article 188 of the Constitution, thus, envisages only one-time exercise of the review jurisdiction, whether made on a review petition or suo motu, by the Court in respect of any of its judgments or orders passed in its original or appellate jurisdiction.

The second review petition, whatever name is given to it including the "curative review", is not maintainable under Article 188 of the Constitution read with the Supreme Court Rules, 1980.

**Per Muhammad Ali Mazhar, J.**

So far as a second review petition is concerned, it is clearly provided under Rule 9 of Order XXVI of the Supreme Court Rules, 1980 that, after the final disposal of the first application for review, no subsequent application for review shall lie to the Court and consequently it shall not be entertained by the Registry. Second review petition is not maintainable under the Supreme Court Rules, 1980.

**Per Syed Mansoor Ali Shah, J.**

**(b) Interpretation of Constitution---**

----Foreign jurisdictions---Any transplant of a rule from a foreign jurisdiction in ours can only be made after considering closely and thoroughly the difference in the constitutional texts and contexts.

**(c) Constitution of Pakistan---**

----Arts. 187(1) & 175(2)---Power of the Supreme Court to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it---Scope---Bare reading of Article 187(1) of the Constitution shows that its provisions are subject to and controlled by Article 175(2) of the Constitution---Article 187(1) only confers power on the Court 'to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it', and does not confer jurisdiction to take cognizance of any case or matter---Phrase 'in any case or matter pending before it' used in Article 187(1) is the key to construe the provisions thereof---No independent proceedings can be initiated under Article 187(1)---Court can invoke its power under Article 187(1) only in a case or matter that is competently filed before it under any Article of the Constitution or provision of some other law conferring jurisdiction as stated in Article 175(2) and is also pending before it---Article 187(1) of the Constitution is not applicable where the case or matter stands finally concluded and is no more pending before the Court.

Zulfiqar Babu v. Government of Punjab PLD 1997 SC 11; Hitachi Limited v. Rupali Polyester 1998 SCMR 1618; Saeed Akhtar v. State 2000 SCMR 383 and Khyber Tractors v. Pakistan PLD 2005 SC 842 ref.

Barrister Umer Aslam Khan, Advocate Supreme Court and Ch. Akhtar Ali, Advocate-on-Record for Appellant.

Babar Ali, Advocate Supreme Court for Respondents.

Date of hearing: 21st September, 2021.

**ORDER**

**UMAR ATA BANDIAL, J.---**The appellant seeks a second review through this petition. Learned counsel has relied upon the judgment of this Court in Khalid Iqbal v. Mirza Khan (PLD 2015 SC 50) which has in turn referred to PLD 2013 SC 829. Regarding Pensionary Benefits of the Judges of Superior Courts.

2. We have read the judgment carefully but do not find that a second review petition is maintainable in the present case. Dismissed.

Sd/-

Umar Ata Bandial, J

Sd/-

Syed Mansoor Ali Shah, J

I have attached a separate note giving reasons for the non-maintainability of the second review petition.

Sd/

**Muhammad Ali Mazhar, J**

**SYED MANSOOR ALI SHAH, J.---**I agree with the conclusion arrived at by my learned brother, Justice Umar Ata Bandial, that the second review petition filed by the appellant is not maintainable, and that the present appeal filed against the order of the Institution Officer of this Court, returning the petition to the appellant, should be dismissed. As the learned counsel for the appellant has vehemently relied upon two judgments of this Court, Khalid Iqbal v. Mirza Khan (PLD 2015 SC 50) and Judges' Pension case (PLD 2013 SC 829), and one from the Indian jurisdiction, Rupa Ashok v. Ashok Hurra (AIR 2002 SC 1771), to argue that second review petition is maintainable. I, therefore, deem it appropriate to briefly address his argument and give my reasons for rejecting the same. Hence, this concurring note is being added.

2. The facts leading to the filing of the present appeal, briefly, are that the appellant filed a writ petition in the Lahore High Court against the respondents regarding an auction matter of the year 1997, which was allowed by a Single Bench of that High Court vide order dated 17.06.2013. The respondents' intra-court appeal before the Division Bench failed on 9 December 2015. They then filed a petition for leave to appeal in this Court, which was allowed by a three-member Bench of this Court vide its order dated 26.09.2018: the impugned judgments of the High Court were set aside and the writ petition of the appellant was dismissed on the ground of laches. The appellant filed a review petition against the said order of this Court, which was dismissed by this Court on 9 December 2019, holding that no ground for review had been made out. The appellant then filed an application under Article 187 of the Constitution of the Islamic Republic of Pakistan ("Constitution") read with

Rule 2 of Order X and Rule 6 of Order XXXIII of the Supreme Court Rules 1980 ("Supreme Court Rules"), for passing appropriate orders in the interest of justice. The Institution Officer of this Court returned the said application of the appellant vide his order dated 17.02.2020 by determining that the application amounted to a second review petition which was not entertainable under Rule 9 of Order XXVI and Rule 2 of Order X of the Supreme Court Rules. The present appeal has been filed against this order of the Institution Officer.

3. The review jurisdiction is conferred on this Court by Article 188 of the Constitution, which states that the 'Supreme Court shall have power, subject to the provisions of any Act of Majlis-e-Shoora (Parliament) and of any rules made by the Supreme Court, to review any judgment pronounced or any order made by it'. The review jurisdiction conferred by Article 188, as it is evident from the reading of that Article, is subject to the provisions of any Act of Parliament and any rules made by the Court. The Parliament has not so far passed any Act under this Article; however, the Supreme Court Rules made by this Court contain the rules that regulate its review jurisdiction. The rules of the Supreme Court Rules referred to by the Institution Officer of this Court while returning the second review petition of the appellant are reproduced here for ready reference:

Order XXVI, Rule 9

9. After the final disposal of the first application for review no subsequent application for review shall lie to the Court and consequently shall not be entertained by the Registry.

Order X, Rule 2

2. Subject to the provisions contained in Order XXVI, a judgment pronounced by the Court or by majority of the Court or by a dissenting Judge in open Court shall not afterwards be altered or added to, save for the purpose of correcting a clerical or arithmetical mistake or an error arising from any accidental slip or omission.

In view of the above rules, the question of maintainability of, and the jurisdiction of this Court to entertain, a second review petition has been considered and decided by this Court in many cases. The legal position as to the non-maintainability of a second review petition is so well settled by the repeated pronouncements of this Court that I consider it unnecessary to delve into this question again and reference to some of these cases here, should suffice: See Ahmad v. Abdul Aziz 1991 SCMR 234; Abdul Hameed Dogar v. Federation of Pakistan 2010 SCMR 312; Shabbar Raza v. Federation of Pakistan 2018 SCMR 514 (7-MB); Akhter Lalayka v. Mushtaq Sukhaira 2018 SCMR 1218 (5-MB); Moinuddin v. State PLD 2019 SC 749 (7-MB). The declaration made by a seven-member larger Bench of this Court in the last mentioned case of Moinuddin is reproduced here to show what the law of the land on this matter is:

6 .. There is, thus, no scope for maintainability of a second or subsequent review petition before this Court after the first review petition has been decided. It is sometimes argued that in such a situation, particularly in a case of extreme hardship, this Court may attend to the matter in exercise of its jurisdictions under Articles 184(3) or 187 of the Constitution or may resort to revisiting the earlier order or judgment in order to safeguard the interests of justice but such arguments have consistently been rejected by this Court in the past. In many previous cases this Court has consistently held that after exhausting the review jurisdiction of this Court a party to a case cannot invoke Articles 184(3) or 187(1) of the Constitution for reopening the same case.

4. Article 175(2) of the Constitution unequivocally declares that '[n]o court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law'. I am, therefore, of the considered view that entertaining a second review petition would amount to vesting the Court with a jurisdiction not conferred on it by the Constitution or by or under any law in terms of Article 175(2) of the Constitution. It is reiterated that the courts in Pakistan enjoy jurisdiction which is conferred on them by the Constitution or by or under any law and do not possess any inherent jurisdiction on the basis of some principles of English common law, equity or good conscience. This is also a well-settled legal position as declared by this Court in the following, among other, cases:

Sindh Employees' Social Security v. Adamjee Cotton Mills PLD 1975 SC 32

It is, however, important to point out that the power to grant interim relief in this case is "ancillary or incidental" to the main appellate jurisdiction expressly conferred by the statute. This should not be confused with what is sometimes, claimed as the "inherent" jurisdiction of a Court, a claim which is no longer tenable in view of clause (2) Article 175 of the Constitution.

Brother Steel Mills v. Ilyas Miraj PLD 1996 SC 543 per Fazal Karim, J.

Clause (2) of that Article [175] provides that "no Court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law". For the purpose of these appeals, it is sufficient to say that the Supreme Court of Pakistan and the High Courts have been established by the Constitution, that the Supreme Court of Pakistan and the High Court have such jurisdiction as has been conferred upon them by the Constitution, that they have also such other jurisdiction as is or may be conferred upon them by or under any law and that other Courts may be established, and will have such jurisdiction as may be conferred upon them by or under law... Two propositions emerge clearly: First, that the jurisdiction of the Courts is never established by themselves, it is established by an authority external to them, either in the Constitution or in law... Secondly, it is for the Constitution and subject to the Constitution, for the law to determine the nature and extent of the jurisdiction and the forum upon which it will be conferred.

Hitachi Limited v. Rupali Polyester 1998 SCMR 1618

The principles of common law or equity and good conscience cannot confer jurisdiction on the Courts in Pakistan which has not been vested in them by law. In this regard reference may be made to clause (2) of Article 175 of the Constitution of Pakistan, which provides that no Court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.

As there is no provision in the Indian Constitution similar to Article 175(2) of our Constitution, the Rupa Ashok case of the Indian jurisdiction, which held that the Indian Supreme Court has the inherent jurisdiction to act ex debito justitiae and can entertain in some rarest of the rare cases a second (curative) review petition, does not advance the argument of the learned counsel for the appellant in any manner. Any transplant of a rule from a foreign jurisdiction in ours can only be made after considering closely and thoroughly the difference in the constitutional texts and contexts. In view of the difference of provisions in the Constitutions of both countries, the reference to the said Indian case is misplaced.

5. So far as the reference to Article 187(1) of the Constitution by the appellant in his application (second review petition) is concerned, the same is also misconceived. The bare reading of Article 187(1) shows that its provisions are subject to and controlled by Article 175(2) of the Constitution. It only confers power on the Court 'to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it', and does not confer jurisdiction to take cognizance of any case or matter. The phrase 'in any case or matter pending before it' used in Article 187(1) is the key to construe the provisions thereof. It leaves little doubt to find that no independent proceedings can be initiated under this Article. The Court can invoke its power under Article 187(1) only in a case or matter that is competently filed before it under any Article of the Constitution or provision of some other law conferring jurisdiction as stated in Article 175(2) and is also pending before it. Article 187(1) of the Constitution is not applicable where the case or matter stands finally concluded and is no more pending before the Court. And this is also a well settled view of this Court: See Zulfiqar Babu v. Government of Punjab PLD 1997 SC 11; Hitachi Limited v. Rupali Polyester 1998 SCMR 1618; Saeed Akhtar v. State 2000 SCMR 383; Khyber Tractors v. Pakistan PLD 2005 SC 842. In the last mentioned case of Khyber Tractors, after going through the earlier cases this Court concluded thus:

The above reports do not lay down that an independent proceedings can be initiated under Article 187 of the Constitution but the ratio of the above reports seems to be that once this Court is seized of a lis competently under the relevant law, its power to grant appropriate relief is not controlled by the technicalities of the pleadings or otherwise as clause (I) of Article 187 lays down that subject to clause (2) of Article 175 of the Constitution, the Supreme Court shall have power to issue such directions, orders, or decrees as may be necessary for doing complete justice in any case or matter pending before it including an order for the purpose of securing the attendance of any person or the discovery of production of any document. We may point out that the key words employed in the above clause are "in any case or matter pending before it." The above words clearly indicate that the relief referred to in the aforesaid clause can be granted in the case or matter pending before the Supreme Court. It may further be observed that the word "pending" means competently brought before this Court. The provision of rule 6 of Order XXXIII of the rules is in line with above clause (1) of Article 187 of the Constitution as it provides that nothing in these rules shall be deemed to limit or otherwise effect the inherent power of the

Court to make such order as may be necessary for the ends of justice or to prevent abuse of process of the Court. The above rule can be pressed into service only in a matter which is competently filed before this Court but it does not give an independent right to initiate proceedings of the nature in question.

6. In Khalid Iqbal case, referred to by the learned counsel, the second review petition was dismissed by this Court holding the same to be not maintainable; the said case, therefore, does not support but rather negates the argument of the learned counsel. The learned counsel relied upon certain observations made by Justice Mian Saqib Nisar as to the reviewing of its per incuriam judgment by this Court, in his concurring opinion recorded in the Judges' Pension case, which was also referred to in the Khalid Iqbal case. Those observations were made by Justice Mian Saqib Nisar by referring, among some cases of foreign jurisdiction, to the observations of Chief Justice Cornelius made in Nawabzada Amir Khan v. Controller of Estate Duty (PLD 1962 SC 335). Thus, the genealogy of the observations made in both the cases referred to by the learned counsel goes back to the observations made by Chief Justice Cornelius in the Nawabzada Amir Khan case. The said case was of a first review petition, and the observations made therein by the learned Chief Justice and other Judges relate to the first review petition, not to the second. So was the Judges' pension case, and the observations made by Justice Mian Saqib Nisar in that case were also about the first review proceedings initiated by the Court suo motu on a note of the Registrar of this Court.

7. It is true that the Supreme Court Rules bar entertaining the second review petition but are silent on the point whether this Court can exercise suo motu review jurisdiction to entertain a second review petition under Article 188 of the Constitution. In my opinion, it cannot do so for the reason that the prohibition on entertaining a second review petition is meant to put an end to litigation and ensuring finality of the judgments and orders of the apex court of the land, in the public interest. If this is the substance and purpose of the Supreme Court Rules, the prohibition operates both on the parties in moving the second review petition and on the Court as well, in exercising suo motu review jurisdiction the second time. If we assume that there is no prohibition on the suo motu exercise of its review jurisdiction the second time by the Court regarding a judgment or order, there will be no end to litigation nor will there be any finality of the judgment or orders of the Court as this suo motu review jurisdiction can then be exercisable for unlimited times and not only for the second time.

8. More importantly, review jurisdiction conferred on the Court by Article 188 of the Constitution, is with regard to 'any judgment pronounced or any order made by the Court' under the preceding Articles of the Constitution, i.e., Articles 184 in its original jurisdiction or under Article 185 in its appellate jurisdiction. Article 188 is not concerned with any judgment or order made in review jurisdiction by the Court under the same Article. And unless the judgment or order passed on the first review petition or in the first suo motu review proceedings is recalled, the judgment or order passed in the original or appellate jurisdiction cannot be reviewed. If this is not the meaning and scope of the words 'any judgment' or 'any order' used in Article 188 of the Constitution but are taken to include the judgment or order passed in the review jurisdiction also, then any judgment or order passed in the second, third or fourth suo motu review proceedings will also be reviewable in the third, fourth or fifth suo motu review proceedings. Such an interpretation of the words 'any judgment' or 'any order' in Article 188 of the Constitution, if adopted, would be against the legislative intent and the public interest that lies in putting an end to litigation and ensuring finality of the judgments and orders of the apex court of the country. Article 188 of the Constitution, thus, envisages only one-time exercise of the review jurisdiction, whether made on a review petition or suo motu, by the Court in respect of any of its judgments or orders passed in its original or appellate jurisdiction.

9. Nonetheless, it may be pertinent to underline here that revisiting, and overruling or modifying if found necessary, a decision on a question of law or enunciation of a principle of law, that is binding on all other courts in the country as per Article 189 of the Constitution, in a case other than that in which the said decision or enunciation was made, must not be confused with reviewing that very judgment or order in which the said decision or enunciation was made. There is no limit, under the Constitution or any law, as to how many times a question of law once decided or a principle of law enunciated in one case can be revisited, if found necessary to do so, in some other case by a larger Bench or the Full Court Bench of this Court, as an exception to the doctrine of stare decisis for the correction or development of the law declared by this Court. The following

observations of a seven-member larger Bench of this Court made in Shabbar Raza may advantageously be quoted on this point:

[A] judgment of this Court can be considered to be per incuriam but it is for the Judges to revisit any such judgment, if and when pointed out by any person during the course of hearing of any other case. Such a finding would be premised on the Court finding the same judgment to be against any provision of the Constitution or the law, or the principle(s) already settled by a larger Bench of the Court. It is not the right of a person, who would have no locus standi under Article 184(3) of the Constitution, to file such a petition, particularly in the situation where the review jurisdiction has been invoked and the same (review) has been dismissed; thus, such judgment (under review) can never be challenged by virtue of filing independent proceedings under Article 184(3) of the Constitution. This would be an abuse of the process of law and is absolutely impermissible.

(Emphasis added)

10. For all that has been discussed above, the argument of the learned counsel for the appellant regarding the maintainability of a second review petition is found meritless and is therefore rejected. The second review petition, whatever name is given to it including the "curative review", is not maintainable under Article 188 of the Constitution read with the Supreme Court Rules, and the Institution Officer of this Court has rightly returned the second review petition filed by the appellant, being not entertainable. The present appeal is meritless and is, therefore, dismissed

Sd/-

Syed

**Mansoor Ali Shah, J**

**04.08.2023**

**MUHAMMAD ALI MAZHAR, J.---**On 21.9.2021, C.M. Appeal No.47/2020 filed in C.M.A. Nil/2020 in C.R.P. No.664/2018 in C.P. No. 130/2016 was dismissed by this Court on the ground that a Second Review Petition is not maintainable. Recently I have authored a judgment in the case of Commissioner Inland Revenue Z-III, Corporate Regional Tax Office, Tax House, Karachi and another v. MSC Switzerland and Geneva (2023 SCMR 1011), wherein the review jurisdiction was discussed in detail keeping in mind Article 188 of the Constitution, Order XXVI of the Supreme Court Rules, 1980 and Order XLVII, Rule 1, C.P.C. Even with reference to the First Review Petition, it was held in the above judgment that clemency by dint of review is accorded to rectify an irreversible injustice, if any, done by a Court such as through misconstruction of law, misreading of the evidence or non-consideration of pleas raised before a Court that would amount to an error floating on the surface of the record; however, where the Court has taken a conscious and deliberate decision on a point of fact or law, a review petition will not be competent. Review by its nature is neither commensurate to a right of appeal or opportunity of rehearing merely on the ground that one party or the other felt dissatisfied with the decision of the Court, nor can a judgment or order be reviewed merely because a different view could have been taken. So far as the Second Review Petition is concerned, it is clearly provided under sub-rule (9), Rule 9 of Order XXVI of the Supreme Court Rules, 1980 that, after the final disposal of the first application for review, no subsequent application for review shall lie to the Court and consequently it shall not be entertained by the Registry.

2. My learned brother Justice Mansoor Ali Shah, in order to elucidate the maintainability and scope of a Second Review Petition, contributed a separate note for amplification. I concur with the view of my learned brother that a "Second Review Petition" is not maintainable under the Rules, and for this reason the Second Review Petition was rightly dismissed vide order dated 21.9.2021.

Sd/-

Muhammad Ali Mazhar, J

MWA/K-6/SC Order accordingly.

**2023 S C M R 1856**

**[Supreme Court of Pakistan]**

**Present: Umar Ata Bandial, C.J., Syed Mansoor Ali Shah, Athar Minallah and Syed Hasan Azhar Rizvi, JJ**

**COMMISSIONER INLAND REVENUE---Petitioner**

**Versus**

**Messrs RYK MILLS---Respondent**

Civil Petitions Nos. 1842-L and 1843-L of 2022, decided on 11th September, 2022.

(Against the order of Lahore High Court, Lahore dated 31.03.2022, passed in ETRs Nos. 32241 and 32246 of 2021)

**(a) Constitution of Pakistan---**

----Arts. 4 & 10A---Show cause notice---Significance and purpose of a show cause notice stated.

A show cause notice is a formal communication from an authority, informing the recipient of an alleged violation or non-compliance with a law, and providing them with an opportunity to respond to the said allegations. It embodies the principle of natural justice, which requires that parties to a dispute be given a fair hearing before any decision is made that may affect their rights or interests. The principles of due process and fairness mandate that the recipient of a show cause notice be given adequate time to respond and present their case, that they be given access to relevant evidence and information, and that they be given the opportunity to be heard before any action is taken against them. This ensures that the decision-maker is not biased, that the decision is based on the facts of the case and the relevant law, and that the recipient's rights and interests are protected. Thus, in addition to the fair hearing principle, there are other principles of natural justice that also apply for the purposes of issuance of show cause notices, including the principle of impartiality, which requires that the decision maker be impartial, and the principle of reasons, which requires that the decision-maker provide reasons for their decision. Therefore, a show cause notice is an important tool for enforcing the law, and to ensure that the recipient is given a fair and transparent opportunity to present their case before any adverse order affecting their rights and interests is passed.

Siemens Engineering v. Union of India AIR 1976 SC 1785 and S.N. Mukherjee v. Union of India AIR 1990 SC 1984 ref.

The Constitution provides for the right to be treated in accordance with the law and enshrines the principles of fair trial and due process under Articles 4 and 10A, respectively. Article 4 of the Constitution provides for the right of citizens to enjoy the protection of law and to be treated in accordance with law as an inalienable right of every citizen. It further provides that no action detrimental to life, liberty, body, reputation or property of any person shall be taken except in accordance with the law and that no person shall be prevented from or be hindered in doing that which is not prohibited by law. Article 10A provides for the fundamental right to a fair trial and due process. The issuance of a show cause notice is an essential element in ensuring the provision of the said rights, as it provides individuals and organizations with the opportunity to explain their actions and to respond to allegations of violation or non-compliance with any law before any adverse action is taken against them. Hence, it follows that when a specific allegation is not put to the recipient, thereby failing to provide the recipient with the opportunity to respond to the same, any adjudication on the said allegation would be against the right of due process and fair trial and therefore, in contravention to Articles 4 and 10A of the Constitution.

A show cause notice can also be viewed as being akin to alternative dispute resolution ("ADR") as it provides a pre-litigation opportunity for the recipient to present their position and show cause. By doing so, the matter can potentially be resolved before it escalates and requires any adjudication. This not only saves time and resources but also encourages the efficient resolution of disputes, acting as an effective mode of resolving disputes outside of the traditional legal framework. Thus, while acting as a means to ensure due process and fair trial by allowing the recipient to explain their position and respond to the allegations before any legal action is taken, the issuance of a show cause notice also acts as a tool to resolve the issue in the pre-litigation stage, similar to the objective of ADR.

**(b) Constitution of Pakistan---**

----Arts. 4 & 10A---Fresh/supplementary show cause notice, issuance of---Circumstances in which issuance of a fresh/supplementary show cause notice becomes necessary highlighted.

In certain cases and to uphold the principles and rights enshrined in Articles 4 and 10A of the Constitution, after the issuance of the initial show cause notice, it may be necessary to issue a supplementary or a fresh show cause notice if there has been a significant change in circumstances or if new evidence has come to light. For example, if the recipient has provided a valid response to the initial show cause notice, but new information has surfaced suggesting that the alleged violation or non-compliance did occur, a fresh show cause notice may be required to enable the recipient to respond to the new allegations and provide further clarification. Similarly, where there has been a significant change in the circumstances or situation that led to the issuance of the initial show cause notice, a fresh or supplementary show cause notice may be required to address these changes; where the original notice was defective or incomplete, a fresh or supplementary notice would be required to be issued to provide a more detailed or accurate statement of the issues; and where the original notice does not fully address all of the issues or violations that need to be addressed, a fresh or supplementary notice should be issued to cover any outstanding matters. Ultimately, the decision to issue a fresh show cause notice should be predicated on a thorough and careful evaluation of the facts and circumstances of each case, guaranteeing that the principles of due process and fair trial are upheld.

**(c) Tax---**

----Show cause notice---Contents---Scope and purpose of a show cause notice stated.

A show cause notice issued to a taxpayer must contain all the necessary facts and must specify the alleged actions or inaction by the taxpayer that violated the law, allowing for a meaningful response from the taxpayer. It is imperative that the taxpayer is confronted with specific allegations, along with the grounds upon which such allegations are based, in order to properly respond to the same and to place relevant material on record that would be necessary for any defence put forth and for any adjudication by the assessing officer in relation thereto. This is also because once a show cause notice is issued, the original adjudication on the said show cause notice can only be based on the grounds and allegations levelled therein. Unless the taxpayer is confronted with the allegations through a show cause notice, no determination can be made by the assessing officer with regards to the said allegations as it is beyond the competence of the department to make out a case which the department had never canvassed and the taxpayer had never been afforded the opportunity to meet. Hence, unless the allegations, and the grounds on which the said allegations are based, are not specifically alleged in the show cause notice issued to the taxpayer, the whole exercise becomes redundant and unsustainable in law.

Commissioner Inland Revenue v. Pakistan Tobacco Company 2022 SCMR 1251; Al-Khair Gadoon v. The Appellate Tribunal 2019 SCMR 2018; Raj Bahadur v. Union of India (1997) 6 SCC 81; New Delhi Television v. Deputy Commissioner of Income Tax AIR 2020 SC 2177; Collector of Central Excise v. H.M.M. Limited 1995 Supp. (3) SCC 322; Collector Central Excise v. Rahm Din 1987 SCMR 1840; SACI Allied Products v. Commissioner of Central Excise (2005) 7 SCC 159; Commissioner of Central Excise v. Ballarpur Industries (2007) 8 SCC 89 and Precision Rubber v. Commissioner of C. Ex. 2016 (334) ELT 577 (SC) ref.

**(d) Tax---**

----Fresh/supplementary show cause notice, issuance of---Circumstances in which issuance of a fresh/supplementary show cause notice becomes necessary highlighted.

Where in response to a show cause notice, the taxpayer, in defence, raises substantial grounds or puts forth substantial factual aspects that are not covered in the initial show cause notice and, therefore, require further inquiry or verification by the department, then, after conducting such further inquiry or verification, a fresh or supplementary show cause notice should be issued to the taxpayer, if it is then so required. No determination can be made with regards to the same unless the taxpayer is afforded the opportunity to respond to any deficiencies or misrepresentations found in relation thereto by specifically alleging the same in a fresh or supplementary show cause notice. Hence, instead of proceeding under the same show cause notice, it is

necessary that a fresh or supplementary show cause notice is issued to the taxpayer in light of the defence so taken. Failure to do so would not only denote that in light of the grounds or facts raised in the defence put forth by taxpayer in response to the show cause notice, which were not in the knowledge of the tax authorities and therefore, were not part of the show cause notice, no further action is required under the said show cause notice, any adjudication in relation to the same would also be against the law, rendering the whole exercise redundant. Therefore, as a policy, such practice must be adopted by the tax authorities in order to prevent wastage of time and effort, and to curb unnecessary litigation. Not only would this allow a taxpayer to meaningfully respond to the specific allegations asserted against the taxpayer upon which the subsequent original adjudication, if any, will be based, as required under the law, it would also allow many cases to be resolved at the initial stages without the need to proceed any further and needlessly burden the public exchequer.

Warner Hindustan v. Collector of Central Excise (1999) 6 SCC 762; Precision Rubber v. Commissioner of C. Ex. 2016 (334) ELT 577 (SC) and Godrej v. Commissioner of Customs 2002 (143) ELT 16 (SC) ref.

**(e) Tax---**

----Factual issues---Highest authority for factual determination in tax matters is the Tribunal.

Commissioner Inland Revenue v. Sargodha Spinning Mills 2022 SCMR 1082 and Commissioner Inland Revenue v. MCB Bank Limited 2021 PTD 1367 ref.

Saba Saeed, Advocate Supreme Court for Petitioners (through video-link, Lahore)

Shehbaz Butt, Advocate Supreme Court for Respondent (through video-link, Lahore)

Assisted by: Muhammad Hassan Ali, Law Clerk, Supreme Court of Pakistan.

Date of hearing: 11th November, 2022.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The petitioner seeks leave to appeal against order dated 31.3.2022 whereby the Excise Tax References ("ETRs") filed by the petitioner department were dismissed by the High Court.

2. The brief background of the case is that the petitioner department issued a show cause notice dated 02.1.2014 to the respondent company with the allegation that the respondent company had to charge Federal Excise Duty ("FED") at the rate of 8% on local supplies of white crystalline sugar but instead it charged 0.5% and as a consequence FED was short levied. The respondent company filed a written reply dated 11.1.2014 controverting the said allegation in the show cause notice. However, through the Order-in-Original dated 27.3.2014 the matter was decided against the respondent company and it was held that the short levied FED along with surcharge is to be recovered from the respondent along with penalty (5% of the amount involved). The respondent filed an appeal before the Commissioner Inland Revenue, Appeal-V, Lahore, which was dismissed vide order dated 23.11.2020 as barred by time. The respondent company then filed a rectification application against the said order, which was also dismissed on 24.12.2020. These orders were then assailed by the respondent through two appeals filed before the Appellate Tribunal Inland Revenue, Lahore ("Tribunal"). Vide order dated 28.1.2021, the appeal against order dated 23.11.2020, whereby the appeal of the respondent had been dismissed by the Commissioner Inland Revenue, was allowed by the Tribunal and resultantly the appeal against order dated 24.12.2020 was deemed to have become infructuous. Against the said order, the petitioner preferred two ETRs before the Lahore High Court under section 34A of the Federal Excise Act, 2005, raising five questions of law. However, at the time of hearing before the High Court, only the following two questions were pressed for determination:

I. Whether or not learned ATIR granted benefit of SRO 77(I)/2013 [to the] tax payer in violation of pre-conditions of clauses (b) and (d) of the SRO 77(I)/2013?

II. Whether the order of learned ATIR is justified and legal as the taxpayer [did] not provide documents of export whereas, as per law, registered person under sections 17 and 21(a) of the Federal Excise Act, 2005 read with section 22(1)(e) of the Sales Tax Act, 1990 is bound to provide it for verification as mandated under section 73 of the Sales Tax Act, 1990?

The said ETRs were then decided against the petitioner department by the High Court vide the impugned order dated 31.3.2022, thus, upholding the decision of the Tribunal.

3. We have heard the learned counsel for the parties and have examined the record of the case. At the outset, we have noticed that in the show cause notice dated 02.1.2014 issued by the petitioner department, the case set out against the respondent company was that it had charged 0.5% FED on the value of local supplies whereas it should have charged 8%. No mention was made of SRO No.77(I)/2013 ("SRO"), or any non-compliance thereof, in the said show cause notice. In response to the said show cause notice, the respondent company pointed out that it had charged 0.5% FED on the basis of the SRO and therefore it was not liable to pay 8% FED on local supplies. Under the said SRO relaxation in the rate of FED is extended to the quantity of the local supply of sugar equivalent to the quantity exported by the sugar manufacturer. Despite raising the above new factual ground claiming benefit under the SRO, no fresh or supplementary show cause notice was issued to the respondent company seeking clarification as to the applicability of the SRO or whether the respondent company was entitled to the benefit of the SRO. Instead, the original adjudication by the Deputy Commissioner Inland Revenue proceeded on the basis of the already issued show cause notice and while deciding the same he addressed the issue of the SRO and held that two pre-conditions of the said SRO i.e. clauses (b) and (d) had not been complied with, which provide that the sugar manufacturer has to present proof of the sugar it has exported and that the benefit of the SRO shall not be admissible in respect of exports made through land routes to Afghanistan and the Central Asian Republics. These matters were extraneous to the show cause notice and the case set up by the department against the respondent company.

4. Before delving into the matter at hand, we feel it necessary to first underscore the significance and purpose of a show cause notice. A show cause notice is a formal communication from an authority, informing the recipient of an alleged violation or non-compliance with a law, and providing them with an opportunity to respond to the said allegations. It embodies the principle of natural justice, which requires that parties to a dispute be given a fair hearing before any decision is made that may affect their rights or interests. The principles of due process and fairness mandate that the recipient of a show cause notice be given adequate time to respond and present their case, that they be given access to relevant evidence and information, and that they be given the opportunity to be heard before any action is taken against them. This ensures that the decision-maker is not biased, that the decision is based on the facts of the case and the relevant law, and that the recipient's rights and interests are protected. Thus, in addition to the fair hearing principle, there are other principles of natural justice that also apply for the purposes of issuance of show cause notices, including the principle of impartiality, which requires that the decision-maker be impartial, and the principle of reasons, which requires that the decision-maker provide reasons for their decision.[1] Therefore, a show cause notice is an important tool for enforcing the law, and to ensure that the recipient is given a fair and transparent opportunity to present their case before any adverse order affecting their rights and interests is passed.

5. The Constitution[2] provides for the right to be treated in accordance with the law and enshrines the principles of fair trial and due process under Articles 4 and 10A, respectively. Article 4 of the Constitution provides for the right of citizens to enjoy the protection of law and to be treated in accordance with law as an inalienable right of every citizen. It further provides that no action detrimental to life, liberty, body, reputation or property of any person shall be taken except in accordance with the law and that no person shall be prevented from or be hindered in doing that which is not prohibited by law. Article 10A provides for the fundamental right to a fair trial and due process. The issuance of a show cause notice is an essential element in ensuring the provision of the said rights, as it provides individuals and organizations with the opportunity to explain their actions and to respond to allegations of violation or non-compliance with any law before any adverse action is taken against them. Hence, it follows that when a specific allegation is not put to the recipient, thereby failing to provide the recipient with the opportunity to respond to the same, any adjudication on the said allegation would be against the right of due process and fair trial and therefore, in contravention to Articles 4 and 10A of the Constitution.

6. As such, in certain cases and to uphold the above principles and rights, after the issuance of the initial show cause notice, it may be necessary to issue a supplementary or a fresh show cause notice if there has been

a significant change in circumstances or if new evidence has come to light. For example, if the recipient has provided a valid response to the initial show cause notice, but new information has surfaced suggesting that the alleged violation or non-compliance did occur, a fresh show cause notice may be required to enable the recipient to respond to the new allegations and provide further clarification. Similarly, where there has been a significant change in the circumstances or situation that led to the issuance of the initial show cause notice, a fresh or supplementary show cause notice may be required to address these changes; where the original notice was defective or incomplete, a fresh or supplementary notice would be required to be issued to provide a more detailed or accurate statement of the issues; and where the original notice does not fully address all of the issues or violations that need to be addressed, a fresh or supplementary notice should be issued to cover any outstanding matters. Ultimately, the decision to issue a fresh show cause notice should be predicated on a thorough and careful evaluation of the facts and circumstances of each case, guaranteeing that the principles of due process and fair trial are upheld.

7. A show cause notice can also be viewed as being akin to alternative dispute resolution ("ADR") as it provides a pre-litigation opportunity for the recipient to present their position and show cause. By doing so, the matter can potentially be resolved before it escalates and requires any adjudication. This not only saves time and resources but also encourages the efficient resolution of disputes, acting as an effective mode of resolving disputes outside of the traditional legal framework. Thus, while acting as a means to ensure due process and fair trial by allowing the recipient to explain their position and respond to the allegations before any legal action is taken, the issuance of a show cause notice also acts as a tool to resolve the issue in the pre-litigation stage, similar to the objective of ADR.

8. Coming to the present matter, in our view, non-compliance of the conditions of the SRO by the respondent company was a distinct and separate allegation which was necessarily required to be properly alleged in a show cause notice issued by the department and put to the respondent company.[3] A show cause notice issued to a taxpayer must contain all the necessary facts and must specify the alleged actions or inaction by the taxpayer that violated the law, allowing for a meaningful response from the taxpayer.[4] It is imperative that the taxpayer is confronted with specific allegations, along with the grounds upon which such allegations are based, in order to properly respond to the same and to place relevant material on record that would be necessary for any defence put forth and for any adjudication by the assessing officer in relation thereto. This is also because once a show cause notice is issued, the original adjudication on the said show cause notice can only be based on the grounds and allegations levelled therein, as pointed out above.[5] Unless the taxpayer is confronted with the allegations through a show cause notice, no determination can be made by the assessing officer with regards to the said allegations as it is beyond the competence of the department to make out a case which the department had never canvassed and the taxpayer had never been afforded the opportunity to meet.[6] Hence, unless the allegations, and the grounds on which the said allegations are based, are not specifically alleged in the show cause notice issued to the taxpayer, the whole exercise becomes redundant and unsustainable in law.

9. Therefore, where in response to a show cause notice, the taxpayer, in defence, raises substantial grounds or puts forth substantial factual aspects that are not covered in the initial show cause notice and, therefore, require further inquiry or verification by the department, then, after conducting such further inquiry or verification, a fresh or supplementary show cause notice should be issued to the taxpayer, if it is then so required.[7] No determination can be made with regards to the same unless the taxpayer is afforded the opportunity to respond to any deficiencies or misrepresentations found in relation thereto by specifically alleging the same in a fresh or supplementary show cause notice. Hence, instead of proceeding under the same show cause notice, it is necessary that a fresh or supplementary show cause notice is issued to the taxpayer in light of the defence so taken. Failure to do so would not only denote that in light of the grounds or facts raised in the defence put forth by taxpayer in response to the show cause notice, which were not in the knowledge of the tax authorities and therefore, were not part of the show cause notice, no further action is required under the said show cause notice, any adjudication in relation to the same would also be against the law, rendering the whole exercise redundant. Therefore, we feel that as a policy, such practice must be adopted by the tax

authorities in order to prevent wastage of time and effort, and to curb unnecessary litigation. Not only would this allow a taxpayer to meaningfully respond to the specific allegations asserted against the taxpayer upon which the subsequent original adjudication, if any, will be based, as required under the law, it would also allow many cases to be resolved at the initial stages without the need to proceed any further and needlessly burden the public exchequer.

10. In the instant case, the show cause notice issued to the respondent had no such grounds or allegations regarding the applicability of the SRO or fulfillment of the conditions therein. Even when the respondent asserted in its reply that it had paid the FED by availing the benefit under the SRO, no fresh or supplementary show cause notice was issued to the respondent after inquiry by the department as to whether the conditions of the SRO had been fulfilled by the respondent. The assessing officer, without confronting the respondent as to the non-fulfilment of the conditions of the SRO, without providing the respondent with the opportunity to respond to the same and place relevant material on the record, and hence, without having any material to adjudicate upon this aspect, proceeded to determine that the respondent had not complied with the conditions of the SRO while adjudicating upon the same show cause notice already issued to the respondent. Therefore, the Order-in-Original passed on the matter, being extraneous to the show cause notice, was wholly without jurisdiction and could not have been sustained.

11. However, since the forums below have discussed the applicability of the SRO, therefore, to conclusively decide the case at hand, we also wish to dilate upon that aspect of the matter. It is now settled law that the highest authority for factual determination in tax matters is the Tribunal.[8] In the instant case, the Tribunal was satisfied that exports were duly made by the respondent company under the SRO and the conditions mentioned therein, including provision of proof of such exports and that such exports should not have been made through land routes to Afghanistan and the Central Asian Republics, were duly complied with by the respondent. The department did not produce any evidence before the Tribunal to dislodge the fact that the petitioners had complied with the said requirements of the SRO. This, even otherwise, could not have been done because it was not the case set out by the department as there was no such allegation in the show cause notice. The learned counsel for the petitioner has been unable to refer to any perversity in the reading of the evidence resulting in the said factual determination made by the Tribunal. Therefore, we see no reason to interfere in the said findings of the Tribunal which have also been upheld by the High Court.

12. As far as the contention of the petitioner department as to the appeal filed by the respondent taxpayer being barred by time is concerned, we have noted that this was also discussed in detail by the Tribunal and decided in favour of the respondent. The question relating to limitation was then raised by the department in the ETRs, however, at the time of arguing the matter before the High Court on 31.3.2022, only two questions were pressed for determination, which even otherwise did not arise from the show cause notice and are highlighted above, and the question of limitation was not pressed. In these circumstances, we are therefore, not inclined to dilate upon the same.[9] Even otherwise, as held above, the Order-in-Original against which the appeal was filed was not sustainable under the law.

13. In view of the above, we see no reason to interfere in the impugned judgment. Therefore, leave is refused and these petitions are dismissed.

MWA/C-12/SC Petitions dismissed.

**2023 S C M R 1935**

**[Supreme Court of Pakistan]**

**Present: Umar Ata Bandial, C.J., Syed Mansoor Ali Shah, Munib Akhtar, Jamal Khan Mandokhail and Muhammad Ali Mazhar, JJ**

**ISLAMABAD HIGH COURT BAR ASSOCIATION ISLAMABAD through President Muhammad Shoaib Shaheen, Advocate Supreme Court, Islamabad and others---Petitioners**

**Versus**

**ELECTION COMMISSION OF PAKISTAN through Chief Election Commissioner, Islamabad and others---Respondents**

Suo Motu Case No. 1 of 2023 and Constitutional Petitions Nos.1 and 2 of 2023, decided on 1st March, 2023.

(Suo Motu Regarding Holding of General Elections to the Provincial Assemblies of Punjab and Khyber Pakhtunkhwa)

Per Umar Ata Bandial, CJ, Munib Akhtar and Muhammad Ali Mazhar, JJ; Syed Mansoor Ali Shah and Jamal Khan Mandokhail, JJ.dissenting (Majority view)

**(a) Constitution of Pakistan---**

----Arts. 105(3)(a), 107, 112(1), 112(2), 224(1), 224(2) & 184(3)---Elections Act (XXXIII of 2017), S. 57(1)---Constitutional petitions and suo motu proceedings regarding holding of General Elections to the Provincial Assemblies of Punjab and Khyber Pakhtunkhwa---Constitutional responsibility and authority for appointing the date for the holding of a general election to a Provincial Assembly, upon its dissolution in the various situations envisaged by and under the Constitution, and how and when such constitutional responsibility is to be discharged stated.

Per Umar Ata Bandial, CJ, Munib Akhtar and Muhammad Ali Mazhar, JJ. (Majority view)

The Constitution envisages three situations for the dissolution of a Provincial Assembly. In the context of the role of the Governor, the "first situation" is set out in clause (2) of Article 112. This envisages the dissolution of the Assembly by an order made by the Governor at his discretion, subject to the previous approval of the President and fulfillment of the conditions set out therein. In this situation, the Assembly cannot, and does not, dissolve without an order being made by the Governor, and dissolves immediately on the making of the order.

The "second situation" is set out in clause (1) of Article 112, when the Chief Minister advises dissolution. This situation can be divided into two sub-categories; the "sub-category (a) of second situation" is where the Governor acts on the advice tendered and makes an order dissolving the Assembly. Here, the Assembly dissolves immediately on the making of the order. The "sub-category (b) of second situation" is where the Governor does not make an order of dissolution on the advice tendered. Here, the Assembly stands dissolved on the expiry of forty-eight hours from the tendering of the advice by the Chief Minister (i.e., by the efflux of time), and that does not require an order of the Governor.

The "third situation" is set out in Article 107 of the Constitution. This provides that unless an Assembly is sooner dissolved (i.e., in terms of either of the two preceding situations), it stands dissolved after a term of five years. Here, the Governor has no role at all; the Assembly dissolves by the efflux of time.

In situations where the Assembly is dissolved by an order of the Governor, the constitutional responsibility of appointing a date for the general election that must follow is to be discharged by the Governor as provided in terms of Article 105(3)(a). These are the "first situation" and "sub-category (a) of second situation" described above.

In situations where the Assembly is not dissolved by an order of the Governor, the constitutional responsibility of appointing a date for the general election that must follow is to be discharged by the President as provided in terms of section 57(1) of the Elections Act, 2017 ('the 2017 Act'). These are the "sub-category (b) of second situation" and "third situation" described above.

Since the general election on a dissolution of a Provincial Assembly has to be held within a time period stipulated by the Constitution itself, which is a constitutional imperative, the President or, as the case may be, the Governor must discharge the constitutional responsibility of appointing a date for the said election swiftly

and without any delay and within the shortest time possible. The Election Commission must proactively be available to the President or the Governor, and be prepared for such consultation as required for a date for the holding of general elections.

In the present case in relation to the dissolution of the Punjab Assembly, to which the "sub-category (b) of second situation" applied, the constitutional responsibility for appointing a date for the general election that must follow was to be discharged by the President. However, in relation to the dissolution of the Khyber Pakhtunkhwa Assembly, to which the "sub-category (a) of second situation" applied, the constitutional responsibility for appointing a date for the general election that must follow was to be discharged by the Governor.

In ordinary circumstances the general election to the Punjab Assembly ought to be held on 09.04.2023, the date announced by the President in terms of his order of 20.02.2023. However, on account of the delay in the emergence of the date for the holding of the general election, it may not be possible to meet the 90 day deadline stipulated by the Constitution. It is also the case that (possibly on account of a misunderstanding of the law) the Election Commission did not make itself available for consultation (with the President) as required under section 57(1) of the 2017 Act. Supreme Court directed that the Election Commission shall use its utmost efforts to immediately propose, keeping in mind sections 57 and 58 of the 2017 Act, a date to the President that is compliant with the 90 day deadline; thatif such a course is not available, then the Election Commission shall in like manner propose a date for the holding of the poll that deviates to the barest minimum from such deadline; that after consultation with the Election Commission, the President shall announce a date for the holding of the general election to the Punjab Assembly; that the Governor of the Khyber Pakhtunkhwa Province must after consultation with the Election Commission forthwith appoint a date for the holding of the general election to the Khyber Pakhtunkhwa Assembly and the directions issued in relation to elections to the Punjab Assembly shall, mutatis mutandis, apply in relation thereto.

Supreme Court further directed that the Federation, and in particular the Federal Government, is obligated, on an immediate and urgent basis, to forthwith provide the Election Commission with all such facilities, personnel and security as it may require for the holding of the general elections; that in like manner, it is the duty of the Provincial Governments, acting under the Caretaker Cabinets, to proactively provide all aid and assistance as may be required by the Election Commission, and that the duty cast upon the authorities as set out in section 50 of the 2017 Act must also be discharged forthwith and proactively. Constitution petitions and suo motu proceedings, being maintainable, were disposed of accordingly.

Per Syed Mansoor Ali Shah and Jamal Khan Mandokhail, JJ. dissenting (Minority view)

**(b) Constitution of Pakistan---**

----Arts. 105(3)(a), 107, 112(1), 112(2), 224(1), 224(2) & 184(3)---Elections Act (XXXIII of 2017), S. 57(1)---Constitutional petitions and suo motu proceedings regarding holding of General Elections to the Provincial Assemblies of Punjab and Khyber Pakhtunkhwa---Maintainability---Detailed reasons for finding the Constitutional petitions and suo motu proceedings as not maintainable recorded.

Per Syed Mansoor Ali Shah and Jamal Khan Mandokhail, JJ. (Minority view)

The present suo motu proceedings, in the facts and circumstances of the case, are wholly unjustified in the mode and manner they were taken up under Article 184(3) of the Constitution, besides being initiated with undue haste. The suo motu case and the Constitutional petitions under Article 184(3) of the Constitution, in the light of the principles settled in cases reported as Manzoor Elahi v. Federation of Pakistan (PLD 1975 Supreme Court 66) and Benazir Bhutto v. Federation of Pakistan (PLD 1988 Supreme Court 416), do not constitute a fit case to exercise the extraordinary original jurisdiction of the Supreme Court under Article 184(3) of the Constitution and are thus not maintainable as the same constitutional and legal issues seeking the same relief are pending and being deliberated upon by the respective Provincial High Courts in Lahore and Peshawar, without there being any inordinate delay in the conduct of the proceedings before them. There is no justification to invoke the extraordinary jurisdiction of the Supreme Court under Article 184(3) to initiate suo motu proceedings or entertain petitions under Article 184(3) of the Constitution, as a single Bench of the Lahore High Court has already decided the matter in favour of the petitioner before the said High Court and the said judgment is still

in the field. The intra court appeals (ICAs) filed against the said judgment are pending before the Division Bench of the Lahore High Court (and none of the said petitioners has approached the Supreme Court under Article 185(3) of the Constitution).

Manzoor Ilahi's case PLD 1975 SC 66 and Benzair Bhutto's case PLD 1988 SC 416 ref.

Once a constitutional issue is pending before a Provincial High Court, keeping in view the Federal structure of the Constitution the autonomy and independence of the apex provincial constitutional court, should not be readily interfered with rather be supported to strengthen the provincial autonomy and avoid undermining the autonomy of the provincial constitutional courts.

There is no inordinate delay in the proceedings pending before the High Courts, infact the present proceedings have unnecessarily delayed the matter before the High Courts. However, considering the importance of the matter it is expected that the respective High Courts shall decide the matters pending before them within three working days from present order.

Even otherwise matters such as the present matter should best be resolved by the Parliament.

Constitutional petitions were dismissed and suo motu proceedings were dropped.

Abid S. Zuberi, Advocate Supreme Court, Shoaib Shaheen, Advocate Supreme Court assisted by Ayan Memon, Advocate, Ms. Amna Khalili, Advocate, Agha Ali Durrani, Advocate, Arif Ansari, Advocate for Petitioners (in Constitutional Petition No. 1 of 2023).

Syed Ali Zafar, Advocate Supreme Court, Sarfraz Ahmad Cheema, Advocate Supreme Court, Zahid Nawaz Cheema, Advocate Supreme Court, Ch. Faisal Fareed, Advocate Supreme Court, Safdar Shaheen Pirzada, Advocate Supreme Court, Ashfaq Ahmed Kharal, Advocate Supreme Court and Amir Saeed Rawn, Advocate Supreme Court for Petitioners (in Constitutional Petition No. 2 of 2023).

On Court's Notice

Shehzad Ata Elahi, Attorney General for Pakistan, Ch. Aamir Rehman, Additional A.G.P., Malik Javaid Iqbal Wains, Additional A.G. assisted by Ms. Mehwish Batool, Advocate, Aitzaz ul Haque, Advocate and Maryam Rasheed, Advocate for Federation of Pakistan.

Salman Akram Raja, Advocate Supreme Court, Amir Malik, Advocate-on-Record assisted by Malik Ghulam Sabir, Advocate, M. Shakeel Mughal, Advocate, Maqbool Ahmed, Advocate and Sameen Qureshi, Advocate for President of Pakistan.

Khalid Ishaq, Advocate Supreme Court for Governor of Khyber Pakhtunkhwa.

Mustafa Ramday, Advocate Supreme Court, Jahanzeb Awan, Advocate Supreme Court, Rashid Hafeez, Advocate Supreme Court assisted by Ms. Zoe K. Khan, Advocate, Ahmed Junaid, Advocate, Akbar Khan, Advocate, Uzair Shafi, Advocate, Barrister Maria Haq, Advocate and Barrister Salman Ahmed, Advocate for Governor of Punjab.

Sajeel Shehryar Swati, Advocate Supreme Court assisted by Barrister Saman Mamoon, Advocate, Ms. Kiran Khadijah, Advocate, Zafar Iqbal, Special Secretary, Muhammad Arshad, DG Law, Khurram Shehzad, Additional D.G. Law, Ms. Saima Tariq Janjua, DD (Law), Ms. Bushra Rasheed, Law Officer and Zaighum Anees, Law Officer for Election Commission of Pakistan.

Muhammad Shan Gul, A.G., Malik Waseem Mumtaz, Additional A.G., Sana Ullah Zahid, Additional A.G. assisted by Khurram Chughtai, Advocate, Usman Ghani, Advocate, Raza Rehman, Advocate and Ahmed Raza Sarwar, Additional Chief Sec. Law (Punjab) for the Government of Punjab.

Aamir Javaid, A.G., Sardar Ali Raza, Additional A.G. and Mian Shafaqat Jan, Additional A.G. for the Government of Khyber Pakhtunkhwa.

Asif Reki, A.G. and M. Ayaz Swati, Additional A.G. for the Government of Balochistan.

Hassan Akbar, A.G., Saifullah, A.A.G. (through V.L. Karachi), Fauzi Zafar, Additional A.G. and Zeeshan Edhi, Additional A.G. for the Government of Sindh.

Jehangir Khan Jadoon, A.G. for ICT.

Haroon-ur-Rasheed, Advocate Supreme Court, Vice Chairman, PBC, Hassan Raza Pasha, Advocate Supreme Court and Chairman, Executive Council for the Pakistan Bar Council.

Abid S. Zuberi, Advocate Supreme Court, President SCBA, Muqtadir Akhtar Shabbir, Advocate Supreme Court/Secretary SCBA and Malik Shakeel-ur-Rehman, Advocate Supreme Court/Additional Secretary for Supreme Court Bar Association.

Syed Ali Zafar, Advocate Supreme Court, Ch. Faisal Fareed, Advocate Supreme Court, Safdar Shaheen Pirzada, Advocate Supreme Court and Ashfaq Kharal, Advocate Supreme Court for PTI.

Farooq H. Naek, Senior Advocate Supreme Court assisted by Barrister Sheraz Shaukat Rajpar for PPPP.

Mansoor Usman Awan, Advocate Supreme Court and Anees Shehzad, Advocate-on-Record for PML(N).

Kamran Murtaza, Senior Advocate Supreme Court for JUIP.

Ghulam Mohyuddin Malik, Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Jamat-e-Islami.

Azhar Siddiqui, Advocate Supreme Court for PML (Awami).

Date of hearing: 28th February, 2023.

**ORDER**

By a majority of 3:2 (Mr. Justice Syed Mansoor Ali Shah and Mr. Justice Jamal Khan Mandokhail dissenting) and for detailed reasons to be recorded later and subject to what is set out therein by way of amplification or otherwise, these matters are disposed of in the following terms:

1. Parliamentary democracy is one of the salient features of the Constitution. There can be no parliamentary democracy without Parliament or the Provincial Assemblies. And there can be neither Parliament nor Provincial Assemblies without the holding of general elections as envisaged, required and mandated by and under the Constitution and in accordance therewith. Elections, and the periodic holding of elections, therefore underpin the very fabric of the Constitution. They are a sine qua non for parliamentary democracy, and ensure that the sacred trust of sovereignty entrusted to the people of Pakistan is always in the hands of their chosen representatives.

2. While the holding of general elections has different aspects and requirements, one that is absolutely crucial is the timeframe or period in which such elections are to be held. The Constitution envisages two such periods, being of sixty and ninety days respectively. In relation to a Provincial Assembly, the first period applies when the Assembly dissolves on the expiration of its term under Article 107 and the second period is prescribed when it is sooner dissolved under Article 112. The time periods so set down in Article 224(1) and (2) respectively are constitutional imperatives that command complete fidelity. We are here concerned with the dissolution of two Provincial Assemblies before the expiry of their terms and therefore to the holding of general elections in relation to each within 90 days.

3. It is in the foregoing context that three questions have to be considered by the Court. The Assemblies in question are those of the Punjab and Khyber Pakhtunkhwa Provinces, which dissolved on 14.01.2023 and 18.01.2023 respectively. In both cases, the then Chief Ministers tendered advice to their respective Governors under Article 112(1) of the Constitution to dissolve the Assembly. In the case of the Punjab Province the Governor chose not to act on the said advice so that the Assembly stood dissolved on the expiry of 48 hours, on the date just mentioned. In the case of the KPK Province, the Governor did act on the advice and made an order dissolving the Assembly, on 18.01.2023. The questions which have been considered with the assistance of learned counsel for the various parties and the Law Officers are as follows:

1. Who has the constitutional responsibility and authority for appointing the date for the holding of a general election to a Provincial Assembly, upon its dissolution in the various situations envisaged by and under the Constitution?

2. How and when is this constitutional responsibility to be discharged?

3. What are the constitutional responsibilities and duties of the Federation and the Province with regard to the holding of the general election?

4. The Constitution envisages three situations for the dissolution of a Provincial Assembly. These, in the context of the role of the Governor, are as follows.

5. The first situation is set out in clause (2) of Article 112. This envisages the dissolution of the Assembly by an order made by the Governor at his discretion, subject to the previous approval of the President and fulfillment

of the conditions set out therein. In this situation, the Assembly cannot, and does not, dissolve without an order being made by the Governor, and dissolves immediately on the making of the order.

6. The second situation is set out in clause (1) of Article 112, when the Chief Minister advises dissolution. This situation can be divided into two sub-categories, which are as follows:

a. The first is where the Governor acts on the advice tendered and makes an order dissolving the Assembly. Here, the Assembly dissolves immediately on the making of the order.

b. The second sub-category is where the Governor does not make an order of dissolution on the advice tendered. Here, the Assembly stands dissolved on the expiry of forty-eight hours from the tendering of the advice by the Chief Minister (i.e., by the efflux of time), and that does not require an order of the Governor.

7. The third situation is set out in Article 107. This provides that unless an Assembly is sooner dissolved (i.e., in terms of either of the two preceding situations), it stands dissolved after a term of five years. Here, the Governor has no role at all; the Assembly dissolves by the efflux of time.

8. Article 105(3)(a) provides that where the Governor dissolves the Assembly he shall appoint a date for the holding of a general election thereto, being a date not later than 90 days from the date of the dissolution.

9. The Elections Act, 2017 ("2017 Act") has been enacted by Parliament in exercise of its legislative competence under the Constitution. That includes, in addition to Entry 41 of the Fourth Schedule, a specific provision in the body of the Constitution, being Article 222, that expressly articulates a list of matters relating to elections which are within the Federal domain. The 2017 Act applies, inter alia, to both the National and the Provincial Assemblies. Section 57(1) thereof provides that the President shall "announce the date or dates of the general elections after consultation with the Commission".

10. On a conjoint reading of the foregoing provisions we conclude and hold as follows:

a. In situations where the Assembly is dissolved by an order of the Governor, the constitutional responsibility of appointing a date for the general election that must follow is to be discharged by the Governor as provided in terms of Article 105(3)(a). These are the situations described in paras 5 and 6(a) above.

b. In situations where the Assembly is not dissolved by an order of the Governor, the constitutional responsibility of appointing a date for the general election that must follow is to be discharged by the President as provided in terms of section 57(1) of the 2017 Act. These are the situations described in paras 6(b) and 7 above.

11. Since the general election on a dissolution of a Provincial Assembly has to be held within a time period stipulated by the Constitution itself, which is a constitutional imperative, the President or, as the case may be, the Governor must discharge the constitutional responsibility of appointing a date for the said election swiftly and without any delay and within the shortest time possible. The Election Commission must proactively be available to the President or the Governor, and be prepared for such consultation as required for a date for the holding of general elections.

12. It follows from the foregoing that in relation to the dissolution of the Punjab Assembly, to which the situation described in para 6(b) above applied, the constitutional responsibility for appointing a date for the general election that must follow was to be discharged by the President. However, in relation to the dissolution of the KPK Assembly, to which the situation described in para 6(a) above applied, the constitutional responsibility for appointing a date for the general election that must follow was to be discharged by the Governor.

13. It further follows that the order of the President dated 20.02.2023 is constitutionally competent and subject to what is observed below, it is hereby affirmed insofar as it applies to the Punjab Assembly; but the same is constitutionally invalid insofar as it applies to the KPK Assembly and is therefore hereby set aside. It also follows that the Governor of KPK Province, inasmuch as he has not appointed a date for the holding of the general election to the Assembly of that Province is in breach of his constitutional responsibility.

14. It is further declared and directed as follows in relation to the matters before the Court:

a. In ordinary circumstances the general election to the Punjab Assembly ought to be held on 09.04.2023, the date announced by the President in terms of his order of 20.02.2023. However, we are informed that on account of the delay in the emergence of the date for the holding of the general election, it may not be possible to meet

the 90 day deadline stipulated by the Constitution. It is also the case that (possibly on account of a misunderstanding of the law) the Election Commission did not make itself available for consultation as required under section 57(1) of the 2017 Act. The Election Commission is therefore directed to use its utmost efforts to immediately propose, keeping in mind sections 57 and 58 of the 2017 Act, a date to the President that is compliant with the aforesaid deadline. If such a course is not available, then the Election Commission shall in like manner propose a date for the holding of the poll that deviates to the barest minimum from the aforesaid deadline. After consultation with the Election Commission the President shall announce a date for the holding of the general election to the Punjab Assembly.

b. The Governor of the KPK Province must after consultation with the Election Commission forthwith appoint a date for the holding of the general election to the KPK Assembly and the preceding clause (a) shall, mutatis mutandis, apply in relation thereto.

15. It is the constitutional duty of the Federation, in terms of clause (3) of Article 148, "to ensure that the Government of every Province is carried on in accordance with the provisions of the Constitution". There can be no doubt that this duty includes ensuring that a general election to the Assembly of every Province is held, and enabled to be held, in a timely manner within the period set out in the Constitution. This duty is in addition to, and applies independently of, the duty cast under Article 220 on "all executive authorities in the Federation and in the Provinces to assist the Commissioner and the Election Commission in the discharge of his or their functions". It follows that the Federation, and in particular the Federal Government, is, inter alia, obligated, on an immediate and urgent basis, to forthwith provide the Election Commission with all such facilities, personnel and security as it may require for the holding of the general elections. In like manner, it is the duty of the Provincial Governments, acting under the Caretaker Cabinets, to proactively provide all aid and assistance as may be required by the Election Commission. The duty cast upon the authorities as set out in section 50 of the 2017 Act must also be discharged forthwith and proactively.

16. The three matters before the Court are found maintainable and stand disposed of as above.

Sd/-

Umar Ata Bandial, C.J.

I have appended my separate order.

Sd/-

Syed Mansoor Ali Shah, J.

Sd/-

Munib Akhtar, J.

I have appended my note along with the main order.

Sd/-

Jamal Khan Mandokhail, J.

Sd/-

Muhammad Ali Mazhar, J.

Announced in Court at Islamabad on 01.03.2023.

Sd/-

**Umar Ata Bandial, C.J.**

**SYED MANSOOR ALI SHAH AND JAMAL KHAN MANDOKHAIL, JJ.---**For the reasons to be recorded later, we hold that:

i. The suo motu proceedings (SMC No. 1 of 2023), in the facts and circumstances of the case, are wholly unjustified in the mode and manner they were taken up under Article 184(3) of the Constitution of the Islamic Republic of Pakistan ("Constitution"), besides being initiated with undue haste.

ii. The Suo Motu Case No.1 of 2023 and the two Const. Petitions Nos. 1 and 2 of 2023 under Article 184(3) of the Constitution, in the light of the principles settled in Manzoor Ilahi[1]1 and Benzair Bhutto[2], do not constitute a fit case to exercise the extraordinary original jurisdiction of this Court under Article 184(3) of the Constitution and are thus not maintainable as the same constitutional and legal issues seeking the same relief are pending

and being deliberated upon by the respective Provincial High Courts in Lahore and Peshawar, without there being any inordinate delay in the conduct of the proceedings before them.

iii. There is no justification to invoke our extraordinary jurisdiction under Article 184(3) to initiate suo motu proceedings or entertain petitions under Article 184(3) of the Constitution, as a single Bench of the Lahore High Court has already decided the matter in favour of the petitioner before the said High Court vide judgment dated 10.02.2023 and the said judgment is still in the field. The intra court appeals (ICAs) filed against the said judgment are pending before the Division Bench of the Lahore High Court (and none of the said petitioners has approached this Court under Article 185(3) of the Constitution).

iv. Once a constitutional issue is pending before a Provincial High Court, keeping in view the Federal structure of our Constitution the autonomy and independence of the apex provincial constitutional court, should not be readily interfered with rather be supported to strengthen the provincial autonomy and avoid undermining the autonomy of the provincial constitutional courts.

v. There is no inordinate delay in the proceedings pending before the High Courts, infact the instant proceedings have unnecessarily delayed the matter before the High Courts. However, considering the importance of the matter we expect that the respective High Courts shall decide the matters pending before them within three working days from today.

vi. Even otherwise without prejudice to the above, such like matters should best be resolved by the Parliament.

2. We, therefore, agree with the orders dated 23.02.2023 passed by our learned brothers, Yahya Afridi and Athar Minallah, JJ.[3], and dismiss the present constitution petitions and drop the suo motu proceedings.

Sd/-

Syed Mansoor Ali Shah, J

Sd/-

Jamal Khan Mandokhail, J

MWA/I-4/SC Order accordingly.

**2023 S C M R 1955**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, Syed Hasan Azhar Rizvi and Shahid Waheed, JJ**

**SULTAN AHMED---Appellant**

**Versus**

**REGISTRAR, BALOCHISTAN HIGH COURT, QUETTA and others-- Respondents**

Criminal Appeal No. 633 of 2019, decided on 7th June, 2023.

(Against the judgment of the High Court of Balochistan, Quetta, dated 06.11.2019 passed in C.P. No. 141 of 2016)

Per Syed Mansoor Ali Shah, J.; Syed Hasan Azhar Rizvi, J. agreeing; Shahid Waheed, J. also agreeing but with his separate note.

**(a) Jurisdiction---**

----Mentioning of a wrong or inapplicable provision of law or non-mentioning of the applicable provision of law while exercising the jurisdiction or power which is otherwise vested in a court, tribunal or authority, does not by itself have any fatal consequences.

Naseer Ahmed v. Returning Officer 2023 SCMR 179; Olas Khan v. NAB PLD 2018 SC 40; Saadat Khan v. State 2018 SCMR 387 and Commissioner of Income Tax v. Abdul Ghani PLD 2007 SC 308 ref.

**(b) Contempt of Court Ordinance (V of 2003)---**

----S. 3---Contempt of Court---Unqualified/unconditional apology---Effect---Unqualified apology tendered by the person accused of having committed the contempt of court necessarily means that he admits his guilt and submits the apology in the realization of the fact that he has done a wrong, for which he repents and seeks forgiveness---In cases where the accused tenders an unqualified apology, there remains no need of framing the charge and recording the evidence.

Abdul Hamid v. State PLD 1964 SC 186; Awal v. State PLD 1964 SC 562; Shahid Orakzai v. P.M.L.(N) 2000 SCMR 1969; Sarfraz Hussain v. State 2002 SCMR 1326 and Feroze Akbar v. Government of Pakistan 2002 SCMR 1623 ref.

**(c) Contempt of Court Ordinance (V of 2003)---**

----S. 3---Contempt of Court---Unqualified/unconditional apology---Discharge of accused---General rule---When the accused offers an unqualified apology at an early stage of the contempt proceeding as a sincere and profound remorse, the courts generally drop such proceeding and discharge the accused while warning him to be careful in the future---However, this is not an absolute rule to be followed invariably in all cases---Exceptional facts and circumstances of a case may justify departure from this general rule---Courts may, despite the submission of an unqualified apology, convict the accused in the peculiar facts and circumstances of the case and may treat his apology only as a mitigating circumstance to impose a lesser punishment.

Abdul Hamid v. State PLD 1964 SC 186; Awal v. State PLD 1964 SC 562; Masroor Ahsan v. Ardeshir Cowasjee PLD 1998 SC 823; Feroze Akbar v. Government of Pakistan 2002 SCMR 1623; Contempt Proceedings against Islamabad Police Officials PLD 2007 SC 688; Contempt Proceedings against Nehal Hashmi 2018 SCMR 556 and Iftikhar Ahmed v. State 2018 SCMR 1385 ref.

**(d) Contempt of Court Ordinance (V of 2003)---**

----S. 3---Contempt of Court---Assistant Commissioner (appellant) raided official residence of a Qazi (judge) without registration of an FIR, assaulted and arrested him, then took the Qazi barefoot to the Levies Line, instead of the Police Station concerned, and kept him confined there for about 6 hours without registration of any criminal case---Subsequently unqualified/unconditional apology was tendered by the appellant---Held, that in the present case the act of assaulting and manhandling the Qazi, a judge, in the general public while arresting him was a flagrant attempt to undermine and lower the authority of district courts---Majority of the people have recourse to these courts for adjudication of their disputes---It is, therefore, in the public interest to protect the honour and authority of these courts---High Court has taken a lenient view in the matter of imposing punishment on the appellant because of his tendering an unqualified apology at the very early stage of the contempt proceeding and his young age---In the facts and circumstances of the case, the discretion exercised by the High

Court in convicting the appellant for contempt and considering his unqualified apology only as a mitigating circumstance for imposing lesser punishment is proper and reasonable, which does not call for any interference---Appeal was dismissed.

**(e) Constitution of Pakistan---**

----Art. 203---Contempt of Court Ordinance (V of 2003), S. 4(2)---District judiciary---Duty of the High Courts to protect the judges of the district judiciary---Such duty is inherent in and concomitant with the power to supervise and control vested in them under Article 203 of the Constitution---It is imperative for the High Courts to protect the district judiciary from any executive onslaught or intrusion that may weaken its institutional independence or tends to lower its judicial fiat and brings it into disrespect---Observations recorded by the Supreme Court regarding importance of protecting the judicial independence and safeguarding the prestige and honour of the judges of the district judiciary.

District Judiciary is the backbone of our judicial system. It is imperative to protect and safeguard the district judiciary from any executive onslaught or intrusion that may weaken its institutional independence or tends to lower its judicial fiat and brings it into disrespect. The need to protect judicial independence and safeguard the prestige and honour of the judges is essential to protect the public confidence and public trust reposed in the judicary. Public confidence and trust in the courts rest on independence, impartiality, neutrality, openness and transparency of the judicial system; it lends the court its high moral authority and its decisions, unquestionable legitimacy. The courts being guardians of the rights of the people must be insulated and walled against any intrusion that weakens its fiat and prestige. This protection applies at all levels of the judiciary, from the constitutional courts to the frontline courts in the district. The Constitution protects the constitutional court judges through the power of contempt under Article 204 of the Constitution and through the Supreme Judicial Council established under Article 209 of the Constitution, while it is Article 203 of the Constitution that safeguards the judges of the district judiciary by placing them under the protective umbrella of the High Court of the respective Province.

Hasnain Raza v. Lahore High Court PLD 2022 SC 7 ref.

The primary duty to ensure the protection of district judiciary is of the High Courts under whose supervision and control it functions. This duty is inherent in and concomitant with the power to supervise and control vested in the High Courts under Article 203 of the Constitution. In line with this constitutional mandate, the Legislature has conferred upon the High Courts the power to punish a contempt committed in relation to any court of the district judiciary.

**(f) Contempt of Court Ordinance (V of 2003)---**

----S. 3--- Constitution of Pakistan, Art. 204---Contempt laws---Purpose---Real purpose of the law of contempt is the protection of the public interest and more importantly public confidence in the justice system.

State v. Khalid Masood PLD 1996 SC 42 ref.

**(g) Constitution of Pakistan---**

---Arts. 175(3) & 204---Contempt of Court Ordinance (V of 2003), S. 4(2)---District judiciary---Security---Marshalls of the Court---Importance of district judiciary to have its own security personnel independent from the district administration and police highlighted.

It is axiomatic that the independence of the judiciary rests on judicial, financial and administrative autonomy. However, the administrative autonomy has been somewhat wanting over the years in the area of security of judges. The security and protection of judges is not an internal function of the judiciary but is dependent on and in control of the executive. The district judiciary protects the common people at the grassroots level against the misuse or abuse of executive power by the district administration and police. This check has an inherent potential to create tension between the district judiciary and the district administration and police. It is perhaps time for the district judiciary to have its own security personnel, somewhat parallel to the internationally recognized 'judicial marshals' or 'marshalls of the court'. The separation of the judiciary from the executive is a constitutional command and must be actualized in all its facets at the earliest. The district judiciary should be independent in all respects and in particular in the matter of its security from the district administration and police, and the High Courts should take up this matter with the respective Provincial Governments and

progressively proceed in establishing their own security agency, like their Process Serving Agency. However, until then the High Courts should take stern action against the district executive officers involved in illegal confrontational acts with the district judiciary under the Contempt of Court Ordinance, 2003.

Per Shahid Waheed, J.; agreeing with Syed Mansoor Ali Shah, J. with his separate note.

**(h) Administration of justice---**

----Criminal liability of a judge for non-judicial acts---Judicial title does not render its holder immune from responsibility even when the criminal act is committed behind the shield of judicial office---Immunity from criminal liability does not extend to non-judicial acts, and thus, a judge cannot in any way escape criminal liability and can be arrested.

Braatelien v. United States 147 F.2d 888 at 895 ref.

**(i) Constitution of Pakistan---**

----Art. 203---District judiciary---Precautionary measures to be observed by the executive while taking action under criminal law against the judges of District judiciary stated.

(i) If a judicial officer of the District Judiciary is to be arrested for some offence, it should be done under intimation to the nominee of the concerned High Court;

(ii) If facts and circumstances necessitate the immediate arrest of a judicial officer of the District Judiciary, a technical or formal arrest may be effected; and the facts of such arrest should be immediately communicated to the nominee of the concerned High Court;

(iii) The Judicial Officer so arrested shall not be taken to a police station, without the prior order or directions of the nominee of the concerned High Court;

(iv) Immediate facilities shall be provided to the Judicial Officer of communication with his family members, legal advisers and the District and Sessions Judge of his District;

(v) No statement of a Judicial Officer who is under arrest be recorded, nor any medical tests be conducted except in the presence of the legal adviser of the Judicial Officer concerned or another Judicial Officer of equal or higher rank, if available; and

(vi) There should be no handcuffing of a Judicial Officer. If, however, violent resistance to arrest is offered or there is imminent need to effect physical arrest to avert danger to life and limb, the person resisting arrest may be overpowered and handcuffed. In such case, immediate report shall be made to the District and Sessions Judge concerned and also to the nominee of the High Court. But the burden would be on the Police/ executive to establish the necessity for effecting the physical arrest and handcuffing of the Judicial Officer, and if it is found that the physical arrest and handcuffing of the Judicial Officer was unjustified, the Police Officers causing or responsible for such arrest and handcuffing would be guilty of misconduct and would also be personally liable for compensation and damages as may be summarily determined by the High Court.

Delhi Judicial Service Association, Tis Hazari Court, Delhi v. State of Gujarat and others AIR 1991 SC 2176 ref.

The above guidelines oblige each High Court to issue a notification, exercising its powers under Article 203 of the Constitution, for the nomination of a person, not less than the rank/grade of a District and Sessions Judge, who will attend to such criminal proceedings in which a judge of the District Judiciary is found involved, so as to ensure transparency and fair trial.

Amanullah Kanrani, Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Appellant.

Malik Javed Iqbal Wains, Additional A.G.P., M. Ayaz Khan Swati, Additional A.G., Balochistan and Kamran Murtaza, Advocate Supreme Court for Respondents.

Date of hearing: 7th June, 2023.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**Through the present appeal, the appellant has challenged the order of the Balochistan High Court, dated 06.11.2019, passed in a suo motu contempt proceeding. The High Court has, by the said order, convicted the appellant under the Contempt of Court Ordinance 2003 and sentenced him to imprisonment till rising of the court with a fine of Rs.5000/-.

2. Briefly, the factual background of the case is that the appellant was posted as Assistant Commissioner at district Kalat, while respondent No.2, Muhammad Zahid, was serving there as Qazi (a judicial office equivalent to that of a Civil Judge), in the District Judiciary. On 16 February 2016, without the registration of an FIR, at about 03:15 p.m., the appellant raided the official residence of the Qazi, assaulted and arrested him, on the allegation of his having illicit relations with Bibi Zubaida, a police constable, whose civil suit for correction of the date of her birth was pending adjudication in the Court of the Qazi. Bibi Zubaida was also recovered from the house of the Qazi at that time. The appellant then took the Qazi barefoot to the Levies Line, Kalat instead of the Police Station concerned. The Qazi was kept confined there for about 6 hours without registration of any criminal case against him and was released on that night at 09:00 p.m. with the intervention of the Commissioner and the District and Sessions Judge.

3. This incident was reported by the District and Sessions Judge, Kalat, on 17 February, to the Registrar, Baluchistan High Court. On 18 February, the Registrar placed the report before the Hon'ble Vacation Judge, who observed that the report raised serious issues as to judicial independence in relation to the judicial service. The Hon'ble Judge formulated certain questions in this regard and directed the Registrar to place the matter before the Hon'ble Chief Justice. The Registrar put up the matter before the Hon'ble Chief Justice, who ordered to treat the report as a Constitution Petition and fix it for hearing before a Division Bench. Accordingly, the report of the District and Sessions Judge was registered as constitution petition No. 41 of 2016, and the same was fixed for hearing before a Division Bench of the High Court. On 19 February, the Division Bench constituted a Commission consisting of an Hon'ble Judge of the High Court to probe into the matter and file his report. The Commission, after making a thorough inquiry into the facts, submitted its detailed report on 2 May 2016.

4. In its report, the Commission reported that the Qazi had issued warrants of arrest of the appellant in the execution proceedings of a decree and to avenge that, the appellant in connivance with Bibi Zubaida trapped the Qazi while the lust of the Qazi provided the opportunity for this trap. The Commission also reported that to satisfy his ego, the appellant mishandled the Qazi in arresting and taking him barefoot to Levies Line and did not proceed against the Qazi, a judicial officer, in accordance with law. On this report of the Commission, the Division Bench issued notices to the appellant and the Qazi. In response thereto, the Qazi tendered his resignation while the appellant submitted his "unqualified apology". The Division Bench of the High Court considered his "unqualified apology" but thought it fit not to exonerate the appellant of the charge and instead took a lenient view and awarded a lesser punishment. Hence, this appeal by the appellant.

5. The learned counsel for the appellant contended that the High Court has no power to suo motu exercise its constitutional jurisdiction under Article 199 of the Constitution on the report of the District and Sessions Judge and placed reliance in this regard on Imran Khattak v. Sofia Khattak (2014 SCMR 122). His next main contention was that while proceeding against the appellant under the Contempt of Court Ordinance, the High Court has not provided him with a fair trial and due process to which he was entitled under Article 10A of the Constitution. Alternatively, he made the submission that in case this Court maintains the conviction and sentence of the appellant, it may pronounce that the conviction and sentence of the appellant for contempt would not affect his service. On the other hand, the learned counsel for the respondents controverted these contentions, supported the impugned order and also opposed the alternate prayer.

6. We have considered the contentions of the learned counsel for the parties and examined the record of the case.

7. As for the first contention, the High Court has not passed any order in the present matter in the exercise of its jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan ("Constitution"). Therefore, the said contention is only academic and does not arise in the facts of the case at hand. It is not disputed that the High Court had the jurisdiction to initiate suo motu the contempt proceeding against the appellant on the report of the District and Sessions Judge. Numbering the matter as a constitution petition instead of a contempt proceeding is only an error of procedure, which does not affect the jurisdiction of the High Court. Needless to reiterate the well-settled legal position that the mentioning of a wrong or inapplicable

provision of law or non-mentioning of the applicable provision of law while exercising the jurisdiction or power which is otherwise vested in a court, tribunal or authority, does not by itself have any fatal consequences.[1]

8. While elaborating his second contention, the learned counsel for the appellant submitted that if the High Court was not to accept the apology of the appellant, it should have framed a proper charge against the appellant, examined the witnesses in his presence and allowed him to cross-examine them. This submission appears to have been made in the oblivion of the import of an unqualified apology. An unqualified apology tendered by the person accused of having committed the contempt of court necessarily means that he admits his guilt and submits the apology in the realization of the fact that he has done a wrong, for which he repents and seeks forgiveness.[2] In cases where the accused tenders an unqualified apology, there remains no need of framing the charge and recording the evidence. Therefore, the conviction of the appellant by the High Court on the basis of his admission made through submitting an unqualified apology does not in any way offend Article 10-A of the Constitution.

9. It is, however, true that when the accused offers an unqualified apology at an early stage of the contempt proceeding as a sincere and profound remorse, the courts generally drop such proceeding and discharge the accused while warning him to be careful in the future. However, this is not an absolute rule to be followed invariably in all cases. The exceptional facts and circumstances of a case may justify departure from this general rule. The courts may, despite the submission of an unqualified apology, convict the accused in the peculiar facts and circumstances of the case and may treat his apology only as a mitigating circumstance to impose a lesser punishment.[3]

10. In the present case, the High Court has observed that the act of assaulting and manhandling the Qazi, a judge, in the general public while arresting him was a flagrant attempt to undermine and lower the authority of district courts. The majority of the people have recourse to these courts for adjudication of their disputes. It is, therefore, in the public interest to protect the honour and authority of these courts. We fully endorse these observations of the High Court and find that they justify the exercise of its discretion by the High Court in not discharging the appellant on his unqualified apology and for considering his apology only as a mitigating circumstance to impose a lesser punishment.

11. It is important to reiterate that the 'District Judiciary is the backbone of our judicial system', as observed by this Court in Hasnain Raza,[4] 'and the judges of the District Judiciary perform the onerous task of dispensing justice at the frontline by dealing with a large number of cases in a difficult and demanding environment'. As per the Judicial Statistics of Pakistan of the year 2021,[5] the percentage of the cases handled by the district judiciary is 82% of the total pendency of cases in Pakistan.[6] The district judiciary thus forms the foundational constituent of the justice system.

12. It is imperative to protect and safeguard the district judiciary from any executive onslaught or intrusion that may weaken its institutional independence or tends to lower its judicial fiat and brings it into disrespect. The need to protect judicial independence and safeguard the prestige and honour of the judges is essential to protect the public confidence and public trust reposed in the judiciary. Public confidence and trust in the courts rests on independence, impartiality, neutrality, openness and transparency of the judicial system; it lends the court its high moral authority and its decisions, unquestionable legitimacy. The courts being guardians of the rights of the people must be insulated and walled against any intrusion that weakens its fiat and prestige. This protection applies at all levels of the judiciary, from the constitutional courts to the frontline courts in the district. The Constitution protects the constitutional court judges through the power of contempt under Article 204 of the Constitution and through the Supreme Judicial Council established under Article 209 of the Constitution, while it is Article 203 of the Constitution that safeguards the judges of the district judiciary by placing them under the protective umbrella of the High Court of the respective Province.

13. Although the Supreme Court of Pakistan as the apex court of the country is the custodian of justice as well as of the courts dispensing justice throughout the land, the primary duty to ensure the protection of district judiciary is of the High Courts under whose supervision and control it functions. This duty is inherent in and concomitant with the power to supervise and control vested in the High Courts under Article 203 of the Constitution.[7] In line with this constitutional mandate, the Legislature has conferred upon the High Courts the

power to punish a contempt committed in relation to any court of the district judiciary.[8] The Balochistan High Court has, in the present case, exercised its power under the Contempt of Court Ordinance to protect the authority of the district courts and to safeguard the administration of justice by them from falling into disrespect and disrepute, and has performed its constitutional duty of protecting the independence of the judiciary by safeguarding the sanctity and prestige of the judges of district judiciary - our bastions of justice and an integral part of the judiciary envisaged under Article 175 of the Constitution.

14. Unlike the popular belief that the law of contempt protects the courts and judges, the real purpose of this law, as observed by this Court in Khalid Masood,[9] is the protection of the public interest and more importantly public confidence in the justice system. Even though the courts are the creation of the Constitution or the law, their real strength and power base lie in the confidence reposed in them by the public. Therefore, anything which is intended to damage the public confidence in the authority of courts is remedied by an action under the law of contempt. Since the bulk of the judicial workload in the country is primarily dealt with by the district judiciary and most of the public approach them in pursuit of justice, it is of utmost importance that the public confidence in the authority of such courts is preserved and maintained.

15. The act of assaulting and insulting while arresting a judge of the district judiciary, in this case, in open public gaze without any prior information to the District and Sessions Judge or the High Court is unprecedented. The High Court has taken a lenient view in the matter of imposing punishment on the appellant because of his tendering an unqualified apology at the very early stage of the contempt proceeding and his young age. In the facts and circumstances of the case, we find that the discretion exercised by the High Court in convicting the appellant for contempt and considering his unqualified apology only as a mitigating circumstance for imposing lesser punishment is proper and reasonable, which does not call for any interference by this Court in its appellate jurisdiction.

16. The incident involved in the present case, however, brings to light a much-neglected area that weighs heavily on the independence of the judiciary. It is axiomatic that the independence of the judiciary rests on judicial, financial and administrative autonomy. However, the administrative autonomy has been somewhat wanting over the years in the area of security of judges. The security and protection of judges is not an internal function of the judiciary but is dependent on and in control of the executive. The district judiciary protects the common people at the grassroots level against the misuse or abuse of executive power by the district administration and police. This check has an inherent potential to create tension between the district judiciary and the district administration and police. We are apprised that there have been some instances in the past when the district police officers, who were annoyed with some judicial orders of the district courts, had withdrawn the police officials performing security duties in the district judiciary or with the judges thereof. It is perhaps time for the district judiciary to have its own security personnel, somewhat parallel to the internationally recognized judicial marshals' or 'marshalls of the court'. The courts in some countries have their own security force.[10] The separation of the judiciary from the executive is a constitutional command[11] and must be actualized in all its facets at the earliest. In our view, the district judiciary should be independent in all respects and in particular in the matter of its security from the district administration and police, and the High Courts should take up this matter with the respective Provincial Governments and progressively proceed in establishing their own security agency, like their Process Serving Agency. However, until then the High Courts should take stern action against the district executive officers involved in illegal confrontational acts with the district judiciary under the Contempt of Court Ordinance.

17. Lastly, we deal with the alternate prayer of the appellant as to pronouncing that his conviction and sentence for contempt would not affect his service. In this regard, we observe that the High Court has not made any direction to the departmental authority of the appellant to take any disciplinary action against him. It appears that the High Court has left it to the discretion of the departmental authority of the appellant to decide in its discretion whether or not to initiate any disciplinary action against him. We also would not pre-empt the exercise of its discretion by the departmental authority in either way.

18. For the above reasons, we find that the present appeal is devoid of any merit. It is, therefore, dismissed.

Sd/-

Syed Mansoor Ali Shah, J

Sd/-

Syed Hasan Azhar Rizvi, J

I have added my separate additional note.

Sd/-

**Shahid Waheed, J**

**SHAHID WAHEED, J.---**In the prelude, I want to say that analysis of facts, application of law to that, observations, and the conclusion drawn from there by my learned brother Syed Mansoor Ali Shah, J., in his proposed judgment, while dismissing this appeal, are well sorted out, so I respectfully concur with them. However, as the facts of this case paint a picture of one of the despicable modus operandi of the executive to shackle the independence of the judiciary, I wish to record my additional note to supplement the main judgment and will confine myself to appraise whether the precautions as ordered by the High Court to the executive to be observed for the prevention of such attempts in future are valid.

2. In the beginning, it is to be noted that it is the will of the people of our country to establish a system that upholds the principles of democracy, freedom, equality, tolerance, social justice and fully preserve the independence of the judiciary.[1] Based on these aspirations, our Constitution promotes the rule of law while protecting the independence of the judiciary. It is important to note that judicial independence is usually defined in terms of freedom from outside influence. Judges who face pressure, harassment, intimidation, undue criticism, or consequences for the merits of their decisions encounter difficulty in deciding cases impartially. As such, the outside influence is deemed a factor that impinges upon their independence. Accordingly, great efforts are required to be made to neutralise those influences and to insulate judges from any potential retaliation of their decisions, so as to give them sufficient protection.[2] Such an effort will, in turn, serve threefold purposes. Firstly, it will protect judicial independence; secondly, it will avoid continual attacks upon judges who may be sincere in their conduct; and thirdly, it will protect the system of justice from falling into disrepute.[3]

3. It is a common fact that most people ordinarily approach the District Judiciary to resolve their disputes. As such, it serves as the primary interface between the justice system and the people. It will not be an overstatement if I say that a trial court judge, for an ordinary common citizen, is the human face of the law. It is, therefore, necessary that the District Judiciary should be honest, fearless and free from any pressure and should be able to achieve the preambular goal of justice by deciding cases only according to the law without being influenced by any external pressure.

4. The above prefatory observations bring me to examine the statutory provisions of the law to ascertain their intent and the extent to which they protect the independence of judges. It is also essential to do so because, after this analysis, I will be able to determine whether further safeguards are needed to protect the independence of judges. So, I proceed. The first law on the subject was enacted in 1850 and is called the Judicial Officers' Protection Act, and its solitary provision is as follows:

"No judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction: Provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of; and no officer of any Court or other person, bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court, for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same."

This section unequivocally affords protection to two broad categories of acts done or ordered to be done by a judicial officer in his judicial capacity. In the first category falls those acts which are within the limits of his jurisdiction. The second category encompasses those acts which may not be within the jurisdiction of the judicial officer, but are, nevertheless, done or ordered to be done by him, believing in good faith that he had jurisdiction to do them or order them to be done.

5. That apart, Pakistan's criminal law also provides some immunity to judges. The Pakistan Penal Code, 1860 (P.P.C.), in its section 77, lays down that any activity done by a judge in the exercise of the power he has been

granted, which he believes to have done in good faith, given to him by the law, is not liable for any offence. This particular section protects and gives the judicial officers immunity for any act done in good faith. Another section of the P.P.C. that deals with the issue is 228, and it states that if any insult or interruption is caused by a person towards another public servant who is part of an ongoing legal proceeding, then the person causing such trouble will be liable to simple imprisonment extendable up to six months along with a fine. This section, again, provides a form of immunity to the public servants who are judges in this case.

6. We find some more protection in the Code of Criminal Procedure, 1898 (Cr.P.C). Its section 480, provides a procedure in cases of contempt of court and grants powers to the judge to initiate relevant contempt proceedings against an offender as the judge may deem fit. This provision also grants power to a judge to take cognizance of an offence after allowing the offender an opportunity to show the cause of their acts before punishing them with a fine or imprisonment. Be it noted that section 197, Cr.P.C, too previously provided protection to judges but it was declared repugnant to the injunctions of Islam by the judgment of the Shariat Appellate Bench of this Court and as such, this provision has ceased to have effect.[4]

7. Exemption from arrest under civil process is also available. According to section 135 of the Code of Civil Procedure, 1908, no Judge, Magistrate or other Judicial Officer shall be liable to arrest under civil process while going to, presiding in, or returning from his Court.

8. The general proposition evident from the above mentioned statutory provisions is that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice. They mandate that judges in all courts, appointed to administer the law be allowed to administer it under the protection of the law freely and independently, without favour and fear. In my opinion, these provisions of the law are also for the benefit of the public, apart from the protection of judges, whose interest is that judges should be at liberty to discharge their functions with independence and without fear of consequences. If I were to summarise the intent of these statutory provisions, I would do so by adapting the words of Lord Denning.[5] Each judge should be protected from liability when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his book with trembling fingers, asking himself: "If I do this, shall I be liable to any action?"

9. The above position of law makes it pellucid that it does not attend to such an eventuality when the executive, being the largest litigant, misuses its powers to prosecute the judge and to force him to compromise his independence. This predicament, under the prevailing circumstances of our over-litigious society, has gained much importance, and the present case is an illustrative example. It will not be amiss if to explain this matter, I briefly state its facts here. The appellant before us was the Assistant Commissioner of the area at the relevant time and was involved in some litigation pending before the Qazi/Judge and bailable warrants were issued against him. He resented it, and it appears that at the end of the trial, he used some of the weak points of the Qazi/Judge's personal life to set a trap and apprehend him under the pretence that he had committed a criminal offence. However, on enquiry, this proved to be a sham and a malicious attempt to make the Qazi/Judge realise the consequences of taking a decision against the executive. It was clearly an abuse of power to discredit the Qazi/Judge. I must say that the High Court, in the given circumstances, meeting all the requirements of a fair trial, rightly convicted the appellant of contempt of Court. It is not necessary to go further into the facts and the application of law thereon, as it has already been elaborated in the main judgment. Lest I lose the thread, I return to the moot question.

10. The questions for me to consider is whether criminal proceedings can be instituted against a judge of the District Judiciary for acts unrelated to his judicial functions, whether an FIR can be recorded against him under section 154, Cr.P.C., and if yes, is it desirable to ask the executive to follow certain precautions while doing so? The sufficient answer to all facets of this question is yes. As to the first two parts of the question, there can be no doubt, and it is well settled that the judicial title does not render its holder immune from responsibility even when the criminal act is committed behind the shield of judicial office.[6] Immunity from criminal liability does not extend to non-judicial acts, and thus, a judge cannot in any way escape criminal liability and can be arrested.

11. I now enter upon the last important aspect of the moot whether it will conduce to the independence of the judiciary if some precautionary measures are ordered to the executive to be observed while taking actions under the criminal law against the judges of District Judiciary, to ensure that the unfortunate incident we experienced here does not happen again. This matter may be viewed from the standpoint of the Constitution. Our Constitution is an expression of the basic values of our system. Those values reflect ethical values of morality and justice; they include values relating to public order, judicial independence, separation of powers, and rule of law. This is why, on the one hand, our Constitution believes in the promotion of good and, on the other, at the same time, in the prevention of evil. As such, here we are faced with a situation of balancing these basic values. There is no settled legal principle which provides us with an answer to what weight is to be assigned to each value and how to balance them; nevertheless, the weighing and balancing of the conflicting values should be: (i) a rational process, manifesting reason, not fiat; (ii) objective, reflecting consensus and shared values of the society, not personal values; (iii) based on traditions or precedents; and (iv) in a manner that it may fit into the general structure of the institutional-government system; and while doing so, the approach should be holistic.

12. Keeping the above principle in mind, when an empirical study of the ground reality is conducted, it comes to light that not only is there an increase in frivolous and unwarranted criticism and complaints against the judges of the District Judiciary, but also the size of false criminal cases is getting bigger. External pressure in the form of unfounded criticism or by way of lodging false criminal case causes a significant injury to the dignity and independence of a judge. Although under the law, a person is presumed to be innocent until proven guilty but the society in which we live today, presumes a judge guilty once accused, irrespective of whether a false complaint has been made or later even when he gets discharged. An innocent, stigmatised by false implications, has to carry this irreparable stigma throughout his life span, and its shadow on his next generations also leaves a dark impression. Despite all these odds, the judges of the District Judiciary must be aware of the shared values of our society, and must also understand that judging is not merely a job. It is a way of life. So, as the saying goes, the robe magnifies the conduct; he ought to maintain the dignity of the office at all times and avoid both impropriety and the appearance of impropriety in his professional and personal life.

13. Indubitably, judiciary is the platform where a common man hopes for justice, even if the case is against the government. So, any offensive and outrageous conduct, either by a judge or the executive, breaks down the very fibre of what is necessary for a functional judiciary. Appraising the above-stated values of our society on a legal principle which states that no one is above the law, no one is below it, and all are equal, it is safe to conclude that it would be injurious to the health of the society if certain mandatory precautions are not suggested to the executive, while dealing with a criminal case in which a judge of the District Judiciary is found to be involved. I am therefore of the view that to maintain a balance between two constitutional values, to wit, preserving the independence of the judiciary and ensuring the prevention of crime while maintaining the rule of law, the guidelines suggested by the High Court[7] fit into the institutional-government system, and it will be tider and safer to order them to be observed with the following modifications:

(i) If a judicial officer of the District Judiciary is to be arrested for some offence, it should be done under intimation to the nominee of the concerned High Court;

(ii) If facts and circumstances necessitate the immediate arrest of a judicial officer of the District Judiciary, a technical or formal arrest may be effected; and the facts of such arrest should be immediately communicated to the nominee of the concerned High Court.

(iii) The Judicial Officer so arrested shall not be taken to a police station, without the prior order or directions of the nominee of the concerned High Court;

(iv) Immediate facilities shall be provided to the Judicial Officer of communication with his family members, legal advisers and the District and Sessions Judge of his District;

(v) No statement of a Judicial Officer who is under arrest be recorded, nor any medical tests be conducted except in the presence of the legal adviser of the Judicial Officer concerned or another Judicial Office of equal or higher rank, if available; and

(vi) There should be no handcuffing of a Judicial Officer. If, however, violent resistance to arrest is offered or there is imminent need to effect physical arrest to avert danger to life and limb, the person resisting arrest may be overpowered and handcuffed. In such case, immediate report shall be made to the District and Sessions Judge concerned and also to the nominee of the High Court. But the burden would be on the Police/ executive to establish the necessity for effecting the physical arrest and handcuffing of the Judicial Officer, and if it is found that the physical arrest and handcuffing of the Judicial Officer was unjustified, the Police Officers causing or responsible for such arrest and handcuffing would be guilty of misconduct and would also be personally liable for compensation and damages as may be summarily determined by the High Court.

The above guidelines oblige each High Court to issue a notification, exercising its powers under Article 203 of the Constitution, for the nomination of a person, not less than the rank/grade of a District and Sessions Judge, who will attend to such criminal proceedings in which a judge of the District Judiciary is found involved, so as to ensure transparency and fair trial. It is expected that this will be done expeditiously.

14. I, having expressed the above opinion while agreeing with the views and conclusions expressed in the main judgment, do not find any ground to interfere with the matter. The appellant must, therefore, fail in his appeal, and it is dismissed.

Sd/-

Shahid Waheed, J

MWA/S-29/SC Appeal dismissed.

**2023 S C M R 1980**

**[Supreme Court of Pakistan]**

**Present: Umar Ata Bandial, Syed Mansoor Ali Shah and Munib Akhtar, JJ**

**CIVIL APPEAL NO. 24-Q OF 2014**

**(On appeal from the judgment dated 20.09.2010 passed by the Balochistan High Court, Quetta in Constitutional Petition No.320 of 2010)**

**AND**

**CIVIL APPEAL NO. 26-Q OF 2018**

**(On appeal from the judgment dated 15.07.2013 passed by the Balochistan High Court, Quetta in Custom References Nos. 20 and 23 of 2018)**

**Haji TOOTI and another---Appellants**

**Versus**

**FEDERAL BOARD OF REVENUE, ISLAMABAD and others---Respondents**

Civil Appeal No.24-Q of 2014 and Civil Appeal No. 26-Q of 2018, decided on 26th May, 2021.

Per Munib Akhtar, J; Umar Ata Bandial, CJ. agreeing; Syed Mansoor Ali Shah, J. also agreeing but with his own reasons.

**(a) Customs Act (IV of 1969)---**

----Ss. 181 & 223---SRO 574(I)/2005 dated 06.06.2005 ("SRO 574"), vires of---Option to pay fine in lieu of confiscated goods---Officers of customs to follow Board's orders, etc.---Whether SRO 574 issued by the Federal Board of Revenue in exercise of its powers under section 181 of the Customs Act 1969 ("Act") is ultra vires the proviso to section 223 of the Act---Legislative and administrative orders issued by the Federal Board of Revenue under sections 181 & 223 of the Customs Act 1969---Extent, scope and nature of such orders explained.

**Per Munib Akhtar, J. (Majority view):**

The case put forward by the appellants was that SRO 574(I)/2005 dated 06.06.2005 ("SRO 574") was ultra vires section 223 of the Customs Act, 1969 ('the Act'); that this was so because it unlawfully interfered with the discretion granted by the main part of section 181 of the Act to the concerned officer to "give the owner of the goods an option to pay in lieu of the confiscation of the goods such fine as the officer thinks fit"; that the second proviso made the notification issued by the FBR (i.e., SRO 574) binding thereby wholly depriving the officer of the discretion conferred on him. This, according to the appellants, could not be done by the FBR by reason of section 223 of the Act.

The order made by the concerned officer under section 181 is not in exercise of quasi-judicial functions. It is in exercise of a statutory power, and is in the nature of an administrative or executive order. Secondly, if the submissions made by the appellants are accepted that would in effect reduce the second proviso of section 181 to redundancy. This would be so because any exercise of the statutory power thereby conferred would "interfere" with the power conferred on the officer of customs under the main part. The result would be that the power under the second proviso could never be exercised, i.e., would be made redundant. Thirdly, appellants misunderstood section 223. This section is not exclusive to the Act; it is to be found in all fiscal statutes, cast in nearly identical terms. It confers a broad and general power, of an administrative and executive nature, on the FBR (in its capacity as the body at apex of the fiscal hierarchy) to supervise, control and guide the tax authorities in the discharge of their duties and functions under the tax laws. However, some of those powers and duties are of a quasi-judicial nature such as, e.g., those conferred on officers holding an appellate post (Collector (Appeals)) or exercising powers in revision. It would obviously be wrong in principle (and contrary to the well-established jurisprudence of the Supreme Court and the High Courts) for the FBR to be in a position to influence or affect the proceedings of such authorities. Hence, the proviso. It is not to be regarded as a standalone provision; it makes sense only when read along with the main part of section 223.

The power exercised by the FBR in terms of the provisos to section 181 is not an exercise of the general statutory power conferred by section 223. That is, a notification issued under section 181 is not some general

administrative or executive order, instruction or direction given by the FBR. It is rather the exercise of a specific and separate statutory power conferred under a different provision for a distinct purpose.

Sections 181 and 223 are separate and distinct, one from the other. The effect of the submissions made by the appellants would however be to conflate and merge the two, one into the other. SRO 574 cannot therefore be regarded as ultra vires section 223 of the Act. Appeals were dismissed.

**Per Syed Mansoor Ali Shah, J.**

The power exercised by the customs officer under section 181 of the Customs Act, 1969 ('the Act') is quasi-judicial in nature. An order passed by the customs officer, in exercise of his discretion under section 181 of the Act, giving or not giving the owner of the goods an option to pay in lieu of the confiscation of the goods such fine as he thinks fit, being ancillary to his power of confiscating the goods and involving the exercise of discretion, is quasi-judicial and not administrative or executive in nature.

M.A. Rahman v. Federation of Pakistan 1988 SCMR 691; Tariq Transport Company v. Sargodha-Bhera Bus Service PLD 1958 SC 437; Messrs Faridsons Ltd. v. Government of Pakistan PLD 1961 SC 537 and Dr. Zahid Javed v. Dr. Tahir Riaz PLD 2016 SC 637 ref.

The orders made by the Federal Board of Revenue ('the Board') under the provisos to section 181 and the orders, instructions or directions issued by it under section 223 of the Act are two different species: one passes for delegated legislative power while the other is merely recognition of administrative supervisory power of the Board. Section 223 provides that officers of customs and other persons employed in the execution of the Act are to observe and follow the orders, instructions and directions of the Board. Under the said provision, the Act is recognizing or acknowledging that the Board has the power to issue orders, instructions and directions to all the officers of customs and that any such orders, instructions and directions issued by the Board shall be binding on the officers of customs in execution of the Act. This statutory acknowledgement of the power of the Board to issue administrative orders, instructions and directions to all the customs officers has no bearing on the rights of the third parties. Section 181 of the Act, on the other hand, provides for giving an option to the owner of goods to pay fine in lieu of confiscation of goods, and its provisos authorize the Board to specify, by an order, any goods or class of goods where such option shall not be given and also to fix the amount of fine, which in lieu of confiscation shall be imposed on any goods or class of goods. The delegation of power under the provisos to the Board, thus, passes for delegated legislation and affects third party rights. The two species of power, therefore, do not conflate or converge.

The Legislature by enacting the first proviso to section 181 has delegated the power to the Board for creating exception to the application of the main provisions of the Section to certain goods or class of goods, and by the second proviso delegated such power for limiting the discretion of the adjudicating customs officer in fixing the amount of fine which he, in lieu of confiscation, can impose on certain goods or class of goods under the main provisions of the Section. An order made by the Board under the powers conferred on it by any one of the two provisos to section 181 is, thus, delegated legislation. Once the Board validly makes such order, it partakes the colour and authority of a statutory instrument. It is read as part of section 181 and has the force of law accordingly. Such order having the force of law is, therefore, binding on the adjudicating customs officer while performing his quasi-judicial function under section 181.

Collector of Customs v. Muhammad Tasleem 2002 MLD 296 and Collector Customs v. Salman Khan 2015 PTD 1733 affirmed.

Collector of Customs v. Wali Khan 2017 SCMR 585 and Maqbool Ahmed v. Customs Appellate Tribunal 2009 SCMR 226 ref.

The orders, instructions and directions issued by the Board under section 223 to the Customs Officers are, therefore, administrative/ executive in character as only the customs officers and other persons employed in the execution of the Act are bound to observe and follow them. Such orders, instructions and directions are not binding on the assessees or other persons whose matters are to be dealt with under the Act. As a corollary, they are also not binding on customs officers who exercise quasi-judicial functions as well as on the appellate authority/tribunal and the courts. They being not applicable to and enforceable against all concerned, thus, lack generality - an essential characteristic of a legislative instrument. They are also limited to the administrative

matters dealt with by the customs officers in the execution of the Act, and can be issued by the Board only in respect of matters falling within the range of the administrative functions of the customs officers.

State Bank of Travancore v. Commissioner of Income Tax AIR 1986 SC 757; Messrs Central Insurance Co. v. CBR 1993 SCMR 1232 and Collector of Customs v. Askari Cement 2020 SCMR 649 ref.

The provisos to Section 181 and the SROs issued thereunder, thus, do not conflict in any manner with the proviso to section 223 of the Act as the latter relates to the administrative orders, instructions or directions of the Board, and not to the legislative order of the Board.

**Per Munib Akhtar, J.**

**(b) Interpretation of statutes---**

----Redundancy of a provision in a statute---Redundancy is not to be lightly imputed, and an interpretation that yields such a result is to be avoided if at all possible.

Naseebullah Khan, Advocate Supreme Court for Appellants (in both cases, Video-Link, Quetta).

Shakeel-ur-Rehman, Advocate Supreme Court and Raja Abdul Ghafoor, Advocate-on-Record for Respondents (in C.A. 24-Q of 2014).

Iftikhar Raza Khan, Advocate Supreme Court for Respondents (in C.A. 26-Q/2018, Video-Link, Quetta).

Date of hearing: 26th May, 2021.

**JUDGMENT**

**MUNIB AKHTAR, J.---**These two appeals arise under the Customs Act, 1969 ("Act") and raise the same questions of law, on facts that can broadly be regarded as similar. The appeals are against two separate judgments of the High Court. In C.A. 24-Q of 2014 (hereinafter the "first appeal") a writ petition filed by the appellant (hereinafter the "first appellant") was dismissed by judgment dated 20.09.20 10 (hereinafter the "first judgment"). In the other matter, C.A. 26-Q of 2018 (hereinafter the "second appeal"), a tax reference filed by the department was allowed by means of the judgment dated 15.07.2013 (hereinafter the "second judgment", the appellant being the "second appellant"). Leave was granted in the first appeal vide order dated 30.09.2014. In the other matter leave was granted vide order dated 28.11.2018 on the ground, inter alia, that it involved the same questions as in the first appeal.

2. The facts can be stated briefly. In the first appeal, the truck of the first appellant was confiscated on the ground that it was carrying smuggled goods. In the second appeal, a coach operated by the second appellant (and used to transport goods and passengers) was confiscated on the same ground. The charge of such smuggling stands established for present purposes in each case. The case of each appellant was that his conveyance was merely transporting goods (and/or passengers), with which the appellant had no concern whatsoever. Insofar as the conveyances were concerned, each appellant was given the option of their release on payment of a redemption fine under section 181 of the Act. That provision is as follows:

"181. Option to pay fine in lieu of confiscated goods.---Whenever an order for the confiscation of goods is passed under this Act, the officer passing the order may give the owner of the goods an option to pay in lieu of the confiscation of the goods such fine as the officer thinks fit:

Provided that the Board may, by an order, specify the goods or class of goods where such option shall not be given:

Provided further that the Board may, by an order, fix the amount of fine which, in lieu of confiscation, shall be imposed on any goods or class of goods imported in violation of the provisions of section 15 or of a notification issued under section 16, or any other law for the time being in force.

Explanation.- Any fine in lieu of confiscation of goods imposed under this section shall be in addition to any duty and charges payable in respect of such goods, and of any penalty that might have been imposed in addition to the confiscation of goods."

In exercise of the powers granted under the two provisos, the Board (i.e., the Federal Board of Revenue) has issued notifications from time to time. The one relevant for present purposes was SRO 574(I)/ 2005 dated 06.06.2005 ("SRO 574") whereby (as presently relevant) the redemption fine for release of conveyances confiscated in circumstances as those of the appellants' was 30%. This option was, as noted, given to the appellants. The first appellant filed a petition in the High Court challenging SRO 574 as being ultra vires the

Act. It may be noted that at the same time departmental proceedings regarding the confiscation of the truck, and option to pay the redemption fine, also reached the High Court by way of a tax reference filed by the first appellant. The learned High Court, by means of the first judgment whereby a number of matters were decided, dismissed the petition. However, insofar as the tax reference was concerned the High Court was pleased to remand the matter (along with those in several other tax references) for fresh determination in light of the observations made in the judgment. The first appellant approached this Court against the dismissal of his writ petition (but not as regards the disposal of his tax reference) and was granted leave to appeal by means of the order dated 30.09.2014.

3. The matter of the second appellant arose, as noted, out of a tax reference. The learned Appellate Tribunal decided in favor of the second appellant and the tax reference, filed by the department, was allowed by means of the second judgment. That led to the second appellant approaching this Court where leave to appeal was granted in terms as stated above.

4. The case put forward by learned counsel for the appellants was that SRO 574 was ultra vires section 223 of the Act. This was so because it unlawfully interfered with the discretion granted by the main part of section 181 to the concerned officer to "give the owner of the goods an option to pay in lieu of the confiscation of the goods such fine as the officer thinks fit". The second proviso made the notification issued by the FBR (i.e., SRO 574) binding thereby wholly depriving the officer of the discretion conferred on him. This, according to learned counsel, could not be done by the FBR by reason of section 223, which may now be set out:

"223. Officers of Customs to follow Board's orders, etc.---All officers of customs and other persons employed in the execution of this Act shall observe and follow the orders, instructions and directions of the Board:

Provided that no such orders, instructions or directions shall be given so as to interfere with the discretion of the appropriate officer of customs in the exercise of their quasi- judicial functions."

Reliance was placed on the proviso to this section, it being contended that the order made by the officer concerned under section 181 was in exercise of quasi-judicial functions. The learned High Court in the first judgment, while holding that the determination of the concerned officer under section 181 was of a quasi-judicial nature nonetheless held that SRO 574 (and its predecessor) were not ultra vires the Act. The petition filed by the first appellant was accordingly dismissed. In the other matter the learned High Court allowed the tax reference filed by the department by relying on an unreported judgment of this Court (which is, unfortunately, only partially identified (Said Gul v. Collector of Customs and others) and which could not be traced here).

5. We have heard learned counsel as above and considered the provisions involved. In our view, the appeals must fail for the following reasons. Firstly, and with respect to the learned High Court, the order made by the concerned officer under section 181 is not in exercise of quasi-judicial functions. It is in exercise of a statutory power, and is in the nature of an administrative or executive order. Secondly, if the submissions made by learned counsel are accepted that would in effect reduce the second proviso of section 181 to redundancy. This would be so because any exercise of the statutory power thereby conferred would "interfere" with the power conferred on the officer of customs under the main part. The result would be that the power under the second proviso could never be exercised, i.e., would be made redundant. It is well settled that redundancy is not to be lightly imputed, and an interpretation that yields such a result is to be avoided if at all possible. Yet, that would precisely be the effect of the case put forward by the appellants. Thirdly, learned counsel have, with respect, misunderstood section 223. This section is not exclusive to the Act; it is to be found in all fiscal statutes, cast in nearly identical terms. It confers a broad and general power, of an administrative and executive nature, on the FBR (in its capacity as the body at apex of the fiscal hierarchy) to supervise, control and guide the tax authorities in the discharge of their duties and functions under the tax laws. However, some of those powers and duties are of a quasi-judicial nature such as, e.g., those conferred on officers holding an appellate post (Collector (Appeals)) or exercising powers in revision. It would obviously be wrong in principle (and contrary to the well established jurisprudence of this Court and the High Courts) for the FBR to be in a position to influence or affect the proceedings of such authorities. Hence, the proviso. It is not to be regarded as a standalone provision; it makes sense only when read along with the main part of section 223. Now, the power

exercised by the FBR in terms of the provisos to section 181 is not an exercise of the general statutory power conferred by section 223. That is, a notification issued under section 181 is not some general administrative or executive order, instruction or direction given by the FBR. It is rather the exercise of a specific and separate statutory power conferred under a different provision for a distinct purpose. That purpose has been considered and highlighted by the learned High Court in the first judgment. Sections 181 and 223 are separate and distinct, one from the other. The effect of the submissions made by learned counsel would however be to conflate and merge the two, one into the other. In our view, that would be to incorrectly appreciate the statutory scheme envisaged by the Act, and a misunderstanding and misapplication of the two sections. SRO 574 cannot therefore be regarded as ultra vires section 223.

6. For the foregoing reasons it was announced in Court at the conclusion of the hearing that the appeals stood dismissed.

Sd/-

Umar Ata Bandial, J

I arrive at the same conclusion for different reasons. Hence I have attached a separate note elaborating my reasons for arriving at the final conclusion.

Sd/-

Syed Mansoor Ali Shah, J

Sd/-

**Munib Akhtar, J**

**SYED MANSOOR ALI SHAH, J.---**

7. I have had the privilege of reading the judgment authored by my learned brother, Justice Munib Akhtar. While I agree with the conclusion, I arrive at it through a different path of reasoning, which is explained hereunder through this additional note.

8. The question before us is whether SRO No. 574(I)/2005 ("Notification") dated 06.06.2005 issued by the Federal Board of Revenue[1] ("Board") in exercise of its powers under section 181 of the Customs Act 1969 ("Act") is ultra vires the proviso to section 223 of the Act. In other words, can the Notification control or regulate the exercise of quasi-judicial power of a customs officer, inspite of the bar contained in the proviso to section 223 of the Act?

9. It is settled that the power exercised by the customs officer under section 181 is quasi-judicial in nature as is evident from the reading of sections 179-181 of the Act and is also affirmed by a five member Bench of this Court in M.A. Rahman v. Federation (1988 SCMR 691). The power is quasi-judicial if it authorizes a customs officer (not a judicial officer) to settle a dispute relating to the rights and liabilities of a person in respect of ownership of goods after ascertaining certain facts on the basis of relevant material/evidence, thus entailing civil consequences for that person.[2] Likewise, an order passed by the customs officer, in exercise of his discretion under section 181 of the Act, giving or not giving the owner of the goods an option to pay in lieu of the confiscation of the goods such fine as he thinks fit, being ancillary to his power of confiscating the goods and involving the exercise of discretion, is quasi-judicial and not administrative or executive in nature.[3]

10. Coming to the question debated before us i.e., whether the Notification issued by the Board under the powers conferred on it by the provisos to section 181 offends the proviso to section 223 of the Act, which provides that "no such orders, instructions or directions shall be given [by the Board] so as to interfere with the discretion of the appropriate officer of customs in the exercise of their quasi-judicial functions." The orders made by the Board under the provisos to section 181 and the orders, instructions or directions issued by it under section 223 of the Act are two different species: one passes for delegated legislative power while the other is merely recognition of administrative supervisory power of the Board. We know that it is common for the Legislature to confer by an Act on the executive bodies the power to make rules having the force of law - delegation of power to legislate. Thus, the phrase "delegated legislation" covers exercise of that power by an executive body to legislate. This delegation brings under its sway the determination of the rights of the third parties. On the other hand, where the Legislature establishes a hierarchy of officers to execute the provisions of an Act, it usually confers the power to the supervisory and controlling officers to make such orders and directions to the

subordinate officers as are considered necessary for efficient performance of their duties under the Act.[4] This conferment or recognition of power is limited and only extends to the officers mentioned under the Act. This power is internal, supervisory and administrative in nature. This is evident from the scope of section 223, which simply provides that officers of customs and other persons employed in the execution of the Act are to observe and follow the orders, instructions and directions of the Board. Under the said provision, the Act is recognizing or acknowledging that the Board has the power to issue orders, instructions and directions to all the officers of customs and that any such orders, instructions and directions issued by the Board shall be binding on the officers of customs in execution of the Act. This statutory acknowledgement of the power of the Board to issue administrative orders, instructions and directions to all the customs officers has no bearing on the rights of the third parties. Section 181 of the Act, on the other hand, provides for giving an option to the owner of goods to pay fine in lieu of confiscation of goods, and its provisos authorize the Board to specify, by an order, any goods or class of goods where such option shall not be given and also to fix the amount of fine, which in lieu of confiscation shall be imposed on any goods or class of goods. The delegation of power under the provisos to the Board, thus, passes for delegated legislation and affects third party rights. The two species of power, therefore, do not conflate or converge.

11. The Legislature has by enacting the first proviso to section 181 has delegated the power to the Board for creating exception to the application of the main provisions of the Section to certain goods or class of goods, and by the second proviso delegated such power for limiting the discretion of the adjudicating customs officer in fixing the amount of fine which he, in lieu of confiscation, can impose on certain goods or class of goods under the main provisions of the Section. An order made by the Board under the powers conferred on it by any one of the two provisos to section 181 is, thus, delegated legislation. Once the Board validly makes such order, it partakes the colour and authority of a statutory instrument. It is read as part of section 181 and has the force of law accordingly. Such order having the force of law is, therefore, binding on the adjudicating customs officer while performing his quasi-judicial function under section 181. I endorse similar views expressed by the Division Benches of the Lahore and Peshawar High Courts in Collector of Customs v. Muhammad Tasleem (2002 MLD 296) and Collector Customs v. Salman Khan (2015 PTD 1733). This Court also has read the SRO No. 574 with section 181 and decided the cases accordingly in Collector of Customs v. Wali Khan (2017 SCMR 585), Maqbool Ahmed v. Customs Appellate Tribunal (2009 SCMR) 226, Said Gul v. Collectorate of Customs (C.Ps. Nos. 95-Q and 96-Q of 2008, decided on 30.04.2009) and a similar previous SRO No. 1374 dated 17.12.1998 in Musa Gul v. Collector Customs (C.P. No. 196-P of 2003 decided on 03.11.2003).

12. The Board being the apex Authority in the hierarchy of Federal Tax Administration, is to supervise, control and guide all the officers performing their functions of tax collection under different tax laws. It has, therefore, been recognized or expressly empowered under almost all the tax laws by enacting the provisions similar to that of Section 223 to issue such orders, instructions and directions to them from time to time as it considers necessary for the proper application and implementation of the various provisions of the relevant tax law, and the officers and other persons employed in the execution of that law are bound to observe and follow them.

13. The orders, instructions and directions issued by the Board under section 223 to the Custom Officers are, therefore, administrative/ executive in character[5] as only the customs officers and other persons employed in the execution of the Act are bound to observe and follow them. Such orders, instructions and directions are not binding on the assessees or other persons whose matters are to be dealt with under the Act. As a corollary, they are also not binding on customs officers who exercise quasi-judicial functions as well as on the appellate authority/ tribunal and the courts. They being not applicable to and enforceable against all concerned, thus, lack generality - an essential characteristic of a legislative instrument. They are also limited to the administrative matters dealt with by the customs officers in the execution of the Act, and can be issued by the Board only in respect of matters falling within the range of the administrative functions of the customs officers as held by this Court in Messrs Central Insurance Co. v. CBR (1993 SCMR 1232)[6] and Collector of Customs v. Askari Cement (2020 SCMR 649). The provisos to Section 181 and the SROs issued thereunder, thus, do not conflict in any manner with the proviso to section 223 of the Act as the latter relates to the administrative orders, instructions or directions of the Board, and not to the legislative order of the Board.

Sd/-

Syed Mansoor Ali Shah, J

MWA/T-4/SC Appeals dismissed.

**2023 S C M R 1991**

**[Supreme Court of Pakistan]**

**Present: Umar Ata Bandial, CJ, Syed Mansoor Ali Shah and Ayesha A. Malik, JJ**

**COMPETITION COMMISSION OF PAKISTAN and others---Appellants**

**Versus**

**DALDA FOODS LIMITED, KARACHI---Respondent**

Civil Appeal No. 1692 of 2021, decided on 29th March, 2022.

(Against the judgment dated 14.09.2021 of the Islamabad High Court, Islamabad, passed in Writ Petition No. 3454 of 2020)

Per Ayesha Malik, J; Umar Ata Bandial, CJ. agreeing; Syed Mansoor Ali Shah, J. also agreeing but with his separate note.

**(a) Competition Act (XIX of 2010)---**

----Ss. 28(1)(b), 33, 36 & 37---Powers of the Commission in relation to a proceeding or enquiry---Power to call for information relating to undertaking---Scope of the Powers of the Competition Commission under sections 33, 36 & 37 of the Competition Act, 2010 stated.

Proceeding under section 33 means and only refers to proceedings under section 30 of the Competition Act, 2010 ('the Act'), and the power to call for information under section 36 of the Act or conduct of a study provided for under section 28(1)(b) cannot be treated as a proceeding within the meaning used in section 33 nor can the powers provided under section 33 be made available to Competition Commission of Pakistan ('CCP') in their exercise of jurisdiction under section 36 or 28(1)(b).

The CCP is a regulator which aims to prevent and address anti-competitive practices across markets for which it studies the market to understand market trends and practices. For this reason, CCP under section 36 of the Act is empowered to call for information relating to an undertaking. Through a general or special order, it may call upon an undertaking to furnish periodically or as and when required any information concerning the activities of the undertaking, including information relating to its organization, accounts, business, trade practices, management and connection with any other undertaking, which information is necessary for the CCP for the purposes of the Act. This is a regulatory power available to CCP aimed to collect and gather information about the undertaking and does not fall under the ambit of a proceeding under section 30. Hence, merely calling for information does not constitute a proceeding nor does it trigger any penal consequences.

Section 37 of the Act provides for enquiry and studies and subsection (1) thereof provides that the CCP may, on its own, conduct enquiries and studies into any matter relevant to the purposes of this Act or as per subsection (2) of section 37 of the Act, the CCP may conduct an enquiry and studies of an undertaking when it receives a complaint in writing of such facts that appear to constitute a contravention of the provisions of Chapter II of the Act unless it is of the opinion that the application is frivolous or vexatious or based on insufficient facts, or is not substantiated by any evidence to conduct an enquiry. Although enquiries and studies are referred together in section 37 of the Act, they serve distinct functions. Enquiry is a process available to the CCP to assess contravention of the Act before it initiates any proceedings under section 30 of the Act. Whereas, studies, as provided under section 28(1)(b) of the Act, are conducted to promote competition in all sectors of economic activity and in terms of section 37(3) of the Act, they are a function which may be outsourced by hiring consultants on contracts. Both enquiry and studies are used as independent tools by the CCP to collect and assess information on market trends and do not constitute an adverse action against the undertaking. Therefore, in terms of sections 36 and 37 the power to call for information or conducting an enquiry or study do not constitute a proceeding against an undertaking under section 30 of the Act.

It is important to draw a distinction between section 30 and section 37. Section 30 empowers the CCP to issue orders under section 31 when it is satisfied that there is a contravention of any provision in Chapter II of the Act. Before proceeding with the matter, the CCP must provide notice of its intent and the reasons behind it, giving the undertaking an opportunity to be heard and defend itself. On the other hand, section 37 defines a different scope for the CCP. Under this section, the CCP has the authority to conduct enquiries, either suo motu or based on references from the Federal Government, into matters related to the objectives of the Act. As

mentioned above an enquiry under section 37 can also be initiated based on a complaint, unless the application is deemed frivolous, vexatious, lacks sufficient evidence, or is not supported by prima facie evidence. If, upon conducting this enquiry, the CCP is of the opinion that the findings necessitate taking action in the public interest, it shall initiate proceedings under section 30. In other words, the enquiry under section 37 serves as a preliminary step to gather information and evidence, and if it reveals a potential contravention of Chapter II of the Act, the CCP can then proceed. However, such enquiry is not always necessary to proceed against an undertaking, and if the CCP is satisfied on the information that it has available that a contravention of Chapter II of the Act is committed, it may proceed without it.

The CCP being a regulator must always act in a transparent manner, keeping the undertaking informed of its decisions. However, section 37 does not in itself result in penal consequences and the procedure is not a proceeding within the meaning of section 33. However, the CCP is required to provide the gist of its reasons as recorded in its internal deliberations which led to the decision of initiating such enquiry. This is a minimum requirement for the purposes of transparency and good governance and also facilitates the regulatory process by keeping the undertaking informed.

When perusing an order under section 37 of the Act, the CCP is not required to give a detailed reasoned explanation to the undertaking as to the enquiry, but should have deliberated on the issue so as to come to the conclusion that an enquiry is necessary, the gist of which reasoning should be communicated to the undertaking in writing. The internal working documents of the CCP need not be communicated in their entirety to the undertaking whilst at the same time its intent, along with gist of the reasoning, to conduct an enquiry must be communicated.

**(b) Competition Act (XIX of 2010)---**

----S. 37---Powers of the Commission to call for information relating to undertaking---Scope---Competition Commission of Pakistan ('CCP'), as a regulator, is not only empowered to but also bears the responsibility to collect the market information in order to understand the market structure as well as to ensure effective enforcement of the Competition Act, 2010 ('the Act') being administered by it---In the absence of market information, that it may seek from different undertakings from time to time, CCP cannot carry out its functions as envisioned under the Act and the provision of this information by no stretch of the imagination amounts to an adverse action against an undertaking---Thus, it is an obligation upon the undertakings to fully comply with such orders of CCP for provision of information.

Per Syed Mansoor Ali Shah, J; agreeing with Ayesha Malik, J. with his separate note.

**(c) Competition Act (XIX of 2010)---**

----Ss. 28(1)(a), 28(1)(b), 28(1)(c), 30, 33, 36 & 37---Distinction between the object and scope of "proceedings," "studies" and "enquiries" conducted by the Commission under Chapter IV of the Competition Act, 2010, and the duty of the Commission to act justly, fairly and reasonably and in a structured manner while exercising its discretionary power under section 37(1) of the Act to initiate on its own an enquiry against an undertaking stated.

Power of the Competition Commission of Pakistan ('the Commission') under section 36 of the Competition Act, 2010 ('the Act') to call upon an undertaking to furnish certain information is not a "proceeding" within the meaning of this term as used in section 33 of the Act. Section 36 of the Act gives the Commission only one power, that is, to "call upon an undertaking to furnish periodically or as and when required any information concerning the activities of the undertaking". By treating this "power to call information" as a "proceeding" within the meaning of section 33, one would be conferring upon the Commission a long list of powers provided in section 33, which include summoning and enforcing the attendance of any person and requiring the production of any books, accounts or other documents in the custody of an undertaking, etc. And by so doing one would be adding further powers of the Commission in section 36 of the Act to interfere in the exercise of the fundamental right of the citizens to conduct any lawful trade or business which the Legislature has nor provided therein.

Although the word "proceeding" used in section 33 has not been defined in the Act, the examination of the overall scheme of Chapter IV (sections 28 to 37) that describes the functions and powers of the Commission

clearly indicates what it means. It has been used in section 33 in special meaning, not in general meaning; it means and refers to a "proceeding" initiated under section 30 of the Act. Therefore, the power of the Commission to call for information under section 36 and to conduct a study under section 28(1)(b), cannot be treated as a "proceeding" within the meaning of that word used in section 33 of the Act, nor can the powers mentioned in section 33 in relation to a "proceeding" be made available to the Commission for the purposes of calling information under section 36.

There is a also clear difference between the scope of "enquires" and "studies" to be conducted by the Commission under the Act. They cannot be used by the Commission as two alternate modes to ascertain any contravention of the Act before it initiates any specific action against an undertaking. Enquiries are a process available to the Commission to assess any contravention of the Act before it initiates any specific action against an undertaking. However, this is not the object of "studies". Their object is mentioned in section 28(1)(b): the "studies" are to be conducted 'for promoting competition in all sectors of commercial economic activity', not to initiate any specific action against an undertaking. Under the Act, no regulatory action is triggered simply on the basis of the "studies". Therefore, the Commission may under section 37(3) outsource "studies" by hiring consultants on contract. It cannot be said that by doing so, the Commission out sources its statutory regulatory function to some consultants hired on contracts. Enquiries" and "studies" thus have no regulatory symbiotic relationship under the Act.

So far as the power of the Commission to initiate an enquiry against an undertaking either on its own under section 37(1) or on a complaint under section 37(2) of the Act is concerned, section 37(2) specifically requires that before initiating an enquiry under upon a complaint of such facts as appear to constitute a contravention of the provisions of Chapter II, the Commission is to examine the veracity of the complaint to ensure that it is neither frivolous or vexatious nor is it based on insufficient facts or unsubstantiated by prima facie evidence.

The Commission should, rather must, do so in order to exercise its discretionary power of initiating an enquiry on its own under section 37(1) of the Act in a just, fair and reasonable manner. And for this purpose, the Commission can advantageously follow the criterion prescribed by the legislature itself for initiating an enquiry on complaints under section 37(2). Further, it is also essential for the Commission to convey to the undertaking concerned the gist of the reasons and facts that prevail with the Commission in making the decision to initiate on its own an enquiry against that undertaking for a potential violation of any provisions of Chapter II of the Act.

**(d) Administration of justice---**

----Public institutions---Verbal orders---Institutions, and more so, public institutions don't function on the basis of verbal orders---Every opinion formed by the institution must be recorded and reduced in writing.

Faisal Siddiqui, Advocate Supreme Court for Appellants.

Syed M. Feisal Hussain Naqvi, Advocate Supreme Court for Respondent.

Ch. Aamir Rehman, Additional A.G. for Federation.

Date of hearing: 29th March, 2022.

**JUDGMENT**

**AYESHA A. MALIK, J.---**The Appellants have impugned judgment dated 14.09.2021, passed by the Islamabad High Court, Islamabad, (High Court) whereby the writ petition filed by the Respondent was allowed. Leave was granted by this Court vide order dated 22.11.2021 to consider the provisions of the Competition Act, 2010 (Act) with reference to the powers of conducting an enquiry.

2. Brief facts are that the Respondent challenged, before the High Court, the calling for information, by the Competition Commission of Pakistan (CCP), regarding the price of vanaspati ghee and cooking oil vide letters dated 13.07.2020 and 06.11.2020 and the initiation of an enquiry by the same. The grievance of the Respondent was that these letters were issued for a no justifiable reason as the CCP cannot initiate an enquiry based on vague and indefinite allegations nor can it enquire into the issue of pricing. Further, that the letter dated 13.07.2020 was vague as it called for information on account of "certain concern" and "need to probe further in the matter" whereas letter dated 06.11.2020 was a notice under section 37 of the Act for initiating an enquiry without stating any reasons. The Respondent's argument is that the CCP could not conduct a roving enquiry on

the basis that it needed to collect information. Further, that under section 37 of the Act, the CCP has to first form an opinion and then confront the undertaking with the material on which this opinion was formed, and on which it intended to initiate an enquiry prior to initiating such enquiry. The Respondent claimed that CCP's conduct in the matter amounts to an adverse action for which a notice disclosing relevant facts and sufficient reasons should have been provided so as to make the Respondent aware of the basis of the allegations against it. In this case, the Respondent argued that, no such opinion was formed nor any reasons given, hence, the challenge.

3. The impugned judgment considered the petition of the Respondent and concluded that the CCP must exercise discretion reasonably and that there must exist a reasonable basis to exercise its statutory authority to enquire into the affairs of an undertaking. The Court further concluded that subsections (1) and (2) of section 37 of the Act are to be read together and the applicable test for the exercise of power under section 37 of the Act is the plausibility test, meaning that, if the CCP wishes to initiate an enquiry it must satisfy itself that there is a plausible case of contravention of the provisions of the Act which necessitates an enquiry. Further, while relying on an earlier judgment National Feeds Limited v. Competition Commission of Pakistan and others (2016 CLD 1688), upheld by this Court vide Order dated 22.11.2017 passed in Competition Commission of Pakistan v. Punjnad Feeds Limited and others, (C.Ps. Nos. 2119 to 2123 of 2016), wherein the High Court concluded that the CCP as vested with powers under a statute cannot use or exercise such powers for the purposes of making indiscriminate, roving and fishing enquiries and that even in cases of suspicion of the CCP of illegality, details should be provided to the party to enable him to have an opportunity to produce all the relevant documents and disclose information. Meaning that CCP cannot order an enquiry under section 37 of the Act to merely dig out the facts on the basis of a hunch or suspicion and that it must disclose reasons. Consequently, the enquiry ordered by the CCP as well as the letter issued on 13.07.2020 were set aside for being in contravention to the mandate of the Act.

4. Learned counsel for CCP, the Appellant No.1, argued that the findings in the impugned judgment with reference to section 37(1) and (2) of the Act being read together, when it comes to the manner in which the enquiry is to begin, is incorrect as the legal requirements provided in subsections (1) and (2) of section 37 of the Act are substantially different. Further, it was argued that the applicability of the plausibility test, in these circumstances, is incorrect since the information was sought under section 36 of the Act whereas the enquiry was initiated under section 37(1) thereof. The learned counsel also argued that the initiation of an enquiry under the Act, of the Respondent along with other similar undertakings, was done to assess if sections 3 and 4 of the Act are being contravened in the light of, amongst others, the concern of the hike in price. The learned counsel stated that it was a sector-based request for information and enquiry and it was only the Respondent that challenged the letters and the initiation of the enquiry. He argued that, at this stage, there is no adverse determination against the Respondent and that it was merely a fact-finding exercise which could not itself be challenged, as it does not infringe any right. He explained that the legal requirements for initiating an enquiry under section 37(1) and (2) of the Act are different and that there is nothing in the language of these subsections that suggests that the requirements of subsection (2) are to be read in subsection (1). He elaborated that the rationale behind the different legal requirements of the two sections is to enable the CCP to act, either on its own motion or on the basis of a complaint. Since the very basis of the action is different, hence, the legal requirements are different. He further stated that seeking information does not require any detailed reasons to explain why the CCP seeks information, therefore, the writ petition was pre-mature and that there is no justification in challenging the letters nor should the Court have interfered in the matter.

5. On behalf of the Respondent, it was emphasized that the actions of the CCP when probing for information must be justified and must be based on some reasoned order. The counsel for the Respondent argued that it is settled law that there must be a reason for initiating an enquiry and that these reasons must be disclosed. Further, that the undertaking must be aware of the allegations on the basis of which, the enquiry is being initiated so that it is able to defend its position. The Respondent relied on the National Feeds case (supra) and stated that subsections (1) and (2) of section 37 of the Act have to be read together as the language of the law is similar, therefore, in order to initiate an enquiry whether suo motu or on the basis of a complaint, reasons must be given.

It was argued that the CCP was conducting a roving sectoral enquiry for which it has no jurisdiction especially with reference to price fixation.

6. The issue raised by the learned counsel is with reference to the CCP's power to call for information from an undertaking under section 36 of the Act and the power to initiate an enquiry under section 37 thereof. In terms of the facts pleaded by the parties, a letter was issued on 13.07.2020, and a reminder on 10.08.2020, requiring information to probe into the matter of excessive pricing of vanaspati ghee in the market. The Respondent responded to this letter on 17.08.2020 by relying on the National Feeds case (supra) stating that there is no allegation against it for being in breach of any provision of the Act nor has any reason been given for initiating an enquiry and that the vague allegations contained in the letter with respect to excessive pricing are not sufficient for the purposes of an enquiry. On 07.09.2020, the CCP sought information under section 33 of the Act and stated in its letter that a formal enquiry has been initiated by the CCP under section 37(1) with reference to the price increase of cooking oil and ghee in the market. These two letters formed the basis of the Respondent's challenge before the High Court. For ease of reference, the relevant sections are reproduced hereunder: -

"28. Functions and powers of the Commission.---(1) The functions and powers of the Commission shall be -

(a) to initiate proceedings in accordance with the procedures of this Act and make orders in cases of contravention of the provisions of the Act;

(b) to conduct studies for promoting competition in all sectors of commercial economic activity;

(c) to conduct enquiries into the affairs of any undertaking as may be necessary for the purposes of this Act;

(d) to give advice to undertakings asking for the same as to whether any action proposed to be taken by such undertakings is consistent with the provisions of this Act, rules or orders made thereunder;

(e) to engage in competition advocacy; and

(f) to take all other actions as may be necessary for carrying out the purposes of this Act.

(2) The Commission may, subject to such conditions as it may think fit to impose, delegate all or any of its functions and powers to any of its Members or officers as it deems fit.

33. Powers of the Commission in relation to a proceeding or enquiry.---(1) The Commission shall, for the purpose of a proceeding or enquiry under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (Act V of 1908), while trying a suit, in respect of the following matters, namely:--

(a) summoning and enforcing the attendance of any witness and examining him on oath;

(b) discovery and production of any document or other material object producible as evidence;

(c) accept evidence on affidavits;

(d) requisitioning of any public record from any court or office; and

(e) issuing of a commission for the examination of any witness, document or both.

(2) Any proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Pakistan Penal Code (Act XLV of 1860), and the Commission shall be deemed to be a civil court for the purposes of section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898 (Act V of 1898).

(3) The Commission may, for the purpose of a proceeding or enquiry under this Act, require any undertaking:---

(a) to produce before, and to allow to be examined and kept by, an officer of the Commission specified in this behalf, any books, accounts, or other documents in the custody or under the control of the undertaking so required, being documents relating to any matter the examination of which may be necessary for the purposes of this Act; and

(b) to furnish to an officer so specified such information in its possession, relating to any matter as may be, necessary for the purpose of this Act.

36. Power to call for information relating to undertaking.---Notwithstanding anything contained in any other law for the time being in force, the Commission may, by general or special order, call upon an undertaking to furnish periodically or as and when required any information concerning the activities of the undertaking,

including information relating to its organization, accounts, business, trade practices, management and connection with any other undertaking, which the Commission may consider necessary or useful for the purposes of this Act.

37. Enquiry and studies.---(1) The Commission may, on its own, and shall upon a reference made to it by the Federal Government, conduct enquiries into any matter relevant to the purposes of this Act.

(2) Where the Commission receives from an undertaking or a registered association of consumers a complaint in writing of such facts as appear to constitute a contravention of the provisions of Chapter II, it shall, unless it is of opinion that the application is frivolous or vexatious or based on insufficient facts, or is not substantiated by prima facie evidence, conduct an enquiry into the matter to which the complaint relates.

(3) The Commission may outsource studies by hiring consultants on contract.

(4) If upon the conclusion of an inquiry under subsection (1) or subsection (2), the Commission is of opinion that the findings are such that it is necessary in the public interest so to do, it shall initiate proceedings under section 30."

7. Section 28 of the Act provides the general functions and powers of the CCP wherein it has been provided that CCP can initiate proceedings in accordance with the Act, make orders in cases of contravention of the Act, conduct studies for promoting competition in all sectors of commercial economic activity, conduct enquiries into affairs of any undertaking as may be necessary, give advice to undertaking asking for the same, and engage in competition advocacy. Section 33 of the Act deals with and expands upon the specific power of the CCP in relation to a proceeding or enquiry, such that CCP shall have the powers of a Civil Court under the Civil Procedure Code, 1908 (C.P.C.) for the purposes of summoning and procuring the attendance of a witness, discovery and production of any document or other material object producible as evidence, requisitioning of any public record and formation of a Commission for the examination of any witness, document or both. Subsection (3) of section 33 of the Act provides that the CCP may, for the purpose of a proceeding or enquiry, have produced before it, for examination of, any books, accounts, or other documents in the custody or under the control of the undertaking, relating to any matter, the examination of which, is deemed necessary for the purposes of the Act. Important to note is that the proceedings under the Act are initiated in cases of contraventions as stipulated in section 30 read with section 28(1)(a) of the Act. The term proceeding as used under section 33 has not been defined in the Act, however, when we consider Chapter IV (sections 28 to 37), which outlines the CCP's functions and powers, it becomes clear that proceeding under section 33 has a specific, rather than a general, meaning or otherwise it would automatically include an enquiry, instead of a separate mention of it. Proceeding under section 33 means and only refers to proceedings under section 30 of the Act, and the power to call for information under section 36 of the Act or conduct of a study provided for under section 28(1)(b) cannot be treated as a proceeding within the meaning used in section 33 nor can the powers provided under section 33 be made available to CCP in their exercise of jurisdiction under section 36 or 28(1)(b).

8. The CCP is a regulator which aims to prevent and address anti-competitive practices across markets for which it studies the market to understand market trends and practices. For this reason, CCP under section 36 of the Act is empowered to call for information relating to an undertaking. Through a general or special order, it may call upon an undertaking to furnish periodically or as and when required any information concerning the activities of the undertaking, including information relating to its organization, accounts, business, trade practices, management and connection with any other undertaking, which information is necessary for the CCP for the purposes of the Act. This is a regulatory power available to CCP aimed to collect and gather information about the undertaking and does not fall under the ambit of a proceeding under section 30. Hence, merely calling for information does not constitute a proceeding nor does it trigger any penal consequences.

9. Section 37 of the Act provides for enquiry and studies and subsection (1) thereof provides that the CCP may, on its own, conduct enquiries and studies into any matter relevant to the purposes of this Act or as per subsection (2) of section 37 of the Act, the CCP may conduct an enquiry and studies of an undertaking when it receives a complaint in writing of such facts that appear to constitute a contravention of the provisions of Chapter II of the Act unless it is of the opinion that the application is frivolous or vexatious or based on insufficient facts, or is

not substantiated by any evidence to conduct an enquiry. Although enquiries and studies are referred together in section 37 of the Act, they serve distinct functions. Enquiry is a process available to the CCP to assess contravention of the Act before it initiates any proceedings under section 30 of the Act. Whereas, studies, as provided under section 28(1)(b) of the Act, are conducted to promote competition in all sectors of economic activity and in terms of section 37(3) of the Act, they are a function which may be outsourced by hiring consultants on contracts. Both enquiry and studies are used as independent tools by the CCP to collect and assess information on market trends and do not constitute an adverse action against the undertaking. Therefore, in terms of sections 36 and 37 the power to call for information or conducting an enquiry or study do not constitute a proceeding against an undertaking under section 30 of the Act.

10. Furthermore, in line with its authority to carry out functions under the Act, the CCP is also empowered to make rules and regulations under sections 57 and 58 of the Act, respectively. The Competition Commission (General Enforcement) Regulations, 2007 (Regulations), originally made under the Competition Ordinance 2007, outline the procedures for enquiry and adjudication. Specifically, Regulations 16 and 17 empower the CCP to initiate an enquiry if the presented facts suggest a potential violation of sections 3, 4, 10 and 11, or the provisions of Chapter II of the Act. This can be done either suo motu or on a reference from the Federal Government. Moreover, the CCP can also conduct an enquiry based on a complaint received from an undertaking or a registered association of consumers, provided the complaint is not deemed frivolous, vexatious, or lacking sufficient evidence. To ensure the integrity of the process, Regulation 20 empowers the CCP to dismiss any vexatious or frivolous complaints, applications, or requests for joinder or intervention. Regulation 17(2) in conjunction with section 37(2) of the Act clearly stipulates that upon receiving a complaint indicating a potential violation of Chapter II of the Act, the CCP is obliged to conduct an enquiry, unless it deems the complaint to be frivolous, vexatious, lacking sufficient evidence, or not substantiated by prima facie evidence in which case, the complaint can be dismissed under Regulation 20. The format in which a complaint against an undertaking is to be made is provided for in Regulation 18, which means that such complaint must at least be in compliance with the prescribed requirements under the Regulations.

11. After having assessed the relevant provisions, it is important to draw a distinction between section 30 and section 37 for our purposes. Section 30 empowers the CCP to issue orders under section 31 when it is satisfied that there is a contravention of any provision in Chapter II of the Act. Before proceeding with the matter, the CCP must provide notice of its intent and the reasons behind it, giving the undertaking an opportunity to be heard and defend itself. On the other hand, section 37 defines a different scope for the CCP. Under this section, the CCP has the authority to conduct enquiries, either suo motu or based on references from the Federal Government, into matters related to the objectives of the Act. As mentioned earlier, an enquiry under section 37 can also be initiated based on a complaint, unless the application is deemed frivolous, vexatious, lacks sufficient evidence, or is not supported by prima facie evidence. If, upon conducting this enquiry, the CCP is of the opinion that the findings necessitate taking action in the public interest, it shall initiate proceedings under section 30. Additionally, Regulation 22 provides in respect of initiation of proceedings under section 30 and states where the CCP, on its own motion or on a complaint, is satisfied that there is a contravention of the Act, it may issue a show cause notice stating its reasons and if the information available is sufficient to satisfy the CCP that the contravention of any provision of Chapter II is committed, it may proceed without conducting enquiry under the Regulations. In other words, the enquiry under section 37 serves as a preliminary step to gather information and evidence, and if it reveals a potential contravention of Chapter II of the Act, the CCP can then proceed. However, such enquiry is not always necessary to proceed against an undertaking, and if the CCP is satisfied on the information that it has available that a contravention of Chapter II of the Act is committed, it may proceed without it.

12. The issue raised by the Respondent before the High Court was that for the purposes of section 36 or section 37 of the Act, the CCP has to provide reasons in writing, to the undertaking, as to why it is seeking information or why it has opted to carry out an enquiry and further that the CCP is to provide the material on which these actions are based, meaning thereby that the CCP must provide the material before it which forms the basis of the reason to invoke section 36 or section 37 of the Act. As examined above, the power of sections 36 and 37

are regulatory in nature, which do not constitute a proceeding against an undertaking under section 30. The dispute arises on account of the interpretation of the National Feeds case (supra). In this case, the petitioners challenged notices issued by the CCP requiring them to submit information with reference to the increased price of poultry feed. Though the notices were issued on the basis of a complaint made by a consumer of poultry feed, and the CCP initiated an enquiry under section 37(1) of the Act, the Court while considering section 37 of the Act concluded that for the purposes of initiating an enquiry on its own motion under section 37 of the Act, the conditions provided for in section 37(2) will be read into the subsection (1). Consequently, whether an enquiry is initiated under subsection (1) or (2), the CCP has to give reasons for conducting an enquiry even if it is initiated on its own motion and ought to disclose the facts on the basis of which the enquiry has been initiated. To our minds, the reading of section 37 of the Act caters to two separate and distinct powers vested in the CCP for initiating an enquiry. Under subsection (1) of section 37 of the Act, the CCP may on its own motion or on a reference made by the Federal Government, conduct an enquiry into any matter relevant for the purposes of the Act. This essentially is the suo motu power of the CCP to initiate an enquiry, which means that the CCP can on its own motion initiate an enquiry, in any matter necessary for the purposes of the Act, provided that it has deliberated on the matter and has produced its reasoning in writing. The question which arises now is whether the CCP is obligated to communicate its reasons to the undertaking, and if so, whether it is required to justify its decision with supporting material. The Respondent argues that the CCP is obligated to inform them of the allegations raised, along with supporting material, and the reasons for conducting an enquiry. The CCP being a regulator must always act in a transparent manner, keeping the undertaking informed of its decisions. However, we have already stated that section 37 does not in itself result in penal consequences and that the procedure is not a proceeding within the meaning of section 33. However, the CCP is required to provide the gist of its reasons as recorded in its internal deliberations which led to the decision of initiating such enquiry. This is a minimum requirement for the purposes of transparency and good governance and also facilitates the regulatory process by keeping the undertaking informed.

13. Now coming to subsection (2) of section 37 of the Act, where the CCP receives a complaint, in this situation, it is required to first establish the veracity of the complaint to ensure that it is neither frivolous or vexatious and that there are sufficient facts provided in the complaint to necessitate an enquiry, as this is an enquiry prompted by a third person, the complainant. Section 37(2) of the Act requires the CCP to satisfy itself in the first instance before initiating an enquiry such that the mere filing of a complaint does not automatically result in an enquiry rather it requires the CCP to consider the complaint and determine whether it merits an enquiry. For the purposes of this enquiry, the CCP has to satisfy itself that there is sufficient cause to initiate an enquiry and in the course of due process when informing the undertaking of the enquiry, the CCP should disclose the nature of the complaint and the allegations contained therein to the undertaking. Before proceeding with the complaint under section 37(2) of the Act, the CCP should form a written opinion that the complaint is not frivolous, vexatious or based on insufficient facts or necessitates an enquiry. The Regulations themselves cater to this by requiring, under Regulation 18, the necessary contents that form a complaint and therefore are required for assessing the veracity of a complaint. Regulation 18(2) prescribes that the complaint, reference, or application shall contain a brief statement of facts, a summary of the alleged contravention of the Act, a succinct presentation in support of each contravention, such other particulars as may be specified by the Commission, a schedule listing all documents/ affidavits/evidence in support of each of the presentations, and the relief(s) sought. Once again, as in the case of section 37(1), the CCP must record its reasons in writing in respect of the veracity of the complaint, and its decision to proceed or not. In the event that CCP chooses to proceed, then it must communicate the gist of the reasons to the undertaking before proceeding on the same.

14. Accordingly, when perusing an order under section 37 of the Act, the CCP is not required to give a detailed reasoned explanation to the undertaking as to the enquiry, but should have deliberated on the issue so as to come to the conclusion that an enquiry is necessary, the gist of which reasoning should be communicated to the undertaking in writing. The internal working documents of the CCP need not be communicated in their entirety to the undertaking whilst at the same time its intent, along with gist of the reasoning, to conduct an enquiry must be communicated. In this case, there were multiple complaints on the price hike in ghee and related

products. The National Price Monitoring Committee considered the general trend of increased prices and required the CCP to check for anti- competitive practices, if any. The Chairperson and the Director General of CCP participated in this meeting and proceeded on the matter. This led to a working paper in the matter of price increase of ghee/cooking oil and related products by CCP on 27.07.2020, followed by a decision dated 30.07.2020 to initiate a sectoral enquiry under section 37(1) of the Act. In the meantime, letters had been sent out to those in the business of ghee and cooking oil to collect information on price patterns and cost structures, amongst other factors, to look for any dominant players in the market and violation of section 3 of the Act. The letters issued to the Respondent and others on 13.07.2020 disclosed that CCP was concerned with the excessive pricing of vanaspati ghee in the market and was looking into the matter. After 30.07.2020, once the decision to initiate an enquiry was made, the CCP vide letter dated 07.09.2020 informed the Respondent and others of its decision to initiate an enquiry to determine, prima facie, contravention of sections 3 and 4 of the Act. These materials, which formed the basis for initiating an enquiry, have been brought on record and they provide the intent of the CCP to probe into the matter to determine contraventions of sections 3 and 4 of the Act. Hence, it is clear that the CCP intended to ascertain market information to see if there are any anti-competitive practices. At this stage, it is just an enquiry to determine if there are any anti-competitive practices which are in contravention under the Act. Any adverse action would take place once the basic enquiry is made, which highlights the anti-competitive practice and then necessitates formal proceedings for which notice, detailed reasoning and hearing is a must as given in section 30 of the Act.

15. It is of relevance to have an understanding of the purpose and function of CCP as well which the Respondent in the instant case appears to have failed to appreciate. CCP, as a regulator, is not only empowered to but also bears the responsibility to collect the market information in order to understand the market structure as well as to ensure effective enforcement of the Act being administered by it. In the absence of market information, that it may seek from different undertakings from time to time, CCP cannot carry out its functions as envisioned under the Act and the provision of this information by no stretch of the imagination amounts to an adverse action against an undertaking. Thus, it is an obligation upon the undertakings to fully comply with such orders of CCP for provision of information. In the event of proceedings against the undertaking, the Act requires for notice, detailed reasoning to be communicated, and due process so as to allow the undertaking an opportunity to defend itself.

16. In view of the foregoing, the impugned judgment is set aside and the appeal is allowed with no order as to costs.

Sd/-

Umar Ata Bandial, C.J.

I agree but I have also attached an additional note.

Sd/-

Syed Mansoor Ali Shah, J

Sd/-

**Ayesha A. Malik, J**

**SYED MANSOOR ALI SHAH, J.---**I have read the judgment authored by my learned colleague, Justice Ayesha A. Malik, which is indeed eloquent and contains a comprehensive analysis of the facts of the case and the law applicable. While I concur with it, I am adding this brief note just to underscore the difference between the object and scope of "proceedings," "studies" and "enquiries" conducted by the Commission under Chapter IV of the Competition Commission Act, 2010 ("Act") and the duty of the Commission to act justly, fairly, reasonably and in a structured manner while exercising its discretionary power under section 37(1) to initiate on its own an enquiry against an undertaking.

2. The Act aims to regulate the fundamental right to conduct any lawful trade or business guaranteed by Article 18 of the Constitution of Pakistan, in the interest of free competition as provided in clause (b) of the proviso to that Article. As one of the primary objectives of enshrining a right within the Constitution is to safeguard it from being susceptible to ordinary legislation, the regulatory laws that have the effect of impacting a constitutionally guaranteed right are to be strictly construed.[1] The wide and liberal interpretation of such laws

may make the constitutional guarantee redundant. Therefore, the provisions of the Act that authorize the Commission, in the public interest of ensuring free competition, to interfere in the exercise of the fundamental right to conduct any lawful trade or business must be strictly construed.

3. In view of the above principle, the argument that the power of the Commission under section 36 of the Act to call upon an undertaking to furnish certain information is a "proceeding" within the meaning of this term as used in section 33 of the Act, is not sustainable. Section 36 of the Act gives the Commission only one power, that is, to "call upon an undertaking to furnish periodically or as and when required any information concerning the activities of the undertaking". By treating this "power to call information" as a "proceeding" within the meaning of section 33, we would be conferring upon the Commission a long list of powers provided in section 33, which include summoning and enforcing the attendance of any person and requiring the production of any books, accounts or other documents in the custody of an undertaking, etc. And by so doing we would be adding further powers of the Commission in section 36 of the Act to interfere in the exercise of the fundamental right of the citizens of Pakistan to conduct any lawful trade or business which the Legislature has not provided therein. Such a wide and liberal interpretation of the provisions of the Act that have the effect of impacting a constitutionally guaranteed right, as aforesaid, is not warranted.

4. Although the word "proceeding" used in section 33 has not been defined in the Act, the examination of the overall scheme of Chapter IV (sections 28 to 37) that describes the functions and powers of the Commission clearly indicates what it means. It has been used in section 33 in special meaning, not in general meaning; otherwise, there was no logic or reason to mention the words "or enquiry" therewith as in its general meaning the word "proceeding" would have included in it an "enquiry" also. That special meaning is more than evident from the use of this word in several provisions of Chapter IV. First and foremost are the provisions of clauses (a), (b) and (c) of section 28(1), which have distinctly described "proceedings", "studies" and "enquires" by providing thus:

28. Functions and powers of the Commission.---(1) The functions and powers of the Commission shall be-

(a) to initiate proceedings in accordance with the procedures of this Act and make orders in cases of contravention of the provisions of the said Act;

(b) to conduct studies for promoting competition in all sectors of commercial economic activity;

(c) to conduct enquiries into the affairs of any undertaking as may be necessary for the purposes of this Act;

(Emphasis added)

The title of section 30, i.e., "Proceedings in cases of contravention", and the provisions of that Section further illustrate what "proceedings" are referred to in clause (a) of section 28(1). As per subsection (1) of section 30, they are the "proceedings" initiated by the Commission for the contravention or likely contravention of any provision of Chapter II. Section 32 also uses the word "proceeding" and mentions the power of the Commission to issue interim orders "during the course of any proceeding under section 30". Next comes section 33(1) which uses the word "proceeding" and describes the powers of the Commission for the purpose of a "proceeding" or enquiry under the Act. Subsection (2) of section 33 states that any "proceeding" before the Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Pakistan Penal Code. Last but not least, subsections (4) of section 37 uses this word and refers to it as "proceedings" under section 30 by providing that [i]f upon the conclusion of an inquiry under subsection (1) or subsection (2), the Commission is of opinion that the findings are such that it is necessary in the public interest so to do, it shall initiate proceedings under section 30. All these provisions of Chapter IV leave little room to doubt what special meaning of the word "proceeding" used in section 33 is: it means and refers to a "proceeding" initiated under section 30 of the Act. Therefore, the power of the Commission to call for information under section 36 and to conduct a study under section 28(1)(b), cannot be treated a "proceeding" within the meaning of that word used in section 33 of the Act, nor can the powers mentioned in section 33 in relation to a "proceeding" be made available to the Commission for the purposes of calling information under section 36.

5. There is a also clear difference between the scope of "enquires" and "studies" to be conducted by the Commission under the Act. They cannot be used by the Commission as two alternate modes to ascertain any contravention of the Act before it initiates any specific action against an undertaking. Subsection (4) of section

30 clearly mentions the object of holding an enquiry by stating that [i]f upon the conclusion of an inquiry under subsection (1) or subsection (2), the Commission is of opinion that the findings are such that it is necessary in the public interest so to do, it shall initiate proceedings under section 30'. Enquiries are therefore a process available to the Commission to assess any contravention of the Act before it initiates any specific action against an undertaking. However, this is not the object of "studies". Their object is mentioned in section 28(1)(b): the "studies" are to be conducted for promoting competition in all sectors of commercial economic activity',[2] not to initiate any specific action against an undertaking. Under the Act, no regulatory action is triggered simply on the basis of the "studies". Therefore, the Commission may under section 37(3) outsource "studies" by hiring consultants on contract. It cannot be said that by doing so, the Commission outsources its statutory regulatory function to some consultants hired on contracts. Enquiries" and "studies" thus have no regulatory symbiotic relationship under the Act.

6. So far as the power of the Commission to initiate an enquiry against an undertaking either on its own under section 37(1) or on a complaint under section 37(2) of the Act is concerned, section 37(2) specifically requires that before initiating an enquiry under upon a complaint of such facts as appear to constitute a contravention of the provisions of Chapter 11, the Commission is to examine the veracity of the complaint to ensure that it is neither frivolous or vexatious nor is it based on insufficient facts or unsubstantiated by prima facie evidence.

7. The High Court has held in the impugned judgment while relying upon its earlier decision in National Feeds case,[3] which remained undisturbed by this Court[4], that before initiating an enquiry on its own under section 37(1) the Commission is required to do the same process, that is, the Commission must ascertain whether there are such sufficient facts substantiated by prima facie evidence which appear to constitute a contravention of any provision of Chapter II while examining the veracity of the information on the basis of which it intends to initiate an enquiry against an undertaking. The High Court has named this preliminary examination to be made by the Commission of the complaint under section 37(1) or of the information under section 37(1) as a plausibility of contravention test with which I have no issue in so far as the said test in substance remains the same as that of the said preliminary examination. It is the substance of the preliminary examination that matters, as nothing turns on the name given to it whether it be called plausibility of contravention test or potential violation test.

8. Institutions, and more so, public institutions don't function on the basis of verbal orders. Every opinion formed by the institution must be recorded and reduced in writing. Any subsequent initiation of an enquiry against an undertaking must reflect the reasons so recorded by the institution in writing. Public institutions are not unregulated personal fiefdoms run on whims and caprice of a few, but are subject to law and can function only with the remit of the Constitution and the law. The days of arbitrary exercise of discretionary powers are long gone. The constitutional courts always read the requirement of acting justly, fairly and reasonably in every statute that confers discretionary powers on some executive or judicial authority while making a judicial review of the exercise of those powers and also insist upon the exercise of such powers in a structured manner. The Commission should, rather must, do so in order to exercise its discretionary power of initiating an enquiry on its own under section 37(1) of the Act in a just, fair and reasonable manner. And for this purpose, the Commission can advantageously follow the criterion prescribed by the legislature itself for initiating an enquiry on complaints under section 37(2). Further, it is also essential for the Commission to convey to the undertaking concerned the gist of the reasons and facts that prevail with the Commission in making the decision to initiate on its own an enquiry against that undertaking for a potential violation of any provisions of Chapter II of the Act.

9. In the present case, the Commission did have with it such sufficient facts substantiated by prima facie evidence which appeared to constitute a contravention of the provisions of Chapter II, as evident from the working paper dated 27 July 2020 placed before the Commission and the resolution dated 30 July 2020 passed by the Commission to initiate the enquiry in the exercise of its power under section 37(1) of the Act, The letter of 13 July 2020 impugned by the respondent in the writ petition before the High Court was merely an information-seeking order of the Commission under section 36 of the Act, while the other two impugned letters of 7 September and 6 November 2020 were issued after the initiation of enquiry under section 37(1) in the

exercise of powers under section 33 of the Act, for the purpose of the enquiry. The material (working paper dated 27 July 2020 and resolution dated 30 July 2020, etc.) containing the statements of such sufficient facts substantiated by prima facie evidence which appeared to constitute a contravention of the provisions of Chapter II and formed the basis for initiating the enquiry by the Commission was provided to the respondent by the appellants during the proceedings of the present appeal under an order of this Court. This should have been done by the High Court instead of quashing the whole enquiry proceedings, especially when the respondent had not specifically challenged in its writ petition the order (resolution) of the Commission dated 30 July 2020 whereby the enquiry was initiated. The present appeal is therefore allowed, and by setting aside the impugned judgment the writ petition of the respondent is dismissed.

MWA/C-23/SC Appeal allowed.

**P L D 2023 Supreme Court 22**

**Present: Syed Mansoor Ali Shah and Ayesha A. Malik, JJ**

**AMJAD HUSSAIN---Petitioner**

**Versus**

**NAZIR AHMAD and others---Respondents**

C.M.A. No. 3610 of 2022 in C.R.P. No. NIL of 2022 in C.A. No.1256 of 2014 and C.M.A. No. 3611 of 2022 in C.R.P. No. NIL/2022 in C.A. No.1257 of 2014, decided on 24th October, 2022.

(Against the judgment of this Court dated 25.02.2022, passed in Civil Appeals Nos. 1256 and 1257 of 2014).

**Supreme Court Rules, 1980---**

----O. XXVI, Rr. 1, 6 & 8---Review petition---Change of Advocate in review petition---Special leave of the Court---Principles---Under Order XXVI, Rule 6 of the Supreme Court Rules, 1980 an application for review has to be drawn by the Advocate who appeared at the hearing of the case in which the judgment or order, sought to be reviewed, was made---Review argued by a new Advocate before a new Bench would inevitably amount to rehearing of the main case and going beyond the scope of review under the law---Special leave to substitute a counsel in a review petition is to be granted (by the Court), only when appearance of the earlier counsel is not possible due to some unavoidable circumstances.

Order XXVI of the Supreme Court Rules, 1980 ('Rules') requires the same Advocate, who earlier appeared to argue the case, to draw up the review application and appeared in support of it before the Court for certain reasons. It is because a review petition is not the equivalent of a petition for leave to appeal or an appeal where the case is argued for the first time. It is not the rehearing of the same matter. The scope of review application is limited to the grounds mentioned in Order XXVI, Rule 1 of the Rules. The Advocate who had earlier argued the main case is perhaps the best person to evaluate whether the said grounds of review are attracted in the case. He being part to the hearing of the main case is fully aware of the proceedings that transpired in the Court leading to the judgment or order sought to be reviewed. He is the one who knows what was argued before the Court and what weighed with the Court in deciding the matter either way. It is also for the same reason that the review application is to be fixed before the same Bench that delivered the judgment or order sought to be reviewed, under Rule 8 of Order XXVI of the Rules. It is not hard to see that the same Advocate and the same Bench can best appreciate the grounds of review. A review argued by a new Advocate before a new Bench would inevitably amount to rehearing of the main case and going beyond the scope of review under the law.

It is true that the requirement of "sufficient ground" for granting the special leave is not expressly stated in Rule 6, but this does not mean that the discretion of the Court to grant or decline the special leave is arbitrary or is mechanical on filing of an application in this regard by a petitioner. This discretion, like all other discretions, is to be exercised judiciously for valid reasons by considering the circumstances of the case. The special leave to substitute a counsel in a review petition is to be granted, only when appearance of the earlier counsel is not possible due to some unavoidable circumstances. The practice of filing review applications by changing the counsel without justifiable reasons or unavoidable circumstances, by the parties as well as by the Advocates representing them is condemnable.

Federation of Pakistan v. Dr. Mubashir Hassan PLD 2011 SC 674 and Tamil Nadu Electricity Board v. Raju Reddiar AIR 1997 SC 1005 ref.

In the present case the ground pleaded for grant of the special leave was that the earlier counsel had refused to file the review petitions, and no other reason had been mentioned as to why he had so refused or what were the circumstances that prevented him to draft the review petition, file the requisite certificate under Rule 4 and appear in support of the review petitions. The stated refusal on his part to file the review petitions prima facie suggested that he believed that there was no sufficient ground for review and he being a responsible Senior Advocate of the Supreme Court had refused to file the frivolous review petitions. Therefore, there was no valid reason or unavoidable circumstance to grant the special leave prayed for. Applications made under Order XXVI, Rule 6 of the Rules were rejected and consequently, the review petitions were not entertained.

Muhammad Khaliq v. Gul Afzal PLD 2015 SC 247 ref.

Syed Rifaqat Hussain Shah, Advocate-on-Record for Petitioner.

N.R. for Respondents.

Date of hearing: 24th October, 2022.

**ORDER**

**SYED MANSOOR ALI SHAH, J**.---These applications have been filed under Order XXVI, Rule 6 of the Supreme Court Rules 1980 ("Rules"), seeking special leave of the Court for entertaining the review petitions drawn by an Advocate other than that who appeared at the hearing of the cases in which the judgment sought to be reviewed was made as well as seeking permission to be heard in support of the said review petitions. Order XXVI, Rule 6 of the Rules is reproduced hereunder for ready reference:

6. Except with the special leave of the Court, no application for review shall be entertained unless it is drawn by the Advocate who appeared at the hearing of the case in which the judgment or order, sought to be reviewed, was made. Nor shall any other Advocate, except such Advocate, be heard in support of the application for review, unless the Court has dispensed with the requirement aforesaid.

2. The only reasons given in the applications is that learned counsel who earlier appeared for the petitioner, namely, Syed Najam-ul-Hassan Kazmi, ASC, has refused to file the review petitions against the impugned judgment dated 25.02.2022. We are afraid, the reason given is utterly insufficient to grant the leave sought.

3. Order XXVI of the Rules deals with the practice and procedure of this Court in exercising its review jurisdiction. It lays special emphasis on the role and obligation of the Advocate who is to draw up the application for review and appear in support of it before the Court. Under Rule 6 an application for review has to be drawn by the Advocate who appeared at the hearing of the case in which the judgment or order, sought to be reviewed, was made. Under Rule 4, the Advocate who draws up the review application has not only to specify the points upon which the prayer for review is based but he has also to add his certificate to the effect that the review would be justifiable in accordance with the law and practice of the Court. Rule 5 provides that in case the Court comes to the conclusion that the review application filed was vexatious or frivolous, the Advocate or the Advocate on Record drawing the application shall render himself liable to disciplinary action, while Rule 7 provides that no application for review shall be entertained unless party seeking review furnishes cash security of Rs. 10,000/- which shall stand forfeited if the review petition is dismissed or shall be paid to the opposite-party, if the review petition is contested. Rule 6, thus, has to be seen and applied in the overall scheme of Order XXVI of the Rules.

4. Order XXVI of the Rules requires the same Advocate, who earlier appeared to argue the case, to draw up the review application and appear in support of it before the Court for certain reasons. It is because a review petition is not the equivalent of a petition for leave to appeal or an appeal where the case is argued for the first time. It is not the rehearing of the same matter. The scope of review application is limited to the grounds mentioned in Order XXVI, Rule 1 of the Rules. The Advocate who had earlier argued the main case is perhaps the best person to evaluate whether the said grounds of review are attracted in the case. He being part to the hearing of the main case is fully aware of the proceedings that transpired in the Court leading to the judgment or order sought to be reviewed. He is the one who knows what was argued before the Court and what weighed with the Court in deciding the matter either way. It is also for the same reason that the review application is to be fixed before the same Bench that delivered the judgment or order sought to be reviewed, under Rule 8 of Order XXVI of the Rules. It is not hard to see that the same Advocate and the same Bench can best appreciate the grounds of review. A review argued by a new Advocate before a new Bench would inevitably amount to rehearing of the main case and going beyond the scope of review under the law. It is true that the requirement of "sufficient ground" for granting the special leave is not expressly stated in Rule 6, but this does not mean that the discretion of the Court to grant or decline the special leave is arbitrary or is mechanical on filing of an application in this regard by a petitioner. This discretion, like all other discretions, is to be exercised judiciously for valid reasons by considering the circumstances of the case. The special leave to substitute a counsel in a review petition is to be granted, as held by a full bench of this Court in Dr. Mubashir Hassan case[1], only when appearance of the earlier counsel is not possible due to some unavoidable circumstances. The practice of filing review applications by changing the counsel without justifiable reasons or unavoidable circumstances, by the parties as well as by the Advocates representing them is condemnable.[2]

5. In this particular case, the ground pleaded for grant of the special leave is that the earlier counsel has refused to file the review petitions, and no other reason has been mentioned as to why he has so refused or what are the circumstances that prevented him to draft the review petition, file the requisite certificate under Rule 4 and appear in support of the review petitions. The stated refusal on his part to file the review petitions prima facie suggests that he believes that there is no sufficient ground for review and he being a responsible Senior Advocate of this Court has refused to file the frivolous review petitions, having regard to the observations made by this Court in Muhammad Khaliq v. Gul Afzal[3] in the following terms:

6. We have noted that review petitions are increasingly being filed as a matter of routine. As a consequence, the certificate required under Order XXVI, Rules 4 and 5 is given as a matter of course by the learned Advocates without application of mind. Statistics provided by the Office show that 1324 review petitions were filed in 2013 and 2014. We also note that a certificate has been given in the present case by the learned counsel to the effect that "according to law and established practice of this Hon'ble Court it is a fit case for review...". Far from being a fit case for review, we find that the law and established practice of this Court demonstrates that this is a frivolous petition where a certificate in terms of Order XXVI, Rule 4 has been filed by the learned counsel in a mechanical and unthinking manner. Such practice is to be deprecated in the interest both of the litigant and the legal system and also to further the Constitutional imperative of ensuring expeditious and inexpensive justice.

If it is the reason of his refusal, as it appears to be, then this is precisely the mischief what Rule 6 addresses. There is no other ground agitated before us for the change of the counsel that would make out a case for grant of special leave to substitute the counsel for drafting, filing and arguing the review petitions. Therefore, we see no valid reason or unavoidable circumstance to grant the special leave prayed for. Thus, the applications made under Order XXVI, Rule 6 of the Rules are rejected and consequently, the review petitions are not entertained. MWA/A-45/SC Order accordingly.

**P L D 2023 Supreme Court 174**

**Present: Syed Mansoor Ali Shah and Ayesha A. Malik, JJ**

**S.D.O./A.M., Hasht Nagri Sub-Division, PESCO, Peshawar and others--Petitioners**

**Versus**

**KHAWAZAN ZAD---Respondent**

Civil Petition No. 1159 of 2019, decided on 6th December, 2022.

(Against the judgment of the Peshawar High Court, Peshawar, dated 11.02.2019, passed in Civil Revision No. 376-P of 2017).

**(a) Civil Procedure Code (V of 1908)---**

----O. III, R. 1, O. IV, R. 1, O. VIII, R. 1, O. VI, Rr. 14, 15 & O. XXIX, R. 1---Suits by or against Corporations---"Signing/verifying a plaint" and "presenting/instituting a suit"---Distinction---Act of presentation of a plaint or a written statement can be done only by the plaintiff and the defendant in person or by their recognized agents or by their duly appointed pleaders, in terms of Rule 1 of Order III, C.P.C.---Rules 14 and 15 of Order VI, or Rule 1 of Order XXIX, C.P.C. which relates to signing and verifying the pleadings (plaint and written statement), cannot be referred to for the purpose of establishing the authority of a person to institute, or defend, the suit.

There is a difference between the signing and verifying a pleading (plaint or written statement) under Rules 14 and 15 of Order VI, or under Rule 1 of Order XXIX, C.P.C. and the presentation of that pleading to the court under Rule 1 of Order IV (plaint) and Rule 1 of Order VIII (written statement), C.P.C. The act of presenting a plaint to the court under Rule 1 of Order IV is called the institution of the suit, and the act of presenting a written statement under Rule 1 of Order VIII constitutes the defence of the suit. These acts manifest the will of a litigant to pursue his claim or to defend the claim made against him, in a court of law. By presenting the plaint, a plaintiff sets the machinery of the court in motion for deciding upon his claim while the presentation of the written statement expresses the will of the defendant to defend that claim. The act of presentation of a plaint or a written statement can, therefore, be done only by the plaintiff and the defendant in person or by their recognized agents or by their duly appointed pleaders, in terms of Rule 1 of Order III. Rules 14 and 15 of Order VI, or Rule 1 of Order XXIX, which relates to signing and verifying the pleadings (plaint and written statement), cannot be referred to for the purpose of establishing the authority of a person to institute, or defend, the suit.

G. M. Pfaff v. Sartaj Engineering Co. PLD 1970 Lah 184; Nadella v. Yamanoori AIR 1957 AP 172 and Shair Ali v. Jagmohan Ram AIR 1931 All 333 ref.

As the authority conferred by Rule 1 of Order XXIX, on the specified officers of the corporation to sign and verify any pleading on behalf of the corporation, does not include the authority to institute or defend the suit in their own names, a corporation being a juristic person must sue or be sued in its own name. Therefore, the name of the corporation, not the name or designation of any of its officers or employees, is to be mentioned as a plaintiff or a defendant. The phrase "service of summons/notice through its principal officer, so and so" may be added with the name of the corporation, for service.

**(b) Civil Procedure Code (V of 1908)---**

----O. VI, Rr. 14 & 15 & O.XXIX, R.1---Suits by or against Corporations---Non-applicability of provisions of C.P.C. relating to signing and verification of pleadings to memorandums of appeal and revision petitions---Rules 14 and 15 of Order VI, as well as Rule 1 of Order XXIX, C.P.C. as to signing and verifying the pleadings (plaint and written statement) are not applicable to the memorandums of appeal and revision petitions.

A memorandum of appeal can be signed, as per Rule 1 of Order XLI, C.P.C. by the appellant or his pleader; so a revision petition can be signed by the petitioner or his pleader as the revisional jurisdiction is a part of the general appellate jurisdiction of a superior court and the provisions of the C.P.C. in regard to appeals are applicable mutatis mutandis to revision petitions. A memorandum of appeal or a revision petition can, therefore, be signed by a duly appointed pleader as per Rule 1 of Order XLI, and presented to the appellate or revisional court by him on behalf of the appellant or petitioner as per Rule 1 of Order III, C.P.C. Rules 14 and 15 of Order VI, as well as Rule 1 of Order XXIX, as to signing and verifying the pleadings (plaint and written statement) are, thus, not applicable to the memorandums of appeal and revision petitions.

Shankar Ramchandra v. Krishnaji Dattatreya AIR 1970 SC 1; Atta Muhammad v. Muhammad Bakhsh PLD 2004 Lah 300 and Saima v. Paramount Spinning Mills 2011 SCMR 1039 ref.

**(c) Administration of justice---**

----Rules of procedure---Procedural technicalities---Courts always lean in favour of adjudicating the matters on merits rather than stifling the proceedings on procedural formalities---Rules of procedure are meant to facilitate the court proceedings for enforcing the rights of litigants, not to trap them in procedural technicalities for frustrating their rights; they are the tools to advance the cause of justice and cannot be used to cause the miscarriage of justice---Ultimate object of securing the ends of justice, therefore, outweighs the insistence on strict adherence to such rules.

Imtiaz Ahmad v. Ghulam Ali PLD 1963 SC 382; Manager, J&K State Property v. Khuda Yar PLD 1975 SC 678; Thal Engineering Industries v. Bank of Bahawalpur 1979 SCMR 32; Abdul Aziz v. Abdul Rahim PLD 1984 SC 164; Salima Begum v. Sardaran Bibi PLD 1995 SC 406; Mir Maza v. Azim PLD 1993 SC 332; Anwar Khan v. Riaz Ahmad PLD 2002 SC 491 and Muhammad Bashir v. Province of Punjab 2003 SCMR 83 ref.

**(d) Civil Procedure Code (V of 1908)---**

----O.XXIX, R.1---Suits by or against Corporations---Suit filed by an unauthorized person---Curable defect---Any defect in the authority of a person to sign and verify a pleading filed in, or to institute or defend, such a suit or in signing and filing a memorandum of appeal or revision petition can be cured at a later stage of the proceedings.

Any defect or omission in signing and verifying, or presenting, a pleading (plaint or written statement) or a memorandum of appeal or revision petition does not affect the merits of the case or the jurisdiction of the court and is therefore taken to be such an irregularity which can be cured at any stage of the proceedings. Likewise, any defect in the authority of a person to sign and verify a pleading filed in a suit by or against a corporation, or to institute or defend such a suit by presenting that pleading to the court, or in signing or filing of a memorandum of appeal or revision petition by a corporation, can also be cured at any stage of the proceedings.

Nadella v. Yamanoori AIR 1957 AP 172; Basit Rice Mills v. Shaheen Insurance Company 2021 SCMR 1413; Rahat and Company v. Trading Corporation of Pakistan PLD 2020 SC 366; U.B.I. v. Naresh Kumar AIR 1997 SC 3 and Musicales v. Secunda (1994) 2 All ER 737 ref.

**(e) Civil Procedure Code (V of 1908)---**

----S. 99 & O.I, R. 10---Misjoinder of parties---Curable defect---Misjoinder of parties is an error that does not affect the merits of the case or the jurisdiction of the court as provided in section 99, C.P.C., and is a procedural error which can be cured by striking out the names of such parties under Rule 10 of Order I, C.P.C. at any stage of the proceedings of the case, including the appellate or revisional stage.

Allah Ditta v. Muhammad Ali PLD 1972 SC 59; Ghulam Ahmad v. Akbar Hussain PLD 2002 SC 615 and Central Govt. v. Suleman Khan PLD 1992 SC 590 ref.

Asad Jan, Advocate Supreme Court (through video-link from Peshawar) for Petitioners.

N.R. for Respondent.

Date of hearing: 6th December, 2022.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**The questions of law before us, in the present case, are: (i) whether there is a difference between the authority to sign and verify a pleading (plaint or written statement) and the authority to institute or defend a suit by or against a corporation, under the Code of Civil Procedure, 1908 ("C.P.C."); (ii) whether the provisions of the C.P.C. relating to signing and verification of the pleadings (plaint and written statement) apply to the memorandums of appeal and revision petitions: and (iii) whether any defect in the authority of a person to sign and verify a pleading filed in, or to institute or defend, such a suit or in signing and filing a memorandum of appeal or revision petition can be cured at a later stage of the proceedings. These questions are often raised in suits instituted by or against corporate bodies (corporations) and in appeals arising from such suits.

2. The background facts of the instant case in which the said questions have arisen for our consideration are that the respondent instituted a suit for declaration and possession of the suit property (on which the petitioner

No.5, Peshawar Electric Supply Company ("PESCO") has its Complaint Centre) against PESCO and its employees, SDO/AM etc., ("petitioners"). The petitioners contested the suit by filing a joint written statement. The respondent did not raise any objection as to the authority of the person filing the said written statement on behalf of all the petitioners, including PESCO, and thus no issue in this regard was framed for trial by the trial court. At the conclusion of the trial, the trial court dismissed the suit of the respondent, holding that he had failed to prove his ownership of the suit property. The respondent's appeal, however, succeeded and the appellate court, by reversing the finding of the trial court, decreed the suit. The petitioners then filed a revision petition, which was dismissed by the High Court without touching upon the merits of the case, through the impugned judgment, on the ground that it had not been filed by a person duly authorised by a resolution of the Board of Directors of PESCO. Hence, the present petition has been filed by the petitioners for leave to appeal. The respondent has, however, not appeared despite due service of the notice. He is, therefore, proceeded against ex -parte.

3. We have heard the learned counsel for the petitioners in detail and examined the record of the case minutely.

Scope of Rule 1 of Orders III, IV, VIII and XXIX, C.P.C.

4. As the questions under consideration mainly require the analysis of the provisions of Rule 1 of Orders III, IV, VIII and XXIX of the C.P.C., these provisions are reproduced here for ease of reference:

Order III, C.P.C. (Recognized Agents and Pleaders)

1. Appearances etc., may be in person, by recognized agent or by pleader.

Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader appearing, applying or acting, as the case may be, on his behalf: Provided that any such appearance shall, if the Court so directs, be made by the party in person.

(Emphasis added)

Order IV, C.P.C. (Institution of Suits)

1. Suit to be commenced by plaint.

(1) Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf.

Order VIII (Written Statement and Set-off)

1. Written statement.

The defendant shall at or before the first hearing or within such time as the Court may permit, present a written statement of his defence

Order XXIX, C.P.C. (Suits By or Against Corporations)

1. Subscription and verification of pleading.

In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.

A bare reading of Rule 1 of Order III, C.P.C. shows that any appearance, application or act in or to a civil court, required or authorized by law to be made or done by a party in such court, except where otherwise expressly provided by any law for the time being in force, may be made or done in three ways: (i) by the party in person or (ii) by his recognized agent or (iii) by his pleader. The term "act" used in this Rule is of quite a comprehensive meaning, which includes all the necessary acts that are to be done in the course of the litigation so that the case may be properly placed before and proceeded with by the court, such as presenting the pleadings, making the miscellaneous applications, paying the process-fee, etc. Although the act of signing and verifying the pleadings (plaint and written statement)[1] comes within the scope of the term "act" as used in Rule 1 of Order III, but it cannot be dealt with under the said Rule as Rules 14 and 15 of Order VI, C.P.C. is the law that contains provisions which expressly provides for otherwise.

5. Under Rule 14 of Order VI, every pleading is to be signed by the party and his pleader (if any); however, where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf. While as per

Rule 15 of Order VI, every pleading is to be verified on oath or solemn affirmation at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case. The acts of signing and verifying pleadings (plaint and written statement), therefore, cannot be done by a pleader in terms of Rule 1 of Order III, C.P.C. Rule 1 of Order XXIX, which contains special provisions as to signing and verifying pleadings in suits by or against a corporation, is like a proviso to Rules 14 and 15 of Order VI, C.P.C. It authorizes, in addition to the persons specified in Rules 14 and 15 of Order VI, the secretary or any director or other principal officer of the corporation who is able to depose to the facts of the case, to sign and verify any pleading on behalf of the corporation.

Difference between signing/verifying a plaint and presenting/instituting a suit

6. The notable point is that neither Rules 14 and 15 of Order VI nor Rule 1 of Order XXIX says anything about presenting the pleadings to the court after signing and verifying the same. Rather, these are Rule 1 of Order IV and Rule 1 of Order VIII which deal with the subject of presenting a plaint or a written statement to the court. Different rules on these two matters make it obvious that there is a difference between the signing and verifying a pleading (plaint or written statement) under Rules 14 and 15 of Order VI, or under Rule 1 of Order XXIX, and the presentation of that pleading to the court under Rule 1 of Order IV (plaint) and Rule 1 of Order VIII (written statement), C.P.C. The act of presenting a plaint to the court under Rule 1 of Order IV is called the institution of the suit,[2] and the act of presenting a written statement under Rule 1 of Order VIII constitutes the defence of the suit.[3] These acts manifest the will of a litigant to pursue his claim or to defend the claim made against him, in a court of law. By presenting the plaint, a plaintiff sets the machinery of the court in motion for deciding upon his claim while the presentation of the written statement expresses the will of the defendant to defend that claim. The act of presentation of a plaint or a written statement can, therefore, be done only by the plaintiff and the defendant in person or by their recognized agents or by their duly appointed pleaders, in terms of Rule 1 of Order III.[4] Rules 14 and 15 of Order VI, or Rule 1 of Order XXIX, which relates to signing and verifying the pleadings (plaint and written statement), cannot be referred to for the purpose of establishing the authority of a person to institute, or defend, the suit.

7. As the authority conferred by Rule 1 of Order XXIX, on the specified officers of the corporation to sign and verify any pleading on behalf of the corporation, does not include the authority to institute or defend the suit in their own names, a corporation (like PESCO in the present case) being a juristic person must sue or be sued in its own name. Therefore, the name of the corporation, not the name or designation of any of its officers or employees, is to be mentioned as a plaintiff or a defendant. The phrase "service of summons/notice through its principal officer, so and so" may be added with the name of the corporation, for service of summons/notice as per Rule 2 of Order XXIX, C.P.C.

Non-applicability of provisions of C.P.C. relating to signing and verification of pleadings to memorandums of appeal and revision petitions

8. A memorandum of appeal can be signed, as per Rule 1 of Order XLI, by the appellant or his pleader; so can a revision petition be signed by the petitioner or his pleader as the revisional jurisdiction is a part of the general appellate jurisdiction of a superior court[5] and the provisions of the C.P.C. in regard to appeals are applicable mutatis mutandis to revision petitions.[6] A memorandum of appeal or a revision petition can, therefore, be signed by a duly appointed pleader as per Rule 1 of Order XLI,[7] and presented to the appellate or revisional court by him on behalf of the appellant or petitioner as per Rule 1 of Order III, C.P.C. Rules 14 and 15 of Order VI, as well as Rule 1 of Order XXIX, as to signing and verifying the pleadings (plaint and written statement) are, thus, not applicable to the memorandums of appeal and revision petitions.

Curing of any defect in the authority of a person to sign and verify a pleading, or a memorandum of appeal and revision petition, and to present the same to the court

9. Having examined the scope of the above-cited rules of procedure contained in the C.P.C., we must reiterate the principle, which is by now well settled, that 'the proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights ... Any system, which by giving effect to the form and not to the substance defeats substantive rights, is defective to that extent.'[8] The courts, thus, always lean in favour of adjudicating the matters on merits rather than stifling the proceedings on

procedural formalities. The rules of procedure are meant to facilitate the court proceedings for enforcing the rights of litigants, not to trap them in procedural technicalities for frustrating their rights. They are the tools to advance the cause of justice and cannot be used to cause the miscarriage of justice. The ultimate object of securing the ends of justice, therefore, outweighs the insistence on strict adherence to such rules. The same is the purpose of the rules of procedure discussed above. Any defect or omission in signing and verifying, or presenting, a pleading (plaint or written statement) or a memorandum of appeal or revision petition does not affect the merits of the case or the jurisdiction of the court and is therefore taken to be such an irregularity which can be cured at any stage of the proceedings.[9] Likewise, any defect in the authority of a person to sign and verify a pleading filed in a suit by or against a corporation, or to institute or defend such a suit by presenting that pleading to the court, or in signing or filing of a memorandum of appeal or revision petition by a corporation, can also be cured at any stage of the proceedings.[10]

10. It is for this reason that section 99, C.P.C. provides inter alia that no decree is to be reversed nor is any case to be remanded in appeal on account of any error, defect or irregularity in any proceedings in the suit that has not affected the merits of the case or the jurisdiction of the court. Similarly, it is not every irregularity in the exercise of its jurisdiction by a lower court that calls for interference in revisional jurisdiction under section 115(1)(c), C.P.C. but only the material irregularity, and the material irregularity is that which affects the merits of the case or the jurisdiction of the court.[11]

11. In the present case, we have noted that the power of attorney (wakalat nama) filed in the present petition is only for petitioner No. 5, PESCO, and not for other petitioners, i.e., the employees of the PESCO, SDO/AM, XEN/DM, etc. The present case relates to the ownership and possession of the suit property on which petitioner No.5, PESCO has its Complaint Centre. The employees of PESCO have no claim as to any right, title or interest in the suit property. They are, thus, neither necessary nor proper party in the case and have wrongly been impleaded. The misjoinder of parties is, however, such an error that does not affect the merits of the case or the jurisdiction of the court as provided in section 99, C.P.C., and is a procedural error which can be cured by striking out the names of such parties under Rule 10 of Order I, C.P.C. at any stage of the proceedings of the case, including the appellate or revisional stage.[12] We, therefore, strike out the names of petitioners Nos. 1 to 4[13] not only from the present petition but also in the proceedings throughout (suit, appeal and revision), for correction of the record of the case.

12. As regards the dismissal of the revision petition by the impugned judgment, we find that the High Court has knocked out the petitioner, PESCO, without touching upon the merits of the case, on a procedural technicality of not filing the resolution of the Board of Directors of PESCO, authorizing any of its officers to file the revision petition and to appoint a pleader for this purpose, and that too without providing any opportunity to present such a resolution. It is pertinent to mention here that the petitioner, PESCO, has submitted in this Court a resolution of its Board of Directors, dated 10.12.2015, whereby the General Manager (Finance)/Finance Director and Addl. DG (Legal)/Director Legal have been authorized to institute and defend cases in courts on behalf of PESCO, and the present petition has been filed by a pleader (AOR) duly appointed by the Director Legal of PESCO. The High Court, if had any doubt about the authority of the pleader to file the revision petition, should have asked him to produce the resolution of the Board of Directors or Articles of Association, to show the authority of the officer appointing him as a pleader for PESCO to file the revision petition, and should have provided a reasonable opportunity for it. The impugned judgment passed without providing such an opportunity is not legally sustainable. The petition is, therefore, converted into an appeal and the same is allowed. The impugned judgment is set aside; the revision petition shall be deemed to be pending before the High Court, which shall be decided by the High Court on merits in accordance with law. The petitioner, PESCO, shall produce a copy of the said resolution of its Board of Directors before the High Court also, for placing the same on record of the revision petition.

MWA/S-2/SC Appeal allowed

**P L D 2023 Supreme Court 185**

**Present: Syed Mansoor Ali Shah, Amin-ud-Din Khan and Ayesha A. Malik, JJ**

**MUHAMMAD IQBAL (deceased)---Applicant**

**Versus**

**AHMAD DIN (deceased) through his L.Rs. and others---Respondents**

C.M.A. No. 1609-L of 2021 in C.R.P. No.NIL-L of 2021 in C.A. No.5-L of 2010, C.M.A. No.1610-L of 2021 in C.R.P. No.Nil-L of 2021 and C.M.A. No.586-L of 2022 in C.R.P. No. Nil-L of 2021 in C.A. No.5-L of 2010, decided on 30th December, 2022.

(Application for grant of permission to represent the petitioner).

**(a) Supreme Court Rules, 1980---**

----O. XXVI, Rr. 1, 6 & 8---Change of Advocate in a review petition---Special leave to substitute a counsel in a review petition is to be granted, only when appearance of the earlier counsel is not possible due to some unavoidable circumstances---Practice of filing review applications by changing the counsel without justifiable reasons or unavoidable circumstances, by the parties as well as by the Advocates representing them is condemnable---Scope of Order XXVI, Rule 6 of the Supreme Court Rules, 1980, regarding change of Advocate in a review petition stated.

Order XXVI of the Supreme Court Rules, 1980 ('the Rules') requires the same Advocate, who earlier appeared to argue the case, to draw up the review application and appear in support of it before the Court for certain reasons. It is because a review petition is not the equivalent of a petition for leave to appeal or an appeal where the case is argued for the first time. It is not the rehearing of the same matter. The scope of review application is limited to the grounds mentioned in Order XXVI, Rule 1 of the Rules. The Advocate who had earlier argued the main case is perhaps the best person to evaluate whether the said grounds of review are attracted in the case. He being part of the hearing of the main case is fully aware of the proceedings that transpired in the Court leading to the judgment or order sought to be reviewed. He is the one who knows what was argued before the Court and what weighed with the Court in deciding the matter either way. It is also for the same reason that the review application is to be fixed before the same Bench that delivered the judgment or order sought to be reviewed, under Rule 8 of Order XXVI of the Rules. The same Advocate and the same Bench can best appreciate the grounds of review. A review argued by a new Advocate before a new Bench would inevitably amount to rehearing of the main case and going beyond the scope of review under the law. It is true that the requirement of "sufficient ground" for granting the special leave is not expressly stated in Rule 6, but this does not mean that the discretion of the Court to grant or decline the special leave is arbitrary or is mechanical on filing of an application in this regard by a petitioner. This discretion, like all other discretions, is to be exercised judiciously for valid reasons by considering the circumstances of the case. The special leave to substitute a counsel in a review petition is to be granted, only when appearance of the earlier counsel is not possible due to some unavoidable circumstances. The practice of filing review applications by changing the counsel without justifiable reasons or unavoidable circumstances, by the parties as well as by the Advocates representing them is condemnable.

Federation of Pakistan v. Dr. Mubashir Hassan PLD 2011 SC 674; Messrs National Electric Co. v. Khalid Siddique PLD 2005 SC 405 and Tamil Nadu Electricity Board v. Raju Reddiar AIR 1997 SC 1005 ref.

**(b) Supreme Court Rules, 1980---**

----O. IV, Rr. 23, 24 & O. XXVI, Rr. 4, 6, 8---Change of Advocate in a review petition---Scope---Special leave to substitute a counsel in a review petition---In the present case, the ground pleaded for grant of the special leave was that the earlier counsel due to ill health and old age could not file the present review petition---Firstly, there was no medical certificate attached along with the NOC tendered by the said counsel besides the "old age" of the said counsel was also not specified---More importantly as per Order XXVI Rule 4 of the Supreme Court Rules, 1980 ('the Rules') there was no certificate given by the earlier counsel that review was justifiable in the present case---Further, the said application was silent regarding change of Advocate on Record (AOR)---Under Order IV Rule 23 of the Rules no person having an Advocate on Record shall file a power of attorney authorizing another Advocate on Record to act for him in the same case except with the consent of the former

Advocate on Record or by leave of the court, unless the former Advocate on Record is dead or is unable by reason of infirmity of mind and body to continue to act---Nothing was available on record of present case to show why, AOR who had also appeared in the Civil Appeal had been replaced without furnishing her consent to such effect or without assigning any reason for her non-appearance as provided under Rule 23---Under Order IV, Rule 24 no Advocate on Record without leave of the court can withdraw from the conduct of any case---Application seeking permission under Order XXVI, Rule 6 of the Rules was not made out in the present case---No other ground was agitated before the Court for the change of the counsel or the AOR that would make out a case of grant of special leave to substitute the counsel for drafting, filing and arguing the review petition---No reason was furnished as to why AOR had been replaced, who had also appeared along with Advocate sought to be replaced in the order under review---Thus the application made under Order XXVI, Rule 6 of the Rules was rejected and consequently, the review petitions were not entertained.

Muhammad Tariq Bashir Awan, Advocate Supreme Court for Applicant/appellant.

Nemo for Respondents.

Date of hearing: 30th December, 2022.

**ORDER**

**Syed Mansoor Ali Shah, J**

C.M.A. No. 1609-L of 2021: Through this application permission is sought by the learned counsel to represent the petitioner in review petition by replacing the earlier counsel. It is stated in the application that the earlier counsel namely Mr. Shuja ud Din Hashmi, ASC has given NOC in favour of Mr. Muhammad Tariq Bashir Awan, ASC, on the ground of his ill health and old age. There is no reason furnished in the application as to why the Advocate on Record namely Mst. Tasneem Amin, AOR cannot represent the petitioner and is being replaced, considering that both Mr. Shuja ud Din Hashim, ASC and Ms. Tasneem Amin, AOR appeared on behalf of the applicants before this Court to argue Civil Appeal No. 5-L of 2010 as reflected in the order under review dated 23.07.2021.

2. Order XXVI of the Supreme Court Rules 1980 ("Rules") deals with the practice and procedure of this Court in exercising its review jurisdiction. It lays special emphasis on the role and obligation of the Advocate who is to draw up the application for review and appear in support of it before the Court. Under Rule 6 an application for review has to be drawn by the Advocate who appeared at the hearing of the case in which the judgment or order, sought to be reviewed, was made. Under Rule 4, the Advocate who draws up the review application has not only to specify the points upon which the prayer for review is based but he has also to add his certificate to the effect that the review would be justifiable in accordance with the law and practice of the Court. Rule 5 provides that in case the Court comes to the conclusion that the review application filed was vexatious or frivolous, the Advocate or the Advocate on Record drawing the application shall render himself liable to disciplinary action, while Rule 7 provides that no application for review shall be entertained unless party seeking review furnishes cash security of Rs. 10,000/- which shall stand forfeited if the review petition is dismissed or shall be paid to the opposite-party, if the review petition is contested. Rule 6, thus, has to be seen and applied in the overall scheme of Order XXVI of the Rules.

3. Order XXVI of the Rules requires the same Advocate, who earlier appeared to argue the case, to draw up the review application and appear in support of it before the Court for certain reasons. It is because a review petition is not the equivalent of a petition for leave to appeal or an appeal where the case is argued for the first time. It is not the rehearing of the same matter. The scope of review application is limited to the grounds mentioned in Order XXVI Rule 1 of the Rules. The Advocate who had earlier argued the main case is perhaps the best person to evaluate whether the said grounds of review are attracted in the case. He being part of the hearing of the main case is fully aware of the proceedings that transpired in the Court leading to the judgment or order sought to be reviewed. He is the one who knows what was argued before the Court and what weighed with the Court in deciding the matter either way. It is also for the same reason that the review application is to be fixed before the same Bench that delivered the judgment or order sought to be reviewed, under Rule 8 of Order XXVI of the Rules. It is not hard to see that the same Advocate and the same Bench can best appreciate the grounds of review. A review argued by a new Advocate before a new Bench would inevitably amount to rehearing of the

main case and going beyond the scope of review under the law. It is true that the requirement of "sufficient ground" for granting the special leave is not expressly stated in Rule 6, but this does not mean that the discretion of the Court to grant or decline the special leave is arbitrary or is mechanical on filing of an application in this regard by a petitioner. This discretion, like all other discretions, is to be exercised judiciously for valid reasons by considering the circumstances of the case. The special leave to substitute a counsel in a review petition is to be granted, as held by a full bench of this Court in Dr. Mubashir Hassan's case[1], only when appearance of the earlier counsel is not possible due to some unavoidable circumstances. The practice of filing review applications by changing the counsel without justifiable reasons or unavoidable circumstances, by the parties as well as by the Advocates representing them is condemnable.[2] See order of the Court passed in C.M.A. No. 3610/2022, etc. dated 24.10.2022.[3]

4. In this particular case, the ground pleaded for grant of the special leave is that the earlier counsel due to ill health and old age cannot file the instant review petition. Firstly, there is no medical certificate attached along with the NOC tendered by the said learned counsel besides the "old age" of the said counsel is also not specified. More importantly as per Order XXVI, Rule 4 there is no certificate given by the earlier counsel that review is justifiable in the instant case. Further, it is also noted that the said application is silent regarding change of Advocate on Record. Under Order IV Rule 23 no person having an Advocate on Record shall file a power of attorney authorizing another Advocate on Record to act for him in the same case except with the consent of the former Advocate on Record or by leave of the court, unless the former Advocate on Record is dead or is unable by reason of infirmity of mind and body to continue to act. There is nothing on the record to show why Ms. Tasneem Amin, AOR who had also appeared in the Civil Appeal No.5-L/2010 has been replaced without furnishing her consent to this effect or without assigning any reason for her non-appearance as provided under Rule 23 above. It is also underlined that under Order IV Rule 24 no Advocate on Record without leave of the court can withdraw from the conduct of any case.

5. We are, therefore, of the view that application seeking permission under Order XXVI, Rule 6 of the Rules is not made out. There is no other ground agitated before us for the change of the counsel or the AOR that would make out a case of grant of special leave to substitute the counsel for drafting, filing and arguing the review petition. Therefore, we see no valid reason or unavoidable circumstances to grant the special leave as prayed for. There is no reason furnished as to why AOR has been replaced, who had also appeared along with ASC in the order under review. Thus the application made under Order XXVI, Rule 6 of the Rules is rejected and consequently, the review petitions are not entertained. We affirm the view taken by this Court in C.M.A. 3610/2022, etc. vide order dated 24.10.2022.[4]

MWA/M-1/SC Order accordingly.

**P L D 2023 Supreme Court 207**

**Present: Syed Mansoor Ali Shah, Jamal Khan Mandokhail and Shahid Waheed, JJ**

**FEDERAL BOARD OF REVENUE through Chairman, Islamabad and others---Petitioners**

**Versus**

**Messrs HUB POWER COMPANY LTD. and others---Respondents**

Civil Petition No. 3739 of 2019, decided on 20th January, 2023.

(Against the order of Islamabad High Court, Islamabad dated 26.07.2019 passed in W.P. No. 1228 of 2016).

**Law Reforms Ordinance (XII of 1972)---**

----S. 3---Constitution of Pakistan, Art. 185(3)---Petition for leave to appeal filed before the Supreme Court without exhausting the available remedy of filing an Intra Court Appeal ("ICA") under section 3 of the Law Reforms Ordinance, 1972 ("Ordinance") before the High Court---Maintainability---Where the right to file an ICA before the High Court under section 3 of the Ordinance exists, then a petition before the Supreme Court without exhausting the said remedy, and thereby circumventing the forum below, is ordinarily not maintainable---Requirement of filing an ICA is a rule of practice for regulating the procedure of the Court and does not oust or abridge the constitutional jurisdiction of the Supreme Court---Such petitions, however, have been entertained by the Supreme Court only when certain exceptional circumstances exist, such as, where the matter involves important questions of law of great public importance having far-reaching consequences, questions of law as to the interpretation of the Constitution and validity of provincial statutes, and substantial questions of law involving fundamental rights, coupled with the fact that the objection with regards to maintainability is taken at a belated stage before the Court.

Imtiaz Ali Malik v. Mst. Surrya Begum 1979 SCMR 22; Ch. Muhammad Ilyas Gujjar v. Chief Election Commissioner PLD 2011 SC 961; Government of Punjab v. Metropole Cinema 2014 SCMR 649; Accountant General v. Zia Mohy-ud-r 294Din PLD 2008 SC 164; PIAC v. Samina Masood PLD 2005 SC 831; PTCL v. Iqbal Nasir PLD 2011 SC 132; Commissioner of Income Tax v. Messrs Media Network PLD 2006 SC 787; Province of Punjab v. Sargodha Textile Mills PLD 2005 SC 988 and PESSI v. Manzoor Hussain 1992 SCMR 441 ref.

Ms. Shazia Bilal, Advocate Supreme Court, Syed Salauddin Gillani, Addl. Commissioner (Through V.L. Karachi Registry) for Petitioners.

Jahanzeb Awan, Advocate Supreme Court for Respondent No.1.

Date of hearing: 20th January, 2023.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The learned counsel for the respondent, at the very outset, raised an objection that the petitioners have filed the instant petition without exhausting the available remedy of filing an Intra Court Appeal ("ICA") under section 3 of the Law Reforms Ordinance, 1972 ("Ordinance") before the High Court, therefore, the instant petition is not maintainable. In support of this contention, the learned counsel has placed reliance on Col. (Retd.) M.R. Hassan[1], Mst. Karim Bibi[2], Samina Masood[3], Zia Mohy-ud-Din[4], Ilyas Gujjar[5] and Abdul Ghani[6].

2. On the other hand, the learned counsel for the petitioners has also relied on Media Network[7] to contend that the instant petition is maintainable.

3. We have heard the learned counsel for the parties and have gone through the case law with their able assistance. It is settled law that where the right to file an ICA before the High Court under section 3 of the Ordinance exists, then a petition before this Court without exhausting the said remedy, and thereby circumventing the forum below, is ordinarily not maintainable.[8] The requirement of filing an ICA is a rule of practice for regulating the procedure of the Court and does not oust or abridge the constitutional jurisdiction of this Court.[9] Such petitions, however, have been entertained by this Court only when certain exceptional circumstances exist, such as, where the matter involves important questions of law of great public importance having far-reaching consequences[10], questions of law as to the interpretation of the Constitution[11] and validity of provincial statutes[12], and substantial questions of law involving fundamental rights[13], coupled with the fact that the objection with regards to maintainability is taken at a belated stage before the Court.[14] We note that no

such exceptional circumstances exist in the matter at hand and the objection regarding maintainability of the petition was also duly raised at the first instance. Reliance on Media Network (supra) by the learned counsel for the petitioners is misconceived as in the said judgment, this Court had noted that the objection as to maintainability was taken at a belated stage and important questions of law of great public importance having far-reaching consequences were involved in terms of selection of cases for audit under a Self-Assessment Scheme and policy guidelines issued by the Central Board of Revenue. Whereas, the present matter relates simply to adjustment of input tax with respect to services received by the respondent against the sales tax on services. Consequently, we find that the instant petition, having been filed without availing the remedy of an ICA before the High Court, is not maintainable.

4. In the light of the above, the preliminary objection raised by the learned counsel for the respondents is upheld and the instant petition is accordingly dismissed being not maintainable.

MWA/F-3/SC Petition dismissed.

**P L D 2023 Supreme Court 211**

**Present: Qazi Faez Isa and Syed Mansoor Ali Shah, JJ**

**MEERA SHAFI---Petitioner**

**Versus**

**ALI ZAFAR---Respondent**

Civil Petition No. 1795 of 2022, decided on 21st November, 2022.

(Against the judgment of Lahore High Court, Lahore, dated 18.05.2022, passed in C.R. No.24617 of 2022).

**(a) Interpretation of statutes---**

----Determining legislative intent---Use of modern technology---Best way to assess the legislative intent of a law is to examine its purpose today by considering its objectives, the goals, the interests, the values, the policy, and the function that the statute is designed to actualize---In the process of interpreting laws, judges must endeavor to bridge the gap between law and society---Intersection of law and technology not only requires the law to regulate technology but also to employ technology to make laws more at home with the technology-savvy society.

The role of a judge is to understand the purpose of law in the society and to help the law achieve its purpose. Law is a living organism and must respond to the changing social realities of the time. Indeed when social reality changes, the law must change too. Just as the change in social reality is the law of life, responsiveness to change in social reality is the life of the law. Legislative intent must be viewed in its changing environment by treating the statute as a living organism. The court cannot be insensitive to the system in which the statute operates. If the statute or the legislative intent is to be viewed as at the time of its origin, it freezes the meaning of the statute at the historical moment of its legislation, which may no longer be relevant to the meaning of the statute in modern times. To limit the meaning of the statute to its original legislative intent only reduces the judge into a historian and an archaeologist whereby he looks backward instead of forward. Sterility and stagnation defeat the purpose of law and defy its organic character. The best way forward to assess the legislative intent of a law is to examine its purpose today by considering its objectives, the goals, the interests, the values, the policy, and the function that the statute is designed to actualize. Change in social reality today also depends on the rapid development of technology to which the law cannot shut its eyes. While law develops gradually and technology is often far ahead of the legislature and the judicature, both these institutions must move forward and ackownledge the technological advances in developing the law which cannot stand still and must adapt to the changes in society. In the process of interpreting laws, judges must endeavor to bridge the gap between law and society. The intersection of law and technology not only requires the law to regulate technology but also to employ technology to make laws more at home with the technology-savvy society.

Benjamin N. Cardozo, The Paradoxes of Legal Science 10-11 (Greenword Press 1970) (1928); William H. Rehnquist, The Changing Role of the Supreme Court, 14 Fla. St. U.L.Rev 1 and Aharon Barak, The Judge in a Democracy, Chapter 1 ref.

**(b) Interpretation of statutes---**

----Updating construction of statutes, principle of---Scope of the principle of updating construction of statutes stated with respect to technological changes/advancements.

Principle of extension of statutes to new things is a well-known principle of the construction of statutes. Except in some cases where the principle of strict construction is to be applied, the language of a statute is generally extended to new things which were not known and could not have been contemplated by the legislature when it was passed. As the constant formal updating of all laws by the legislature is not practicable and each generation mostly lives under the law it inherits, the legislature is presumed to have intended that the laws enacted by it should ordinarily be taken as "always speaking" and applied at any future time in such a way that gives effect to its intention in the changed circumstances that have occurred since the enactment of the law. This is commonly called the "updating construction" of laws. The changes that require the updating construction of law may include technological or scientific developments, new natural phenomena or changes in social conditions, etc---Updating construction is, however, applied only where its application would be consistent with the legislative intention. When a new state of affairs or matters comes into existence, the courts have to consider

whether they fall within the legislative intention. They may be held to do so if they fall within the same genus of facts as those to which the expressed [legislative] policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can be fulfilled if the extension is made. The principle of updating construction is in consonance with the purposive approach adopted while interpreting different statutes.

Fakir Muhammad v. Federation of Pakistan PLD 1958 SC 118; Maxwell on Interpretation of Statutes (Tenth Edition); Bennion, Bailey and Norbury on Statutory Interpretation (Eighth Edition) pp. 503-518; R v. Walsall Metropolitan Borough Council [2015] 1 All ER 165 per Leggatt J; Royal College of Nursing v. Department of Health 1981 AC 800 per Lord Wilberforce; JS Bank v. Province of Punjab 2021 SCMR 1617; Tariq Iqbal v. Government of KPK 2019 SCMR 859; Saif-Ur-Rehman v. ADJ 2018 SCMR 1885; Nawaz Chandio v. Ismail Rahu 2016 SCMR 875; Aamer Raza v. Minhaj Ahmad 2012 SCMR 6; Khalid Masood v. Khurshid Begum 2001 SCMR 550; Federation of Pakistan v. Noori Trading Corporation 1992 SCMR 710; SYC Leung, How Do Statutes 'Speak' in Recent Technology Advancement Cases? (2021) Statute Law Review 1 and Birmingham City Council v. Oakley [2001] 1 AC 617 per Lord Hoffmann ref.

In the 21st century, technological advancement has reached an unprecedented speed. A technological change is thus often so radical that it could not have reasonably been perceived by the legislature and catered in the language of the statute, nor can the legislature promptly catch up with such changes by the formal legislative process. In such a scenario, the principle of updating construction requires judges to bridge the gap between law and technology by identifying the concept (purpose and policy) behind the statutory provision and giving effect thereto in interpreting a particular provision. For, when a statute employs a concept which may change in content with advancing knowledge, technology or social standards, it should be interpreted as it would be currently understood. The content may change but the concept remains the same. The courts should therefore look at the bigger picture (purpose and policy) to harmonize law with technological change, and adopt a realistic approach in factual assessment to retrieve what the law intends to achieve. In applying the statutory language to a new situation created by technological change, it is necessary both to view the facts realistically and to keep in mind the purpose of the legislation

SYC Leung, How Do Statutes 'Speak' in Recent Technology Advancement Cases? (2021) Statute Law Review 1; Birmingham City Council v. Oakley [2001] 1 AC 617 per Lord Hoffmann and Uber BV v. Aslam [2021] UKSC 5 per Lord Leggatt ref.

**(c) Civil Procedure Code (V of 1908)---**

----O. XVIII, R. 4 & S. 151---Qanun-e-Shahadat (10 of 1984), Art. 164---Constitution of Pakistan, Arts. 9, 10A & 37(d)---Evidence of witness, recording of---Use of video conferencing---Permissibility---Evidence of a witness who is not physically present in court can be recorded in a civil case by using the modern technology of video conferencing, within the existing legal framework---Civil court can allow, under Section 151, C.P.C. and Article 164 of the Qanun-e-Shahadat, 1984 recording the oral evidence of a witness through video conferencing---Virtual attendance of a witness in court, appears to be the species of the genus of "attendance" required under Rule 4 of Order XVIII, C.P.C. and fulfills the legislative purpose and policy in requiring the attendance of a witness in court for recording his evidence---Word "attendance" used in Rule 4 can be extended to "virtual attendance", and the word "attendance" mentioned in the said Rule does not mean only "physical attendance" but includes "virtual attendance" made possible by the modern technology of video conferencing.

The "virtual attendance" of a witness in court through the medium of video conferencing enables the judge and other persons present in court to see the witness and hear what he says, and vice versa. Such an attendance is thus, in effect, in open court, and his evidence is also recorded under the personal superintendence of the judge. The judge under whose superintendence the evidence through video conferencing is recorded can satisfy himself about the free will of the witness present on screen as he does about the witness present physically in court by questioning him in this regard and ensuring that he is not under the immediate influence of any other person. A court can ensure the independence of a witness only from the immediate influence, not from any covert influence, of any other person in both situations whether he is physically present or virtually present in court. In the latter situation, the court can ensure that there is no other person in the room where the witness is

sitting, while his evidence is being recorded, by asking him to provide a full view of that room on the screen. The identity of the witness, if disputed, can also be verified by the judge through appropriate means. The witness can be confronted on screen with documents produced or sought to be produced in court by any of the parties or, if needed, the scanned copies of such documents can be sent to him through modern means of communication. In all such necessary matters as to the recording of evidence, the physical attendance and the virtual attendance of a witness in court do not differ. The virtual attendance of a witness in court, thus, appears to be the species of the genus of "attendance" required under Rule 4 of Order XVIII, C.P.C. and fulfills the legislative purpose and policy in requiring the attendance of a witness in court for recording his evidence. Therefore, the word "attendance" used in Rule 4 can be extended to "virtual attendance", and the word "attendance" mentioned in the said Rule does not mean only "physical attendance" but includes "virtual attendance" made possible by the modern technology of video conferencing.

State of Maharashtra v. Praful Desai AIR 2003 SC 2053 and Cyberworks Audio Video Technology Ltd v. Mei Ah (HK) Co Ltd [2020] HKCFI 347 ref.

Article 164 of the Qanun-e-Shahadat, 1984 ('QSO') provides that in such cases as the court may consider appropriate, the court may allow to be produced any evidence that may have become available because of modern devices or techniques. When in the circumstances of a case, requiring physical attendance of a witness in court will incur an unnecessary amount of delay, expense or inconvenience, the order of the court allowing virtual attendance of a witness through video conferencing is for the ends of justice, and the rejection of an unjustifiable insistence of the opposing party on securing physical attendance of such witness in court is to prevent abuse of the process of the court. An order allowing virtual attendance of the witness in such circumstances thus squarely falls within the scope of section 151 of the C.P.C.

The interpretation of the various provisions of law allowing modern technology of video conferencing to be read into the exiting enactments enhances access to justice, promotes fair trial and introduces inexpensive and expeditious justice thereby advancing the fundamental rights under Articles 9 and 10A and principle of policy under Article 37(d) of the Constitution.

Government of Balochistan v. Azizullah Memon PLD 1993 SC 341; Chairman NAB v. Nasar Ullah PLD 2022 SC 497 and Muhammad Sharif v. Nabi Bakhsh 2012 SCMR 900 ref.

Although the powers conferred by section 151 of the C.P.C. and Article 164 of the QSO are discretionary, the courts are to exercise them judiciously, not arbitrarily or mechanically, on the filing of an application in such regard by a party to the proceedings. Such discretion, like all other discretions, is to be exercised judiciously for valid reasons by considering the circumstances of the case. In exercising the discretion, the courts are to see: (i) whether the evidence of the witness appears essential to the just decision of the case, and (ii) whether requiring physical attendance of the witness in court would incur unreasonable delay, expense or inconvenience. Supreme Court observed that the strict adherence to the obligatory list of guidelines/protocols to be complied with by the courts for allowing evidence of a witness to be recorded through video conferencing provided in the cases reported as Munawar Hussain v. State 2020 PCr.LJ 1184 and Muhammad Israr v. State PLD 2021 Pesh 105 may impede the application of the very law declared therein; therefore, it was proper that the said guidelines are to be followed by the courts to the extent it is found just and proper to follow them in the facts and circumstances of a particular case. For instance, where there is a serious apprehension that the witness would be under the influence of or tutored by some other person in the course of recording his evidence, or his very identity is disputed on substantial, not flimsy, grounds, the court may require his presence in the Pakistan Embassy in the country concerned and engage some officer of the Embassy in the process of recording his statement through video conferencing, as provided in those guidelines. But without any such serious apprehension or substantial dispute, requiring all such witnesses in every case to go to the Pakistan Embassy and engaging some officer of the Embassy in the process would also involve some unnecessary delay, expense or inconvenience. This matter should, therefore, be left to the discretion of the court concerned, which shall obviously exercise it judiciously for valid reasons.

In the present case the petitioner is the only defendant in the suit; therefore, her evidence is very much essential to the just decision of the case. The petitioner lives in a foreign country (Canada) since 2016 as her ordinary

place of residence, with her family including two children, and is not in that country for a short visit. The petitioner comes to Pakistan only when there is a working schedule for her. Waiting for her such a schedule would certainly cause a delay in the decision of the suit, and forcing her to come to Pakistan from the foreign country (Canada) by leaving her children there or carrying them with her would incur such expense and inconvenience which surely appears unreasonable under the circumstances of the case. The prayer of the petitioner for allowing her remaining cross-examination through video conferencing is, thus, justified. Furthermore, there is no dispute as to the identity of the petitioner, nor is there any serious apprehension that the petitioner would be under the influence of or tutored by any other person in the course of recording her remaining cross-examination, therefore, there is no need to require her to go to the Pakistan Embassy in Canada and to involve any officer of the Embassy in the process of recording her remaining cross-examination through video conferencing. Petition for leave to appeal was converted into appeal and allowed.

**(d) Civil Procedure Code (V of 1908)---**

----Preamble---Procedures provided under the Civil Procedure Code, 1908 ('C.P.C.')---Scope---Courts are not to act upon the principle that every procedure is to be taken to be prohibited unless it is expressly provided for by the Code [of Civil Procedure], but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by law---As a matter of general principle, prohibition cannot be presumed.

Narsingh Das v. Mangal Dubey (1882) ILR 5 All 163; Nur Elahi v. State PLD 1966 SC 70 and H. M. Saya & Co. v. Wazir Ali Industries PLD 1969 SC 65 ref.

**(e) Qanun-e-Shahadat (10 of 1984)---**

----Art. 132(2)---Cross-examination, right of---Scope---Right of cross-examination is neither unlimited nor unbridled---When the judge observes that the right of cross-examination is being abused by asking questions which are irrelevant and intended to prolong the cross-examination with the object of manipulating error, or to scandalize, insult or annoy the witness, he should intervene and disallow such questions.

Muhammad Shafi v. State PLD 1967 SC 167; Muddassar v. State 1996 SCMR 3 and Mir Hassan v. State 1999 SCMR 1418 ref.

Muhammad Saqib Jillani, Advocate Supreme Court for Petitioner.

Muhammad Ali Raza, Advocate Supreme Court for Respondent.

Date of hearing: 2nd September, 2022.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**The question that falls for our consideration is: whether the evidence of a witness who is not physically present in court can be recorded in a civil case by using the modern technology of video conferencing, within the existing legal framework.

2. Briefly, the background facts of the case in which the said question has arisen for our consideration are that the respondent instituted a suit for damages against the petitioner, on the basis of alleged defamation. The petitioner contested the suit by filing her written statement. On the pleadings of the parties, the trial court framed certain issues for trial and called upon the parties to produce their evidence. After the completion of the affirmative evidence of the respondent, the petitioner produced her witnesses and also appeared herself in the witness box as DW-4 in her defence evidence. On two dates of hearing, the petitioner (DW-4) was cross-examined but her cross-examination could not be completed and on the next two dates, the hearing of the case was adjourned due to the leave of the Presiding Officer and the strike of the Bar. In the meanwhile, the petitioner left for Canada and filed an application in the trial court for recording her remaining cross-examination from Canada through a video link.

3. In the said application, the petitioner mainly pleaded that she had been appearing in court on several dates for her cross-examination, but for one reason or the other, her cross-examination could not be completed; that she had to return to her place of abode, Canada, where she had been living with her family since 2016; that she was a mother of two children of 6 and 8 years of age, and it would cause her unnecessary expense and inconvenience in travelling to Pakistan and leaving her children in Canada, for the remaining cross-

examination; and that by such travelling she would also face the risk of coming in contact with coronavirus and of consequent restrictions upon her re-entry into Canada.

4. The respondent opposed the application, and the trial court dismissed the same by its order dated 28.03.2022. The High Court also dismissed the revision petition of the petitioner filed against that order of the trial court, vide its judgment dated 18.05.2022 ("impugned judgment"). Hence, the petitioner has knocked at the door of this Court through the present petition for leave to appeal.

5. We have heard the arguments of the learned counsel for the parties, read the cited precedent cases and perused the record of the case.

6. As the question being considered in the present case is, whether the evidence of a witness who is not physically present in court can be recorded in a civil case by using the modern technology of video conferencing within the existing legal framework, we think that it would be appropriate to cite here the relevant provisions of the law, which are to be examined for answering the said question. They are Rule 4 of Order XVIII of the Code of Civil Procedure 1908 ("C.P.C."), Section 151 of the C.P.C. and Article 164 of the Qanun-e-Shahadat Order, 1984 ("Q.S.O."):

Rule 4 of Order XVIII of C.P.C.:

4. Witnesses to be examined in open Court: The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge.

Section 151 of C.P.C.:

151. Saving of inherent powers of Court: Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court, to be exercised after recording reasons in writing,[1] to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

Article 164 of the Q.S.O.:

164. Production of evidence that has become available because of modern devices, etc.: In such cases as the Court may consider appropriate, the Court may allow to be produced any evidence that may have become available because of modern devices or techniques.

The most important of the above provisions, for the present purpose, is perhaps Rule 4 of Order XVIII of the C.P.C. ("Rule 4"), which provides that the evidence of the witnesses in attendance shall be taken orally in open court in the presence and under the personal direction and superintendence of the judge. Although the expression "witnesses in attendance" used in Rule 4 is not followed by the words "in court", the reading of the Rule as a whole leaves little room to doubt that the attendance of the witnesses referred to therein means the attendance of the witnesses in court. However, what is unclear is whether this "attendance" means only "physical attendance" or may include "virtual attendance" by video conferencing. Can the word "attendance" used in Rule 4 be extended to "virtual attendance"?

7. In order to answer the above question it is important to highlight the conceptual role of a court in a constitutional democracy. The role of a judge is to understand the purpose of law in the society and to help the law achieve its purpose. Law is a living organism and must respond to the changing social realities of the time. Indeed when social reality changes, the law must change too. Just as the change in social reality is the law of life, responsiveness to change in social reality is the life of the law.[2] Legislative intent must be viewed in its changing environment by treating the statute as a living organism. The court cannot be insensitive to the system in which the statute operates. If the statute or the legislative intent is to be viewed as at the time of its origin, it freezes the meaning of the statute at the historical moment of its legislation, which may no longer be relevant to the meaning of the statute in modern times. To limit the meaning of the statute to its original legislative intent only reduces the judge into a historian and an archaeologist whereby he looks backward instead of forward. Sterility and stagnation defeat the purpose of law and defy its organic character. The best way forward to assess the legislative intent of a law is to examine its purpose today by considering its objectives, the goals, the interests, the values, the policy, and the function that the statute is designed to actualize. Change in social reality today also depends on the rapid development of technology to which the law cannot shut its eyes. While law develops gradually and technology is often far ahead of the legislature and the judicature, both these institutions must move forward and acknowledge the technological advances in developing the law, which cannot stand

still and must adapt to the changes in society. In the process of interpreting laws, judges must endeavor to bridge the gap between law and society. The intersection of law and technology not only requires the law to regulate technology but also to employ technology to make laws more at home with the technology-savvy society.

8. Coming back to the question, whether the word "attendance" used in Order 18, Rule 4 of the C.P.C. can be extended to "virtual attendance", we find a five-member bench decision of this Court in Fakir Muhammad case[3] to be instructive in this regard and points us in the right direction. The Court held, in that case, that the principle of extension of statutes to new things is a well-known principle of the construction of statutes and cited Maxwell[4] to say that except in some cases where the principle of strict construction is to be applied, the language of a statute is generally extended to new things which were not known and could not have been contemplated by the legislature when it was passed. By applying the said principle, the Court held that the words "by land" used in section 19 of the Sea Customs Act 1878, include "by air".

9. The principle of extension of statutes to new things, referred to by this Court in the Fakir Muhammad case in 1958, has over the years been crystallized into the principle of "updating construction" of statutes. As the constant formal updating of all laws by the legislature is not practicable and each generation mostly lives under the law it inherits, the legislature is presumed to have intended that the laws enacted by it should ordinarily be taken as "always speaking" and applied at any future time in such a way that gives effect to its intention in the changed circumstances that have occurred since the enactment of the law. This is commonly called the "updating construction" of laws.[5] The changes that require the updating construction of law may include technological or scientific developments, new natural phenomena or changes in social conditions, etc. 'It is not difficult to see why an updating construction of legislation is generally to be preferred. Legislation is not and could not be constantly re-enacted and is generally expected to remain in place indefinitely, until it is repealed, for what may be a long period of time. An inevitable corollary of this is that the circumstances in which a law has to be applied may differ significantly from those which existed when the law was made, as a result of changes in technology or in society or in other conditions. This is something which the legislature may be taken to have had in contemplation when the law was made. If the question is asked "is it reasonable to suppose that the legislature intended a court applying the law in the future to ignore such changes and to act as if the world had remained static since the legislation was enacted?" the answer must generally be "no". A "historical" approach of that kind would usually be perverse and would defeat the purpose of the legislation.'[6]

10. The updating construction is, however, applied only where its application would be consistent with the legislative intention. When a new state of affairs or matters comes into existence, the courts have to consider whether they fall within the legislative intention. They may be held to do so if they fall within the same genus of facts as those to which the expressed [legislative] policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can be fulfilled if the extension is made.'[7] We may underline here that the principle of updating construction is in consonance with the purposive approach, which this Court has consistently adopted while interpreting different statutes.[8] In fact, the purpose and policy of the law, which is to be interpreted, play a central role in applying this principle.[9]

11. In the 21st century, technological advancement has reached an unprecedented speed. A technological change is thus often so radical that it could not have reasonably been perceived by the legislature and catered in the language of the statute, nor can the legislature promptly catch up with such changes by the formal legislative process. In such a scenario, the principle of updating construction requires judges to bridge the gap between law and technology by identifying the concept (purpose and policy) behind the statutory provision and giving effect thereto in interpreting a particular provision. For, 'when a statute employs a concept which may change in content with advancing knowledge, technology or social standards, it should be interpreted as it would be currently understood. The content may change but the concept remains the same.'[10] The courts should therefore look at the bigger picture (purpose and policy) to harmonize law with technological change, and adopt a realistic approach in factual assessment to retrieve what the law intends to achieve. In applying the statutory language to a new situation created by technological change, it is necessary both to view the facts realistically and to keep in mind the purpose of the legislation.[11]

12. When we examine the question as to extending the word "attendance" used in Rule 4 to "virtual attendance" in light of the above principle of updating construction, there remains no difficulty to find the right answer. What we need to do is to see: what are the legislative purpose and policy in requiring the attendance of a witness in court for recording his evidence, and whether extending the word "attendance" used in Rule 4 to "virtual attendance" would fulfill or defeat that purpose and policy. The legislative purpose, in this regard, is evident from Rule 4 itself, that is, the evidence of the witness is to be recorded: (i) in open court, and (ii) under the personal superintendence of the judge. It is also not hard to discern the legislative policy. The recording of evidence of a witness in an open court under the personal superintendence of the judge ensures that the witness may give the evidence, of his free will as per his conscience without being under the influence of any other person.

13. The "virtual attendance" of a witness in court through the medium of video conferencing enables the judge and other persons present in court to see the witness and hear what he says, and vice versa. Such an attendance is thus, in effect, in open court, and his evidence is also recorded under the personal superintendence of the judge. The judge under whose superintendence the evidence through video conferencing is recorded can satisfy himself about the free will of the witness present on screen as he does about the witness present physically in court by questioning him in this regard and ensuring that he is not under the immediate influence of any other person. Needless to say that a court can ensure the independence of a witness only from the immediate influence, not from any covert influence, of any other person in both situations whether he is physically present or virtually present in court. In the latter situation, the court can ensure that there is no other person in the room where the witness is sitting, while his evidence is being recorded, by asking him to provide a full view of that room on the screen. The identity of the witness, if disputed, can also be verified by the judge through appropriate means. The witness can be confronted on screen with documents produced or sought to be produced in court by any of the parties or, if needed, the scanned copies of such documents can be sent to him through modern means of communication. In all such necessary matters as to the recording of evidence, the physical attendance and the virtual attendance of a witness in court do not differ.[12] The virtual attendance of a witness in court, thus, appears to be the species of the genus of "attendance" required under Rule 4 and fulfills the legislative purpose and policy in requiring the attendance of a witness in court for recording his evidence. Therefore, we can legitimately conclude that the word "attendance" used in Rule 4 can be extended to "virtual attendance", and the word "attendance" mentioned in this Rule does not mean only "physical attendance" but includes "virtual attendance" made possible by the modern technology of video conferencing.

14. Next, we proceed to examine under which provision of the C.P.C. can a court make an order for the virtual attendance of a witness as there is no such provision in Order XVI of the C.P.C., which relates to 'Summoning and Attendance of Witnesses'. Learned counsel for the petitioner has referred to section 151 of the C.P.C., in this regard; therefore, we need to see whether a court can make such an order, in the exercise of its inherent powers under section 151 of the C.P.C.

15. Admittedly, the C.P.C. is silent on the matter of evidence recording through video conferencing: there is no express provision either allowing or prohibiting such procedure of recording evidence. And regarding the procedural law, it is a well-settled principle that the 'courts are not to act upon the principle that every procedure is to be taken to be prohibited unless it is expressly provided for by the Code [of Civil Procedure], but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by law. As a matter of general principle, prohibition cannot be presumed.'[13] The provisions of section 151, which empowers the civil courts to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court, are intended to preclude the possibility of the civil courts being stuck in a situation for any omission in the C.P.C. The inherent powers of the civil courts saved by section 151 are thus supplementary to their powers stated expressly in the C.P.C. and are to be exercised where the situation is not covered by any provision of the C.P.C. It hardly needs lengthy arguments to establish that when in the circumstances of a case, requiring physical attendance of a witness in court will incur an unnecessary amount of delay, expense or inconvenience, the order of the court allowing virtual attendance of a witness through video conferencing is for the ends of justice, and the rejection of an unjustifiable insistence of the opposing party on

securing physical attendance of such witness in court is to prevent abuse of the process of the court. An order allowing virtual attendance of the witness in such circumstances thus squarely falls within the scope of section 151 of the C.P.C.

16. The learned counsel for the petitioner has also relied upon the provisions of Article 164 of the QSO, in addition to section 151 of the C.P.C., for allowing the production of the evidence of the petitioner (DW-4) through video conferencing, while the learned counsel for the respondent has opposed this reliance with the contention that the term "evidence" used in Article 164 only relates to documentary evidence and does not include the oral evidence of a witness which is to be recorded in court.

17. Article 164 of the QSO provides that in such cases as the court may consider appropriate, the court may allow to be produced any evidence that may have become available because of modern devices or techniques. The QSO is mainly a procedural law; its provisions are therefore to be construed liberally, not restrictively, to advance the remedy. As per Article 2 (1) (c) of the QSO, unless there is anything repugnant in the subject or context, the term "evidence" used in the QSO is to include: (i) all statements which the Court permits or requires be made before it by witnesses, in relation to matters of fact under inquiry - such statements are called oral evidence; and (ii) all documents produced for the inspection of the Court - such documents are called documentary evidence. The learned counsel for the respondent could not point out to us anything in the subject or context of Article 164, that may be repugnant to the said inclusive meaning of the term "evidence" in Article 164. We are, therefore, not persuaded to agree with his contention and are of the view that the oral evidence of a witness that may become available because of the modern technique of video conferencing, does fall within the scope of the provisions of Article 164 of the QSO.[14]

18. Article 164 of the QSO is actually our gateway to allowing modern science and technology to come into our courtrooms.[15] 'If justice is to be done, then law must not become stagnant or archaic while society moves forward. It must be accessible, intelligible and must change with the time, responding to the realities of modern life.'[16] In the present age of information technology, no one can dispute the advantages of the use of this technology in courts for improving the efficiency of the judicial process and reducing the delay in the dispensation of justice. As the ultimate objective of the law is to serve society, the courts need to embrace and use technological developments with a pragmatic and dynamic approach in case management and court proceedings, for dispensing justice more efficiently and expeditiously. The above interpretation of the various provisions of law allowing modern technology of video conferencing to be read into the exiting enactments enhances access to justice[17], promotes fair trial[18] and introduces inexpensive and expeditious justice[19] thereby advancing the fundamental rights under Articles 9 and 10A and principle of policy under Article 37(d) of the Constitution of the Islamic Republic of Pakistan, 1973.

19. We find it necessary to underline here that although the powers conferred by section 151 of the C.P.C. and Article 164 of the QSO are discretionary, the courts are to exercise them judiciously, not arbitrarily or mechanically, on the filing of an application in this regard by a party to the proceedings. This discretion, like all other discretions, is to be exercised judiciously for valid reasons by considering the circumstances of the case. In exercising the discretion, the courts are to see: (i) whether the evidence of the witness appears essential to the just decision of the case, and (ii) whether requiring physical attendance of the witness in court would incur unreasonable delay, expense or inconvenience. We have inferred the standard of "unreasonable delay, expense or inconvenience" from the legislature's wisdom. The standard of unreasonable "delay or expense" for relaxing adherence to certain general rules of the law of evidence has been provided in Articles 46, 47 and 71 of the QSO, while sections 503 and 512 of the Code of Criminal Procedure 1898 add the ground of unreasonable "inconvenience" to the said two grounds for creating exceptions to some general rules of recording the evidence of witnesses.

20. Before turning to the facts of the present case, for examining the prayer of the petitioner on the touchstone of the above two conditions, we would like to say a few words on the precedent cases of Munawar Hussain[20] and Muhammad Israr[21] cited by the learned counsel for the petitioner, and on the rules and laws of other countries on the subject of recording evidence through video conferencing referred to by the learned counsel for the respondent. In these cases, the Lahore and Peshawar High Courts while relying, among other cases, upon the

Aijazur Rehman case[22] of the Sindh High Court and the Praful Desai case[23] of the Indian Supreme Court have observed that the word "presence" used in section 353 of the Code of Criminal Procedure 1898 includes "constructive presence" through video conferencing, and by referring to Article 164 of the QSO have held that the statement of a witness can be recorded through video conferencing in a criminal case. Although we agree, in principle, with the exposition of law made in the cited two cases as to the permissibility of recording evidence of a witness through video conferencing in a criminal case, the point on which we have some reservations is that in these cases both the High Courts have prescribed a long list of guidelines/protocols to be complied with by the courts in allowing evidence of a witness to be recorded through video conferencing and have made the compliance therewith obligatory. The learned counsel for the respondent has also asked us to lay down such guidelines in line with the rules and laws of the other countries referred to by him. However, we are not inclined to undertake such an exercise in the present case and find it appropriate that it should be left to be done by the High Courts in the exercise of their rule-making power under Article 202 of the Constitution of the Islamic Republic of Pakistan 1973, on the administrative side, after due deliberation. In doing so, the High Courts may, if deemed appropriate, look into the rules and laws made by other countries on the subject. Till then, the courts may exercise their power to allow recording evidence through video conferencing and may consider the guidelines provided by the two High Courts in the said cases. The requirement of strict adherence to the guidelines prescribed by the High Courts in the present case may, however, impede the application of the very law declared therein; therefore, we think it proper to make it clear that those guidelines are to be followed by the courts to the extent it is found just and proper to follow them in the facts and circumstances of a particular case. For instance, where there is a serious apprehension that the witness would be under the influence of or tutored by some other person in the course of recording his evidence, or his very identity is disputed on substantial, not flimsy, grounds, the court may require his presence in the Pakistan Embassy in the country concerned and engage some officer of the Embassy in the process of recording his statement through video conferencing, as provided in those guidelines. But without any such serious apprehension or substantial dispute, requiring all such witnesses in every case to go to the Pakistan Embassy and engaging some officer of the Embassy in the process would also involve some unnecessary delay, expense or inconvenience. This matter should, therefore, be left to the discretion of the court concerned, which shall obviously exercise it judiciously for valid reasons.

21. Now, we examine the prayer of the petitioner on the touchstone of the above two conditions: (i) whether her evidence appears essential to the just decision of the case, and (ii) whether requiring her physical attendance in court for recording the remaining cross-examination will incur unreasonable delay, expense or inconvenience.

22. The petitioner is the only defendant in the suit; therefore, her evidence is very much essential to the just decision of the case. The petitioner lives in Canada since 2016 as her ordinary place of residence, with her family including two children, and is not in that country for a short visit. The petitioner comes to Pakistan only when there is a working schedule for her. Waiting for her such a schedule would certainly cause a delay in the decision of the suit, and forcing her to come to Pakistan from Canada by leaving her children there or carrying them with her would incur such expense and inconvenience which surely appears unreasonable under the circumstances of the case. The prayer of the petitioner for allowing her remaining cross-examination through video conferencing is, thus, found justified.

23. The trial court and the High Court have legally erred in disallowing it. Their orders rejecting the prayer of the petitioner are not sustainable. The present petition for leave to appeal is, therefore, converted into an appeal and the same is allowed. The impugned judgment is set aside, and the revision petition of the petitioner is allowed by setting aside the order of the trial court and accepting the application of the petitioner for recording her remaining cross-examination through video conferencing.

24. There is no dispute as to the identity of the petitioner, nor is there any serious apprehension that the petitioner would be under the influence of or tutored by any other person in the course of recording her remaining cross-examination. We are, therefore, not inclined in the present case to require the petitioner to go to the Pakistan

Embassy in Canada and to involve any officer of the Embassy in the process of recording her remaining cross-examination through video conferencing.

25. Before parting with the judgment, we feel constrained to express our concern about the unending, lengthy cross-examination of the petitioner (DW-4). So far, a 24-page cross-examination of the petitioner has been recorded, and the parties are contesting on the mode of recording further cross-examination of the petitioner for the last about eight months. This state of affairs is really disquieting. 'The purpose of cross-examination', as observed by this Court in the case of Muhammad Shafi[24], 'is to assist the Court in bringing the truth to light by disclosing or clarifying matters which witnesses may wish to conceal or confuse from motives of partisanship.' There is, however, a regrettable practice to use the tool of prolonged cross-examination for the purpose of leading the witness into some error by exhausting him through unnecessary and irrelevant questioning. This practice is designed not for the disclosure of truth but for the manipulation of error. In such a situation the presiding officer of the court, the judge, should not remain a silent spectator but should act as a vigilant supervisor, for the right of cross-examination is neither unlimited nor unbridled. When the judge observes that the right of cross-examination is being abused by asking questions which are irrelevant and intended to prolong the cross-examination with the object of manipulating error, or to scandalize, insult or annoy the witness, he should intervene and disallow such questions.[25]

MWA/M-73/SC Appeal allowed.

**P L D 2023 Supreme Court 252**

**Present: Umar Ata Bandial, Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ**

**ABID AMIN and 2 others---Petitioners**

**Versus**

**NATIONAL ACCOUNTABILITY BUREAU and others---Respondents**

Civil Petitions Nos.3236, 3283 and 3494 to 3496 of 2019, decided on 17th January, 2022.

(Against the judgment dated 09.07.2019 of the High Court of Sindh, Karachi passed in Constitution Petitions Nos. D-2635, D-2575, D-3509, D-2441 and D-2447 of 2018).

**National Accountability Ordinance (XVIII of 1999)---**

----Ss. 31-C & 31-D---Constitution of Pakistan, Art. 18 & Preamble---'Restructuring' and 'rescheduling' of loans under financial agreements---Prior approval of State Bank of Pakistan---Scope of Sections 31-C and 31-D of the National Accountability Ordinance, 1999 stated.

Under section 31-C of the National Accountability Ordinance, 1999 ('the NAB Ordinance') the Accountability Court cannot take cognizance, under the NAB Ordinance, of an offence against an officer or an employee of a bank or financial institution for writing off, waving, restructuring or refinancing any financial facility, interest or mark-up, without prior approval of the State Bank of Pakistan. While under section 31-D, no inquiry, investigation or proceedings in respect of imprudent loans, defaulted loans or rescheduled loans can be initiated or conducted by the National Accountability Bureau (NAB) against any person, company or financial institution without reference from the Governor, State Bank of Pakistan. Unlike section 31-C that relates to only taking cognizance of an offence by the Accountability Court, section 31-D provides protection even against initiation of inquiry, investigation or proceedings against a person or a company in respect of imprudent loans, defaulted loans or rescheduled loans. The protection provided under Section 31-D is, therefore, broader and more expansive.

Section 31-D is also attracted in respect of a "defaulted loan". Defaulted loan means the failure to fulfill the obligation to repay the loan.a

"Restructuring" is a comprehensive and a broad ranging term, which includes "Rescheduling". One of the modes of restructuring can be rescheduling. Therefore, for the purposes of the NAB Ordinance, the two terms can be read as having been used interchangeably. Further, the NAB Ordinance has not defined any of the terms used in sections 31-C and 31-D, namely, writing off, waving, restructuring, refinancing, imprudent loans, defaulted loans or rescheduled loans; therefore, their general dictionary meanings are to be considered, for understanding their import and scope.

While both the terms signify a financial settlement, restructuring is an all-embracing term, which includes rescheduling.

Oxford Dictionary of Business and Management, Pakistan Edition (5th Edition). pp. 165-166 ref.

However, more important than hairsplitting technical banking terms, is to understand the legislative intent, purpose and objective of enacting sections 31-C and 31-D of NAB Ordinance, and question why in such cases, the NAB has not been allowed to proceed, or the Accountability Court has not been allowed to take cognizance, unless there is a permission or approval of the State Bank of Pakistan. The answer is obvious: through the mode of restructuring or rescheduling, the default of the outstanding financial liability of a person or a company or a financial institution is remedied and default rectified, and this exercise is blessed by the consent and permission, not only of the financial institution concerned but also of the State Bank of Pakistan, the apex fiscal authority in the country. Such a financial arrangement/ settlement is accepted by the financial institutions because the alternative may be outright default on the debt.

Thus, the conversion of the default into a viable financial arrangement between the parties arrived at by the blessing of the State Bank of Pakistan cannot be questioned, doubted or ignored unless the State Bank of Pakistan, the apex overseeing authority, so permits. Any unilateral intervention by the NAB into restructured and rescheduled loans would seriously undermine the authority of the apex fiscal institution in the country, i.e.,

the State Bank of Pakistan. It would also render any such financial settlement meaningless, thereby generating mistrust and lack of faith and confidence amongst the business community against the State Bank of Pakistan. Any such mistrust could be disastrous and result in destabilizing the economy. Such an act would also offend the constitutional value of economic justice and the fundamental right to trade and business.

The legislative intent, purpose and objective of enacting sections 31-C and 31-D of the NAB Ordinance, in the said backdrop, becomes clear: to safeguard sound and stable functioning of the economic, banking and fiscal governance in the country by honouring the financial decisions of the State Bank of Pakistan. The import of these provisions, therefore, has to be understood in this larger constitutional perspective and legislative intent, purpose and objective, not by losing into the technicalities of the financial terms used in sections 31-C and 31-D of the NAB Ordinance, which have not been given any special meaning under the NAB Ordinance and can safely be treated general financial terms as understood in common parlance.

Supreme Court approved the construction put to the provisions of section 31-D of the NAB Ordinance, in case of their noncompliance, by the Sindh High Court in the cases reported as Kaloodi International v. Federation PLD 2001 Kar. 311 and Naseem v. Federation PLD 2013 Kar. 357

Kaloodi International v. Federation PLD 2001 Kar. 311 and Naseem v. Federation PLD 2013 Kar. 357 approved.

Arshad M. Tayebaly, Advocate Supreme Court for Petitioners (in C.Ps. Nos. 3236 and 3283 of 2019).

Naeem Tariq Sagheer, Spl. Prosecutor for NAB.

Abid Naseem, Advocate Supreme Court for Respondents/co-accused (in C.P. No. 3496 of 2019).

Date of hearing: 17th January, 2022.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**By this order, we shall decide all the above-captioned petitions as they arise out of the same judgment of the Sindh High Court.

2. The petitioners, Abid Amin and Ahmed Humayun ("petitioners"), seek leave to appeal against the judgment of the Sindh High Court, dated 09.07.2019, whereby the High Court has declined to quash the Reference No.21/2017 filed against them under the National Accountability Ordinance, 1999 ("NAB Ordinance"), despite quashing the same Reference against four of their co-accused, the bank employees, namely, Qamar Husain, Nadeem Anwar Ilyas, Nausherwan Adil and Asif Brohi, ("co-accused") while the National Accountability Bureau ("NAB") has, by its petitions, challenged the quashment of the Reference against the co-accused, bank employees, by the impugned judgment.

2. Brief facts of the case are that petitioners are directors and shareholders of Messrs Azgard Nine Limited ("ANL"), a public limited company. The ANL obtained financial facility/loan from different financial institutions. Upon default of the financial facility, the ANL arrived at a settlement with 22 financial institutions and got the debt restructured by entering into a Debt Swap Agreement, a Master Restructuring Agreement and other supplemental agreements for an amount of Rs. 10.5 billion. The National Bank of Pakistan (NBP) played a lead role amongst the 22 financial institutions by purchasing the shares of Messrs Agritech Ltd., a subsidiary of the ANL, at a price of Rs.35 per share and adjusting the same against the outstanding debt of the ANL with the NBP and 21 other financial institutions. The co-accused are senior bank employees of the NBP who were involved in restructuring and rescheduling the loans of the ANL.

3. The financial settlement arrived at under the aforementioned agreements has since been implemented, and none of the financial institutions has challenged the same in any court of law. However, multiple complaints were filed by one Transparency International on the ground that the officers of the NBP misused their authority and bought the shares of Messrs Agritech Limited at a higher price, i.e., at Rs.35/- per share instead of Rs.13.47/- per share, thus causing a colossal loss of Rs.3.02 billion to the national exchequer.

4. As the NAB Reference against the petitioners was not filed with the approval of the State Bank of Pakistan, the petitioners and the co-accused filed applications under section 265-K, Cr.P.C, before the trial court, i.e., the Accountability Court, for their acquittal or discharge from the case. The applications were dismissed by the Accountability Court and the constitutional petitions filed under Article 199 of the Constitution read with section 561-A, Cr.P.C., by the petitioners against the order of the trial court met the same fate at the High Court

by the impugned judgment. However, the constitutional petition filed by the co-accused succeeded and the Reference to their extent was quashed by the High Court, holding the same to have been filed in violation of section 31-C of the NAB Ordinance.

5. The learned counsel for the petitioners submitted that it is an admitted position that the ANL defaulted on the loans and as a result 22 financial institutions rescheduled the loan through Debt Swap Agreement and Master Restructuring Agreement for an amount of Rs. 10.5 billion, and the said agreements were duly approved by the State Bank of Pakistan. The matter was of defaulted loans and rescheduled loans; therefore, before investigating and filing the Reference thereon the NAB should have sought permission from the State Bank of Pakistan, as required under section 31-D of the NAB Ordinance, which was admittedly not done, hence the entire proceedings are without jurisdiction and liable to be quashed. Learned counsel for the co-accused supported the submissions of the petitioners.

6. The learned Special Prosecutor, NAB controverted the contention of the petitioners vehemently and submitted that there is a difference between restructuring and rescheduling of the loans. Section 31-C refers to restructured loans while Section 31-D refers to rescheduled loans. In the present case, the loans were restructured; hence, Section 31-D of the NAB Ordinance is not attracted.

7. We have heard the learned counsel at some length and gone through the record of the case. As the question involved in the present petitions revolves around the meaning and scope of sections 31-C and 31-D of the NAB Ordinance, the provisions thereof are reproduced hereunder for convenience of reference:-

31-C. Court to take cognizance of offence with prior approval of the State Bank.---No Court established under this Ordinance shall take cognizance of an offence against an officer or an employee of a bank or financial institution for writing off, waving, restructuring or refinancing any financial facility, interest or mark-up without prior approval of the State Bank of Pakistan.

31D. Inquiry, investigation or proceedings in respect of imprudent bank loans, etc.- Notwithstanding anything contained in this Ordinance or any other law for the time being in force, no inquiry, investigation or proceedings in respect of imprudent loans, defaulted loans or rescheduled loans shall be initiated or conducted by the National Accountability Bureau against any person, company or financial institution without reference from Governor, State Bank of Pakistan.

Provided that cases pending before any Accountability Court before coming into force of the National Accountability Bureau (Second Amendment) Ordinance, 2000, shall continue to be prosecuted and conducted without reference from the Governor, State Bank of Pakistan.

The bare reading of the above provisions shows that under section 31-C the Accountability Court cannot take cognizance, under the NAB Ordinance, of an offence against an officer or an employee of a bank or financial institution for writing off, waving, restructuring or refinancing any financial facility, interest or mark-up, without prior approval of the State Bank of Pakistan. While under section 31-D, no inquiry, investigation or proceedings in respect of imprudent loans, defaulted loans or rescheduled loans can be initiated or conducted by the NAB against any person, company or financial institution without reference from the Governor, State Bank of Pakistan. Unlike Section 31-C that relates to only taking cognizance of an offence by the Accountability Court, Section 31-D provides protection even against initiation of inquiry, investigation or proceedings against a person or a company in respect of imprudent loans, defaulted loans or rescheduled loans. The protection provided under section 31-D is, therefore, broader and more expansive. Admittedly, the ANL had defaulted on the loans extended by multiple financial institutions, and it was that default that led the ANL and the financial institutions to enter into Debt Swap and Master Restructuring Agreements, under which the loans were restructured and as a consequence the servicing of the debt to the financial institutions stood rescheduled.

8. The High Court has not granted the relief prayed to the petitioners on the ground that the financial arrangement between the ANL and the financial institutions was restructured and not rescheduled; hence, section 31-D is not attracted to the case of the petitioners. This observation of the High Court is not well founded. First of all, section 31-D is also attracted in respect of a "defaulted loan". Defaulted loan means the failure to fulfill the obligation to repay the loan.[1] Admittedly, it was the inability of the ANL to service its debt that necessitated the said agreements; hence, the ANL had defaulted on its loans. "Default" means "failure to

fulfill an obligation, especially to repay a loan."[2] The present case thus relates to a "defaulted loan", and this act of default alone attracts section 31-D of the NAB Ordinance. The High Court has failed to consider this aspect of section 31-D of the NAB Ordinance and its applicability to the facts of the present case.

9. In order to differentiate between restructuring and rescheduling, the High Court referred to the definitions of these terms provided in the Prudential Regulations as amended under BPRD Circular 13 of 2016 dated 07.10.2016 (reproduced hereunder for reference) to hold that restructuring and rescheduling are different terms:

Restructuring means such concessions to the borrower, due to borrowers' financial difficulty, which the bank/DFI would not otherwise consider. Restructuring normally involves modification in the terms and conditions of the financing/ securities and generally includes, amongst others, alteration of repayment period, repayable amount, installment amount, mark-up rates (due to reasons other than competitive pricing) etc.

Rescheduling means such concession in the grace period or modification in the repayment dates of principal loan amount (without changing overall loan tenor), due to borrowers' financial difficulty, which the bank/DFI would not otherwise consider."

The highlighted portion of the above definitions appearing in the BPRD Circular shows that "Restructuring" is a comprehensive and a broad-ranging term, which includes "Rescheduling". One of the modes of restructuring can be rescheduling. Therefore, for the purposes of the NAB Ordinance, the two terms can be read as having been used interchangeably. Further, the NAB Ordinance has not defined any of the terms used in sections 31-C and 31-D, namely, writing off, waving, restructuring, refinancing, imprudent loans, defaulted loans or rescheduled loans; therefore, their general dictionary meanings are to be considered, for understanding their import and scope. The terms, "debt restructuring" and "debt rescheduling", have been defined in the Oxford Dictionary of Business and Management, thus:

Debt restructuring means the adjustment of a debt, either as a result of legal action or by agreement between the interested parties, to give the debtor a more feasible arrangement with the creditors for meeting the financial obligations.[3]

Debt rescheduling means a change in the terms of outstanding loans in which the debtor has repayment difficulties. The rescheduling can take the form of an entirely new loan or an extension of the existing loan repayment period, deferring interest or principal repayments.[4]

Reading of these definitions also shows that while both the terms signify a financial settlement, restructuring is an all-embracing term, which includes rescheduling.

10. However, more important than hairsplitting technical banking terms, is to understand the legislative intent, purpose and objective of enacting Sections 31-C and 31-D of NAB Ordinance, and question ourselves why in such cases, the NAB has not been allowed to proceed, or the Accountability Court has not been allowed to take cognizance, unless there is a permission or approval of the State Bank of Pakistan. The answer is obvious: through the mode of restructuring or rescheduling, the default of the outstanding financial liability of a person or a company or a financial institution is remedied and default rectified, and this exercise is blessed by the consent and permission, not only of the financial institution concerned but also of the State Bank of Pakistan, the apex fiscal authority in the country. Such a financial arrangement/ settlement is accepted by the financial institutions because the alternative may be outright default on the debt.

11. Thus, the conversion of the default into a viable financial arrangement between the parties arrived at by the blessing of the State Bank of Pakistan cannot be questioned, doubted or ignored unless the State Bank of Pakistan, the apex overseeing authority, so permits. Any unilateral intervention by the NAB into restructured and rescheduled loans would seriously undermine the authority of the apex fiscal institution in the country, i.e., the State Bank of Pakistan. It would also render any such financial settlement meaningless, thereby generating mistrust and lack of faith and confidence amongst the business community against the State Bank of Pakistan. Any such mistrust could be disastrous and result in destabilizing the economy. Such an act would also offend the constitutional value of economic justice and the fundamental right to trade and business.

12. The legislative intent, purpose and objective of enacting sections 31-C and 31-D of the NAB Ordinance, in the said backdrop, becomes clear: to safeguard sound and stable functioning of the economic, banking and fiscal governance in the country by honouring the financial decisions of the State Bank of Pakistan. The import of

these provisions, therefore, has to be understood in this larger constitutional perspective and legislative intent, purpose and objective, not by losing into the technicalities of the financial terms used in sections 31-C and 31-D of the NAB Ordinance, which have not been given any special meaning under the NAB Ordinance and can safely be treated general financial terms as understood in common parlance.

13. In the present case, it is an admitted position that company of the petitioners, the ANL, defaulted on several loans and as a result its liability was restructured and rescheduled under various financial agreements. To date, no financial institution has come forward to oppose the case of the petitioner. It is also an admitted position that the said agreements have been duly implemented, and liabilities thereunder have been settled between the parties. The learned Special Prosecutor, NAB has also frankly conceded that no permission of the State Bank of Pakistan was ever sought and no such reference was made by the Governor, State Bank of Pakistan. We, therefore, hold that no inquiry, investigation or proceedings could have been initiated against the petitioners without a reference from the Governor, State Bank of Pakistan in terms of section 31-D of the Ordinance.[5]

14. For the above reasons, the proceeding initiated by the NAB against the petitioners is found violative of the provisions of Section 31-D of the NAB Ordinance, and thus the consequent filing of the Reference against the petitioners is also without lawful authority and of no legal effect. The High Court has failed to correctly interpret and apply the provisions of section 31-D of the NAB Ordinance, in the present case. We, therefore, convert the petitions of the petitioners, i.e., C.Ps. Nos.3236 and 3283 of 2019, into appeals and allow the same. The constitutional petitions of the petitioners are accepted, and the proceedings initiated by the NAB including the inquiry, investigation, and Reference, and the proceedings pending before the Accountability Court on that Reference are quashed. For the same reasons, the petitions filed by the NAB, i.e., C.Ps. Nos.3494 to 3496, are dismissed.

15. Needless to say that the NAB is free to proceed de novo against the petitioners and the co-accused, by complying with the necessary legal requirement of Sections 31-C and 31-D of the NAB Ordinance.

MWA/A-19/SC Order accordingly.

**P L D 2023 Supreme Court 265**

**Present: Syed Mansoor Ali Shah and Ayesha A. Malik, JJ**

**F.I.A. through Director General, FIA and others---Petitioners**

**Versus**

**Syed HAMID ALI SHAH and others---Respondents**

Constitutional Petition No. 1257 of 2020, decided on 6th February, 2023.

(Against the judgment of the Islamabad High Court, dated 04.02.2020, passed in W.P. No.2367/2018)

**(a) Criminal Procedure Code (V of 1898)---**

----Ss. 561-A & 154---Inherent power of High Court---Quashment of FIR or investigation of criminal case---Scope---High Court has no power under Section 561-A, Cr.P.C. to quash an FIR or an investigation proceeding, however, the High Court can quash a judicial proceeding pending before any subordinate court under Section 561-A, Cr.P.C.

High Court has no power under Section 561-A, Cr.P.C. to quash an FIR or an investigation proceeding; therefore, applications filed under Section 561-A, Cr.P.C. in the High Court for quashing an FIR and investigation proceeding are not maintainable. This is because jurisdiction of a High Court to make an appropriate order under Section 561-A, Cr.P.C., necessary to secure the ends of justice, can only be exercised with regard to the judicial or court proceedings and not relating to proceedings of any other authority or department, such as FIR registration or investigation proceedings of the police department.

Shahnaz Begum v. High Courts of Sindh and Baluchistan PLD 1971 SC 677 ref.

A High Court can quash a judicial proceeding pending before any subordinate court under Section 561-A, Cr.P.C., if it finds it necessary to make such order to prevent the abuse of the process of that court or otherwise to secure the ends of justice; however, it should not ordinarily exercise its power under Section 561-A, Cr.P.C. to make such order unless the accused person has first availed his remedy before the trial court under Section 249-A or 265-K, Cr.P.C.

Sher Afgan v. Ali Habib 2011 SCMR 1813 ref.

**(b) Criminal Procedure Code (V of 1898)---**

----S. 154---Constitution of Pakistan, Art. 199(1)(a)(ii)---Quashment of FIR or investigation of criminal case---Scope---Constitutional jurisdiction of the High Court---Registration of an FIR and the doing of an investigation are acts amenable to the jurisdiction of the High Courts under Article 199(1)(a)(ii) of the Constitution, thus, the High Courts can declare such acts of the police officers, to have been made without lawful authority and of no legal effect if they are found to be so and can also make any appropriate incidental or consequential order to effectuate its decision, such as quashing the FIR and investigation proceeding.

Where before the submission of the police report under Section 173, Cr.P.C. to the court concerned, the accused person thinks that the FIR has been registered, and the investigation is being conducted, without lawful authority, he may have recourse to the constitutional jurisdiction of the High Court under Article 199 of the Constitution for judicial review of the said acts of the police officers.

Shahnaz Begum v. High Courts of Sindh and Baluchistan PLD 1971 SC 677 ref.

Article 199(1)(a)(ii) of the Constitution empowers the High Courts to judicially review the acts done or proceedings taken by the persons performing functions in connection with the affairs of the Federation, a Province or a local authority and if find such acts or proceedings to have been done or taken without lawful authority, to declare them to be so and of no legal effect. The registration of an FIR and the doing of an investigation are the acts of officers of the police department (a provincial law enforcement agency) who perform functions in connection with the affairs of a Province and are thus amenable to the jurisdiction of the High Courts under Article 199(1)(a)(ii) of the Constitution. The High Courts can declare such acts of the police officers, to have been made without lawful authority and of no legal effect if they are found to be so and can also make any appropriate incidental or consequential order to effectuate its decision, such as quashing the FIR and investigation proceeding.

R. SIM & Co v. District Magistrate PLD 1966 SC 650 ref.

**(c) Criminal Procedure Code (V of 1898)---**

----Ss. 154 & 156---Investigation into a cognizable offence---Scope---Contents of an FIR have to be seen to ascertain whether a cognizable offence is made out of the allegations contained therein, and mere mentioning of a particular Section of the P.P.C. or any other offence under the law in the FIR is not determinative in this regard.

State v. Sultan Ahmed PLD 2007 SC 48 ref.

**(d) Supreme Court Rules, 1980---**

----O. XXVIII, R. 3---Vexatious and frivolous petition---Imposition of costs---First Information Report registered and investigation carried out without lawful authority---Present petition was not only meritless but also vexatious, as it amounted to continuation of harassment caused to the respondents---Such petitions being meritless and against the law settled by the Supreme Court unduly waste the time of the Court depriving it from attending to more lawful and genuine claims pending before it---Such frivolous litigation clogs the pipelines of justice causing delay in dispensation of justice, thereby impairing the right to expeditious justice of a genuine litigant---Such vexatious and frivolous petitions add to the pendency of cases which over-burdens the Court dockets and slows down the engine of justice, thus, they must be dealt with firmly and strongly discouraged---Petition for leave to appeal was dismissed, and leave was declined with costs of Rs.100,000/- with the directions that said costs shall be deposited by the Inspector, In-charge Federal Investigation Agency (FIA), who registered the present FIR and was making the investigation against the respondents, from his own pocket, with the Registrar of the Supreme Court within 30 days, and after the deposit, they shall be paid to the respondents.

Malik Javed Iqbal Wains, Addl. A.G.P. and Ch. Akhtar Ali, Advocate-on-Record for Petitioners.

Syed Naeem Bokhari, Advocate Supreme Court for Respondents.

Date of hearing: 6th February, 2023.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The petitioners seek leave to appeal against a judgment of the Islamabad High Court, dated 04.02.2020 ("impugned judgment"), whereby the High Court while accepting the writ petition of the respondents, as well as a writ petition and two criminal miscellaneous applications of other accused persons, has quashed FIR No. 05/2018 registered against them at Police Station FIA, Islamabad, for offences punishable under sections 409/109 of the Pakistan Penal Code 1860 ("P.P.C.") and section 5(2) of the Prevention of Corruption Act 1947 ("PCA").

2. Briefly, the facts of the case are that on a news item published in a daily newspaper, reporting that a number of employees of the various directorates of the Capital Development Authority ("CDA") had been illegally upgraded in violation of the relevant rules and regulations during the years 2007 to 2013, the Federal Investigation Agency ("FIA") conducted an inquiry and found that prima facie a case of abuse of authority was made out against the officers who processed and approved those illegal upgradations as well as against the beneficiary officials of the CDA (including the respondents). With this finding, the FIA registered the above-mentioned FIR and initiated the formal investigation, which may have included the arrest and detention of the accused persons. The respondents and some other persons nominated as accused in the FIR as well as in the investigation proceeding, filed two writ petitions under Article 199 of the Constitution of the Islamic Republic of Pakistan 1973 ("Constitution") and two criminal miscellaneous applications under section 561-A of the Code of Criminal Procedure 1898 ("Cr.P.C.") for quashing of the FIR, mainly on the ground that no offence was made out of the allegations recorded in the FIR. The High Court agreed with the ground pleaded, accepted the writ petitions and miscellaneous applications, and quashed the FIR vide the impugned judgment. Hence, the petitioners have filed the present petition for leave to appeal.

3. We have heard the learned counsel for the parties, read the cases cited by them and examined the record of the case.

4. First of all, we want to make it clear that a High Court has no power under section 561-A, Cr.P.C. to quash an FIR or an investigation proceeding; therefore, the criminal miscellaneous applications filed under section 561-A, Cr.P.C. by some of the accused persons in the High Court for quashing the FIR and investigation proceeding in the present case were not maintainable. This is because jurisdiction of a High Court to make an appropriate order under section 561-A, Cr.P.C. necessary to secure the ends of justice, can only be exercised

with regard to the judicial or court proceedings and not relating to proceedings of any other authority or department, such as FIR registration or investigation proceedings of the police department. This has been authoritatively held by a five-member bench of this Court in Shahnaz Begum.[1] A High Court, therefore, can quash a judicial proceeding pending before any subordinate court under section 561-A, Cr.P.C., if it finds it necessary to make such order to prevent the abuse of the process of that court or otherwise to secure the ends of justice; however, it should not ordinarily exercise its power under section 561-A, Cr.P.C. to make such order unless the accused person has first availed his remedy before the trial court under section 249-A or 265-K, Cr.P.C.[2] Where before the submission of the police report under section 173, Cr.P.C. to the court concerned, the accused person thinks that the FIR has been registered, and the investigation is being conducted, without lawful authority, he may have recourse to the constitutional jurisdiction of the High Court under Article 199 of the Constitution for judicial review of the said acts of the police officers.[3]

5. In the present case, as the High Court was competent to judicially review the acts of registering the FIR and conducting the investigation by the officers of the FIA in the exercise of its constitutional jurisdiction under Article 199 of the Constitution, therefore, the acceptance of the criminal miscellaneous applications filed by some of the accused persons under section 561-A, Cr.P.C. and the reference to section 561-A, Cr.P.C. while quashing the FIR have no material bearing on the jurisdiction of the High Court while passing the impugned judgment. Even otherwise, if the reasons stated for passing the impugned judgment fall within the scope of the jurisdiction of the High Court under Article 199 of the Constitution, the reference to a wrong or inapplicable provision of law will not by itself have any fatal consequence.[4] The High Court has observed in the impugned judgment that the matter in issue, which relates to the violation of the terms and conditions of service of the CDA employees, does not constitute the offence of criminal misconduct punishable under section 5(2) of the PCA nor are the ingredients of the offence of criminal breach of trust under section 409, P.P.C. made out. The High Court has also specifically quoted the statement made before it by the Addl. Director, FIA that "FIA has concluded investigation and no element of bribery has been found in the entire inquiry against any official of CDA". With the said observations, the High Court has quashed the FIR, by holding that FIA authorities have failed to legally justify their actions of initiating the inquiry and registration of the FIR. These reasons squarely fall within the scope of the provisions of Article 199(1)(a)(ii) of the Constitution.

6. Article 199(1)(a)(ii) of the Constitution empowers the High Courts to judicially review the acts done or proceedings taken by the persons performing functions in connection with the affairs of the Federation, a Province or a local authority and if find such acts or proceedings to have been done or taken without lawful authority, to declare them to be so and of no legal effect. The registration of an FIR and the doing of an investigation are the acts of officers of the police department (a provincial law enforcement agency) who perform functions in connection with the affairs of a Province and are thus amenable to the jurisdiction of the High Courts under Article 199(1)(a)(ii) of the Constitution. The High Courts can declare such acts of the police officers, to have been made without lawful authority and of no legal effect if they are found to be so and can also make any appropriate incidental or consequential order to effectuate its decision,[5] such as quashing the FIR and investigation proceeding. The acts of registering the FIR and conducting investigation by the officers of the FIA, in the present case, are also subject to said jurisdiction of the High Court, as they have been done by the officers performing functions in connection with the affairs of the Federation.

7. The FIA has been established by the Federal Government under Section 3 of the Federal Investigation Agency Act, 1974 ("FIA Act"), for inquiry into, and investigation of the offences specified in the Schedule to the said Act, including an attempt or conspiracy to commit, and abetment of, any such offence. Under section 5 of the FIA Act, the officers of the FIA have such powers, including powers relating to search, arrest of persons and seizure of property, and such duties, privileges and liabilities as the officers of a Provincial Police have in relation to the investigation of offences under the Cr.P.C., and its officer not below the rank of a Sub-Inspector may, for the purposes of any inquiry or investigation under this Act, exercise any of the powers of an officer-incharge of a Police Station under the Cr.P.C.. That being so, one has to look at the provisions of sections 154 and 156 of the Cr.P.C., which relate to the registration of FIRs and conducting the investigations, for the purpose

of examining whether the acts of registering the FIR and doing the Investigation by the FIA officers in the present case were with or without lawful authority.

8. Under section 154 of the Cr.P.C., a first information report (FIR) can be registered only with regard to the commission of a cognizable offence. Similarly, an investigation can be made by a police officer, without the order of a Magistrate, under section 156 of the Cr.P.C. only in respect of a cognizable offence. Needless to say that it is the contents of an FIR which are to be seen to ascertain whether a cognizable offence is made out of the allegations contained therein, and mere mentioning of a particular Section of the P.P.C. or any other offence under the law in the FIR is not determinative in this regard.[6] However, the falsity or truthfulness of those allegations is not under examination for the purpose of determining the legal authority of the police officer to register the FIR. The precise question is: whether the allegations as contained in the FIR make out the commission of a cognizable offence; if so, what is that?

9. When asked how the accused officers who processed and approved the alleged illegal upgradations have committed the cognizable offences of criminal breach of trust and criminal misconduct punishable under section 409, P.P.C. and section 5(2), P.C.A. and how the officials who were granted the illegal upgradations are the abettors in the commission of those offences and are thus liable for the offence of abetment punishable under section 109, P.P.C., we got no plausible reply. The allegations as contained in the FIR do not involve the very essential ingredients of the offence of criminal breach of trust as defined in section 405, P.P.C., (i) the entrustment of, or dominion over, any property, and (ii) the dishonest misappropriation or conversion to his own use of that property, or the dishonest use or disposal of that property in violation of any direction of law or of any legal contract. Therefore, the cognizable offence of criminal breach of trust by a public servant punishable under section 409, P.P.C. mentioned in the FIR is not made out. Similar is the case with the cognizable offence punishable under section 5(2), P.C.A. mentioned in the FIR, which is also not made out of the allegations as contained in the FIR. The argument of the learned counsel for the petitioner is totally misconceived, that the authority conferred upon the accused officers, who granted the illegal upgradations, was a trust and by misusing that authority, they have committed the offence of criminal breach of trust punishable under section 409, P.P.C. and the offence of criminal misconduct punishable under section 5(2), P.C.A. No doubt, the powers of the public servants are like a trust conferred upon them and they should exercise them fairly, honestly and in good faith as a trustee; but the entrustment of the power to upgrade his subordinate officials is not equivalent to the entrustment of property as mentioned in section 405, P.P.C. and its misuse, or use in violation of the relevant rules and regulations, does not constitute the cognizable offences punishable under section 409, P.P.C and section 5(2), P.C.A. The misuse of such a power may constitute misconduct under the service laws, but does not attract criminal misconduct punishable under the criminal laws.

10. In view of the above legal position, the acts of the FIA officers in registering the FIR and carrying out investigation in the present case are certainly without lawful authority. We thus find no legal flaw in the impugned judgment. The present petition is not only meritless but also vexatious, as it amounts to continuation of harassment caused to the respondents by initiating the criminal proceeding against them in relation to their service matter, without any lawful authority. Additionally, these petitions being meritless and against the law settled by this Court have unduly wasted the time of the Court depriving it from attending to more lawful and genuine claims pending before it. Such frivolous litigation clogs the pipelines of justice causing delay in dispensation of justice, thereby impairing the right to expeditious justice of a genuine litigant. Such vexatious and frivolous petitions add to the pendency of cases which over-burdens the Court dockets and slows down the engine of justice. Such vexatious and frivolous litigation must be dealt with firmly and strongly discouraged.[7] We, therefore, dismiss the present petition and decline the leave to appeal, with costs of Rs.100,000/- under Order 28, Rule 3 of the Supreme Court Rules, 1980. The costs shall be deposited by petitioner No.2, Inspector Irfan Azim Burki, In-charge FIA, Corporate Crime Circle, Islamabad, who registered the FIR and was making the investigation against the respondents, from his own pocket, with the Registrar of this Court within 30 days from today, and after the deposit, they shall be paid to the respondents. A compliance report, in this regard, shall be placed on the record of the case. In case of non-compliance, the matter shall be put up before the Court for appropriate orders.

MWA/F-5/SC Petition dismissed.

**P L D 2023 Supreme Court 298**

**Present: Syed Mansoor Ali Shah, Jamal Khan Mandokhail and Ayesha A. Malik, JJ**

**Qazi NAVEED UL ISLAM---Petitioner**

**Versus**

**DISTRICT JUDGE, GUJRAT and others---Respondents**

C.P. No. 3127 of 2020, decided on 12th January, 2023.

(Against the order of Lahore High Court, Lahore dated 06.10.2020, passed in Writ Petition No.10492 of 2016).

**(a) Supreme Court Rules, 1980---**

----O.XXVIII, R. 3---Frivolous litigation---Abusing process of the Court---Costs, imposition of---Litigation initiated by a person having no interest in the matter to avenge a private grudge---Frivolous, vexatious and speculative litigation unduly burdens the courts giving artificial rise to pendency of cases which in turn clogs the justice system and delays the resolution of genuine disputes---One of the ways to curb such practice of instituting frivolous and vexatious cases is by imposing of costs under Order XXVIII, Rule 3 of the Supreme Court Rules, 1980---Petition for leave to appeal was dismissed with costs of Rs.100,000/ that were to be deposited by the petitioner in the Trial Court for payment to the respondent.

Present case is a classic case of abusing the process of the court. Respondent has been punished with a penalty of pursuing an outright frivolous litigation for a period of more than a decade, just for the reason that he had got a succession certificate in his favour to receive a meagre amount of Rs.32,185/- left by his deceased father in a bank account, and that too on the applications of the persons who had no right or interest in the legacy of his deceased father rather had been in litigation over some other property first against the deceased father of respondent and after his death against respondent and his mother and siblings.

When asked, as to what right or interest of the petitioner or his predecessor was affected by the issuance of the succession certificate in favour of respondent, the answer of their counsel was nothing but that the petitioner and his predecessor had acted just as informers of the commission of offences of fraud and perjury with the court during the proceedings of the application for succession certificate. The spiteful conduct of the petitioner and his predecessor in making repeated applications and venomously pursuing them up to the Supreme Court did not paint of picture of a bona fide informer committed to unfold the offences of fraud and perjury for the love of justice, equity and fairplay. The conduct of the petitioner reeks of private vengeance against respondent and his mother and siblings, because of a simmering dispute over some other property.

In view of the stance of the sisters of respondent as to having no objection to the succession certificate issued in favour of their brother, i.e. the respondent, the trial court had rightly dismissed both the applications, the first filed by the petitioner's predecessor and the second by the petitioner, by noting the fact that the same had been filed with mala fide to avenge a private grudge and without having any interest in the matter decided by it. And the order of the trial court has correctly been maintained by the revisional court and the High Court. The present petition is completely frivolous and vexatious and the process of court has been abused just to pressurise the other side and to settle a personal score.

Such frivolous, vexatious and speculative litigation unduly burdens the courts giving artificial rise to pendency of cases which in turn clogs the justice system and delays the resolution of genuine disputes. Such litigation is required to be rooted out of the system and one of the ways to curb such practice of instituting frivolous and vexatious cases is by imposing of costs under Order XXVIII, Rule 3 of the Supreme Court Rules, 1980 ("Rules").

The petitioner has repeatedly abused the courts to advance a personal grudge by repeatedly filing vexatious and frivilous claims in various courts, not only wasting the precious time of these courts but also causing anguish and pain to the other party that unnecessary, unfair and prolonged litigation brings. Petition for leave to appeal was dismissed with costs of Rs.100,000/-, and the Supreme Court directed that the same shall be deposited by the petitioner in the trial court for payment to respondent within three months; that in case of failure by the petitioner to deposit the said costs within the prescribed time, they shall be recovered from the petitioner as a

money decree with 10% monthly increase, and the costs of the execution proceedings shall also be recovered in addition thereto.

**(b) Criminal Procedure Code (V of 1898)---**

----S. 476---Perjury---Discretionary power of Court under section 476, Cr.P.C, to take cognizance stated.

The power conferred by section 476, Cr.P.C. on a Civil, Revenue or Criminal Court to take cognizance of certain offences committed in, or in relation to, any proceedings before it, is discretionary as evident from the expression, "may take cognizance", used in section 476, Cr.P.C. No doubt, like all other discretionary powers, the court concerned is to exercise this discretion judiciously, not arbitrarily, while taking into consideration the facts and circumstances of the case.

Abdul Hakeem v. State 1994 SCMR 1103 ref.

While exercising its discretion under section 476, Cr.P.C. the court concerned should give prime consideration to the question, whether it is expedient in the interests of justice to take cognizance of the offence. The court is to exercise this discretionary power with due care and caution, and must be watchful of the fact that its process under Section 476 is not abused by an unscrupulous litigant scheming to wreak private vengeance or satisfy a private grudge against a person.

Feroze Din v. Munir 1970 SCMR 10 and Naushaba v. Khalil Ahmad 2004 SCMR 805 ref.

**(c) Supreme Court Rules, 1980---**

----O.XXVIII, R. 3---Constitution of Pakistan, Art. 10A---Frivolous litigation---Abusing process of the Court---Costs, imposition of---Scope, purpose and benefits of awarding costs stated.

Frivolous, vexatious and speculative litigation unduly burdens the courts giving artificial rise to pendency of cases which in turn clogs the justice system and delays the resolution of genuine disputes. Such litigation is required to be rooted out of the system and one of the ways to curb such practice of instituting frivolous and vexatious cases is by imposing of costs under Order XXVIII, Rule 3 of the Supreme Court Rules, 1980 ("Rules"). The spectre of being made liable to pay actual costs should be such as to make every litigant think twice before putting forth a vexatious claim or defence before the Court. These costs in an appropriate case can be over and above the nominal costs which include costs of the time spent by the successful party, the transportation and lodging, if any, or any other incidental cost, besides the amount of the court fee, process fee and lawyer's fee paid in relation to the litigation. Imposition of costs in frivilous and vexatious cases meets the requirement of fair trial under Article 10A of the Constitution, as it not only discourages frivilous claims or defences brought to the court house but also absence of such cases allows more court time for the adjudication of genuine claims. It also incentivizes the litigants to adopt alternative dispute resolution (ADR) processes and arrive at a settlement rather than rushing to courts. Costs lay the foundation for expeditious justice and promote a smart legal system that enhances access to justice by entertaining genuine claims. The purpose of awarding costs at one level is to compensate the successful party for the expenses incurred to which he has been subjected and at another level to be an effective tool to purge the legal system of frivolous, vexatious and speculative claims and defences. In a nutshell costs enourage alternative dispute resolution; settlements between the parties; and reduces unnecessary burden off the courts, so that they can attend to genuine claims. Costs are aweapon of offence for the plaintiff with a just claim to present and a shield to the defendant who has been unfairly brought into court.

Vinod Seth v. Devinder Bajaj (2010) 8 SCC 1; Province of Balochistan v. Murree Brewery Company PLD 2007 SC 386 and Arthur L.Godhart, 'Costs' (1929) 38 Yale Law Journal 849 ref.

Anis Muhammad Shahzad, Advocate Supreme Court for Petitioner.

Respondent No.3 in person.

Date of hearing: 12th January, 2023.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The petitioner seeks leave to appeal against an order of the Lahore High Court, dated 06.10.2020 ("impugned order"), whereby the High Court has dismissed his writ petition filed against the orders of the trial court and revisional court, dated 14.12.2015 and 20.02.2016 respectively. The trial court, by its order dated 14.12.2015, had dismissed the application of the petitioner filed under section 476 of

the Code of Criminal Procedure 1898 ("Cr.P.C.") against respondents Nos. 3 to 5 and by its order dated 20.02.2016, the revisional court had dismissed his revision petition filed against that order of the trial court. All three courts below have thus decided the matter against the petitioner.

2. Briefly, the facts of the case are that on the death of his father (Qazi Khursheed Alam), respondent No.3 (Qazi Mubasher Shahzad) made an application for the issuance of a succession certificate in respect of an amount of Rs.32,185/- left by his deceased father in a bank account, which was allowed by the trial court on 03.12.2009. The present petitioner's father (Qazi Zahoor Alam), who was the brother of the deceased Qazi Khursheed Alam and was in litigation with him over some other property, made a miscellaneous application to the trial court, on 10.11.2010, for the cancellation of the succession certificate and taking legal action against respondents Nos. 3 to 5 on the ground that in the application for the succession certificate as well as in their statements made before the court, respondent No.3 and his brother (respondent No.4) and mother (respondent No.5) had not mentioned the names of the daughters of the deceased Qazi Khursheed Alam, and had thus played fraud and perjury in the court proceedings. The petitioner's father died during the pendency of this application, upon which the petitioner and his siblings were substituted as applicants in the application.

3. The sisters of respondent No.3 (daughters of the deceased Qazi Khursheed Alam) appeared before the trial court and filed their written reply opposing the said application with the assertions that the applicants had no locus standi to make the application; that they had surrendered their share in the amount of Rs.32,185/- left by their deceased father and had no objection on the succession certificate issued in favour of their brother, respondent No.3, to receive that amount from the bank; and that their family was in litigation with the applicants for the last about 7/8 years and they had made the application just to blackmail respondents Nos.3 to 5 (their brothers and mother).

4. Although we are unable to understand why the trial court did not reject the application summarily, and instead proceeded further thereon by framing issues, after the said reply of the sisters of respondent No.3, ultimately the trial court dismissed the application after recording evidence on the issues, vide its order dated 27.01.2015, with the findings that the applicants being not the legal heirs of the deceased Qazi Khursheed Alam had no locus standi and cause of action to challenge the succession certificate issued in respect of his legacy, and that the filing of the application was based on mala fide in order to avenge the other litigation ensuing between the parties. This order of the trial court was not challenged by the petitioner or any of his siblings and thus attained finality.

5. Just about a month before the final decision of that application, and probably in view of the expected decision, the present petitioner filed an application under section 476 of the Cr.P.C., on 09.12.2014, against respondents Nos. 3 to 5, making the same averments. Respondents Nos. 3 to 5 filed their written reply, opposing the application. After hearing the arguments of the counsel for the parties, the trial court dismissed this application, vide its order dated 14.12.2015, holding therein that the matter had already been decided in the order dated 27.01.15 passed on a similar application on the same matter, which order having not been challenged had attained finality and that the issue of mala fide in the previous application had been decided against the petitioner. The petitioner preferred a revision petition against this order of the trial court, which was dismissed by the revisional court, vide its order dated 20.02.2016. The petitioner did not stop there and filed a writ petition in the High Court, challenging the orders of the trial and revisional courts. The High Court dismissed his writ petition, by the impugned order. Hence, the petitioner has filed the present petition, in this Court, for leave to appeal.

6. Having heard the learned counsel for the petitioner and respondent No.3 in person and examining the record of the case, we are of the view that it is a classic case of abusing the process of the court. Respondent No.3 has been punished with a penalty of pursuing an outright frivolous litigation for a period of more than a decade, just for the reason that he had got a succession certificate in his favour to receive a meagre amount of Rs.32,185/- left by his deceased father in a bank account, and that too on the applications of the persons who had no right or interest in the legacy of his deceased father rather had been in litigation over some other property first against the deceased father of respondent No.3 and after his death against respondent No.3 and his mother and siblings.

7. To our query, as to what right or interest of the present petitioner or his deceased father was affected by the issuance of the succession certificate in favour of respondent No.3, the answer of the learned counsel for the petitioner was nothing but that the petitioner and his deceased father had acted just as informers of the commission of offences of fraud and perjury with the court during the proceedings of the application for succession certificate. The spiteful conduct of the petitioner and his deceased father in making repeated applications and venomously pursuing them up to this Court do not paint of picture of a bona fide informer commited to unfold the offences of fraud and perjury for the love of justice, equity and fairplay. The conduct of the petitioner reeks of private vengeance against respondent No.3 and his mother and siblings, because of a simmering dispute over some other property.

8. It is also regrettable to note that the first application filed by the petitioner's father and later pursued by the petitioner and his siblings after his death, for cancellation of the succession certificate and taking legal action against respondents Nos. 3 to 5, which should have been dismissed summarily after the filing of opposing written reply of the sisters of respondent No. 3, was proceeded with unnecessarily by framing issues and decided after the protracted proceedings of about five years.

9. The power conferred by section 476, Cr.P.C. on a Civil, Revenue or Criminal Court to take cognizance of certain offences committed in, or in relation to, any proceedings before it, is discretionary as evident from the expression, "may take cognizance", used in the Section. No doubt, like all other discretionary powers, the court concerned is to exercise this discretion judiciously, not arbitrarily, while taking into consideration the facts and circumstances of the case.[1] Previously, before its substitution by the Act XXI of 1976, section 476 had stated it expressly that the court is to take action under section 476 when it is of opinion that "it is expedient in the interests of justice" that an inquiry should be made into such an offence. As the discretionary powers must always be exercised in the interests of justice, we are of the considered view that notwithstanding the omission of that expression in the present section 476, while exercising its discretion under this Section the court concerned should give prime consideration to the question, whether it is expedient in the interests of justice to take cognizance of the offence. The court is to exercise this discretionary power with due care and caution, and must be watchful of the fact that its process under section 476 is not abused by an unscrupulous litigant scheming to wreak private vengeance or satisfy a private grudge against a person,[2] as has been done by the petitioner in the present case.

10. In view of the stance of the sisters of respondent No.3 as to having no objection to the succession certificate issued in favour of their brother, respondent No. 3, the trial court had rightly dismissed both the applications, the first filed by the petitioner's father and the second by the petitioner, vide its orders dated 27.01.2015 and 14.12.2015, by noting the fact that the same had been filed with mala fide to avenge a private grudge and without having any interest in the matter decided by it. And the order of the trial court has correctly been maintained by the revisional court and the High Court. The present petition is completely frivolous and vexatious and the process of court has been abused just to pressurise the other side and to settle a personal score.

Imposition of costs

11. Such frivolous, vexatious and speculative litigation unduly burdens the courts giving artificial rise to pendency of cases which in turn clogs the justice system and delays the resolution of genuine disputes. Such litigation is required to be rooted out of the system and one of the ways to curb such practice of instituting frivolous and vexatious cases is by imposing of costs under Order XXVIII, Rule 3 of the Supreme Court Rules, 1980 ("Rules"). The spectre of being made liable to pay actual costs should be such as to make every litigant think twice before putting forth a vexatious claim or defence[3] before the Court. These costs in an appropriate case can be over and above the nominal costs which include costs of the time spent by the successful party, the transportation and lodging, if any, or any other incidental cost, besides the amount of the court fee, process fee and lawyer's fee paid in relation to the litigation.[4] Imposition of costs in frivilous and vexatious cases meets the requirement of fair trial under Article 10A of the Constitution, as it not only discourages frivilous claims or defences brought to the court house but also absence of such cases allows more court time for the adjudication of genuine claims. It also incentivizes the litigants to

adopt alternative dispute resolution (ADR) processes and arrive at a settlement rather than rushing to courts.[5] Costs lay the foundation for expeditious justice[6] and promote a smart legal system that enhances access to justice by entertaining genuine claims. The purpose of awarding costs at one level is to compensate the successful party for the expenses incurred to which he has been subjected and at another level to be an effective tool to purge the legal system of frivolous, vexatious and speculative claims and defences. In a nutshell costs enourage alternative dispute resolution; settlements between the parties; and reduces unnecessary burden off the courts, so that they can attend to genuine claims. Costs are a weapon of offence for the plaintiff with a just claim to present and a shield to the defendant who has been unfairly brought into court[7].

12. In the instant case, the petitioner has repeatedly abused the courts to advance a personal grudge by repeatedly filing vexatious and frivilous claims in various courts, not only wasting the precious time of these courts but also causing anguish and pain to the other party that unnecessary, unfair and prolonged litigation brings. We, therefore, dismiss the present petition with costs of Rs.100,000/- which shall be deposited by the petitioner in the trial court for payment to respondent No.3 (Qazi Mubasher Shahzad) within three months from today. In case of failure by the petitioner to deposit the said costs within the prescribed time, they shall be recovered from the petitioner as a money decree with 10% monthly increase, and the costs of the execution proceedings shall also be recovered in addition thereto.

MWA/N-4/SC Petition dismissed.

**P L D 2023 Supreme Court 362**

**Present: Umar Ata Bandial, Syed Mansoor Ali Shah and Muhammad Ali Mazhar, JJ**

**SAADAT KHAN and others---Petitioners**

**Versus**

**SHAHID-UR-REHMAN and others---Respondents**

Civil Petition No.262-P of 2017, decided on 23rd September, 2021.

(Against the order of Peshawar High Court, Peshawar dated 10.4.2017, passed in C.R. No.411-P of 2014).

**(a) Specific Relief Act (I of 1877)---**

----S. 42---Limitation Act (IX of 1908), S. 18 & Sched. I, Art. 120---Inheritance---Female heirs---Suit instituted by a female legal heir against her brother for declaration of her ownership rights as to the property left by her deceased father in his inheritance---Limitation---Period of limitation for filing such suit; the principles relating to accrual of right to sue and the criterion for determining the actual denial of female heir's rights as to joint property stated.

As per the residuary Article 120 of Schedule-I to the Limitation Act 1908, a suit for which no period of limitation is provided elsewhere in the Schedule, the period of limitation for that suit is six years from the time when the right to sue accrues. No specific Article of Schedule-I to the Limitation Act, 1908 provides a period of limitation for a suit instituted by a person, under Section 42 of the Specific Relief Act 1877, for declaration of his ownership rights to any property against a person denying his said rights; therefore, the residuary Article 120 applies to such suit. A suit instituted by a female legal heir for declaration of her ownership rights as to the property left by her deceased father in his inheritance, against her brother who denies her rights is thus governed by the provisions of Article 120. To decide whether such a suit is barred by limitation, the six-year period of limitation provided by Article 120 is to be counted from the time when the right to sue for declaration accrues as provided therein. The question, when the right to sue for declaration has accrued in a case, depends upon the facts and circumstances of that case, as it accrues when the defendant denies (actually) or is interested to deny (threatens) the rights of the plaintiff as per Section 42 of the Specific relief Act 1877. The actual denial of rights gives rise to a compulsory cause of action and obligates the plaintiff to institute the suit for declaration of his/her rights, if he/she wants to do so, within the prescribed period of limitation; while in case of a threatened denial of rights, it is the option of the plaintiff to institute such a suit on a particular threat. On the actual denial of rights, the cause of action and the consequent right to sue matures for instituting the suit for declaration; whereas every threatened denial of rights gives rise to a fresh cause of action, and thus a fresh right to sue accrues on such a denial.

The obligations of the brothers to their sisters, as co-sharers of joint property, are further augmented when viewed in the light of the Islamic law and jurisprudence. Because of the fiduciary and protecting relation of the brothers to their sisters, they cannot claim their possession of the joint property adverse to the rights of their sisters; possession of the brothers is taken to be the possession of their sisters. Mere omission to pay a share of the profits or produce of the joint property to their sisters by the brothers in possession of the joint property does not in itself constitute a repudiation of the sisters' rights, nor does a wrong entry as to the inheritance rights in the revenue record oust the sisters from their ownership of the joint property as the devolution of the ownership of the property on legal heirs of a person takes place under the Islamic law of inheritance immediately on the death of that person without any intervention of anyone and without the sanction of the inheritance mutation in the revenue record. The position is, however, different when the brothers in possession of the joint property make a fraudulent sale or gift deed or get sanctioned some mutation, whether of sale or gift etc, in the revenue record claiming that their sisters have transferred their share in the joint property to them, or when they on the basis of a wrong inheritance mutation start selling out or otherwise disposing of the joint property claiming them to be the exclusive owners thereof. In such circumstances, the brothers by their overt act expressly repudiate the rights of their sisters in the joint property, and oust them from the ownership of the joint property. Their acts are, therefore, a clear and actual denial of the rights of the sisters, which give rise to a compulsory cause of action and obligates the sisters to institute the suit for declaration of their rights, if they want to do so, within the prescribed period of limitation.

Ghulam Ali v. Ghulam Sarwar PLD 1990 SC 1 ref.

Although, by the above mentioned acts of the brothers, the right accrues to the sisters to sue for declaration of their rights, but if they by means of fraud are kept from the knowledge of those overt acts, the time limit of six years provided in Article 120 for instituting the suit for declaration against brothers or any person claiming through them otherwise than in good faith and for a valuable consideration, is to be computed from the time when the fraud of the brothers first became known to the sisters, by virtue of the provisions of Section 18 of the Limitation Act. The "fraud" contemplated by Section 18 means suppression of those acts or transactions that give rise to the cause of action from coming into the knowledge of the plaintiff. A deliberate concealment of facts intended to prevent discovery of the right to sue is also a "fraud" within the meaning of the term used in Section 18, but an open act of a party cannot be said to be a fraudulent act of concealment and is therefore not covered by this Section. The benefit of Section 18 is, however, not available against any person who though claims through the defrauding party but is a transferee in good faith and for a valuable consideration. That is why the Supreme Court treats differently the two types of cases: (i) where the joint property is still in possession of the defrauding brothers or their legal heirs; and (ii) where the joint property has been alienated further to third persons - the transferees in good faith and for a valuable consideration.

**(b) Specific Relief Act (I of 1877)---**

----S. 42---Co-sharers---Suit instituted by one co-sharer for declaration of his/her ownership rights---Accrual of right to sue---Criterion for determining the actual denial of a co-sharer's rights as to joint property stated.

Due to the special characteristics of their relationship, the criterion for determining the actual denial of a co-sharer's rights as to joint property by the other co-sharer is different from the one that is applied between strangers. Co-sharers have a relationship of trust and support for each other. Possession of joint property with one co-sharer is considered to be for and on behalf of all the co-sharers. A co-sharer who is not in actual possession is considered to be in constructive possession of the joint property. Each co-sharer protects the joint property against trespassers for the benefit of all the co-sharers. Even if one co-sharer acquires possession of some portion of the joint property in consequence of legal proceedings initiated by him against a trespasser, he is deemed to be in possession of that portion of the joint property, on behalf of all the co-sharers. Against such backdrop, the actual denial of a co-sharer's rights as to joint property by the other co-sharer is not to be readily inferred. Actual denial of a co-sharer's rights by the other co-sharer may occur when the latter does something explicit in denial of the former's rights. A mere oral negation, even made several times, of each other's rights by the co-sharers on different disputes as to the use and sharing of the profits of the joint property, but without doing any overt act to oust a co-sharer from the ownership of the joint property, cannot be treated as an actual denial of the rights and thus does not necessitate to sue for declaration of ownership rights.

Manzoor Khan Khalil, Advocate Supreme Court and Haji Muhammad Zahir Shah, Advocate-on-Record for Petitioners.

Nemo for Respondents.

Date of hearing: 23rd September, 2021.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**The petitioners seek leave to appeal against a judgment of the Peshawar High Court, dated 10.04.2017 ("impugned judgment"), whereby the High Court has upheld, in revision, the judgment of the appellate court non-suiting the petitioners on the issue of limitation. Although there are concurrent findings of the two courts below, on the issue of limitation against the petitioners but as the matter involves the enforcement of an alleged right of inheritance of some females, the predecessors of the petitioners, we are inclined to re-examine the issue of limitation, in the interest of justice, to satisfy ourselves as to the correctness of the said concurrent findings.

2. Facts forming the background of the case are that one Isa Khan son of Hameedullah was the owner of the suit property, i.e., the then agriculture land measuring 19-Kanal 17-Marla. He died and his inheritance mutation No. 327 was sanctioned on 23 March 1935 in favour of his son Abdur Rehman. In the year 1960- 61, some portion of the suit property was acquired by the Small Industries Corporation of West Pakistan, and the said Abdur Rehman received the compensation therefor. Later on, Abdur Rehman also died and respondents Nos. 1

to 5 being his sons and daughters, and respondent No.6 being his widow, inherited the remaining suit property. Respondents Nos. 1 to 6 sold out almost all of the remaining suit property to respondents Nos. 12 to 74 and others, who are now recorded as owners-in-possession of the suit property in very small shares measuring in Marla and Sarsai, in the revenue record (Exh-P 1).

3. It was in the year 2004 that the petitioners instituted a suit on 19 November 2004 praying for a declaration that inheritance mutation No. 327 sanctioned on 23 March 1935 in favour of Abdur Rehman, the predecessor of respondents Nos.1 to 6, and the subsequent inheritance mutation in favour of respondents Nos. 1 to 6 and the further transfers made on the basis of those inheritance mutations, in favour of respondents Nos. 12 to 74 were void and ineffective against their rights. They asserted that Isa Khan had left one son, Abdur Rehman, and two daughters, Mst. Mehro and Mst. Afsro, as his legal heirs but Abdur Rehman fraudulently got sanctioned inheritance mutation No. 327 in his favour excluding his sisters from the inheritance of their father; that the said Mst. Mehro and Mst. Afsro daughters of Isa Khan had died, and they and respondents Nos. 7 to 11, who did not join them as plaintiffs in the suit, were their legal heirs; that being legal heirs of Mst. Mehro and Mst. Afsro, they and respondents Nos. 7 to 11 were owners of the suit property to the extent of their share; and that they had, time and again, asked the respondents to accept their entitlement and get corrected the revenue record to the extent of their share in the suit property, but they first evaded the matter and then flatly refused to do so, hence the need to institute the suit arose.

4. Respondents Nos. 1 to 6 contested the suit and claimed that the inheritance mutation No. 327 was correctly sanctioned in favour of their predecessor, Abdur Rehman, in the year 1935 as per the then prevailing law; that since 1935 their predecessor, and after his death they, had been in possession of the suit property as the exclusive owner to the knowledge of the petitioners; and that the fact of acquisition of a portion of the suit property by the Small Industries Corporation and receiving of the compensation by their predecessor for that acquisition was in knowledge of the petitioners, therefore, their suit was time-barred.

5. The trial court decreed the suit by its judgment dated 28.01.2012, and on the issue of limitation held that the limitation does not apply where a person seeks to enforce his right of inheritance in the estate of his deceased predecessor. Respondents Nos. 1 to 6 appealed in District Court. The appellate court noticed that Mst Mehro and Mst. Afsro, the predecessor of the petitioners, had not challenged the inheritance mutation in their lifetime, despite knowledge of receiving the compensation by Abdur Rehman, the predecessor of respondents Nos. 1 to 6, in the year 1960-61, for the acquisition of some land out of the suit property by the Small Industries Estate and the sale of a major portion of the suit property by respondents Nos. 1 to 6. Keeping in view these facts and while relying upon two unreported judgments and one reported judgment (Abdul Haq v. Surraya Begum 2002 SCMR 1330) of this Court, the appellate court decided the issues as to cause of action, estoppel and limitation against the petitioners and reversing the judgment and decree passed by the trial court, dismissed the suit. The petitioners then agitated their grievance against the judgment of the appellate court in the High Court by filing a revision petition.

6. The High Court also took up the issues as to cause of action, estoppel and limitation, examined the evidence available on record relating thereto, and upheld the decision of the appellate court on these issues. The High Court relied upon the judgments of this Court reported as Kala Khan v. Rab Nawaz 2004 SCMR 517, Lal Khan v. Muhammad Yousaf PLD 2011 SC 657, Muhammad Rustam v. Makhan Jan 2013 SCMR 299, Mst Grana v. Sahib Kamala PLD 2014 SC 167 and Ghulam Abbas v. Muhammad Shafi 2016 SCMR 1403.

7. The petitioners have impugned the concurrent findings of the appellate court and the High Court on the question of limitation. Their learned counsel has submitted that the trial court correctly applied the principle that the limitation does not apply in cases of inheritance, while the appellate court and the High Court erred in non-suiting the petitioners on the ground of limitation. He has relied upon judgments of this Court reported as Ghulam Ali v. Ghulam Sarwar PLD 1990 SC 1, Namdara v. Sahibzada 1998 SCMR 996, Shahro v. Fatima PLD 1998 SC 1512, Muhammad Iqbal v. Allah Bachaya 2005 SCMR 1447 and Peer Baksh v. Mst. Khanzadi 2016 SCMR 1417.

8. As the High Court for applying and the counsel for the petitioners for opposing the application of, the bar of limitation to the present case have relied upon the judgments of this Court, we have deeply considered the ratio

of the said judgments as well as other relevant judgments[1] to understand as if there is any conflict of opinions recorded therein. We have found no such conflict, which we shall explain hereunder.

9. We may say at the very outset that in view of the provisions of the residuary Article 120 of Schedule-I to the Limitation Act 1908, there can hardly be any suit to which the bar of limitation does not apply. As per the said Article a suit for which no period of limitation is provided elsewhere in the Schedule, the period of limitation for that suit is six years from the time when the right to sue accrues. No specific Article of Schedule-I to the Limitation Act provides a period of limitation for a suit instituted by a person, under Section 42 of the Specific Relief Act 1877, for declaration of his ownership rights to any property against a person denying his said rights; therefore, the residuary Article 120 applies to such suit. A suit instituted by a female legal heir for declaration of her ownership rights as to the property left by her deceased father in his inheritance, against her brother who denies her rights is thus governed by the provisions of Article 120. To decide whether such a suit is barred by limitation, the six-year period of limitation provided by Article 120 is to be counted from the time when the right to sue for declaration accrues as provided therein. The question, when the right to sue for declaration has accrued in a case, depends upon the facts and circumstances of that case, as it accrues when the defendant denies (actually) or is interested to deny (threatens) the rights of the plaintiff as per Section 42 of the Specific Relief Act, 1877. The actual denial of rights gives rise to a compulsory cause of action and obligates the plaintiff to institute the suit for declaration of his rights, if he wants to do so, within the prescribed period of limitation; while in case of a threatened denial of rights, it is the option of the plaintiff to institute such a suit on a particular threat. On the actual denial of rights, the cause of action and the consequent right to sue matures for instituting the suit for declaration; whereas every threatened denial of rights gives rise to a fresh cause of action, and thus a fresh right to sue accrues on such a denial. This Court has, therefore, decided the question of limitation in the cases relied upon by the High Court and referred to by the counsel for the petitioners, in the peculiar facts and circumstances of each case.

10. Because of the special characteristics of their relationship, the criterion for determining the actual denial of a co-sharer's rights as to joint property by the other co-sharer is different from the one that is applied between strangers. Co-sharers have a relationship of trust and support for each other. Possession of joint property with one co-sharer is considered to be for and on behalf of all the co-sharers. A co-sharer who is not in actual possession is considered to be in constructive possession of the joint property. Each co-sharer protects the joint property against trespassers for the benefit of all the co-sharers. Even if one co-sharer acquires possession of some portion of the joint property in consequence of legal proceedings initiated by him against a trespasser, he is deemed to be in possession of that portion of the joint property, on behalf of all the co-sharers. Against this backdrop, the actual denial of a co-sharer's rights as to joint property by the other co-sharer is not to be readily inferred. Actual denial of a co-sharer's rights by the other co-sharer may occur when the latter does something explicit in denial of the former's rights. A mere oral negation, even made several times, of each other's rights by the co-sharers on different disputes as to the use and sharing of the profits of the joint property, but without doing any overt act to oust a co-sharer from the ownership of the joint property, cannot be treated as an actual denial of the rights and thus does not necessitate to sue for declaration of ownership rights.

11. The obligations of the brothers to their sisters, as co-sharers of joint property, are further augmented when viewed in the light of the Islamic law and jurisprudence as expounded by this Court in Ghulam Ali. Because of the fiduciary and protecting relation of the brothers to their sisters, they cannot claim their possession of the joint property adverse to the rights of their sisters; possession of the brothers is taken to be the possession of their sisters. Mere omission to pay a share of the profits or produce of the joint property to their sisters by the brothers in possession of the joint property does not in itself constitute a repudiation of the sisters' rights, nor does a wrong entry as to the inheritance rights in the revenue record oust the sisters from their ownership of the joint property as the devolution of the ownership of the property on legal heirs of a person takes place under the Islamic law of inheritance immediately on the death of that person without any intervention of anyone and without the sanction of the inheritance mutation in the revenue record. The position is, however, different when the brothers in possession of the joint property make a fraudulent sale or gift deed or get sanctioned some mutation, whether of sale or gift etc, in the revenue record claiming that their sisters have transferred their share

in the joint property to them, or when they on the basis of a wrong inheritance mutation start selling out or otherwise disposing of the joint property claiming them to be the exclusive owners thereof. In such circumstances, the brothers by their overt act expressly repudiate the rights of their sisters in the joint property, and oust them from the ownership of the joint property. Their acts are, therefore, a clear and actual denial of the rights of the sisters, which give rise to a compulsory cause of action and obligates the sisters to institute the suit for declaration of their rights, if they want to do so, within the prescribed period of limitation.

12. Although, by the said acts of the brothers, the right accrues to the sisters to sue for declaration of their rights, but if they by means of fraud are kept from the knowledge of those overt acts, the time limit of six years provided in Article 120 for instituting the suit for declaration against brothers or any person claiming through them otherwise than in good faith and for a valuable consideration, is to be computed from the time when the fraud of the brothers first became known to the sisters, by virtue of the provisions of Section 18 of the Limitation Act. The "fraud" contemplated by Section 18 means suppression of those acts or transactions that give rise to the cause of action from coming into the knowledge of the plaintiff. A deliberate concealment of facts intended to prevent discovery of the right to sue is also a "fraud" within the meaning of the term used in this Section, but an open act of a party cannot be said to be a fraudulent act of concealment and is therefore not covered by this Section. The benefit of Section 18 is, however, not available against any person who though claims through the defrauding party but is a transferee in good faith and for a valuable consideration. That is why this Court has treated differently the two types of cases: (i) where the joint property is still in possession of the defrauding brothers or their legal heirs; and (ii) where the joint property has been alienated further to third persons - the transferees in good faith and for a valuable consideration.

13. We have gone through the facts of the present case in light of the above principles regarding the calculation of the period of limitation. We find that the acts of acquisition of a part of the suit property by the Small Industries Estate and receiving of the compensation therefor by Abdur Rehman, the predecessor of respondents Nos. 1 to 6, in the year 1960-61 were open acts and were also in the knowledge of Mst. Mehro and Mst. Afsro, the predecessor of the petitioners. This fact has been admitted by petitioner No. 1, Saadat Khan, when he appeared in the witness box as PW-5. He further said that they had demanded their share in the compensation amount from Abdur Rehman but he had refused to pay. The act of receiving compensation for the acquired portion of the suit property by Abdur Rehman was equal to selling that portion of the suit property by claiming him to be the exclusive owner thereof. It was his express overt act whereby he repudiated the rights of his sisters, Mst. Mehro and Mst. Afsro, in the suit property and ousted them from the ownership thereof. By the said act of Abdur Rehman, the right accrued to his sisters to sue for declaration of their rights, and the six-year limitation period provided in Article 120 started to run from the date of knowledge of Mst. Mehro and Mst. Afsro, of that act of Abdur Rehman and expired in the year 1967-68. For when once limitation time had begun to run, no subsequent disability or inability to sue could stop it as per Section 9 of the Limitation Act. Similar was the effect of the acts of selling out the remaining portion of the suit property by respondents Nos. 1 to 6 to respondents Nos. 12 to 74 and others. The limitation period having thus expired in the lifetime of Mst. Mehro and Mst. Afsro, it cannot start over again for their successors, the present petitioners, in view of the definition of the term "plaintiff" provided in Section 2(8) of the Limitation Act, which provides that "plaintiff" includes any person from or through whom a plaintiff derives his right to sue. Because of the said definition of "plaintiff", it was the knowledge of Mst. Mehro and Mst. Afsro that had triggered the period of limitation to run not only against them but also against their successors, i.e., the petitioners who derive their right to sue from them. The appellate court and the High Court have, thus, correctly decided the issue of limitation against the petitioners.

14. For all what has been discussed above, the present petition for leave to appeal is found meritless; it is, therefore, dismissed and leave declined.

MWA/S-10/SC Petition dismissed.

**P L D 2023 Supreme Court 378**

**Present: Syed Mansoor Ali Shah, Jamal Khan Mandokhail and Shahid Waheed, JJ**

**PAKISTAN ELECTRONIC MEDIA REGULATORY AUTHORITY---Appellant**

**Versus**

**PAKISTAN BROADCASTERS ASSOCIATION and others---Respondents**

Civil Appeal No. 1518 of 2013, decided on 24th February, 2023.

(On appeal against judgment dated 16.8.2013 passed by the High Court of Sindh, Karachi in C.P. No. D-2633 of 2010).

**(a) Pakistan Electronic Media Regulatory Authority Ordinance (XIII of 2002)---**

----Ss. 24, 29 & 39---Pakistan Electronic Media Regulatory Authority (PEMRA) Rules, 2002, R. 30---PEMRA (TV/Radio Broadcast Operations) Regulations, 2002, ('the 2002 Regulations') vires of---PEMRA (TV/Radio Broadcast Operations) Regulations, 2002 ('the 2002 Regulations') were made under Rule 30 of the Pakistan Electronic Media Regulatory Authority (PEMRA) Rules, 2002 ('the 2002 Rules') which was beyond the scope of the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 ('the Ordinance')---Said '2002 Regulations' did not derive their power from the parent statute i.e. the Ordinance and therefore, were void ab initio having been made without any lawful authority, and hence, of no legal effect.

The Pakistan Electronic Media Regulatory Authority Ordinance, 2002 ('the Ordinance') before it was amended by the Pakistan Electronic Media Regulatory Authority (Amendment) Act, 2007 ("Amendment Act of 2007"), did not provide for any power to PEMRA to issue regulations. It only provided for the power to make rules under Section 39 of the Ordinance, which was exercised by making the Pakistan Electronic Media Regulatory Authority (PEMRA) Rules, 2002 ("2002 Rules"). Through the said 2002 Rules, without any such power to the said effect in the Ordinance, the power to make regulations was extended to PEMRA through Rule 30 of the 2002 Rules. The 2002 Regulations were then issued under said Rule 30 of the 2002 Rules. Thereafter, the Ordinance was amended through the Amendment Act of 2007 and the power to make regulations under the Ordinance was specifically added into the Ordinance by substituting Section 4 of the Ordinance. However, the Amendment Act of 2007 was not given retroactive effect and did not contain any provision validating the 2002 Regulations.

Molasses Trading v. Federation of Pakistan 1993 SCMR 1905 and Star Textile v. Government of Sindh 2002 SCMR 356 ref.

The amended Section 4 of the Ordinance authorized PEMRA to make regulations by notification in the official Gazette, however, the 2002 Regulations were not notified in the official Gazette. Therefore, the Amendment Act of 2007 did not extend any legal cover to the 2002 Regulations. The 2002 Regulations, which were made under the 2002 Rules without any such power provided in the Ordinance, remained operative till 2012 i.e. when the Pakistan Electronic Media Regulatory Authority (Television Broadcast Station Operations Regulations, 2012) ("2012 Regulations") were issued for the first time under the amended Ordinance. Therefore, the 2002 Regulations did not derive their power from the parent statute i.e. the Ordinance and, even after the Ordinance was amended, remained non est. They were made under Rule 30 of the 2002 Rules which was beyond the scope of the Ordinance.

Therefore, Rule 30 of the 2002 Rules, going beyond the scope of the Ordinance, was ultra vires to the Ordinance and the 2002 Regulations were void ab initio, having been made without any lawful authority, and hence, of no legal effect. Appeal was dismissed.

**(b) Interpretation of statutes---**

----Rules made under a parent statute---Said Rules cannot go beyond the scope of the parent statute and nor can they enlarge the scope of the statutory provisions therein---Power of rule-making is an incidental power that must follow and not run parallel to the parent statute.

**(c) Interpretation of statutes---**

----Regulations made under a parent statute---Regulations must be made by the authority of the parent statute and regulations that do not draw their power from the parent statute are also ultra vires to the said parent statute.

Jurists Foundation v. Federal Government PLD 2020 SC 1; Zarai Taraqiati Bank v. Said Rehman 2013 PLC (C.S.) 1223; (Suo Motu Case No. 11 of 2011) PLD 2014 SC 389; (Suo Motu Case No. 13 of 2009) PLD 2011 SC 619 and Farrukh Raza Sheikh v. The Appellate Tribunal Inland Revenue 2022 SCMR 1787 ref.

**(d) PEMRA (TV/Radio Broadcast Operations) Regulations, 2002---**

----Regln. 9(5)---Pakistan Electronic Media Regulatory Authority Ordinance (XIII of 2002), Ss. 29-A & 30(1)(a)---Pakistan Electronic Media Regulatory Authority (PEMRA)---Power to levy and recover surcharge on late payment of annual fee pertaining to the licences granted to the private broadcasters by PEMRA---Legality---No specific provision in the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 ('the Ordinance') empowers PEMRA to impose a surcharge on the late payment of annual fee---Said Ordinance only contemplates the levy of a licence fee and annual fee but does not empower PEMRA to levy any surcharge over and above the annual fee---Demand of surcharge under Regulation 9(5) of the) PEMRA (TV/Radio Broadcast Operations) Regulations, 2002 was ultra vires to the Ordinance which does not confer any power on PEMRA to impose and recover such a surcharge.

The Pakistan Electronic Media Regulatory Authority Ordinance, 2002 ('the Ordinance') as it stood before it was amended through the Pakistan Electronic Media Regulatory Authority (Amendment) Act, 2007 ("Amendment Act of 2007"), and as it stands after it has been amended through the Amendment Act of 2007, there was and is no specific provision that empowers PEMRA to impose a surcharge on the late payment of annual fee. The Ordinance only contemplates the levy of a licence fee and annual fee but does not empower PEMRA to levy any surcharge over and above the annual fee. The contention of PEMRA that after the Ordinance was amended through the Amendment Act of 2007, the power to levy and recover surcharge was included in the term "other charges" as appearing in Sections 29-A and 30(1)(a), is without any force. Despite the Ordinance being amended through the Amendment Act of 2007, the power to levy and recover surcharge was still not provided therein by the legislature. Even otherwise, Section 29A of the Ordinance only caters to recovery of dues as arrears of land revenue and Section 30(1) provides that PEMRA may revoke or suspend a licence on one or more of the grounds mentioned therein, including, as stipulated under Section 30(1)(a), if the licensee fails to pay the licence fee, annual renewal fee or any other charges including any fine, if any. Therefore, it is apparent that there is no definition of "other charges" under the Ordinance and no specific charging provision whereby the "other charges" are levied on a licensee or any provision that empowers PEMRA to levy and recover surcharge even as "other charges".

The PEMRA (TV/Radio Broadcast Operations) Regulations, 2002 ('the 2002 Regulations') were void ab initio and remained non est. As such, there were no valid regulations in the field for the purposes of Sections 2(s), 19(3), 24(4) or 24(5) of the Ordinance up till the Pakistan Electronic Media Regulatory Authority (Television Broadcast Station Operations Regulations, 2012) ("2012 Regulations") were issued. Thus, the demand of surcharge under Regulation 9(5) of the 2002 Regulations was ultra vires to the Ordinance which does not confer any power on PEMRA to impose and recover such a surcharge. Appeal was dismissed.

Province of Sindh v. Azad Wine Shop PLD 2006 SC 528 ref.

**(e) Interpretation of statutes---**

----Fiscal statutes---Fiscal statutes are to be interpreted strictly and there is no room for any intendment therein.

Hirjina and Co. v. Commissioner of Sales Tax 1971 SCMR 128; Star Textile v. Government of Sindh 2002 SCMR 356; Pearl Continental Hotel v. Government of NWFP PLD 2010 SC 1004 and The Commissioner Inland Revenue v. Kohinoor Sugar Mills 2021 SCMR 536 ref.

Ahmed Pervaiz, Advocate Supreme Court (via video link from Lahore), Tahir Tarar, H.L. (PEMRA), Muhsin Dogar, Director (R) Anas Farooq, L.O. and Barrister Ali Asghar, L.O. for Appellant.

Salahuddin Ahmed, Advocate Supreme Court (via video link from Karachi) for Respondents.

Ch. Amir Rehman, Addl. AGP. for the Federation.

Assisted by Muhammad Hassan Ali, Law Clerk.

Date of hearing: 24th February, 2023.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**Through the instant appeal, the appellant has challenged judgment dated 16.8.2013 passed by the High Court of Sindh, Karachi, whereby the constitutional petition filed by the respondents was allowed.

2. The brief facts of the case are that respondents Nos. 2 to 8, being private broadcasters owning and operating different television channels, were issued various show cause notices in 2010 by the appellant/PEMRA, demanding payment of surcharge on account of late payment of annual fee pertaining to the licences granted to the respondents by the appellant. The said surcharge claimed by the appellant was under Regulation No. 9(5) of the PEMRA (TV/Radio Broadcast Operations) Regulations, 2002 ("2002 Regulations"). The respondents challenged the vires of the said surcharge by filing a constitutional petition before the High Court. Through the impugned judgment dated 12.09.2013, the constitutional petition was allowed and the demand for payment of said surcharge under the 2002 Regulations was in effect declared to be ultra vires to the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 ("Ordinance"), and resultantly, the show cause notices demanding the same were set aside.

3. Leave to appeal was granted by this Court vide order dated 19.11.2013 in the following terms:-

"It is argued that the view set out by the learned High Court in the impugned judgment that the levy of surcharge vide Regulation 9(5) of the PEMRA (TV/Radio Broadcast Operations) Regulations, 2002 is beyond the scope of the provisions of Pakistan Electronic Media Regulatory Authority Ordinance, 2002 (the Ordinance, 2002) and thus ultra vires is not in consonance with the provisions of Section 24(5) of the Ordinance, 2002 read with Section 29- A of the Ordinance, 2002. Leave is granted to consider the above."

4. While arguing the matter, the learned counsel for the appellant took us through the scheme of the Ordinance, particularly referring to Sections 2(s), 4(3), 24(4), 24(5), 29-A, 30(1)(a) and 39 of the Ordinance. He also referred to the Pakistan Electronic Media Regulatory Authority (PEMRA) Rules, 2002 ("2002 Rules") and the Pakistan Electronic Media Regulatory Authority Rules, 2009 ("2009 Rules"), as well as to two sets of Regulations; the 2002 Regulations and the Pakistan Electronic Media Regulatory Authority (Television Broadcast Station Operations Regulations, 2012) ("2012 Regulations"). While referring to the above, the main plank of the arguments of the learned counsel for the appellant was that the surcharge provided under the 2002 Regulations was sanctioned by the Ordinance through Sections 29-A and 30(1)(a), being described as "other charges". While explaining the legality of the 2002 Regulations, he submitted that initially the 2002 Regulations were promulgated under the 2002 Rules made under the Ordinance, thereafter, an amendment was brought about in Section 4 of the Ordinance through the Pakistan Electronic Media Regulatory Authority (Amendment) Act, 2007 ("Amendment Act of 2007"), authorizing PEMRA to make Regulations for carrying out the purposes of the Ordinance. Under the said provision, regulations were then issued for the first time in the year 2012 i.e. the 2012 Regulations. Therefore, he argued that the demand for surcharge was valid as the same had the sanctity of the law. Further, the learned Additional Attorney General for Pakistan submitted that the said surcharge could be treated as compensation for late payment of annual fee which could be charged by PEMRA under Section 19(4) of the Ordinance.

5. On the other hand, the learned counsel for the respondents supported the judgment of the High Court and vehemently reiterated that the 2002 Regulations did not have the sanction of the law; they could not have been issued under the 2002 Rules without any substantive sanction under the Ordinance; the Ordinance did not provide for any power to demand surcharge on late payment of annual fee, therefore, Regulation 9(5) of the 2002 Regulations, being beyond the scope of the Ordinance, was ultra vires to the Ordinance; and that even if Regulation 9(5) of the 2002 Regulations is taken on its face value, it only provides for late payment surcharge on licence fee or renewal fee and does not provide for any sanction for demanding surcharge with regards to late payment of annual fee.

6. We have heard the learned counsel for the parties and the learned Additional Attorney General for Pakistan, and have also examined the record with their able assistance. The question before us pertains to whether the demand of payment of surcharge under Regulation 9(5) of the 2002 Regulations, through the show cause notices issued to the respondents pertaining to the years 2004 to 2011, was valid under the law. In order to dilate upon the said question, it will have to be ascertained whether the 2002 Regulations were legally issued under the

Ordinance and whether the Ordinance provides for any power to levy and recover surcharge on late payment of annual fee with or without the 2002 Regulations.

7. It is an admitted position that the Ordinance before it was amended through the Amendment Act of 2007 neither had any provision empowering PEMRA to issue regulations thereunder and nor any power to impose surcharge on account of late payment of annual fee was provided therein. By virtue of Section 39, the Ordinance only empowered PEMRA to make rules with the approval of the Government and by notification in the official Gazette. The 2002 Rules were then promulgated under the said provision. Rule 30 of the 2002 Rules provided for the power to issue regulations and by exercising the same, the 2002 Regulations were issued by PEMRA, which, through Regulation 9(5), provided for the imposition of surcharge for 'late payment of the licence or renewal fee'. Subsequently, through the Amendment Act of 2007, Section 4 of the Ordinance was substituted and the new Section 4 provided that, by notification in the official Gazette, the Authority i.e. PEMRA[1] may make regulations and also issue determinations for carrying out the purposes of the Ordinance. Notably, the Amendment Act of 2007 was not given retroactive effect and no validation clause was provided in the Amendment Act of 2007 to validate or save the proceedings initiated or actions undertaken under the 2002 Regulations. Furthermore, no express provision to impose surcharge was provided in the Amendment Act of 2007 either. It, however, added a new provision i.e. Section 29-A into the Ordinance which caters to recovery of dues, including any other charges, as arrears of land revenue. It also substituted Section 30 of the Ordinance, which, through Section 30(1)(a), now provides that PEMRA may revoke and suspend any licence if the licensee fails to pay the licence fee, annual renewal fee or any other charges including fine, if any. The term "other charges", however, has not been defined therein.

8. Thereafter, the 2009 Rules were promulgated under the Ordinance, repealing the 2002 Rules. However, still no regulations were made under the Ordinance after the express power to make the same was added into the Ordinance through the Amendment Act of 2007, as noted above. The 2002 Regulations, made under the 2002 Rules, were still applied by PEMRA and the show cause notices, pertaining to the years 2004 to 2011, demanding payment of surcharge were issued to the respondents under Regulation 9(5) of the said 2002 Regulations. Thereafter, as admitted by the learned counsel for the appellant, the 2012 Regulations, as notified in the official Gazette, were issued under the Ordinance for the first time in the year 2012.

9. It is apparent from the above that the Ordinance before it was amended by the Amendment Act of 2007 did not provide for any power to PEMRA to issue regulations. It only provided for the power to make rules under Section 39 of the Ordinance, which was exercised by making the 2002 Rules. Through the said 2002 Rules, without any such power to the said effect in the Ordinance, the power to make regulations was extended to PEMRA through Rule 30 of the 2002 Rules. The 2002 Regulations were then issued under said Rule 30 of the 2002 Rules. Thereafter, the Ordinance was amended through the Amendment Act of 2007 and the power to make regulations under the Ordinance was specifically added into the Ordinance by substituting Section 4 of the Ordinance. However, the Amendment Act of 2007 was not given retroactive effect and did not contain any provision validating the 2002 Regulations.[2] We have also noted that the amended Section 4 of the Ordinance authorized PEMRA to make regulations by notification in the official Gazette, however, the 2002 Regulations were not notified in the official Gazette, as admitted by the appellant in its para-wise comments filed before the High Court.[3] Therefore, the Amendment Act of 2007 did not extend any legal cover to the 2002 Regulations. The 2002 Regulations, which were made under the 2002 Rules without any such power provided in the Ordinance, remained operative till 2012 i.e. when the 2012 Regulations were issued for the first time under the amended Ordinance. Therefore, the 2002 Regulations did not derive their power from the parent statute i.e. the Ordinance and, even after the Ordinance was amended, remained non est. They were made under Rule 30 of the 2002 Rules which was beyond the scope of the Ordinance. It is settled law that the rules made under a parent statute cannot go beyond the scope of the said statute and nor can they enlarge the scope of the statutory provisions therein. The power of rule-making is an incidental power that must follow and not run parallel to the parent statute. Furthermore, regulations must be made by the authority of the parent statute and regulations that do not draw their power from the parent statute are also ultra vires to the said parent statute.[4] Therefore, Rule

30 of the 2002 Rules, going beyond the scope of the Ordinance, was ultra vires to the Ordinance and the 2002 Regulations were void ab initio, having been made without any lawful authority, and hence, of no legal effect.

10. Even otherwise, without prejudice to the above, the Ordinance as it stood before it was amended through the Amendment Act of 2007 and as it stands after it has been amended through the Amendment Act of 2007, there was and is no specific provision that empowers PEMRA to impose a surcharge on the late payment of annual fee. The Ordinance only contemplates the levy of a licence fee and annual fee but does not empower PEMRA to levy any surcharge over and above the annual fee.[5] The contention of the learned counsel for the appellant that after the Ordinance was amended through the Amendment Act of 2007, the power to levy and recover surcharge was included in the term "other charges" as appearing in Sections 29-A and 30(1)(a), is without any force. It is trite law that fiscal statutes are to be interpreted strictly and there is no room for any intendment therein.[6] It is underlined that despite the Ordinance being amended through the Amendment Act of 2007, the power to levy and recover surcharge was still not provided therein by the legislature. Even otherwise, Section 29- A of the Ordinance only caters to recovery of dues as arrears of land revenue and Section 30(1) provides that PEMRA may revoke or suspend a licence on one or more of the grounds mentioned therein, including, as stipulated under Section 30(1)(a), if the licensee fails to pay the licence fee, annual renewal fee or any other charges including any fine, if any. Therefore, it is apparent that there is no definition of "other charges" under the Ordinance and no specific charging provision whereby the "other charges" are levied on a licensee or any provision that empowers PEMRA to levy and recover surcharge even as "other charges".

11. Reliance on Section 19(4) of the Ordinance by the learned Additional Attorney General of Pakistan is also misplaced as the said provision only empowers PEMRA to charge fee as it may fix from time to time for the grant of a licence and for its annual renewal but does not provide for the power to levy and recover surcharge on non-payment of annual fee. Section 19(3) provides that every licence shall be subject to such terms and conditions as may be prescribed. Section 24(4) of the Ordinance provides that a licence shall be valid for a period of five, ten or fifteen years subject to payment of the annual fee prescribed from time to time. Section 24(5) provides that the Authority may renew a licence on such terms and conditions as may be prescribed. Although, through the Amendment Act of 2007, Section 2(s) was amended and the definition of "prescribed" was expanded to include as "prescribed by the rules or regulations made by the Authority", however, as held above, the 2002 Regulations were void ab initio and remained non est. As such, there were no valid regulations in the field for the purposes of Sections 2(s), 19(3), 24(4) or 24(5) of the Ordinance up till the 2012 Regulations were issued. Thus, the demand of surcharge under Regulation 9(5) of the 2002 Regulations was ultra vires to the Ordinance which does not confer any power on PEMRA to impose and recover such a surcharge.[7]

12. Even otherwise, we have also noted that Regulation 9(5) of the 2002 Regulations provided that the surcharge would be incurred upon the late payment of the licence or the renewal fee but did not provide that surcharge could be imposed on late payment of annual fee. Therefore, even under Regulation 9(5), the demand of surcharge on late payment of annual fee was without any lawful authority.

13. In view of what has been held above, we see no reason to interfere in the well-reasoned judgment of the High Court. The instant appeal is therefore, dismissed accordingly.

MWA/P-7/SC Appeal dismissed.

**P L D 2023 Supreme Court 431**

**Present: Syed Mansoor Ali Shah and Ayesha A. Malik, JJ**

**PAKISTAN ELECTRONIC MEDIA REGULATORY AUTHORITY (PEMRA) through Chairman and another---Petitioners**

**Versus**

**Messrs ARY COMMUNICATIONS PRIVATE LIMITED (ARY DIGITAL) through Chief Executive Officer and another---Respondents**

Civil Petition No.3506 of 2020, decided on 12th April, 2023.

(Against the order of the High Court of Sindh, dated 11.11.2020, passed in M.A. No.45 of 2020).

**(a) Pakistan Electronic Media Regulatory Authority (Councils of Complaints) Rules, 2010---**

----R. 4---Councils of Complaints---Chairperson and Members---Citizens of eminence---Term 'citizens of eminence' explained.

Council of Complaints consists of a chairperson and five members including at least two women, who all are citizens of eminence from the general public. Although the expression "citizens of eminence", which is of wide import, is not defined in the Pakistan Electronic Media Regulatory Authority Ordinance, 2002, it ordinarily refers to persons who are widely recognized and respected for their knowledge and experience in their respective fields, such as media, law, human rights and social service, etc. The term "eminence" suggests a level of distinction, implying that these persons hold a special status or position within the circle of their vocation. Additionally, those of such persons who are considered for assigning a public function, whether paid or honourary, ought to be also known for their integrity. Such consideration must also take into account the objective of ensuring that the Councils of Complaints remain independent and impartial, and are protected against both political and commercial pressure or interference. A Council of Complaints comprising of such persons reflect a broad cross-section of our society in order to represent diverse interests, balance, inclusivity and different perspectives of the public, while ensuring their independence and impartiality, which can best ensure the public interest in reviewing complaints against any aspects of programmes and advertisements. The members of the Councils therefore hold honorary position for two years and are to perform their function independently and impartially, without any government interference.

PEMRA v. ARY Communications 2022 SCMR 1923 and Toby Mendel et el. Modernizing Media Law in Pakistan: Review of Legal Framework Governing Media, pp. 26-27 (IRADA, 2017) ref.

**(b) Pakistan Electronic Media Regulatory Authority Ordinance (XIII of 2002)---**

----Ss. 26(2) & 27(a)---Pakistan Electronic Media Regulatory Authority (Councils of Complaints) Rules, 2010, Rr. 8 & 10---Councils of Complaints---Power to receive and review complaints against any content---Scope---PEMRA has to consider the opinion of Councils of Complaints before passing any order of prohibition under section 27(a) of the Pakistan Electronic Media Regulatory Authority Ordinance, 2002.

To regulate public fundamental rights of expression and information, the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 ("PEMRA Ordinance") envisages a two tiered regulatory system. The media content has to be first viewed by the Council of Complaints, an independent public regulatory body, and after obtaining its opinion, PEMRA, the government regulatory body, is to consider the opinion of the Council of Complaints and finally decide the matter. Section 27(a) of the PEMRA Ordinance is not an independent and self-governing provision; it rather requires for its applicability the opinion of a Council of Complaints regarding the objectionable aspect of a programme or advertisement in terms of Section 26(2) of the PEMRA Ordinance read with the Pakistan Electronic Media Regulatory Authority (Councils of Complaints) Rules, 2010. [pp. 449, 451] H & K

Even if suo motu notice is taken by PEMRA or its Chairman, as to "any aspects of programmes", the matter has to be first sent to a Council of Complaints for its opinion and after considering the said opinion, PEMRA or its Chairman, as the case may be, can take the final decision.

**(c) Interpretation of statutes---**

----Rules made under a statute---Scope---Rules validly made to carry out the purposes of a statute are an integral part of that statute, therefore, it is also necessary to read them in conjunction with the statute to fully understand the operational scheme of any particular provision of the statute.

Ibrahim v. Regional Transport Authority AIR 1953 SC 79 and National Insurance Co. v. Swaran Singh AIR 2004 SC 1531 ref.

**(d) Interpretation of Constitution---**

----Holistic interpretation---Scope---Court always prefers the approach of holistic interpretation to that of fragmented interpretation while interpreting any provision of the Constitution or a statute---By this approach, the courts seek to ascertain the overall intent and purpose of the law and, by considering how its individual provisions fit within its larger framework, attempt to harmonize their meaning and scope with each other.

Munir Bhatti v. Federation PLD 2011 SC 407; D.B.A., Rawalpindi v. Federation PLD 2015 SC 401; Reference No.1 of 2020 PLD 2021 SC 825 and Waqar Bakhtawari v. Mazhar Shah PLD 2018 SC 81 ref.

**(e) Pakistan Electronic Media Regulatory Authority Ordinance (XIII of 2002)---**

----Ss. 26(2) & 27(a)---Pakistan Electronic Media Regulatory Authority (Councils of Complaints) Rules, 2010, Rr. 8 & 10---Council of Complaints---Power to receive and review complaints against any 'advertisement'---Scope---Inadvertent drafting omission in statute---Although the word "advertisement" is not mentioned in subsection (2) of Section 26 of the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 ('the Ordinance') but it is found mentioned in subsection (5) thereof---Omission of the word advertisement in subsection (2) of Section 26 appears to be an accidental one, as it does not fit within the overall intent of the legislature manifested from reading the provisions of Section 26 as a whole---Subsection (5) of Section 26 clearly empowers the Councils of Complaints to make a recommendation to PEMRA for the action of censure or fine against a licensee for violation of the codes not only of programmes content but also of advertisements---Provisions of subsection (5) of Section 26 thus make the intent of the legislature abundantly clear that it intended to confer the power on the Councils of Complaints to receive and review complaints against any aspects of programmes or advertisements, which shall be so read in subsection (2) of Section 26, in order to give effect to that manifest intent of the legislature.

**(f) Interpretation of statutes---**

----Inadvertent omissions in drafting a statute---Object of the process of interpretation of a statute is to find out what the legislature must have intended and then to give effect to that intent of the legislature, and in order to give effect to the manifest intent of the legislature, the courts can supply the inadvertent omission of the draftsman by reading the necessary words in the statute.

Badrul Haque v. Election Tribunal PLD 1963 SC 704; Reference No.1 of 2012 PLD 2013 SC 279; Amir Khan v. Controller of Estate Duty PLD 1961 SC 119; Amir Khan v. Controller of Estate Duty PLD 1962 SC 335 and Muhammad Ismail v. State PLD 1969 SC 241 ref.

**(g) Pakistan Electronic Media Regulatory Authority (Councils of Complaints) Rules, 2010---**

----R. 4---Councils of Complaints---Chairperson and Members---Selection criteria and procedure of appointment of members of the Councils of Complaints stated.

Selecting and appointing members of the public to regulate media content on the Councils of Complaints must, represent diverse interests and perspectives of the public while ensuring independence and impartiality. The Federal Government must establish: (i) clear criteria for the selection of public representatives, which might include a mix of expertise, professional backgrounds, demographic diversity and geographic representation; (ii) announce the opportunity to serve on the Councils through various channels, such as newspapers, websites, social media and community organizations. This will help attract a diverse pool of applicants; (iii) set up an application process that requires interested individuals to submit their credentials, relevant experience and a statement explaining their motivation for serving on the regulatory body. This information will be used to evaluate the suitability of each applicant; (iv) establish an independent selection committee composed of representatives from different sectors, e.g. media, academia, civil society, to review applications and recommend candidates. The committee should ensure a transparent and impartial selection process; and (v) provide the members, once appointed, with training and orientation on media regulation, ethics and relevant

laws. This will help them make informed decisions and effectively contribute to the regulation of media content. The inclusion of public representatives in media regulation, in this manner, can contribute to greater transparency, diversity and public trust in the media ecosystem.

**(h) Constitution of Pakistan---**

----Arts. 19 & 19A---Tolerance---Constitutional value and significance of the concept of tolerance in a society stated.

"Tolerance" is an essential preambular constitutional value that assumes more significance in the context of freedom of expression and right to information. It is a multifaceted concept and at its core, tolerance refers to the ability or willingness to accept and respect differences in opinions, beliefs, customs and practices among individuals or groups. This can include differences in race, religion, culture, gender, sexual orientation, political ideology and other aspects of human diversity. Tolerance promotes understanding, harmony and coexistence among people with diverse backgrounds, fostering open-mindedness and empathy. In a broader sense, it is an essential aspect of democratic societies, as it supports freedom of expression and the exchange of ideas, ultimately contributing to social cohesion and stability. It is important to note that tolerance does not necessarily imply agreement with or endorsement of the opinions or beliefs of others; rather, it is about respecting their right to hold those beliefs and coexist peacefully. The standard of tolerance in a society can be influenced by several factors. Societies with a tradition of valuing diversity and inclusivity tend to have higher levels of tolerance. In these societies, people are more likely to be accepting of differences and supportive of equal rights for all members of society. Societies that emphasize education and promote awareness of diverse cultures, religions and ways of life, tend to foster tolerance among their citizens. By understanding different perspectives and experiences, people are better equipped to appreciate and respect the diversity within their society. In some societies, tolerance is enshrined in the legal framework through anti-discrimination laws, human rights protections and equal opportunity policies. These measures help to create an environment in which tolerance is promoted and intolerance is discouraged. The standard of tolerance in a society is not static; it can change over time as a result of shifting cultural values, political climates and other factors.

**(i) Pakistan Electronic Media Regulatory Authority Ordinance (XIII of 2002)---**

----Ss. 26(2) & 27(a)---Pakistan Electronic Media Regulatory Authority (Councils of Complaints) Rules, 2010, Rr. 8 & 10---Constitution of Pakistan, Arts. 19 & 19A---Pakistan Electronic Media Regulatory Authority (PEMRA)---Councils of Complaints---Content regulation---Plays, dramas and other content broadcasted on electronic media---Expressions "obscene", "vulgar" and "offensive" to the commonly accepted standards of decency"---Scope of restrictions to be imposed by PEMRA and Council of Complaints and the scope of the expressions "obscene", "vulgar" and "offensive" stated.

The restriction imposed by law, i.e. the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 ('PEMRA Ordinance"), on the right to freedom of expression in relation to any programme including a play or drama, or any advertisement, broadcasted on the electronic media, on the ground of it being "obscene", "vulgar" or "offensive to the commonly accepted standards of decency", is defended to achieve the legitimate objectives of securing the interest of "public decency" and "public morality" as mentioned in Article 19 of the Constitution. This restriction, however, should not be more than necessary in its scope and applicability, to accomplish the said objectives. Additionally, while it is accepted that what constitutes appropriate limitation on freedom of expression to protect morals does vary from society to society, it must be kept in mind that the concept of decency and morality is derived from many social, philosophical and religious traditions; therefore, the limitations for the purpose of protecting public decency and public morality must be based on principles not deriving exclusively from a single tradition, and any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.

R v. Oakes, [1986] 1 SCR 103 (Supreme Court of Canada); General Comment No. 22 of the UN Human Rights Committee and General Comment No. 34 of the UN Human Rights Committee ref.

The expressions "obscene", "vulgar" and "offensive to the commonly accepted standards of decency" as used in Section 27(a) of the PEMRA Ordinance, are actually interconnected. Only that form of an expression can be said to be "obscene" or "vulgar" which is "offensive to the commonly accepted standards of decency". Thus,

the "commonly accepted standards of decency" in the community is the benchmark to determine whether or not a particular form of the expression of one's thought, idea or opinion in a play or drama is "obscene" or "vulgar". The important thing to understand is that the commonly accepted standard of decency in a community is a "standard of tolerance, not taste". It is not what the people generally think is right for them to see but what they would not tolerate others being exposed to it on the basis of the degree of harm to "public decency" or "public morality" that may flow from such exposure. Further, the expression "commonly accepted standards of decency" must be understood to be the contemporary standards as the social mores and sensibilities change over time.

R v. Butler, [1992] 1 SCR 452 (Supreme Court of Canada) ref.

A work of art and literature, which includes a play or drama broadcasted on the electronic media, is usually considered a strong and effective medium to break the silence on social taboos; therefore, it is not to be labelled as "obscene" or "vulgar" readily without appraising the message it intends to convey. In this perspective, one would need to see whether that message tends to promote or glorify the conduct or behavior which is offensive to the commonly accepted standards of decency, or it tends to condemn or deprecate such conduct or behavior. Such a review is to be undertaken on an objective assessment of the play or drama as a whole, not on the basis of pick and choose of its parts from here and there. If the ultimate message of the play or drama under review passes the test of being not offensive to the commonly accepted standards of decency, the review of a particular part thereof which depiction is necessary to convey the message effectively must be lenient and tolerant. However, where the obscenity of such part is too pronounced to eschew, only the objectionable part should be prohibited from being broadcasted and directed to be suitably modified, and the broadcast or rebroadcast of the complete play or drama must not be prohibited. In view of the applicability of the principle of proportionality to restrictions on the rights guaranteed by the Constitution, such an approach is necessary to protect the exercise of the fundamental right to freedom of expression and right to information to the maximum extent possible and to enforce the restrictions on the exercise of these rights to the minimum.

Ramamurthy v. State of Mysore AIR 1954 Mys 164 ref.

For the Petitioners:

Shahid Mubeen, Advocate Supreme Court.

Barrister Haris Azmat, Advocate Supreme Court.

Barrister Hamza Amjad and Barrister Fauzia Asad,

(Through video link from Lahore Registry)

Tahir Farooq Tarar, Head Legal,

Mohsin Hameed Dogar, Dir. (Legal), and Muhammad Jalal Haider, L.O.

Hafiz Muhammad Junaid, D.D. (Regulations), PEMRA.

For the Respondents:

Barrister Abid S. Zuberi, Advocate Supreme Court.

Barrister Agha Ali Durrani.

Barrister Shahreen Chughtai.

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For the Federation:

Malik Javaid Iqbal Wains, Addl. A.G.

Kashif Zaman and Imran Haider, Representatives of Ministry of Information and Broadcasting, GoP.

Research Assistance by:

Ms. Fareeha Aziz, Co-Founder, Bolo Bhi.

Date of hearing: 24th November, 2022 (Judgment Reserved)

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**The main question of law that requires determination in the present case is: whether Section 27(a) of the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 ("PEMRA Ordinance") is an independent and self-governing provision or whether its applicability requires the opinion of the Council of Complaints in terms of Section 26(2) of the PEMRA Ordinance read with the Pakistan Electronic

Media Regulatory Authority (Councils of Complaints) Rules, 2010 ("Councils of Complaints Rules"). The case also necessitates some elaboration on how the Councils of Complaints are to address complaints and deal with expressions like "obscene", "vulgar" and "offensive to the commonly accepted standards of decency" as used in Section 27(a) of the PEMRA Ordinance, in relation to any programme, including a play or drama and advertisement ("media content"), broadcasted on the electronic media, in the context of our constitutional values and fundamental rights, in particular, the right to freedom of speech and expression and right to information guaranteed by Articles 19 and 19A of the Constitution of the Islamic Republic of Pakistan ("Constitution"). Further, the manner of selection of the members of the Councils of Complaints established under Section 26 of the PEMRA Ordinance, especially the requirement of such members being "citizens of eminence", needs elucidation.

2. Briefly, the relevant facts of the case are that M/s ARY Communications Private Limited ("ARY") broadcasted a drama serial, JALAN, ("drama serial") on its TV Channel, ARY Digital. Some persons from the general public made complaints on the Pakistan Citizen's Portal of the Prime Minister's Performance Delivery Unit, alleging that the story of the drama serial is immoral and against social and cultural values. The said complaints were forwarded to the Chairman, Pakistan Electronic Media Regulatory Authority ("PEMRA") for appropriate action. PEMRA, acting through its delegate i.e. the Chairman, called for the comments of ARY, which were submitted by ARY, refuting the allegations. PEMRA, however, being dissatisfied with the comments, first issued two directives to ARY to amend the script of the drama serial before broadcasting further episodes and then passed an order on 10 September 2020 under Section 27(a) of the PEMRA Ordinance, prohibiting the broadcasting and rebroadcasting of the drama serial. ARY filed an appeal against the said order before the High Court of Sindh under Section 30A of the PEMRA Ordinance, which was allowed on 15 September 2020 and the matter was remanded to PEMRA to decide the same afresh after serving a proper show cause notice to ARY, specifying the objectionable content of the drama serial and providing a sufficient opportunity of hearing.

3. In compliance with the direction of the High Court, PEMRA served two show cause notices to ARY, one of which contained the following assertions:

[The] storyline/theme of the said drama serial does not conform to the religious injunctions enshrined in the Holy Quran and established social/cultural more/values of the country containing highly objectionable content compromising sanctity of relations between brother-in-law and sister-in-law. Further, the storyline and theme of the drama serial seems a lethal attempt to induce the younger segments of the society with an obvious intent to go against the commonly accepted standards of decency and to distort the social fabric by dislodging century old cultural and social norms/mores of the society. Transcript of a few video clips showing intimacy between brother-in-law and sister-in-law is enclosed herewith at (Annex-I) for ready reference.

In one of its replies, ARY took the following stance:

[T]he drama serial "JALAN" does not contain any objectionable content which may hurt the feelings of any viewers or violate any social, moral, religious or cultural norms. It is categorically submitted that there is no vulgarity or obscenity in the said drama serial and it only portrays a story of a social issue and further highlight[s] the adverse consequences of such conduct. The subject drama serial further highlights the issue of "mental illness". It is submitted that the said drama serial does not promote any anti-social behaviour but rather acts as a deterrent as it shows the adverse consequences that people can suffer due to their actions. There are no violations of any regulations or code in the script, dialogues or scenes of the drama, which is the reason why PEMRA has been unable to point out any particular violation(s).

In both of its replies, ARY also raised the objection regarding the jurisdiction of PEMRA to issue the show cause notice without first obtaining the opinion of a Council of Complaints under Section 26 of the PEMRA Ordinance. PEMRA did not take notice of this objection and, without catering to the same, passed a prohibition order under Section 27 of the PEMRA Ordinance on 29 October 2020, prohibiting ARY from airing the drama serial ("prohibition order").

4. ARY then preferred an appeal against this prohibition order before the High Court of Sindh under Section 30A of the PEMRA Ordinance. While allowing the appeal and setting aside the prohibition order by its

judgement dated 11.11.2020 ("impugned judgement"), the High Court held that the legislature has empowered the Councils of Complaints, under Section 26 of the PEMRA Ordinance, to receive and review complaints against any aspects of the programmes and to recommend appropriate action to PEMRA, and that PEMRA could not have bypassed the Councils of Complaints in making the prohibition order. The present petition has been filed by PEMRA for leave to appeal against this judgement of the High Court.

5. We have considered the oral as well as written arguments of the learned counsel for the parties and examined the record of the case.

Regulating two fundamental rights: freedom of expression and right to information.

6. First of all, we think it appropriate to conceptualize the framework of establishing a regulatory authority like PEMRA under the law, i.e. the PEMRA Ordinance. This can best be contextualized in the framework of regulating the fundamental rights to freedom of expression and information guaranteed by Articles 19 and 19A of the Constitution, to begin with the preamble of the PEMRA Ordinance states that it provides for the development of the electronic media to improve the standards of information and enlarge the choice available to the people of Pakistan through media in the current affairs, religious knowledge, art, culture, science, technology, economic development, social sector concerns, music sports, drama and other subjects of public and national interest. Empowering people at the grass root level by improving access of the people to mass media and ensuring accountability, transparency and good governance by optimizing the free flow of information. In essence the purpose of PEMRA is to improve and regulate the standard of information disseminated (media content) through media broadcast to the public. In the constitutional context, the function of PEMRA is to enhance, protect and regulate freedom of speech and expression by regulating media content and the right of information of the public to be able to access and receive such media content through different mediums of communication. Even though implied in the freedom of speech and expression is the freedom to communicate such speech and expression (media content) to the public, our Constitution additionally provides an independent fundamental right to information, in all matters of public importance. Media broadcasts, plays, and dramas are also matters of public importance. They can significantly impact society in various ways. Shaping public opinion: Media broadcasts, plays, and dramas often reflect or challenge societal norms and values. They can influence public opinion by shedding light on important issues, presenting different perspectives, and encouraging critical thinking. Raising awareness: These forms of communication can raise awareness about pressing social, political, or environmental issues, prompting public discourse and encouraging people to take action or make informed decisions. Cultural preservation and promotion: Plays and dramas often showcase a society's history, culture, and traditions, helping to preserve and promote cultural heritage and identity. Entertainment and escapism: Media broadcasts, plays, and dramas provide entertainment and escapism, allowing people to relax, enjoy, and momentarily escape from the stress of everyday life. This can contribute to overall well-being and social cohesion. Education: These mediums can serve as educational tools, introducing audiences to new ideas, historical events, or scientific concepts in an engaging and accessible way. Media broadcast in the shape of plays or dramas collectively play a crucial role in shaping society, influencing public opinion and fostering cultural development. Right to information under Article 19A is therefore not limited to the access to information from public bodies as envisaged under the Right to Access of Information Act, 2017 but also includes media content disseminated to the public as an integral part of "information." So in the public space, the freedom of expression of one becomes the right to information of another. While one has the freedom to express oneself, the other has the right to have access and receive such information. If an individual has the right to express their opinions and ideas, others have the right to hear them and be informed. In this way, the right to receive information can be seen as a way to ensure that the right to freedom of expression is fully realized. Both these fundamental rights complement each other.

7. "Expression" in the context of freedom of expression (Article 19), refers to the act of conveying thoughts, ideas, emotions, beliefs, or opinions through various forms of communication. This can include: (i) spoken or written words like speeches, conversations, books, articles, and social media posts; (ii) artistic works such as painting, drawing, sculpture, music, dance, theater and film can be ways to express thoughts, ideas, or emotions; and (iii) symbolic actions that can take the form of gestures, clothing choices, or other actions that convey

meaning, like protest marches or flag burning. Freedom of expression is a fundamental human right that allows individuals to openly communicate their thoughts and ideas without fear of censorship, discrimination, or punishment. It is essential for the healthy functioning of a democratic society to encourage exchange of ideas, fosters debate and allow for the development of diverse opinions and perspectives.

8. "Information", on the other hand, generally refers to data, facts or knowledge that have been organized, processed, and communicated in various formats to help people understand or make decisions about a particular topic or issue. Information can come from a variety of sources, such as books, articles, websites, social media, databases, speeches, videos, images, or audio recordings. Having "access to information", typically refers to the ability of individuals or groups to find, obtain and use information effectively and efficiently. This helps build a more informed, inclusive, cultured and a tolerant society.

9. PEMRA on the one hand has to ensure that the freedom of expression through media broadcast is enhanced without infringing the reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defense of Pakistan, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court or commission or incitement of an offence under Article 19 of the Constitution. While on the other hand, it also has to ensure that the right to information of the public is enlarged without impinging on the reasonable restrictions imposed by law under Article 19A of the Constitution. These constitutional restrictions are further actualized through the restrictions provided under PEMRA Ordinance and the rules, regulations and the code of conduct developed thereunder. The "reasonable restrictions" flow from Articles 19 and 19A of the Constitution and the statutory restrictions by and under the PEMRA Ordinance are to be interpreted in a forward looking manner in order to persistently advance and promote the constitutional values of tolerance, freedom, equality, democracy and social justice.

10. In order to regulate these two important fundamental rights, the media content[1] broadcasted and received in the public space is regulated under the PEMRA Ordinance[2] through a two-tiered regulatory system. First, through the independent public regulatory bodies called the Councils of Complaints, comprising citizens of eminence selected from the general public. Second, by PEMRA, a Government controlled regulatory body. The primary responsibility of these two bodies is to ensure that the media content is constitution complaint under Articles 19 and 19A and meets the reasonable restrictions under the PEMRA Ordinance, rules, regulations and the code of conduct. The importance of establishing independent Councils of Complaints from amongst citizens of eminence from the general public is to ensure that the media content for the public is also reviewed by representatives of the public, through a public regulatory body by applying commonly accepted or community based standards of decency. As the media content has to be put out in the public space, it is therefore, first and foremost, that an independent public body representing a broad cross-section of society reviews the media content. This helps protect, nuture and enhance the freedom of expression and right to information of the people and shields the media content against government interference and control.

11. The composition of the Councils of Complaints leaves little room to guess why the function of reviewing complaints against any aspects of programmes or advertisements and of rendering an opinion on such complaints has been entrusted by the legislature to them. Each Council of Complaints consists of a chairperson and five members including at least two women, who all are citizens of eminence from the general public. Although the expression "citizens of eminence", which is of wide import, is not defined in the PEMRA Ordinance, it ordinarily refers to persons who are widely recognized and respected for their knowledge and experience in their respective fields, such as media, law, human rights and social service, etc.[3] The term "eminence" suggests a level of distinction, implying that these persons hold a special status or position within the circle of their vocation. Additionally, those of such persons who are considered for assigning a public function, whether paid or honourary, ought to be also known for their integrity. Such consideration must also take into account the objective of ensuring that the Councils of Complaints remain independent and impartial, and are protected against both political and commercial pressure or interference.[4] A Council of Complaints comprising of such persons reflect a broad cross-section of our society in order to represent diverse interests, balance, inclusivity and different perspectives of the public, while ensuring their independence and impartiality, which can best ensure the public interest in reviewing complaints against any aspects of programmes and

advertisements. The members of the Councils therefore hold honourary position for two years and are to perform their function independently and impartially, without any government interference.[5] PEMRA, the government regulatory authority, on the other hand, is a body comprising a Chairman and twelve members who are appointed by the President of Pakistan for tenure of four years on payment of such emoluments as determined by him.[6] The two tiered regulatory system is an effective regulatory mechanism to actualize and advance the fundamental rights to freedom of expression and information.

Scope of Sections 26 and 27 of the PEMRA Ordinance

12. With this conceptual background, we now examine the interpretation of Section 27(a) of the PEMRA Ordinance to see whether it is a self-governing provision, independent of Section 26(2) of the PEMRA Ordinance read with the Councils of Complaints Rules. The relevant provisions are reproduced here for ease of reference:

26. Council of Complaints. (1) The Federal Government shall, by notification in the official Gazette, establish Councils of Complaints at Islamabad, the Provincial capitals and also at such other places as the Federal Government may determine.

(2) Each Council shall receive and review complaints made by persons or organizations from the general public against any aspects of programmes broadcast or distributed by a station established through a licence issued by the Authority and render opinions on such complaints.

(3) Each Council shall consist of a Chairperson and five members being citizens of eminence from the general public at least two of whom shall be women.

(3A) The Councils shall have the powers to summon a licensee against whom a complaint has been made and call for his explanation regarding any matter relating to its operation.

(4) The Authority shall formulate rules for the functions and operation of the Councils within two hundred days of the establishment of the Authority.

(5) The Councils may recommend to the Authority appropriate action of censure, fine against a broadcast or CTV station or licensee for violation of the codes of programme content and advertisements as approved by the Authority as may be prescribed.

27. Prohibition of broadcast media or distribution service operation. The Authority shall by order in writing, giving reasons, prohibit any broadcast media or distribution service operator from:

(a) broadcasting or re-broadcasting or distributing any programme or advertisement if it is of the opinion that such particular programme or advertisement is against the ideology of Pakistan or is likely to create hatred among the people or is prejudicial to the maintenance of law and order or is likely to disturb public peace and tranquility or endangers national security or is pornographic, obscene or vulgar or is offensive to the commonly accepted standards of decency; or

(b) engaging in any practice or act which amounts to abuse of media power by way of harming the legitimate interests of another licensee or willfully causing damage to any other person.

(Emphasis added)

The relevant provisions of Rules 8 and 10 of the Councils of Complaints Rules are also reproduced here for convenience of reference:

Rule 8. Filing of complaint and functions of the Councils:-

..

(4) A Council shall also take cognizance of such matters as referred to it by the Chairman or the Authority and render its opinion thereon.

(5) A Council may recommend to the Authority appropriate action of censure, fine upto the limit prescribed in section 29 of the Ordinance, seizure, suspension or revocation of licence against a broadcast media or distribution service provider or licensee for violation of the Ordinance, rules, regulation, code of conduct for programmes and advertisements or terms and conditions of licence.

(6) A Council shall keep the Authority informed on the feedback and public response to the contents quality and impact of the programmes and advertisements broadcast or distributed.

Rule 10. Procedure upon recommendation by a Council:- The Authority shall take into consideration the recommendations made by a Council in each matter and may approve the recommendations or disagree with the recommendations, while recording the reasons in writing for the same, and pass such order as deemed appropriate, or refer the matter back to the Council for reconsideration if so considered necessary in the opinion of the Authority.

(Emphasis added)

A plain reading of Section 26 of the PEMRA Ordinance read with Rules 8 and 10 of the Councils of Complaints Rules shows that the function of receiving and reviewing "complaints against any aspects of programmes" or "such matters as referred to it by the Chairman or the Authority" [PEMRA] and of rendering opinion on "such complaints" or "such matters" is assigned by the legislature to the Councils of Complaints, each of which consists of a chairperson and five members including at least two women, who all are citizens of eminence from the general public. The "opinion" of a Council of Complaints rendered under section 26(2) of the Ordinance is then placed before PEMRA, which after giving due consideration to the said opinion is to decide the matter in accordance with the parameters spelled out in Section 27(a) of the Ordinance. Likewise, in the case of any "recommendations" made by a Council of Complaints under section 26(5) of the PEMRA Ordinance, PEMRA may approve the recommendations or disagree with the same, while recording reasons in writing for the same, and pass such order as deem appropriate or refer the matter back to the Council concerned for reconsideration, under Rule 10 of the Councils of Complaints Rules.

13. Under Section 26(2) of the PEMRA Ordinance, the Councils of Complaint are empowered to receive and review complaints made by persons or organizations from the general public against "any aspects of programmes" and render their opinions on them. The expression "any aspects of programmes" is wide enough to include the violation of any provision of the PEMRA Ordinance, rules, regulations or code of conduct, in respect of programmes. It can, therefore, be hardly argued that the grounds provided for making an order prohibiting broadcast or rebroadcast of a programme in Section 27(a) of the PEMRA Ordinance do not fall within the expression "any aspects of programmes" used in Section 26(2). It has, however, been argued on behalf of PEMRA that the power of the Councils of Complaints and PEMRA to review the contents of a programme on the grounds mentioned in Section 27(a) is concurrent. We are not convinced with this argument. As discussed above the scope of regulatory framework under the PEMRA Ordinance is two tiered; comprising the public regulatory body (Councils of Complaints) and the governmental regulatory body (PEMRA). Further, if PEMRA had been considered suitable to make the initial review of the contents of programmes on the grounds mentioned in Section 27(a), then there would have been no plausible reason to restrict the power of PEMRA in respect of other grounds. Acceptance of this argument would negate the very justification for establishing the Councils of Complaints, the bodies comprising the members of the public i.e. "citizens of eminence". Alternatively, it has been argued that the power of PEMRA under Section 27(a) is to be exercised by PEMRA suo motu i.e. on its own, while the complaints from the general public are to be dealt with by the Councils of Complaints under Section 26(2). This argument has also not impressed us. In fact, it appears to be anomalous. For, it gives no plausible answer to the question as to how the matter will proceed if PEMRA takes a suo motu initiative of reviewing the contents of a programme and a complaint is also filed before a Council of Complaints for the same purpose; which of the proceedings would be carried on and which stopped, or would both the proceedings continue simultaneously. Such a state of affairs would lead to confusion and thus frustrate the legislative intent and object. Such an interpretation of the statute cannot therefore be encouraged.

14. Further, the apprehension of the learned counsel for PEMRA that if the power of PEMRA to act in such matters suo motu is not conceded, it would frustrate the role of PEMRA as a regulatory body, is also misconceived. There is no bar on PEMRA under the PEMRA Ordinance to take notice, either on its own (suo motu) or on the information received from any source, of the alleged contravention of any provision of the PEMRA Ordinance, rules, regulations or code of conduct in relation to the broadcasting of any programme or advertisement, and then to refer the said matter to a Council of Complaints for reviewing the same and rendering its opinion thereon in terms of Section 26 of the PEMRA Ordinance. It is worth noting that as per Rule 8(4) of the Councils of Complaints Rules, the Councils of Complaints are bound to take cognizance of any matter

referred to them by the Chairman or PEMRA and to render their opinion thereon. Rules validly made to carry out the purposes of a statute are an integral part of that statute.[7] It is, therefore, also necessary to read them in conjunction with the statute to fully understand the operational scheme of any particular provision of the statute.

15. It has also been argued on behalf of PEMRA that the Councils of Complaints have no power under Section 26(5) to recommend an action of prohibiting the broadcast of any programme and can only recommend the action of censure or fine. As such, it has been argued, that Section 27(a) confers an independent power on PEMRA which is not dependent upon obtaining and considering the opinion of a Council of Complaints. We find that this argument has been made without appreciating the difference between the powers of the Councils of Complaints under subsection (2) and subsection (5) of Section 26 of the PEMRA Ordinance. The power of the Councils of Complaints under subsection (2), to receive and review "complaints against any aspects of programmes" and to render "opinion on such complaints", is a power distinct from its power under subsection (5) to recommend action of censure or fine, which is in addition to its power of rendering an opinion on any aspect of the programme complained of. Indeed, a Council of Complaints cannot recommend the action of prohibiting the broadcast or rebroadcast of any programme, and the appropriateness of taking such an action is to be decided by PEMRA by itself, but it can do so only after receiving or obtaining, as the case may be, and considering the opinion of the Council of Complaints concerned on the objectionable aspect of the programme as per Section 26(2) of the PEMRA Ordinance read with the Councils of Complaints Rules.

16. The attention of the Court was also invited to the proviso to Section 30(1)(b) of the PEMRA Ordinance, in support of the contention that the legislature has provided expressly where it intended PEMRA to act after obtaining and considering the opinion of a Council of Complaints, and that the absence of such a provision in Section 27(a) suggests that PEMRA is to act under Section 27(a) independent of any opinion of a Council of Complaints. This contention is based upon a reading of the various provisions of the PEMRA Ordinance in isolation of each other and upon their fragmented interpretation, which approach rarely leads to a correct understanding of the meaning and scope of a particular provision of law. This Court has, therefore, always preferred the approach of holistic interpretation to that of fragmented interpretation while interpreting any provision of the Constitution[8] or a statute[9]. By this approach, the courts seek to ascertain the overall intent and purpose of the law and, by considering how its individual provisions fit within its larger framework, attempt to harmonize their meaning and scope with each other. In making the said contention, it has not been noticed that even in Section 29(6), which empowers PEMRA to impose fine on a licensee who contravenes any of the provisions of the PEMRA Ordinance, or of the rules or regulations made thereunder, no provision like proviso to Section 30(1)(b) is provided for and despite this omission, no one has argued, and perhaps rightly so, that PEMRA can exercise its power to impose fine on a licensee for any such contravention in respect of any aspect of a programme or advertisement, without first obtaining the opinion of the Council of Complaints concerned. For, the provisions of Section 29(6) are to be read with the provisions of Section 26(5) and given effect accordingly.

17. It has also been argued on behalf of PEMRA that the Councils of Complaints have no power to receive and review complaints against any "advertisement" under Section 26(2), while PEMRA has such power under Section 27(a); therefore, the power of PEMRA under Section 27(a) is independent of the provisions of Section 26. It is true that the word "advertisement" is not mentioned in subsection (2) of Section 26 but it is found mentioned in subsection (5) thereof. The omission of this word in subsection (2) of Section 26 appears to be an accidental one, as it does not fit within the overall intent of the legislature manifested from reading the provisions of Section 26 as a whole. Needless to say that the ultimate object of the process of interpretation of a statute is to find out what the legislature must have intended and then to give effect to that intent of the legislature,[10] and in order to give effect to the manifest intent of the legislature, the courts can supply the inadvertent omission of the draftsman by reading the necessary words in the statute.[11] Subsection (5) of Section 26 clearly empowers the Councils of Complaints to make a recommendation to PEMRA for the action of censure or fine against a licensee for violation of the codes not only of programmes content but also of advertisements. The provisions of subsection (5) of Section 26 thus make the intent of the legislature abundantly clear that it intended to confer the power on the Councils of Complaints to receive and review complaints

against any aspects of programmes or advertisements, which shall be so read in subsection (2) of Section 26, in order to give effect to that manifest intent of the legislature.

18. Lastly, the learned counsel for PEMRA contended that it cannot be possible to hold that the power of PEMRA under clause (a) of Section 27 is dependent on obtaining and considering the opinion of a Council of Complaint but its power under clause (b) of the same Section is an independent one. The question whether the power of PEMRA under clause (b) is or is not independent, does not arise in the circumstances of the present case; therefore, we do not consider it appropriate to take up and decide the same in vacuum as an academic question. However, in view of the discussion above, especially with regard to the legislative intent in establishing the Councils of Complaints under Section 26 of the PEMRA Ordinance for making review of "any aspects" of the programmes, we deem it necessary to state that if the power of PEMRA under clause (b) of Section 27 is to be exercised in respect of "any aspects" of a programme or advertisement, then it must be exercised after obtaining and considering the opinion of the Council of Complaint concerned under Section 26(2) of the PEMRA Ordinance.

19. From the above discussion it transpires that to regulate public fundamental rights of expression and information, the PEMRA Ordinance envisages a two tiered regulatory system. The media content has to be first viewed by the Council of Complaints, an independent public regulatory body and after obtaining its opinion, PEMRA, the government regulatory body, is to consider the opinion of the Council of Complaints and finally decide the matter. It is also worth taking note that under Section 13 of the PEMRA Ordinance, PEMRA allows delegation of its powers and functions to its Chairman or a member or to any member of its staff, or to an expert, consultant or adviser[12]. This delegation of the powers and functions of a 13-member authority to a single person also necessitates that the Councils of Complaints, comprising six members of eminence from the general public, must first examine the complaints. Even if suo motu notice is taken by PEMRA or its Chairman, as to "any aspects of programmes", the matter has to be first sent to a Council of Complaints for its opinion and after considering the said opinion, PEMRA or its Chairman, as the case may be, can take the final decision.

Selection and appointment of members of the Councils of Complaints

20. Selecting and appointing members of the public to regulate media content on the Councils of Complaints must, therefore, represent diverse interests and perspectives of the public while ensuring independence and impartiality. The Federal Government must establish: (i) clear criteria for the selection of public representatives, which might include a mix of expertise, professional backgrounds, demographic diversity and geographic representation; (ii) announce the opportunity to serve on the Councils through various channels, such as newspapers, websites, social media and community organizations. This will help attract a diverse pool of applicants; (iii) set up an application process that requires interested individuals to submit their credentials, relevant experience and a statement explaining their motivation for serving on the regulatory body. This information will be used to evaluate the suitability of each applicant; (iv) establish an independent selection committee composed of representatives from different sectors, e.g. media, academia, civil society, to review applications and recommend candidates. The committee should ensure a transparent and impartial selection process; and (v) provide the members, once appointed, with training and orientation on media regulation, ethics and relevant laws. This will help them make informed decisions and effectively contribute to the regulation of media content. The inclusion of public representatives in media regulation, in this manner, can contribute to greater transparency, diversity and public trust in the media ecosystem.

21. Having examined the contentions advanced on behalf of PEMRA and after reading the provisions of Sections 26 and 27 in conjunction with other relevant provisions of the PEMRA Ordinance and the Councils of Complaints Rules made thereunder, we are of the considered opinion that Section 27(a) of the PEMRA Ordinance is not an independent and self-governing provision; it rather requires for its applicability the opinion of a Council of Complaints regarding the objectionable aspect of a programme or advertisement in terms of Section 26(2) of the PEMRA Ordinance read with the Councils of Complaints Rules. The question is answered accordingly.

22. In view of the above answer to the question, we find that the High Court is correct in holding that PEMRA could not have bypassed the Councils of Complaints in making the prohibition order and has rightly set aside

the prohibition order. However, the High Court should have also specified that the matter of making a review of the objectionable aspect of the drama serial was to be referred by PEMRA to the Council of Complaint concerned, and after receiving and considering the opinion of that Council, PEMRA could make an appropriate order. With the said clarification, we find nothing wrong in the impugned judgement. Therefore, we dismiss the petition and decline the leave to appeal.

Regulating content: what is "obscene", "vulgar" and "offensive to the commonly accepted standards of decency"

23. It is important to understand on what standards the members of the Councils of Complaints will assess the media content. Every statute is in the public interest and must always align and flow with the text and spirit of the Constitution. Therefore, the constitutional values, fundamental rights and the principles of policy laid down under the Constitution enjoy a symbiotic relationship with any statutory framework including the one regulating media content i.e. Sections 20(c) and 27(a) of the PEMRA Ordinance, the PEMRA Rules 2009, the PEMRA (Content) Regulations 2012 and the Electronic Media Code of Conduct-2015. This statutory framework has to be read subject to the Constitution.

24. We wish to underline that the members of the Councils of Complaints while applying the constitutional and statutory standards must always view the media content through the lens of the constitutional value of tolerance. "Tolerance" is an essential preambular constitutional value that assumes more significance in the context of freedom of expression and right to information. It is a multifaceted concept and at its core, tolerance refers to the ability or willingness to accept and respect differences in opinions, beliefs, customs and practices among individuals or groups. This can include differences in race, religion, culture, gender, sexual orientation, political ideology and other aspects of human diversity. Tolerance promotes understanding, harmony and coexistence among people with diverse backgrounds, fostering open-mindedness and empathy. In a broader sense, it is an essential aspect of democratic societies, as it supports freedom of expression and the exchange of ideas, ultimately contributing to social cohesion and stability. It is important to note that tolerance does not necessarily imply agreement with or endorsement of the opinions or beliefs of others; rather, it is about respecting their right to hold those beliefs and coexist peacefully. The standard of tolerance in a society can be influenced by several factors. Societies with a tradition of valuing diversity and inclusivity tend to have higher levels of tolerance. In these societies, people are more likely to be accepting of differences and supportive of equal rights for all members of society. Societies that emphasize education and promote awareness of diverse cultures, religions and ways of life, tend to foster tolerance among their citizens. By understanding different perspectives and experiences, people are better equipped to appreciate and respect the diversity within their society. In some societies, tolerance is enshrined in the legal framework through anti-discrimination laws, human rights protections and equal opportunity policies. These measures help to create an environment in which tolerance is promoted and intolerance is discouraged. The standard of tolerance in a society is not static; it can change over time as a result of shifting cultural values, political climates and other factors. It is essential for the Councils of Complaints to promote tolerance and inclusivity, as this is crucial for fostering peace, understanding and social cohesion in an increasingly diverse and interconnected world.

25. It is also important to underline that freedom of expression is an effective and a powerful fundamental rights as it gives voice to other freedoms and rights i.e. freedom of thought, right to life, liberty and dignity. Freedom of expression helps actualize other fundamental rights, hence its prominence and importance is easily distinguished in the cluster of fundamental rights. However, while freedom of expression is a fundamental human right, it is not absolute and can be subject to certain limitations. These limitations are usually put in place to balance the rights of individuals with the broader interests of society, public order, and national security. Some common limitations on freedom of expression include: (i) laws against defamation (libel and slander), which are in place to protect individuals' reputations from false and damaging statements; (ii) laws against hate speech, which is a speech that incites violence, discrimination or hostility towards a particular individual or group based on attributes such as race, religion, ethnicity, gender or sexual orientation. Such laws aim to protect targeted groups from harm and promote social harmony; (iii) laws against obscenity and pornography to protect public morality and decency; (iv) laws to protect national security, public order or public safety. In times of emergency or crisis, governments may impose temporary limitations on freedom of expression to maintain

public order, protect national security or prevent the spread of misinformation; and (v) laws to protect personal privacy. Such laws may restrict the disclosure of certain information, such as medical records or personal correspondence, to protect individuals' right to privacy. It is important to note that these limitations should be necessary, proportionate and clearly defined by law to avoid abuse or infringement on fundamental freedoms. In democratic societies, the courts often play a crucial role in interpreting and determining the appropriate balance between freedom of expression and these limitations.

26. The fundamental point that needs to be noted in this regard is that the exhibition of any kind of works of art and literature, which includes plays and dramas broadcasted on electronic media, is a part of the fundamental right to freedom of expression guaranteed by Article 19 of the Constitution[13] and right to information guaranteed under Article 19A of the Constitution. Freedom of expression and right to information are complementary fundamental rights and constitute essential foundations of a democratic society. It is applicable not only to information or ideas that are favourably received but also to those which offend, shock or disturb the State or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society.[14] Freedom of expression is so fundamental a human right that one can have no other right unless one has this right and can ask for his rights.[15] Freedom of expression thus begets all other freedoms, and the right to freedom of expression guarantees all other rights. It is because of the paramount importance of this right that it has been included in the Universal Declaration of Human Rights (UDHR)[16] and the International Covenant on Civil and Political Rights (ICCPR)[17].

27. Crucial though freedom of expression and right to information are to an open and democratic society, these rights are not absolute. Some reasonable restrictions can be imposed on these right by law in the interest of any of the objectives mentioned in Articles 19 and 19A of the Constitution.[18] However, such restrictions must be "reasonable"[19] and any ambiguity as to the reasonableness of a restriction must be resolved in favour of protecting the exercise of the fundamental right rather than enforcing the restriction.[20] To ensure that they are not unnecessarily used to suppress the right, the clawback provisions of a law containing the restrictions on the right should be interpreted strictly and narrowly.[21] The courts are to be conscious that in a fledgling democracy like ours, there is all the more need to jealously guard the right to freedom of expression and right to information. Given the pivotal importance of these fundamental rights in a democratic society, it is not enough for the State and its instrumentalities (including PEMRA) simply to claim that the restriction relates to a legitimate objective. The reasonable restrictions must also be proportionate in that the legitimate objective cannot reasonably be achieved through a means less restrictive of the right protected by the Constitution. The reasonable restrictions should therefore not only be rationally connected to, but also be no more than necessary to accomplish, any of the legitimate objectives mentioned in Articles 19 and 19A of the Constitution.[22]

28. The restriction imposed by law, i.e. the PEMRA Ordinance, on the right to freedom of expression in relation to any programme including a play or drama, or any advertisement, broadcasted on the electronic media, on the ground of it being "obscene", "vulgar" or "offensive to the commonly accepted standards of decency", is defended to achieve the legitimate objectives of securing the interest of "public decency" and "public morality" as mentioned in Article 19 of the Constitution. This restriction, however, should not be more than necessary in its scope and applicability, to accomplish the said objectives. Additionally, while it is accepted that what constitutes appropriate limitation on freedom of expression to protect morals does vary from society to society, it must be kept in mind that the concept of decency and morality is derived from many social, philosophical and religious traditions; therefore, the limitations for the purpose of protecting public decency and public morality must be based on principles not deriving exclusively from a single tradition,[23] and any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.[24]

29. The expressions "obscene", "vulgar" and "offensive to the commonly accepted standards of decency" as used in Section 27(a) of the PEMRA Ordinance, are actually interconnected. Only that form of an expression can be said to be "obscene" or "vulgar" which is "offensive to the commonly accepted standards of decency". Thus, the "commonly accepted standards of decency" in the community is the benchmark to determine whether or not a particular form of the expression of one's thought, idea or opinion in a play or drama is "obscene" or "vulgar". The important thing to understand is that the commonly accepted standard of decency in a community

is a "standard of tolerance, not taste".[25] It is not what the people generally think is right for them to see but what they would not tolerate others being exposed to it on the basis of the degree of harm to "public decency" or "public morality" that may flow from such exposure. Further, the expression "commonly accepted standards of decency" must be understood to be the contemporary standards as the social mores and sensibilities change over time.

30. A work of art and literature, which includes a play or drama broadcasted on the electronic media, is usually considered a strong and effective medium to break the silence on social taboos; therefore, it is not to be labelled as "obscene" or "vulgar" readily without appraising the message it intends to convey.[26] In this perspective, one would need to see whether that message tends to promote or glorify the conduct or behavior which is offensive to the commonly accepted standards of decency, or it tends to condemn or deprecate such conduct or behavior. Such a review is to be undertaken on an objective assessment of the play or drama as a whole, not on the basis of pick and choose of its parts from here and there. If the ultimate message of the play or drama under review passes the test of being not offensive to the commonly accepted standards of decency, the review of a particular part thereof which depiction is necessary to convey the message effectively must be lenient and tolerant. However, where the obscenity of such part is too pronounced to eschew, only the objectionable part should be prohibited from being broadcasted and directed to be suitably modified, and the broadcast or rebroadcast of the complete play or drama must not be prohibited. In view of the applicability of the principle of proportionality to restrictions on the rights guaranteed by the Constitution as expounded above, such an approach is necessary to protect the exercise of the fundamental right to freedom of expression and right to information to the maximum extent possible and to enforce the restrictions on the exercise of these rights to the minimum.

MWA/P-9/SC Petition dismissed

**P L D 2023 Supreme Court 461**

**Present: Syed Mansoor Ali Shah and Jamal Khan Mandokhail, JJ**

**MUHAMMAD NAWAZ---Petitioner**

**Versus**

**ADDITIONAL DISTRICT AND SESSIONS JUDGE and others---Respondents**

Civil Petition No.2414-L of 2015, decided on 5th April, 2023.

(Against the judgment of the Lahore High Court, Lahore dated 02.09.2015, passed in Writ Petition No.6669 of 2011).

**(a) Constitution of Pakistan---**

----Arts. 9 & 14---Parentage, determination of---Deoxyribonucleic acid test ('DNA test')---DNA test cannot be conducted without consent of the party in civil cases---Conducting of the DNA test of a person, without his consent, infringes his fundamental rights to liberty and privacy guaranteed by Articles 9 and 14 of the Constitution---Unauthorized collection of someone's DNA can be considered a violation of their privacy, autonomy and freedom---In a civil case, if the person upon whom the onus to prove his genetic relationship with another person lies, does not give consent for his DNA test, and thus withholds such evidence, the court may draw an adverse presumption against the claim of such person and presume that such evidence, if produced, would be unfavourable to him, as per Article 129(g) of the Qanun-e-Shahadat, 1984---However such presumption was permissive but not obligatory.

In the present case the revisional court ordered the DNA test of two persons who are not privy to the proceedings of the suit either as a party or witness; who were not heard in the matter; and no law was referred under which such an order could have been made, without their consent. The High Court has maintained the order through the impugned judgement, again without providing any opportunity of hearing to them and without pointing out and relying upon any law under which the DNA test of a person can be ordered, without his consent, in a civil case. Conducting of the DNA test of a person, without his consent, infringes his fundamental rights to liberty and privacy guaranteed by Articles 9 and 14 of the Constitution.

Salman Akram Raja v. Government of Punjab 2013 SCMR 203 and Laila Qayyum v. Fawad Qayum PLD 2019 SC 449 ref.

The unauthorized collection of someone's DNA can be considered a violation of their privacy, autonomy and freedom because it involves the collection of sensitive personal information without their knowledge or consent. This intrusion can lead to potential misuse or unauthorized disclosure of the individual's genetic information, which may have significant implications for their personal and professional lives.

DNA testing has raised significant concerns regarding the right to liberty and privacy. As DNA contains a wealth of personal information about an individual, such as their genetic predispositions, familial relationships, and ethnicity, its collection, storage, and use have implications for privacy rights. DNA testing is sometimes used to establish paternity or other family relationships. While this can provide important information for legal and personal reasons, it can also raise privacy concerns when individuals are tested without their knowledge or consent.

Bodily autonomy is protected by both the fundamental rights; right to liberty and right to privacy. Individuals have the right to control their own bodies, make decisions about their healthcare, and refuse unwanted medical interventions. Unauthorized DNA collection could be seen as violating this principle, as it involves taking a sample of an individual's biological material without their permission.

DNA test can be ordered only either with the consent of the persons concerned or without their consent if permissible under a law. Certain provisions of criminal law do permit the DNA test of an accused person without his consent, but no civil law allows this test in civil cases without the consent of the person concerned.

In a civil case, if the person upon whom the onus to prove his genetic relationship with another person lies, does not give consent for his DNA test, and thus withholds such evidence, the court may draw an adverse presumption against the claim of such person and presume that such evidence, if produced, would be unfavourable to him, as per Article 129(g) of the Qanun-e-Shahadat, 1984. But the court cannot draw such an adverse presumption if a person, who is not a party to the proceedings before it, does not give his consent and

present himself for his DNA test. Further, the presumption under Article 129(g) of the Qanun-e-Shahadat, 1984 being permissive, not obligatory, in nature, the court may or may not draw such presumption in the peculiar facts and circumstances of a case.

Muhammad Ramzan v. State PLD 2007 Kar. 1 ref.

In the present case, neither the petitioner nor the two persons alleged to be his real parents, have given consent for their DNA test. The petitioner preferred to prove his relationship with the deceased on the basis of other evidence produced by him. And while dismissing the application of the respondents for the DNA test of the petitioner, the trial court has observed that "the matter can easily be ascertained with the evidence available on record". The revisional court was thus not legally justified to order the DNA test of the petitioner as well as of the two persons alleged to be his real parents, without their consent. Petition for leave to appeal was converted into appeal and allowed, order of the revisional court was declared to have been made without lawful authority and was of no legal effect, and consequentially the order of the trial court was restored.

**(b) Constitution of Pakistan---**

----Art. 14---Right to privacy---Scope---Privacy, which is the ultimate expression of the sanctity of a person, represents the core of the human personality---Said right recognises the ability of each person to make choices and to take decisions on matters intimate and personal to him, and thus protects for him a zone of choice and self-determination.

The right to privacy involves the protection of individuals from unwarranted intrusion into their personal lives. It safeguards an individual's personal information, communications, family life, and other aspects of their private sphere from unjustified interference by the government, organizations, or other individuals. Privacy is crucial for maintaining personal autonomy, as it allows individuals to make choices and engage in activities without fear of surveillance, judgment, or unauthorized disclosure of their personal information. Though the right to privacy is an integral part of the right to life and liberty, it has been elevated to a separate and independent fundamental right by Article 14 of our Constitution. Privacy, which is the ultimate expression of the sanctity of a person, represents the core of the human personality. It recognises the ability of each person to make choices and to take decisions on matters intimate and personal to him, and thus protects for him a zone of choice and self-determination. The expression, "privacy of home", used in Article 14 is not restricted to the physical house of a person but covers the entire treasure of his personal life, as the privacy attaches to the person, not to the place where it is associated.

Justice Qazi Faez Isa v. President of Pakistan PLD 2021

SC 1 and Benazir Bhutto v. President of Pakistan PLD 1998 SC 388

ref.

Mian Abdul Quddus, Advocate Supreme Court for Petitioner.

Malik Mushtaq Ahmad, Advocate Supreme Court for Respondents.

Date of hearing: 5th April, 2023.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**The petitioner seeks leave to appeal against an order of the Lahore High Court, dated 02.09.2015, ("impugned order") whereby the High Court has dismissed his writ petition filed against an order of the revisional court, dated 02.06.2010. By the said order, the revisional court had reversed the order of the trial court, dated 03.02.2010, and allowed the application of the respondents for DNA test of one Taj Din and his wife Zubaida Bibi as well as of the petitioner to determine the parentage of the petitioner.

2. Briefly, the facts necessary to state for the decision of the present petition are that the respondents asserting themselves to be the legal heirs of the deceased Muhammad Hussain, being his nephews, instituted a suit to challenge a gift mutation, purportedly got sanctioned by Muhammad Hussain in favour of the petitioner, wherein the petitioner was mentioned as the son of Muhammad Hussain. The respondents asserted in the plaint that their uncle, Muhammad Hussain, died issueless and the petitioner was not his son, and that the petitioner had got sanctioned the gift mutation fraudulently.

3. The trial court framed issues for trial and recorded the evidence of both parties. After the close of the petitioner's evidence, the respondents made an application alleging therein that the petitioner was the son of one

Taj Din and his wife Zubaida Bibi, and prayed for the DNA test of the petitioner and of the said Taj Din and Zubaida Bibi, to rebut the evidence produced by the petitioner regarding his parentage. The trial court dismissed the said application by its order dated 03.02.2010 with the observation that "the matter can easily be ascertained with the evidence available on record". But the revisional court, on a revision petition of the respondents, allowed the said application by its order dated 02.06.2010, holding that the parentage of the petitioner "can be determined through DNA test of Muhammad Nawaz [petitioner], Taj Din as well as Zahida Begum". The petitioner challenged the order of the revisional court in the High Court by filing a writ petition, which was dismissed by the impugned order. Hence, he has filed the present petition for leave to appeal.

4. We have heard the learned counsel for the parties, read the case law[1] cited by them and examined the record of the case.

5. At the very outset, it is astonishing that the revisional court ordered the DNA test of two persons, namely, Taj Din and his wife Zubaida Bibi, who are not privy to the proceedings of the suit either as a party or witness; who were not heard in the matter; and no law was referred under which such an order could have been made, without their consent. The High Court has maintained the order through the impugned judgement, again without providing any opportunity of hearing to them and without pointing out and relying upon any law under which the DNA test of a person can be ordered, without his consent, in a civil case. We find that both the revisional court and the High Court have failed to consider that the conducting of the DNA test of a person, without his consent, infringes his fundamental rights to liberty and privacy guaranteed by Articles 9 and 14 of the Constitution of the Islamic Republic of Pakistan ("Constitution").[2]

6. The right to privacy involves the protection of individuals from unwarranted intrusion into their personal lives. It safeguards an individual's personal information, communications, family life, and other aspects of their private sphere from unjustified interference by the government, organizations, or other individuals. Privacy is crucial for maintaining personal autonomy, as it allows individuals to make choices and engage in activities without fear of surveillance, judgment, or unauthorized disclosure of their personal information. Though the right to privacy is an integral part of the right to life and liberty[3], it has been elevated to a separate and independent fundamental right by Article 14 of our Constitution. Privacy, which is the ultimate expression of the sanctity of a person, represents the core of the human personality. It recognises the ability of each person to make choices and to take decisions on matters intimate and personal to him, and thus protects for him a zone of choice and self-determination. We may also underline that the expression, "privacy of home", used in Article 14 is not restricted to the physical house of a person but covers the entire treasure of his personal life, as the privacy attaches to the person, not to the place where it is associated.[4]

7. The unauthorized collection of someone's DNA can be considered a violation of their privacy, autonomy and freedom because it involves the collection of sensitive personal information without their knowledge or consent. This intrusion can lead to potential misuse or unauthorized disclosure of the individual's genetic information, which may have significant implications for their personal and professional lives.

8. The right to liberty guaranteed by Article 9 of the Constitution does not mean merely freedom from physical constraint but assures freedom to do what a person wants to or does not want to, unless a law enacted by the legislature in public interest provides for otherwise. The right to liberty thus includes freedom from all arbitrary or purposeless encroachments and restraints sought to be made by the State or its instrumentalities, on individual autonomy. The right to liberty is a fundamental human right that protects the freedom of individuals to live their lives without unreasonable or unjust restrictions from governments or other authorities. It is a core principle of democratic societies and is enshrined in various international human rights instruments, such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). The right to liberty also protects individuals' privacy, including their personal information, communications, and family life, from unjustified intrusion or surveillance.

9. DNA testing has raised significant concerns regarding the right to liberty and privacy. As DNA contains a wealth of personal information about an individual, such as their genetic predispositions, familial relationships, and ethnicity, its collection, storage, and use have implications for privacy rights. DNA testing is sometimes used to establish paternity or other family relationships. While this can provide important information for legal

and personal reasons, it can also raise privacy concerns when individuals are tested without their knowledge or consent.

10. Bodily autonomy is protected by both the fundamental rights; right to liberty and right to privacy. Individuals have the right to control their own bodies, make decisions about their healthcare, and refuse unwanted medical interventions. Unauthorized DNA collection could be seen as violating this principle, as it involves taking a sample of an individual's biological material without their permission.

11. These fundamental rights, are subject to law and can only be interfered with if so regulated by law made by the legislature. Further, as per the constitutional command of Article 4 of the Constitution, no action detrimental to the liberty, body or reputation of a person can be taken except in accordance with the law, nor can a person be compelled to do that which the law does not require him to do. This being the constitutional mandate, any executive or judicial act taken in respect of the rights to liberty, privacy, body or reputation of a person must be backed by some law. A court order for the DNA test of two persons as a means of identifying their genetic relationships interferes with their right to privacy and liberty. This test can be ordered only either with the consent of the persons concerned or without their consent if permissible under a law. We are aware of certain provisions of criminal law[5] which permit the DNA test of an accused person without his consent, but no civil law has been brought to our notice which allows this test in civil cases without the consent of the person concerned.

12. It may be pertinent to mention here that in a civil case, if the person upon whom the onus to prove his genetic relationship with another person lies, does not give consent for his DNA test, and thus withholds such evidence, the court may draw an adverse presumption against the claim of such person and presume that such evidence, if produced, would be unfavourable to him, as per Article 129(g) of the Qanun-e-Shahadat 1984. But the court cannot draw such an adverse presumption if a person, who is not a party to the proceedings before it, does not give his consent and present himself for his DNA test. Further, the presumption under Article 129(g) of the Qanun-e-Shahadat 1984 being permissive, not obligatory, in nature, the court may or may not draw such presumption in the peculiar facts and circumstances of a case.[6] In this regard, we may observe that the court should ordinarily draw and act upon such presumption only where the evidence produced by both parties is so evenly balanced that it cannot come to a conclusion on the basis thereof or where the party upon whom the onus lies has not produced any evidence. But where the evidence on record is sufficient to decide the matter either way on the standard of preponderance of probability applicable in civil cases, the court should generally prefer to decide the matter on the basis of that evidence rather than merely relying on presumption. It must also be remembered that civil proceedings are primarily adversarial and in such proceedings, it is for the party concerned to prove his assertion by adducing sufficient evidence of his choice. The court should not compel a party in a civil case to prove his assertion in the manner suggested by his opponent.[7]

13. In the present case, neither the petitioner nor the said Taj Din and his wife Zubaida Bibi have given consent for their DNA test. The petitioner has preferred to prove his relationship with the deceased Muhammad Hussain on the basis of other evidence produced by him. And while dismissing the application of the respondents for the DNA test of the petitioner, the trial court has observed that "the matter can easily be ascertained with the evidence available on record". The revisional court was thus not legally justified to order the DNA test of the petitioner as well as of the said Taj Din and his wife Zubaida Bibi, without their consent.

14. It is also important to note that Article 128 of the Qanun-e-Shahadat, 1984 declares that the fact that any person was born during the continuance of a valid marriage between his mother and any man shall be conclusive proof that he is the legitimate child of that man, unless the husband had refused, or refuses, to own the child. In the present case, the deceased Muhammad Hussain is not alleged to have refused to own the petitioner as his son during his lifetime. Therefore, if the petitioner proves that the deceased Muhammad Hussain's wife, Rashidaan Bibi, was his mother and he was born during the continuance of a valid marriage between his mother and the deceased Muhammad Hussain, this fact shall conclusively prove that he is the son of the deceased Muhammad Hussain and no evidence, including the evidence of DNA test, can be accepted to negate the statutory declaration made by Article 128 of the Qanun-e-Shahadat, 1984. Further, it is worth noting that the mutation under challenge is not that of the inheritance of the deceased Muhammad Hussain but rather of a gift

allegedly made by the deceased Muhammad Hussain in favour of the petitioner. And as a valid gift can be made by a person of his property in favour of any person, whether the donee is his legal heir or not, the main issue in the present case is whether or not the deceased Muhammad Hussain made a valid gift in favour of the petitioner. The issue, whether the petitioner is the real or adopted son of the deceased Muhammad Hussain, would assume importance only when the petitioner fails to prove the validity of the challenged gift.

15. Given the legal position stated above as to the DNA test of a person in civil cases and the fact that neither the petitioner nor the said Taj Din and his wife Zubaida Bibi had given consent for their DNA test, we find that there was no jurisdictional error in the order passed by the trial court, which could have justified interference therewith by the revisional court under Section 115 of the Code of Civil Procedure 1908. The revisional court had, in reversing the order of the trial court, acted without lawful authority and its order was thus of no legal effect. The High Court, therefore, should have exercised its constitutional jurisdiction under Article 199 of the Constitution to so declare the order of the revisional court. But by dismissing the writ petition of the petitioner and maintaining the order of the revisional court, the High Court has committed a legal error, which requires correction by this Court. The present petition is therefore converted into an appeal and the same is allowed. The impugned judgment is set aside and the writ petition of the petitioner is accepted. The order of the revisional court is declared to have been made without lawful authority and is of no legal effect, and consequentially the order of the trial court is restored.

MWA/M-17/SC Appeal allowed.

**P L D 2023 Supreme Court 482**

**Present: Syed Mansoor Ali Shah and Syed Hasan Azhar Rizvi, JJ**

**Messrs PAK SUZUKI MOTORS COMPANY LIMITED through Manager ---Appellant**

**Versus**

**FAISAL JAMEEL BUTT and another---Respondents**

Civil Appeal No. 797 of 2017, decided on 23rd May, 2023.

(Against the judgment dated 20.02.2017, passed by the Lahore High Court, Lahore in F.A.O. No. 115 of 2014).

**(a) Punjab Consumer Protection Act (II of 2005)---**

----Ss. 5, 6, 7 & 8---Defective motor vehicle---Claim filed against manufacturer of vehicle before the Consumer Court---Alleged defects not mentioned in the pleadings---Effect---Claim filed by respondent/claimant did not make any specific mention of the alleged defects in the vehicle---Even the legal notices sent by respondent made no mention of any specific defects, and it was only in his affidavit, submitted as his examination-in-chief, that he mentioned the defects---Litigant was required to plead all material facts that were necessary to seek the relief claimed and then to prove the same through evidence---Parties were required to lead evidence in consonance with their pleadings and no evidence could be led or looked into in support of a fact or a plea that had not been taken in the pleadings---Notably, respondent also admitted in his cross-examination that he had not described the specific defects in the vehicle in his pleadings/claim---Therefore, the defects alleged in the affidavit of respondent were beyond the scope of the pleadings and, hence, could not have been considered---Appeal was allowed and claim filed by respondent was dismissed.

Muhammad Ghaffar v. Arif Muhammad 2023 SCMR 344; Saddaruddin v. Sultan 2021 SCMR 642; Moiz Abbas v. Latifa 2019 SCMR 74 and Muhammad Tariq v. Shamsa PLD 2011 SC 151 ref.

**(b) Punjab Consumer Protection Act (II of 2005)---**

----S. 30(1)(c)---Defective motor vehicle---Claim filed against manufacturer of vehicle before the Consumer Court---Expert evidence---Where the defects alleged are of such a nature that required expert inspection or probe, the onus to provide such expert evidence falls on the consumer who is alleging that the product is defective or faulty---Where such defects are alleged by the consumer, a Consumer Court, before deciding that a certain product is defective or faulty, must satisfy itself that sufficient expert evidence is available and could be relied upon to ascertain the defects so alleged instead of merely placing reliance on the statement of a consumer who may not be from the related field of expertise and therefore, not competent to address the technicalities forming part of the alleged defects, especially where the claim of the consumer is denied by the manufacturer---To this effect, Section 30(1)(c) of the Punjab Consumer Protection Act, 2005 allows the Consumer Court to invite expert evidence, if required, where the claim alleges that the products are defective and do not conform to the accepted industry standards.

In the present case despite alleging technical manufacturing defects in the vehicle, no expert evidence was led by respondent/claimant or invited by the Consumer Court under Section 30(1)(c) of the Punjab Consumer Protection Act, 2005('the Act') to prove that the said defects alleged by respondent actually existed. Instead, the Court relied only on the evidence of respondent, who was not an expert in the automotive industry, and firstly deposed in his cross-examination that the alleged defects were based on his general observations regarding the vehicle and then stated that there were no manufacturing defects in the vehicle. It is apparent that at least two of the defects alleged by the claimant, i.e. with regards to the hatch box and the colour of the stereo, were of such nature that could not have been ascertained without expert inspection. Where the defects alleged are of such a nature that required expert inspection or probe, the onus to provide such expert evidence falls on the consumer who is alleging that the product is defective or faulty. Where such defects are alleged by the consumer, a Consumer Court, before deciding that a certain product is defective or faulty, must satisfy itself that sufficient expert evidence is available and could be relied upon to ascertain the defects so alleged instead of merely placing reliance on the statement of a consumer who may not be from the related field of expertise and therefore, not competent to address the technicalities forming part of the alleged defects, especially where

the claim of the consumer is denied by the manufacturer. To this effect, Section 30(1)(c) of the Act allows the Consumer Court to invite expert evidence, if required, where the claim alleges that the products are defective and do not conform to the accepted industry standards. Additionally, Section 30(1)(d) of the Act provides that where the dispute cannot be determined without proper analysis or test of the products, the Consumer Court shall obtain a sample of the products from the claimant and refer the same to a laboratory to make analysis or test with a view to find out if such products suffer from any defect, which may be paid for by the claimant, or if the test or analysis supports the version of the claimant, then to be paid by the defendant, as stipulated under Section 30(1)(e) of the Act. In the present case, the onus to prove the alleged defects was on respondent, which he failed to do. No expert evidence was produced by respondent or invited by the Consumer Court to ascertain whether the alleged defects existed in the vehicle. Therefore, respondent failed to prove that the vehicle was defective in construction or composition as required under Section 5 or that it was otherwise defective for the purposes of any other provision of the Act. Appeal was allowed and claim filed by respondent was dismissed.

Plum Qingqi v. Muhammad Moeed 2015 CLC 1538; Muhammad Aslam v. General Manager Pioneer Pakistan Seed Limited 2014 CLD 257 and Dawlance v. Muhammad Jameel 2012 CLD 1461 ref.

**(c) Qanun-e-Shahadat (10 of 1984)---**

----Art. 30---Admission---Admission of a co-defendant is not binding on the other defendant.

Farzand Ali v. Khuda Bakhsh PLD 2015 SC 187 and Shah Muhammad v. Dullah 2000 SCMR 1588 ref.

**(d) Punjab Consumer Protection Act (II of 2005)---**

----S. 28(4)---Settlement of claims---Limitation period, commencement of---Defective motor vehicle---Claim filed against manufacturer of vehicle before the Consumer Court --Limitation period of 30 days provided under Section 28(4) of the Punjab Consumer Protection Act, 2005 runs from date of knowledge of the defect or fault in the product or service---During this time, the consumer has to first send a written notice to the manufacturer or service provider under Section 28(1) of the Act and provide 15 days to respond to the same, as required under Section 28(2) of the Act.

Even though no limitation period is provided for sending a written notice under Section 28(1) of the Punjab Consumer Protection Act, 2005 ('the Act') it is apparent that Section 28(4) of the Act in unequivocal terms stipulates and clarifies that a claim with regards to a defective or faulty product or service, or contravention of the provisions of the Act by the manufacturer or service provider, has to be filed within 30 days of the arising of the cause of action. The cause of action, in such circumstances where a product or service is faulty, therefore, arises the moment the consumer obtains knowledge that the product or service is defective or faulty.

The limitation period in consumer protection claims, involving defective products, becomes more significant especially because claimants should bring a claim as quickly as possible due to the potential depreciation of the product in question, the characteristics of which may differ according to the specific product. Delaying the filing of a claim can lead to challenges in establishing the product's condition at the time of purchase and linking any defects to the consumer's use or handling. As time passes, the product may deteriorate, be repaired or modified, or become unavailable, making it more difficult to prove the defects or assess its original condition. Bringing a claim promptly helps ensure that the product's condition and any defects can be accurately evaluated and documented. This can also contribute to a stronger case by providing evidence that directly supports the consumer's claim. Additionally, timely action demonstrates the consumer's diligence and commitment to addressing the issue.

When the consumer obtains knowledge of the defect or fault in the product or the service, the 30-day limitation period stipulated under Section 28(4) of the Act commences. It is during this period that the consumer has to first put his grievance before the manufacturer or service provider, seeking rectification of the defect or fault in the product or service, or damages, and provide 15 days to the manufacturer or service provider to remedy the same, as required under Section 28(2). It is only after the manufacturer or the service provider responds to the written notice, or where he fails to respond within the stipulated 15-day period, that the consumer can file a claim before the Consumer Court if the cause of action still subsists. The consumer can stillfile a claim before the Consumer Court by giving sufficient cause for filing the claim beyond 30 days which will be examined by the Consumer Court, as per the provisos to Section 28(4) of the Act.

**(e) Limitation---**

----Limitation is not a mere technicality, and where the limitation period has expired, a right accrues in favour of the other side which cannot be lightly brushed aside.

Muhammad Anwar v. Essa PLD 2022 SC 716 and Asad Ali v. The Bank of Punjab PLD 2020 SC 736 ref.

Khalid Ishaq, Advocate Supreme Court for Appellant.

Muhammad Ayyub Aheer, Advocate along with Faisal Jameel Butt/claimant in person for Respondent No.1.

Respondent No. 2 in person (via video link from Lahore).

Assisted by Muhammad Hassan Ali, Law Clerk, Supreme Court.

Date of hearing: 23rd May, 2023.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**Brief facts of the case are that respondent No. 1 purchased a motor vehicle, a Suzuki Swift (model 2010), from the appellant, through respondent No.2 who is a car dealer, for Rs. 1,049,000/-. The said vehicle was delivered to respondent No.1 on 15.05.2010. However, on discovering certain defects in the vehicle, respondent No. 1 issued legal notices to the appellant and respondent No.2 on 10.08.2010 and thereafter filed a claim under Section 25 of the Punjab Consumer Protection Act, 2005 ("Act") before the District Consumer Protection Court, Lahore ("Consumer Court") on 22.09.2010. The claim was allowed on 19.02.2014 to the effect that respondent No.1 was granted refund of the price of the vehicle in the sum of Rs. 1,049,000/- along with compensation/ litigation costs of Rs.50,000/-, to be paid by the appellant within 30 days, failing which an additional penalty of Rs. 1,000/- per day was imposed till the realization of the said amount. The appellant filed an appeal under Section 33 of the Act before the High Court, which was subsequently dismissed through the impugned judgment dated 20.02.2017. Leave to appeal was granted by this Court vide order dated 25.05.2017.

2. While arguing the matter, the learned counsel for the appellant submits that the sole evidence placed on the record by respondent No.1/claimant was his own statement/ affidavit. He submits that it is for the first time that in the said affidavit, the three defects i.e. one relating to the hatch box not being properly fitted, second relating to the repainting of the colour of the stereo installed in the car and the third pertaining to the alignment of vehicle while driving, were identified by the claimant, which were earlier missing in the claim/ pleadings. He further submits that in his cross-examination, the claimant has stated that the defects were based on his general observations and he has also admitted that there is no manufacturing defect in the vehicle. He also submits that the evidence produced by the appellant was through its Assistant Manager Sales, namely Imran Hassan (RW-2), and there is no admission on the part of said representative of the appellant regarding the defects alleged by the claimant. As far as the statement of RW-1, Malik Ijaz-ul-Haq, who is supposedly the manager of respondent No.2/car dealer Adil Ashraf Motors, is concerned, he submits that in his cross-examination RW-1 admits that he has not been authorized by the said car dealer to depose before the Consumer Court. The learned counsel also submits that the said car dealership is neither the agent nor the authorized dealership of the appellant, and therefore, any statement or admission made by RW-1 is not binding upon the appellant.

3. The learned counsel for the appellant has also pointed out that the instant case is barred by limitation as the car was delivered to the claimant on 15.05.2010, thereafter a legal notice was issued to the appellant on 10.08.2010 while the claim was filed on 22.09.2010, which was barred by 23 days even if the period of limitation is worked out from the date of the notice. He submits that no application for condonation of such delay was moved by the claimant as per the provisos to Section 28(4) of the Act. He further submits that the claim is devoid of any specific allegation regarding the defects in terms of Sections 5, 6, 7 and 8 of the Act. He further contends that neither any expert was called by the Consumer Court nor any application was given by the claimant to call an expert to examine the vehicle to ascertain the defects as envisaged in Section 30(1)(c) of the Act. On the other hand, the learned counsel for respondent No.1 has controverted the above contentions and has supported the impugned judgment.

4. We have heard the learned counsel for the parties and have perused the record with their able assistance. At the very outset, we have noticed that the claim filed by respondent No. 1/claimant does not make any specific mention of the alleged defects in the vehicle. Even the legal notices sent by respondent No.1 make no mention

of any specific defects. It was only in his affidavit, submitted as his examination-in-chief, that he mentioned the above defects. It is settled law that a litigant is required to plead all material facts that are necessary to seek the relief claimed and then to prove the same through evidence. Parties are required to lead evidence in consonance with their pleadings and no evidence can be led or looked into in support of a fact or a plea that has not been taken in the pleadings.[1] Notably, respondent No.1 also admitted in his cross-examination that he had not described the specific defects in the vehicle in his pleadings/ claim. Therefore, the defects alleged in the affidavit of respondent No.1 were beyond the scope of the pleadings and, hence, could not have been considered.

5. Furthermore, even otherwise, despite alleging such technical manufacturing defects in the vehicle, no expert evidence was led by respondent No.1 or invited by the Consumer Court under Section 30(1)(c) of the Act to prove that the said defects alleged by respondent No.1 actually existed. Instead, the Court relied only on the evidence of respondent No. 1, who is not an expert in the automotive industry, and firstly deposed in his cross-examination that the alleged defects were based on his general observations regarding the vehicle and then stated that there were no manufacturing defects in the vehicle. It is apparent that at least two of the defects alleged by the claimant, i.e. with regards to the hatch box and the colour of the stereo, were of such nature that could not have been ascertained without expert inspection.[2] Where the defects alleged are of such a nature that require expert inspection or probe, the onus to provide such expert evidence falls on the consumer who is alleging that the product is defective or faulty. Where such defects are alleged by the consumer, a Consumer Court, before deciding that a certain product is defective or faulty, must satisfy itself that sufficient expert evidence is available and can be relied upon to ascertain the defects so alleged instead of merely placing reliance on the statement of a consumer who may not be from the related field of expertise and therefore, not competent to address the technicalities forming part of the alleged defects, especially where the claim of the consumer is denied by the manufacturer. To this effect, Section 30(1)(c) of the Act allows the Consumer Court to invite expert evidence, if required, where the claim alleges that the products are defective and do not conform to the accepted industry standards. Additionally, Section 30(1)(d) of the Act provides that where the dispute cannot be determined without proper analysis or test of the products, the Consumer Court shall obtain a sample of the products from the claimant and refer the same to a laboratory to make analysis or test with a view to find out if such products suffer from any defect, which may be paid for by the claimant, or if the test or analysis supports the version of the claimant, then to be paid by the defendant, as stipulated under Section 30(1)(e) of the Act. In the instant case, the onus to prove the alleged defects was on respondent No.1, which he failed to do. No expert evidence was produced by respondent No.1 or invited by the Consumer Court to ascertain whether the alleged defects existed in the vehicle. Therefore, respondent No.1 failed to prove that the vehicle was defective in construction or composition as required under Section 5 or that it was otherwise defective for the purposes of any other provision of the Act.

6. We have noted that even when respondent No.1 had failed to provide any proof regarding the defects alleged in his affidavit, the only reason that the Courts below decided the matter in favour of respondent No.1 was the supposed admission by the appellant in para Nos. 6 and 7 in its written reply to the claim and an admission by RW-1, the witness of respondent No.2, with regards to the vehicle being defective. A perusal of the written reply by the appellant indicates that no admission with regards to alleged defects was made by the appellant and the appellant has specifically denied the assertions made by respondent No.1 in paras. Nos. 6 and 7 in the claim wherein he had alleged that the appellant's technical staff had admitted the defects in the vehicle. Instead, the appellant stated that it had dispatched its team to facilitate respondent No.1 as per company policy, however, respondent No.1 did not cooperate with them. As far as the admission by RW-1 is concerned, we have noted that the said witness did not produce any authority letter authorizing RW-1 to depose on behalf of respondent No.2, and therefore, failed to provide any proof as to his authority to depose on its behalf. Even otherwise, he specifically admitted in his cross-examination that respondent No.2 is not a dealer of the appellant, hence, it is apparent that respondent No.2 was not the appellant's agent and any admission made vis- -vis the obligations of the appellant holds no legal value. It is settled law that the admission of a codefendant is not binding on the other and therefore, the claim could not have been decided against the appellant based upon the admission made by RW-1.[3] Notably, he too in his admission failed to mention any specific defect in the vehicle to which he was

admitting. Therefore, despite respondent No. 1's failure to prove any defect in the vehicle for the purposes of his claim under the Act, the judgments of the Courts below, premised mainly on the above admission by RW-1, are not sustainable.

7. Coming to the question of limitation raised in the instant matter, we have observed that there are contradictory judgments of the Lahore High Court with regards to the commencement of the limitation period of 30 days provided under Section 28(4) of the Act for filing a claim; in Muhammad Ashraf[4] it has been held that the cause of action accrues in favour of the claimant the moment the goods or services turn out to be defective and/or in violation of the provisions of the Act, whereas, in Deltex[5] it has been held that the terminus quo for counting the limitation period is the date when the time of 15 days expires after receiving the written notice under Section 28(1) of the Act. Therefore, we deem it appropriate to first settle this question of law.

8. Section 28 of the Act provides for settlement of claims and also stipulates the limitation period for filing of a claim by a consumer. For reference, Section 28 of the Act is reproduced as under:

28. Settlement of Claims.---(1) A consumer who has suffered damage, or Authority in other cases, shall, by written notice, call upon a manufacturer or provider of services that a product or service is defective or faulty, or the conduct of the manufacturer or service provider is in contravention of the provisions of this Act and he should remedy the defects or give damages where the consumer has suffered damage, or cease to contravene the provisions of this Act.

(2) The manufacturer or service provider shall, within fifteen days of the receipt of the notice, reply thereto.

(3) No claim shall be entertained by a Consumer Court unless the consumer or the Authority has given notice under sub-section (1) and provides proof that the notice was duly delivered but the manufacturer or service provider has not responded thereto.

(4) A claim by the consumer or the Authority shall be filed within thirty days of the arising of the cause of action:

Provided that the Consumer Court, having jurisdiction to hear the claim, may allow a claim to be filed after thirty days within such time as it may allow if it is satisfied that there was sufficient cause for not filing the complaint within the specified period:

Provided further that such extension shall not be allowed beyond a period of sixty days from the expiry of the warranty or guarantee period specified by the manufacturer or service provider and if no period is specified one year from the date of purchase of the products or providing of services.

A perusal of the above provision indicates that before filing a claim before the Consumer Court, the consumer or the Authority[6] has to issue a written notice under Section 28(1) to the manufacturer or service provider notifying him of the defect in the product or service or if the conduct of the manufacturer or service provider is in contravention of the provisions of the Act, seeking that he should remedy the defect or give damages, or cease to contravene the provisions of the Act. Under Section 28(2), the manufacturer or service provider is to respond to the notice within 15 days. Section 28(3) provides that no claim shall be entertained by the Consumer Court unless the consumer provides proof of sending and delivery of the said notice. Section 28(4) stipulates that a claim shall be filed within 30 days of the arising of the cause of action. The provisos to Section 28(4) provide that the Consumer Court may extend this limitation period beyond the period of 30 days if it is satisfied that there was sufficient cause for not filing the complaint within the specified period, however, this extension shall not be beyond a period of 60 days from the expiry of the warranty or guarantee period specified by the manufacturer or service provider, or if no period is specified, then one year from the date of purchase of the product or provision of service.

9. In our view, even though no limitation period is provided for sending a written notice under Section 28(1) of the Act, it is apparent that Section 28(4) of the Act in unequivocal terms stipulates and clarifies that a claim with regards to a defective or faulty product or service, or contravention of the provisions of the Act by the manufacturer or service provider, has to be filed within 30 days of the arising of the cause of action. The cause of action, in such circumstances where a product or service is faulty, therefore, arises the moment the consumer obtains knowledge that the product or service is defective or faulty. If the provision is interpreted to mean that despite having knowledge of the defect in the product or the service, the consumer can issue a written notice

under Section 28(1) of the Act at any time the consumer desires, pursuant to which, after 15 days of such receipt of the notice, the cause of action for the purposes of the 30-day limitation period would ensue, this would make Section 28(4) of the Act as redundant, and a claim under the Act can be filed at any time without any limitation period subsequent to obtaining knowledge of the defect or fault in the product or the service.

10. The limitation period in such consumer protection claims becomes more significant especially because claimants should bring a claim as quickly as possible due to the potential depreciation of the product in question, the characteristics of which may differ according to the specific product. Delaying the filing of a claim can lead to challenges in establishing the product's condition at the time of purchase and linking any defects to the consumer's use or handling. As time passes, the product may deteriorate, be repaired or modified, or become unavailable, making it more difficult to prove the defects or assess its original condition. Bringing a claim promptly helps ensure that the product's condition and any defects can be accurately evaluated and documented. This can also contribute to a stronger case by providing evidence that directly supports the consumer's claim. Additionally, timely action demonstrates the consumer's diligence and commitment to addressing the issue.

11. The legislative intent behind Sections 28(1), (2) and (3) of the Act is to grant rights to both the consumer and the manufacturer or service provider to address the defects or faults in the product or service before the matter proceeds to litigation. It ensures that the consumer firstly brings the issue to the attention of the manufacturer or the service provider through a written notice, so that the defect or fault is rectified and they fulfill their obligation to the consumer before the consumer has to file a claim before the Consumer Court, so that there is a possibility of settling the claim of the consumer without the need to initiate litigation, which would be more cumbersome for a simple consumer. At the same time, it also affords the manufacturer or the service provider the right to respond to the notice within a specified timeframe, enabling them to address any legitimate concerns, protect their reputation, and mitigate potential costs that may be incurred under the Act. In effect, it provides for a mechanism to settle the dispute before initiation of litigation and the same cannot be construed as giving a fresh cause of action wherefrom the 30-day limitation provided under Section 28(4) would commence. Therefore, when the consumer obtains knowledge of the defect or fault in the product or the service, the 30-day limitation period stipulated under Section 28(4) of the Act commences. It is during this period that the consumer has to first put his grievance before the manufacturer or service provider, seeking rectification of the defect or fault in the product or service, or damages, and provide 15 days to the manufacturer or service provider to remedy the same, as required under Section 28(2). It is only after the manufacturer or the service provider responds to the written notice, or where he fails to respond within the stipulated 15-day period, that the consumer can file a claim before the Consumer Court if the cause of action still subsists. The consumer can still file a claim before the Consumer Court by giving sufficient cause for filing the claim beyond 30 days which will be examined by the Consumer Court, as per the provisos to Section 28(4) of the Act.

12. In the instant case, the vehicle was delivered to respondent No.1 on 15.05.2010 and respondent No.1 has admitted in his cross-examination that he obtained knowledge of the defect in the hatch box on 17.05.2010 and the other defects were also apparent in his view. Thereafter, a written notice was sent to the appellant on 10.08.2010, which was responded to by the appellant on 18.08.2010, whereafter, the claim was filed on 22.09.2010. Therefore, despite having knowledge of the defects on 17.05.2010, respondent No.1 had sent the written notice to the appellant after almost 03 months on 10.08.2010, during which the 30-day limitation period provided under Section 28(4) had expired. Respondent No.1 had also not applied for extension of time by showing sufficient cause for the extension of the limitation period under the provisos of Section 28(4) of the Act. It is settled law that that limitation is not a mere technicality, and where the limitation period has expired, a right accrues in favour of the other side which cannot be lightly brushed aside.[7] The claim filed by respondent No.1, therefore, was also barred by limitation.

13. In view of the above, the instant appeal is allowed. The impugned judgment is set aside and the claim filed by respondent No.1 stands dismissed.

MWA/P-11/SC Appeal allowed.

**P L D 2023 Supreme Court 516**

**Present: Syed Mansoor Ali Shah and Syed Hasan Azhar Rizvi, JJ**

**A. RAHIM FOODS (PVT.) LIMITED and another---Appellants**

**Versus**

**K&N'S FOODS (PVT.) LIMITED and others---Respondents**

Civil Appeals Nos. 444 and 445 of 2017, decided on 10th May, 2023.

(Against the judgment of the Competition Appellate Tribunal, Islamabad, dated 25.01.2017, passed in Appeal No. 03 of 2016).

**(a) Constitution of Pakistan---**

----Art. 185---Appellate jurisdiction of the Supreme Court---Scope---Concurrent findings of facts by courts below---Interference with---In the exercise of its appellate jurisdiction in civil cases, the Supreme Court as a third or fourth forum, as the case may be, does not interfere with the concurrent findings of the courts below on the issues of facts unless it is shown that such findings are on the face of it against the evidence available on the record of the case and is so patently improbable or perverse that no prudent person could have reasonably arrived at it on the basis of that evidence---Mere possibility of forming a different view on the reappraisal of the evidence is not a sufficient ground to interfere with such findings.

Federation of Pakistan v. Ali Ihsan PLD 1967 SC 249; Abdur Rauf v. Babu Munir 1976 SCMR 436; Fateh Muhammad v. Muhammad Adil PLD 2007 SC 460; Khan Muhammad v. Muhammad Din 2010 SCMR 1351; Mohyuddin Hashmi v. Allama Iqbal Open University 2012 SCMR 1414 and Hussain Naqvi v. Zakara Chatha 2015 SCMR 1081 ref.

**(b) Competition Act (XIX of 2010)---**

----Ss. 31, 37 & 38 & Preamble---Constitution of Pakistan, Art. 18---Freedom of trade and business---Scope---Free and fair competition in trade and business is an intrinsic part of the fundamental right to freedom of trade and business guaranteed by Article 18 of the Constitution.

The preamble to the Competition Act, 2010 (the Act') sets out the objective of the Act and provides for free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive forces. The Act aims to address the situations that tend to lessen, distort or eliminate competition, such as (i) actions constituting an abuse of market dominance, (ii) competition restricting agreements, and (iii) deceptive marketing practices. Free and fair competition is a fundamental concept in economics that involves providing a level playing field for all market participants. It is based on the principles of a free market where businesses compete on equal terms, and consumers make decisions based on price, quality, and preference. Free and fair competition is competition that is based on quality, price, and service rather than unfair practices. Predatory pricing, competitor bashing, and the abuse of monopoly-type powers, for example, are unfair practices. When competitors can compete freely on a 'level playing field,' economies are more likely to thrive. On the other hand, unfair competition is using illegal, deceptive, and fraudulent selling practices that harm consumers or other businesses to gain a competitive advantage in the market. However, free and fair competition is encouraged and enforced through legislation and regulation to promote economic efficiency, innovation, and consumer welfare. Violations of fair competition principles can lead to legal consequences, penalties, or other corrective measures. Competition is not only healthy for businesses, but pivotal for innovation. It sparks creativity and nurtures transformation and progress.

Article 18 of the Constitution provides that every citizen shall have the right to conduct any lawful trade or business and clause (b) of the proviso to the said Article states that nothing in this Article shall prevent the regulation of trade, commerce or industry in the interest of free competition. Therefore, regulation in the interest of free competition actualizes the fundamental freedom guaranteed under the Constitution to conduct lawful trade and business. As free and fair competition ensures freedom of trade, commerce and industry and therefore forms an intrinsic part of the fundamental right to freedom of trade and business guaranteed under Article 18 of the Constitution. The preambular objective of the Act is to ensure "free competition" in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from "anticompetitive behaviour". The "free competition" envisaged by the Constitution and aimed to be ensured by

the Act, therefore, means a competition through fair means, not by any means. To ensure fair competition in trade and business, Section 10 of the Act has prohibited certain marketing practices by categorising them as deceptive marketing practices, and Sections 31, 37 and 38 of the Act have empowered the Commission to take appropriate actions to prevent those practices.

**(c) Competition Act (XIX of 2010)---**

----S. 10(2)(d)---Deceptive marketing practices---Expression 'fraudulent use'in Section 10(2)(d) of the Competition Act, 2010---Meaning and scope stated.

The expression 'fraudulent use' in Section 10(2)(d) of the Competition Act, 2010 ('the Act')has made the intention of the defendant (user of another's trademark, firm name, or product labelling or packaging) relevant for holding him liable under the Act. However, as the Act has not defined the term 'fraudulent' and thus not given any particular meaning to it, the expression 'fraudulent use' in Section 10(2)(d) is to be understood in its ordinary sense of 'intentional and dishonest use' in contrast to a mere 'mistaken or negligent' use. Needless to mention that 'intention', being a state of mind, can rarely be proved through direct evidence, and in most cases, it is to be inferred from the surrounding facts and circumstances of the case.

The word "use" in Section 10(2)(d) of the Act includes the use of trademark, firm name, or product labelling or packaging which is confusingly similar (also referred to as deceptively similar) to that of another undertaking.

**(d) Competition Act (XIX of 2010)---**

----S. 10(2)(d)---Deceptive marketing practices---Criterion for determining confusing similarity in the use of another's product labeling and packaging stated.

Criterion to determine the confusing similarity is well-established in our jurisdiction in passing-off and trademark-infringement actions, which also applies in deciding disputes under Sections 10(2)(d) of the Competition Act, 2010. It is whether an unwary ordinary purchaser is likely to be confused or deceived into purchasing the article of the defendant carrying the contentious mark, name or get-up as that of the plaintiff (complainant). The criterion is thus that of such an ordinary purchaser 'who knows more or less the peculiar characteristics of the article he wants; he has in his mind's eye a general idea of the appearance of the article and he looks at the article not closely, but sufficiently to take its general appearance'. It is not that of a careful purchaser neither is it of a 'moron in a hurry'. The purchaser is unwary in the sense that he does not when he buys the article 'look carefully to see what the particular mark or name upon it is' but not that he does not even know the peculiar characteristic of the article he wants to buy. An ordinary customer is not supposed to precisely remember every detail of the mark, name or get-up of the article he intends to buy. The standard is therefore also described as that of a purchaser of average intelligence and imperfect recollection. Further, to determine the confusing or deceptive similarity from the point of view of an unwary ordinary purchaser, the leading characteristics, not the minute details, of the two marks, names or get-ups (labelling or packaging) are to be considered. As the competing marks, names or get-ups when placed side by side, may exhibit many differences yet the overall impression left by their leading characteristics on the mind of an unwary purchaser may be the same. An unwary ordinary purchaser acquainted with the one and not having the two side by side for comparison, may well be confused or deceived by the overall impression of the second, into a belief that he is buying the article which bears the same mark, name or get-up as that with which he is acquainted.

Jamia Industries v. Caltex Oil PLD 1984 SC 8; Insaf Soap v. Lever Brothers PLD 1959 Lah. 381; Ram Kumar v. Wood & Co. AIR 1941 Lah. 262; Lever v. Goodwin (1887) 36 Ch.D. 1; Pasquali Cigarette v. Diaconicolas and Capsopolus 1905 T.S. 472; Morning Star v. Express Newspapers [1979] F.S.R. 113; Lever v. Goodwin (1887) 36 Ch.D. 1; Corn Products v. Shangrila Products AIR 1960 SC 142 and Amritdhara Pharmacy v. S. D. Gupta AIR 1963 SC 449 ref.

**(e) Competition Act (XIX of 2010)---**

----S. 10(2)(d)---Deceptive marketing practices, action for---Pre-requisites---Registration of trademark (or for that matter, registration of firm name, or product labelling or packaging) is not necessary for the applicability of the provisions of Section 10(2)(d) of the Competition Act, 2010---Neither the common law action of passing-off requires such registration nor does the language of Section 10(2)(d) of the Act provide for any such requirement.

**(f) Trade Marks Ordinance (XIX of 2001)---**

----S. 46---Trademark-infringement---Passing-off, tort of---Difference between the objectives of a passing-off action and a trademark-infringement action---Passing-off action essentially aims to protect 'property in goods' on account of its reputation (goodwill), not the trademark thereof, whereas the trademark-infringement action is meant to protect 'property of trademark' as a trademark itself is a property.

Tabaq Restaurant v. Tabaq Restaurant 1987 SCMR 1090 ref.

**(g) Competition Act (XIX of 2010)---**

----S. 10(2)(d)---Deceptive marketing practices---Using a competitors product labelling and packaging in a deceptive marketing manner---In the present case, to determine the liability of appellant-company under Section 10(2)(d) of the Competition Act, 2010 ('the Act'), the Competition Commission ('the Commission') specifically mentioned the criterion applied, that is, whether 'the striking similar packaging and labelling is misleading enough to cause confusion in the minds of the average consumer of a commodity, with the end result of an unjust advantage accruing to the copycat at the expense of and to the detriment of the complainant'---Commission further observed that it would examine the appearance of the product packaging and labelling 'as a whole which may collectively include visually confusing resemblances in elements of colour scheme, layout style, design, images, labels, font usages etc., instead of each individual similarity in isolation'---By applying this criterion the Commission recorded the findings of facts and held appellant-company liable for the contravention of Section 10(2)(d) of the Act---Competition Appellate Tribunal ('the Tribunal'), affirmed the criterion applied and the findings of facts recorded by the Commission---Supreme Court observed that in determining the liability of appellant-company under Section 10(2)(d) of the Act, the criterion applied by the Commission and affirmed by the Tribunal was legally correct, and the Commission and the Tribunal had correctly decided that the facts of the case fell within the prohibition of Section 10(1) read with Section 10(2)(d) of the Act---Appeals were dismissed.

**(h) Competition Act (XIX of 2010)---**

----Ss. 10(2)(a) & 10(2)(d)---Deceptive marketing practices---Meaning of distribution of false or misleading information in Section 10(2)(a) of the Competition Act, 2010 stated.

Section 10(2)(a) of the Competition Act, 2010 ('the Act') has codified the common law on injurious falsehood claims. In common law, 'misrepresentation' is a common ground in both the actions for passing-off and injurious falsehood, but it is understood and applied in a different sense in each action. The general difference between misrepresentation in a passing-off action and misrepresentation in an injurious falsehood action is that in the former action, the misrepresentation is made by the defendant concerning his own goods while in the latter it is made concerning the goods of the plaintiff. In a passing-off action, the defendant by misrepresentation primarily attempts to take the undue benefit of the reputation (goodwill) of the goods of the plaintiff though he thereby also causes damage to the business of the plaintiff indirectly; but in an injurious falsehood action, the direct and express purpose of the misrepresentation is to cause damage to the reputation (goodwill) of the goods of the plaintiff though it may also impliedly or indirectly benefit the business of the defendant.

Christopher Wadlow, The Law of Passing-Off (5th Ed. 2016) p 16.; White v. Mellin [1895] A.C. 154 HL; Kaye v. Robertson [1991] F.S.R. 62 CA and Schulke and Mayr v. Alkapharm [1999] F.S.R. 161 ref.

There is nothing in the language of Section 10(2)(a) of the Act that suggests that the legislature has changed therein the meaning of 'misrepresentation' as understood in common law action for injurious falsehood. On the contrary, the use of the words 'false or misleading information' in Section 10(2)(a) shows that the legislature has intended to retain the same meaning; for in common law both the terms 'false' and 'misleading' are used in injurious falsehood actions for a representation to be taken as 'misrepresentation'. Further, the use of the phrase 'harming the business interests of another undertaking' in Section 10(2)(a) of the Act, and not in Section 10(2)(d), denotes that the said phrase has been used in the sense of causing express and direct harm to the business interests of the complainant undertaking as it is understood in an injurious falsehood action. And the non-mentioning of this phrase in Section 10(2)(d) of the Act shows that the damage caused to the business interests of the complainant undertaking is taken to be an implied and indirect effect of the fraudulent use of its

trademark, etc., as it is understood in a passing-off action, which the legislature has considered unnecessary to be expressly mentioned.

Kaye v. Robertson [1991] F.S.R. 62 CA and White v. Mellin [1895] A.C. 154 HL ref.

**(i) Competition Act (XIX of 2010)---**

----Ss. 12 & 43---Competition Commission of Pakistan ('the Commission')---Appeal filed by the Commission before the Supreme Court against an order passed by the Competition Appellate Tribunal ('the Tribunal')---Maintainability---Adjudicatory body (such as the Commission) deciding a matter in exercise of its quasi-judicial powers between two rival parties under a law cannot be treated as an aggrieved person if its decision is set aside or modified by a higher forum under that law or by a court of competent jurisdiction and such body thus does not have locus standi to challenge the decision of that higher forum or court.

Although the role of the Competition Commission ('the Commission') under the Competition Act, 2010 ('the Act') is primarily of a regulatory body, it is quasijudicial as well under some provisions of the Act. The provisions of clauses (a) and (d) of Section 10(2) of the Act, envisage the quasi-judicial role of the Commission while deciding upon the divergent claims and allegations of two competing undertakings. And, an adjudicatory body deciding a matter in exercise of its quasi-judicial powers between two rival parties under a law cannot be treated as an aggrieved person if its decision is set aside or modified by a higher forum under that law or by a court of competent jurisdiction and such body thus does not have locus standi to challenge the decision of that higher forum or court. The appeal filed by the Commission in the present case against the decision of the Tribunal setting aside partially its quasi-judicial order is therefore not maintainable. Appeals were dismissed.

Wafaqi Mohtasib v. SNGPL PLD 2020 SC 586 ref.

Hasan Irfan Khan, Advocate Supreme Court assisted by Saqib Asghar, Advocate for Appellant (in C.A. 445 of 2017).

Azid Nafees, Advocate Supreme Court along with Syed Rifaqat Hussian Shah, Advocate-on-Record for Appellant (in C.A. 444 of 2017).

Barrister Haris Azmat, Advocate Supreme Court and Azid Nafees, Advocate Supreme Court for Respondents (in C.A. 445 of 2017).

Hasan Irfan Khan, Advocate Supreme Court and Azid Nafees, Advocate Supreme Court for Respondents (in C.A. 444 of 2017).

Date of hearing: 10th May 2023.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**'No man is allowed to pass off his goods as the goods of another person; no manufacturer of goods is allowed to represent to the public that the goods which he is selling are the goods of a rival manufacturer.'[1] This is one of the basic principles of business morality, honesty and fair dealing that forbid deceptive marketing practices and unfair competition in commercial and economic activities. In this backdrop, the present case requires the interpretation of the phrase 'fraudulent use of another's trademark, firm name, or product labelling or packaging' as used in clause (d) of Section 10(2) of the Competition Act 2010 ("Act"). Further, clause (a) of Section 10(2)(a) of the Act, which includes 'distribution of false or misleading information that is capable of harming the business interests of another undertaking' in the prohibited deceptive marketing practices, also needs some elaboration.

2. Briefly, the facts of the case are that K&N's Foods (Pvt) Limited ("K&N's Foods") filed a complaint against A. Rahim Foods (Pvt) Limited ("Rahim Foods") with the Competition Commission of Pakistan ("Commission"), asserting involvement of Rahim Foods in deceptive marketing practices in contravention of the provisions of Section 10 of the Act. In the complaint, K&N's Foods mainly alleged that Rahim Foods was copying the K&N's Foods product labelling and packaging for the sale of its several frozen and processed meat products. It also alleged copying of its trademark term "Combo Wings" by Rahim Foods for one of the products, that is, the chicken wings. Two officers of the Commission, under the delegated powers, conducted an enquiry into the matter complained of. After collecting and considering the respective evidence of the parties, the enquiry officers submitted their report confirming the allegations and proposing the initiation of proceedings against Rahim Foods under Section 30 of the Act.

3. Upon this report of the enquiry officers, the Commission initiated proceedings against Rahim Foods under Section 30 of the Act. The Commission gave notice to Rahim Foods stating therein the gist of the enquiry officers' findings of facts that appeared to the Commission to be contraventions of the provisions of Section 10 of the Act and asking it to show cause as to why an appropriate order under Section 31(c) of the Act may not be passed against it and a penalty under Section 38 of the Act may not be imposed upon it. Rahim Foods was also provided with an opportunity to place before the Commission the facts and material in support of its contentions. Rahim Foods filed its reply to the said notice disputing the findings of the enquiry officers, together with the material in support of its contentions, and also filed an application for rejection of the enquiry report. The Commission identified the following issues for deciding the matter:

(A) Whether the Respondent's [Rahim Foods'] product labelling and packaging is misleadingly similar to that of the Complainant's K&N Packing and if so, whether such confusing resemblance is deceptive and amounts to "fraudulent use of another's ..product labelling or packaging" within the meaning and scope of Section 10(2)(d) and hence a contravention of Section 10(1) of the Act;

(B) Whether the use of the term/mark 'Combo Wings' by the Respondent [Rahim Foods], in the absence of authorization from the Complainant [K&N's Foods], amounts to ""fraudulent use of another's trademark..." within the meaning and scope of Section 10(2)(d) and hence a contravention of Section 10(1) of the Act;

(C) Whether the Respondent's [Rahim Foods'] product labelling and packaging and/or use of the mark 'Combo Wings' amount to the distribution of false or misleading information that is capable of harming the business interest" of the Complainant [K&N's Foods] within the meaning and scope of Section 10(2)(a) and hence a contravention of Section 10(1) of the Act.

On considering the material collected by the enquiry officers as well as the material produced by the parties before it and the relevant provisions of the Act, the Commission decided all three issues in the affirmative by its order dated 08.02.2016. In its discussion on issue (B), the Commission observed that as the trademark "Combo Wings" had not been registered at the time of lodging of the complaint by K&N's Foods, its use by Rahim Foods did not constitute a contravention of Section 10(1) read with Section 10(2)(d) of the Act, but decided this issue in affirmative with the following observations:

32. However, the use of the term "Combo Wings" by the Respondent [Rahim Foods], when seen in conjunction with the overall layout and design of the copied and duplicated K&N Packaging, demonstrates the Respondent's intention to pass off its products as those of the Complainant [K&N's Foods]. To such extent only, and as part of its overall scheme of deception, the use of the term in question falls within the scope of Section 10(2)(d) of the Act, as fraudulent use of another's product labelling....

Pursuant to its findings on the said issues, the Commission imposed the following penalties on Rahim Foods for contravention of the provisions of Section 10, under Section 38 of the Act:

i. Pakistani Rupees 10 Million (PKR 10,000,000) for the contraven-tion of Section 10(1) read with Section 10(2)(a) of the Act;

ii. Pakistani Rupees 10 Million (PKR 10,000,000) for the contravention of Section 10(1) read with Section 10(2)(d) of the Act;

In the exercise of its powers under Section 31(c) of the Act, the Commission further directed Rahim Foods to cease the use of the contentious copycat packaging for its frozen and processed meat products and to ensure that the products were repackaged in a manner that was distinct in its overall layout so as to be easily distinguishable from that of the K&N's Foods products.

4. Rahim Foods appealed the order of the Commission before the Competition Appellate Tribunal ("Tribunal"), under Section 42 of the Act. On reappraisal of the material available on the record of the case, the Tribunal affirmed the findings of the Commission that Rahim Foods had used the K&N's Foods product labelling and packaging in a deceptive marketing manner, and held that Section 10(2)(d) of the Act empowers the Commission to provide protection to the manufactures against practices of copycat packaging and parasitic copying. The Tribunal observed that Section 10(2)(d) confers jurisdiction on the Commission regarding fraudulent use of another's trademark, firm name, or product labelling or packaging 'whether the same is registered or not'. The Tribunal, however, held that as Rahim Foods had not distributed any false or misleading

information regarding the K&N's Foods products, the penalty imposed by the Commission upon Rahim Foods for the contravention of Section 10(2)(a) of the Act was not warranted. With these reasons, the Tribunal allowed the appeal of Rahim Foods partially and set aside the order of the Commission with regard to imposing a penalty for the contravention of Section 10(2)(a) of the Act, while maintaining the order of the Commission to the extent of imposing a penalty for the convention of Section 10(2)(d), by its judgment dated 25.01.2017 ("impugned judgment"). Hence, Rahim Foods and the Commission filed these appeals against the impugned judgment under Section 44 of the Act.

5. We have heard the arguments of the learned counsel for the parties, examined the record of the case and read the case law cited by them.

Non-interference by Supreme Court with concurrent findings of facts

6. In the exercise of its appellate jurisdiction in civil cases, this Court as a third or fourth forum, as the case may be, does not interfere with the concurrent findings of the courts below on the issues of facts unless it is shown that such findings are on the face of it against the evidence available on the record of the case and is so patently improbable or perverse that no prudent person could have reasonably arrived at it on the basis of that evidence.[2] A mere possibility of forming a different view on the reappraisal of the evidence is not a sufficient ground to interfere with such findings. It is underlined that the appellate jurisdiction conferred on this Court under Section 44 of the Act is also of a civil nature, hence the same rules apply. No such grave infirmity has been pointed out in the findings of the Commission on the facts of the case, which were also concurred by the Tribunal. We are therefore not inclined to interfere with the factual matrix of the case and will decide the questions of law as to the applicability of the provisions of clauses (a) and (d) of Section 10(2) of the Act to those findings of facts, which are as follows:

i. that the K&N's Foods product packaging had been introduced in 2003 in Pakistan, prior to that of Rahim Foods, and had acquired a reputation and distinctiveness in the relevant market of frozen and processed meat products in Pakistan;

ii. that the K&N's Foods product packaging and the trademark of one of its products "Combo Wings" were not registered when the complaint was made under the Act in 2012;

iii. that Rahim Foods launched its products of frozen and processed meat products in 2008, with product labelling and packaging that was clearly distinguishable from that of the K&N's Foods products;

iv. that Rahim Foods re-designed its products' packaging and copied the K&N's Foods product packaging in 2012 for marketing its products with such a confusing similarity that ordinary consumers would be deceived as to the origin of the two products at the time of exercising a choice of purchase;

v. that Rahim Foods was aware of it that its re-designed packaging would cause deceptive confusion in the mind of the consumers; and

vi. that by so doing Rahim Foods stood to gain an undue benefit and unfair advantage at the expense of K&N's Foods, which it would not otherwise have obtained.

The Commission and the Tribunal both have also concurred on the point that the above facts fall within the prohibition of Section 10(1) read with Section 10(2)(d) though they have differed on the applicability of Section 10(2)(a) of the Act. They have also expressed divergent views on the requirement of registration of a trademark to attract the provisions of Section 10(2)(d) for "fraudulent use of another's trademark".

7. In order to examine the legality of these views, we examine the meaning and scope of clauses (a) and (d) of Section 10(2). The provisions whereof are reproduced hereunder for ready reference:

10. Deceptive marketing practices.--(1) No undertaking shall enter into deceptive marketing practices.

(2) The deceptive marketing practices shall be deemed to have been resorted to or continued if an undertaking resorts to ---

(a) the distribution of false or misleading information that is capable of harming the business interests of another undertaking;

(b) the distribution of false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method or place of production, properties, suitability for use, or quality of goods;

(c) false or misleading comparison of goods in the process of advertising; or

(d) fraudulent use of another's trademark, firm name, or product labelling or packaging.

A bare reading of the above provisions of Section 10 of the Act shows that subsection (1) of Section 10 prohibits the undertakings[3] from entering into deceptive marketing practices and subsection (2) thereof has defined the acts that constitute such practices.

Constitutional underpinning

8. Before embarking upon the discussion on the meaning and scope of clauses (a) and (d) of Section 10(2) of the Act, it would be expedient to understand the legislative policy in promulgating the Act. The preamble to the Act sets out the objective of the Act and provides for free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive forces. The Act aims to address the situations that tend to lessen, distort or eliminate competition, such as (i) actions constituting an abuse of market dominance, (ii) competition restricting agreements, and (iii) deceptive marketing practices. Free and Fair competition is a fundamental concept in economics that involves providing a level playing field for all market participants. It is based on the principles of a free market where businesses compete on equal terms, and consumers make decisions based on price, quality, and preference. Free and fair competition is competition that is based on quality, price, and service rather than unfair practices. Predatory pricing, competitor bashing, and the abuse of monopoly-type powers, for example, are unfair practices. When competitors can compete freely on a 'level playing field,' economies are more likely to thrive. On the other hand, unfair competition is using illegal, deceptive, and fraudulent selling practices that harm consumers or other businesses to gain a competitive advantage in the market. However, free and fair competition is encouraged and enforced through legislation and regulation to promote economic efficiency, innovation, and consumer welfare. Violations of fair competition principles can lead to legal consequences, penalties, or other corrective measures. Competition is not only healthy for businesses, but pivotal for innovation. It sparks creativity and nurtures transformation and progress.

9. Article 18 of the Constitution of Pakistan provides that every citizen shall have the right to conduct any lawful trade or business and clause (b) of the proviso to the said Article states that nothing in this Article shall prevent the regulation of trade, commerce or industry in the interest of free competition. Therefore, regulation in the interest of free competition actualizes the fundamental freedom guaranteed under the Constitution to conduct lawful trade and business. As free and fair competition ensures freedom of trade, commerce and industry and therefore forms an intrinsic part of the fundamental right to freedom of trade and business guaranteed under Article 18 of the Constitution. The preambular objective of the Act is to ensure "free competition" in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from "anti-competitive behaviour". The "free competition" envisaged by the Constitution and aimed to be ensured by the Act, therefore, means a competition through fair means, not by any means. To ensure fair competition in trade and business, Section 10 of the Act has prohibited certain marketing practices by categorising them as deceptive marketing practices, and Sections 31, 37 and 38 of the Act have empowered the Commission to take appropriate actions to prevent those practices. With this constitutional underpinning in the background, we now proceed to examine the meaning and scope of clauses (a) and (d) of Section 10(2) of the Act.

Codification of common law on injurious falsehood and passing-off actions

10. The acts of distributing false or misleading information that is capable of harming the business interests of another undertaking and fraudulent use of another's trademark, firm name, or product labelling or packaging, which constitute deceptive marketing practices as per clauses (a) and (d) of Section 10(2), were in themselves wrongful acts even before the promulgation of the Act. The common law actions of 'injurious falsehood' and 'passing-off' were the well-known remedies for these wrongs. The Act has codified the common law on these two actions in clauses (a) and (d) of Section 10(2) and entrusted the adjudication of the same to the specialised forums - the Commission and the Tribunal. The main objective of codifying common law is to create a coherent and clear system of laws that is readily accessible and understandable to the public. Codification adds consistency, accessibility, clarity, uniformity and predictability. Any such codification may or may not amend

or modify the common law. It is, therefore, useful to examine and point out whether the codification of the common law actions of 'injurious falsehood' and 'passing-off' in clauses (a) and (d) of Section 10(2) of the Act, respectively, have undergone any changes.

Changes made in common law actions of injurious falsehood and passing-off

11. Codification of common law on "injurious falsehood" action under Section 10(2)(a) and "passing-off action" under Section 10(2)(d) of the Act are concerned, we note that there are some changes in the constituent ingredients thereof. A common law action on injurious falsehood (which is also named as slander of title, slander of goods, trade libel or malicious falsehood) requires the proof of 'malice' in addition to 'misrepresentation' and 'damage' for holding the defendant liable. The provisions of Section 10(2)(a) of the Act do not mention this requirement. Conversely, the 'malice' of the defendant which is not required to be proved in a common law action for passing-off, has been made relevant in the provisions of Section 10(2)(d) of the Act by using therein the expression 'fraudulent use'. Goodwill, misrepresentation and damage are the three essential elements of a passing-off action under common law, which are usually referred to as its 'classic trinity', and the liability for passing-off under common law is not affected by the defendant's state of mind.[4] The expression 'fraudulent use' in Section 10(2)(d) has made the intention of the defendant (user of another's trademark, firm name, or product labelling or packaging) also relevant for holding him liable under the Act. However, as the Act has not defined the term 'fraudulent' and thus not given any particular meaning to it, the expression 'fraudulent use' in Section 10(2)(d) is to be understood in its ordinary sense of 'intentional and dishonest use' in contrast to a mere 'mistaken or negligent' use. Needless to mention that 'intention', being a state of mind, can rarely be proved through direct evidence, and in most cases, it is to be inferred from the surrounding facts and circumstances of the case. It appears that in the present case the Commission, while relying upon one of its previous orders,[5] has referred to this legal position by using the expression subjective intent and objective manifestation of intent.

Meaning of the word 'use' in Section 10(2)(d) of the Act

12. The word 'use' in the phrase of Section 10(2)(d), that is, 'fraudulent use of another's trademark, firm name, or product labelling or packaging', also requires elaboration: whether it only relates to the use of the same trademark, firm name, or product labelling or packaging, or it includes the use of the similar trademark, firm name, or product labelling or packaging and whether it covers the 'parasitic copying' of another's trademark, firm name, or product labelling or packaging. Since Section 10(2)(d) of the Act has codified the common law on passing-off action, we need to see how the use of another's trademark, firm name, or product labelling or packaging is understood and applied in such common law action and whether the language of Section 10(2)(d) suggest any change.

13. In this regard, it is notable that though the common law of passing-off action and the statutory law of infringement of registered trademarks deal in different ways with deceptive marketing practices, their basic principle is common. It is that 'a trader may not sell his goods under false pretences, either by deceptively passing them off as the goods of another trader so as to take unfair advantage of his reputation in his goods, or by using a trade sign the same, or confusingly similar to, a registered trade mark.'[6] The misrepresentation alleged in a passing-off action is therefore also judged on the same or confusingly similar standard as it is done in a trademark-infringement action.[7] Further, the criterion to determine the confusing similarity (also referred to as deceptively similar), which is described hereinafter, is also common in both these actions.[8]

14. As 'nobody has any right to represent his goods as the goods of somebody else',[9] it is unlawful for a trader to pass off his goods as the goods of another by using the same or confusingly similar mark, name, or get-up. In a passing-off action, 'the point to be decided', as said by Lord Parker,[10] 'is whether, having regard to all the circumstances of the case, the use by the defendant in connection with the goods of the mark, name, or get-up in question impliedly represents such goods to be the goods of the plaintiff'. There is nothing in the language of Section 10(2)(d) of the Act that the meaning of the word use has been restricted therein to the use of the same trademark, firm name, or product labelling or packaging. We, therefore, hold that the word "use" in Section 10(2)(d) of the Act includes the use of trademark, firm name, or product labelling or packaging which is confusingly similar (also referred to as deceptively similar) to that of another undertaking.

Criterion for determining confusing similarity

15. So far as the criterion to determine the confusing similarity is concerned, the same is well-established in our jurisdiction in passing-off and trademark-infringement actions, which also applies in deciding disputes under Section 10(2)(d) of the Act. It is whether an unwary ordinary purchaser is likely to be confused or deceived into purchasing the article of the defendant carrying the contentious mark, name or get-up as that of the plaintiff (complainant).[11] The criterion is thus that of such an ordinary purchaser 'who knows more or less the peculiar characteristics of the article he wants; he has in his mind's eye a general idea of the appearance of the article and he looks at the article not closely, but sufficiently to take its general appearance'[12]. It is not that of a careful purchaser neither is it of a 'moron in a hurry'[13]. The purchaser is unwary in the sense that he does not when he buys the article 'look carefully to see what the particular mark or name upon it is'[14] but not that he does not even know the peculiar characteristic of the article he wants to buy. An ordinary customer is not supposed to precisely remember every detail of the mark, name or get-up of the article he intends to buy. The standard is therefore also described as that of a purchaser of average intelligence and imperfect recollection.[15] Further, to determine the confusing or deceptive similarity from the point of view of an unwary ordinary purchaser, the leading characteristics, not the minute details, of the two marks, names or get-ups (labelling or packaging) are to be considered.[16] As the competing marks, names or get-ups when placed side by side, may exhibit many differences yet the overall impression left by their leading characteristics on the mind of an unwary purchaser may be the same. An unwary ordinary purchaser acquainted with the one and not having the two side by side for comparison, may well be confused or deceived by the overall impression of the second, into a belief that he is buying the article which bears the same mark, name or get-up as that with which he is acquainted.

Registration of trademark, etc, is not necessary for Section 10(2)(d)

16. The question, whether registration of trademark (or for that matter, registration of firm name, or product labelling or packaging) is necessary for the applicability of the provisions of Section 10(2)(d) of the Act, is not difficult, as neither the common law action of passing-off requires such registration nor does the language of Section 10(2)(d) provide for any such requirement. The statutory law and common law stand together on this point. We, therefore, endorse the view of the Tribunal on this point. One must remember, in this regard, the difference between the objectives of a passing-off action and a trademark-infringement action. A passing-off action essentially aims to protect 'property in goods' on account of its reputation (goodwill), not the trademark thereof, whereas the trademark-infringement action is meant to protect 'property of trademark' as a trademark itself is a property.[17]

17. In the present case, to determine the liability of Rahim Foods under Section 10(2)(d) of the Act, the Commission specifically mentioned the criterion applied,[18] that is, whether 'the striking similar packaging and labelling is misleading enough to cause confusion in the minds of the average consumer of a commodity, with the end result of an unjust advantage accruing to the copycat at the expense of and to the detriment of the complainant'. The Commission further observed[19] that it would examine the appearance of the product packaging and labelling 'as a whole which may collectively include visually confusing resemblances in elements of colour scheme, layout style, design, images, labels, font usages etc., instead of each individual similarity in isolation'. By applying this criterion the Commission recorded the findings of facts and held Rahim Foods liable for the contravention of Section 10(2)(d) of the Act. The Tribunal affirmed the criterion applied and the findings of facts recorded by the Commission. Given the meaning and scope of the provisions of Section 10(2)(d) of the Act expounded above, we find that in determining the liability of Rahim Foods under Section 10(2)(d) of the Act, the criterion applied by the Commission and affirmed by the Tribunal was legally correct. And the Commission and the Tribunal have correctly decided that the facts of the case fall within the prohibition of Section 10(1) read with Section 10(2)(d) of the Act.

18. We may mention here that the terms 'parasitic copying' or 'copycat packaging', used by the Commission and the Tribunal in their orders refer to the 'confusing or deceptive similarity' of the product packaging and labelling. 'Copycat packaging', as mentioned by the Tribunal in its order quoting from an academic source,[20] 'is the practice of designing the packaging of a product in a way that gives it the general look and feel of a competing, well-known brand (typically the market leader) ... The risk posed by copycat packaging is consumer confusion,

and consequentially, distortion of their commercial behaviour'. The use of these terms by the Commission and the Tribunal, therefore, does not amount to mentioning and applying any other standard for determining the liability of Rahim Foods under Section 10(2)(d) of the Act.

Meaning of distribution of false or misleading information in Section 10(2)(a)

19. Next, we take up the point on which the Commission and the Tribunal have differed, that is, the applicability of the provisions of clause (a) of Section 10(2) of the Act, to the facts of the present case. As per the said clause, the distribution of false or misleading information that is capable of harming the business interests of another undertaking is also a deceptive marketing practice. The Commission opined that though the distribution of false or misleading information may take place in numerous forms, the parasitic copycat packaging which causes deceptive confusion to the consumers also amounts to the distribution of misleading information capable of harming the business interest of another undertaking within the meaning of Section 10(2)(a) of the Act, in addition to being culpable under Section 10(2)(d) of the Act. The Commission observed that a contravention of Section 10(2)(d) will almost in every case lead to a consequent contravention of Section 10(2)(a) of the Act unless there exist exceptional circumstances in a particular case that warrant otherwise. On the other hand, the Tribunal held that as Rahim Foods had not distributed any false or misleading information regarding the K&N's Foods products, the contravention of Section 10(2)(a) of the Act was not made out.

20. To decide which view, whether of the Commission or of the Tribunal, is correct, we again have to look at the position of common law on the injurious falsehood claims; for Section 10(2)(a) of the Act has, as mentioned above, codified the common law on such claims. In common law, 'misrepresentation' is a common ground in both the actions for passing-off and injurious falsehood, but it is understood and applied in a different sense in each action. The general difference between misrepresentation in a passing-off action and misrepresentation in an injurious falsehood action is that in the former action, the misrepresentation is made by the defendant concerning his own goods while in the latter it is made concerning the goods of the plaintiff. In a passing-off action, the defendant by misrepresentation primarily attempts to take the undue benefit of the reputation (goodwill) of the goods of the plaintiff though he thereby also causes damage to the business of the plaintiff indirectly; but in an injurious falsehood action, the direct and express purpose of the misrepresentation is to cause damage to the reputation (goodwill) of the goods of the plaintiff though it may also impliedly or indirectly benefit the business of the defendant.[21]

21. There is nothing in the language of Section 10(2)(a) of the Act that suggests that the legislature has changed therein the meaning of 'misrepresentation' as understood in common law action for injurious falsehood. On the contrary, the use of the words 'false or misleading information' in Section 10(2)(a) shows that the legislature has intended to retain the same meaning; for in common law both the terms 'false'[22] and 'misleading'[23] are used in injurious falsehood actions for a representation to be taken as 'misrepresentation'. Further, the use of the phrase 'harming the business interests of another undertaking' in Section 10(2)(a) of the Act, and not in Section 10(2)(d), denotes that the said phrase has been used in the sense of causing express and direct harm to the business interests of the complainant undertaking as it is understood in an injurious falsehood action. And the non-mentioning of this phrase in Section 10(2)(d) of the Act shows that the damage caused to the business interests of the complainant undertaking is taken to be an implied and indirect effect of the fraudulent use of its trademark, etc., as it is understood in a passing-off action, which the legislature has considered unnecessary to be expressly mentioned.

22. In the present case, Rahim Foods made 'misrepresentation' concerning its own products by fraudulent use of the K&N's Foods products labelling and packaging primarily to take advantage of the reputation (goodwill) of the products of K&N's Foods, not concerning the products of K&N's Foods to cause the express and direct harm to the business interests of K&N's Foods. Therefore, we find that the view of the Tribunal is legally correct on the non-applicability of the provisions of Section 10(2)(a) of the Act to the facts of the present case.

No locus standi of an adjudicatory body to contest for upholding its quasi-judicial decision

23. It may also be pertinent to mention here that K&N's Foods, which may have been aggrieved of the decision of the Tribunal on the point of non-applicability of the provisions of Section 10(2)(a) of the Act, has not impugned the decision of the Tribunal by preferring an appeal to this Court, and it is the Commission that has

challenged the decision of the Tribunal on that point by filing the appeal. In this regard, we may observe that though the role of the Commission under the Act is primarily of a regulatory body, it is quasi-judicial as well under some provisions of the Act. The provisions of clauses (a) and (d) of Section 10(2) of the Act,[24] in our view, envisage the quasi-judicial role of the Commission while deciding upon the divergent claims and allegations of two competing undertakings. And, as held by this Court in Wafaqi Mohtasib case,[25] an adjudicatory body deciding a matter in exercise of its quasi-judicial powers between two rival parties under a law cannot be treated as an aggrieved person if its decision is set aside or modified by a higher forum under that law or by a court of competent jurisdiction and such body thus does not have locus standi to challenge the decision of that higher forum or court. The appeal filed by the Commission in the present case against the decision of the Tribunal setting aside partially its quasi-judicial order is therefore not maintainable.

24. For the above reasons, these appeals are found meritless and are therefore dismissed.

MWA/A-22/SC Appeals dismissed.

**P L D 2023 Supreme Court 493**

**Present: Umar Ata Bandial, C.J., Ijaz ul Ahsan, Munib Akhtar, Syed Hasan Azhar Rizvi and Shahid Waheed, JJ**

**ABID SHAHID ZUBERI, ADVOCATE SUPREME COURT OF PAKISTAN and 3 others---Petitioners**

**Versus**

**FEDERATION OF PAKISTAN through Secretary, Cabinet Division, Islamabad and 2 others---Respondents**

Constitution Petitions Nos. 14 to 17 of 2023, decided on 26th May, 2023.

(Declaring Notification dated 19.05.2023 (Regarding constitution of an inquiry Commission to probe into the veracity of alleged Audio Leaks) as ultra vires to the Constitution of Pakistan, 1973).

**Pakistan Commissions of Inquiry Act (IX of 2017)---**

----S. 3---Constitution of Pakistan, Art. 184(3)---Constitutional petitions challenging formation of an Inquiry Commission comprising of Senior Puisne Judge of the Supreme Court and two Chief Justices of the High Courts---Permission of the Chief Justice of the Supreme Court---Whenever a sitting Judge was intended to be made a member of a Commission, the permission of the Chief Justice (of the Supreme Court) first had to be sought---Since such power was peculiar to the said office, the incumbent for the time being of the same could neither divest himself nor be divested by the Federal Government from discharging the constitutional duty---Said constitutional principle would apply even in regard to the Chief Justices of the High Courts being made members of a Commission---Prima facie, therefore, the very constitution of the Commission in the present case was cast in doubt.

The petitioner's challenge was to Notification No.SRO.596(I)/ 2023 dated 19.05.2023 (impugned notification) was issued by the Federal Government for appointment of an Inquiry Commission (Commission) in exercise of its power under Section 3 of the Pakistan Commissions of the Inquiry Act, 2017 comprising Senior Puisne Judge Supreme Court, and Chief Justices of High Court of Balochistan and Islamabad High Court. The terms of reference (TORs) of the Commission, inter alia, were to determine whether certain alleged audios leaked on 16-02-2023 and thereafter subsequently broadcast on the electronic media, involving alleged conversations between persons connected to or including Judges of the superior Courts, constituted material whereby public trust and confidence in the credibility, uprightness, impartiality and independence of the superior judiciary was eroded.

It was an accepted and settled constitutional principle, acted upon several times in the constitution of Commissions whenever a sitting Judge was intended to be made a member thereof, that the permission of the Chief Justice (of the Supreme Court) had first to be sought. Since this power was peculiar to the said office, the incumbent for the time being of the same could neither divest himself nor be divested by the Federal Government from discharging the constitutional duty. Inasmuch as the Federal Government appeared to have acted unilaterally in the present matter, a constitutional principle of the highest importance had been, prima facie, breached.

In the present matter even though the other two members of the Commission were Chief Justices of respective High Courts, the subject matter of the reference transcended any particular High Court and involved at the very least a sitting Judge of the Supreme Court and a Chief Justice of a third High Court. Therefore, keeping in mind the settled principles of federalism, prima facie, the aforementioned constitutional principle would apply even in regard to the other two members of the Commission and therefore, the permission of the Chief Justice (of the Supreme Court) was required for their appointment. Prima facie, therefore, the very constitution of the Commission was cast in doubt.

Federation of Pakistan v. Muhammad Akram Sheikh PLD 1989 SC 689; Gen.(R) Parvez Musharraf v. Nadeem Ahmed (Advocate) and another PLD 2014 SC 585; The President v. Justice Shaukat Ali PLD 1971 SC 585 and Malik Asad Ali v. Federation of Pakistan PLD 1998 SC 161 ref.

Supreme Court directed that till the next date of hearing, the operation of the impugned notification No.SRO.596(I)/2023 dated 19-05-2023 issued by the Federal Government was suspended as was the order dated 22-05-2023 made by the Commission and in consequence thereof proceedings of the Commission were stayed.

For the Petitioner(s)

M. Shoaib Shaheen, Haseeb Jamali, Umar Lakhani, Ayan Memon and Maqsood Buttar, Advocate Supreme Court (in Constitutional Petition No. 14 of 2023).

Malik Shakeel-ur-Rehman, Advocate Supreme Court and Muqtedir Akhtar Shabbir, Advocate Supreme Court (in Constitutional Petition No. 15 of 23).

Nemo (in Constitutional Petition No. 16 of 2023).

In-person (in Constitutional Petition No. 17 of 2023).

For the Federation

Mansoor Usman Awan, Attorney General for Pakistan assisted by Saad Javaid Satti, Advocate, Ms. Maryam Rasheed, Advocate and Ms. Maryam Ali Abbasi, Consultant.

Date of hearing: 26th May, 2023.

**ORDER**

**UMAR ATA BANDIAL, C.J.---**We have heard Shoaib Shaheen, Advocate Supreme Court learned counsel for the petitioner at length and have also heard the brief submissions in response by Mr. Mansoor Usman Awan, the learned Attorney General for Pakistan. The petitioner's challenge is to Notification No.SRO.596(I)/2023 dated 19.05.2023 (impugned notification) issued by the Federal Government for appointment of an Inquiry Commission (Commission) in exercise of its power under Section 3 of the Pakistan Commissions of the Inquiry Act, 2017 comprising Justice Qazi Faez Isa, Hon'ble Senior Puisne Judge Supreme Court of Pakistan, Mr. Justice Naeem Akhtar Afghan, Chief Justice High Court of Balochistan and Mr. Justice Aamer Farooq, Chief Justice Islamabad High Court. The terms of reference (TORs) of the Commission, inter alia, are to determine whether certain alleged audios leaked on 16.02.2023 and thereafter subsequently broadcast on the electronic media, involving alleged conversations between persons connected to or including Judges of the superior Courts, constitute material whereby public trust and confidence in the credibility, uprightness, impartiality and independence of the superior judiciary is eroded.

2. The essence of the submissions made by Mr. Shoaib Shaheen, Advocate Supreme Court, learned counsel for the petitioners are as follows:

i) The impugned notification violates fundamental rights by breaching the principle of separation of powers on the basis of which the constitutional framework of our country is established. The Executive cannot transgress into the area of the judicial function. While Article 209 of the Constitution of Islamic Republic of Pakistan, 1973 (Constitution) enables the President of Pakistan (acting on advice i.e. the Executive branch) to present a Reference in respect of any alleged misconduct by a Judge of the superior Courts, the determination and all matters and aspects relating thereto whether directly or indirectly are exclusively vested in the judicial branch, as embodied in the constitutional body known as the Supreme Judicial Council (SJC). Thus, the constitutional principle of trichotomy of powers has placed these functions in mutually exclusive zones i.e. the two branches of the Executive and the Judiciary. However, in appointing senior sitting Judges as the Commission of Inquiry to investigate and enquire upon the matters which are the subject matter of the TORs of the Commission, prima facie, the principle of separation of powers has been breached. The Federal Government, in what tentatively appears to be a complete misdirection of law, has thus trenched upon a constitutional domain exclusive to the Judiciary and demarcated exclusively for the latter under Article 209 ibid.

ii) The TORs for the Commission are specified in the impugned notification in sub-paras (iii) to (ix) of paragraph-6, being the questions upon which the Commission is to render its determination. These questions include in paragraph-6(v) the determination whether any disciplinary proceedings are attracted by virtue of the matters under inquiry. Keeping in view paragraph-6 (viii) which concerns the genuineness and the correctness of the alleged audios leaked, it appears, prima facie, that paragraph-6(v) is addressing judicial misconduct in veiled terms. This function is reserved by Article 209 of the Constitution to be performed solely by the Judiciary through the SJC. In this way, the TORs of the Commission appear to extend its jurisdiction into an area falling within the domain of the SJC at the instance of the Executive which is an arrangement that is, prima facie, unconstitutional and void.

iii) A perusal of paragraph-6(i) and (ii) of the TORs of the Commission setting out the subject matter of enquiry by the Commission, prima facie, overlaps or at the very least appears to fall within the penumbra of the constitutional jurisdiction vesting in the SJC under Article 209 of the Constitution. This jurisdiction is an integral component of the independence of the Judiciary enunciated, inter alia, in Article 175(3) of the Constitution which is not only a fundamental right but also a Salient Feature of the Constitution.

3. Learned counsel for the petitioner also emphasised on the apparent violation of Article 14 of the Constitution relating to dignity of man and the rights of privacy that are inherent therein. Learned counsel submitted that such rights extended not just to the person but also to the communications made by him. Illegal and unlawful surveillance of such communication or the

targeting of any person in this regard was clear cut violation of the said fundamental rights. In this regard reference was made to certain laws, including principally, the Investigation for Fair Trial Act, 2013 (Act) to show that it is the only law which permits surveillance under strictly limited circumstances in terms of the elaborate regime set out in the Act and only in relation to the offences appearing in the Schedule thereof which relate to terrorism and such like offences. Learned counsel read out various sections of the said Act and in particular drew attention to Section 10(2)(b) where even if surveillance for such limited purposes could be lawfully carried out, rights of privacy and property were always to be respected. It was submitted that the subject matter of the present proposed inquiry could not conceivably fall within the ambit of the said Act. Learned counsel also placed reliance on the judgment of Justice Syed Mansoor Ali Shah (concurring in part) and reported as Justice Qazi Faez Isa and others v. The President of Pakistan (PLD 2021 SC 1). Various paragraphs in relation to the concept of privacy were read out from this judgment and in particular reliance was strongly placed on the following passage from para-48:

> "48. ... While the fundamental right to personal liberty and privacy guaranteed by Articles 9 and 14 of the Constitution are subject to law, there is no law in our country that authorizes any law enforcement or intelligence agency to pry into the privacy of any person through surveillance and interception, except the IFTA. The scope of the IFTA, as discussed above, is also restricted to the surveillance and interception of a person who is suspected to be involved in any terrorist or anti-state activity. Besides this limited scope under the IFTA, no other law regulates the fundamental right of privacy of citizens and allows probe into their lives through surveillance and interception. Thus, in the remaining sphere the right to privacy is absolute, until law is enacted to regulate it. The violation of this sphere of the absolute privacy right makes the inadmissibility of evidence collected in violation thereof also absolute. Absolute right entails absolute prohibition on its violation. ..."
>
> (emphasis supplied)

4. It was submitted that since there was, and could not possibly be, any law that allows for surveillance or hacking of any communication of Judges or their family members, the bar, as noted in the extract above, was absolute and that therefore, at a very fundamental level there could hardly be any point in light of the forgoing observations to the inquiry envisaged by the impugned notification being held. In addition, it was also submitted that in respect of the petitioner in Const. P. 14 of 2023, who is an Advocate, the alleged audio (the veracity of which was directly challenged) would amount to illegal disclosure of privileged communication which could not form the subject matter of any inquiry. Reliance was also placed in this regard on Ishtiaq Ahmed Mirza v. Federation of Pakistan (PLD 2019 SC 675), which lays down detailed parameters as to admissibility of any audio or video material. Given that the alleged audios in the present case were all leaks made by a so called "black hat hacker" operating under the twitter handle "indibell", the first and primary question was the very veracity, credibility and legality of, and authorization for the alleged audios and so also the identity of the person or "hacker" engaged in or abetting such acts.

5. On any view of the matter, therefore, learned counsel submitted, further proceedings by the Commission in terms of the impugned notification would amount to a continued serious breach of fundamental constitutional principles and rights.

6. At the outset, learned Attorney General for Pakistan had sought permission to make a preliminary submission which was to the effect that one of us (Umar Ata Bandial, CJ) ought to consider recusing himself from the Bench. Reason given in this regard was that the constitution of the Commission and in particular the appointment of its Chairman could not have been done by the Hon'ble Chief Justice, in view of the stated subject matter of the reference. The contention was repelled, inter alia, for the reason that it was an accepted and settled constitutional principle, acted upon several times in the constitution of Commissions whenever a sitting Judge was intended to be made a member thereof, that the permission of the Hon'ble Chief Justice of Pakistan had first to be sought. Since this power was peculiar to the said office, the incumbent for the time being of the same could neither divest himself nor be divested by the Federal Government from discharging the constitutional duty. Inasmuch as the Federal Government appeared to have acted unilaterally in this matter, a constitutional principle of the highest importance had been, prima facie, breached. We may note in this regard that even though the other two members of the Commission are Chief Justices of respective High Courts as noted above, the subject matter of the reference transcends any particular High Court and involves at the very least a sitting Judge of the Supreme Court and a Chief Justice of a third High Court. Therefore, keeping in mind the settled principles of federalism, prima facie, the aforementioned constitutional principle would apply even in regard to the other two members of the Commission and therefore, the permission of the Hon'ble Chief Justice of Pakistan was required for their appointment. Prima facie, therefore, the very constitution of the Commission is cast in doubt. In this regard reliance is placed on:

a) Federation of Pakistan v. Muhammad Akram Sheikh [PLD 1989 SC 689 @ para-28(ii) to (iv)]

b) Gen.(R) Parvez Musharraf v. Nadeem Ahmed (Advocate) and another (PLD 2014 SC 585 @ para-26)

c) The President v. Justice Shaukat Ali (PLD 1971 SC 585 @ page 605)

d) Malik Asad Ali v. Federation of Pakistan (PLD 1998 SC 161 @ para 66)

7. In view of the above, let notice be issued to the respondents in all petitions. Notice be also issued to the learned Attorney General for Pakistan in terms of Order XXVIIA of the Civil Procedure Code.

8. C.M.A. NO.3663 OF 2023 IN CONST.P.14 OF 2023. Learned counsel for the petitioner also prayed for interim relief since the Commission has already started functioning and has made an order on 22.05.2023 and the next meeting of the Commission is scheduled for 27.05.2023. In the circumstances, till the next date of hearing, the operation of the impugned notification No.SRO.596(I)/2023 dated 19.05.2023 issued by the Federal Government is suspended as is the order dated 22.05.2023 made by the Commission and in consequence thereof proceedings of the Commission are stayed.

To come up on 31.05.2023.

MWA/A-18/SC Order accordingly.

## Syed Mansoor Ali Shah

**IN THE SUPREME COURT OF PAKISTAN (Original Jurisdiction)**

**C.M.A No. 3924 of 2023 In Constitution Petition No. 14 of 2023**

**ABID SHAHID ZUBERI, ADVOCATE SUPREME COURT OF PAKISTAN---Petitioner**

**Versus**

**FEDERATION OF PAKISTAN through Secretary Cabinet, Islamabad and others---Respondents**

CONCISE STATEMENT

It is respectfully submitted by the Inquiry Commission, respondent No. 2, as under:

**Non-compliance with the rules.**

1. The Supreme Court Rules, 1980 ( the Rules') require that notices, prior to filing of any petition, must be sent by the petitioner/petitioner's counsel to the respondents informing about the filing of the petitions, but this was not done. The Rules also require submission of an affidavit of service confirming service of notice on the respondents, and though such an affidavit was filed, service was not affected. Till date the Commission has not received copies of the petitions, therefore, the Commission reserves its right to attend to the same when and if the same are provided.

Petitions filed under Article 184(3) of the Constitution.

2. The petitions are statedly filed under Article 184(3) of the Constitution of the Islamic Republic of Pakistan ( The Constitution'), but the order of the Supreme Court dated 26 May 2023 does not mention this provision, let alone that the petitions were maintainable thereunder. A petition under Article 184(3) can only be filed provided 'a question of public importance with reference to the enforcement of any of the Fundamental Rights' is involved. It is respectfully submitted that Mr. Abid Shahid Zuberi is himself one of the persons allegedly talking in the audio recordings. Moreover, it needs consideration whether Mr. Abid Zuberi can represent the public interest in such circumstances. All other persons allegedly found talking in the audio recordings have not filed petitions, nor have objected to appear before the Commission. On the contrary, Messrs Khawaja Tariq Rahim and Abdul Qayyum Siddiqui, have shown their readiness to do so.

Petitions could not be fixed for hearing or heard.

3. The Supreme Court (Practice and Procedure) Act, 2023[1] states that:

2. Constitution of Benches.-

(1) Every cause, appeal or matter before the Supreme Court shall be heard and disposed of by a bench constituted by the Committee comprising the Chief Justice of Pakistan and two most senior judges, in order of seniority.

(2) The decisions of the Committee shall be by majority.'

These petitions were not fixed before a bench constituted by the Committee comprising the Chief Justice of Pakistan and the most senior judges. Therefore, it is most respectfully submitted that these petitions cannot be heard till the said Committee determines which bench should hear them.

4. Khawaja Tariq Rahim, Advocate, who is one of the persons allegedly talking in the audio recordings and five others had filed petitions ( the six Petitions ) challenging the Supreme Court (Practice and Procedure) Bill, under Article 184(3) of the Constitution, even before it became law. The Office of the Supreme Court had noted five legal objections to the maintainability of the six Petitions, the first two of which are reproduced hereunder:

a. That the petitioners have not pointed out as to what questions of public importance in the instant case are involved with reference to enforcement of any of the Fundamental Rights guaranteed under the Constitution, so as to directly invoke jurisdiction of the Supreme Court under Article 184(3) of the Constitution.

b. That ingredients for invoking extra ordinary jurisdiction of this Court under Article 184(3) of the Constitution have not been satisfied.'

However, Chamber appeals against the said Office Objections were not filed, nor were the Office Objections set aside by this Court. Yet in the six Petitions ex parte ad-interim orders were passed suspending the said Bill and later on 2 May 2023, it was ordered `That injunction continues and shall continue to be enforced against the Act till further orders'. On 8 May 2023, the petitions were adjourned to 1 June 2023, that is, after 24 days.

5. With utmost respect the six Petitions filed under Article 184(3) of the Constitution appear not to be maintainable because the two pre-requisites mentioned in Article 184(3) were not attracted, as was correctly noted by the Office of this Court, because the subject matter of the six Petitions did not constitute a matter of public importance nor did they seek the enforcement of any Fundamental Right. The fate of these petitions is connected with that of the six Petitions and till they are decided these petitions should not have been fixed for hearing. And, all the more so because if the six Petitions are dismissed it will create a legal quagmire - whether conducting court in the interregnum violated section 2 of the Supreme Court (Practice and Procedure) Act, 2023?

It would not be appropriate for this bench to hear these petitions.

6. The oath taken by the Chief Justices and Judges of the Supreme Court and the High Courts require them to act, 'in accordance with the Constitution of the Islamic Republic of Pakistan and the law'. They are also required to, 'abide by the code of conduct issued by the Supreme Judicial Council' and not to allow their 'personal interest to influence' their 'official conduct' or 'official decisions'. The code of conduct[2] also requires that:

A Judge must decline resolutely to act in a case involving his own interest, including those of persons whom he regards and treats as near relatives or close friend.

A judge must refuse to deal with any case in which he has a connection with one party or its lawyer more than the other, or even with both parties and their lawyers.'

To ensure that justice is not only done, but is also seen to be done, a Judge must avoid all possibility of his opinion or action in any case being swayed by any consideration of personal advantage, either direct or indirect.'

One of the audio recordings allegedly pertains to the mother-in-law of the Hon'ble Chief Justice. Hon'ble Mr. Justice Munib Akhtar may also be mentioned in the said recording. And, in another audio recording reference is made to case fixation before a particular bench headed by Hon'ble Mr. Justice Ijaz ul Ahsan.

Members of the Commission are bound to act in accordance with the law.

7. The Constitution, law and the code of conduct must also be observed by the Members of the Commission, who respectively are the senior puisne Judge of the Supreme Court, the Chief Justice of the High Court of Balochistan and the Chief Justice of the Islamabad High Court. The law includes the Act, which grants to the Federal Government the power, under section 3(2), to constitute inquiry commissions:

3(2) The Federal Government shall, by Notification in the official gazette, appoint the members of the Commission and where more than one member are so appointed, the Federal Government shall designate one of the members to be the Chairman of the Commission.'

The Act does not stipulate that the Government must consult with the Chief Justice of Pakistan before it constitutes a commission. The Act also does not grant to the Chief Justice the power to nominate members of

a commission. Merely because the Government may elect to consult the Chief Justice does not mean that it has to. The Act has existed for over six years and, to the best of the knowledge of the undersigned, no challenge to it or specifically to its section 3(2) has been made, let alone the same having been struck down.

Constituting the Commission.

8. Pursuant to Notification No. S.R.O. 596(I)/2023, dated 19 May 2023 ( the Notification'), issued under the Pakistan 5 Commissions of Inquiry Act, 2017[3] ( the Act'), an inquiry commission ( the Commission') was constituted. The Notification's preamble states:

WHEREAS, recently wide circulations of controversial audios have been witnessed on the national electronic, print and social media, allegedly regarding the Judiciary and former Chief Justices/Judges, conversation raising serious apprehensions about the independence, impartiality and uprightness of the Chief Justices/Judges of the Superior Courts in the administration of justice.

2. AND WHEREAS, such audio leaks have eroded pubic trust and serious concerns have been raised by the general public regarding independence, impartiality and uprightness of the Chief Justices/Judges of the Superior Courts. Under the Constitution of the Islamic Republic of Pakistan, the independence, integrity and character of Chief Justices/Judges is of utmost importance for keeping the public trust and confidence in the administration of justice. Judiciary is one of the main pillars under the Constitution and the society's confidence is shattered when independence of the Judiciary is tarnished.

3. AND WHEREAS, it is imperative to inquire into the authenticity, correctness and veracity of these audio leaks in order to restore not just the credibility of the Judiciary but also the public interest and confidence in the Judiciary in the larger public interest, as a matter of definite public importance.'

Commission's working.

9. The Commission was given an initial thirty days to complete its task. Therefore, it immediately held its first meeting on 22 May 2023. The Commission's order dated 22 May 2023 is attached hereto and marked as 'A', which was uploaded the same day on the webpage of the office of the learned Attorney-General for Pakistan ( AG ). In compliance with the Commission's order, public notices were published in three Urdu newspapers (Jang, Daily Express and Nawa-i-Waqt), and three English newspapers (Dawn, The News and Express Tribune), which are attached hereto and respectively marked as B1 to 'B6'. The notices called upon the general public to provide information they may have regarding the matter, which was to be inquired into by the Commission, to the following:

Mr. Hafeezullah Khajjak, Secretary to the Commission Cell phone number: 0301-5579326

Email address: inquirycommission2023@gmail.com

Postal address: Supreme Court Building, care of Private Secretary to Mr. Justice Qazi Faez Isa, 3rd Floor, Judges Block, Supreme Court Building, Constitution Avenue, Sector G-5, Islamabad.'

10. The following were issued summons to attend before the Commission on 27 May 2023:

Mr. Abid Shahid Zuberi, Advocate,

Kh. Tariq Rahim, Advocate,

Mr. Najam Saqib, Advocate and

Mr. Qayyum Siddiqui, Journalist.

The aforesaid were also sent summons through TCS Courier Service.

11. The Commission was to meet next on 27 May 2023, when it was learnt that a number of petitions were filed before the Supreme Court in its original jurisdiction under Article 184(3) of the Constitution. The Commission was informed that in two of these petitions,[4] the Commission, through its Secretary, was arrayed as a respondent.

The Commission was stopped from working.

12. It transpired that a Bench headed by the Hon'ble Chief Justice and four Hon'ble Judges of the Supreme Court heard these petitions on 26 May 2023, and the very same day suspended the Notification and the order of the Commission dated 22 May 2023 and the proceedings of the Commission were also stayed. Therefore, on 27 May 2023, the Commission, after noting the filing of the petitions and the order passed therein, adjourned

its proceedings. The Commission required the learned AG to apprise the Commission of further developments in these petitions.

Non-attendance and non-disclosure.

13. Of the four gentlemen summoned on 27 May 2023, only Mr. Abdul Qayyum Siddiqui attended the Commission. Khawaja Tariq Rahim, Advocate, submitted an application (through email) stating that he had to undergo pre-scheduled 'bi-annual medical tests relating to my medical condition' on 27 May 2023 and also stated that:

I understand that the Commission has already indicated that keeping in view the age of two females whose audio is also in issue is willing to hold proceedings relating to them in Lahore. Since one of the ladies concerned is my wife it would be appropriate and in fitness of things that matter pertaining to my alleged audio leaks be also heard on the same day and date at Lahore.'

Messrs Abid Zuberi and Najam Saqib, Advocates, who had been summoned, did not attend nor did they inform the Commission why they were not doing so. They also did not bring to the Commission's notice that petitions had been filed and that the Supreme Court had stayed the Commission from proceeding further.

Submissions made by Mr. Abid Zuberi's counsel.

14. The order of the Supreme Court dated 26 May 2023 refers to, 'the submissions made by Mr. Shoaib Shaheen, ASC', who represents Mr. Abid Zuberi. The learned counsel submitted that the Commission had assumed the powers of the Supreme Judicial Council ( SJC'). However, the learned counsel failed to point out the Commission's order dated 22 May 2023, which had also stated that:

At the very outset it is clarified that the Commission is not the Supreme Judicial Council ( SJC ) constituted under Article 209 of the Constitution of the Islamic Republic of Pakistan ( the Constitution'). This Commission will not be assuming the powers of the SJC and it will endeavor to perform its functions to the best of its ability as per the Notification and in accordance with the Act.'

Given that the Commission had specifically clarified that it was neither the SJC nor was it assuming the powers of the SJC, it was incumbent upon the petitioners and their learned counsel to point this out and not make submissions to the contrary.

The Supreme Judicial Council - SJC.

15. Article 209 of the Constitution stipulates that the SJC comprises of the Chief Justice of Pakistan, the two next senior Judges of the Supreme Court and the two most senior Chief Justices of the High Courts. And, that if the SJC is, 'inquiring into the capacity or conduct of a Judge who is a member of the Council' then he cannot be part of the SJC and is to be substituted by the person next in seniority. If Article 209 of the Constitution is extrapolated as a principle, then making the next senior most Judge head the Commission accords therewith.

Independence of the Judiciary.

16. The petitioner's learned counsel also referred to the independence of the judiciary, and assumed that the same was under threat if the senior puisne Judge of the Supreme Court and two Chief Justices of the High Courts comprised of the Commission. It is not understandable why the independence of the judiciary would be threatened or even undermined if the senior most Judge of the Supreme Court and two Chief Justices are its members.

Privileged Communication'.

17. The petitioner's learned counsel also contended that communications between Mr. Abid Zuberi, an Advocate, and his client is 'privileged communication'. However, Mr. Abid Zuberi did not claim privilege before the Commission. Moreover, under Article 9 of the Qanun-e-Shahadat, 1984, the said privilege is not absolute as it excludes illegal purpose, crime or fraud.

9. Professional communications. No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this Article shall protect from disclosure

(1) any such communication made in furtherance of any illegal purpose; or

(2) any fact observed by any advocate, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to such fact by or on behalf of his client.'

If Mr. Abid Zuberi as an Advocate claims that any communication of his was privileged, the Commission would consider the same.

Mr. Abid Zuberi's public discussion on his alleged recordings.

18. Mr. Abid Zuberi has repeatedly spoken about the alleged audio recordings, including on national television both prior to, and after, passing of the order of this Court dated 26 May 2023. He did so on several television talk-shows, including the following:

| Date | Programme |
|---|---|
| 20 May 2023 | 'Face to Face' on GNN News[5] |
| 23 May 2023 | 'Off the Record with Kashif Abbasi' on ARY News[6] |
| 26 May 2023 | Sawal yeh hai with Maria Memon' on ARY News[7] |
| 26 May 2023 | 'Ab Pata Chala' on Bol News.[8] |

In each of these programmes, he was attired as an Advocate, and spoke about the audio recordings/the subject of his petition.

Mr. Abid Zuberi's counsel, Mr. Shoaib Shaheen, also participated in several television programmes to discuss the workings of the Commission. These include the following:

| Date | Programme |
|---|---|
| 22 May | 'Faisla aap ka with Asma Shirazi' on Aaj News[9] |
| 23 May | '11th Hour with Waseem Badaami' on ARY News[10] |
| 24 May | GNN News[11] |
| 26 May | ARY News[12] |

Mr. Abid Zuberi, together with his counsel, also did a press talk outside the Supreme Court Building on 26 May 2023.[13]

Right of Privacy.

19. The petitioner's learned counsel also contended that there was an absolute right of privacy stipulated in the Constitution. However, Article 14(1) of the Constitution stipulates that, 'The dignity of man and, subject to law, the privacy of home, shall be inviolable'. Whether the alleged audio recordings constitute privacy of home would have to be considered by the Commission, if this is contended before it. The Supreme Court in the case of Benazir Bhutto v. President of Pakistan[14] had also restricted the phrase privacy of home, by excluding therefrom certain matters:

25. ...Article 14 guarantees to protect dignity of man and the privacy of home which shall be inviolable subject to law. ...If a person intrudes into the privacy of any man, pries on the private life, it injures the dignity of man, it violates the privacy of home, it disturbs the peace and tranquility of the family and above all it puts such person to serious danger of being blackmailed. Such acts are not permissible under law and if any occasion arises for such operation, then it can be only in cases of defence and national security.'

It is submitted that if it be urged before the Commission, that the audio recordings constitute privacy of home in terms of Article 14(1) of the Constitution, this submission would be considered by it. The Commission would also consider whether evidence, if it is gathered illegally, is inadmissible and/or whether those gathering it would have to face prosecution under the relevant law, and may also have to consider Article 164 of the Qanun-e-Shahadat, 1984, if these points are taken up.

International Practice.

20. Though reference was made by this Court to paragraph 48 of a judgment of this Court,[15] the learned counsel failed to point out paragraph 46 thereof, which stated that:

46. The Irish Supreme Court has in DPP v. JC56 laid down the following principles with regard to the admission or exclusion of the evidence obtained in violation of the constitutional rights, in order to balance the legitimate

competing public interests: (i) The onus is on the prosecution to establish the admissibility of all evidence; (ii) If a claim is raised that evidence was obtained in breach of constitutional rights, the onus is on the prosecution to establish either (a) that there was no unconstitutionality, or (b) that despite any interference with constitutional rights the evidence should still be admitted; (iii) Where evidence is obtained in deliberate and conscious violation of constitutional rights, it should be excluded except in exceptional circumstances; (iv) Where evidence was taken in breach of constitutional rights, there is a presumption in favour of exclusion, which can be rebutted by evidence that the breach of rights was either (a) inadvertent or (b) derived from subsequent legal developments; and (v) Whether or not a breach of constitutional rights was deliberate and conscious requires analysis of the conduct or state of mind of the individual who actually gathered the evidence, as well as, any senior official or officials within the investigating or enforcement authority concerned who was involved either in that decision or in decisions of that type generally or in putting in place policies concerning evidence- gathering of the type concerned.'

Federalism.

21. The order of this Court dated 26 May 2023 has referred to the settled principles of Federalism, and on the basis of the same it was noted that permission of the Hon'ble Chief Justice of Pakistan was required before appointing the two Chief Justices as members of the Commission. With the greatest of respect, the Federation includes territories mentioned in the Constitution, including the Province of Balochistan and the Islamabad Capital Territory.[16] The Constitution stipulates that, 'Each High Court shall supervise and control all courts subordinate to it'.[17] The Constitution does not grant a similar supervisory and/or controlling role to the Supreme Court of Pakistan with regard to the High Courts, let alone exclusively to the Chief Justice of Pakistan. On the contrary, Federalism requires, as endorsed by the Constitution, that the High Courts function independently. The Supreme Court is only the appellate Court before which the decisions of the High Courts are assailed. And, the decisions of the Supreme Court are binding on 'all other courts in Pakistan', which include the High Courts. The constitutional autonomy of the High Courts is also reflected in Article 209, whereunder the SJC is established. Of the five SJC members, two are Chief Justices of the High Courts. In addition, Article 198(6) of the Constitution grants to the Governor in consultation with the Chief Justice of the High Court, the power to make rules with regard to the matters mentioned in clause (a) thereof and all incidental, supplemental or consequential matters, as per clause (6) of Article 198(6). Rules of procedure are made by the High Court alone, without the consultation with the Chief Justice of Pakistan or with the concurrence of the Supreme Court.[18] The language of Article 184(3) of the Constitution is also significant in that it commences by referring to Article 199 (jurisdiction whereunder is to be exercised by the High Courts), and states that the Supreme Court can make an order of the nature mentioned in the said Article 199. Significantly, the powers of the High Courts, exercised under Article 199, are not circumscribed by the constitutional prerequisites of public importance and enforcement of any of the Fundamental Rights. It is further submitted that where the Chief Justice of Pakistan has been empowered, the Constitution specifically states this, for instance, with regard to the transfer of High Court Judges under Article 200 of the Constitution.

Copies of concise statement

22. Copies of this Concise Statement have been supplied to all concerned, receipt whereof is attached hereto and marked as 'C'.

23. This Concise Statement is submitted by the Secretary of the Commission without engaging the services of an Advocate-on -Record to save public resources. The Commission also does not consider the need to engage the services of an Advocate Supreme Court as it would unnecessarily waste public resources. The Commission however expects that this Concise Statement will be read out in Court by the petitioner's counsel or by the learned AG.

Conclusion

24. It is most respectfully submitted that the Commission has no interest in the matter other than to undertake the assignment given to it and to do so strictly in accordance with the Constitution and the law. The Commission also assures that legal objections and concerns raised before it will be considered.

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|---|---|
| Islamabad<br>Dated: 31 May 2023 | Secretary<br>Inquiry Commission |

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**In,**

**CONSTITUTION PETITIONS NOS. 24, 25, 26 AND NIL OF 2023**

**SARDAR TARIQ MASOOD, J.---**I totally agree with what Mr. Justice Qazi Faez Isa has written in his note/order. I was also not consulted by the Hon ble Chief Justice before putting me on this Bench in the Constitution Petitions Nos. 24, 25, 26 and Nil of 2023. Surprisingly, these petitions in this Bench have been fixed when just a day earlier the petitioner of the Constitution Petition No. 25 of 2023 himself along with his counsel met the Hon ble Chief Justice in his Chamber and thereafter on the next day these petitions have been fixed without any consultation or ascertaining the availability of mine. If this practice is allowed than whether every petitioners/appellants whose petitions/appeals are lying in this court since years can be allowed to meet the Hon'ble Chief Justice in the Chamber for getting fixed their cases on the very next day.

2. I was awaiting the decision in the petitions through which the Supreme Court (Practice and Procedure) Act 2023 ( the Act') have been challenged and expected that they would be decided soon as interim ex-parte stay order was issued which had suspended the operation of the then bill and the proposed Act. Section 3 of the Act stipulates that "any matter invoking exercise of original jurisdiction under clause 3 of Article 184 of the Constitution shall be first placed before the committee constituted under section 2 for examination if the Committee is of the view that a question of public importance with reference to enforcement of any of the fundamental rights conferred by Chapter 1 of Part II of the Constitution is involved it shall constitute a Bench comprising not less than three Judges of the Supreme Court of Pakistan which may also include the member of the committee for adjudication of the matter." However, the present matter was not referred to the Committee, of which I am member. Only by presuming that the Act will be struck down, the mechanism provided in section 3 of the Act has been disregarded.

When stay order was passed I was also reluctant to sit on a Bench till the final decision of the said petitions in which the Act was challenged but as I was heading a Bench in which about thirty to thirty five criminal cases used to be fixed daily of the citizens of the Pakistan, who were in jail and waiting for the decision of their petitions/appeals against their conviction hence I kept on dealing the said criminal work and also requested the Hon ble Chief Justice for early disposal of the petitions filed against the Act. Although during this period I when heading two members bench, have heard Constitution Petitions Nos.26 and 28 of 2016 titled as Muhammad Tariq Asad v. Federation of Pakistan and Siraj-ul-Haq, Ameer Jamaat-e-Islami v. Federation of Pakistan, for the reason that regarding the maintainability of those petitions under Article 184(3), a five Members Bench, had already decided in affirmative and declared that those petitions were maintainable. Even after formulating the certain queries, I adjourned the said case for more than a month with expectation that by that time, petitions against the said Act would be decided.

3. These four petitions have been filed by those who apparently are not detained, nor facing trial with regard to the offences, allegedly committed on 9th May 2023 in Cantonment Areas and the said persons had attacked, destroyed and/or burnt public property and the property of the armed forces, PAF base and other prohibited areas etc. including the GHQ. If a law is challenged, usually it is before the High Court under Article 199 of the Constitution however these petitions have been filed in this court under Article 184(3) of the Constitution which jurisdiction can only be invoked in the public interest for the enforcement of fundamental rights mentioned in Chapter 1 of Part-II of the Constitution. It should not be presumed that those who may be tried raised objections to their trial under the Army Act, 1952 nor that they prefer to be tried in any Anti-Terrorism Court under the Anti-Terrorism Act, 1997 or before a criminal court mentioned in the Criminal Procedure Code. In any event, every individual case has to be considered on the basis of the fact of the case and the applicable law and this is to be done after hearing the nominated accused, nothing should be done which may jeopardize the interest of an accused without hearing his side.

4. I am also surprised that this nine Members Bench was constituted on the assumption that the Act will be struck down because if it is not, than any party who is not satisfied with its decision, their right to appeal under

section 5 of the Act would be made redundant because such an appeal is to be heard by a larger bench of the Supreme Court. Presently, the Supreme Court comprises of fifteen Judges and the Chief Justice, which makes a total of sixteen Judges. However, if the full court comprising of sixteen judges and the Chief Justice is available i.e. seventeen judges then an appeal would be heard by minimum of ten Judges which is not possible in the present situation so the appeal if filed by the either party would not be heard.

5. It is made clear that I have not recused from the Bench, hence there was no question to sign the purported order in which it has been mentioned that new Bench will be constituted whereas my point of view was that these petitions be heard after the decision of the said petitions which have been filed against the Act, hence I am writing my independent note/order.

Sd/-

**Sardar Tariq Masood, J**

**SYED MANSOOR ALI SHAH, J.---I** sit on this Bench with a reservation which I wish to record at the very outset on this first day of hearing. With respect, in the recent past there has been a consistent pattern and reluctance of not constituting the Full Court Bench (but instead Special Benches of some Hon'ble Judges) in cases[1] of immense public importance that have far-reaching impact on the political, social and economic life of the people of Pakistan and their fundamental rights. The non-formation of the Full Court Bench, in my opinion, has severely undermined the authority of the Court and the legitimacy of its judgments. The constitutional significance of the matter involved in the present case and its potential ramifications, call for the highest level of judicial scrutiny.[2] Collective deliberations and diverse insights by all the judges in cases of public importance helps the Court arrive at a sound judgment and reinforces public confidence and trust in this Court.

2. Additionally, I am of the opinion that until this Court decides the constitutionality of the Supreme Court (Practice and Procedure) Act 2023, Section 3 of which prescribes the procedure for invoking the original jurisdiction of this Court under Article 184(3) of the Constitution, all such matters under this jurisdiction must be heard by the Full Court Bench of this Court.

3. In order to safeguard the integrity and authority of this Court, I requested the Hon'ble Chief Justice of Pakistan to consider constituting the Full Court Bench of all judges of this Court, except those who are out of the country,[3] and leave it to each one of them to decide whether or not to recuse from hearing the case. However, his lordship has not, in his wisdom, thought it fit to accede to my request. I have no choice but to sit on the Bench as part of my constitutional obligation including above all the terms of my oath, which require me to preserve, protect and defend the Constitution including the fundamental rights of the people of Pakistan, in particular their right to life, liberty, dignity, due process and fair trial.

| | |
|---|---|
| Islamabad,<br>22nd June, 2023 | Sd/-<br>Syed Mansoor Ali Shah, J |

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* Published as received. Contains multiple orders and notes recorded by Members of the Bench on different dates of hearing of the present case.

* Annexure

1 No. PF.(674)/E-5(PAS) issued by the Establishment Division, Cabinet Secretariat, Government of Pakistan, from Islamabad on 3 April 2023. This order was copied to Mr. Ishrat Ali amongst others and also ordered to be published in the Gazette of Pakistan.

2 Qazi Faez Isa, Amin-ud-Din Khan and Shahid Waheed, JJ.

3 With a 2-1 majority, Shahid Waheed, J dissented.

4 No. Registrar/2023/SCJ dated 31st March 2023.

5 Constitution of the Islamic Republic of Pakistan, Article 176.

6 Ibid., Article 175(2).

7 Ibid., Article 184.

8 Ibid., Article 185.

9 Ibid., Article 186.

10 Ibid. Article 186A.

11 Ibid., Article 188.

12 Ibid., Article 204.

13 Ibid., Article 212(3).

14 Supreme Court Rules, 1980, Order XXVI, rule 8. The bench which had passed order dated 29 March 2023 comprised of Qazi Faez Isa, Amin-ud-Din Khan and Shahid Waheed, JJ, therefore, it had to be heard by this bench or before a bench of which at least the author Judge was a member.

15 Pakistan Medical and Dental Council (PMDC) represented by Mr. Afnan Karim Kundi, ASC.

16 Ijaz Ul Ahsan and Munib Akhtar, JJ, respectively.

17 *Suo Motu Case No. 4 of 2021,* PLD 2022 Supreme Court 306, written by Munib Akhtar, J.

18 Dated 24 August 2021, which stated that it should be *'immediately uploaded on the Supreme Court website'* but the Chief Justice had stopped it from being up-loaded. Therefore, it was circulated to my distinguished colleagues.

19 Paragraph 7 of the Note.

20 Presidential assent was given on 12 April 1973.

21 Four Members abstained.

22 Constitution of the Islamic Republic of Pakistan, Part VII, Articles 175 to 212.

23 Ibid., Article 4(1).

24 Ibid., Article 10A.

25 Ibid., Article 227.

26 Ibid., Article 2.

27 Ibid., Preamble/Objectives Resolution, which Article 2A has made into a, *`substantive part of the Constitution and shall have effect accordingly'.*

28 Al Qur'an, surah Ash-Shura (42) verse 38.

29 To cite just two examples, the Pakistani Islamic scholar Abul Ala Maududi (1903-1979) in his *Tafhim Al-Qur'an* (vol. 4, pp. 508-510) and the great Qur'anic exegete and hadith scholar *(muhaddith)* of Cordoba, Spain Abu Abdullah Muhammad bin Ahmad al-Qurtabi (1214-1273) in his *Al-Jami li-Ahkam Al-Qur'an* (vol. 18, pp. 586-588).

30 Ibid., surah Al-Imran (3) verse 159.

31 *Sunan al-Tirmidhi*, Kitab al-Jihad, Hadith No. 48, on the authority of Abu Hurairah.

32 Inscribed on a pillar in the courtyard of the Supreme Court of Bhutan.

33 Enacted in 2008.

34 Now High Court of Sindh.

35 Now the Supreme Court of Pakistan.

* Annexure

* Annexure

1 Supreme Court (Practice and Procedure) Act, 2023, published in the Gazette of Pakistan Extraordinary, Part 1, dated 21 April 2023.

2 *Code of Conduct to be observed by the Judges of the Supreme Court of Pakistan and of the High Courts of Pakistan,* Article IV.

3 Pakistan Commissions of Inquiry Act, 2017, enacted on 31 March 2017.

4 Constitution Petitions Nos. 14 and 15/2023.

5 https://www.youtube.com/watch?v-PE5mtZOBm5c&ab_channel-GNN (last accessed on 29 May 2023).

6 https://www.youtube.com/watch?v-MTH7aAyZLZk&ab_channel-ARYNews
(last accessed on 29 May 2023).

7 https://www.youtube.com/watch?v=7uBdfRGq5c8&ab_channe1=BOLNews
(last accessed on 29 May 2023).

8 https://www.youtu be.com/watch?v=4iEpzLS6eQ&ab_channel=ARYNews (last accessed on 29 May 2023).

9 https://www.youtube.com/watch?v-IgtlGk4aLwo (last accessed on 29 May 2023).

10 https://www.youtube.com/watch?v=oFGzah-OyrI&ab_channeI=ARYNews (last accessed on 29 May 2023).

11 https://www.youtube.com/watch?v=rdjQjg2B0c&ab_channe1=GNM%2B (last accessed on 29 May 2023).

12 https://www.youtube.com/watch?v=MNU1BM5D13E&ab_channe1=ARYNews (last accessed on 29 May 2023).

13 https://www.youtube.com/watch?v=hVOFJyUZ5EE&ab_channel---CapitalTV (last accessed on 29 May 2023).

14 PLD 1988 Supreme Court 388.

15 PLD 2021 SC 1.

16 Constitution of the Islamic Republic of Pakistan, Article 1(2)(a) and (b).

17 Ibid, Article 203. 18

18 Ibid, Article 202.

1 (1) S.M.C. 1/2022 (Regarding rejection of the motion of no-confidence against the Prime Minister); (2) Reference 1/2022 (Reference by the President of Pakistan under Article 186 of the Constitution, seeking interpretation of Article 63-A of the Constitution); (3) Const.P.22/2022 Chaudhary Parvez Elahi v. Deputy Speaker, Provincial Assembly of Punjab (Regarding Election of Chief Minister of Punjab); (4) S.M.C.1/2023 (Regarding Holding of General Elections to the Provincial Assemblies of Punjab and Khyber Pakhtunkhwa); (5) Const.P.5/2023 Muhammad Sibtain Khan v. Election Commission of Pakistan (Regarding change of polling date by the Election Commission of Pakistan); (6) Const.P.6/2023 Raja Amer Khan v. Federation of Pakistan (Challenging the Supreme Court (Practice and Procedure) Bill, 2023); (7) Const.P.9/2023 Sardar Kashif Khan v. Federation of Pakistan (Regarding holding of General Elections of National Assembly and Provincial Assemblies on same date); (8) Const.P.14/2023 Abid Shahid Zuberi v. Federation of Pakistan (Regarding constitution of an Inquiry Commission to probe into the veracity of alleged Audio Leaks); (9) Const.P.21/2023 Ghulam Mohiuddin v. Federation of Pakistan (Challenging the Supreme Court (Review of Judgments and Orders) Act 2023, etc.

2 TYH

3 Justice Athar Minallah and Justice Syed Hasan Azhar Rizvi are out of the country.

**P L D 2023 Supreme Court 617**

**Present: Syed Mansoor Ali Shah, Amin-ud-Din Khan and Jamal Khan Mandokhail, JJ**

**ZAFAR IQBAL---Petitioner**

**Versus**

**The STATE and others---Respondents**

Crl. P. No. 497-L of 2023, decided on 31st July, 2021.

(Against the order of Lahore High Court, Lahore dated 04.01.2023, passed in Crl. Misc. No. 8873-B of 2022).

**Criminal Procedure Code (V of 1898)---**

----Ss. 497 & 498---Supreme Court Rules, 1980, O. XXIII, R.2---Constitution of Pakistan, Arts. 9, 10A, 14 & 185(3)---Pre-arrest bail, petition for---Limitation---Scope---Law of limitation is fully applicable to petitions for leave to appeal in matters relating to pre-arrest bail and there is no relaxation as far as the period of limitation is concerned unless sufficient cause is shown for the delay, as required under the law---After dismissal of the petition for pre-arrest bail by the High Court, the Supreme Court should be approached promptly in a pre-arrest bail matter to avail the remedy available under the law and to actualize the right of access to justice.

The law of limitation is fully applicable to petitions for leave to appeal in matters related to pre-arrest bail like in other criminal petitions filed under Article 185(3) of the Constitution, and a delay in a petition filed beyond the limitation period must be supported by an application for condonation of delay which is to be examined by the Court on its own merits. Even though sufficient cause for condoning delay in criminal matters has been interpreted liberally and leniently by the Supreme Court while dealing with petitions and appeals filed by those incarcerated, this view is rooted in the objective to ensure that those incarcerated have equal opportunities of access to justice, and for safe administration of criminal justice. A person behind bars faces numerous hindrances in pursuing his legal remedies because of restricted access to the outside world, and therefore, suffers a disability in comparison to those who enjoy liberty and freedom. The delay, therefore, is usually because of the constraints due to being imprisoned and not because of any ulterior motive. As such, condonation of delay in such petitions is viewed leniently through the lens of fundamental rights, particularly the right to liberty, dignity and fair trial guaranteed under Articles 9, 14 and 10A of the Constitution, with the purpose to provide those incarcerated with equal access to courts, and equal and proper opportunities to defend themselves and to avail remedies available under the law. It is for this reason that, by following the practice of taking a lenient and permissive view in cases of those incarcerated, the Supreme Court has held that the incarceration of a petitioner seeking post arrest bail itself constitutes sufficient cause to allow condonation of delay, unless the delay was caused due to some ulterior motive of the said petitioner himself.

Muhammad Arshad v. The State PLD 2021 SC 927; Sikandar Hayat v. The State PLD 2020 SC 559 and Bashir Ahmed v. The State 1996 SCMR 308 ref.

However, the above ground is not available to condone delay in a petition for leave to appeal related to prearrest bail as the petitioner is not incarcerated and therefore, suffers no such disability. Failure to surrender before the authorities after dismissal of the pre-arrest bail petition by the High Court and then filing a time barred petition, impugning the decision of the High Court and seeking pre-arrest bail, before this Court could be indicative of an intent to remain a fugitive from the law. Such conduct could also be considered as a deliberate attempt to thwart the investigation, resulting in the loss of valuable evidence which is now simply lost or is impossible to collect due to afflux of time by failing to join the investigation. As such, failing to file a pre-arrest bail petition before this Court within the limitation period could either be intentional with ulterior purposes or, in the very least, due to the negligence of the petitioner, for which no reprieve can be granted by condoning delay without any sufficient cause. This Court should be approached promptly in a pre-arrest bail matter to avail the remedy available under the law and to actualize the right of access to justice. Therefore, the law of limitation is applicable to such petitions for leave to appeal in matters related to pre-arrest bail with its full rigour and there is no relaxation as far as the period of limitation is concerned unless sufficient cause is shown for the delay, as required under Rule 2 of Order XXIII of the Supreme Court Rules, 1980.

Awal Gul v. Zawar PLD 1985 SC 402 ref.

Zubair Afzal Rana, Advocate Supreme Court for Petitioner along with Petitioner.

Muhammad Jaffar, Addl. P.G. Pb. for the State along with Saadat Hussain, DSP and Yasir Nawaz, S.I.

Assisted by Muhammad Hassan Ali, Law Clerk, Supreme Court.

Date of hearing: 31st July, 2023.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The petitioner seeks leave to appeal against the impugned order dated 04.01.2023, whereby pre-arrest bail in case FIR No.438/2022 dated 03.11.2022, under Section 379, P.P.C., registered at Police Station Mitro, District Vehari, was denied to the petitioner.

2. At the very outset we have noted that the instant petition has been filed after a delay of 74 days from the expiry of the limitation period. Rule 2 of Order XXIII of the Supreme Court Rules, 1980 ("Supreme Court Rules") provides that a petition for leave to appeal under Article 185(3) of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution") in criminal matters has to be filed within thirty days from the judgment or final order sought to be appealed from. The second proviso to the said Rule provides that the Court may condone delay if "sufficient cause" is shown. However, to this effect, no application for condonation of delay has been filed with the instant petition.

3. Before deciding the matter at hand, we deem it necessary to first cater to a contention raised by the counsel of the petitioner during his arguments. The learned counsel for the petitioner has tried to argue that no limitation period is applicable for filing the instant petition dealing with pre-arrest bail because the matter involves the liberty and freedom of a person. We are not impressed by the said contention. The law of limitation is fully applicable to petitions for leave to appeal in matters related to pre-arrest bail like in other criminal petitions filed under Article 185(3) of the Constitution, and a delay in a petition filed beyond the limitation period must be supported by an application for condonation of delay which is to be examined by the Court on its own merits. Even though sufficient cause for condoning delay in criminal matters has been interpreted liberally and leniently by this Court while dealing with petitions and appeals filed by those incarcerated, this view is rooted in the objective to ensure that those incarcerated have equal opportunities of access to justice[1], and for safe administration of criminal justice[2]. A person behind bars faces numerous hindrances in pursuing his legal remedies because of restricted access to the outside world, and therefore, suffers a disability in comparison to those who enjoy liberty and freedom. The delay, therefore, is usually because of the constraints due to being imprisoned and not because of any ulterior motive. As such, condonation of delay in such petitions is viewed leniently through the lens of fundamental rights, particularly the right to liberty, dignity and fair trial guaranteed under Articles 9, 14 and 10A of the Constitution, with the purpose to provide those incarcerated with equal access to courts, and equal and proper opportunities to defend themselves and to avail remedies available under the law. It is for this reason that, by following the practice of taking a lenient and permissive view in cases of those incarcerated, this Court has held that the incarceration of a petitioner seeking post arrest bail itself constitutes sufficient cause to allow condonation of delay, unless the delay was caused due to some ulterior motive of the said petitioner himself.[3]

4. However, the above ground is not available to condone delay in a petition for leave to appeal related to pre-arrest bail as the petitioner is not incarcerated and therefore, suffers no such disability. Failure to surrender before the authorities after dismissal of the pre-arrest bail petition by the High Court and then filing a time barred petition, impugning the decision of the High Court and seeking pre-arrest bail, before this Court could be indicative of an intent to remain a fugitive from the law. Such conduct could also be considered as a deliberate attempt to thwart the investigation, resulting in the loss of valuable evidence which is now simply lost or is impossible to collect due to afflux of time by failing to join the investigation.[4] As such, failing to file a pre-arrest bail petition before this Court within the limitation period could either be intentional with ulterior purposes or, in the very least, due to the negligence of the petitioner, for which no reprieve can be granted by condoning delay without any sufficient cause. This Court should be approached promptly in a pre-arrest bail matter to avail the remedy available under the law and to actualize the right of access to justice. Therefore, the law of limitation is applicable to such petitions for leave to appeal in matters related to pre-arrest bail with its full rigour and there is no relaxation as far as the period of limitation is concerned unless sufficient cause is shown for the delay, as required under Rule 2, of Order XXIII of the Supreme Court Rules.

5. In the instant case, as pointed out above, the petition has been filed after a delay of 74 days and no application for condonation has been filed to show sufficient cause for condonation of the said delay. After dismissal of his pre-arrest bail petition by the High Court, the petitioner should have approached this Court within the period of limitation. Faced with this situation, the learned counsel for the petitioner after arguing the matter at some length wished to withdraw the titled petition. Therefore, with the above observations, the instant petition is dismissed as withdrawn.

MWA/Z-6/SC Petition dismissed.

**P L D 2023 Supreme Court 661**

**Present: Umar Ata Bandial, Maqbool Baqar, Manzoor Ahmad Malik, Mazhar Alam Khan Miankhel, Sajjad Ali Shah, Syed Mansoor Ali Shah, Munib Akhtar, Yahya Afridi, Qazi Muhammad Amin Ahmed and Amin-ud-Din Khan, JJ**

**Justice QAZI FAEZ ISA and others---Petitioners**

**Versus**

**PRESIDENT OF PAKISTAN and others---Respondents**

Civil Review Petition No. 296 of 2020 along with Civil Miscellaneous Application No. 1243 of 2021, Civil Review Petitions Nos. 296 to 301 of 2020, C.M.A. No. 4533 of 2020 in C.R.P. No. Nil of 2020, Civil Review Petitions Nos. 308, 309 and 509 of 2020, decided on 13th April, 2021 (Released on 4th April, 2022).

Per Munib Akhtar, J; Umar Ata Bandial, J., Sajjad Ali Shah, Qazi Muhammad Amin Ahmed and Amin-ud-Din Khan, JJ. agreeing; Maqbool Baqar, Manzoor Ahmed Malik (only to the extent of the short order), Mazhar Alam Khan Miankhel, Syed Mansoor Ali Shah, JJ. dissenting; Yahya Afridi, J. partially agreeing with the majority view with respect to dismissal of present application.

**(a) Administration of justice---**

----Dispensation of justice---Fundamental rule---Justice must not only be done, it should be seen to be done.

R v Sussex Justices ex parte McCarthy [1924] 1 KB 256, [ 1923] EWHC KB 1 ref.

**(b) Administration of justice---**

----Procedural laws---Such laws have to be complied with; otherwise, the judicial system will enter chaos.

**(c) Constitution of Pakistan---**

----Art. 188---Supreme Court Rules, 1980, O.XXVI, R. 1---Review jurisdiction of the Supreme Court---Scope---In review jurisdiction the Court can only determine whether a material irregularity has been committed in the judgment under review and, even if the answer be in the affirmative, it must further be shown that the irregularity has had a substantial effect on the outcome of the case.

Mohammad Amir Khan v. Controller of Estate Duty PLD 1962 SC 335 ref.

**(d) Constitution of Pakistan---**

----Arts. 19, 19-A, 25, 178, 184(3), 188, 191 & 209(5)(b)---Supreme Court Rules, 1980, O.XXXIII, R. 6---Broadcasting or live streaming of court proceedings---Constitutionality and permissibility---Review petitions before the Supreme Court challenging the directions given to the tax authorities by the Supreme Court to conduct an inquiry into the foreign assets of petitioner judge's family members and submit a report to the Supreme Judicial Council despite quashing of Presidential reference against the petitioner-judge---Present application was filed by the petitioner-judge praying that the Supreme Court may order live-streaming of the court proceedings of his case (review petitions), and direct the State-owned Pakistan Television Corporation (PTV) to broadcast live proceedings of his case and the Pakistan Electronic Media Regulatory Authority (PEMRA) to issue written instructions to all private television channels that they cannot be restrained in any manner whatsoever from broadcasting the proceedings---Maintainability and competency---[Per Munib Akhtar, J. (Majority view)]: Present application raised an altogether new prayer that had no nexus with the review jurisdiction of the Court; it also involved adjudication of substantive law issues and, appeared to be wrongly filed as a miscellaneous matter in the review jurisdiction of the Court---Present application could not cross the hurdle of maintainability by relying on O. XXXIII, R. 6 of the Supreme Court Rules, 1980, as the said Rule had no relevance to the facts of the present case---Present Bench was sitting, as an "open court"---Public, which was always welcome to sit in the open court proceedings, included members of the press and, vloggers and bloggers; they were free to witness Court proceedings and frequently did so---Relief sought through the present application was novel, as there had been no judicial pronouncements by the Supreme Court on the merits and demerits of allowing public broadcast and/or live streaming of Court proceedings---Exercise of deciding the issue of public broadcast and/or live streaming could only be deliberated upon on and be approved by the Court in its administrative manifestation, therefore, the Supreme Court referred the said issue to the Chief Justice so that he may place it before the Full Court for deliberation and appropriate action---Application was dismissed]---[Per Maqbool Baqar, Mazhar Alam Khan Miankhel and Syed Mansoor Ali Shah, JJ. (Minority

view): Prayer made in the present application for livestreaming and broadcasting the court-proceedings could be decided only by the present Bench, and cannot be agitated through filing a separate constitution petition under Article 184(3) of the Constitution---Cases heard by the Supreme Court in its original jurisdiction under Article 184(3) of the Constitution, including review petitions and other matters arising therein, are matters of public importance within the meaning and scope of that expression used in Article 19A of the Constitution---Live-streaming (audio and video) of the court-proceedings in cases heard by the Supreme Court, on a petition or suo motu, under Article 184(3) of the Constitution, should be made available for the information of the public through a link on the official website of the Court, in the enforcement of the fundamental right of the public, and for the fulfillment of the obligation of the Court, under Article 19A of the Constitution---Registrar of the Supreme Court shall take steps to provide for the requisite technological infrastructure for livestreaming the court-proceedings---Registrar shall also place the matter before the Court, on the administrative side, for considering amendments in the Supreme Court Rules 1980, in order to livestream court-proceedings of all cases heard under Article 184(3) and to regulate the practice and procedure in this regard---Keeping in view the current state of technological infrastructure available in the Supreme Court and the fact that the review petitions filed in the case were fixed for hearing, audio recording of the proceedings of the court-hearings of the petitioner's case shall be made available through a link on the official website of the Supreme Court, for public information]---[Per Yahya Afridi, J. (partially agreeing with the majority view with respect to dismissal of present application): Relief sought by the petitioner through present application would negate the very spirit of the oath taken by him---However the right of the public to have access to live-streaming or audio-video recording, written transcript or any other medium, of the court hearings in the proceedings of public importance, including those under Articles 184(3) and 186 of the Constitution, was their fundamental right under Article 19A of the Constitution---Said right, however, could not be left to reign absolute, lest it be abused and, thus, it was required to be regulated by framing rules under Article 191 of the Constitution]

Per Munib Akhtar, J. (Majority view):

Regardless of how (and not just jurisprudentially) important the claim put forward by the present application may be, it cannot be lost sight of that what were before the Court were petitions inviting the exercise of review jurisdiction under Article 188 of the Constitution. Present application raises an altogether new prayer that has no nexus with the review jurisdiction of the Court.

It is Article 184(3) of the Constitution, and not Article 188, that would be the proper vehicle for considering relief of the nature sought by, and through, the present application. The present application involves adjudication of substantive law issues and, appears to be wrongly filed as a miscellaneous matter in the review jurisdiction of the Court.

Swapnil Tripathi v. Supreme Court of India AIR 2018 SC 4806 ref.

Petitioner cannot cross the hurdle of maintainability of present application by relying on O. XXXIII, R. 6 of the Supreme Court Rules, 1980. The said Rule has no relevance to the facts of the present case, in the context of the present application. Said Rule can be invoked by the Court to either further the "ends of justice" or to "prevent abuse of the process of the Court". However, neither of these conditions is engaged in the present context. It cannot be that the "ends of justice" will be defeated or there will be an "abuse of the process of the Court" if the relief sought in the present application is not allowed, i.e., public broadcast and/or live streaming of the review proceedings is denied. The primary reason put forward by the petitioner was his and his family's constant public humiliation and degradation at the hands of different State officials and functionaries ('the respondents'). Even if it be accepted that the petitioner's reputation (and that of his family) has been tarnished by the acts of the respondents in the manner as contended, no cogent reason was put forward as to how hearings in the present matters, held according to settled practice and time honored principles, would prevent the alleged negative publicity surrounding him from being dispelled. After all, the Court (including of course the present Bench) sits, and was sitting, as an "open court".

Black's Law Dictionary (10th ed., at page 1263) ref.

Petitioner also put forward his apprehension that even if the public was allowed to enter the courtroom, this access was subject to limitations such as space constraints (only intensified with the advent of Covid-19); that

as a result, the vast majority of the public would be excluded from observing the review hearings. This apprehension of the petitioner is without force. For it to be accepted would mean that until the advent of present-day means of communication and broadcast, which have only been around in the modern era, there have never been open and public hearings in the courts of law. What has happened for many centuries prior thereto and is accepted as such even today all around the world-that is, that the open court system is quite sufficient to ensure transparency and openness in the judicial system and of court proceedings-would be cast in doubt, if not abandoned altogether. Such a result cannot, be countenanced on any view of the matter. Furthermore, it is to be noted that the public, which is always welcome to sit in the open court proceedings, includes members of the press (and also, which is a distinctly recent phenomenon, vloggers and bloggers). They are free to witness Court proceedings and frequently do so. Certainly, they appear to have attended in droves to witness the proceedings both in these review petitions and the proceedings in relation to the hearing of the petitions under Article 184(3) from which these petitions emanate. If therefore the petitioner's primary aim was to disseminate his narrative to the public at large, this task can be easily performed, and has been duly performed all along by the journalists and vloggers/bloggers who have throughout closely followed all the proceedings, including his arguments, in Court.

The relief sought through the present application was novel. As a result, there have been no judicial pronouncements by the Supreme Court on the merits and demerits of allowing public broadcast and/or live streaming of Court proceedings. Dismissal of present application should not be construed as an absolute refusal of public broadcast and/or live streaming of Court proceedings. Instead, it should be understood as an exercise in judicial restraint and caution.

A decision on public broadcast and/or live streaming cannot be taken hastily. Instead, it is a matter which requires careful consideration of multiple factors and participation of the different stakeholders involved in the judicial system. As a result, this exercise cannot be carried out on the judicial side but can only be deliberated upon on and be approved by the Court in its administrative manifestation.

National Director of Public Prosecutions v. Media 24 Limited and others [2017] ZASCA 97 and Swapnil Tripathi v. Supreme Court of India AIR 2018 SC 4806 ref.

Keeping in view the evolving practice of the Courts around the world and acknowledging the benefits of technology for the justice system, the Supreme Court referred the matter of public broadcast and live streaming of Court proceedings to the Chief Justice so that he may place it before the Full Court for deliberation and appropriate action. Application was dismissed.

Per Maqbool Baqar, Mazhar Alam Khan Miankhel and Syed Mansoor Ali Shah, JJ. (Minority view):

The prayer made in the present application for livestreaming and broadcasting on Pakistan Television Corporation (PTV) and other television channels, the court-proceedings of present case can be decided only by the present Bench in this case, and cannot be agitated through filing a separate constitution petition under Article 184(3) of the Constitution; for such a petition, if filed, may then be entrusted to and heard by any other Bench of the Supreme Court. Each Bench of the Supreme Court, whether small or large, exercises the judicial powers vested in the Court, and a decision rendered by it, irrespective of its numeric strength, is considered the decision of the Court. Thus, one Bench of the Supreme Court cannot deal with an ancillary or incidental matter pertaining to a case being heard by another Bench.

The cases heard by the Supreme Court in its original jurisdiction under Article 184(3) of the Constitution, including review petitions and other matters arising therein, are matters of public importance within the meaning and scope of that expression used in Article 19A of the Constitution, as it is only when the "question of public importance" is involved that the Supreme Court can exercise its jurisdiction under Article 184(3) to make an order for the enforcement of any of the fundamental rights. The public, therefore, has a fundamental right under Article 19A of the Constitution to have access to information as to the court proceedings of the cases heard by the Supreme Court in its original jurisdiction under Article 184(3) of the Constitution, including to know and see how the court-proceedings in these cases are conducted and concluded by the Court.

The obligation of the Supreme Court, under Article 19A of the Constitution, to give access to the public to information of the court proceedings in the cases heard by it under Article 184(3) cannot be said to be fulfilled

by allowing permission to come to the court-room and see the court-proceedings, as this facility may be availed of only by a few of the public who can afford travelling to the courthouse and are lucky enough to have a seat in the court-room, there being a very limited space. The facility of entry to the Court and seeing the court proceedings, in this context, appears rather discriminatory, available only to the affluent and thus, offending Article 25 of the Constitution.

A very few of the public, can afford to reach the Court and see the court-proceedings while a large section of the people of the country, who are more than 200 million, cannot avail their right to see the court-proceedings due to time, distance and financial constraints. They, thus, depend on the information reported in print and electronic media. When the reporting is accurate and comprehensive, it fulfills their right to information; but when it is inaccurate or incomplete, it thwarts the right. The gavel-to-gavel live-streaming of the court proceedings would give the public a more direct sense of what occurs in these proceedings than second-hand information given to them by the media through reporting the event in a summarized form.

Live-streaming of the court proceedings, in the present age, can easily be made through the latest technology, and that too, at the lowest and reasonable cost. It would make the public to be virtually present in the courtroom and enable them to see, in real-time, how the court proceedings are conducted and concluded.

To maintain and boost up the public trust in the Court's working, it is essential to make the public aware of how the Court deals with cases under Article 184(3) and to be reassured that it always functions within the terms of the Constitution and law independently, impartiality and fairly. Live-streaming of the court-proceedings would reflect a responsive image of the Court acknowledging that it is accountable to the public for whom it functions, and promote the public confidence in its functioning. There is no legal impediment in live-streaming the court-proceedings of cases heard under Article 184(3) on the official website of the Supreme Court and it is a positive obligation of the Supreme Court, under Article 19A, to do this for enforcement of the right of the public to have access to information of these proceedings.

Access of the public to the court-proceedings in cases under Article 184(3) of the Constitution can expose information as to the matters of public importance that may otherwise not be possible for the public to have; as in most cases under Article 184(3), it is the Government, or any of its departments or instrumentalities, which is alleged to have infringed the fundamental rights of the public and the Court is called upon to enforce them. The information as to the court-proceedings in such cases would be a vital avenue for public information about what the Government does and why the Court interferes. The access of the public to the court proceedings in cases heard under Article 184(3) through live-streaming would, thus, serve the democracy as much as it would make the exercise of judicial power by the Court in such cases transparent.

Argument of respondents that question of live-streaming of the court-proceedings is a policy matter and should be decided by the Court on the administrative side, is not well-founded, especially in the context of court proceedings of cases heard under Article 184(3) of the Constitution which is under consideration, in the present matter. The proceedings in such cases are "matters of public importance" within the meaning of that expression used in Article 19A and the public has a fundamental right to know how these proceedings are conducted; the question of enforcement of this right is a legal matter to be decided judicially and is not a policy matter for decision on the administrative side.

Scott v. Scott 1913 AC 417 ref.

Live-streaming (audio and video) of the court-proceedings in cases heard by the Supreme Court, on a petition or suo motu, under Article 184(3) of the Constitution should be made available for the information of the public through a link on the official website of the Court, in the enforcement of the fundamental right of the public, and for the fulfillment of the obligation of the Court, under Article 19A of the Constitution. However, present Bench of the Court can make an order to live-stream the court proceedings of this case only as per the prayer made therein, and cannot direct the other Benches of the Supreme Court that are, or would be, hearing such cases, to live-stream their court-proceedings. The general practice in this regard can be enforced only by making rules under Article 191 of the Constitution. However, until such rules are made by the Court on the administrative side, it lies in the discretion of each Bench of the Court hearing such a case to order, or not to

order, in the exercise of powers of the Court, live-streaming of its court-proceedings and to regulate that live-streaming, if ordered.

In the circumstances of the present case, the Court is inclined to exercise its discretion in favour of ordering livestreaming of its court proceedings; however, it had been apprised that in the current state of technological set-up available in the Supreme Court such an order, if made, could not be executed. Courts do not make in-executable orders, therefore, the Court is abstaining from making an order for live-streaming the court-proceedings of the present case. However, the Registrar of the Supreme Court shall take steps to provide for the requisite technological infrastructure for livestreaming the court-proceedings, so that any Bench of the Supreme Court may, if so decides, order for live-streaming the court proceedings of a case being heard under Article 184(3) of the Constitution, in future. The Registrar shall also place the matter before the Court, on the administrative side, for considering amendments in the Supreme Court Rules 1980, in order to livestream court-proceedings of all cases heard under Article 184(3) and to regulate the practice and procedure in this regard.

Facility of live audio-hearing of the court-proceedings of all Benches of the Supreme Court is currently available to all the Judges of Court in their Chambers as well to their staff, and audio recording of the court-proceedings is also sometimes made. Therefore, keeping in view the current state of technological infrastructure available in the Supreme Court and the fact that the petitioner's case (review petitions) is already fixed for hearing, the audio recording of the proceedings of the court-hearings of the petitioner's case shall be made available through a link on the official website of the Supreme Court, for public information. The Registrar of the Supreme Court shall ensure that the unedited audio recording of the proceedings of the court-hearings of the present case is uploaded on the official website of the Court on the same day soon after the hearing and before the close of the working hours.

So far as the prayer of the petitioner to the extent of directing the State-owned Pakistan Television (PTV) Corporation to broadcast live the proceedings of his case is concerned, such a direction would breach the freedom of expression and press guaranteed by Article 19 of the Constitution as both kinds of direction, viz, to broadcast or not to broadcast something, are tantamount to interference into the freedom guaranteed by the Constitution, unless such act or omission of PTV breaches any legal right of someone or any of its legal obligations and it is also made a party to the proceedings initiated thereon. Likewise, the prayer of the petitioner that the Pakistan Electronic Media Regulatory Authority (PEMRA) may be directed to issue written instructions to all private television channels that they cannot be restrained from broadcasting the proceedings, appears to be not entertainable, as none of the private television channels has agitated its right (if any) to broadcast the court-proceedings of cases heard by the Supreme Court under Article 184(3), and such determination of the question as to their such right (if any) is to be left to be made in a case where they would agitate the same and claim enforcement thereof.

**Per Yahya Afridi, J.** (partially agreeing with the majority view with respect to dismissal of present application):

To allow the relief the petitioner seeks in the present application would, "negate the very spirit of the oath taken" by him as a Judge of the superior judiciary, that mandates him to avoid "publicity", which in itself warrants dismissal of the present application.

The right of the public to have access to court-hearings through live-streaming, audio-video recording, written transcript or any other medium, in the proceedings of public importance including those under Articles 184(3) and 186 of the Constitution, is their fundamental right under Article 19A of the Constitution. This right, however, cannot be left to reign absolute, lest it be abused and, thus, requires to be regulated, as Article 19A of the Constitution mandates the same to be "subject to regulation and reasonable restrictions imposed by law". Therefore, for the safe and proper implementation of this fundamental right, the appropriate means would be to frame rules under Article 191 of the Constitution.

Once the Supreme Court has adjudged and declared on the judicial side that the public has a right to have access to information of the court-proceedings in cases of public importance, the process of effectuating the said right should best be left for the Court to be dealt with on the administrative side. The full court comprising all Judges of the Supreme Court, with the deliberation and input of all of them, would be better poised than any Bench of

the Supreme Court to balance the interests of all stakeholders, in giving the public access to court proceedings, by making well considered rules to regulate its practice and procedure on this subject, and obviating the possibility of causing affront to the proceedings of the Supreme Court, which should in all eventualities be vehemently avoided to preserve the majesty of the Court. Accordingly, His Lordship directed the Registrar of the Supreme Court to place the matter before the Full Court, on the administrative side, for appropriate steps as it deems fit, under Article 191 of the Constitution.

Per Munib Akhtar, J. (Majority view):

**(e) Administration of justice---**

----Use of technology for enhancing transparency and openness of judicial proceedings---Technological developments should be monitored and appreciated, to ensure that access to justice for litigants is constantly improving---Judicial system should, administratively speaking, be alive and alert, and responsive, to technological advances and changes that can enhance the transparency and openness of judicial proceedings---Any approach that smacks of Luddite thinking should be avoided; but at the same time it should be kept in mind-and this is the corollary- that one need not be dazzled and mesmerized by advances in technology; it must always be remembered that technology is merely a tool and an aid---Technology is the servant and not the master---Simply because the Court (technologically) can, does not mean that it, therefore, necessarily must---Sober and robust approach is much to be preferred.

Per Maqbool Baqar, Mazhar Alam Khan Miankhel and Syed Mansoor Ali Shah, JJ. (Minority view):

**(f) Constitution of Pakistan---**

----Arts. 184(3) & 188---Original jurisdiction of the Supreme Court under Article 184(3) of the Constitution - Scope---Said jurisdiction cannot be exercised as a parallel review jurisdiction, and a judgment or an order of the Supreme Court can never be challenged by virtue of filing independent proceedings under Article 184(3) of the Constitution---Such course is absolutely impermissible.

Shabbar Raza v. Federation of Pakistan 2018 SCMR 514 ref.

**(g) Constitution of Pakistan---**

----Art. 188---Review jurisdiction of the Supreme Court---Scope---When a Court sits to review its judgment it does not sit in appeal over its own judgment but proceeds to have a fresh look at it within the limits of the review jurisdiction and for this purpose, it invokes the very same jurisdiction which it exercised earlier, whether it be appellate or original, and can modify its judgment in the exercise of that very jurisdiction---Review jurisdiction only provides a mode to re-invoke the jurisdiction earlier exercised, and thus takes colour from the nature of the jurisdiction exercised by the Court in passing the judgment under review; it cannot be said to be some independent jurisdiction other than the jurisdiction exercised by the Court when the judgment under review was passed.

Reliance Industries v. Pravinbhai Patel AIR 1997 SC 3892 ref.

**(h) Constitution of Pakistan---**

----Art. 19A---Right to information---Scope---Matter of public importance---Provisions of Article 19A of the Constitution do not contain an abstract guiding principle, rather confer a justiciable right---Right to have access to information in all matters of public importance conferred by Article 19A is a corrective apparatus, which allows public scrutiny to the working of the public authorities and institutions, and makes them answerable to the public, thus, it ensures transparency and accountability in the functioning of all public authorities and institutions---Right conferred by Article 19A is effective in operation and extensive in scope: it is though subject to, but is not dependent for its effectiveness upon enactment of, a law that may provide for the regulation of, and reasonable restrictions on, such right and it comprehends all matters of public importance undertaken by all State institutions.

**(i) Interpretation of statutes---**

----Same expression used in different parts of the statute---ordinarily the same meaning is attached to an expression used in different parts of a statute unless the context in which the expression appears suggests otherwise.

Muhammad Rashid v. State PLD 1960 SC 168 and Muhammad Nazeef v. Gulbat Khan 2012 SCMR 235 ref.

**(j) Constitution of Pakistan---**

----Art. 19A---Expression "matters of public importance" used in Article 19A of the Constitution---Meaning---Said expression means the matters that pertain to and affect the public at large, a whole community, and not an individual or a small group of individuals; in other words, it includes the matters in which the general interest of a whole community, as opposed to the particular interest of individuals, is directly and vitally concerned---Adjective "public" necessarily implies a matter relating to the people at large, the nation, the State or a community as a whole; if a matter in which only a particular individual or group of individuals is interested and the people at large or an entire community have no interest, that cannot be treated as a matter of public importance.

PLD 1975 SC 66; PLD 1988 SC 416; Shahida Zahir v. President of Pakistan PLD 1996 SC 632; Zulfiqar Mehdi v. PIA Corporation 1998 SCMR 793; Asad Ali v. Federation of Pakistan PLD 1998 SC 161; Watan Party v. Chief Executive/President of Pakistan PLD 2003 SC 74; Javed Jabbar v. Federation of Pakistan PLD 2003 SC 955; Shahbaz Sharif v. Federation of Pakistan PLD

2004 SC 583; APNS v. Federation of Pakistan PLD 2004 SC 600; Muhammad Siddique v. Government of Pakistan PLD 2005 SC 1; PML(N) v. Federation of Pakistan PLD 2007 SC 642; Watan Party v. Federation of Pakistan PLD 2012 SC 292; Tahir-Ul-Qadri v. Federation of Pakistan PLD 2013 SC 413 and Abdul Wahab v. HBL 2013 SCMR 1383 ref.

**(k) Constitution of Pakistan---**

----Arts. 19A, 184(3) & 188---Cases heard by the Supreme Court in its original jurisdiction under Article 184(3) of the Constitution including review petitions and other matters arising therein---Such cases are matters of public importance.

Province of Punjab v. Qaisar Iqbal PLD 2018 Lah. 198 ref.

**(l) Constitution of Pakistan---**

----Part II, Chap. I---Fundamental rights---Positive and negative rights---Distinction stated.

The Constitution has conferred fundamental rights in positive as well as in negative language. The negative language of a fundamental right imposes a limitation on the power of the State and declares the corresponding guarantee as to the entitlement of the people to that right. The positive language of a fundamental right not only operates as a limitation on the power of the State but it also requires affirmative State action to protect and fulfill the right conferred. In view of this difference of language, the fundamental rights are sometimes classified into negative and positive rights: a negative right generally obliges inaction, a positive right requires action. The holder of a negative right is entitled to non-interference, while the holder of a positive right is entitled to the provision of some service. A negative right places a duty on the State not to interfere in certain areas where the citizens have the right to act in a certain way or the other and have their freedom of choice within the existing right; the State cannot encroach upon such freedom. A positive right, on the other hand, places an obligation on the State to take certain actions and measures to give effect to that right.

Province of Sindh v. M.Q.M. PLD 2014 SC 531 ref.

**(m) Constitution of Pakistan---**

----Art. 19A---Right to information---Scope---Article 19A of the Constitution creates a positive obligation on all State organs, authorities and institutions, including the Judiciary, to take the necessary measures to ensure the realization of the fundamental right of citizens to have access to information in matters of public importance.

**(n) Constitution of Pakistan---**

----Art. 19A---Right to information---Progressive and dynamic interpretation---Approach of the Supreme Court to the interpretation of the fundamental rights guaranteed by the Constitution has been progressive, liberal and dynamic---Therefore, provisions of Article 19A of the Constitution have to be interpreted with a progressive, liberal and dynamic approach with which the Supreme Court has been interpreting the other fundamental rights and the Court has to explore the modern means of enforcement of the right guaranteed by Article 19A, which have been made available by the latest technology of the day.

Jabendra Kishore v. East Pakistan PLD 1957 SC 9; Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416 and Nawaz Sharif v. President of Pakistan PLD 1993 SC 473 ref.

**(o) Constitution of Pakistan---**

----Part II, Chapt. I & Preamble---Doctrines, principles, rules and precedents from foreign jurisdictions---Persuasive value---Scope---Any transplant of a rule from a foreign jurisdiction to ours should be made after considering closely and thoroughly the difference of the constitutional scheme---Similarities and differences between the constitutional dispensation in that foreign jurisdiction and our Constitution are to be deeply evaluated---Any doctrine, principle, rule and precedent in the foreign jurisdiction must be viewed through the prism of fundamental rights guaranteed by our Constitution and other constitutional values.

**(p) Constitution of Pakistan---**

----Arts. 184, 185 & 188---Short order signed by a Judge of the Supreme Court before his retirement---Detailed reasons for the order released after date of retirement of the Judge---Principles relating to signing or recording the detailed reasons by a retired Judge of the Supreme Court stated.

Short orders are made and announced by the Supreme Court, after due application of the judicious mind to, and after due consideration of, the pleadings of the parties and their arguments in the light of the material available on record of cases for definite "reasons" that are present in the mind of the judges at the time of making those orders. Short orders are made due to paucity of time to record detailed "reasons" and due to the urgency of the matters involved. That is why the detailed reasons recorded later in support of the short orders always bear the date of the short order, not the date of recording those reasons. The expression used in the short orders, "for the reasons to be recorded later", clearly means that it is the act of recording reasons that is postponed to a later time, and not the act of creating or searching for the reasons. The latter meaning, if given, to the expression "reasons to be recorded later" would completely shatter the legal sanctity and validity of the short orders, and unsettle the well-settled legal position according to which the short orders made by the Supreme Court are fully operative orders, executable forthwith, and a party feeling aggrieved thereby is to avail his legal remedy of review within the prescribed period of limitation computing from the date of the short order, and not from the date of release of the detailed reasons recorded in support thereof.

A judge of the Supreme Court who has vacated his office on retirement joins the detailed reasons recorded by any of his colleagues in support of the short order made by them jointly or records his own reasons, in his status, capacity and authority he had on the date when that short order was made.

It is the status of a judge of the Supreme Court on the date of making the short order that is relevant at the time of recording the detailed reasons in support thereof and determines his authority to record such reasons. From the settled practice of the Supreme Court, according to which the detailed reasons recorded in support of a short order always bear the date of the short order, not the date of recording them, and the status and capacity of the judges as on the date of the short order, it is not hard to discern that it is the status, capacity and authority of a judge of the Supreme Court as on the date of the short order under which he records, after retirement, his reasons for making the short order or joins in the reasons recorded by some other judge if he finds that they are the same for which he made the short order.

Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324 and CJP Iftikhar Muhammad Chaudhry v. President of Pakistan PLD 2010 SC 61 ref.

**(q) Constitution of Pakistan---**

----Arts. 184, 185 & 188---Precedential effect and value of the opinion of some Members of a Bench of the Supreme Court---Whether the dissenting Members of a Bench could adjudicate upon the precedential effect and value of the opinion of other (majority) Members of the same Bench, in their judgment delivered in the same case---Held, that such practice had never been seen in our jurisdiction as well as in any of the foreign jurisdictions---Members of the same Bench differ on issues and strongly express their respective opinions, as well as make comments on the opinion of each other highlighting the reasons for which they think other Member(s) has erred in his opinion, but do not adjudicate upon the precedential effect and value of each other's opinion---Question of extracting ratio decidendi and determining precedential effect and value of the opinion of some Members of a Bench of the Supreme Court expressed in a judgment delivered in one case, can be examined only in other cases where such a judgment is cited as precedent, and that can be done not only by a Bench of the Supreme Court but even by a court lowest in the judicial hierarchy; nevertheless, it is in no way a

domain of the Members of the same Bench to make this exercise in their respective judgments rendered in the same case.

For the Petitioner(s)

Justice Qazi Faez Isa (in-person) (in C.R.P. No. 296 of 2020).

Rasheed A. Rizvi, Senior Advocate Supreme Court (through Vide Link from Karachi) (in C.R.Ps. Nos. 297 and 309 of 2020).

Mrs. Sarina Faez Isa (in-person) (in C.R.P. No. 298 of 2020).

Hamid Khan, Senior Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record (in C.R.Ps. Nos. 299, 300, 301 and 308 of 2020).

Nemo for Petitioner (in C.M.A. No. 4533 of 2020).

Nemo for Petitioner (in C.R.P. No.509 of 2020).

For Federation of Pakistan:

Ch. Aamir Rehman, Addl. AGP.

For President, PM and AGP.

Sohail Mahmood, Addl. AGP.

Dates of hearing: 2nd 3rd, 8th, 17th and 18th March, 2021.

**JUDGMENT**

**MUNIB AKHTAR, J.---**The learned petitioner in C.R.P. No. 296/2020 filed C.M.A. No. 1243/2021 ("CMA") seeking the following relief:

"Therefore, for the reasons stated above [in the CMA] this Hon'ble Court may be pleased to: (a) direct the State-owned Pakistan Television Corporation (PTV) to broadcast live the proceedings of the petitioner's case, (b) to direct the Pakistan Electronic Media Regulatory Authority (PEMRA) to issue written instructions to all private channels that they cannot be restrained in any manner whatsoever from broadcasting the proceedings and (c) to order live streaming of court proceedings.

The prayer has been made in the best interest of justice."

2. The CMA was heard over several dates and was ultimately dismissed by a majority of 6:4 on 13.04.2020, when the following short orders were made (reported as Justice Qazi Faez Isa and others v. President of Pakistan and others PLD 2021 SC 595):

[per Umar Ata Bandial, Sajjad Ali Shah, Munib Akhtar, Qazi Muhammad Amin Ahmed and Amin-ud-Din Khan, JJ.:]

"For reasons to be recorded later, this Misc. Application is dismissed. However, the right of the people to have access to information in matters of public importance under Article 19-A of the Constitution is recognized, the details and modalities of which are to be decided by the Full Court on the administrative side."

[per Maqbool Baqar, Manzoor Ahmed Malik, Mazhar Alam Khan Miankhel and Syed Mansoor Ali Shah, JJ.:]

"For the reasons to be recorded later, we dispose of the miscellaneous application (C.M.A. No.1243/2021) filed by the Petitioner in review petition (CR.P. No.296/2020) in the following terms:

i) Article 19-A of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution") creates an obligation on State institution, including the Judiciary, to take the necessary measures to ensure realization of the fundamental right of citizens to have access to information in matters of public importance. Cases under Article 184(3) of the Constitution, including review petitions and other matters arising therein, are matters of public importance, and the public has a right to know and see how proceedings in these cases are conducted and concluded by the Court. We, therefore, hold that Live Streaming (audio and video) of Court hearings of these cases should be made available for information of the public through a link on the official website of this Court, and for this purpose the Registrar of this Court should take steps to provide for the requisite technological infrastructure and make arrangements for necessary amendments in the Rules under Article 191 of the Constitution to regulate its practice and procedure in this regard;

ii) Keeping in view the current state of technological infrastructure available in this Court and the fact that the review petitions filed in the case are fixed for hearing, we direct the audio recording of the proceedings of the court hearings of the said review petitions to be made available to the public through a link on the official

website of this Court. The Registrar of this Court shall ensure that the un-edited audio recording of the proceedings of the court hearing of the review petitions is made available to the public on the official website of the Court on the same day soon after the hearing and before the close of the working hours."

[per Yahya Afridi, J.:]

"For the reasons already recorded in my judgment delivered in Constitution Petition No. 17 of 2019, the present Civil Miscellaneous Application No.1243 of 2021 is dismissed, as the relief sought by the petitioner would "negate the very spirit of the oath taken by the petitioning Judge".

2. However, for the reasons to be recorded later, I find the right of the public to have access to live-streaming or audio-video recording, written transcript or any other medium, of the court hearings in the proceedings of public importance, including those under Articles 184(3) and 186 of the Constitution, is their fundamental right under Article 19A of the Constitution. The Registrar of this Court is, therefore, directed to place the matter before the Full Court for appropriate steps as it deems fit, under Article 191 of the Constitution, to effectuate this fundamental right of the public."

The Order of the Court was as follows:

"By majority of 6 to 4 (Maqbool Baqar, J; Manzoor Ahmad Malik, J; Mazhar Alam Khan Miankhel, J and Syed Mansoor Ali Shah, J dissenting), Civil Misc. Application No. 1243 of 2021 is dismissed."

3. The following are our reasons for dismissing the CMA.

4. The learned petitioner, who appeared on his own behalf, anchored and seated his case in support of the CMA in the well known legal precept that justice must not only be done, it should be seen to be done. As is well known, this fundamental rule, essential for the dispensation of justice, was stated in the form in which it is best known by Lord Hewart, CJ, who famously said in R v Sussex Justices ex parte McCarthy [1924] 1 KB 256, [1923] EWHC KB 1 as follows: "... a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".

5. The learned petitioner began his submissions by drawing attention to Article IV of the Code of Conduct formulated for Judges of the Supreme Court and the High Courts by the Supreme Judicial Council under Article 209(8) of the Constitution, where express reference is made to the aforementioned rule in the second paragraph. It was submitted that since the rule lay at the heart of the code of conduct to which Judges had to adhere, it was vitally important that it be applied with vigor. The CMA was filed to ensure that justice should be seen to be done in the instant case, i.e., the review petitions being heard by the Court. It was submitted that it was important that the public at large should actually see justice being done, which could only be ensured by giving them access to the proceedings and hearings in terms as prayed for in the CMA. In support of his case, the learned petitioner gave a homely example, referring to his young granddaughter who, when asked whether she saw justice, replied that she only saw it when she came to the Court, or on TV. And, even though the courtroom was almost invariably packed on the days that the review petitions were fixed for hearing, the learned petitioner submitted that that represented only a tiny sliver of the public. Even though the hearings were in open court to which members of the public (including the press) had access that was not the same as the public at large having the opportunity to hear and see the proceedings for themselves. It was for that reason that relief was prayed for as in the CMA. In support of his prayer, the learned petitioner, inter alia, referred to local and foreign case-law. In particular, he relied on two cases: National Director of Public Prosecutions v. Media 24 Limited and others [2017] ZASCA 97 decided by the Supreme Court of Appeal of South Africa ("NDPP") and Swapnil Tripathi v. Supreme Court of India AIR 2018 SC 4806 ("Swapnil") decided by the Supreme Court of India.

6. We intend no disrespect for not immediately engaging with the submissions made by the learned petitioner in support of his application. The reason is that the learned Additional Attorney General ("AAG") in reply raised a preliminary objection that needs to be considered first. It is only if the legal hurdle thrown up by this objection is crossed that there will be a need to consider in detail the submissions made by the learned petitioner.

7. The learned AAG opposed the application on two main grounds:

a. The application was not maintainable as it had been filed in review jurisdiction under Article 188 of the Constitution, which by its nature was limited; and

b. There was no constitutional or statutory right available which provided for public broadcast and/or live streaming of proceedings of the Court.

8. The preliminary issue as to maintainability was in the context of the main petitions being an invocation of the review jurisdiction of the Court. The learned AAG submitted that to invoke the fundamental right of access to information under Articles 19 and/or 19A of the Constitution (which plea sustained the CMA) the proper course would have been for the learned petitioner to file a petition under Article 184(3). In this regard, Order XXVI of the Supreme Court Rules, 1980 ("SCR"), which relates only to the review jurisdiction, was referred to show that an application for enforcement of fundamental rights under Article 184(3) of the Constitution did not lie in terms thereof. Such petitions /applications are treated in the SCR under Order XXV and it was submitted that the two courses could not be conflated and intermingled. Therefore, it was submitted, the CMA was not maintainable and ought to be dismissed.

9. In response to the preliminary objection, the learned petitioner relied on Order XXXIII, Rule 6 SCR. This well known rule relates to the inherent powers of the Court and is in the following terms:

"Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

The learned petitioner submitted that the Court had ample powers under the afore-mentioned Rule to make an order of any nature which would further the "ends of justice" or "prevent abuse of the process of the Court". He added that the transgressions and illegalities committed by the respondents in his case necessitated public broadcast and/or live streaming of the review proceedings so that the public would become aware of the truth. He, therefore, contended that the present case was a fit one for the Court to exercise its powers under Rule 6.

10. We have carefully considered the preliminary objection and the reply thereto. Certainly, the prayer made in the CMA, as candidly (and quite properly) accepted by the learned petitioner himself, is novel. As far as the records show no such request has previously been made. In essence, the CMA seeks enforcement of two fundamental rights, namely, freedom of speech (Article 19) and right to information (Article 19A). While there is no cavil with the proposition that petitions filed to enforce fundamental rights are to be appreciated, it needs also to be ensured that these are processed through proper channels. Procedural law has to be complied with; otherwise, the judicial system will enter chaos. Therefore, with respect, regardless of how (and not just jurisprudentially) important the claim put forward by a miscellaneous application may be, it cannot be lost sight of that what were before the Court were petitions inviting the exercise of review jurisdiction under Article 188. As has already been elaborated upon in other judgments and decisions (including those emanating from these very review petitions), this jurisdiction is far more restricted in scope compared to the original jurisdiction exercisable under Article 184(3). In short: in review jurisdiction the Court can only determine whether a material irregularity has been committed in the judgment under review and, even if the answer be in the affirmative, it must further be shown that the irregularity has had a substantial effect on the outcome of the case. Reference may be made to the leading case of Mohammad Amir Khan v. Controller of Estate Duty PLD 1962 SC 335 at 340. As is clear even on a bare perusal, the CMA, with respect, raises an altogether new prayer that has no nexus with the review jurisdiction of the Court.

11. In contrast to the position when review jurisdiction is being exercised, the Court, when treating a matter in its jurisdiction under Article 184(3), can pass any order of the nature mentioned in Article 199 if two requirements are satisfied: firstly, the case raises a question of public importance and secondly, it is related to a violation of any fundamental right(s). (This is of course only a summary statement of the jurisdiction, which has over the years developed a rich and complex jurisprudence. What has just been said must be read in the light of the relevant case law.) However, what is relevant for present purposes is that it is Article 184(3), and not Article 188, that would be the proper vehicle for considering relief of the nature sought by, and through, the CMA. Even the case from the Indian jurisdiction cited by the learned petitioner (noted above) tends to show this. In Swapnil the jurisdiction of the Indian Supreme Court was invoked under Article 32 of their Constitution (which can be treated as equivalent to our Article 184(3)) for live streaming of cases of constitutional importance having an impact on the public at large. Therefore, even on the basis of the case-law cited by the learned petitioner the CMA involves adjudication of substantive law issues and, with respect, appears to be

wrongly filed as a miscellaneous matter in the review jurisdiction of the Court. In our view therefore there appears to be force in the preliminary objection taken.

12. As noted above, the learned petitioner sought to rely on Order XXXIII, Rule 6 to overcome the objection of maintainability. With respect, we are unable to agree that the hurdle can be crossed in this manner. The said Rule has no relevance to the facts of this case, in the context of the CMA. It can be invoked by the Court to either further the "ends of justice" or to "prevent abuse of the process of the Court". However, neither of these conditions is engaged in the present context. With respect, it cannot be that the "ends of justice" will be defeated or there will be an "abuse of the process of the Court" if the relief sought in the CMA is not allowed, i.e., public broadcast and/or live streaming of the review proceedings is denied. The primary reason put forward by the learned petitioner was his and his family's constant public humiliation and degradation at the hands of the respondents. Now even if it be accepted that the learned petitioner's reputation (and that of his family) has been tarnished by the acts of the respondents in the manner as contended, no cogent reason was put forward as to how hearings in the present matters, held according to settled practice and time honored principles, would prevent the alleged negative publicity surrounding him from being dispelled. After all, the Court (including of course this Bench) sits, and was sitting, as an "open court", a term which has been defined in Black's Law Dictionary, (10th ed., at page 1263) as being a "court session that the public is free to attend". This obvious point could not be denied and the learned petitioner very fairly conceded the same. However, his insistence was upon the anxiety that arose from the fact that even if the public was allowed to enter the courtroom, this access was subject to limitations such as space constraints (only intensified with the advent of Covid-19). As a result, he submitted, the vast majority of the public would be excluded from observing the review hearings. This apprehension of the learned petitioner is, with respect, without force. For it to be accepted would mean that until the advent of present-day means of communication and broadcast, which have only been around in the modern era, there have never been open and public hearings in the courts of law. What has happened for many centuries prior thereto and is accepted as such even today all around the world-that is, that the open court system is quite sufficient to ensure transparency and openness in the judicial system and of court proceedings-would be cast in doubt, if not abandoned altogether. Such a result cannot, with respect, be countenanced on any view of the matter. Furthermore, it is to be noted that the public, which is always welcome to sit in the open court proceedings, includes members of the press (and also, which is a distinctly recent phenomenon, vloggers and bloggers). They are free to witness Court proceedings and frequently do so. Certainly, they appear to have attended in droves to witness the proceedings both in these review petitions and the proceedings in relation to the hearing of the petitions under Article 184(3) from which these petitions emanate. If therefore the learned petitioner's primary aim was to disseminate his narrative to the public at large, this task can be easily performed, and has been duly performed all along by the journalists and vloggers/bloggers who have throughout closely followed all the proceedings, including his arguments, in Court. Insofar as his expressed anxiety about incorrect reporting is concerned that, with respect, shows little respect for the press and vloggers/bloggers and belittles their efforts and reporting, which is not warranted. In any case it is an accusation (whether stated expressly or impliedly) for which the Court cannot provide a remedy unless (which is altogether a different matter) the reporting falls within the parameters of contempt as set out in Article 204 of the Constitution. No doubt any alleged misleading reporting of Court proceedings (unfortunate as it may be and as to which we record no finding whatsoever) is of acute discomfiture to the party concerned. However, as has been said in the UK Court of Appeal in R v Central Independent Television plc [ 1994] 3 All ER 641 (per Hoffman LJ (as he then was)):

"...Newspapers are sometimes irresponsible and their motives in a market economy cannot be expected to be unalloyed by considerations of commercial advantage. And publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which 'right-thinking people' regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute... It cannot be too strongly emphasised that outside the established exceptions (or any new ones which Parliament may enact in accordance with its obligations under

the convention) there is no question of balancing freedom of speech against other interests. It is a trump card which always wins." (emphasis supplied)

13. In view of the above discussion, we therefore concluded that the preliminary objection taken by the learned AAG had to be sustained and, with respect, the CMA dismissed as not maintainable, on account of being incompetent in the review jurisdiction of the Court.

14. The foregoing is dispositive of the CMA. However, it would not be inappropriate to say something about the substantive law questions raised in the CMA, even if such be only on a tentative and provisional basis. We start with a basic premise: the judicial system should, administratively speaking, be alive and alert, and responsive, to technological advances and changes that can enhance the transparency and openness of judicial proceedings. An approach that smacks of Luddite thinking should be avoided. But at the same time it should be kept in mind-and this is the corollary- that one need not be dazzled and mesmerized by advances in technology. It must always be remembered that technology is merely a tool and an aid. It is, to use an old fashioned phrase, the servant and not the master. And, if one may borrow a phrase from a different context, simply because yes, we (technologically) can, that does not mean that we, therefore, necessarily must. This side of the coin-the corollary-is unfortunately often lost sight of in the razzmatazz of the Internet age. A sober and robust approach is much to be preferred.

15. Having said that, let us nonetheless return to the basic premise: technological developments should be monitored and appreciated, to ensure that access to justice for litigants is constantly improving. Our dismissal of the CMA should not therefore be construed as an absolute refusal of public broadcast and/or live streaming of Court proceedings. Instead, it should be understood as an exercise in judicial restraint and caution. We are aware that judicial systems around the world are experimenting with cameras in the courtroom. Some are regularly broadcasting /live streaming their proceedings while others are participating in pilot projects. In the former category, we have the UK and Canadian Supreme Courts who have permitted live streaming of their cases since long (the links can be found on their official websites). In the latter group, we have the State and Federal Courts of the USA, all of which are at varying stages in terms of allowing broadcasting of their hearings.

16. We have already expressed the view that the relief sought through the CMA is novel. As a result, there have been no judicial pronouncements by this Court on the merits and demerits of allowing public broadcast and/or live streaming of Court proceedings. However, the decision rendered by the Indian Supreme Court, noted above, provides insight into the factors which may be considered by a Court while deciding a petition seeking such relief, and the manner in which it is to be disposed of. The matter in Swapnil was in essence a public interest litigation filed by a group of public-spirited persons who sought "Supreme Court case proceedings of constitutional importance having an impact on the public at large or a large number of people to be live streamed in a manner that is easily accessible for public viewing" and for "guidelines to be framed to enable the determination of exceptional cases that qualify for live streaming and to place those guidelines before the Full Court of this Court". The Court allowed the petition but emphasized the issues which had to be sorted out before such live streaming could be permitted. A few of these are listed below for reference:

a. How will the live streaming project be phased;

b. In what categories of cases will live streaming not be permitted;

c. What types of communications will not be streamed;

d. Would Judges/Court have power to disallow live streaming in the interests of justice;

e. How would the identity of witnesses, accused and complainants who wished to remain anonymous be protected;

f. What equipment would be used to live stream proceedings;

g. In what manner would live streaming be done;

h. How much time lag will be provided during the live streaming to ensure that sensitive/ confidential information is not revealed;

i. How would the cameras be positioned; and

j. Would the Court retain copyright over the recorded proceedings?

17. A somewhat similar approach was taken in NDPP, the other case noted above from South Africa. Although that matter was only concerned with the broadcast of criminal trials, the principles laid down appear to be of general application. In that case the Court accepted that trial court proceedings could be televised but it did not set down any fixed rules to regulate such broadcast and instead left it to the discretion of each trial court to determine whether a case before it is fit for live telecast. The Supreme Court of Appeal also acknowledged that in allowing the broadcast of court proceedings, the following stakeholders' interests would need to be considered:

a. The interests of the prosecuting authority, the accused and the public to hold a trial that is fair and is seen to be fair;

b. The interests of the media and the public in maintaining freedom of the press and in ensuring open justice;

c. The interests of the participants in the trial process; and

d. The interests of the Court and the public in maintaining the dignity and decorum in the administration of justice.

18. It is significant that these judgments confirm that a decision on public broadcast and/or live streaming cannot be taken hastily. Instead, it is a matter which requires careful consideration of multiple factors and participation of the different stakeholders involved in the judicial system. As a result, this exercise cannot be carried out on the judicial side but can only be deliberated upon on and be approved by the Court in its administrative manifestation. This is evident from the experience of the Indian Supreme Court which referred the matter of live streaming to the Chief Justice for further action. In fact, even in this Court similar matters have been determined by the Full Court sitting on the administrative side, e.g., approval for setting up of video links for hearing cases at the principal seat and the branch registries was given by the Full Court after an extensive discussion. This was followed by the constitution of an IT Committee which was tasked with examining the matter and recommending appropriate solutions. At no stage was the issue referred to in, or decided by, a judicial order. In our view, there appears to be a certain overlap (both technologically and otherwise) between granting permission for hearings through video link and for permitting public broadcast/live streaming of Court proceedings.

19. Accordingly, keeping in view the evolving practice of the Courts around the world and acknowledging the benefits of technology for the justice system, we refer the matter of public broadcast and live streaming of Court proceedings to the Hon'ble Chief Justice so that he may place it before the Full Court for deliberation and appropriate action.

20. The foregoing are the reasons for our short order, noted above, in terms of which the CMA was dismissed.

Sd/-

Umar Ata Bandial, J

Sd/-

Sajjad Ali Shah, J

Sd/-

Munib Akhtar, J

Sd/-

Qazi Muhammad Amin Ahmed, J

Sd/-

Amin-ud-Din Khan, J

Present: Umar Ata Bandial, C.J., Maqbool Baqar, Manzoor Ahmad Malik, Mazhar Alam Khan Miankhel, Sajjad Ali Shah, Syed Mansoor Ali Shah, Munib Akhtar,

Yahya Afridi, Qazi Muhammad Amin Ahmed and Amin-ud-Din Khan, JJ

**Justice QAZI FAEZ ISA and others---Petitioners**

**Versus**

**PRESIDENT OF PAKISTAN and others---Respondents**

C.M.A. No. 1243 of 2021 in Civil Review Petition No. 296 of 2020.

(For livestreaming and broadcasting the court-proceedings)

For the Petitioner(s)

Justice Qazi Faez Isa (in-person) Assisted by Barrister Kabir Hashmi. (in C.R.P. No. 296 of 2020).

Mrs. Sarina Faez Isa (in-person) (in connected C.R.P. No. 298 of 2020).

Hamid Khan, Senior Advocate Supreme Court, Syed Rifaqat Hussain Shah, Advocate-on-Record (in connected C.R.Ps. Nos. 299, 300, 301 and 308 of 2020).

Rasheed A. Rizvi, Senior Advocate Supreme Court (through Video Link from Karachi), (in connected C.R.Ps. Nos. 297 and 309 of 2020).

Syed Rifaqat Hussain Shah, Advocate-on-Record (in connected C.R.P. No. 509 of 2020).

For Federation of Pakistan

Ch. Aamir Rehman, Addl. AGP.

For President, PM & AGP.

Sohail Mahmood, Addl. AGP.

Dates of hearing: 2nd, 3rd, 8th, 17th and 18th March, 2021.

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**ORDER**

**MAQBOOL BAQAR, MAZHAR ALAM KHAN MIANKHEL AND SYED MANSOOR ALI SHAH, JJ.--**

Preface

This application raises the questions, whether the time has come to open our court-room and allow public access to judicial proceedings through live audio-video streaming. "Sunshine is said to be the best of disinfectants"[1]; we need to ask ourselves whether the traditional closed architecture of our court-room needs to be redesigned to allow sunshine of public access through live audio-video streaming ? Should we embrace technology and

align ourselves with the modern judiciaries of the world by giving online access to the public to our court proceedings? And do we wish to make our justice system more transparent by holding judicial proceedings in public gaze?

2. This Court being at the apex of the judicial hierarchy of the country is often the final arbiter of the constitutional questions having a profound effect on all and sundry. The cases involving questions of public importance with reference to the enforcement of fundamental rights of the citizens, which are heard by this Court in its original jurisdiction under Article 184(3) of the Constitution, have a distinct characteristic: the Court, in these cases, acts as the first and the final arbiter. The uniqueness of this jurisdiction exercised by the Court at times invites criticism of judicial overreach.[2] Would not the openness of the Court to public through live streaming be an effective restraint on the possible misuse of judicial power under this jurisdiction ?

3. "Democracies die behind closed doors ... When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation."[3] Openness serves to ensure the durability of democracy. No organ of the State, however, has remained a greater mystery to people than the Judiciary. Live-streaming of the court proceedings could demystify the Judiciary and make it truly a public institution. Would it not give
the people a better understanding of the working of the Court, and reassure them that their fundamental rights are being protected and enforced by the Court in its jurisdiction under Article 184(3) of the Constitution?

Prayer of the petitioner

4. The petitioner, Justice Qazi Faez Isa, has prayed that this Court may order live-streaming of the court proceedings of his case (review petitions), and direct the State-owned Pakistan Television Corporation (PTV) to broadcast live proceedings of his case and the Pakistan Electronic Media Regulatory Authority (PEMRA) to issue written instructions to all private television channels that they cannot be restrained in any manner whatsoever from broadcasting the proceedings.

Factual background

5. Before describing the assertions of the petitioner made in the present application, it would be proper to give a brief background of the case, to comprehend the context of the prayer of the petitioner. A Reference under Article 209 of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution") was filed by the President of Pakistan on the advice of the Prime Minister of Pakistan against the petitioner in the Supreme Judicial Council of Pakistan ("Council"), alleging commission of misconduct mainly on the basis of his non-disclosure of certain foreign properties of his family members in the declaration of his assets filed with the annual income tax returns. The Council commenced proceedings against the petitioner on the said Reference. The petitioner, and many Bar Councils and Bar Associations of the country, challenged the action of the President, of filing the said Reference and also the proceedings of the Council commenced on the basis thereof, in this Court invoking its original jurisdiction by filing constitution petitions under Article 184(3) of the Constitution. Those constitution petitions were allowed by this Court: the Reference filed against the petitioner was quashed and the proceedings before the Council were declared abated. However, the Court also made certain directions to the officers of the Federal Board of Revenue, Pakistan to initiate proceedings against the petitioner's family members under the Income Tax Ordinance, 2001 and to submit a report regarding determination made in those proceedings to the Council, and the Council was asked to consider the matter in exercise of its suo motu powers, for such proceedings in relation to the petitioner as it may deem appropriate. It is against these directions of the Court that the petitioner, his spouse, and some Bar Councils and Bar Associations have filed the review petitions. And before arguing on his review petition, the petitioner has filed the present application.

Assertions of the petitioner

6. The petitioner has asserted in the application that immediately after the President of Pakistan sent the Reference against him to the Council, the contents of the Reference were leaked to the media, and the same were broadcast on television channels and published in newspapers. An unrelenting false propaganda campaign was launched against him. He, as a Judge of the Supreme Court, was handicapped to hold a press conference to rebut or respond to the allegations, while the official respondents with their iron grip on the media ensured

that the contents of his reply filed in the Reference were neither broadcast nor published. The Law Minister sensationalized the matter by making false statements to the media, and the President of Pakistan, in his three television interviews, elaborated upon the Reference when the matter was pending adjudication before this Court in the constitution petitions. The tactics of the official respondents formed a negative public opinion about the petitioner and his family, and whether he survives as a Judge or not, his reputation has been tarnished by the negative propaganda. Although the irreparable harm already caused to him cannot be undone; however, to restore a semblance and to correct the public perception, all future proceedings in his case may be directed to be broadcast live and/or live-streamed. Broadcasting and/or live-streaming of the court proceedings would be an affirmation of the Fundamental Rights of the petitioner and of the public, and would also be a testament to accountability and transparency.

Stance of the other parties

7. Learned counsel for the petitioners in the other connected
review petitions supported the prayer of the petitioner, while the
learned Additional Attorneys-General who appeared before the Court on behalf of the some of the respondents, i.e., Federal Government, President of Pakistan, Prime Minister and the Attorney-General for Pakistan ("contesting respondents"), opposed it mainly on the ground that the prayer of the petitioner made through a miscellaneous application, and that too, filed in a review petition is not maintainable, besides there is no fundamental right of the public to have access to information of the court-proceedings through livestreaming or broadcasting of the same. They contended that the Court could take up and decide the questions involved in the present application only on a separate and independent petition under Article 184(3) of the Constitution.

8. After hearing the arguments of the petitioner and the contesting respondents at length, we disposed of the application of the petitioner, for the reasons to be recorded later, vide our short order dated 13.04.2021 in the following terms:

Short order

(i) Article 19-A of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution") creates an obligation on State institutions, including the Judiciary, to take the necessary measures to ensure realization of the fundamental right of citizens to have access to information in matters of public importance. Cases under Article 184(3) of the Constitution, including review petitions and other matters arising therein, are matters of public importance, and the public has a right to know and see how proceedings in these cases are conducted and concluded by the Court. We, therefore, hold that Live Streaming (audio and video) of court hearings of these cases should be made available for information of the public through a link on the official website of this Court, and for this purpose the Registrar of this Court should take steps to provide for the requisite technological infrastructure and make arrangements for necessary amendments in the Rules under Article 191 of the Constitution to regulate its practice and procedure in this regard;

(ii) Keeping in view the current state of technological infrastructure available in this Court and the fact that the review petitions filed in the case are fixed for hearing, we direct the audio recording of the proceedings of the court hearings of the said review petitions to be made available to the public through a link on the official website of this Court. The Registrar of this Court
shall ensure that the un-edited audio recording of the proceedings of the court hearing of the review petitions is made available to the public on the official website of the Court on the same day soon after the hearing and before the close of the working hours.

In this discourse, we undertake to describe our reasons for the above order.

Questions for determination

9. At the outset, we want to make it clear that although the pro and contra arguments were advanced as to the broader concepts of 'open trial' and 'open justice' and 'live-streaming' of all cases in all courts of the country, we being cognizant of the procedural aspect of the principle of judicial restraint that requires "if it is not necessary to decide more, it is necessary not to decide more"[4], restrict ourselves only to the determination of the questions that are necessary for decision on the prayer made in the present application, viz:

(i) Whether it is the fundamental right of the public to have access to information as to the court-proceedings of the cases heard by this Court in its original jurisdiction under Article 184(3) of the Constitution, including review petitions and other matters arising therein.

(ii) If so, whether there is any obligation of this Court to provide the public the access to information of the court-proceedings of such cases through livestreaming.

There is a serious "risk of error or misconception which inevitably attends judicial efforts to declare the law at large and in general terms outside of the points really raised by the facts of the case."[5] It would, therefore, be appropriate to examine the broader question of live-streaming of all cases heard by this Court or of all cases heard by all courts of the country, in some case where this matter is agitated as a main question, and not as an ancillary one raised in a miscellaneous application. We, therefore, leave this broader question to be examined and decided in some other appropriate case.

Objection as to maintainability of prayer through a miscellaneous application

10. Before embarking upon the discussion on the above questions, we would like to deal with the preliminary objection of the contesting respondents. We find that the objection of the contesting respondents as to the maintainability of the prayer made through a miscellaneous application filed in a review petition is misconceived. The misconception, we think, has partly occurred due to the submissions made by the parties during arguments on the application, which were not restricted to the prayer made in the application rather were expanded to the broader questions of 'open trial' and 'open justice' and 'live-streaming' of all cases in all courts of the country, which we have decided to not take up in the present case. These questions can only be taken up and decided on an independent petition under Article 184(3) of the Constitution filed only for this purpose, and not on a miscellaneous application like the present one, filed as an ancillary matter to the main case agitating some other grievance.

11. But the prayer made in the present application for livestreaming and broadcasting on PTV and other television channels, the court-proceedings of this case can be decided only by this Bench in this case, and cannot be agitated through filing a separate constitution petition under Article 184(3); for such a petition, if filed, may then be entrusted to and heard by any other Bench of this Court. Needless to say that each Bench of this Court, whether small or large, exercises the judicial powers vested in the Court, and a decision rendered by it, irrespective of its numeric strength, is considered the decision of the Court. Thus, one Bench of this Court cannot deal with an ancillary or incidental matter pertaining to a case being heard by another Bench. This legal position may be elucidated by a presumptive question: If this Bench decides to either allow or disallow the prayer made in the present application, whether any other Bench of this Court can reverse such order of this Bench, on a separate petition under Article 184(3) of the Constitution, and can direct this Bench to livestream, or restrain it from livestreaming, the court-proceedings of this case. The answer is a clear-cut "No", and for reaching this answer, one does not need to do any intense brainstorming. There is no such jurisdiction conferred on this Court by the Constitution, or by or under any law, in terms of Article 175(2) of the Constitution. Even, this Bench also cannot review its order made on the present application, on a separate petition filed under Article 184(3) of the Constitution. For the original jurisdiction of this Court under Article 184(3) of the Constitution, as authoritatively held by a 7-member Bench of this Court by a unanimous decision in Shabbar Raza v. Federation[6], "cannot be exercised as a parallel review jurisdiction", and a judgment or an order of this Court "can never be challenged by virtue of filing independent proceedings under Article 184(3) of the Constitution"; such course is "absolutely impermissible". It is thus only this Bench, and no other, that can decide on the prayer made in the present application, that too only on a miscellaneous application as the present one, and not on a separate and independent petition under Article 184(3) of the Constitution. The objection of the contesting respondent is found meritless and is therefore rejected.

12. Now, we proceed to deal with the substantive question (i), above cited, as to the claimed fundamental right of the public to have access to information of the court-proceedings of the cases heard by this Court in the exercise of its original jurisdiction under Article 184(3) of the Constitution and of the review proceedings in such cases. However, before commencing the discussion thereon, we would like to clarify that we have specifically included the "review proceedings" in the question, as when a Court sits to review its judgment it

does not sit in appeal over its own judgment but proceeds to have a fresh look at it within the limits of the review jurisdiction and for this purpose, it invokes the very same jurisdiction which it exercised earlier, whether it be appellate or original, and can modify its judgment in the exercise of that very jurisdiction. The review jurisdiction only provides a mode to re-invoke the jurisdiction earlier exercised, and thus takes colour from the nature of the jurisdiction exercised by the Court in passing the judgment under review; it cannot be said to be some independent jurisdiction other than the jurisdiction exercised by the Court when the judgment under review was passed.[7]

(i) Fundamental right of the public to have access to information of the court-proceedings of cases heard under Article 184(3)

**(a) Reliance on Article 19A of the Constitution**

13. To establish that the public has a fundamental right to have access to information as to the court proceedings of the cases heard by this Court under Article 184(3) of the Constitution, the petitioner has referred to the right to access to justice comprised in the fundamental right to life and liberty guaranteed under Article 9, the right to a fair trial guaranteed under Article 10A, the right to freedom of expression and freedom of the press guaranteed under Article 19 and the right to information guaranteed under Article 19A of the Constitution. We find that rights guaranteed under Articles 9, 10A and 19 of the Constitution may be relevant for determination of the broader question of live-streaming of all cases heard by this Court or of cases heard by all courts of the country, which we have left to be determined in some other appropriate case, but for the questions being considered for the decision of the prayer made in the present application, the provisions of Article 19A of the Constitution that guarantees right to information, appear to us, to be the most significant, which are reproduced hereunder for ready reference:

19A. Right to information: Every citizen shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law.

(Emphasis added)

Article 19A was added to the Constitution by the Constitution (18th Amendment) Act, 2010. Since then, it has been a subject of discussion and interpretation by the constitutional courts of the country in several cases. Observations made in some of those cases, which are relevant for the present case, are briefly cited here.

**(b) Overview of the previous opinions of Constitutional Courts on Article 19A of the Constitution**

13.1 Probably for the first time, the addition of this Article in the Constitution was noted by a division bench of the Lahore High Court in the case of Atta Ullah v. Federation[8], in the year 2010; one of us (Syed Mansoor Ali Shah, J.) speaking for the bench observed that "Article 19A of the Constitution is a recent and welcome addition to the chapter of fundamental rights under the Constitution.... Right to information is another corrective tool, which allows public access to the working and decision making of the public authorities. It opens the working of public administration to public scrutiny... Article 19A empowers the civil society of this country to seek information from public institutions and hold them answerable."

13.2 In the same year, i.e., the year 2010, this Court also noticed the then-recent addition of Article 19A in the Constitution in the case of Shahid Masood v. Federation,[9] hearing two constitution petitions filed under Article 184(3) of the Constitution, that had agitated the grievance as to the breach of the fundamental rights alleging closure and suspension of broadcasting and transmission of some T.V. Channels by the licensed T.V. Cable Operators. The Court observed that the importance and weight attached to the obligations of the Cable T.V. Network Operators to offer undisturbed distribution of service "is not far to find as the same stems out of the fundamental rights of freedom of speech, expression and of press as guaranteed by Article 19 of the Constitution and equally importantly, if not more, the right of every citizen to have access to information in all matters of public importance as guaranteed by the recently inserted provisions of Article 19-A of the Constitution." Ensuring accountability, transparency and good governance by optimizing the free flow of information was highlighted by the Court as one of the objects of the promulgation of the Pakistan Electronic Media Regulatory Authority (PEMRA) Ordinance, 2002.

13.3 In the case of Muhammad Masood v. S.M. Corporation,[10] very important observations were made by a division bench of the Sindh High Court as to the scope and extent of the right conferred by Article 19A of the

Constitution. The division bench observed: "A perusal of the Article [19A] indicates that every citizen has been conferred a right to have access to information in all matters of public importance, however, subject firstly to regulations and secondly to reasonable restrictions by law. There is no disagreement that no such regulations have been framed. Non-framing of the regulations cannot have effect of rendering the right guaranteed by Article 19-A as nugatory. Therefore, even if no regulations are framed this right is available to all the citizens. In the absence of regulations and in the absence of restrictions task will be thrown to the Court to determine whether request for information in a particular case or denial of information in a particular case is reasonable."[11]

13.4 The significance of the insertion of Article 19A in the Constitution was underlined by Justice Jawwad S. Khawaja, the then Judge of this Court, in the case of Watan Party v. Federation[12] by describing it to be a "major constitutional change". His lordship observed that "the people of Pakistan have been, at times, disserved by a non-inclusive governance paradigm where information critical to them has been withheld from them. Pakistan has faced many crises of public importance... but the citizens of Pakistan, the most direct affectees, have remained clueless and uninformed as to the causes or the progenitors of the multiple crises in our history ... The people in quest of the truth have mostly been left with conjectures, rumours and half-truths. Concealment of information has, in turn, led to a distorted history of the country and to a destabilizing division in the polity." He noted: "This paradigm has shifted through the recent incorporation of Article 19A in the Constitution. By virtue of the said Article the right of a citizen to have information 'in all matters of public importance' is made a fundamental right which is guaranteed by the Constitution ... Article 184 (3) read in conjunction with Article 19A has empowered the citizens of Pakistan by making access to information a justiciable right of the People rather than being largesse bestowed by the State at its whim. Article 19A has thus, enabled every citizen to become independent of power centres which, heretofore, have been in control of information on matters of public importance... This provides for and makes good a crucial missing element of responsible State governance in our Constitutional scheme."[13]

13.5 A full bench of the Lahore High Court made an exhaustive discussion in the case of Province of Punjab v. Qaisar Iqbal[14] on the scope of Article 19A of the Constitution by referring to the previous cases of our jurisdiction as well as of foreign jurisdictions. The full bench, in that case, was hearing intra court appeals against the judgment passed by a single bench of that court, whereby the single bench had directed the Government of Punjab to provide a copy of the report of the Inquiry Tribunal appointed under the Punjab Tribunal of Inquiry Ordinance 1969, to the petitioners. The full bench not only maintained the judgment of the single bench, rather made further direction that the inquiry report of the Tribunal should also be published by the concerned authorities for public information. The full bench observed: "Under clause [sic: Article] 19-A of the Constitution, every citizen shall have the right to have access to information in matter of 'public importance'. The word 'public importance' used in Article 19-A of the Constitution is not defined term. However, term public importance according to dictionary meaning could be defined that 'question which affects and has its repercussions on the public at large and it also includes the purpose and aim in which the general interest of the community...is directly or widely concerned'....The reasons recorded by Government itself in its letter dated 17.06.2017 for holding inquiry, when [is] juxtapose[d] with the definition of 'public importance' narrated above, it can safely be concluded that the inquiry report of a Tribunal is a matter of public importance and every citizen has right under Article 19-A to have excess to this inquiry report, indeed subject to reasonable restrictions imposed by law. Even otherwise under section 3 of the Ordinance 1969, inquiry could only take place in [a] definite matter of public importance."[15]

**(c) Right conferred by Article 19A is operative and justiciable**

14. Survey of the above cases shows that the constitutional courts of the country have appreciated the addition of Article 19A in the Constitution, as its addition in the Constitution has embedded and guaranteed responsible State governance in the Constitutional scheme. The provisions of Article 19A do not contain an abstract guiding principle, rather confer a justiciable right. The right to have access to information in all matters of public importance conferred by this Article is a corrective apparatus, which allows public scrutiny to the working of the public authorities and institutions, and makes them answerable to the public. It, thus, ensures transparency and accountability in the functioning of all public authorities and institutions. The right conferred by Article

19A is effective in operation and extensive in scope: it is though subject to, but is not dependent for its effectiveness upon enactment of, a law that may provide for the regulation of, and reasonable restrictions on, such right and it comprehends all matters of public importance undertaken by all State institutions.

**(d) Meaning of the expression "matters of public importance"**

15. The expression, "public importance", though has been used in Article 19A, but the same has not been defined therein. Earlier to the addition of Article 19A, the expression, "public importance" was already there in the provisions of Article 184(3), 186(1) and Article 212(3) of the Constitution. The provisions of Article 184(3), being the most relevant for the present matter, are reproduced hereunder for ease of reference:

Article 184(3)

Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved have the power to make an order of the nature mentioned in the said Article.

(Emphasis added)

The Constitution did not define the expression "public importance" used in Article 184(3) also; this expression had, therefore, been a subject of judicial interpretation since the very promulgation of the Constitution in the year 1973, and this Court had defined it in several cases heard under Article 184(3). A judicial definition of this expression was, thus, in field when the new Article 19A was added in the Constitution, in the year 2010. It appears that the Legislature being content with the judicial definition did not feel the need to provide the definition of the said expression while enacting the new Article 19A. Therefore, the judicial definition of the expression "public importance" which was in field till the year 2010 is relevant for determining what the Legislature intended to mean by using the said expression in Article 19A, as it is a well-settled principle of interpretation of statutes that ordinarily the same meaning is attached to an expression used in different parts of a

statute unless the context in which the expression appears suggests otherwise.[16]

16. The expression, "public importance" used in Article 184(3) came up for interpretation before this Court, for the first time, in the case of Manzoor Elahi v. Federation[17]. Anwarul Haq, J., explained it thus:

Now, what is meant by a question of public importance. The term "public" is invariably employed in contradistinction to the terms private or individual, and connotes, as an adjective, something pertaining to, or belonging to, the people; relating to a nation, state, or community. In other words, it refers to something which is to be shared or participated in or enjoyed by the public at large, and is not limited or restricted to any particular class of the community. As observed by the Judicial Committee of the Privy Council in Hamabai Framjee Petit v. Secretary of State for India-in-Council I L R 39 Bom. 279 while construing the words public purpose such a phrase, whatever else it may mean must include a purpose, that is an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned". This definition appears to me to be equally applicable to the phrase "public importance." In order to acquire public importance, the case must obviously raise a question which is of interest to, or affects, the whole body of people or an entire community. In other words, the case must be such as gives rise to questions affecting the legal rights or liabilities of the public or the community at large, even though the individual, who is the subject-matter of the case, may be of no particular consequence.

This interpretation of the expression was approvingly referred to by the full court bench of this Court in the case of Benazir Bhutto v. Federation,[18] and it was further explained thus:

Lastly is the consideration of the connotation of the expression "public importance" which is tagged to the enforcement of the Fundamental Rights as a pre-condition of the exercise of the power. This should not be understood in a limited sense, but in the gamut of the constitutional rights of freedoms and liberties, their protection and invasion of such freedoms in a manner which raises a serious question regarding their enforcement. Such matters can be viewed as of public importance, whether they arise from an individual's case touching his human rights of liberty and freedom, or of a class or a group of persons as they would also be legitimately covered by this expression.

This interpretation made of the expression "public importance" in the cases of Manzur Ilahi and Benazir Bhutto was later-on followed by this Court in several cases.[19] Therefore, as per the said judicial definition, the expression "matters of public importance" used in Article 19A means the matters that pertain to and affect the public at large, a whole community, and not an individual or a small group of individuals; in other words, it includes the matters in which the general interest of a whole community, as opposed to the particular interest of individuals, is directly and vitally concerned. The adjective "public" necessarily implies a matter relating to the people at large, the nation, the State or a community as a whole; if a matter in which only a particular individual or group of individuals is interested and the people at large or an entire community have no interest, that cannot be treated as a matter of public importance.

**(e) Cases heard under Article 184(3) are "matters of public importance"**

17. Section 3 of the Punjab Tribunals of Inquiry Ordinance, 1969 empowers the Government of Punjab to appoint a Tribunal for the purpose of making an inquiry into any definite matter of public importance. For making direction that the inquiry report of the Tribunal should be published for public information, the full bench of the Lahore High Court reasoned, in Qaisar Iqbal case,[20] inter alia that the inquiry report of the Tribunal is a matter of public importance because under Section 3 of the Ordinance 1969 inquiry can only take place in a definite matter of public importance. We approve this reasoning of the Lahore High Court and adopt it for holding that the cases heard by this Court in its original jurisdiction under Article 184(3) of the Constitution are matters of public importance, as for invoking the original jurisdiction of this Court under Article 184(3) of the Constitution two conditions are necessary to be fulfilled: (i) the matter should be for the enforcement of any of the fundamental rights; and (ii) with reference to the enforcement of such fundamental right, the question involved should be of public importance.[21] These are the essential conditions for the exercise of the jurisdiction vested in this Court under Article 184(3).

18. In the present case also, this Court held in the judgment[22] under review that "examination of the jurisprudence of this Court makes it clear that in order to invoke its original jurisdiction under Article 184(3) of the Constitution, the impugned action must be shown to involve a matter of public importance arising from the breach of a fundamental right which affects the public at large."[23] The Court referred to and quoted the following observations made in the case of Al-Jehad Trust v. Lahore High Court[24]:

"11: ...unless the matter is of public importance relating to the enforcement of any of the fundamental rights conferred by Part II, Chapter 1 of the Constitution (Articles 8 to 28), the jurisdiction of the Court under Article 184(3) of the Constitution, cannot be invoked. The mere importance of a matter, without enforcement of any fundamental right or reference to a fundamental right without any public importance, will not attract the jurisdiction of this Court under Article 184(3) of the Constitution."[25]

The Court concluded that the "fundamental right of the general public which is claimed by the petitioner to be under threat is the derivative right of the independence of the judiciary. This right is an essential prerequisite for the enjoyment of, inter alia, the principal fundamental right to access justice which is guaranteed to the people of Pakistan by Articles 4, 9 and 10-A of the Constitution"[26] and further held that "the petitioner has alleged that there have been serious violations of Article 209(5) of the Constitution in the preparation of the Reference against him... [I]nfringements of Article 209 erode the independence of the judiciary which is directly connected with the right to access justice. Therefore, the present petition satisfies the two-fold requirement of Article 184(3) of the Constitution."[27]

19. Thus, there remains no difficulty to conclude that the cases heard by this Court in its original jurisdiction under Article 184(3) of the Constitution, including review petitions and other matters arising therein, are matters of public importance within the meaning and scope of that expression used in Article 19A of the Constitution, as it is only when the "question of public importance" is involved that this Court can exercise its jurisdiction under Article 184(3) to make an order for the enforcement of any of the fundamental rights. The public, therefore, has a fundamental right under Article 19A of the Constitution to have access to information as to the court proceedings of the cases heard by this Court in its original jurisdiction under Article 184(3) of the Constitution, including to know and see how the court-proceedings in these cases are conducted and concluded by the Court.

(ii) Obligation of the Court to provide access to information of the court-proceedings of cases heard under Article 184(3) through livestreaming

20. Now we turn to question (ii). Opposing the prayer for livestreaming the court-proceedings of this case on behalf of the contesting respondents, the learned Additional Attorney-General submitted that the right of the public to have access to information as to the proceedings of cases heard by this Court under Article 184(3) is fulfilled as the doors of the Court are open for everyone, and anyone from the public can come in the Court and see the court-proceedings, and can also obtain the certified copy of the final decision made by the Court in such cases. The questions arise: whether this is sufficient enforcement of the fundamental right to have access to information so far as the proceedings of the cases heard under Article 184(3) are concerned, or whether there is any obligation on this Court to do something more for making enforcement of the said right.

**(a) Article 19A creates a positive obligation**

21. The Constitution has conferred fundamental rights in positive as well as in negative language. Article 19A has been couched in positive language: it guarantees to all citizens as a fundamental right that they shall have the right to have access to information in all matters of public importance. The negative language of a fundamental right imposes a limitation on the power of the State and declares the corresponding guarantee as to the entitlement of the people to that right. The positive language of a fundamental right not only operates as a limitation on the power of the State but it also requires affirmative State action to protect and fulfill the right conferred. In view of this difference of language, the fundamental rights are sometimes classified into negative and positive rights[28]: a negative right generally obliges inaction, a positive right requires action. The holder of a negative right is entitled to non-interference, while the holder of a positive right is entitled to the provision of some service. A negative right places a duty on the State not to interfere in certain areas where the citizens have the right to act in a certain way or the other and have their freedom of choice within the existing right; the State cannot encroach upon such freedom. A positive right, on the other hand, places an obligation on the State to take certain actions and measures to give effect to that right.

22. The positive language in which the right to information has been conferred by Article 19A makes it fall in the category of positive rights. This right, therefore, not only operates as a limitation on the power of the State to act in a manner that would negate the right of the citizens to have access to information in all matters of public importance, but it also requires the State to take some affirmative action to fulfill this right. The State is an abstract entity, which acts through its organs: the Legislature, the Executive and the Judiciary. The State's obligation with regard to the fundamental right conferred by Article 19A of the Constitution is, therefore, to be fulfilled by all its organs within the sphere of their authority and competence as prescribed under the Constitution and law. We, thus, find that Article 19A of the Constitution creates a positive obligation on all State organs, authorities and institutions, including the Judiciary, to take the necessary measures to ensure the realization of the fundamental right of citizens to have access to information in matters of public importance.

23. The contention of the learned Additional Attorney-General, as aforesaid, is that the right of the public to have access to information guaranteed by Article 19A is fulfilled, for the doors of the Court are open for everyone, and anyone from the public can come in the Court and see the court-proceedings. Pakistan's current population is estimated as more than 200 million people as per the provisional summary results of the 6th population census of 2017.[29] The obligation of this Court, under Article 19A, to give access to the public (people of Pakistan) to information of the court proceedings in the cases heard by it under Article 184(3) cannot be said to be fulfilled by allowing permission to come to the court-room and see the court-proceedings, as this facility may be availed of only by a few of the public who can afford travelling to the courthouse and are lucky enough to have a seat in the court-room, there being a very limited space. We are, therefore, not impressed by the said contention of the learned Additional Attorney-General; it appears to us to be misconceived and amounts to taking a very restrictive approach to the import, extent and scope of the provisions of Article 19A.

(b) Progressive and dynamic approach to interpret fundamental rights

24. The approach of this Court to the interpretation of the fundamental rights guaranteed by the Constitution has been progressive, liberal and dynamic since its very establishment and promulgation of the first Constitution of Pakistan, in 1956. As back as in 1957, Chief Justice Muhammad Munir made the observation that it is a

fundamental canon of construction that a Constitution should receive a liberal interpretation in favour of the citizen.[30] Chief Justice Muhammad Haleem said in the year 1988 that "the Constitution is not an imprisonment of the past but is also alive to the unfolding of the future."[31] Chief Justice Nasim Hasan Shah held in 1993 that "[w]ith the passage of time and the evolution of civil society great changes occur in the political, social and economic conditions of society. There is, therefore, the corresponding need to re-evaluate the essence and soul of the fundamental rights as originally provided in the Constitution. They require to be construed in consonance with the changed conditions of the society and must be viewed and interpreted with a vision to the future."[32] Justice Shafi-ur-Rahman said that "[t]he Fundamental Rights guaranteed in any Constitution, an organic instrument, are not capable of precise or permanent definition. They cannot be charted on a piece of paper delineating their boundaries for all times to come."[33] And Justice Ajmal Mian held that "[a] Constitutional provision containing Fundamental Right is a permanent provision intended to cater for all time to come and, therefore, while interpreting such a provision the approach of the Court should be dynamic, progressive and liberal keeping in view ideals of the people, socio-economic and politico-cultural values (which in Pakistan are enshrined in the Objectives Resolution) so as to extend the benefit of the same to the maximum possible."[34]

25. With the said progressive and dynamic approach this Court, earlier to the insertion of Article 19A in the Constitution, had interpreted the provisions of Article 19 of the Constitution that guarantees the right to freedom of expression to include the right to receive information.[35] The right to receive information which was thus interpreted as a penumbra to the right to freedom of expression has now been recognized as a separate and independent fundamental right by the addition of Article 19A in the Constitution. We are, therefore, to interpret the provisions of Article 19A of the Constitution with the progressive, liberal and dynamic approach with which this Court has been interpreting the other fundamental rights[36] and to explore the modern means of enforcement of the right guaranteed by this Article, which have been made available by the latest technology of the day.

(c) Right of Access to Information Act, 2017 and Article 19A of the Constitution

26. The Right of Access to Information Act, 2017 ("Act") has been enacted by the Federal Legislature[37] in pursuance of the provisions of Article 19A of the Constitution. It appears that the Act is not applicable to this Court as Section 2(ix)(e) thereof has included only "any court, tribunal, commission or board under the Federal law" in the definition of "public body" for the purposes of that Act while this Court is established under the Constitution and not under any Federal law. While this question may be decided authoritatively in some other appropriate case, it prima facie appears that the Legislature has left to this Court the matter of regulating and imposing reasonable restrictions as to the right to have access to information in matters of public importance dealt with by, and relating to, it by making rules under Article 191 of the Constitution, which empowers this Court to make rules for regulating its practice and procedure. Such rules when made would, no doubt, be a "law" within the scope of this expression used in Article 19A but, as we have already observed, the right conferred by Article 19A is operative and justiciable even without making of the law envisaged therein for regulating and imposing reasonable restrictions on this right. Nevertheless, the general and broader principles, as to the enforcement of the fundamental right guaranteed under Article 19A of the Constitution, contained in the Act being the expression of the legislative wisdom of the Parliament of Pakistan, deserve due consideration and weight while determining the scope of the provisions of Article 19A and assessing the obligation of this Court thereunder until this Court makes the rules under Article 191 of the Constitution, in this regard.

27. Section 3(2) of the Act states that the Act is to be interpreted so as to advance its purposes as set out in the preamble, and (a) to promote the right of access to information and (b) facilitate and encourage promptly the disclosure of the information at the lowest and reasonable cost[38]. The preamble of the Act containing purposes of its enactment is cited below, for ready reference:

WHEREAS Government believes in transparency and the right to have access to information to ensure that the people of the Islamic Republic of Pakistan have improved access to records held by public authorities and promote the purposes of making the Government more accountable to its people, of improving participation by the people in public affairs, of reducing corruption and inefficiency in Government, of promoting sound economic growth, of promoting good governance and respect for human rights;

AND WHEREAS it is expedient to provide for a law which gives effect to the fundamental right of access to information, as guaranteed under Article 19A of the Constitution of the Islamic Republic of Pakistan and international law, whereby everyone shall have the right to have access to all information held by public bodies subject only to reasonable restrictions imposed by law, and for matters connected therewith or incidental thereto;[39]

To promote the right of access to information, and to facilitate and encourage promptly the disclosure of the information at the lowest and reasonable cost, the Act has prescribed, in its Sections 5 and 8, the use of the latest information technology. Section 5 of the Act provides for uploading of the specified categories of information on the internet in a manner which best ensures its accessibility, and Section 8 thereof mandates each public body to ensure that all the record accessible under the Act is computerized and made available online for facilitation of the public's access to such records.

(d) Live-streaming of court -proceedings on the Court's website

28. This Court, even before the promulgation of the Act, has set up its official website and commenced sharing data on several matters of its working, including the information as to the roster of benches, cause lists, judgments approved for reporting and reports regarding pendency, institution and disposal of cases, on the website for public information. In view of this already functioning website of the Court, the disturbing issues are: why can the Court not live-stream on its official website the court-proceedings of cases heard under Article 184(3) which, we have hereinbefore held, are matters of public importance and the public has a right to know and see how the proceedings in these cases are conducted and concluded by the Court. If anyone from the public, who can afford it, can come to the Court and see the proceedings of such case, then what is the impediment in live-streaming these proceedings on the official website of the Court for information of all public including those who cannot meet the expense of travelling to Court. The facility of entry to the Court and seeing the court proceedings, in this context, appears rather discriminatory, available only to the affluent and thus, offending Article 25 of the Constitution.

29. A very few of the public, as afore-observed, can afford to reach the Court and see the court-proceedings while a large section of the people of Pakistan, who are more than 200 million, cannot avail their right to see the court-proceedings due to time, distance and financial constraints. They, thus, depend on the information reported in print and electronic media. When the reporting is accurate and comprehensive, it fulfills their right to information; but when it is inaccurate or incomplete, it thwarts the right. The gavel-to-gavel live-streaming of the court-proceedings would give the public a more direct sense of what occurs in these proceedings than second-hand information given to them by the media through reporting the event in a summarized form. The latest technology and internet facility have made it possible to reach out to the masses, in the language of the Legislature used in the Act, "to promote the right of access to information, and to facilitate and encourage promptly the disclosure of the information at the lowest and reasonable cost."

30. Live-streaming is the fastest method of communication and is the most suited for directly connecting to geographically dispersed people of the country. We firmly believe that the time has come to let some sunshine in our courts and, for this purpose, this Court being at the apex of the judicial hierarchy of the country should take a leading step. This Court has often held for other organs of the State that their functioning should be open and transparent; it is, therefore, all the more necessary for the Court itself to abide by that principle and take progressive steps to demystify its own functioning. Law develops gradually, and technology is often far ahead of both the legislature and the judiciary. However, both these institutions are not etched in stone and they should recognize the technological advances, in developing law. Live-streaming of the court proceedings, in the present age, can easily be made through the latest technology, and that too, at the lowest and reasonable cost. It would make the public to be virtually present in the courtroom and enable them to see, in real-time, how the court-proceedings are conducted and concluded.

(e) Practice in other major common law jurisdictions

31. We have also explored the practice around the globe in other jurisdictions to satisfy ourselves whether live-streaming of court-proceedings by this Court would be a strange or novel thing in the judicial system. We find it otherwise: we are lagging behind the world on this matter. Almost all major common law jurisdictions of the

world broadcast their court-proceedings in some way or the other, for public information. The Supreme Court of Canada has allowed broadcast and live-streaming of its proceedings since 1994, and has also started broadcasting/webcasting live video streams of court hearings on its website since 2009.[40] The Supreme Court of the United Kingdom has allowed for hearings to be live-streamed on its website since 2010.[41] The High Court of Australia has made available on its website audio-visual recordings of all full-court hearings since 2013.[42] The Supreme Court of the United States has been posting written transcripts of oral arguments since 2000[43] and the audio recording of oral arguments since 2010,[44] at its website and has also allowed live broadcast, on media, of oral arguments heard by telephone conference during COVID-19 pandemic since 2020.[45] The International Courts and Tribunals, namely, the European Court of Human Rights (ECHR),[46] the International Criminal Court (ICC),[47] and the International Criminal Tribunal for the former Yugoslavia (ICTY)[48] also broadcast court proceedings on their official websites.

32. The contesting respondents argued that the Indian Supreme Court while deciding a similar matter, in Swapnil Tripathi v. Supreme Court of India,[49] though recognized that the court-proceedings ought to be live-streamed but did not make any order or direction in this regard and left the matter to be regulated on administrative side by making amendments in the Supreme Court Rules. We have carefully gone through the Indian case referred to. In that case, the petitioners had agitated the matter of live-streaming proceedings of all those cases heard by the Indian Supreme Court that have constitutional importance and impact on the public at large and had not prayed for the live-streaming of a particular case. The Court, therefore, examined the prayer in the broader perspective of the right of access to justice, right to open justice and public trial, right to justice at the doorstep and right to know the developments of law. The Court generally agreed with the live-streaming of court proceedings but observed that the project of live streaming of the court proceedings on the internet, radio and/or TV through live audio-visual broadcasting/ telecasting universally by an official agency having exclusive telecasting rights and/or official website/mobile application of the Court, should be implemented in a progressive, structured and phased manner, and before the commencement of the project, formal Rules should be framed by the Court.

33. It appears that the Indian Supreme Court did so as there is not a specific fundamental right to have access to information in matters of public importance in their Constitution, like Article 19A of our Constitution, nor is there any class of cases of public importance specifically so mentioned in their Constitution, like Article 184(3) of our Constitution. Therefore, the Indian Supreme Court took up the matter of 'live-streaming' of all cases heard by it and by other courts of the country in the context of concepts of 'open trial' and 'open justice' and other constitutional rights stated above, which we have left to be decided in some other appropriate case. Against this backdrop, the Indian Supreme Court disposed of the case and left the matter of live-streaming of all cases heard by it, including the cases of constitutional importance having an impact on the public at large, to be regulated by making amendments in their Rules. The position under our Constitution is different: Article 19A, as above held, confers an operative and justiciable right which is not dependent upon the promulgation of any law or making of any Rules by this Court. In view of this difference of provisions in the Constitutions of both the countries, the reference to the said Indian case for determination of the questions under consideration in the present case, is not apt or relevant.

34. We may observe that any transplant of a rule from a foreign jurisdiction to ours should be made after considering closely and thoroughly the difference of the constitutional scheme. The similarities and differences between the constitutional dispensation in that foreign jurisdiction and our Constitution are to be deeply evaluated. Any doctrine, principle, rule and precedent in the foreign jurisdiction must be viewed through the prism of fundamental rights guaranteed by our Constitution and other constitutional values.

(f) Question of livestreaming court -proceedings is a matter of law, not of policy

35. The contesting respondents argued it also that question of live-streaming of the court-proceedings is a policy matter and should be decided by the Court on the administrative side. We are afraid the argument is not well-founded, especially in the context of court-proceedings of cases heard under Article 184(3) which is under consideration, before us, in the present matter. We have found, as aforementioned, that proceedings in such cases are "matters of public importance" within the meaning of that expression used in Article 19A and the

public has a fundamental right to know how these proceedings are conducted; the question of enforcement of this right is a legal matter to be decided judicially and is not a policy matter for decision on the administrative side. In the context of the rule that justice should be administered in open court and power of a court to direct a case to be heard with closed doors in exceptional circumstances, Earl Loreburn remarked in Scott v. Scott,[50] that it "is not to be considered...as a matter of policy, but as a matter of law". We respectfully subscribe to his lordship's view and adopt it for the matter under consideration.

(g) Live-streaming court -proceedings would reflect a responsive image of the Court

36. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[51] The foundational constitutional value of accountability, responsibility and openness applicable to other organs of the State, the Legislature and the Executive, is attracted to the functioning of the third organ, the Judiciary, also. The cases involving questions of public importance with reference to the enforcement of fundamental rights of the citizens, which are heard by this Court in its original jurisdiction under Article 184(3) of the Constitution, have a unique characteristic: the Court, in these cases, acts as the first and the final arbiter. The uniqueness of this jurisdiction sometimes invites criticism of judicial overreach, on the Court. Foundations of the judicial institution stand on, and its real strength lies in, the public trust which gives to its decisions legitimacy and public acceptance. A court cannot buy support for its decisions by spending money or using force. A court's power lies in its legitimacy, a product of substance and perception, that shows itself in the people's acceptance of the court as the best forum to determine what the law means and decide their disputes accordingly. Without such public trust and public acceptance, the judiciary loses the legitimacy and independence it requires to perform its functions. To maintain and boost up the public trust in the Court's working, it is essential to make the public aware of how the Court deals with cases under Article 184(3) and to be reassured that it always functions within the terms of the Constitution and law independently, impartiality and fairly. Live-streaming of the court-proceedings would reflect a responsive image of the Court acknowledging that it is accountable to the public for whom it functions, and promote the public confidence in its functioning.

37. This Court, being the guardian of the fundamental rights of the people of Pakistan against encroachments made by other public authorities and institutions, is to enforce the fundamental right of the public relating to its own proceedings with more fervor and commitment than others. We are enlightened in this respect by the remarks of Fletcher Moulton, L.J., and quoted by Earl Loreburn in Scott v. Scott,[52] that "courts of justice, who are the guardian of public liberties, ought to be doubly vigilant against encroachments by themselves." After profound and thorough deliberations, we are unable to see any legal impediment in live-streaming the court-proceedings of cases heard under Article 184(3) on the official website of this Court and find it a positive obligation of this Court, under Article 19A, to do this for enforcement of the right of the public to have access to information of these proceedings.

Access of public to the court-proceedings of cases of public importance and the democracy

38. At the heart of democracy lie the rights to freedom of expression and to have access to information in matters of public importance. These mutually supporting rights ensure transparency and accountability in public institutions, which results in good governance, especially in a flourishing democracy. These rights uncover the wrongdoings and transgressions of the public authorities and institutions. The informed public opinion is therefore considered the most potent of all restraints upon bad governance in a democracy. The rights to freedom of expression and to have access to information in matters of public importance are thus not only useful but are indispensable to the proper functioning of a democratic system. The oft-quoted, old dictums are that "let the people have the truth and the freedom to discuss it and all will go well"[53], and that "in the darkness of secrecy, sinister interest and evil in every shape have full swing."[54] Not all information in matters of public importance, however, is readily revealed by the Government, and an environment of secrecy is maintained. Access of the public to the court-proceedings in cases under Article 184(3) can expose information as to the matters of public importance that may otherwise not be possible for the public to have; as in most cases under Article 184(3), it is the Government, or any of its departments or instrumentalities, which is alleged to have infringed the fundamental rights of the public and the Court is called upon to enforce them. The information as to the court-

proceedings in such cases would be a vital avenue for public information about what the Government does and why the Court interferes. The access of the public to the court-proceedings in cases heard under Article 184(3) through live-streaming would, thus, serve the democracy as much as it would make the exercise of judicial power by the Court in such cases transparent.

Conclusion

39. The above discussion leads us to conclude and hold that live-streaming (audio and video) of the court-proceedings in cases heard by this Court, on a petition or suo motu, under Article 184(3) of the Constitution should be made available for the information of the public through a link on the official website of the Court, in the enforcement of the fundamental right of the public, and for the fulfillment of the obligation of the Court, under Article 19A of the Constitution. However, this Bench of the Court can make an order to live-stream the court-proceedings of this case only as per the prayer made therein, and cannot direct the other Benches of this Court that are, or would be, hearing such cases, to live-stream their court-proceedings. We believe that the general practice in this regard can be enforced only by making rules under Article 191 of the Constitution.

40. However, until such rules are made by the Court on the administrative side, it lies in the discretion of each Bench of the Court hearing such a case to order, or not to order, in the exercise of powers of the Court, live-streaming of its court-proceedings and to regulate that live-streaming, if ordered. Because the right conferred by Article 19A, as aforesaid, is operative and justiciable even without the enactment of a law that may provide for the regulation of, and reasonable restrictions on, such right. Needless to reiterate that this Court under its rules of practice and procedure made under Article 190, namely, the Supreme Court Rules 1980, ordinarily sits in Benches, and not en banc as a full-court, and each Bench irrespective of its numeric strength exercises the jurisdiction and powers vested in the Court.

41. In the circumstances of the present case, we are inclined to exercise our discretion in favour of ordering livestreaming of its court-proceedings; however, we have been apprised that in the current state of technological set-up available in this Court such an order, if made, could not be executed. Courts do not make in-executable orders; we, therefore, abstain from making an order for live-streaming the court-proceedings of the present case. However, we direct the Registrar of this Court to take steps to provide for the requisite technological infrastructure for live-streaming the court-proceedings, so that any Bench of this Court may, if so decides, order for live-streaming the court proceedings of a case being heard under Article 184(3) of the Constitution, in future. The Registrar shall also place the matter before the Court, on the administrative side, for considering amendments in the Supreme Court Rules 1980, in order to livestream court-proceedings of all cases heard under Article 184(3) and to regulate the practice and procedure in this regard.

42. Facility of live audio-hearing of the court-proceedings of all Benches of this Court is currently available to all the Judges of this Court in their Chambers as well to their staff, and audio recording of the court-proceedings is also sometimes made. Therefore, keeping in view the current state of technological infrastructure available in this Court and the fact that the petitioner's case (review petitions) is already fixed for hearing, we direct that the audio recording of the proceedings of the court-hearings of the petitioner's case shall be made available through a link on the official website of this Court, for public information. The Registrar of this Court shall ensure

that the unedited audio recording of the proceedings of the court-hearings of the present case is uploaded on the official website of the Court on the same day soon after the hearing and before the close of the working hours.

43. So far as the prayer of the petitioner to the extent of directing the State-owned Pakistan Television (PTV) Corporation to broadcast live the proceedings of his case is concerned, we think such a direction would breach the freedom of expression and press guaranteed by Article 19 of the Constitution as both kinds of direction, viz, to broadcast or not to broadcast something, are tantamount to interference into the freedom guaranteed by the Constitution, unless such act or omission of PTV breaches any legal right of someone or any of its legal obligations and it is also made a party to the proceedings initiated thereon.[55] Likewise, the prayer of the petitioner that the Pakistan Electronic Media Regulatory Authority (PEMRA) may be directed to issue written instructions to all private television channels that they cannot be restrained from broadcasting the proceedings, appears to us to be not entertainable, as none of the private television channels has agitated its right (if any) to

broadcast the court-proceedings of cases heard by this Court under Article 184(3), and we leave the determination of the question as to their such right (if any) to be made in a case where they would agitate the same and claim enforcement thereof.

Signing or recording the detailed reasons by a retired Judge of this Court

44. The above are the reasons for the short order dated 13.04.2021 made by us and our learned brother, Justice Manzoor Ahmad Malik (since retired). Although we have attempted, to the best of our ability, to record these reasons as discussed and agreed to by us and our learned brother, Justice Malik, at the time of making the short order, the human susceptibility to err demands us to have the concurrence of our learned brother in correctly recording the reasons for which he joined us in the short order. Therefore, following the precedents of Al-Jehad Trust v. Federation of Pakistan (PLD 1996 SC 324) and CJP Iftikhar Muhammad Chaudhry v. President of Pakistan (PLD 2010 SC 61), the office is directed to send a copy of these detailed reasons to his lordship for his consideration.. The office shall annex the response received from his lordship, with these detailed reasons.

45. Here, we consider it appropriate to state why we earlier offered, and are now offering the detailed reasons to our learned brother, Justice Malik (since retired), to consider whether or not he agrees that it correctly records the reasons for which he joined us in the short order, despite having the advantage of reading the note recorded by one of our learned brothers and agreed to by other three, in addition to their detailed reasons[56] recorded in support of their short order dated 26.04.2021, expressing their reservations on our sending, as well as on signing by Justice Malik, the detailed reasons recorded in support of our short order dated 26.04.2021.

46. First and foremost, we and our learned brother, Justice Malik, followed the precedent of a 13-Member larger Bench of this Court, which is binding upon us while sitting in a smaller Bench of 10 Members. Our learned brothers have treated, and dealt with, the observation made in para 206 of the judgment delivered in the CJP Iftikhar Muhammad Chaudhry case taking it as the opinion of one Hon'ble Judge, namely, Justice Khalil-ur-Rehman Ramday, despite the fact that his lordship was speaking for a Bench of 13 Members and the judgment authored by him (including para 206) was signed by other 6 sitting Hon'ble Judges of this Court. None of those 6 Hon'ble sitting Judges took any exception to any observation made in the judgment while signing and becoming party thereto; therefore, each and every word written in the said judgment, including para 206 thereof, is to be taken as of all 7 sitting Hon'ble Judges of the 13 Member Bench. Futher, the judgment, including para 206 thereof, having been signed by majority of the 13-Member Bench had become the judgment of the Court, i.e., the judgment of a 13-Member Bench of the Court, and did not remain to be only of those 7 sitting Hon'ble Judges or of 10 Hon'ble Judges including the 3 retired Hon'ble Judges who joined in the judgment (detailed reasons of the short order). We have already explained this concept in our detailed reasons[57] released 29.01.2022 (See para 9 thereof) recorded in support of our short order dated 26.04.2021. The 3 retired Hon'ble Judges thus signed, and one of them also recorded his additional note, in pursuance of the observation and action of the 7 sitting Hon'ble Judges forming majority of the 13-Member Bench. With profound reverence to the view of our learned brothers, we are unable to understand how 4 or all 10 Judges of a 10-Member Bench can declare the observation made, and the action done in pursuance thereto, by a 13-Member larger Bench to be an error in law, even if it may be so. Ignoring the sanctity and authority of a precedent of a larger bench may pass for judicial arrogance and lead to judicial chaos.

47. Although it is not our function to supply the reasons in support of the said precedent of a 13-Member Bench, or to examine any possible arguments contrary to the opinion of our four learned brothers, in the present case. It can be done, in our view, only by a Bench larger than a 13-Member Bench, but we think it proper to note just some of the points in this regard, to show that the precedent of the 13-Member Bench is based on sound wisdom.

48. No one can dispute that the short orders are made and announced by this Court, after due application of the judicious mind to, and after due consideration of, the pleadings of the parties and their arguments in the light of the material available on record of cases for definite "reasons" that are present in the mind of the judges at the time of making those orders. Short orders are made due to paucity of time to record detailed "reasons" and due to the urgency of the matters involved. That is why the detailed reasons recorded later in support of the short orders always bear the date of the short order, not the date of recording those reasons. The expression used in the short orders, "for the reasons to be recorded later", clearly means that it is the act of recording

reasons that is postponed to a later time, and not the act of creating or searching for the reasons. The latter meaning, if given, to the expression "reasons to be recorded later" would completely shatter the legal sanctity and validity of the short orders, and unsettle the well-settled legal position according to which the short orders made by this Court are fully operative orders, executable forthwith, and a party feeling aggrieved thereby is to avail his legal remedy of review within the prescribed period of limitation computing from the date of the short order, and not from the date of release of the detailed reasons recorded in support thereof.

49. Further, we observe it very respectfully and humbly that one of our four learned brothers had vacated the office of a Judge of this Court when they released their detailed reasons on 04.02.2022 and assumed the office of the Chief Justice of Pakistan, but has recorded the detailed reasons, and signed the additional note, in his capacity as a Judge of this Court which he had on 26.04.2021 when the short order was made, and not in his present position and capacity as the Chief Justice of Pakistan, and their detailed reasons also bears the date of 26.04.2021, the date when the short order was made, and not the date when these detailed reasons were recorded. We, with great respect, say that our learned brother has so done as per the above said settled practice of this Court. Needless to mention that the office of the Chief Justice of Pakistan and the office of a Judge of this Court are two different offices under the Constitution; one stands vacated on assuming the other. Similarly, a judge of this Court who has vacated his office on retirement joins the detailed reasons recorded by any of his colleagues in support of the short order made by them jointly or records his own reasons, in his status, capacity and authority he had on the date when that short order was made.

50. Another important fact, which also depicts a settled practice of this Court, deserves to be noted. Our learned brothers as well as we have mentioned the presence of our learned brother, Justice Malik, under the heading "Present" for showing the coram and constitution of the Bench, in our respective detailed reasons recorded in support of our short orders dated 26.04.2021 and 13.04.2021 (both released after his retirement). This fact also shows that it is the status of a judge of this Court on the date of making the short order that is relevant at the time of recording the detailed reasons in support thereof and determines his authority to record such reasons. Otherwise, the fact of mentioning his presence in the coram of the Bench that records the detailed reasons would become a false statement and a patent contradiction in itself amounting to blowing hot and cold in the same breath; as, on the one hand, we would show him as a Member of the Bench that records the detailed reasons but on the other hand, say he is not and cannot record the detailed reasons.

51. From the said settled practices of this Court, according to which the detailed reasons recorded in support of a short order always bear the date of the short order, not the date of recording them, and the status and capacity of the judges as on the date of the short order, it is not hard to discern that it is the status, capacity and authority of a judge of this Court as on the date of the short order under which he records, after retirement, his reasons for making the short order or joins in the reasons recorded by some other judge if he finds that they are the same for which he made the short order. These and other points can be examined by a Bench larger than a 13-Member Bench when they arise before such Bench, however for present, we follow the 13-Member Bench and act upon it.

52. We may, with great respect, also express our concern on adjudicating by some Members of a Bench the precedential effect and value of the opinion of other Members of the same Bench, in their judgment delivered in the same case. We have never seen such practice in our jurisdiction as well as in any of the foreign jurisdictions. Members of the same Bench differ on issues and strongly express their respective opinions, as well as make comments on the opinion of each other highlighting the reasons for which they think other Member(s) has erred in his opinion, but do not adjudicate upon the precedential effect and value of each other's opinion. We believe the question of extracting ratio decidendi and determining precedential effect and value of the opinion of some Members of a Bench of this Court expressed in a judgment delivered in one case, can be examined only in other cases where such a judgment is cited as precedent, and that can be done not only by a Bench of this Court but even by a court lowest in the judicial hierarchy; nevertheless, it is in no way a domain of the Members of the same Bench to make this exercise in their respective judgments rendered in the same case.

Sd/-

Maqbool Baqar, Judge

Sd/-

Mazhar Alam Khan Miankhel, Judge

Sd/-

Syed Mansoor Ali Shah, Judge

**YAHYA AFRIDI, J.---**The learned petitioner, Justice Qazi Faez Isa, during the proceedings of his Review Petition (C.R.P. No. 296 of 2020), moved an application (C.M.A. No. 1243 of 2021) seeking directions of this court, in terms:

"(a) direct the State-owned Pakistan Television Corporation (PTV) to broadcast live the proceedings of the petitioner's case, (b) to direct the Pakistan Electronic Media Regulatory Authority (PEMRA) to issue written instructions to all private channels that they cannot be restrained in any manner whatsoever from broadcasting the proceedings and (c) to order live streaming of court proceedings."

After extensive hearing of the submissions of the parties, this Court dismissed the application by a majority of 6:4 vide three separate short orders, all dated 13.04.2020. I dismissed the application vide my short order in terms:

"For the reasons already recorded in my judgment delivered in Constitution Petition No.17 of 2019, the present Civil Miscellaneous Application No.1243 of 2021 is dismissed, as the relief sought by the petitioner would "negate the very spirit of the oath taken by the petitioning Judge".

2. However, for the reasons to be recorded later, I find the right of the public to have access to live-streaming or audio- video recording, written transcript or any other medium, of the court hearings in the proceedings of public importance, including those under Articles 184(3) and 186 of the Constitution, is their fundamental right under Article 19A of the Constitution. The Registrar of this Court is, therefore, directed to place the matter before the Full Court for appropriate steps as it deems fit, under Article 191 of the Constitution, to effectuate this fundamental right of the public."

2. At the very outset, and that too without much ado, I am clear and firm in my view that, to allow the relief the applicant seeks in the application would, for the reasons already recorded in detail in my judgment delivered in Constitution Petition No.17 of 2019, "negate the very spirit of the oath taken" by him as a Judge of the superior judiciary, that mandates him to avoid "publicity", which in itself warrants dismissal of the application.

3. As for the reasons stated, to declare the right of the public to have access to the court-hearings through live-streaming, audio-video recording, written transcript or any other medium, in the proceedings of public importance including those under Articles 184(3) and 186 of the Constitution, to be their fundamental right under Article 19A of the Constitution, I adopt the weighty reasons stated in paragraphs 13 - 25 of the detailed order rendered by my learned brothers, Maqbool Baqar, Mazhar Alam Khan Miankhel, and Syed Mansoor Ali Shah, JJ.

4. This right, however, cannot be left to reign absolute, lest it be abused and, thus, requires to be regulated, as Article 19A of the Constitution mandates the same to be "subject to regulation and reasonable restrictions imposed by law". Therefore, for the safe and proper implementation of this fundamental right, the appropriate means would be to frame rules under Article 191 of the Constitution.

As to the perils of immediately allowing such access to the public, and the matters that require consideration before allowing such access, I concur with the reasoning recorded by my learned brother, Munib Akhtar J., in paragraphs 16 - 18 of his detailed order.

5. I am of the considered view that once this Court has adjudged and declared on the judicial side that the public has a right to have access to information of the court-proceedings in cases of public importance, the process of effectuating the said right should best be left for the Court to be dealt with on the administrative side. The full court comprising all Judges of this Court, with the deliberation and input of all of them, would be better poised than any Bench of this Court to balance the interests of all stakeholders, in giving the public access to court-proceedings, by making well considered rules to regulate its practice and procedure on this subject, and obviating the possibility of causing affront to the proceedings of this Court, which should in all eventualities be vehemently avoided to preserve the majesty of the Court.

6. Accordingly, the worthy Registrar of this Court is directed to place the matter before the Full Court, on the administrative side, for appropriate steps as it deems fit, under Article 191 of the Constitution.

Sd/-

Yahya Afridi, J

**2024 S C M R 527**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, Jamal Khan Mandokhail and Athar Minallah, JJ**

**VICE-CHANCELLOR AGRICULTURE UNIVERSITY, PESHAWAR and others---Petitioners**

**Versus**

**MUHAMMAD SHAFIQ and others---Respondents**

C.Ps. Nos.2270, 4783 and 4784 of 2019, C.Ps. Nos.1228 to 1230, 1295 to 1298, 1555, 1781 to 1783, 1807, 456-P and 496-P of 2020, C.P. No. 5871/2021, C.P. No. 5872/2021, C.P. No. 2291/2022, C.P. No. 2782/2022, C.P. No. 3811/2022 to C.P. No. 3813/2022 and C.P. No. 1438/2019, decided on 17th January, 2024.

(Against the order(s)/judgment(s) of Peshawar High Court Peshawar dated 02.04.2019, passed in W.P. No. 956-P of 2018 dated 11.02.2020, passed in W.P. No.3799-P/2019 dated 13.02.2020, passed in W.P. No.4433-P/2019 dated 13.02.2020, passed in W.P. No.4088-P/2019 dated 06.02.2020, passed in W.P. No.3253-P/2019 dated 06.02.2020, passed in W.P. No.4507-P/2019 dated 06.02.2020, passed in W.P. No. 1568-P/2019 dated 06.02.2020, passed in W.P. No. 1512-P/2019 dated 12.03.2020, passed in W.P. No.3091-P/2019 dated 12.03.2020, passed in W.P. No.3582-P/2019 dated 12.03.2020, passed in W.P. No.3583-P/2019 dated 12.03.2020, passed in W.P. No. 5318-P/2019 dated 12.03.2020, passed in W.P. No. 5893-P/2018 dated 04.06.2020, passed in W.P. No.4875-P/2019 dated 29.06.2020, passed in W.P. No. 3538-P/2019 dated 23.09.2021, passed in W.P. No. 1762-P/2020 dated 14.10.2021, passed in W.P. No.3788-P/2020 dated 10.05.2022, passed in W.P. No.2699-P/2020 dated 01.06.2022, passed in W.P. No. 1561-P/2021 dated 12.03.2020, passed in W.P. No.4526-P/2019 dated 12.03.2020, passed in W.P. No.4729-P/2019 dated 12.03.2020, passed in W.P. No.3679-P/2019 dated 07.03.2019, passed in W.P. No.3125-P/2017)

**(a) Civil service---**

----Contractual employees---Regularization in service---Principles---Once the contractual services are regularized, the appointment can become substantive or permanent and cannot be terminated without due process---Therefore, the regularization of a contractual employee is a fresh appointment into the stream of regular appointment.

Province of Punjab through Secretary, Livestock and Dairy Development, Government of Punjab v. Dr. Javed Iqbal 2021 SCMR 767 ref.

**(b) Civil service---**

----Contractual employees---Regularization in service---Parameters for regularization in service---Institutional autonomy---Scope---Any institution opting for regularization of its employees must be either mandated by law or must carry out regularization through a well-thought out policy of the institution concerned laying down the criteria and the process for regularization; performance evaluation of the contractual employee must be assessed to determine if the employee meets the standards required for a regular position; there must be availability of positions that match the skills and experience of the contractual employee; the budgetary considerations and financial implication of a regular employee be weighed and considered---There must be a fair assessment of the employee s qualifications, performance and merit, so as to ensure only competent and committed employees be granted permanent employment status---Regularization is, therefore, not a ritualistic and mechanical exercise---It requires fresh assessment of the candidature of the contractual employee by the competent authority before he is made a regular employee as any such act carries long term financial implications on the institution concerned---Process of regularization is grounded in principles of fairness, openness, transparency, non-discrimination and public interest---Regularization therefore has a close nexus with institutional policy and autonomy.

Hadayat Ullah v. Federation of Pakistan 2022 SCMR 1691; Syed Mubashir Raza Jaffri v. Employees of Old Age Benefits Institution 2014 PLC 428 and Ikhlaq Ahmed v. Chief Secretary, Punjab 2018 SCMR 1120 ref.

**(c) Civil service---**

----Contractual employees---Regularization in service---Principles---There is no vested right to seek regularization for employees hired on contractual basis unless there is any legal or statutory basis for the same---Process of regularization requires backing of any law, rules or policy---It should adhere to the relevant statutory provisions and government policies---In the absence of any of the same, a contractual employee cannot claim regularization---Any regularization without the backing of law offends the principles of fairness, transparency and meritocracy and that too at the expense of public exchequer.

Faraz Ahmed v. Federation of Pakistan 2022 PLC 198; Government of Khyber Pakhtunkhwa v. Sher Aman and others 2022 SCMR 406; Vice Chancellor, Bacha Khan University Charsadda, Khyber Pakhtunkhwa v. Tanveer Ahmad 2022 PLC (C.S.) 85; Pakistan Telecommunication Company Ltd. v. Muhammad Samiullah 2021 SCMR 998; Messrs Sui Northern Gas Company Ltd. v. Zeeshan Usmani 2021 SCMR 609; Khushal Khan Khattak University v. Jabran Ali Khan 2021 SCMR 977; Pakistan Telecommunication Company Ltd. v. Muhammad Samiullah 2021 SCMR 998; Government of Khyber Pakhtunkhwa v. Saeed-ul-Hassan 2021 SCMR 1376; Muzaffar Khan v. Government of Pakistan 2013 SCMR 304; Government of Balochistan, Department of Health v. Dr. Zahid Kakar 2005 SCMR 642; Government of Khyber Pakhtunkhwa, Workers Welfare Board v. Raheel Ali Gohar 2020 SCMR 2068; Government of Khyber Pakhtunkhwa v. Intizar Ali 2022 SCMR 472 and Pir Imran Sajid v. Managing Director Telephone Industries of Pakistan 2015 SCMR 1257 ref.

**(d) Constitution of Pakistan---**

----Art. 25---Civil service---Contractual employees---Regularization in service---Principle of similarly placed employees---Scope---Where a contractual employee wishes to be regularized, he must demonstrate statutory basis for such a claim, in the absence of which, relief cannot be granted solely on the principle of similarly placed persons ---Article 25 of the Constitution has no application to a claim based upon other unlawful acts and illegalities---It comes into operation when some persons are granted a benefit in accordance with law but others, similarly placed and in similar circumstances, are denied that benefit---But where a person gains, or is granted, a benefit illegally, other persons cannot plead, nor can the court accept such a plea, that the same benefit must be allowed to them also in violation of law.

Deputy Director Finance and Administration FATA v. Dr. Lal Marjan 2022 SCMR 566 and Muhammad Yasin v. D.G. Pakistan, Post Office 2023 SCMR 394 ref.

**(e) Civil service---**

----Contractual employees---Regularization in service---Policy matter---Non-interference by Courts---Institutional autonomy---Process of regularization is a policy matter and the prerogative of the Executive which cannot be ordinarily interfered with by the Courts especially in the absence of any such policy---It does not befit the courts to design or formulate policy for any institution, they can, however, judicially review a policy if it is in violation of the fundamental rights guaranteed under the Constitution---Wisdom behind non-interference of courts in policy matters is based on the concept of institutional autonomy.

Waqas Aslam v. Lahore Electric Supply Company Limited 2023 SCMR 549 and Province of Punjab through Chief Secretary, Lahore v. Prof. Dr. Javed Iqbal 2022 SCMR 897 ref.

**(f) Civil service---**

----Public sector University---Contractual employees---Regularization in service---Policy matter of the University---Non-interference by Courts---Institutional autonomy, concept of---Wisdom behind non-interference of courts in policy matters is based on the concept of institutional autonomy which is defined as a degree of self-governance, necessary for effective decision making by institutions of higher education regarding their academic work, standards, management, and related activities---Institutional autonomy is usually determined by the level of capability and the right of an institution to decide its course of action about institutional policy, planning, financial and staff management, compensation, students, and academic freedom, without interference from outside authorities---Autonomy of public institutions is not just a matter of administrative convenience, but a fundamental requirement for the effective functioning of a democratic society, as public sector organizations are guardians of the public interest---Democracy, human rights and rule of law cannot become and remain a reality unless higher education institutions and staff and students, enjoy

academic freedom and institutional autonomy---Courts must sparingly interfere in the internal governance and affairs of educational institutions i.e., contractual employments; this is because the courts are neither equipped with such expertise, nor do they possess the relevant experience that would allow for interference in such policy matters---Under this autonomous realm, educational institutions are entitled to deference when making any decisions related to their mission---At the same time, any transgression by Courts would amount to the usurpation of the power of another, which would be against the spirit of Article 7 of the Constitution as it is not the role of the Courts to interfere in policy decisions.

Chapter V, Recommendation concerning the Status of Higher-Education Teaching Personnel (1997) UNESCO < https:// en.unesco. org/about-us/legal-affairs/recommendation-concerning - status - higher-education-teaching-personnel?>; OECD, Governance and Quality Guidelines in Higher Education: A Review of Governance Arrangements and Quality Assurance Guidelines (2005); Khyber Medical University v. Aimal Khan PLD 2022 SC 92; Principles, Values and Responsibilities, Magna Charta Universaitum (2020); Waqas Aslam v. Lahore Electric Supply Company Limited 2023 SCMR 549; Hafsa Habib Qureshi v. Amir Hamza and others 2023 SCP 388; Abdul Hameed and others v. Water and Power Development Authority 2021 PLC (C.S.) 1439; Regents of University of Michigan v. Ewing 474 U.S. 214 (1985); Healy v. James 408 U.S. 169 (1972); R v. Dunsheath; Ex parte Meredith [1950] 2 All ER 741; Thorne v. University of London [1966] 2 All ER 338; Neelima Misra v. Harinder Kaur Paintal (1990) 2 SCC 746; Bhushan Uttam Khare v. Dean, B. J Medical College (1992) 2 SCC 420 and Basavaiah v. H. L. Ramesh AIR (2010) 8 SCC 372 ref.

**(g) Void order---**

----When the basic order is without lawful authority, then the entire superstructure raised thereon falls to the ground automatically.

Pakistan People s Party Parliamentarians v. Federation of Pakistan PLD 2022 SC 574 and Atta-ur-Rehman v. Sardar Umar Farooq PLD 2008 SC 663 ref.

**(h) Civil service---**

---Contractual employees---Regularization in service---Prospective effect---Regularization takes effect prospectively, from the date when a regularization order is passed---This is because regularization is based on several considerations which help guage not only the competence and ability of the employee, proposed to be regularized, but also the financial impact and long term legal obligations on the employer institution---It is a conscious decision to be taken by the employer institution at a particular time and therefore cannot be given a retrospective effect.

Province of Punjab through Chief Secretary, Lahore v. Prof. Dr. Javed Iqbal 2022 SCMR 897 and Province of Punjab through Secretary, Livestock and Dairy Development, Government of Punjab v. Dr. Javed Iqbal 2021 SCMR 767 ref.

Naveed Akhtar, Advocate Supreme Court along with Jahan Bakht, V.C. and Muhammad Rizwan, Registrar for Petitioners.

Ms. Tahmina Ambreen, Advocate Supreme Court, Hafiz S.A. Rehman, Senior Advocate Supreme Court, Shahid Saleem Khel, Advocate Supreme Court, Jehanzeb Mahsud, Advocate Supreme Court, Niaz Wali Khan, Advocate Supreme Court, Ijaz Ahmad, Advocate Supreme Court, Muhammad Asif Yousafzai, Advocate Supreme Court, Zartaj Anwar, Advocate Supreme Court, Nasrum Minallah, Advocate Supreme Court, Waseem ud Din Khattak, Advocate Supreme Court, Amjad Ali, Advocate Supreme Court, Khaled Rehman, Advocate Supreme Court, Syed Rifaqat Hussain Shah, Advocate-on-Record, Wakeel Khan in person, Shafique, in person and Sultan Mazhar Sher, Additional A.G. Khyber Pakhtunkhwa for Respondents.

Umer A. Ranjha, Law Clerk, Research Assistance.

Date of hearing: 17th January, 2024.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**

Civil Petition No.2270/2019: This consolidated judgment shall decide the instant petition as well as, petitions mentioned in Schedule A to this judgment as common questions of law and facts arise in these cases.

2. The brief facts giving rise to the instant petition is that a set of contractual employees (hereinafter referred to as the Respondents ) joined the University of Agriculture, Peshawar ( Petitioner ) as Class IV employees from 2009 to 2012. Aggrieved of the fact that the Respondents were not considered as permanent employees despite serving the Petitioner University for seven (07) to eight (08) years, they invoked the constitutional jurisdiction of the Peshawar High Court, Peshawar under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (the Constitution ) vide W.P. No. 965-P/2013 praying for their regularization of service and grant of all back benefits. The High Court held that as some of the Respondents having a similar nature of job, have already been regularized, the Respondents were also entitled to be dealt with accordingly. In doing so, the High Court disposed the petition vide judgment dated 02.04.2019 ( Impugned Judgment ) directing the Petitioners to consider the Respondents strictly in accordance with law and in line with the earlier judgments of the High Court. Hence, the present appeal by leave of this Court.

3. The following set of cases before us include five categories of employees; (i) Category-A: This includes the Respondents who were contractually employed and subsequently regularized by the High Court. The said regularization has been challenged; (ii) Category-B: In this case, the Respondents were appointed on regular basis after advertisement and in compliance with the due process. Their contention is that they be given regularization from the date of their initial appointment when they were first appointed on contractual basis ( ante-date regularization ); (iii) Category C: This category includes those Respondents who were regularized through Court orders with immediate effect, which were not challenged by the Petitioner. Having been regularized, the Respondents have once again approached the High Court to seek ante-date regularization, which was granted to them, hence the challenge; Category D: This includes the Respondents who simply seek ante-date regularization. Schedule-A to this judgment lists the cases falling in each of the aforesaid categories.

4. We have heard the learned counsel for the parties perused the record with their able assistance. The questions to be addressed by this Court are two-fold; firstly, whether the contractual employees could be regularized in the absence of any law or policy allowing such regularizartion; secondly, whether the Respondents who stood regularized through earlier court orders, which remain unchallenged to date, seek ante-date regularization i.e., from the date of their initial appointment on contract basis.

5. In order to understand the issue at hand, it is expedient to understand the regime of regularization which in essence means to make regular or permanent. Once the contractual services are regularized, the appointment can become substantive or permanent and cannot be terminated without due process. Therefore, the regularization of a contractual employee is a fresh appointment into the stream of regular appointment.[1] The differences between a contractual employee and a regular employee is material for both the employee and the employer and, inter alia, include: (i) Duration of employment; a contractual employee is usually employed for a specific period or task, with a set end date. (ii) Benefits; contractual employee generally do not receive the same benefits or statutory protection as a regular employee. (iii) Scope of work; contractual employee is engaged for specific project or task. (iv) Flexibility; contractual employee often has more flexibility in terms of work hours and location. (v) Cost Considerations: a contractual employee can be less costly in the short term as it doesn t require benefits and other long-term financial commitments. (vi) Risk Management; hiring regular employee is often a long-term commitment, so organizations opt for contractual workers to manage risks associated with fluctuating market demands. Therefore, any institution opting for regularization of its employees must be either mandated by law or must carry out regularization through a well-thought out policy of the institution concerned laying down the criteria and the process for regularization; performance evaluation of the contractual employee must be assessed to determine if the employee meets the standards required for a regular position; there must be availability of positions that match the skills and experience of the contractual employee; the budgetary considerations and financial implication of a regular employee be weighed and considered. There must be a fair assessment of the employee s qualifications, performance and merit, so as to ensure only competent and committed employees be granted permanent employment status.[2] Regularization is, therefore, not a ritualistic and mechanical exercise. It requires fresh assessment of the candidature of the contractual employee by the competent authority before he is made a regular employee as any such act carries long term financial implications on the institution concerned. The process of regularization is grounded in

principles of fairness, openness, transparency, non-discrimination and public interest.[3] Regularization therefore has a close nexus with institutional policy and autonomy.

6. It is well settled that there is no vested right to seek regularization for employees hired on contractual basis unless there is any legal or statutory basis for the same.[4] The process of regularization requires backing of any law, rules or policy.[5] It should adhere to the relevant statutory provisions and government policies.[6] In the absence of any of the same, a contractual employee cannot claim regularization. Applying the principles settled by this Court to the proposition at hand, it becomes clear that the Respondents have no automatic right to be regularized unless the same has specifically been provided for in law or policy which in the present case is not available. Any regularization without the backing of law offends the principles of fairness, transparency and meritocracy and that too at the expense of public exchequer. The Impugned Judgment has also erred in law by failing to take into account that where a contractual employee wishes to be regularized, he must demonstrate statutory basis for such a claim, in the absence of which, relief cannot be granted solely on the principle of similarly placed persons.[7] Article 25 of the Constitution has no application to a claim based upon other unlawful acts and illegalities. It comes into operation when some persons are granted a benefit in accordance with law but others, similarly placed and in similar circumstances, are denied that benefit. But where a person gains, or is granted, a benefit illegally, other persons cannot plead, nor can the court accept such a plea, that the same benefit must be allowed to them also in violation of law.[8] Thus, the ground of discrimination also does not stand, because in order to establish discrimination it is important to show that the earlier act was based on law and policy, which has not been the case here. Thus, with respect to the first question raised, we are of the view that the regularization of the Respondents cannot take place without the backing of any law, rule or policy and without an open and transparent process based on an objective criteria, as discussed above.

7. At this juncture, it is underlined that the process of regularization is a policy matter and the prerogative of the Executive which cannot be ordinarily interfered with by the Courts[9] especially in the absence of any such policy. It does not befit the courts to design or formulate policy for any institution, they can, however, judicially review a policy if it is in violation of the fundamental rights guaranteed under the Constitution. The wisdom behind non-interference of courts in policy matters is based on the concept of institutional autonomy which is defined as a degree of self-governance, necessary for effective decision making by institutions of higher education regarding their academic work, standards, management, and related activities... [10] Institutional autonomy is usually determined by the level of capability and the right of an institution to decide its course of action about institutional policy, planning, financial and staff management, compensation, students, and academic freedom, without interference from outside authorities.[11] The autonomy of public institutions is not just a matter of administrative convenience, but a fundamental requirement for the effective functioning of a democratic society, as public sector organizations are guardians of the public interest. Democracy, human rights and rule of law cannot become and remain a reality unless higher education institutions and staff and students, enjoy academic freedom and institutional autonomy.[12] More recently, the concept has in its longstanding and idealized form been well captured in the Magna Charta Universaitum 2020 that states ...intellectual and moral autonomy is the hallmark of any university and a precondition of its responsibilities to society.[13]

8. Courts must sparingly interfere in the internal governance and affairs of educational institutions i.e., contractual employments.[14] This is because the courts are neither equipped with such expertise, nor do they possess the relevant experience that would allow for interference in such policy matters. Under this autonomous realm, educational institutions are entitled to deference when making any decisions related to their mission.[15] At the same time, any transgression by Courts would amount to the usurpation of the power of another, which

would be against the spirit of Article 7 of the Constitution as it is not the role of the Courts to interfere in policy decisions.[16] The judicial pronouncement of the Courts in other jurisdictions i.e., United States of America[17], United Kingdom[18] and India[19] also provide that that courts should not interfere in the internal affairs of educational institutions.

9. Now coming to the second question raised, given that the regularization of the Respondents cannot take place without the backing of any law, rule or policy, there lies no claim for ante-date regularization. It is well settled that when the basic order is without lawful authority, then the entire superstructure raised thereon falls to the ground automatically.[20] However, if it is the case of some Respondents i.e., Categories B, C, and D who stood regularized through earlier Court orders which remain unchallenged can seek ante-date regularization, it is well established that regularization takes effect prospectively, from the date when a regularization order is passed.[21] This is because regularization is based on several considerations which help guage not only the competence and ability of the employee, proposed to be regularized, but also the financial impact and long term legal obligations on the employer institution. It is a conscious decision to be taken by the employer institution at a particular time and therefore cannot be given a retrospective effect. Thus, the Respondents in the aforesaid categories cannot claim ante-date regularization.

10. For the above reasons, the impugned judgments are contrary to the well-established judicial pronouncements of this Court and hence, set aside. Thus, the instant petition filed by the Petitioner and those listed below in Schedule A are converted into appeals and allowed.

11. C.Ps. Nos.4783, 4784 and 456-P/2019: The question of law involved in these petitions is different from the other petitions. Office is, therefore, directed to de-club these petitions from rest of the bunch and fix them separately for hearing. Adjourned.

SCHEDULE-A

| Sr. No. | Category | Case Number |
|---|---|---|
| 1. | Category – A | C.P. No.2270/2019 |
| 2. | | C.P. No.1230/2019 |
| 3. | | C.P. No.1781/2019 |
| 4. | | C.P. No.1782/2019 |
| 5. | | C.P. No.496-P/2020 |
| 6. | | C.P. No.2291/2022 |
| 7. | | C.P. No.3812/2022 |
| 8. | | C.P. No.1438/2019 |
| 9. | Category – B | C.P. No.1807/2020 |
| 10. | | C.P. No.3811/2022 |
| 11. | | C.P. No.3813/20222 |
| 12. | | C.P. No.1228/2020 |
| 13. | | C.P. No.1229/2020 |
| 14. | Category – C | C.P. No.1295/2020 |
| 15. | | C.P. No.1296/2020 |
| 16. | | C.P. No.1297/2020 |
| 17. | | C.P. No.1298/2020 |
| 18. | | C.P. No.1555/2020 |
| 19. | | C.P. No.1783/2020 |
| 20. | | C.P. No.5871/2021 |
| 21. | | C.P. No.5872/2021 |
| 22. | Category – D | C.P. No. 2782/2022 |

MWA/V-1/SC Order accordingly.

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1 Province of Punjab through Secretary, Livestock and Dairy Development, Government of Punjab v. Dr. Javed Iqbal (2021 SCMR 767).

2 Hadayat Ullah v. Federation of Pakistan (2022 SCMR 1691) and Syed Mubashir Raza Jaffri v. Employees of Old Age Benefits Institution (2014 PLC 428).

3 Ikhlaq Ahmed v. Chief Secretary, Punjab (2018 SCMR 1120).

4 Faraz Ahmed v. Federation of Pakistan (2022 PLC 198); Government of Khyber Pakhtunkhwa v. Sher Aman and others (2022 SCMR 406); Vice Chancellor, Bacha Khan University Charsadda, Khyber Pakhtunkhwa v. Tanveer Ahmad (2022 PLC (C.S.) 85; Pakistan Telecommunciation Company Ltd. v. Muhammad Samiullah (2021 SCMR 998); Messrs Sui Northern Gas Company Ltd. v. Zeeshan Usmani (2021 SCMR 609); Khushal Khan Khattak University v. Jabran Ali Khan (2021 SCMR 977); Pakistan Telecommunication Company Ltd. v. Muhammad Samiullah (2021 SCMR 998); Government of Khyber Pakhtunkhwa v. Saeed-Ul-Hassan (2021 SCMR 1376); Muzaffar Khan v. Government of Pakistan (2013 SCMR 304) and Government of Balochistan, Department of Health v. Dr. Zahid Kakar (2005 SCMR 642).

5 Government of Khyber Pakhtunkhwa v. Sher Aman and others (2022 SCMR 406) and Government of Khyber Pakhtunkhwa, Workers Welfare Board v. Raheel Ali Gohar (2020 SCMR 2068).

6 Government of Khyber Pakhtunkhwa v. Intizar Ali (2022 SCMR 472) and Pir Imran Sajid v. Managing Director Telephone Industries of Pakistan (2015 SCMR 1257).

7 Deputy Director Finance and Administration FATA v. Dr. Lal Marjan (2022 SCMR 566).

8 Muhammad Yasin v. D.G. Pakistan, Post Office (2023 SCMR 394).

9 Waqas Aslam v. Lahore Electric Supply Company Limited (2023 SCMR 549) and Province of Punjab through Chief Secretary, Lahore v. Prof. Dr. Javed Iqbal (2022 SCMR 897).

10 Chapter V, Recommendation concerning the Status of Higher-Education Teaching Personnel (1997) UNESCO < https://en.unesco.org/about-us/legal-affairs/recommendation-concerning-status-higher-education-teaching personnel?>

11 OECD, Governance and Quality Guidelines in Higher Education: A Review of Governance Arrangements and Quality Assurance Guidelines (2005).

12 Khyber Medical University v. Aimal Khan (PLD 2022 SC 92).

13 Principles, Values and Responsibilities, Magna Charta Universaitum (2020).

14 Waqas Aslam v. Lahore Electric Supply Company Limited (2023 SCMR 549).

15 Hafsa Habib Qureshi v. Amir Hamza and others (2023 SCP 388).

16 Abdul Hameed and others v. Water and Power Development Authority (2021 PLC (C.S.) 1439).

17 Regents of University of Michigan v. Ewing 474 U.S. 214 (1985); Healy v. James 408 U.S. 169 (1972).

18 R v. Dunsheath; Ex parte Meredith [1950] 2 All ER 741; Thorne v. University of London [1966] 2 All ER 338.

19 Neelima Misra v. Harinder Kaur Paintal (1990) 2 SCC 746; Bhushan Uttam Khare v. Dean, B. J Medical College (1992) 2 SCC 420; Basavaiah v. H. L. Ramesh AIR (2010) 8 SCC 372.

20 Pakistan People s Party Parliamentarians v. Federation of Pakistan (PLD 2022 SC 574); Atta-ur-Rehman v. Sardar Umar Farooq (PLD 2008 SC 663).

21 Province of Punjab through Chief Secretary, Lahore v. Prof. Dr. Javed Iqbal (2022 SCMR 897); Province of Punjab through Secretary, Livestock and Dairy Development, Government of Punjab v. Dr. Javed Iqbal (2021 SCMR 767).

**2024 S C M R 553**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, Jamal Khan Mandokhail and Athar Minallah, JJ**

**UMAR ASLAM KHAN---Petitioner**

**Versus**

**ELECTION COMMISSION OF PAKISTAN and others---Respondents**

Civil Petition No. 159 of 2024, decided on 26th January, 2024,

(Against the order of Lahore High Court, Lahore dated 12.1.2024, passed in Writ Petition No.2224 of 2024)

**Elections Act (XXXIII of 2017)---**

----S. 62---Constitution of Pakistan, Art. 62(1)(d), (e), (f) & (g)---Elections for seat of National Assembly---Nomination papers---Nomination papers of petitioner (candidate) rejected by the High Court on the ground that he was a proclaimed offender in a criminal case---Validity---There was no provision either in the Constitution or in the Elections Act, 2017 that made a proclaimed offender disqualified from contesting the election, and the courts cannot on their own create such additional disqualification, without any backing of the law---Further, in this particular case, the petitioner was declared a proclaimed offender in a criminal case, however, he obtained a protective bail in the case by surrendering himself to the court; he, therefore, could not be considered a proclaimed offender---Furthermore Article 62(1)(d), (e), (f) and (g) was not self-executory and served as guidelines for the voters in exercising their right to vote, hence even being a proclaimed offender did not attract the disqualification under the said provisions--- Petition was converted into an appeal and the same was allowed; the impugned order of the High Court was set aside and the nomination paper of the petitioner for the seat of a Member of the National Assembly stood accepted with the direction to the Election Commission of Pakistan (ECP) to ensure that all the necessary steps to be taken in the electoral process were completed forthwith so that the petitioner could contest the election on the scheduled date for the seat in question, without fail.

Hamza Rasheed Khan v. Election Appellate Tribunal and others Civil Appeal No. 982 of 2018 ref.

Syed Ali Zafar, Advocate Supreme Court, Zahid Nawaz Cheema, Advocate Supreme Court and Ch. Akhtar Ali, Advocate-on-Record for Petitioner.

Rashid Hanif, Advocate Supreme Court and Mehr Khan Malik, Advocate-on-Record for Respondents.

Falak Sher, Consultant Law for ECP.

Date of hearing: 26th January, 2024.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The petitioner seeks leave to appeal against the order dated 12.01.2024, passed by a Full Bench of the Lahore High Court, Lahore, whereby his nomination paper for seat of the National Assembly from NA-87, Khushab, was rejected on the ground that he is a proclaimed offender in a criminal case.

2. Briefly, the facts are that the nomination paper of the petitioner was rejected by the Returning Officer ("RO") on the same ground on 30.12.2023, however, on appeal, the Appellate Tribunal set aside the order of the RO and accepted the nomination paper of the petitioner. The objector-respondent challenged the order of the Appellate Tribunal through a writ petition in the High Court, which vide order dated 12.01.2024 was allowed and the nomination paper of the petitioner stood rejected.

3. We have heard the learned counsel for the parties and have gone through the record. It is pointed out that the same bench of the High Court vide order of the even date in another election case (W.P. 2383/2024) titled Tajammal Abbas v. Returning Officer and others discarded the ground of proclaimed offender and accepted the nomination paper of the candidate by holding that "[i]t is settled law that if a person is fugitive from law, he does not lose all his rights and mere abscondence of an accused is nowhere recognized ground to eliminate him to contest the election." Yet a diametrically opposite view was taken by the same bench of the High Court, in a case having similar facts, in the impugned order.

4. Learned counsel for the respondent as well as the learned counsel for the ECP were asked to refer to any provision of law that disqualifies a proclaimed offender from contesting the elections but they were unable to refer to any provision from the Elections Act, 2017 or from the Constitution. Since there is no provision either

in the Constitution or in the Elections Act that makes a proclaimed offender disqualified from contesting the election, the courts cannot on their own create such additional disqualification, without any backing of the law. Further, in this particular case, the petitioner was declared a proclaimed offender in criminal case FIR No. 231/23 registered at Police Station, Khushab. However, he obtained a protective bail in the said case by surrendering himself to the court; he, therefore, cannot be considered a proclaimed offender. We may point out that Article 62(1)(d), (e), (f) and (g) has been recently declared by this Court, in Civil Appeal No. 982 of 2018 etc titled Hamza Rasheed Khan v. Election Appellate Tribunal and others, not to be self-executory and to serve as guidelines for the voters in exercising their right to vote, hence even being a proclaimed offender does not attract the disqualification under the said provisions.

5. In view of the above, this petition is converted into an appeal and the same is allowed. The impugned order of the High Court is set aside and the nomination paper of the petitioner for the seat of a Member of the National Assembly, NA-87, Khushab-I, stands accepted. The Election Commission of Pakistan shall ensure that all the necessary steps to be taken in the electoral process are completed forthwith so that the petitioner can contest the election on the scheduled date for the said seat, without fail.

MWA/U-1/SC Appeal allowed.

**2024 S C M R 563**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, Amin-ud-Din Khan, Jamal Khan Mandokhail, Ayesha A. Malik and Athar Minallah, JJ**

**Syed ASGHAR ALI SHAH and another---Petitioners**

**Versus**

**KALEEM ARSHAD and others---Respondents**

Civil Petitions Nos. 167-P and 391 of 2022, decided on 15th January, 2024.

(Against the judgment dated 18.12.2021 passed by Khyber Pakhtunkhwa Subordinate Judiciary Service Tribunal in Service Appeal No.06-P of 2021)

Per Syed Mansoor Ali Shah, J; Amin-ud-Din Khan, Jamal Khan Mandokhail and Athar Minallah, JJ. agreeing; Ayesha A. Malik, J. also agreeing with regard to maintainability of present petitions but not with the reasons given for the same [Majority view]

**Constitution of Pakistan---**

----Arts. 212(2), proviso, 212(3) & 142---Order of a Tribunal created by a Provincial law---Appeal to the Supreme Court under Article 212(3) of the Constitution---Maintainability---Whether an appeal lies to the Supreme Court under Article 212(3) against an order of a Tribunal created by a Provincial law to which the proviso to Clause (2) of the Article 212 has not been made applicable---[Per Syed Mansoor Ali Shah, J. (Majority view): Proviso to clause (2) does not apply to clause (3) of Article 212 of the Constitution---Appeals against orders of the Provincial Administrative Tribunals are competent before the Supreme Court under Article 212(3) of the Constitution---Supreme Court over ruled the law declared in such regard in the judgment reported as Gomal Medical College v. Armaghan Khan (PLD 2023 SC 190)]---[Per Ayesha A. Malik, J. (Minority view): As Article 212(1) of the Constitution itself confers jurisdiction on the Provincial Legislature to establish the Provincial Tribunal under Article 212(1), the Constitution also confers appellate jurisdiction to the Supreme Court from a judgment, decree, order or sentence of the said Provincial Tribunal---Discussion of the majority opinion in the instant matter on Entry 55 of the Federal Legislative List (FLL), is not relevant to the dispute at hand]

Per Syed Mansoor Ali Shah, J. (Majority view)

Clause (2) of Article 212 of the Constitution is merely an ouster clause and not a jurisdiction clause. In case of Federal Tribunals, it provides that no other court can take jurisdiction over any matter which falls under the subject matter of the Administrative Tribunal established under Article 212(1). If clause (2) has not been made applicable to a Provincial Tribunal, it at best means that there are other forums also available to redress the grievance of the officers, e.g., the High Court under Article 199 or the Civil Courts under section 9 of the Civil Procedure Code, 1908. In the absence of clause (2), all the judicial forums in a Province have concurrent jurisdiction along with the Provincial Administrative Tribunal. Once a civil servant invokes the jurisdiction of the Provincial Tribunal, the remedy of an appeal by leave against any decision of the Provincial Tribunal before the Supreme Court becomes alive. Remedy of appeal under clause (3) will not be available if the civil servant approaches the High Court or the Civil Court for the redressal of his grievance. Applicability of clause (2) to a Provincial Tribunal is totally insignificant as it has no effect on the remedy of appeal against the decision of the Provincial Tribunal before the Supreme Court which is ensured under clause (3).

Clause (3) is the third part of Article 212, which provides than an appeal shall lie to the Supreme Court from a judgment, decree order or sentence of the Administrative Tribunal, and the Supreme Court shall grant leave if the Supreme Court is satisfied that a substantial question of law of public importance arises in the case. Clause (3) has no correlation whatsoever with the ouster clause of clause (2). Whether a Provincial Tribunal enjoys the ouster clause or not, does not affect the appellate jurisdiction of the Supreme Court. Clause (3) is independently connected with all the administrative Tribunals, including Provincial Tribunals, established under Article 212(1). The appeal to the Supreme Court is available against orders of both the Federal and Provincial Administrative Tribunals by a special constitutional scheme provided under Article 212, which due to the non obstante clause is over and above any sub-constitutional legislation under the regular constitutional scheme.

The law declared in the judgment reported as Gomal Medical College v. Armaghan Khan (PLD 2023 SC 190) that unless and until the proviso to Article 212(2) of the Constitution is activated, appeal against an order of a Provincial Tribunal is not available before the Supreme Court under Article 212(3) of the Constitution, and that in the absence of such a law passed by the Parliament, the decision of a Tribunal established under the Provincial law is to be challenged under Article 199 of the Constitution, is not correct and is therefore overruled.

Dean/Chief Executive, Gomal Medical College, Medical Teaching Institution, D.I. Khan v. Muhammad Armaghan Khan PLD 2023 SC 190 overruled.

Per Ayesha A. Malik, J. (Minority view)

Article 212(3) of the Constitution is the constitutional mandate which prescribes that leave to appeal before the Supreme Court for the Tribunal established under Article 212(1) of the Constitution can be filed directly, meaning thereby, the Constitution itself provides for the remedy of appeal before the Supreme Court. Both Sub-Articles (1) and (3) of Article 212 of the Constitution are exceptions to the legislative authority contained in Article 142 of the Constitution as the Constitution itself authorizes and permits the Federal and Provincial Legislature, irrespective of the authority given in Article 142 of the Constitution read with the Federal Legislative List (FLL), to establish the Tribunal and to allow its leave to appeal directly before the Supreme Court. Article 212(2) merely ousts the jurisdiction of other courts or fora. Resultantly, even though the Tribunal is established under Article 212(1), the ouster of jurisdiction of other courts is automatically triggered by Article 212(2) of the Constitution and with respect to federal courts but for the provincial courts it is necessary that the Provincial Assembly activate the proviso to Article 212(2) of the Constitution. In such case, the Tribunal will be an exclusive forum, which totally and completely ousts the jurisdiction of all other courts or fora with respect to the special subject-matters contained in sub Articles (a), (b) and (c) of Article 212(1) of the Constitution. However, if the proviso is not activated, meaning there is no resolution by the Provincial Legislature (followed by an Act of Parliament) the ouster of jurisdiction will not be triggered. Consequently, a litigant will have the option to avail its remedy before any other forum including the remedy before the Supreme Court.

The law declared in the judgment reported as Gomal Medical College v. Armaghan Khan (PLD 2023 SC 190) appears to read exclusivity and ouster as synonymous, because it relies on the principle that the Provincial Legislature cannot act upon the jurisdiction of the Supreme Court without intervening Federal legislation, hence, in order for the Tribunal to have exclusive jurisdiction, the proviso must be activated. This in turn means that if the proviso is activated, then the exclusivity of the Tribunal will mean ouster of the jurisdiction as well. However, exclusivity will not per se oust the jurisdiction of other courts without an express provision stating so as exclusivity of jurisdiction does not imply the ouster of jurisdiction. For ouster of jurisdiction to take effect an express provision is required which is precisely what Article 212(2) of the Constitution does. In other words, the proviso does not act as a bridge between Sub-Articles (1) and (3) of Article 212, rather it allows and empowers the Provincial Legislature to decide whether, for the purposes of the establishment of the Provincial Tribunal, remedy should lie exclusively to the Supreme Court or, in the alternate, giving more options to the litigant.

The discussion of the majority opinion in the instant matter on Entry 55 of the Federal Legislative List (FLL), is not relevant to the dispute at hand. The issue before the Court in this matter is simply whether the remedy of appeal as provided in Article 212(3) of the Constitution is available to the petitioners. The answer to this question is in the affirmative as this remedy has been provided, specifically and categorically, by the Constitution itself, and not by way of any ordinary legislation. Therefore, there is no issue pertaining to legislative competence under Entry 55 of the FLL.

Petitioner in -person (in C.P. 167-P of 2022).

Hafiz S. A. Rehman, Senior Advocate Supreme Court for Petitioners (in C.P. 391 of 2022).

Syed Hamid Ali Shah, Advocate Supreme Court and Syed Rafaqat H. Shah, Advocate-on-Record for Respondents (in C.P. 391 of 2022).

Hasan Nawaz Makhdoom, Additional A.G.P., Ch. Amir Rehman, Additional A.G.P., Ayyaz Shoukat, A.G. (Islamabad), Khalid Ishaq, A.G. (Punjab), Sanaullah Zahid, Additional A.G. (Punjab), Baleeghuzzaman, Additional A.G. (Punjab), Malik Waseem Mumtaz, Additional A.G. (Punjab), Sultan Mazhar Sher Khan,

Additional A.G. (Khyber Pakhtunkhwa), M. Ayyaz Khan Swati, Additional A.G. (Balochistan) and Barrister Zeeshan Adhi, Additional A.G. (Sindh) for Respondents.

Date of hearing: 15th January, 2024.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**Petitioners seek leave to appeal under Article 212(3) of the Constitution of the Islamic Republic of Pakistan, 1973 ( Constitution ) against the judgment of the Khyber Pakhtunkhwa Subordinate Judiciary Tribunal ( Tribunal ), dated 18.12.2021, whereby the issue of seniority of respondent No.1 appointed as Additional District and Sessions Judge from the selection process of the year 2001 was considered and decided in terms of Rule 10(a) of the Khyber Pakhtunkhwa Judicial Service Rules, 2001[1] read with section 8(3) of the Khyber Pakhtunkhwa Civil Servants Act 1973, and his seniority was fixed along with his batchmates above the petitioners who were appointed from the selection process of the years 2002 and 2003.

2. Learned counsel for respondent No. 1, in the course of hearing of the petitions before a regular Bench of this Court, raised a preliminary objection regarding the maintainability of these petitions for leave to appeal under Article 212(3) of the Constitution on the basis of the law declared by this Court in Gomal,[2] which held that no appeal lies to this Court in terms of Article 212(3) against the decision of a Tribunal created by a Provincial law to which the proviso to clause (2) has not been applied. [3] Admittedly, there is no federal law that extends clause (2) to the Tribunal in terms of the said proviso. The question of maintainability, raised by the learned counsel, entailed the interpretation of Article 212 of the Constitution. Under section 4 of the Supreme Court (Practice and Procedure) Act, 2023 ( Act of 2023 ) if any matter involves interpretation of a constitutional provision, the Committee[4] is to constitute a Bench comprising not less than five Judges of the Supreme Court to hear the matter. The regular Bench of this Court, therefore, referred the matter to the Committee for constitution of the larger Bench in accordance with section 4 of the Act of 2023, on 09.01.2024. Hence, this Bench. On the last date of hearing, this Bench issued fresh notices under Order XXVII A, C.P.C. to the Attorney-General for Pakistan and Advocate-General, Khyber Pakhtunkhwa, as well as Advocates-General of other provinces.

Reconsideration of Gomal and the maintainability of the petitions for leave to appeal under Article 212(3) of the Constitution.

3. First, we take up the question of maintainability of the instant petitions for leave to appeal. The question raised in Gomal was whether an appeal lies to the Supreme Court under Article 212(3) against an order of a Tribunal created by a Provincial law to which the proviso to Clause (2) of the Article 212 has not been made applicable. Gomal answered this in the negative by holding that no appeal lies to this Court in terms of Article 212(3) against the decision of a Tribunal created by a Provincial law to which the proviso to Clause (2) has not been applied. Gomal went ahead to direct that all the pending petitions or appeals, being not maintainable, were to be returned forthwith by the Office and that no such leave petitions were to be entertained in future except matters regarded as past and closed or reserved or part heard, subject to the direction of the Bench concerned, and matters heard under the direction of the Hon ble Chief Justice.[5]

4. In Gomal, the facts were that an employee of Gomal Medical College ( College ) upon being terminated from service filed an appeal before the Appellate Tribunal established under the Khyber Pakhtunkhwa Medical Teaching Institution Reforms Act, 2015[6] ( Reforms Act ). The said appeal was allowed, and the employee was directed to be reinstated in service with back benefits. Against this order of reinstatement, the College preferred a petition for leave to appeal under Article 212(3) of the Constitution before this Court. In this background, the above question regarding the maintainability of the petition for leave to appeal before this Court under Article 212(3) arose.

5. In Gomal, a two-member Bench of this Court held that the appeal arising from the decision of a Provincial Tribunal constituted under Article 212(1)(a) are not maintainable before this Court under Article 212(3) unless the Federal Legislature extends the provision of clause (2) of Article 212 to the said Provincial Tribunal through a Federal Act. This Court in Gomal first identified the principle and then proceeded to interpret Article 212 in the light of the said principle. According to Gomal, the principle is that it is only the Parliament that can (if at all) enact legislation that affects or acts upon the jurisdiction of this Court. The Provinces have no such

legislative competence. [7] Taking this further, Gomal reasoned that jurisdiction can only be conferred on this Court through the federal legislature in terms of entry No. 55 of the Federal Legislative List of the Constitution and that the provincial legislature while establishing a Provincial Tribunal cannot confer jurisdiction of appeal on this Court, unless and until effect is given to proviso to Article 212(2) of the Constitution through an Act of Parliament. According to Gomal, clause (3) of Article 212 could only be activated through proviso to clause (2) which formed the necessary bridge connecting clauses (2) and (3) of Article 212 and only under the cover of an Act of Parliament could the door to this Court be opened under Article 212(3). Gomal went ahead to hold that if the Provincial Assembly does not wish to follow this route or Parliament refuses to enact the enabling legislation in terms of the proviso, then the door to this Court remains shut. And when clause (2) does not apply, the jurisdiction of the other courts, which in practical terms would mean recourse to the High Court under Article 199, would remain open, holding clause (2) and its proviso the gateway to clause (3).

6. We have heard the learned counsel for respondent No.1, the Attorney-General and the Advocates-General of all the Provinces and ICT. All[8] of them argued that Article 212(3) is a stand-alone provision and decision of the Provincial Tribunals established under Article 212(1) can be appealed before the Supreme Court. They also contended that Article 212(2) is an ouster clause that keeps the other courts away in matters that fall within the jurisdiction of the Tribunal and do not in any manner confer any additional jurisdiction on the Provincial Tribunals, hence even if clause (2) is not made applicable to the Provincial Tribunals established under Article 212(1), the Provincial Tribunals under Article 212(1) still continue to exist and function, their jurisdiction is not affected and the appellate jurisdiction conferred by the Constitution on this Court against any decision of the Provincial Tribunals under Article 212(3) remains intact. Mr. Amir Rehman, Additional-Attorney General for Pakistan explained that the object of clause (2) of Article 212 is to leave the option of invoking the ouster clause with the Provinces, respecting their provincial autonomy under our federal scheme. He added that clause (2) does not confer jurisdiction as understood in Gomal but simply provides for an ouster clause, keeping away other courts from taking up matters falling under the jurisdiction of the Provincial Administrative Tribunals. If the proviso to clause (2) is not invoked, only the ouster clause is not available in a Province, which neither affects the jurisdiction of the Provincial Administrative Tribunals nor the appellate jurisdiction of this Court against the decisions of these Administrative Tribunals under clause (3). We have noticed that the arguments of the law officers before us were similar to the ones submitted by the then law officers before the two-member Bench in Gomal.

7. During the course of hearing in Gomal, it was pointed out by the Advocate-General, KPK that the interpretation of Article 212 in this case will also apply to Khyber Pukhtunkwa Subordinate Judiciary Service Tribunal Act, 1991, as decisions from the said Tribunal are also challenged through leave to appeal before this Court under Article 212(3). This submission was acknowledged by the Bench and therefore notices were issued to Advocates-General of all the Provinces.[9] Gomal, therefore, while interpreting Article 212, had considered its impact on all the provincial laws relating to the Tribunals established in respect of the terms and conditions of service of the members of the subordinate judiciary.

8. In order to better understand Gomal, we have gone through Article 212 of the Constitution, which is reproduced hereunder, for ready reference:-

Administrative Courts and Tribunals

212(1) Notwithstanding anything hereinbefore contained, the appropriate Legislature may by Act provide for the establishment of one or more Administrative Courts or Tribunals to exercise exclusive jurisdiction in respect of

(a) matters relating to the terms and conditions of persons who are or have been in the service of Pakistan, including disciplinary matters;

(b) matters relating to claims arising from tortious acts of Government, or any person in the service of Pakistan, or of any local or other authority empowered by law to levy any tax or cess and any servant of such authority acting in the discharge of his duties as such servant; or

(c) matters relating to the acquisition, administration and disposal of any property which is deemed to be enemy property under any law.

(2) Notwithstanding anything hereinbefore contained, where any Administrative Court or Tribunal is established under clause (1), no other court shall grant an injunction, make any order or entertain any proceedings in respect of any matter to which the jurisdiction of such Administrative Court or Tribunal extends and all proceedings in respect of any such matter which may be pending before such other court immediately before the establishment of the Administrative Court or Tribunal other than an appeal pending before the Supreme Court, shall abate on such establishment:

Provided that the provisions of this clause shall not apply to an Administrative Court or Tribunal established under an Act of a Provincial Assembly unless, at the request of that Assembly made in the form of a resolution, Majlis-e-Shoora (Parliament) by law extends the provisions to such a Court or Tribunal.

(3) An appeal to the Supreme Court from a judgment, decree, order or sentence of an Administrative Court or Tribunal shall lie only if the Supreme Court, being satisfied that the case involves a substantial question of law of public importance, grants leave to appeal.

Article 212, starts with a non-obstante clause and has three parts: (i) clause (1) empowers the appropriate legislature to establish Administrative Tribunals with exclusive jurisdiction over specific subject matters provided in clauses (a), (b) and (c); (ii) clause (2) does two things, it provides for an ouster clause , excluding the jurisdiction of other courts in matters falling under the jurisdiction of the Administrative Tribunals under clause (1), and an abatement clause , abating any proceedings in respect of any such matter pending before any other court except the Supreme Court. The proviso to clause (2) extends the ouster clause in clause (2) to the Provincial Administrative Tribunals established under clause (1) only if on the request of the Provincial Assembly through a resolution, clause (2) is extended to a Provincial Tribunal through an Act of Parliament; and (iii) under clause (3) an appeal by leave is provided to the Supreme Court against the decisions of these Administrative Tribunals, if they involve a substantial question of law of public importance.

9. Article 212(1) has a non-obstante clause, i.e., Notwithstanding hereinbefore contained , that overrides other provisions of the Constitution, in particular, Article 142,[10] which vests exclusive power in the federal legislature to make laws with respect to any matter in the Federal Legislative List and concurrent power in the federal and provincial legislatures to make laws only with respect to criminal law, criminal procedure and evidence. Article 212(1) authorizes and allows the appropriate legislatures, both federal and provincial, to establish Administrative Tribunals with exclusive jurisdiction for dealing with specific subject matters as provided in clauses (a), (b) and (c) thereof. Federal legislature might not otherwise possess legislative competence under the Federal Legislative List, or under the concurrent power mentioned in Article 142, to establish these Administrative Tribunals regarding subject matters enumerated under clauses (a), (b) and (c) of Article 212(1); however, Article 212(1) of the Constitution empowers both the federal and provincial legislatures to establish such Administrative Tribunals over and above the permissible legislative competence under Article 142 and the Federal Legislative List. This unique legislative power of the provincial and federal legislatures to establish Administrative Tribunals under Article 212 with specialized subject matter and a dedicated forum of appeal, i.e., the Supreme Court, is the significance of the non-obstante clause that enables Article 212 to override the regular constitutional regime.

10. Clause (2) of Article 212 also contains a non-obstante clause, which does two things: first, it ousts the jurisdiction of all other courts vested in them in terms of Article 175 to deal with matters covered under the exclusive jurisdiction of the Administrative Tribunals established under Article 212(1); and second, it provides that any such matter pending before any other court shall abate, excluding matters pending before the Supreme Court. The proviso to clause (2) further provides that the said ouster clause will come into effect for the Provincial Tribunals only if on the resolution of the Provincial Assembly the Parliament passes an Act, which extends the provisions of clause (2) to such a Tribunal. Such a Federal Law was once enacted in 1974 titled, the Provincial Service Tribunals (Extension of Provisions of the Constitution) Act, 1974 and admittedly there is no such law that extends to the Provincial Tribunal in question.

11. Clause (2) of Article 212 is, in our opinion, merely an ouster clause and not a jurisdiction clause. In case of Federal Tribunals, it provides that no other court can take jurisdiction over any matter which falls under the subject matter of the Administrative Tribunal established under Article 212(1). If clause (2) has not been made

applicable to a Provincial Tribunal, it at best means that there are other forums also available to redress the grievance of the officers, e.g., the High Court under Article 199 or the Civil Courts under Section 9 of the Civil Procedure Code, 1908. In the absence of clause (2), all the judicial forums in a Province have concurrent jurisdiction along with the Provincial Administrative Tribunal. Once a civil servant invokes the jurisdiction of the Provincial Tribunal, the remedy of an appeal by leave against any decision of the Provincial Tribunal before this Court becomes alive. Remedy of appeal under clause (3) will not be available if the civil servant approaches the High Court or the Civil Court for the redressal of his grievance. Applicability of clause (2) to a Provincial Tribunal is totally insignificant as it has no effect on the remedy of appeal against the decision of the Provincial Tribunal before this Court which is ensured under clause (3).

12. Gomal repeatedly lays stress on clause (2) and its proviso to say that unless the provision of clause (2) is made applicable to a Provincial Tribunal, the remedy of appeal under clause (3) before this Court is not available against any decision of a Provincial Tribunal. This line of reasoning is based on the central principle formulated in Gomal; that only federal legislature can vest jurisdiction in the Supreme Court under the Constitution (entry 55 of the Federal Legislative List) and therefore unless there is an Act of Parliament extending clause (2) to a Provincial Tribunal, right to appeal is not available to this Court under clause (3). This line of reasoning is, with respect, flawed as Gomal fails to appreciate the clear and direct provision of the Constitution, i.e. clause (3) of Article 212, and instead places reliance on the legislative competence to enact a sub-constitutional law under the Constitution. While Gomal is right when it reasons that the appellate jurisdiction can only be conferred upon the Supreme Court by federal legislature under entry 55 of the Federal Legislative List and not by the provincial legislature, it utterly fails to appreciate that it is the non-obstante provision of Article 212 of the Constitution itself that is allowing appeal by leave from a Provincial Administrative Tribunal to the Supreme Court. The principle enunciated in Gomal, that it is only the Parliament that can (if at all) enact legislation that acts upon or affects the jurisdiction of this Court[;] [t]he provincial assemblies cannot do so , has little significance once the Constitution itself has conferred appellate jurisdiction on the Supreme Court against matters arising from a Tribunal constituted under Article 212(1)(a). Even otherwise, the foundational premise of Gomal that only federal legislature can vest jurisdiction in this Court seems to have no nexus or co-relation with clause (2) which is simply an ouster clause. It is not as if the act of the Parliament under the proviso to clause (2) converts the Provincial Tribunal into a Federal Tribunal, or the provincial legislation into federal legislation, it simply ousts other courts from exercising jurisdiction in matters covered by a Provincial Tribunal.

13. Clause (3) is the third part of Article 212, which provides than an appeal shall lie to the Supreme Court from a judgment, decree order or sentence of the Administrative Tribunal, and the Supreme Court shall grant leave if the Supreme Court is satisfied that a substantial question of law of public importance arises in the case. Clause (3) has no co- relation whatsoever with the ouster clause of clause (2). Whether a Provincial Tribunal enjoys the ouster clause or not, does not affect the appellate jurisdiction of this Court. Clause (3) is independently connected with all the administrative Tribunals, including Provincial Tribunals, established under Article 212(1). It is once again reiterated that the appeal to the Supreme Court is available against orders of both the Federal and Provincial Administrative Tribunals by a special constitutional scheme provided under Article 212, which due to the non-obstante clause is over and above any sub-constitutional legislation under the regular constitutional scheme. Gomal, with respect, overlooks this important distinction and proceeds to assess the maintainability of appeal before the Supreme Court under Article 212(3) through a sub- constitutional lens. If there were no Article 212(3), Gomal would have been right in holding that only federal legislature can confer jurisdiction on the Supreme Court and not the provincial legislature, but the provincial legislature (or for that matter even the federal legislature) has not conferred the right of appeal on this Court; it is the Constitution itself that has done so under Article 212(3). It is therefore difficult for us to understand how Gomal holds that clause (2) is the gateway to clause (3), when we find no such co-relation between the two clauses. The view in Gomal that unless there is an Act of the Parliament in terms of the proviso to clause (2), the Supreme Court cannot sit over the decisions of the Provincial Tribunal in appeal, in our view and with due respect, is erroneous and deconstructs the unique constitutional scheme of establishing Administrative Tribunals under Article 212,

which grants an appellate remedy to the Supreme Court from the decisions of the all Administrative Tribunals federal and provincial.

14. For the above reasons, the law declared in Gomal that unless and until the proviso to Article 212(2) of the Constitution is activated, appeal against an order of a Provincial Tribunal is not available before this Court under Article 212(3) of the Constitution, and that in the absence of such a law passed by the Parliament, the decision of a Tribunal established under the Provincial law is to be challenged under Article 199 of the Constitution, is not correct and is therefore overruled.

Merits of the present case

15. Coming to the merits of the present case, briefly the facts are that vide letter dated 6th November 2000 issued by the Services and General Administration Department, Government of NWFP (as it then was), the provincial government wrote to the Registrar, Peshawar High Court for creation of 10 additional posts of Additional District and Sessions Judges to be filled on the recommendation of the Peshawar High Court under the erstwhile NWFP Senior Judicial Officers (Terms and Conditions of Service) Rules, 1979 ( Rules, 1979 ). Names were solicited for the above posts by the Peshawar High Court from the District and Sessions Judges of KPK. One such letter addressed to District and Sessions Judge, D.I. Khan, is dated 09.12.2000. And in response, vide letter dated 21.02.2001 issued by the District and Sessions Judge, Dera Ismail Khan, name of respondent No.1, namely, Kaleem Arshad Khan, advocate along with one other was proposed from District D.I. Khan for the post of Additional District and Sessions Judge ( ADJ ) in the selection process initiated by the High Court in the year 2001. Respondent No.1 sat through the written examination and stood first in the said examination.[11] He was called for an interview and appeared before the Selection Committee and stood at the top of the merit list.[12] In pursuance to delegation notification dated 29.08.2001 issued under section 5 of the N.W.F.P Civil Servants Act, 1973, the Chief Justice of Peshawar High Court appointed four Additional and Sessions Judges vide Notification dated 19th September 2001; however, respondent No.1 who stood first in the said selection process was denied appointment. It is also pointed out that Khyber Pakhtunkhwa Judicial Service Rules, 2001 ( Rules, 2001 ) were introduced repealing Rules, 1979.

16. The respondent No.1 challenged this non-selection before the Peshawar High Court, through a writ petition which was allowed vide judgment dated 09.4.2004 [reported as Kaleem Arshad Khan v. Secretary to Government of NWFP (2004 PLC (C.S.) 1558)] with the direction to appoint respondent No.1 as Additional and District Sessions Judge on the available seat. Thereafter, the petitioner was appointed vide Notification dated 22.02.2005. Thereafter, respondent No.1 was granted seniority w.e.f. the date of his Notification and not from the date of Notification of the rest of his batchmates, i.e., 19.09.2001, who were appointed from the same selection process held in the year 2001. The issue of seniority became more important because through selection process in the year 2002 and 2003, several other ADJs were appointed, who were placed higher in seniority than the said respondent. After the denial of the seniority by the Administration Committee of the Peshawar High Court vide letter dated 13.03.2021, the respondent No. 1 challenged the same before the Khyber Pakhtunkhwa Subordinate Judiciary Service Tribunal ( Tribunal ), which through the impugned judgment dated 18.12.2021, allowed his appeal and granted him seniority along with his batchmates who were appointed from the same selection process held in 2001. The contention of the petitioners, who are admittedly appointed from the selection process of the years 2002 and 2003, is that they are senior to respondent No.1 because the date of appointment of respondent No.1 is 22.02.2005.

17. We have heard the learned counsel for the parties and have examined the case record. Section 8(3) of the Khyber Pakhtunkhwa Civil Servants Act, 1973 provides that the seniority shall be determined in accordance with the Rules prescribed under the said Act and Rule 10(a) of the Rules, 2001 provides that persons selected for the service in the earlier selection shall rank senior to the persons selected in a later selection. The date or year of selection process determines the seniority of an officer as per Rule 10(a). Implied in the selection process is a group or batch of candidates who go through the selection process together and are subsequently selected and appointed together. Admittedly, respondent No.1 was a part and parcel the selection process of the year 2001 but he was denied appointment which he challenged before the High Court and was successfully appointed on the direction of the High Court. His seniority under Rule 10(a) will be considered from the date of his

selection process along with his group and batchmates who were a part of the same selection process. It is also admitted that the petitioners were appointed through the subsequent selection process of the years 2002 and 2003. Hence, the petitioners cannot claim seniority over respondent No.1.

18. We have gone through a well-reasoned judgment of the Tribunal, which has elaborately attended to the issue of seniority and other ancillary questions relating to limitation and res judicata, which were not specifically raised before us. We see no reason to take a view different from the view taken by the Tribunal and also find that there is no substantial question of law of public importance in this case that qualifies grant of leave to appeal. Hence, these petitions are dismissed, and the seniority of respondent No.1 settled by the Tribunal is upheld.

Sd/-

Syed Mansoor Ali Shah, J

Sd/-

Amin-ud-Din Khan, J

Sd/-

Jamal Khan Mandokhail, J

While I agree with the outcome and result I do not agree with the reasoning given, hence I have appended my separate opinion on maintainability.

Sd/-

Ayesha A. Malik, J

Sd/-

**Athar Minallah, J**

**AYESHA A. MALIK, J.---**I have read the opinion of the majority as authored by Syed Mansoor Ali Shah, J. and while I agree with the conclusion on the issue of maintainability, being that these Petitions are maintainable, I do not agree with the reasons given therein. So far as the reasons and conclusions drawn on the merit of the case, I have no disagreement.

2. On the question of maintainability, the Gomal case[1] has been relied upon for its interpretation of Article 212 of the Constitution of the Islamic Republic of Pakistan, 1973 (Constitution). In the instant Petitions, the dispute emanates out of service appeals decided by the service tribunal for the Khyber Pakhtunkhwa against which Petitions under Article 212(3) of the Constitution have been filed before this Court. The relevant Provincial law is the Khyber Pakhtunkhwa Subordinate Judiciary Service Tribunal Act, 1991 (SJST Act) read with the Khyber Pakhtunkhwa Judicial Service Rules, 2001 (JS Rules), and the issue is whether leave to appeal can be filed before this Court in terms of Article 212(3) of the Constitution given the decision rendered in the Gomal case.

3. The Gomal judgment finds that where a Provincial law establishes Administrative Tribunals or Courts (herein after referred to as the Tribunal) under Article 212(1) of the Constitution, it must first, by way of a resolution followed by an Act of Parliament, oust the jurisdiction of all other courts to grant exclusive jurisdiction to the Provincial Tribunal, and only then can the remedy of appeal before this Court, as contained in Article 212(3) of the Constitution, be availed. The relevant law under consideration in the Gomal judgment was the Khyber Pakhtunkhwa Medical Teaching Institutions Reforms Act, 2015 (Act) which provided for a medical tribunal which heard appeals in service matters under the Act. The decision of the medical tribunal was challenged before this Court under Article 212(3) of the Constitution by way of a leave petition wherein the question of maintainability arose being whether a leave petition under Article 212(3) of the Constitution is maintainable. The Gomal judgment finds that where a Province establishes the Tribunal under Article 212(1) of the Constitution, then an appeal to the Supreme Court from a judgment, decree, order or sentence of the Tribunal shall lie to the Supreme Court, subject to the fulfilment of the requirements contained in the proviso to Article 212(2) of the Constitution. The said judgment explains that the proviso must be activated for the remedy under Article 212(3) of the Constitution to be made available because the Provincial Legislature, on its own, cannot affect or act upon the jurisdiction of this Court without intervening Federal legislation. The Gomal judgment refers to the proviso to Article 212(2) as the bridge between Sub-Articles (1) and (3) of Article 212 for the purposes of availing the constitutional remedy of an appeal before this Court. It further explains that if the

Provincial Assembly does not activate the proviso then the remedy of appeal before this Court is not available to such Provincial Tribunal.

4. Consequently, the question before us is whether these Leave to Appeal Petitions (Petitions) under Article 212(3) of the Constitution are maintainable given that these Petitions arise out of a judgment from a Provincial Tribunal, admittedly for which the requirements contained in the proviso to Article 212(2) have not been fulfilled.

5. The relevant Article of the Constitution (Article 212) provides that the appropriate legislature may by an Act establish the Tribunal having exclusive jurisdiction in respect of the subject-matters described in Sub-Articles (a), (b) and (c) of Article 212(1) of the Constitution. So, Article 212(1) allows the competent legislature, be it Federal or Provincial, as the case may be, to establish the Tribunal with exclusive jurisdiction for the given subject-matters. Article 212(1) starts with a non-obstante clause notwithstanding anything hereinbefore contained which addresses the constitutional authority with respect to legislative competence set out in Article 142 of the Constitution. It may be noted that Article 212(1) of the Constitution has an overriding effect on Article 142 of the Constitution which provides that it is subject to the Constitution. Therefore, the constitutional command is that while legislative competence is derived from Article 142 of the Constitution, the Constitution itself grants competence to the relevant legislature to establish the Tribunal on the given subject-matters under Article 212. Effectively, Article 212(1) of the Constitution gives competence to the Federal and Provincial Legislatures to establish the Tribunal on the given subject-matters such that the Tribunal has exclusive jurisdiction and Article 212(3) further provides that an appeal to the Supreme Court from the judgment, decree, order or sentence of the Tribunal shall lie to the Supreme Court. This appeal under Article 212(3) is not as of right but is subject to the satisfaction that a substantial question of law of public importance arises in the case.

6. Article 212(2), on the other hand, provides that notwithstanding anything hereinbefore contained, no other court can grant an injunction, or make any order, or entertain any proceeding in respect of any matter for which the Tribunal established under Article 212(1) has exclusive jurisdiction, and any pending matter before such other court shall abate. For the purposes of the Provincial Legislature, by way of a proviso, it states that the ouster of jurisdiction as explained in Article 212(2) of the Constitution shall not apply unless the Provincial Assembly, in the form of a resolution, requests for an Act of Parliament to extend the provisions of Article 212(2) to the Tribunal. Accordingly, Article 212(2) ousts the jurisdiction of all other courts for the purposes of the Tribunal under Article 212(1) established by Parliament and where the Provincial Assembly is concerned, it must by way of a resolution request for an Act of Parliament which will oust the jurisdiction of all other Provincial courts or tribunals. An example of this proviso being activated is the Provincial Service Tribunals (Extension of Provisions of the Constitution) Act, 1974 being a Federal law which extended the provisions of Article 212(2) of the Constitution to the Provincial Service Tribunals of Balochistan, Khyber Pakhtunkhwa, Punjab and Sindh resulting thereby in a direct leave to appeal petition before this Court under Article 212(3) of the Constitution.

7. Hence, the question is what is the effect of this ouster of jurisdiction under Article 212(2) and whether it is mandatory for the proviso contained therein to be activated in order for the leave to appeal to be filed before this Court. To my mind, Article 212(3) of the Constitution is the constitutional mandate which prescribes that leave to appeal before the Supreme Court for the Tribunal established under Article 212(1) of the Constitution can be filed directly, meaning thereby, the Constitution itself provides for the remedy of appeal before the Supreme Court. Both Sub-Articles (1) and (3) of Article 212 of the Constitution are exceptions to the legislative authority contained in Article 142 of the Constitution as the Constitution itself authorizes and permits the Federal and Provincial Legislature, irrespective of the authority given in Article 142 of the Constitution read with the Federal Legislative List (FLL), to establish the Tribunal and to allow its leave to appeal directly before this Court. Article 212(2) merely ousts the jurisdiction of other courts or fora. Resultantly, even though the Tribunal is established under Article 212(1), the ouster of jurisdiction of other courts is automatically triggered by Article 212(2) of the Constitution and with respect to federal courts but for the provincial courts it is necessary that the Provincial Assembly activate the proviso to Article 212(2) of the Constitution. In such case, the Tribunal will be an exclusive forum, which totally and completely ousts the jurisdiction of all other courts

or fora with respect to the special subject-matters contained in Sub-Articles (a), (b) and (c) of Article 212(1) of the Constitution. However, if the proviso is not activated, meaning there is no resolution by the Provincial Legislature (followed by an Act of Parliament) the ouster of jurisdiction will not be triggered. Consequently, a litigant will have the option to avail its remedy before any other forum including the remedy before the Supreme Court.

8. Gomal appears to read exclusivity and ouster as synonymous, because it relies on the principle that the Provincial Legislature cannot act upon the jurisdiction of this Court without intervening Federal legislation, hence, in order for the Tribunal to have exclusive jurisdiction, the proviso must be activated. This in turn means that if the proviso is activated, then the exclusivity of the Tribunal will mean ouster of the jurisdiction as well. However, to my understanding, exclusivity will not per se oust the jurisdiction of other courts without an express provision stating so as exclusivity of jurisdiction does not imply the ouster of jurisdiction.

9. For ouster of jurisdiction to take effect an express provision is required which is precisely what Article 212(2) of the Constitution does. In other words, the proviso does not act as a bridge between Sub-Articles (1) and (3) of Article 212, rather it allows and empowers the Provincial Legislature to decide whether, for the purposes of the establishment of the Provincial Tribunal, remedy should lie exclusively to the Supreme Court or, in the alternate, giving more options to the litigant.

10. As far as the discussion of the majority opinion in the instant matter on Entry 55 of the FLL[2], to my mind, and with great respect, is not relevant to the dispute at hand. The issue before us in this matter is simply whether the remedy of appeal as provided in Article 212(3) of the Constitution is available to the Petitioners. The answer to this question is in the affirmative as this remedy has been provided, specifically and categorically, by the Constitution itself, and not by way of any ordinary legislation. In my opinion, therefore, there is no issue pertaining to legislative competence under Entry 55 of the FLL. Consequently, the entire discussion as to Entry 55 of the FLL in the instant case, has no bearing or impact on the outcome of the issue of maintainability.

11. Furthermore, as to my understanding, even Gomal discusses Entry 55 of the FLL in its Paragraph No. 14 in a specific and limited context with reference to the Interim Constitution, 1972 (1972 Constitution) as an explanation to the point that competence to make law conferring additional jurisdiction on the Supreme Court lies only with Parliament, if at all, that too, to the extent and manner specified therein and further that the Provinces do not have legislative competence with regard to the jurisdiction of the Supreme Court. Thus with reference to this discussion, Gomal highlights that the 1972 Constitution did not have a provision equivalent to Article 212(3) of the existing Constitution and linked the legislative entry to Article 188 thereof. This provision of the 1972 Constitution has no equivalent in the present Constitution and it is for this reason that Gomal has expressed its reservations as to Entry 55 of the FLL by using the words if at all in parentheses, the import of which may have escaped the attention of the majority s opinion. While discussing the present Constitution in Paragraph No. 15, Gomal stresses on the fact that the Provinces have no legislative competence to enact legislation that affects or acts upon the jurisdiction of this Court, and hence, in this context, Gomal considers the proviso to Article 212(2) as a bridge between Article 212(1) and (3) of the Constitution, meaning thereby Article 212(3) cannot be regarded as an independent standalone provision as it needs the proviso to activate the exclusivity and ouster of jurisdiction. So the focus of Gomal in fact is the issue of legislative competence of the Provincial legislature with respect to the jurisdiction of this Court.

12. Accordingly, as Article 212(1) of the Constitution itself confers jurisdiction on the Provincial Legislature to establish the Provincial Tribunal under Article 212(1), the Constitution also confers appellate jurisdiction to the Supreme Court from a judgment, decree, order or sentence of the said Provincial Tribunal, the remedy of leave to appeal before the Supreme Court is available against the decision of the KPK Service Tribunal established under Article 212(1) since these Petitions are with reference to the appeal under section 5 of the SJST Act from an order of the said Service Tribunal.

13. Accordingly, these Petitions under Article 212(3) of the Constitution are maintainable.

MWA/A-2/SC Petitions dismissed.

1 Or Rule 9(1)(a) of the Khyber Pakhtunkhwa Senior Judicial Officers (Terms and Conditions of Service) Rules, 1979 (since repealed by Rule 14 of the Rules, 2001)

2 Dean/Chief Executive, *Gomal* Medical College, Medical Teaching Institution, D.I. Khan v. Muhammad Armaghan Khan, PLD 2023 SC 190.

3 Para 20 ibid

4 Constituted under the Act, 2023.

5 See para 20a, b, c and d of Gomal

6 As a matter of background Khyber Pakhtunkhwa Medical Teaching Institution Reforms Act, 2015 was enacted and in the year 2020 through an amendment in the said Act an Appellate Tribunal was established in terms of Article 212(1)(a) of the Constitution.

7 Para 15 of Gomal

8 Except the Advocate-General Sindh who took a novel argument that both the remedies under Article 199 and under Article 212(3) are available, however, he failed to substantiate his point.

9 Para 6 of Gomal

10 Article 142 also begins with the phrase: Subject to the Constitution

11 Award List dated 21 April 2001.

12 See para 4 of Kaleem Arshad Khan v. Secretary to Government of N. W.F.P, 2004 PLC (C.S.) 1558

1 Dean/Chief Executive, *Gomal* Medical College, Medical Teaching Institution, D.I. Khan v. Muhammad Armaghan Khan and others (PLD 2023 SC 190) (Gomal).

2 Entry 55 of the Part-I in Fourth Schedule:

55. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List and, to such extent as is expressly authorized by or under the Constitution, the enlargement of the jurisdiction of the Supreme Court, and the conferring thereon of supplemental powers.

**2024 S C M R 640**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, Athar Minallah and Irfan Saadat Khan, JJ**

**Civil Appeal No. 722 of 2012**

**(Against the judgment of Lahore High Court, Lahore, dated 14.5.2012, passed in Civil Revision No.691/2012)**

**and**

**Civil Appeal No. 2649 of 2016.**

**(Against the judgment of High Court of Sindh, Karachi, dated 07.10.2016, passed in HCA No.99/2015)**

**TAISEI CORPORATION and another---Appellants**

**Versus**

**A.M. CONSTRUCTION COMPANY (PVT.) LTD. and another---Respondents**

Civil Appeal No. 722 of 2012 and Civil Appeal No. 2649 of 2016, decided on 28th February, 2024.

**(a) Arbitration Act (X of 1940)---**

----Preamble---Arbitration, concept of---Minimal interference by courts in international commercial arbitration---Minimal interference and support for the arbitration by the courts as an alternate mode of dispute resolution, explained.

The idea of arbitration is that of binding resolution of disputes accepted with serenity by those who bear its consequences because of their special trust in chosen decision makers. It is difficult for courts to achieve this kind of acceptance; public justice tends to be distant and impersonal. Arbitration is a private initiative. The idea of Arbitration is freedom reconciled with law. The philosophical premise is that people are free to arrange their private affairs as they see fit, provided that they do not offend public policy or mandatory law. Arbitration thus embodies the principles of autonomy and voluntariness, respecting the parties' freedom to design a process that best suits their needs. It reflects a philosophical shift towards self-governance in dispute resolution, allowing parties to choose their arbitrators and the applicable law, thereby creating a more tailored and potentially equitable outcome. The role of courts in the context of arbitration has therefore evolved with a trend towards minimal interference.

Jan Paulsson, Idea of Arbitration, Oxford University Press (2013) ref.

More significant is the minimal interference in international commercial arbitration that stands as a cornerstone in the resolution of cross-border commercial disputes, offering a preferred alternative to litigation in national courts for businesses worldwide. One of the foundational aspects of international commercial arbitration is its emphasis on neutrality, expeditiousness, efficiency and the ability to provide solutions tailored to the needs of international business transactions. International commercial arbitration plays a crucial role in resolving disputes arising from cross-border trade and commerce, expeditiously and efficiently. The global view on international commercial arbitration is therefore overwhelmingly positive, with businesses and legal professionals alike recognizing its benefits over traditional litigation.

**(b) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the "New York Convention")---**

----Art. I---International commercial arbitration---Pro-enforcement bias of the New York Convention for enforcing foreign awards, explained.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 plays a pivotal role, underpinning the global enforcement regime for foreign awards that has made arbitration a linchpin in international commerce. The

Convention facilitates the recognition and enforcement of arbitration agreements and awards across its member States, significantly reducing the uncertainty and complexity associated with cross-border dispute resolution. The role of courts in the context of international commercial arbitration has thus evolved to support and complement the arbitration process. Courts are no longer seen as competitors to arbitration but as essential partners in ensuring the effectiveness and integrity of the process. Their duty is to support, not to supplant, the arbitral process.

This approach of minimal interference and support for the arbitral process is enshrined in the concept of "pro-enforcement bias", which refers to the inclination of legal frameworks, such as the New York Convention and national laws, to facilitate the enforcement of arbitral awards. This bias underscores the commitment to uphold the integrity of arbitration as a means of settling international disputes by limiting the grounds on which enforcement can be refused and placing the burden of proof on the party resisting enforcement. The courts' role is to interpret these provisions narrowly to promote certainty and predictability in international transactions. This bias is not about unjustly favoring one party over another but is aimed at promoting the effectiveness and efficiency of arbitration as a dispute resolution mechanism. The pro-enforcement bias underscores the commitment of the legal system, embodied in international conventions, like the New York Convention, to respect and uphold the parties' agreement to arbitrate and to ensure that the outcome of such arbitrations (the arbitral awards) are recognized and enforced with minimal interference. This bias is critical in providing parties with the confidence that their decisions to arbitrate disputes will be supported by courts around the world, thus enhancing the attractiveness of arbitration as a method of resolving international commercial disputes. This enforceability is crucial for the fluidity of international trade, providing businesses with the certainty and security needed to engage in cross-border transactions.

**(c) Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act (XVII of 2011)---**

----Ss. 2(b), 2(c) & 2(e) ---International commercial arbitration---Foreign arbitral award---Scope---Whether an award made in a Contracting State, in pursuance to an arbitration agreement governed by the law of Pakistan, is a foreign arbitral award for applicability of the Recognition and Enforcement of Arbitration Agreement and Foreign Award Act 2011?---Held, that as per the definitions provided in sections 2(b), 2(c) & 2(e) of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 (‘the 2011 Act’), an arbitral award made in a State which is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 or in such other State as may be notified by the Federal Government in the official Gazette, is a “foreign arbitral award” for applicability of the 2011 Act---Nothing more is required to make an award the “foreign arbitral award” for applicability of the provisions of the 2011 Act---Law governing the main contract between the parties, the law governing the arbitration agreement, and the law governing the arbitration proceedings are all irrelevant and extraneous in determining the status of an arbitral award under the 2011 Act---In defining a “foreign arbitral award” for applicability of the 2011 Act, the legislature has adopted a pure “territorial approach” and has made in this regard the “seat of arbitration” the sole criterion---Not only the governing laws but also the nationality of the parties to the award are irrelevant in determining the status of an arbitral award under the 2011 Act---In the present case the Award had been made in a Contracting State, i.e., Singapore---Nothing more was required to make it a foreign arbitral award, for applicability of the 2011 Act---In this regard, the facts that the main contract between the parties and the arbitration agreement were governed by the law of Pakistan, did not have any effect.

**(d) Interpretation of statutes---**

----Repealed law---Scope---Court cannot administer a repealed law, except to the extent specified by the legislature itself in the repealing law or some other general law providing the effect of the repeal of laws.

**(e) Interpretation of statutes---**

----Expression 'means' used in a statute to define any word, term or expression---When the legislature employs the verb “means” in defining any word, term or expression, the definition provided is restrictive and exhaustive, and nothing else can be added to the same---Such definition being itself the most authentic expression of the legislature’s intent as to the meaning of a particular word used in the law enacted by the legislature is binding on the courts and leaves no room for them to discover by way of interpretation some other intent of the legislature.

Commissioner of Income Tax v. Khurshid Ahmad PLD 2016 SC 545 ref.

**(f) Interpretation of statutes---**

----Prospective and retrospective effect of a law---Principles stated.

A new law that only deals with the procedure and does not in any way affect the substantive rights of the parties applies both prospectively to future proceedings as well as retrospectively to pending proceedings. However, a law that takes away or abridges the substantive rights of the parties only applies prospectively unless either by express enactment or by necessary intendment the legislature gives to it the retrospective effect. The notable point is that even a procedural law that affects, though indirectly, the substantive rights of the parties is to be applied only prospectively, in the absence of any contrary provision therein, such as the right to institute an action for the enforcement of a substantive right or the right to appeal arising from that action as an appeal is considered a continuation of the original action. Denial of the remedy, it is said, is destruction of the right. Without remedy, there is no right; it is the remedy that makes the right real. The proper approach, therefore, to the construction of a statute as to its prospective or retrospective applicability, in the absence of legislature’s express enactment or necessary intendment, is not to decide what label to apply to it, procedural or otherwise, but to see whether the statute if applied retrospectively to a particular type of case would impair existing rights and obligations. Such an examination, however, is needed only where the legislature has not, by express enactment or necessary intendment, provided for retrospective effect; as the legislature can by express enactment or necessary intendment also affect the existing rights and obligations. The legislature which is competent to make a law also has the power to legislate it retrospectively and can by legislative fiat take away even the vested rights.

State v. Jamil PLD 1965 SC 681; Alam v. State PLD 1967 SC 259; Adnan Afzal v. Sher Afzal PLD 1969 SC 187; Abdullah v. Imdad Ali 1972 SCMR 173; Commissioner of Income Tax v. Asbestos Cement Industries 1993 SCMR 1276; Gul Hasan & Co. v. Allied Bank 1996 SCMR 237; Tariq Badr v. National Bank 2013 SCMR 314; Controller General of Accounts v. Abdul Waheed 2023 SCMR 111; PTCL v. Collector of Customs 2023 SCMR 261; Yew Bon v. Kenderaan 1983 PSC 1200 (Privy Council); Commissioner of Income Tax v. Asbestos Cement Industries 1993 SCMR 1276; In re: Joseph Suche & Co. Limited (1875) 1 Ch. D. 48; Sutlej Cotton Mills v. Industrial Court PLD 1966 SC 472 (5-MB); Shohrat Bano v. Ismail Soomar 1968 SCMR 574; Federation of Pakistan v. Muhammad Siddiq PLD 1981 SC 249; The Colonial Sugar Refining Co. v. Irving 1905 AC 369; Iftikhar Ahmed v. State 2018 SCMR 1385; Hassan Nawaz v. Muhammad Ayub PLD 2017 SC 70; Mubeen-Us-Salam v. Federation of Pakistan PLD 2006 SC 602; F.A. Khan v. Government of Pakistan PLD 1964 SC 520; Shahmir Transport Company v. Board of Revenue PLD 1964 Lah 710; Garikapati v. Subbiah Choudhury PLD 1957 SC (Ind.) 448; National Bank v. SAF

Textile PLD 2014 SC 283; Shahida Zaheer v. President of Pakistan PLD 1996 SC 632; Yew Bon Tev v. Kenderaan Bas Mara 1983 PSC 1200 (Privy Council); Haider Automobile v. Federation of Pakistan 1969 SC 623; Molasses Trading v. Federation of Pakistan 1993 SCMR 1905 and Annoor Textile v. Federation of Pakistan PLD 1994 SC 568 ref.

**(g) Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act (XVII of 2011)---**

----Ss. 1(3) & 4---Arbitration Act (X of 1940), S. 34---International commercial arbitration---Scope of section 1(3) as to the retrospective effect of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 ('the 2011 Act') on arbitration agreements---As for subsection (3) of Section 1 of the 2011 Act, which states that the Act shall apply to arbitration agreements made before the date of commencement of the Act, it only applies for the purpose of Section 4 of the 2011 Act to stay the legal proceedings in respect of a matter which is covered by the arbitration agreement and to refer the parties to arbitration---Notable point, however, is that because of the retrospective effect given by Section 1(3) of the 2011 Act, all courts in Pakistan are to recognize and enforce arbitration agreements, wherein the parties have agreed to have the arbitration held in a Contracting State, within the scope of the provisions of Section 4 of the 2011 Act, not of Section 34 of the Arbitration Act, 1940 ('the 1940 Act'), despite that such agreements have been made before the commencement of the 2011 Act.

**(h) Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act (XVII of 2011)---**

----Ss. 1(4) & 10(2)---Arbitration (Protocol and Convention) Act (VI of 1937) [since repealed], S. 2---International commercial arbitration---Foreign arbitral award---Scope of Section 1(4) as to the retrospective effect of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 on foreign arbitral awards expounded.

Subsection (4) of Section 1 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 ('the 2011 Act') states that the Act shall not apply to foreign arbitral awards made before 14 July 2005 and thus by necessary intendment gives the Act retrospective effect on foreign arbitral awards that have been made on or after the said date.

As per subsection (2) of Section 10 of the 2011 Act, notwithstanding its repeal the Arbitration (Protocol and Convention) Act, 1937 ('the 1937 Act') is to continue to have effect in relation to foreign arbitral awards made before the date of commencement of this Act and within the meaning of section 2 of the 1937 Act, which are not foreign arbitral awards within the meaning of section 2 of the 2011 Act.To come within the compass of the saving provisions of Section 10(2) of the 2011 Act, a foreign arbitral award must therefore fulfill both the conditions mentioned in clauses (a) and (b), i.e., (a) it must have been made before the date of commencement of the 2011 Act, and (b) it must fall within the meaning of "foreign award" as defined in Section 2 of the 1937 Act.

In section 10(2)(b) of the 2011 Act the phrase "which are not foreign arbitral awards within the meaning of section 2 of this Act" is like a proviso to the saving provisions and has qualified them in their scope and applicability. This phrase has exempted from the purview of the saving provisions those foreign awards which though fulfill both the conditions mentioned in clauses (a) and (b) of section 10(2) but they are also foreign arbitral awards within the meaning of Section 2 of the 2011 Act. It means that an award which is a foreign arbitral award within the meaning of Section 2 of the 2011 Act shall not come within the scope of the saving provisions and shall therefore be dealt with in accordance with the provisions of the 2011 Act, not of the 1937 Act.

The object of the saving provisions of Section 10(2) of the 2011 Act, is to save certain foreign arbitral awards, after the repeal of the 1937 Act, from falling within the scope of the Arbitration Act, 1940.

**(i) Arbitration Act (X of 1940)---**

----Preamble---Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act (XVII of 2011), Preamble---International commercial arbitration---Foreign arbitral award---Non-applicability of the Arbitration Act, 1940 ('the 1940 Act')---Since, the 1940 Act relates, in pith and substance, to domestic arbitration, its status after the 18th amendment to the Constitution is that of a provincial law---The 1940 Act, a provincial law after the 18th amendment that came into force on 19 April 2010, cannot deal with international arbitration and any award made therein---So, in no way the remedies available to a party, before the 18th amendment, under the 1940 Act in relation to the Award made in an international arbitration would continue to be so after the 18th amendment, and more so, after the enactment of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 by the Federal Legislature.

Shahbaz Garments v. Government of Sindh 2021 SCMR 1088 ref.

**(j) Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act (XVII of 2011)---**

----S. 2(c)---Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the "New York Convention"), Arts. III & V---International commercial arbitration---Foreign arbitral award---Non-interference by domestic courts in Pakistan---Exceptions --The New York Convention implemented in Pakistan by the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 ('the 2011 Act'), contains no ground as to the invalidity of a foreign award or its being against the law of the Contracting States, to refuse its recognition and enforcement and thus leaves no room for the courts of a Contracting State to enter into the exercise of examining the merits of a foreign award on the points of facts or law---In accordance with its objective, the New York Convention grants the Courts of the Contracting States the discretion to refuse to recognize and enforce a foreign arbitral award only on the grounds listed in Article V of the Convention and places the burden to prove those grounds on the party opposing the recognition and enforcement of the award---Article V(1) provides five grounds whereby the recognition and enforcement of an award may be refused at the request of the party against whom it in invoked, and Article V(2) lists two further grounds on which the Court may refuse enforcement on its own motion---Ultimate burden of proof, however, remains on the party opposing recognition and enforcement---It is, therefore, only when the party against whom the award is invoked discharges this burden that a challenge may be sustained against the recognition and enforcement of an award---Language of Article V for refusing recognition and enforcement of foreign arbitral awards is permissive and not mandatory, and the exceptions stated therein are exhaustive and construed narrowly in view of the public policy favouring the enforcement of such foreign arbitral awards---Courts may nonetheless recognize and enforce the award even if some of the exceptions exist.

Gary B. Born, International Commercial Arbitration 3418-24 (2nd ed. 2014); Gary B. Born, International Commercial Arbitration 3413, 3418 and 3428 (2nd ed. 2014); Gary B. Born, International Commercial Arbitration 3413 (2nd ed. 2014); Redfern and Hunter on International Arbitration (6th ed. 2015); Albert Jan van den Berg's The New York Arbitration Convention of 1958 (1981); Russel on Arbitration, Sweet & Maxwell (24th ed. 2015) and Gary B. Born, International Commercial Arbitration 3410 (2nd ed. 2014) ref.

**(k) Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act (XVII of 2011)---**

----S. 2(c)---Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the "New York Convention"), Art. V---International commercial arbitration---Foreign arbitral award---Non-interference by domestic courts in Pakistan---Exceptions---Public policy---Objectives sought to be achieved by the New York Convention underscore the "pro-enforcement bias" informing the Convention, guiding the Courts towards a "narrow reading" of the grounds of defence listed in the Convention, particularly, the public policy ground---Ground of defence that the arbitrator's decision is erroneous in law or fact is, therefore, not provided in the Convention; it cannot be read into in any ground of defence provided in the Convention, particularly, the public policy ground, by a "liberal reading" instead of a "narrow reading" thereof---An expansive construction of the public policy ground "would vitiate the Convention's basic effort to remove preexisting obstacles to enforcement---Recognition and enforcement of a foreign arbitral award may be refused by the courts of Pakistan on the public policy ground only where it would violate the most basic notions of morality and justice prevailing in Pakistan---Public policy ground cannot be used to examine the merits of a foreign arbitral award or to create more grounds of defence that are not provided for in the Convention, such as misapplication of the law of Pakistan by the arbitrator in making the award or the arbitrator's decision being contrary to the law of Pakistan.

Parsons and Whittemore v. Societe Generale, 508 F.2d 969 (2d Cir.1974) and Orient v. SNGPL 2021 SCMR 1728 ref.

**(l) Interpretation of statutes---**

----Prospective and retrospective effect of a law---Principles---While interpreting a provision of law or construing its effect, a constitutional court only declares what the law is and does not make or amend it---Law so declared by the court, therefore, as a general principle applies both prospectively to future cases and as well as retrospectively to pending cases, including the one in which it is declared---It is only as an exception to this general principle that while considering the possibility of some grave injustice or inconvenience due to the retrospective effect, the courts sometimes provide for the prospective effect of their judgments from such date as they think just and proper in the peculiar facts and circumstances of the case---But this exception cannot be invoked in a case where its effect would be tantamount to negation of the legislature's intent.

Malik Asad Ali v. Federation of Pakistan PLD 1998 SC 161 and Muhammad Khan v. Haider PLD 2020 SC 233 ref.

Zahid F. Ebrahim, Advocate Supreme Court for Appellant (in C.A. No. 722 of 2012) and the Respondent (in C.A. No. 2649 of 2016).

Uzair Karamat Bhandari, Advocate Supreme Court, Tariq Aziz, Advocate-on-Record, Sheikh Muhammad Ali, Advocate Supreme Court assisted by Ali Uzair Bhandari, Advocate for Respondent (in C.A. No. 722 of 2012) the Appellant (in C.A. No. 2649 of 2016)

Ch. Aamir ur Rehman, Addl. A.G.P. for the Federation (On Court's call).

Assisted by Muhammad Hassan Ali and Umer A. Ranjha, Law Clerks.

Date of hearing: 22nd February 2024.

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**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.**

Preface

'The idea of arbitration', writes Jan Paulsson,[1] 'is that of binding resolution of disputes accepted with serenity by those who bear its consequences because of their special trust in chosen decision makers. It is difficult for courts to achieve this kind of acceptance; public justice tends to be distant and impersonal. Arbitration is a private initiative. The idea of Arbitration is freedom reconciled with law... [T]he philosophical premise is that people are free to arrange their private affairs as they see fit, provided that they do not offend public policy or mandatory law.' Arbitration thus embodies the principles of autonomy and

voluntariness, respecting the parties' freedom to design a process that best suits their needs. It reflects a philosophical shift towards self-governance in dispute resolution, allowing parties to choose their arbitrators and the applicable law, thereby creating a more tailored and potentially equitable outcome. The role of courts in the context of arbitration has therefore evolved with a trend towards minimal interference.

2. More significant is the minimal interference in international commercial arbitration that stands as a cornerstone in the resolution of cross-border commercial disputes, offering a preferred alternative to litigation in national courts for businesses worldwide. One of the foundational aspects of international commercial arbitration is its emphasis on neutrality, expeditiousness, efficiency and the ability to provide solutions tailored to the needs of international business transactions. International commercial arbitration plays a crucial role in resolving disputes arising from cross-border trade and commerce, expeditiously and efficiently. The global view on international commercial arbitration is therefore overwhelmingly positive, with businesses and legal professionals alike recognizing its benefits over traditional litigation.

3. In this regard, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 plays a pivotal role, underpinning the global enforcement regime for foreign awards that has made arbitration a linchpin in international commerce. The Convention facilitates the recognition and enforcement of arbitration agreements and awards across its member States, significantly reducing the uncertainty and complexity associated with cross-border dispute resolution. The role of courts in the context of international commercial arbitration has thus evolved to support and complement the arbitration process. Courts are no longer seen as competitors to arbitration but as essential partners in ensuring the effectiveness and integrity of the process. Their duty is to support, not to supplant, the arbitral process.

D

4. This approach of minimal interference and support for the arbitral process is enshrined in the concept of "pro-enforcement bias", which refers to the inclination of legal frameworks, such as the New York Convention and national laws, to facilitate the enforcement of arbitral awards. This bias underscores the commitment to uphold the integrity of arbitration as a means of settling international disputes by limiting the grounds on which enforcement can be refused and placing the burden of proof on the party resisting enforcement. The courts' role is to interpret these provisions narrowly to promote certainty and predictability in international transactions. This bias is not about unjustly favoring one party over another but is aimed at promoting the effectiveness and efficiency of arbitration as a dispute resolution mechanism. The pro-enforcement bias underscores the commitment of the legal system, embodied in international conventions, like the New York Convention, to respect and uphold the parties' agreement to arbitrate and to ensure that the outcome of such arbitrations (the arbitral awards) are recognized and enforced with minimal interference. This bias is critical in providing parties with the confidence that their decisions to arbitrate disputes will be supported by courts around the world, thus enhancing the attractiveness of arbitration as a method of resolving international commercial disputes. This

enforceability is crucial for the fluidity of international trade, providing businesses with the certainty and security needed to engage in cross-border transactions.

5. With this understanding of arbitration, particularly international arbitration in commercial disputes, and pro-enforcement bias in enforcing foreign awards, we approach the instant case which addresses the questions: (i) whether an award made in a Contracting State, in pursuance to an arbitration agreement governed by the law of Pakistan, is a foreign arbitral award for applicability of the Recognition and Enforcement of Arbitration Agreement and Foreign Award Act 2011; and (ii) whether the retrospective application of this Act extends to an award made in arbitral proceedings commenced before its enactment.

Facts

6. The facts of the case that have given rise to these questions are quite straightforward. The appellant ("Taisei"), a Japanese company, was awarded a contract by the National Highway Authority of Pakistan, on 4 October 2006, for carrying out certain works on the Karar-Wadh Section of the Highway (N-25) in the Province of Baluchistan, Pakistan ("Project"). On 19 May 2007, Taisei entered into a subcontract with the respondent ("AMC"), a Pakistani company, for doing some part of the Project. It was agreed in the subcontract that the governing law of the subcontract shall be the law in force at the time in Pakistan, and that any dispute arising between the parties would be settled through arbitration under the Rules of Conciliation and Arbitration of the International Chamber of Commerce ("ICC"), to be held at Singapore. In the course of performing their respective obligations under the subcontract, some disputes arose between the parties. On 17 December 2008, AMC referred the matter to ICC for arbitration as per the arbitration agreement incorporated in the subcontract, and after holding the arbitration proceedings in Singapore, the arbitrator delivered the award on 9 September 2011 ("Award").

Proceedings of the courts below in Civil Appeal No. 722 of 2012

7. In order to challenge the Award, AMC filed an application under Section 14 of the Arbitration Act 1940 ("1940 Act") in the Civil Court, Lahore, on 21 September 2011, praying for a direction to the arbitrator to file the Award and the record of the arbitration proceedings. Taisei appeared before the Civil Court, Lahore, and filed an application under Order VII, Rule 10 of the Code of Civil Procedure 1908 ("C.P.C."), to return the application of AMC made under the 1940 Act. In its application, Taisei pleaded that the Civil Court, Lahore lacked territorial as well as subject matter jurisdiction. Taisei's plea of lack of territorial jurisdiction was based on the assertion that neither it resided or carried on business in Lahore nor the cause of action had arisen at Lahore; whereas on the plea of lack of subject matter jurisdiction, Taisei maintained that the Award was a 'foreign award' regarding which the jurisdiction exclusively vested in the High Courts under the Recognition and Enforcement of Arbitration Agreement and Foreign Award Act 2011 ("2011 Act"). The Civil Court dismissed the application of Taisei by its order dated 28 January 2012, holding that the cause of action partly arose at Lahore and that the Award was not a foreign award. Taisei preferred a revision petition in the Lahore High Court, against the order of the Civil Court. The Lahore High Court upheld the order of the Civil Court and dismissed the revision petition of Taisei by its judgment dated 14 May 2012. Taisie then sought leave from this Court to appeal the judgment of the Lahore High Court, which was granted on 8 August 2012 to examine, inter alia, the question of whether the Award was a foreign award or a domestic award. This appeal, by leave of the Court, is Civil Appeal No. 722 of 2012.

Proceedings of the courts below in Civil Appeal No. 2649 of 2016

8. In addition to the filing of the application under Order VII, Rule 10, C.P.C., in the Civil Court, Lahore, Taisei filed a petition under Section 6 of the 2011 Act in the High Court of Sindh at Karachi, on 1 November 2011, for recognition and enforcement of the Award. For

the rejection of this petition of Taisei, AMC filed an application under Section 11 and Order VII, Rule 11, C.P.C. The ground pleaded by AMC for rejection of Taisei's petition was that the issues of jurisdiction and non-applicability of the 2011 Act had become res judicata by virtue of the order dated 28 January 2012 passed by the Civil Court, Lahore. A Single Bench of the Sindh High Court allowed AMC's application and dismissed Taisei's petition, by its order dated 13 February 2015. It held that not the Lahore Civil Court's order but the Lahore High Court's judgment passed in revision, whether right or wrong, operated inter partes as res judicata on the issue of the nature of the Award. Taisei preferred an intra-court appeal, which was allowed by a Division Bench of the Sindh High Court by its judgment dated 7 October 2016. The Division Bench remanded the matter to the Single Bench to proceed with Taisei's petition in accordance with the 2011 Act, by holding that since an appeal against the Lahore High Court's judgment was pending before the Supreme Court, that judgment did not operate as res judicata. This decision of the Division Bench has been challenged by AMC in Civil Appeal No. 2649 of 2016.

Competing contentions of the parties

9. Before us, Taisei contends that the Award is a foreign arbitral award and is therefore to be dealt with under the 2011 Act, not under the 1940 Act. AMC controverts this contention and maintains that the Award is not a foreign arbitral award as defined in the 2011 Act and that even if it falls within that definition, the 2011 Act does not apply retrospectively to the Award made under the arbitration agreement of May 2007 and in the arbitration proceedings commenced in December 2008. Alternatively, AMC submits that if the Award is held to be a foreign arbitral award and the 2011 Act applicable to it, such construction of the 2011 Act may be declared to operate prospectively, not applicable to the present case. The learned counsel for the parties, especially the learned counsel for AMC, have advanced extensive arguments and cited several cases to support these contentions, which we shall deal with in the course of our discussion on the questions formulated on the basis of these contentions and stated at the outset of this judgment.

(i) Whether the Award is a foreign arbitral award.

10. This is the primary question involved in the case. The Lahore High Court has answered it in the negative in the impugned judgment, mainly relying upon the judgment of this Court delivered in Hitachi[2]. The learned counsel for AMC has also relied, before us, upon this case. Therefore, before we go on to the relevant provisions of the 2011 Act, on the basis of which this question is to be answered, we find it appropriate to first discuss the relevancy of Hitachi to this question.

Relevancy of Hitachi

11. In Hitachi, this Court considered the question of the nationality of two awards with reference to the relevant provisions of the law that was then in force in Pakistan on the subject of enforcement of foreign awards, i.e., the Arbitration (Protocol and Convention) Act 1937 ("1937 Act"). Those provisions are cited here for ease of reference:

> 9. Saving.--Nothing in this Act shall-
>
> (a) ……..
>
> b) apply to any award made on an arbitration agreement governed by the law of Pakistan.

Section 9(b) of the 1937 Act, since repealed, had clearly stated that nothing in the said Act was to apply to any award made on an arbitration agreement governed by the law of Pakistan. In view of these provisions of Section 9(b) of the 1937 Act, this Court decided in Hitachi that "the two awards in question cannot be treated as foreign awards as the same are made on an arbitration agreement governed by the laws of Pakistan". That decision was thus not based on some principle of general application, enunciated by the Court in the exercise

of its judicial power, but on the specific provision of a statutory law then in force in Pakistan. The 1937 Act has been repealed and replaced by the 2011 Act. There is no provision in the 2011 Act similar to the provisions of Section 9(b) of the 1937 Act. With the change of law, the statement made by this Court in Hitachi, that an award made on an arbitration agreement governed by the law of Pakistan is not a foreign award, has lost its efficacy. The Lahore High Court has failed to appreciate this point and wrongly relied upon Hitachi in the impugned judgment. For the same reason, the reliance of the learned counsel for AMC upon this case is also misplaced.

Definition of "foreign arbitral award" in the 2011 Act

12. For the purpose of determining its applicability to an award, Section 2(e) of the 2011 Act has defined the term "foreign arbitral award" and has not left the definition thereof to judicial articulation. Section 2(e) of the 2011 Act provides:

"foreign arbitral award" means a foreign arbitral award made in a Contracting State and such other State as may be notified by the Federal Government, in the official Gazette.

Section 2(b) of the 2011 Act defines a "Contracting State" thus:

"Contracting State" means a State which is a Party to the Convention;

The term "Convention" is defined in Section 2(c) of the 2011 Act:

"Convention" means the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10th June, 1958, set forth in the Schedule to this Act;

A combined reading of the above three definitions leaves little room to speculate or argue as to what the term "foreign arbitral award" means for determining the applicability of the 2011 Act to an award. As per these definitions, an arbitral award made in a State which is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 or in such other State as may be notified by the Federal Government in the official Gazette, is a "foreign arbitral award" for applicability of the 2011 Act. Nothing more is required to make an award the "foreign arbitral award" for applicability of the provisions of the 2011 Act. The law governing the main contract between the parties, the law governing the arbitration agreement, and the law governing the arbitration proceedings are all irrelevant and extraneous in determining the status of an arbitral award under the 2011 Act. In defining a "foreign arbitral award" for applicability of the 2011 Act, the legislature has adopted a pure "territorial approach" and has made in this regard the "seat of arbitration" the sole criterion. Not only the governing laws but also the nationality of the parties to the award are irrelevant in determining the status of an arbitral award under the 2011 Act.

Effect of word "foreign" in definition clause and option of reciprocity in the Convention

13. The learned counsel for AMC stressed much on the word "foreign" used with the words "arbitral award" in the definition of the term "foreign arbitral award" as provided in Section 2(e) of the 2011 Act and some of the Ordinances that preceded it as well as on the absence of this word in some of those Ordinances, to argue that its addition or omission makes a significant impact on the scope of the definition. Elaborating his argument, he submitted that where the word "foreign" is used as it has been in the 2011 Act, it means that the status of the award is to be first determined as being a foreign award under the 1937 Act; if the award is a foreign award within the scope of the 1937 Act and is also made in a Contracting State, only then does it fall within the definition of a "foreign arbitral award" provided in Section 2(e) of the 2011 Act.

14. With respect, we find no logic in the argument of the learned counsel for AMC. He, in fact, wants us to determine the status of an arbitral award simultaneously both under the 1937 Act and the 2011 Act. If an arbitral award passes the test of being a foreign arbitral award under both these Acts, only then as per his argument it can be treated as a foreign arbitral award for applicability of the 2011 Act. In making this argument, the learned counsel failed to note that the 1937 Act has been repealed by the 2011 Act; it is no longer the law of the land.[3] A court cannot administer a repealed law, except to the extent specified by the legislature itself in the repealing law or some other general law providing the effect of the repeal of laws.

15. The addition or omission of the word "foreign" with "arbitral award" in the definition of the term "foreign arbitral award" given in Section 2(e) of the 2011 Act does not make any difference in the scope of the definition. As an award made in a foreign country is generally called a foreign award, this word has been used only for emphasis and clarity that not all foreign awards but only those foreign awards that are made in a Contracting State or such other State as may be notified by the Federal Government in the official Gazette, shall be dealt with as "foreign arbitral awards" under the 2011 Act. In this regard, it may be underlined that the definition of the "foreign arbitral award" given in the 2011 Act is actually the manifestation of the adoption of the option of the reciprocity-principle provided for in clause 3 of Article I of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("Convention" and "New York Convention").[4] Though clause 1 of Article I of the Convention generally makes the Convention applicable to arbitral awards made in the territory or a State other than the State where the recognition and enforcement of such awards are sought, clause 3 of the same Article gives an option of adopting the reciprocity-principle by providing that when signing, ratifying or acceding to the Convention, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.

The definition in Section 2(e) of the 2011 Act is restrictive and exhaustive

16. We all know that when the legislature employs the verb "means" in defining any word, term or expression, the definition provided is restrictive and exhaustive, and nothing else can be added to the same. Such definition being itself the most authentic expression of the legislature's intent as to the meaning of a particular word used in the law enacted by the legislature is binding on the courts and leaves no room for them to discover by way of interpretation some other intent of the legislature.[5] We cannot, therefore, read anything further into the definition of "foreign arbitral award" given by the legislature in Section 2(e) of the 2011 Act.

The Award is a foreign arbitral award

17. Thus, when we apply the definition of a "foreign arbitral award" as it is in Section 2(e) of the 2011 Act, without reading anything else into it, we find the Award to be a foreign arbitral award for the applicability of the 2011 Act. It has been made in a Contacting State, i.e., Singapore. Nothing more is required to make it a foreign arbitral award, for applicability of the 2011 Act. In this regard, the facts that the main contract between the

parties and the arbitration agreement were governed by the law of Pakistan, do not have any effect.

18. The matter, however, does not end with this answer to question (i). The learned counsel for AMC made extensive arguments to establish that the 2011 Act does not apply retrospectively to the Award, which need to be addressed also.

(ii) Whether the 2011 Act applies retrospectively to the Award made in arbitration proceedings commenced before its enforcement.

19. Regarding the retrospective applicability of the 2011 Act, subsections (3) and (4) of Section 1 thereof contain the following provisions:

(3) It shall apply to arbitration agreements made before, on or after the date of commencement of this Act.

(4) It shall not apply to foreign arbitral awards made before the 14th day of July, 2005.

A bare reading of these provisions shows that the 2011 Act has prescribed no cut-off date for its retrospective applicability to arbitration agreements and has brought into the scope of its applicability all arbitration agreements made at any time before the date of its commencement. However, it has restricted its retrospective applicability to only those foreign arbitral awards that have been made on or after 14 July 2005, not before that date. This date of 14 July 2005 is actually the date when the first Ordinance[6] for recognition and enforcement of foreign arbitral awards was promulgated in Pakistan, to implement the Convention through domestic legislation. After that, eight more Ordinances[7] were promulgated before the enactment of the 2011 Act, and in all those Ordinances as well as in the 2011 Act, the date for retrospective applicability of the new law to foreign arbitral awards was kept the same, i.e., 14 July 2005.

Principles for construing a law as to its prospective and retrospective effect

20. The well-settled principle in our jurisdiction is that a new law that only deals with the procedure and does not in any way affect the substantive rights of the parties applies both prospectively to future proceedings as well as retrospectively to pending proceedings. However, a law that takes away or abridges the substantive rights of the parties only applies prospectively unless either by express enactment or by necessary intendment the legislature gives to it the retrospective effect.[8] The notable point is that even a procedural law that affects, though indirectly, the substantive rights of the parties is to be applied only prospectively, in the absence of any contrary provision therein, such as the right to institute an action for the enforcement of a substantive right[9] or the right to appeal arising from that action[10] as an appeal is considered a continuation of the original action.[11] Denial of the remedy, it is said, is destruction of the right.[12] Without remedy, there is no right; it is the remedy that makes the right real.[13] The proper approach, therefore, to the construction of a statute as to its prospective or retrospective applicability, in the absence of legislature's express enactment or necessary intendment, 'is not to decide what label to apply to it, procedural or otherwise, but to see whether the statute if applied retrospectively to a particular type of case would impair existing rights and obligations.'[14] Such an examination, however, is needed only where the legislature has not, by express enactment or necessary intendment, provided for retrospective effect; as the legislature can by express enactment or necessary intendment also affect the existing rights and obligations. The legislature which is competent to make a law also has the power to legislate it retrospectively and can by legislative fiat take away even the vested rights.[15] Our Constitution only bars retrospective legislation on criminal liabilities,[16] not on civil rights and obligations.

21. These are the principles in the light of which we are to examine the provisions of subsections (3) and (4) of Section 1 of the 2011 Act and address the arguments of the learned counsel for AMC against the retrospective effect of the 2011 Act.

Scope of Section 1(3) as to the retrospective effect of the 2011 Act on arbitration agreements

22. As for subsection (3) of Section 1 of the 2011 Act, which states that the Act shall apply to arbitration agreements made before the date of commencement of the Act, the learned counsel for AMC argued that it only applies for the purpose of Section 4[17] of the 2011 Act to stay the legal proceedings in respect of a matter which is covered by the arbitration agreement and to refer the parties to arbitration. We find the argument convincing as there is no mention of the expression "arbitration agreement" in any other part of the 2011 Act. Likewise, Article II of the Convention also mentions the same purpose of recognition and enforcement of the arbitration agreements. Section 1(3) of the 2011 Act has implemented clause 3 of Article II of the Convention, which states that the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this Article shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. The notable point, however, is that because of the retrospective effect given by Section 1(3) of the 2011 Act, all courts in Pakistan are to recognize and enforce arbitration agreements, wherein the parties have agreed to have the arbitration held in a Contracting State, within the scope of the provisions of Section 4 of the 2011 Act, not of Section 34 of the 1940 Act, despite that such agreements have been made before the commencement of the 2011 Act.

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Scope of Section 1(4) as to the retrospective effect of the 2011 Act on foreign arbitral awards

23. Subsection (4) of Section 1 of the 2011 Act states that the Act shall not apply to foreign arbitral awards made before 14 July 2005 and thus by necessary intendment gives the Act retrospective effect on foreign arbitral awards that have been made on or after the said date. As to this provision, the learned counsel for AMC argued that it is to be read in the light of Section 10 of the Act, and when so read the Award does not, as per his stance, fall within the scope of the retrospective effect given by Section 1(4) of the Act but rather is saved from that effect. The provisions of Section 10 of the 2011 Act referred to by the learned counsel are cited here for ready reference and better appreciation of his argument:

10. Repeal and saving. (1) The Arbitration (Protocol and Convention) Act, 1937 (VI of 1937) (hereinafter in this section referred to as "the Act") is hereby repealed.

(2) Notwithstanding the repeal of the Act, it shall continue to have effect in relation to foreign arbitral awards made--

(a) before the date of commencement of this Act; and

(b) within the meaning of section 2 of the Act which are not foreign arbitral awards within the meaning of section 2 of this Act.

(Emphasis added)

A plain reading of Section 10 shows that its subsection (1) simply repeals the 1937 Act, while its subsection (2) contains the saving provisions. So it is only subsection (2) that requires some elaboration to appreciate the sustainability of the argument of the learned counsel for AMC.

24. As per subsection (2) of Section 10 of the 2011 Act, notwithstanding its repeal the 1937 Act is to continue to have effect in relation to foreign arbitral awards made before the date of commencement of this Act and within the meaning of section 2 of the 1937 Act, which are not foreign arbitral awards within the meaning of section 2 of the 2011 Act. We have added emphasis in the above cited provisions of Section 10(2) on the word "and" and the phrase "which are not foreign arbitral awards within the meaning of section 2 of this Act" to signify their importance in determining the true meaning and scope of the provisions of Section 10(2) of the 2011 Act. The word "and", coordinating conjunction, has been used therein in its usual meaning conjunctively, not disjunctively, to connect the two clauses (a) and (b). To come within the compass of the saving provisions of Section 10(2), a foreign arbitral award must therefore fulfill both the conditions mentioned in clauses (a) and (b), i.e., (a) it must have been made before the date of commencement of the 2011 Act, and (b) it must fall within the meaning of "foreign award" as defined in Section 2 of the 1937 Act.

25. The phrase "which are not foreign arbitral awards within the meaning of section 2 of this Act" is like a proviso to the saving provisions and has qualified them in their scope and applicability. This phrase has exempted from the purview of the saving provisions those foreign awards which though fulfill both the conditions mentioned in clauses (a) and (b) but they are also foreign arbitral awards within the meaning of Section 2 of the 2011 Act. It means that an award which is a foreign arbitral award within the meaning of Section 2 of the 2011 Act shall not come within the scope of the saving provisions and shall therefore be dealt with in accordance with the provisions of the 2011 Act, not of the 1937 Act.

26. The object of the saving provisions of Section 10(2) of the 2011 Act, in our opinion, is to save certain foreign arbitral awards, after the repeal of the 1937 Act, from falling within the scope of the 1940 Act. The Award involved in the present case, as afore-held, is a foreign arbitral award within the meaning of Section 2 of the 2011 Act; therefore, the provisions of Section 10(2) of the 2011 Act do not apply to it. Even otherwise, the learned counsel for AMC argued that since the governing law of the arbitration agreement between the parties was Pakistani law, the Award was not a foreign award within the scope of the

1937 Act. Also for this reason, the saving provisions of Section 10(2) of the 2011 Act have nothing to do with the Award involved in the present case.

Effect of the 2011 Act on remedy under Sections 30 and 33 of the 1940 Act

27. The learned counsel for AMC argued that when the arbitration proceedings commenced in the present case neither the 2011 Act nor any of its predecessor Ordinances was in force, AMC has therefore acquired a vested right to challenge the validity of the Award under Sections 30 and 33 of the 1940 Act, which right is akin to the substantive right of appeal. In support of his argument, he relied upon Rupali[18]. He further argued that since the arbitration proceedings were commenced
in the present case before the coming into force of the 2011 Act,
the Award is to be dealt with for its enforcement as well as for its challenge under the 1940 Act. He, in this regard, placed reliance upon Thyssen[19].

28. We have no cavil to the general statement made by the Lahore High Court in Rupali that the right to challenge the validity of an award under the 1940 Act is akin to the right of appeal as well as to the statement made by the Indian Supreme Court in Thyssen that the right to have an award enforced or to challenge the same accrues on the commencement of the arbitration proceedings. However, the ultimate decisions made in those cases cannot be cited as a relevant precedent to have the same result in the present case. Those cases were decided on the basis of particular provisions applicable to peculiar facts of those cases. In the present case, both the applicable provisions and the facts involved are different. Rupali is the same case of Hitachi decided by this Court in appeal against the judgment of the Lahore High Court. We have already explained that it has no relevance to the present case as it was decided as per the provisions of Section 9(b) of the 1937 Act, a law that was then in force in Pakistan. Similarly, Thyssen was decided by the Indian Supreme Court in view of the provisions of Section 85(2)(a) of the Indian Arbitration and Conciliation Act 1996 which provides inter alia that notwithstanding the repeal of the 1940 Act the provisions thereof shall apply in relation to arbitral proceedings which commenced before the 1996 Act came into force unless otherwise agreed by the parties. There is no provision in the 2011 Act similar to that of Section 85(2)(a) of the Indian Arbitration and Conciliation Act 1996. Both the cases referred to by the learned counsel, therefore, do not help AMC's stance.

29. AMC's right to challenge the validity of the Award under Sections 30 and 33 of the 1940 Act accrued with the commencement of the arbitration proceedings has been taken away by the legislature in the exercise of its legislative power by giving effect to the 2011 Act on all foreign arbitral awards irrespective of the fact, whether they have been made in arbitration proceedings commenced either before or after the 2011 Act came into force. What the legislature intended to save from the operation of the 2011 Act, it provided in Section 10(2) of the 2011 Act. The Award involved in the present case, we have found above, does not come within the purview of Section 10(2) of the 2011 Act.

Effect of the change of legislative power on the subject of arbitration by the 18th Amendment to the Constitution

30. The learned counsel for AMS also argued that the 1940 Act has not been repealed by the 2011 Act, nor could it have been repealed by the Federal Legislature after the 18th amendment in the Constitution as after that amendment the subject of arbitration has fallen in the domain of the Provincial Legislatures. Since the 1940 Act has not been repealed, the remedies available to AMC under that Act, he submitted, would continue to be so even after the enactment of the 2011 Act by the Federal Legislature.

31. At first blush, the argument appears attractive but it does not survive closer scrutiny. No doubt, after the 18th amendment, the subject of "arbitration" other than "international arbitration" has fallen into the domain of the Provincial Legislatures. The question is

whether the arbitration made in a foreign country, of a dispute that is governed by the domestic law, as it is in the present case, comes within the compass of "international arbitration". In this regard, the most authentic and reliable definition of "international arbitration", in our opinion, is that which is given in the UNCITRAL Model Law on International Commercial Arbitration; as this Model law is approved by the United Nations General Assembly and has so far been adopted by 121 jurisdictions of 88 States,[20] and thus reflects a worldwide consensus on that definition. Article 1(3) of the Model law has defined the international arbitration, thus:

(3) An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

(Emphasis added)

A perusal of the above definition shows that it is mainly the place outside the State in relation to certain matters that makes the arbitration an international arbitration. The law that governs the contract between the parties, their arbitration agreement or the arbitration proceedings, does not have any bearing in determining the status of an arbitration as the international arbitration. Though the Federal Legislature of Pakistan, i.e., Parliament, could have covered in the 2011 Act the awards made in all types of international arbitration as provided in the UNCITRAL Model Law, it chose to exercise its legislative power only in respect of the awards made in one of the several types of international arbitration, i.e., an arbitration made outside the State.

32. Since, the 1940 Act relates, in pith and substance, to domestic arbitration, its status after the 18th amendment is that of a provincial law.[21] The argument of the learned counsel brings forth a canvas converse to that portrayed by him. It is: Can a provincial law deal with a matter that falls within the scope of the subject of "international arbitration" allocated exclusively to the Federal Legislature[22] after the 18th amendment? Certainly not. The 1940 Act, a provincial law after the 18th amendment that came into force on 19 April 2010, cannot deal with international arbitration and any award made therein. So, in no way the remedies available to AMC, before the 18th amendment, under the 1940 Act in relation to the Award made in an international arbitration would continue to be so after the 18th amendment, and more so, after the enactment of the 2011 Act by the Federal Legislature.

No remedy in the 2011 Act against the misapplication of the law of Pakistan in making an award

33. The main thrust of the arguments of the learned counsel for AMC, as we understand, was on the point that by availing remedy under Sections 30 and 33 of the 1940 Act, AMC can challenge the validity of the Award on the ground of it being the result of the misapplication of the law of Pakistan, the governing law of the contract; but under the 2011

Act, AMC may not do so. Therefore, according to him, it would be unjust and inconvenient for AMC if it is deprived of that remedy, and would put AMC into a situation that was not visualized by AMC when it entered into the arbitration agreement with Taisei on 19 May 2007.

34. We think that what the learned counsel for AMC has presented as an unjust and inconvenient situation is perhaps one of those very situations to change them the Convention came into being and the 2011 Act was enacted. Through an arbitration agreement, the parties undertake to submit to arbitration their disputes, present or future, for resolution. By doing so, they make a choice to have their disputes resolved through a medium that is alternate to the traditional mode of dispute resolution through litigation in courts. Over the years, the courts however expanded the scope of their jurisdiction to examine the validity of an award, under the 1940 Act, to such an extent that arbitration which was an alternate mode of dispute resolution became an additional process before the regular litigation in courts, and thus almost lost its efficacy. Without appreciating the objective of the parties in adopting the alternate mode of arbitration, the courts started examining the merits of the decision made by the arbitrators, as a first appellate court, treating it just a decision of a trial court open to full scrutiny in first appeal on all points of facts and law. Similarly, in the 1937 Act there was a scope for the courts to enter into the merits of the award; for it provided that the enforcement of a foreign award would be refused if its enforcement was contrary to the law of Pakistan, in addition to the ground of its being contrary to the public policy.[23] The New York Convention implemented in Pakistan by the 2011 Act, contains no ground as to the invalidity of a foreign award or its being against the law of the Contracting States, to refuse its recognition and enforcement and thus leaves no room for the courts of a Contracting State to enter into the exercise of examining the merits of a foreign award on the points of facts or law.

Pro-enforcement bias of the New York Convention

35. In the context of recognition and enforcement of foreign arbitral awards, there has been a global shift from a standard enforcement of awards towards a more "pro-enforcement" approach.[24] The New York Convention, implemented in Pakistan by the 2011 Act, replaced the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 ("Geneva Convention") incorporated in Pakistan under the 1937 Act, and sought to overcome the hurdles that an award-creditor had to meet under the previous regime for the recognition and enforcement of a foreign arbitral award. Its main objective is to facilitate the recognition and enforcement of foreign arbitral awards to the greatest extent possible and to set out a maximum level of control that the Contracting States may exert over such awards.[25] This shift and the underlying objective become evident in the comparison of the New York Convention with the preceding Geneva Convention.

36. The change in the structure adopted in the New York Convention reflects that the world consensus was towards further liberalizing the recognition and enforcement of foreign arbitral awards in their respective States. Firstly, the Geneva Convention, though a pivotal step for the standardization of enforcement procedures with regards to foreign arbitral awards, had placed the burden on the party relying on the arbitral award to prove five cumulative conditions in order to obtain recognition and enforcement, as required under Article 1 of the Geneva Convention. Conversely, in accordance with its objective, the New York Convention grants the Courts of the Contracting States the discretion to refuse to

recognize and enforce a foreign arbitral award only on the grounds listed in Article V of the Convention and places the burden to prove those grounds on the party opposing the recognition and enforcement of the award. Article V(1) provides five grounds whereby the recognition and enforcement of an award may be refused at the request of the party against whom it in invoked, and Article V(2) lists two further grounds on which the Court may refuse enforcement on its own motion. The ultimate burden of proof, however, remains on the party opposing recognition and enforcement. It is, therefore, only when the party against whom the award is invoked discharges this burden that a challenge may be sustained against the recognition and enforcement of an award.[26]

37. Further, Article 2 of the Geneva Convention had provided that even if the conditions laid down in Article 1 are fulfilled, the recognition and enforcement of the award "shall" be refused if the Court is satisfied that any of the grounds provided under this provision, including if the award has been annulled in the country in which it was made[27], are fulfilled. Whereas, the New York Convention imposes no such positive obligation to deny the recognition or enforcement of international arbitral awards. Instead, Articles V(1) and (2) provide exceptions to an affirmative obligation of recognizing and enforcing a foreign arbitral award indicating that this "may" be refused provided the grounds enumerated therein are proved, therefore, not being affirmative obligations in their own right. This interpretation is also premised in the cumulative reading of Article III of the Convention, which provides that each Contracting State "shall" recognize arbitral awards as binding and enforce awards in accordance with the Convention, and Article V, which provides that recognition and enforcement of awards may be refused "only" if one of the specified exceptions apply.[28] Therefore, the language of Article V for refusing recognition and enforcement of foreign arbitral awards is permissive and not mandatory[29], and the exceptions stated therein are exhaustive and construed narrowly in view of the public policy favouring the enforcement of such foreign arbitral awards.[30] The Courts may nonetheless recognize and enforce the award even if some of the exceptions exist.[31]

38. Another notable difference is with regards to the grounds available to refuse the recognition and enforcement of foreign arbitral awards in the New York Convention and the Geneva Convention. In addition to the cumulative requirements under Article 1 and the grounds available to refuse recognition and enforcement under Article 2, Article 3 of the Geneva Convention went further and provided that if the party against whom the award has been made, proves that under the law governing the arbitration procedure there is a ground, other than the grounds in Articles 1 and 2, entitling him to contest the validity of the award in the Court, the Court may, if it thinks fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof, giving the party reasonable time within which to have the award annulled by the competent tribunal. The New York Convention, however, restricts the grounds for refusing recognition and enforcement to only those specifically mentioned in Article V.[32] These grounds set out a "maximum level of control" that the Contracting States may exert over foreign arbitral awards.[33]

39. The intent to restrict grounds for the refusal of recognition and enforcement of foreign arbitral awards can also be gauged from the omissions made in the New York Convention. Article 1(e) of the Geneva Convention required that it had to be positively demonstrated that recognition and enforcement of the award was not contrary to public policy or the "principles of law" of the country in which it is sought to be relied upon. The New York

Convention omits any reference to an award being contrary to "principles of law", a notable omission highlighting the pro-enforcement bias of the New York Convention.[34] Another pro-enforcement change in the New York Convention was the elimination of the requirement of "double exequatur". To obtain recognition and enforcement, the Geneva Convention required proof that the award had become final in the country in which it was made.[35] This essentially required two decisions leading up to the enforcement of the award; one for confirmation of the award in the country where the award was issued (the first "exequatur"), and one at the place of enforcement recognizing the award (the second "exequatur"). If either Court denied exequatur, the award could not be recognized and enforced.[36] This was done away in the New York Convention as a means to restrict the grounds for refusal of recognition and enforcement as much as possible and to place the burden of proving such grounds on the party opposing such recognition and enforcement of the award.[37] No such requirement was included in Article V of the New York Convention, and a reference to "final" award, contained in the Geneva Convention[38], was replaced with a requirement for a "binding" award in Article V(1) (e) of the New York Convention.[39]

40. Additionally and importantly, the New York Convention provides that a Contracting State may, by its domestic law, reduce the grounds for refusal to recognize and enforce a foreign arbitral award and make the provisions more favourable for a party relying upon such award, but cannot add further grounds. As is apparent from Article III of the New York Convention, any Contracting State imposing more onerous conditions on the recognition and enforcement of foreign arbitral awards will be in breach of its obligations under the New York Convention. On the other hand, Article VII(1) of the New York Convention declares inter alia that the provisions of the Convention shall not deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law of the country where such award is sought to be relied upon. This Article, thus, refers to a "more-favourable-right" provision in the domestic law of the Contracting State, where a foreign arbitral award is sought to be relied upon, and confirms the objective of the Convention to establish a "ceiling" or "maximum level of control" for the enforcement of foreign arbitral awards, leaving each Contracting State free to act less restrictively by applying more liberal rules than what those stipulated in the New York Convention.[40] Catering to the progressive liberalization of the law of international arbitration, the New York Convention foresaw the application of more than one regime in a Contracting State, and sought to ensure that the more favourable to recognition and enforcement is to be applied, essentially leading to the application of the principle of maximum effectiveness.[41]

41. These objectives sought to be achieved by the New York Convention underscore the "pro-enforcement bias" informing the Convention, guiding the Courts towards a "narrow reading" of the grounds of defence listed in the Convention, particularly, the public policy ground.[42] The ground of defence that the arbitrator's decision is erroneous in law or fact is, therefore, not provided in the Convention; it cannot be read into in any ground of defence provided in the Convention, particularly, the public policy ground, by a "liberal reading" instead of a "narrow reading" thereof. An expansive construction of the public policy ground "would vitiate the Convention's basic effort to remove preexisting obstacles to enforcement".[43] The recognition and enforcement of a foreign arbitral award may be refused by the courts of Pakistan on the public policy ground only where it would violate the "most basic notions of morality and justice"[44] prevailing in Pakistan. The public policy ground cannot be used to examine the merits of a foreign arbitral award or to create more grounds

of defence that are not provided for in the Convention,[45] such as misapplication of the law of Pakistan by the arbitrator in making the award or the arbitrator's decision being contrary to the law of Pakistan.

The 2011 Act applies retrospectively to the Award made in arbitration proceedings commenced before its enforcement.

42. Thus, we find that all the relevant arguments of learned counsel for AMC against the retrospective effect of the 2011 Act on the Award are not legally sustainable. The 2011 Act applies retrospectively to the Award made in arbitration proceedings commenced before its enforcement and has taken away the right accrued in favour of AMC, as well as of Taisei if it had been aggrieved of the Award, with the commencement of the arbitration proceedings on 17 December 2008, to challenge the validity of the Award under the then applicable law, i.e, Sections 30 and 33 of the 1940 Act.

Prospective or retrospective applicability of the construction of the 2011 Act

43. So far as the alternative prayer for declaring the construction of the 2011 Act against the AMC's stance to be not applicable to the present case is concerned, the learned counsel for AMC in his arguments relied upon Bharat Aluminium,[46] a case from a neighbouring jurisdiction.

44. We all know that while interpreting a provision of law or construing its effect, a constitutional court only declares what the law is and does not make or amend it. The law so declared by the court, therefore, as a general principle applies both prospectively to future cases and as well as retrospectively to pending cases, including the one in which it is declared. It is only as an exception to this general principle that while considering the possibility of some grave injustice or inconvenience due to the retrospective effect, the courts sometimes provide for the prospective effect of their judgments from such date as they think just and proper in the peculiar facts and circumstances of the case.[47] But this exception cannot be invoked in a case where its effect would be tantamount to negation of the legislature's intent. As afore-held, the legislature has applied the 2011 Act retrospective to all arbitration agreements made at any time before the commencement of the 2011 Act and to all foreign arbitral awards made on or after 14 May 2005. The legislature consisting of the chosen representatives of the people of Pakistan did not consider it fit to do what AMC wants us to do. We are, in no way, better positioned than the representatives of the people to judge what is or what is not unjust and inconvenient for the people. Where the intent of the legislature is clear in its enactment, the courts cannot second judge the wisdom of the legislature and refuse to give effect thereto by declaring it unjust or inconvenient.[48] The case relied upon by the learned counsel also has the distinguished facts and circumstances as in that case, the Indian Supreme Court held that its earlier two judgments had not declared the correct law and that the law earlier declared by it was being followed by it as well as by all the High Courts in the country on numerous occasions. The present case does not involve any such situation, as no earlier law declared by this Court has been said to be wrong. In fact, there is no other judgment of this Court that has earlier interpreted the provisions of the 2011 Act examined in the present case.

45. As afore-said, we have found that the Award is a "foreign arbitral award" within the meaning and scope of this expression as defined in the 2011 Act, notwithstanding what law governed the main contract between the parties and their arbitration agreement, and the Act applies to all foreign arbitral awards, including the Award, made on or after 14 May 2005, notwithstanding what law governs the arbitration agreement when the arbitration proceedings commenced in which they are made. In view thereof, the order of the Civil Court, Lahore, made on Taisei's objection as to lack of subject matter jurisdiction is held to be erroneous. As the present case can be decided only on this ground, we find it unnecessary to go on to Taisei's objection as to lack of territorial jurisdiction of the courts at Lahore. In the exercise of its revisional jurisdiction, the Lahore High Court failed to correct the legal error committed by the Civil Court and went wrong on a point of law in upholding the Civil Court's order. Therefore, while allowing Civil Appeal No.722, we set aside both the judgment of the Lahore High Court and the order of the Civil Court, Lahore. Consequently, Taisei's application made under Order VII, Rule 10, C.P.C., stands accepted on the ground of lack of subject matter jurisdiction and AMC's application filed in the Civil Court, Lahore under Section 14 of the 1940 Act is rejected under Order VII, Rule 11, C.P.C.

46. We may clarify here that since no other civil court anywhere in Pakistan can assume and exercise its jurisdiction under the 1940 Act regarding the Award, we have rejected AMC's application under Order VII, Rule 11, C.P.C. instead of returning it under Order VII, Rule 10, C.P.C., as prayed for by Taisei in its application. The lack of subject matter jurisdiction means that the suit or for applicability of the principle, any other proceeding is barred by law and thus comes within the scope of clause (d) of Rule 11 of Order VII, C.P.C.[49] Rule 10 of Order VII, C.P.C. mainly relates to lack of territorial or pecuniary jurisdiction, where after the return of the plaint the same may be presented to the court in which the suit should have been instituted. Further, it may be underlined that it is the duty of the courts to apply the correct law to the admitted or established facts of the case before them, whether or not it has been relied upon by a party.[50]

Decision in Civil Appeal No. 2649 of 2016

47. In this appeal, we find that the impugned judgment of the Division Bench of the Sindh High Court is completely correct in holding that since an appeal against the Lahore High Court's judgment was pending before this Court, that judgment did not operate as res judicata. The appeal pending before this Court could at most attract the applicability of the principle of res sub judice[51] and the Single Bench of the Sindh High Court could have stayed under Section 10, C.P.C., the proceeding on Taisei's petition filed under the 2011 Act, till decision of the pending appeal by this Court. But as this Court itself had asked the Single Bench to decide Taisei's petition,[52] the bar of the principle of res sub judice also stood eclipsed. We find no merits in this appeal; it is therefore dismissed.

MWA/T-2/SC Order accordingly.

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1 Jan Paulsson, Idea of Arbitration, Oxford University Press (2013)

2 Hitachi v. Rupali 1998 SCMR 1618.

3 Except to a limited extent as provided in Section 10(2) of the 2011 Act. The meaning and scope of this Section we shall discuss later in the judgment.

4 Dr. Ijaz Ali Chishti, Enforcement of Foreign Arbitral Awards: Law and Practice of Pakistan (2017) p. 107.

5 Commissioner of Income Tax v. Khurshid Ahmad PLD 2016 SC 545.

[6] Ordinance No. VIII of 2005.

[7] (i) Ordinance No. XX of 2005, (ii) Ordinance No. III of 2006, (iii) Ordinance No. XIV of 2006, (iv) Ordinance No. XLII of 2006, (v) Ordinance No. XXV of 2007, (vi) Ordinance No. LVIII of 2007, (vii) Ordinance No. XXXIII of 2009, and (viii) Ordinance No. IX of 2010.

[8] State v. Jamil PLD 1965 SC 681; Alam v. State PLD 1967 SC 259 (5MB); Adnan Afzal v. Sher Afzal PLD 1969 SC 187; Abdullah v. Imdad Ali 1972 SCMR 173 (4MB); Commissioner of Income Tax v. Asbestos Cement Industries 1993 SCMR 1276; Gul Hasan & Co. v. Allied Bank 1996 SCMR 237; Tariq Badr v. National Bank 2013 SCMR 314; Controller General of Accounts v. Abdul Waheed 2023 SCMR 111 and PTCL v. Collector of Customs 2023 SCMR 261.

[9] Yew Bon v. Kenderaan 1983 PSC 1200 (Privy Council), approvingly cited in Adnan Afzal v. Sher Afzal PLD 1969 SC 187 and Commissioner of Income Tax v. Asbestos Cement Industries 1993 SCMR 1276; In re: Joseph Suche & Co. Limited (1875) 1 Ch. D. 48 approvingly cited in Adnan Afzal v. Sher Afzal PLD 1969 SC 187.

[10] Sutlej Cotton Mills v. Industrial Court PLD 1966 SC 472 (5-MB); Shohrat Bano v. Ismail Soomar 1968 SCMR 574 (5MB); Federation of Pakistan v. Muhammad Siddiq PLD 1981 SC 249 (4MB); The Colonial Sugar Refining Co. v. Irving 1905 AC 369.

[11] Iftikhar Ahmed v. State 2018 SCMR 1385 (5MB); Hassan Nawaz v. Muhammad Ayub PLD 2017 SC 70; Mubeen-Us-Salam v. Federation of Pakistan PLD 2006 SC 602 (9MB); F.A. Khan v. Govt. of Pakistan PLD 1964 SC 520; Shahmir Transport Company v. Board of Revenue PLD 1964 Lah 710 (DB); Garikapati v. Subbiah Choudhury PLD 1957 SC (Ind.) 448.

[12] National Bank v. SAF Textile PLD 2014 SC 283.

[13] Shahida Zaheer v. President of Pakistan PLD 1996 SC 632 approvingly cited in Malik Asad Ali v. Federation of Pakistan (10MB)

[14] Yew Bon Tev v. Kenderaan Bas Mara 1983 PSC 1200 (Privy Council).

[15] Haider Automobile v. Federation of Pakistan 1969 SC 623 (5MB); Molasses Trading v. Federation of Pakistan 1993 SCMR 1905 (5MB); Annoor Textile v. Federation of Pakistan PLD 1994 SC 568.

[16] The Constitution of the Islamic Republic of Pakistan 1973, Article 12.

[17] Section 4. Enforcement of arbitration agreements.(1) A party to an arbitration agreement against whom legal proceedings have been brought in respect of a matter which is covered by the arbitration agreement may, upon notice to the other party to the proceedings, apply to the Court in which the proceedings have been brought to stay the proceedings in so far as they concern that matter.

(2) On an application under subsection (1), the Court shall refer the parties to arbitration, unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

[18] Rupali Polyester v. Nael Bunni PLD 1994 Lah 525.

[19] Thyssen Stahlunion v. Steel Authority of Indian AIR 1999 SC 3923.

[20] https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/ status.

[21] See Shahbaz Garments v. Govt. of Sindh 2021 SCMR 1088, for how the existing laws are allocated to a Federal or Provincial Legislature after a change in the constitutional dispensation.

[22] Entry 32 Part I of the Federal Legislative List.

[23] The 1937 Act, Section 7.

[24] 2 Gary B. Born, International Commercial Arbitration 3412 (2nd ed. 2014).

[25] UNCITRAL Secretariat, Guide on the New York Convention, https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=730&opac_view=-1#null.

[26] Gary B. Born, International Commercial Arbitration 3418-24 (2nd ed. 2014).

[27] The Geneva Convention, Article 2(a).

[28] Gary B. Born, International Commercial Arbitration 3413, 3418 and 3428 (2nd ed. 2014).

[29] Gary B. Born, International Commercial Arbitration 3413 (2nd ed. 2014); Redfern and Hunter on International Arbitration (6th ed. 2015); Albert Jan van den Berg's The New York Arbitration Convention of 1958 (1981).

[30] Russel on Arbitration, Sweet & Maxwell (24th ed. 2015).

[31] Gary B. Born, International Commercial Arbitration 3410 (2nd ed. 2014).

[32] UNCITRAL Secretariat, Guide on the New York Convention, https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=730&opac_view=-1#null.

[33] Gary B. Born, International Commercial Arbitration 3428-33 (2nd ed. 2014).

[34] Parsons & Whittemore v. Societe Generale, 508 F.2d 969 (2d Cir.1974).

[35] The Geneva Convention, Articles 1(d) and 4(2).

[36] Gary B. Born, International Commercial Arbitration 3424 (2nd ed. 2014).

[37] Travaux préparatoires, United Nations Conference on International Commercial Arbitration, Recognition and Enforcement of Foreign Arbitral Awards, Comments by Governments on the draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, E/CONF.26/3/Add.1, para. 7; Albert Jan van den Berg, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation (1981), 247.

[38] The Geneva Convention, Articles 1(d).

[39] Gary B. Born, International Commercial Arbitration 3424 (2nd ed. 2014).

[40] Ibid at 3428-33.

[41] Denysiana S.A. v. Jassica S.A., March 14, 1984, Arrêts du Tribunal Fédéral 110 Ib 191, 194. (Swiss Federal Supreme Court).

[42] Parsons & Whittemore v. Societe Generale, 508 F.2d 969 (2d Cir.1974).

[43] Ibid.

[44] Ibid.

[45] Orient v. SNGPL 2021 SCMR 1728.

[46] Bharat Aluminium v. Kaiser Aluminium (2012) 9 SCC 552.

[47] Malik Asad Ali v. Federation of Pakistan PLD 1998 SC 161 (1 0MB) and Muhammad Khan v. Haider PLD 2020 SC 233 (5MB).

[48] Ismal v. State PLD 1969 SC 241 (5MB)

[49] Kamran Industry v. Industrial Development Bank 1994 SCMR 1970.

[50] Abdullah Khan v. Nisar Muhammad Khan PLD 1965 SC 690 (5MB).

[51] Annamalay v. Thornhill AIR 1931 PC 263. F.A. Khan v. Govt. of Pakistan PLD 1964 SC 520.

[52] Order dated 18 March 2014 passed in Civil appeal No.722 of 2012.

**2024 S C M R 700**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, Amin-ud-Din Khan and Jamal Khan Mandokhail, JJ**

**COMMISSIONER INLAND REVENUE, LAHORE---Appellant**

**Versus**

**Messrs MILLAT TRACTORS LIMITED, LAHORE and others---Respondents**

Civil Appeals Nos.87 to 106 of 2024 in Civil Petitions Nos.2447-L, 2448-L, 2601-L to 2606-L, 2765-L, 2787-L, 2834-L, 2901-L, 2915-L, 2928-L, 2944-L to 2946-L, 2992-L of 2022 and Civil Petitions Nos. 646-L and 647-L of 2023, decided on 1st February, 2024.

(Against the judgment/order(s) of Lahore High Court, Lahore dated 09.06.2022, passed in ITR No.59534 of 2021, etc. and dated 12.01.2023 passed in ITR No. 79913 of 2022 and ITR No. 1420 of 2023).

**(a) Income Tax Ordinance (XLIX of 2001)---**

----Ss. 111 & 122 (as it existed prior to amendment by the Finance Act, 2020)---Unexplained income or assets---Amendment of an assessment---Notices issued under Sections 111 & 122(9) of the Income Tax Ordinance, 2001 ("Ordinance")---Whether a separate notice is required under Section 111 of the Ordinance or whether a notice under Section 122(9) is enough to initiate proceedings for amendment of the assessment on the grounds mentioned in Section 111 of the Ordinance---Held, that the proceedings under Sections 111 & 122 of the Income Tax Ordinance, 2001 ("Ordinance") are different and distinguishable in nature and cannot be subsumed---Before an assessment can be amended under Section 122 on the basis of Section 111, the proceedings under Section 111(1) are to be initiated, the taxpayer is to be confronted with the information and the grounds applicable under Section 111(1) through a separate notice under the said provision, and then the proceedings are to be culminated through an appropriate order in the shape of an opinion of the Commissioner---This then becomes definite information for the purposes of Section 122(5), provided the grounds mentioned in Section 122(5) are applicable---The taxpayer is then to be confronted with these grounds through a notice under Section 122(9) and only then can an assessment be amended under Section 122.

The initiation and culmination of proceedings under Section 111 of the Income Tax Ordinance, 2001 ('Ordinance') becomes necessary before action can be taken under Section 122 to amend assessments on the basis of proceedings undertaken under Section 111. The information available with the department under Section 111(1) is mere information. It is only after the taxpayer is confronted with this information through a separate notice by calling for an explanation, and when no explanation is offered or the explanation is not satisfactory in the opinion of the Commissioner under Section 111(1), that it transforms or crystallizes into "definite information" for the purposes of action under Section 122(5) for amendment of assessment under Section 122. The taxpayer will then be confronted with the grounds applicable under Section 122(5) through a notice under Section 122(9) of the Ordinance. As such, where the Commissioner has formed an opinion against the taxpayer as to the fulfilment of one of the grounds mentioned in Section 111(1)(a) to (d) of the Ordinance, and is of the view that any of the grounds in Section 122(5) is applicable, the process under Section 122 is to be initiated to amend assessments through a notice under Section 122(9). Thus, unless the proceedings under Section 111(1) are initiated and completed, Section 122(5) cannot be given effect to and no notice under Section 122(9) can be issued for the purposes of amending an assessment through an addition contemplated under Section 111. After the amendment introduced in Section 122(5) of the Ordinance through the Finance Act, 2020, the words "definite information acquired from an audit or otherwise" have been substituted with "audit or on the basis of definite information". Therefore, the interpretation rendered above as to the applicability of Section 122(5) may not be applicable to cases post 2020 and the effect of the substituted expression will have to be determined in an appropriate case in the future.

Commissioner Inland Revenue v. Bashir Ahmed 2021 SCMR 1290; Commissioner Inland Revenue v. Faqir Hussain 2019 PTD 1282; Commissioner Inland Revenue v. Ranipur CNG Station 2017 PTD 1839 and Commissioner Inland Revenue v. Muhammad Shafique 2015 PTD 1823 ref.

Before an assessment can be amended under Section 122 on the basis of Section 111, the proceedings under Section 111(1) are to be initiated, the taxpayer is to be confronted with the information and the grounds applicable under Section 111(1) through a separate notice under the said provision, and then the proceedings are to be culminated through an appropriate order in the shape of an opinion of the Commissioner. This then becomes definite information for the purposes of Section 122(5), provided the grounds mentioned in Section 122(5) are applicable. The taxpayer is then to be confronted with these grounds through a notice under Section 122(9) and only then can an assessment be amended under Section 122. A notice under Section 111 can be simultaneously issued with a notice under Section 122(9), however, proceedings under Section 111 have to be finalized first in terms of an opinion of the Commissioner so as to constitute definite information, as is required under Section 122(5) of the Ordinance.

Commissioner Inland Revenue v. Falah 2021 PTD 192; Commissioner Inland Revenue v. Faqir Hussain 2019 PTD 1828; Commissioner Inland Revenue v. Ranipur CNG Station 2017 PTD 1839 and Commissioner Inland Revenue v. Bashir Ahmed 2021 SCMR 1290 ref.

Even where a notice under Section 111 is issued simultaneously with a notice to amend an assessment under Section 122(9) of the Ordinance, no proceedings can be undertaken under the latter until the proceedings under Section 111 are finalized and result in an opinion against the taxpayer. This is because, even if some basis for action under Section 111 is mentioned in a notice under Section 122(9), it cannot constitute definite information for the purposes of Section 122(5). The proceedings under the notice issued under Section 122(9) can only be formally initiated when the requirement of definite information is satisfied under Section 122(5) after finalization of the proceedings under Section 111 through an opinion of the Commissioner. Therefore, where no opinion is formed against the taxpayer under Section 111, the proceedings under both provisions i.e., Sections 111 and 122 would lapse, and the notice under Section 122(9) would be of no legal effect. Where, however, there is an opinion formed against the taxpayer as definite information for the purposes of Section 122(5), the proceedings on the notice issued under Section 122(9) can formally proceed and shall be deemed to have commenced. It must also be noted that where the opinion formed against the taxpayer under Section 111 is materially different from what has been confronted to the taxpayer through the notice already issued under Section 122(9), and the Commissioner is of the view that another or different ground under Section 122(5) is applicable, a fresh or supplementary show cause notice under Section 122(9) must be issued to the taxpayer by confronting such ground(s) to the taxpayer. This is in view of the right to be treated in accordance with the law, and the principles of fair trial and due process enshrined in Articles 4 and 10A of the Constitution, respectively, and in terms of settled law that once a show cause notice is issued, the original adjudication on the said show cause notice can only be based on the grounds and allegations levelled therein.

Commissioner Inland Revenue v. RYK Mills 2023 SCMR 1856; Collector Central Excise v. Rahm Din 1987 SCMR 1840 and Commissioner Inland Revenue v. Rose Food Industries 2023 SCMR 2070 ref.

Two provisos have been added after Section 122(9) through the Finance Act, 2021 and further amended through the Finance Act, 2022, which provide for a time period from the date of issuance a show cause notice for making an order under Section 122. The said time period is to be considered as commencing on the day that the taxpayer is confronted with the opinion formed by the Commissioner under Section 111(1), as it is only then that the proceedings under Section 122 are to be formally taken up. This reconciliation harmonizes Section 111, its Explanation and Section 122(5) of the Ordinance.

**(b) Income Tax Ordinance (XLIX of 2001)---**

----Ss. 111, Explanation & 122---Explanation introduced in Section 111 of the Income Tax Ordinance, 2001 ('Ordinance') pursuant to the Finance Act, 2021---Effect---On a plain reading of the said Explanation, it appears that it is couched in clarificatory and declaratory terms for "removal of doubt"---However, the intention behind the Explanation and the effect of adding the Explanation is to take away the right to a

separate notice and proceedings under Section 111 if the grounds under Section 111(1)(a) to (d) are confronted to the taxpayer through a notice under Section 122(9) of the Ordinance---Therefore, in essence, it abridges the right to a separate notice and proceedings under Section 111 of the Ordinance, which was the requirement of the law---As a consequence, the Explanation takes away a substantive right of separate proceedings of the taxpayer, which otherwise existed prior to the introduction of the Explanation in Section 111---Explanation added in Section 111 of the Ordinance divests and affects a substantive right of the taxpayer to a separate notice and proceedings under Section 111, thus, the same would not have retrospective effect and would apply prospectively---Effect of the Explanation, therefore, is only to dispense with the requirement of a separate notice under Section 111, however, it cannot subsume two different and distinguishable proceedings under Sections 111 & 122---As such, while the Explanation dispenses with the requirement of a separate notice under Section 111, it does not dispense with the requirement that in case proceedings are initiated under Section 122(5) on the basis of definite information to be provided through Section 111, the proceedings under Section 111 are to be concluded first in the manner provided under the law and till such time, the proceedings under Section 122(9) cannot be given effect to---Therefore, as far as the cases prior to the Explanation are concerned, a separate notice is required to be issued under Section 111 before proceedings can be initiated under Section 122---Simultaneity of notices issued under Sections 111 & 122(9) is not of much consequence and the proceedings under Section 111 have to proceed first and be finalized before proceedings under Section 122 are formally taken up---After the introduction of the Explanation in Section 111 in the year 2021, a notice encompassing both the grounds under Section 111(1) and Section 122(5) can be issued under Section 122(9), however, the proceedings under Section 111 still have to be concluded first and thereafter the remaining part of the notice under Section 122(9) can be given effect to.

**(c) Interpretation of statutes---**

----Explanation to an enactment---Rationale and scope---Purpose of an Explanation is ordinarily to explain some concept or expression or phrase occurring in the main provision---It is not uncommon for the legislature to accord either an extended or restricted meaning to such concept or expression by inserting an appropriate Explanation---Such a clarificatory provision is to be interpreted according to its own terms having regard to its context and not as to widen the ambit of the provision---As a general rule, an explanation added to a statutory provision is not a substantive provision in any sense of the term but as the plain meaning of the word itself shows, it is merely meant to explain or clarify certain ambiguities which may have crept in the statutory provision---Object of adding an Explanation to a statutory provision is only to facilitate its proper interpretation and to remove confusion and misunderstanding as to its true nature---It is relied upon only as a useful guide or in aid to the construction of the main provision---It is in this view of its effect that courts have normally given retrospective effect to such clarificatory or declaratory provisions in the shape of an Explanation---However, where the effect of the Explanation warps out of its normal purpose explained above, and acts as a substantive enactment or deeming provision, or enlarges substantive provisions of law or creates new liabilities, such an Explanation cannot be given retrospective effect unless the express language of the Explanation warrants such an interpretation.

M.N. Rao and Amita Dhanda in N S Bindra's - Interpretation of Statutes (12th Edition, 2016); Rehman Cotton Mills v. Federation of Pakistan 2016 PTD 1256; M. P. Tandon - Interpretation of Statutes (12th Edition, 2019); Rehman Cotton Mills v. Federation of Pakistan 2016 PTD 1256; Hussain Patel v. Habib PLD 1981 SC 1; Chief Administrator Auqaf v. Koura PLD 1991 SC 596; Hamid Ashraf v. Commissioner Inland Revenue 2020 SCMR 843; Commissioner of Income Tax v. Asbestos Cement Industries 1993 SCMR 1276; Kohinoor Sugar Mills v. Federation of Pakistan 2018 PTD 821; Commissioner Inland Revenue v. Trillium Pakistan 2019 SCMR 1643 and Commissioner of Income Tax v. Nazir Ahmed and Sons 2004 PTD 921 ref.

**(d) Interpretation of statutes---**

----Retrospective and prospective application of law---Principles---A change in substantive law which divests and adversely affects vested rights of the parties shall always have prospective application unless by express word of the legislation and/or by necessary intendment/ implication such law has been made applicable

retrospectively---As a cardinal principle of interpretation of statutes, tax statutes operate prospectively and not retrospectively unless clearly indicated by the legislature, therefore, retrospectivity cannot be presumed---Where an insertion or deletion of any provision in the rules or the law is merely procedural in nature, the same would apply retrospectively but not if it
affects substantive rights which already stood accrued at the time when the un-amended rule or provision was in vogue---A provision curtailing substantive rights does not have retroactive operation unless the legislature elects to give it retrospective effect---Thus, where existing rights are affected or giving retroactive operation causes inconvenience or injustice, the Court will not favour an interpretation giving retrospective effect even where the provision is procedural.

Controller General of Accounts v. Abdul Waheed 2023 SCMR 111; Tariq Badar v. National Bank of Pakistan 2013 SCMR 314; Commissioner of Income Tax v. Eli Lilly Pakistan 2009 SCMR 1279; Hassan v. Fancy Foundation PLD 1975 SC 1; Province of East Pakistan v. Sharafatullah PLD 1970 SC 514; Nagina Silk Mill v. Income Tax Officer PLD 1963 SC 322; Rajby Industries v. Federation of Pakistan 2023 SCMR 1407; Member (Taxes) Board of Revenue v. Qaisar Abbas 2019 SCMR 446; Zila Council Jhelum v. Pakistan Tobacco Company PLD 2016 SC 398; Commissioner of Income Tax v. Eli Lilly Pakistan 2009 SCMR 1279; Manzoor Ali v. United Bank 2005 SCMR 1785; Badshah Gul Wazir v. Government of Khyber Pakhtunkhwa 2015 SCMR 43; Adnan Afzal v. Capt. Sher Afzal PLD 1969 SC 187 and Gul Hasan v. Allied Bank of Pakistan 1996 SCMR 237 ref.

Ahmad Pervaiz, Advocate Supreme Court, Muhammad Yahya, Advocate Supreme Court, Muhammad Shahzad Cheema, Advocate Supreme Court, Muhammad Qasim, Addl. Commissioner and M. Saeed Tahir, Advocate Supreme Court for Appellants (through V.L. from Lahore).

Imtiaz Rashid Siddiqui, Advocate Supreme Court (Through V.L. Lahore Registry)

Shahryar Kasuri, Advocate Supreme Court for Respondents.

Assisted by Muhammad Hassan Ali and Umer A. Ranjha, Law Clerks, Supreme Court of Pakistan.

Date of hearing: 1st February, 2024.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**These civil petitions for leave to appeal have been filed against a consolidated judgment of the Lahore High Court dated 09.06.2022 and two other orders dated 12.01.2023[1] (collectively referred to as the "impugned judgment"), whereby the Tax References filed by the petitioner department and Intra Court Appeals ("ICAs") filed by the taxpayers were decided against the petitioner department. The matters pertained to different tax years[2] with the latest being 2020[3]. In the ICAs, the matters involved the question as to whether a notice under Section 111 of the Income Tax Ordinance, 2001 ("Ordinance") is to be issued prior or subsequent to a notice issued under Section 122(9) of the Ordinance. Similarly, in the Tax References, the following questions of law, substantially involving the same legal question, were raised before the High Court:

1. Whether the learned Appellate Tribunal has erred in law by deleting the additions made under Section 111 of the Ordinance while holding that a separate and specific notice is required for addition under Section 111 when there is no specific provision in the Ordinance requiring separate notice under Section 111 of the Ordinance?

2. Whether the learned Appellate Tribunal IR has overlooked the scheme of law that Section 111 of the Ordinance cannot be read in isolation without making reference to Sections 122(1), 122(5)(ii) and 122(9) of the Ordinance?

3. Whether the learned Appellate Tribunal IR fell in error by failing to appreciate that in view of the insertion of the 'Explanation' in section 111 of the Income Tax Ordinance, 2001 vide Finance Act, 2021 the issuance of a separate notice under section 111 was not required for amendment of an assessment under section 120 of the Ordinance?

To examine these questions, leave to appeal is granted in these petitions. The office is directed to assign numbers to the appeals arising out of these petitions. The appeals are being taken up today and being decided on the basis of available record.

2. The first two questions appear to be interconnected and were decided by the High Court against the appellant department by holding that a separate notice under Section 111 of the Ordinance was required before proceedings can be initiated through a notice under Section 122 for the purposes of amending the assessment. As to the third question, the High Court held that the Explanation added to Section 111 of the Ordinance through the Finance Act, 2021 to the effect that a separate notice under the said provision was not required, was to apply prospectively as it adversely affected vested rights of the parties. Consequently, this question was also decided against the appellant department.

3. The learned counsel for the appellant department argued that there is no requirement of a separate notice under Section 111 because a notice under Section 122(9) is sufficient and covers the matters that ought to be taken up under Section 111 of the Ordinance. However, referring to the jurisprudence evolved over the years on the subject, he candidly submitted that such jurisprudence does point out that a separate notice under Section 111 is required, nonetheless, he clarified that such jurisprudence does not discuss whether the said notice is subsumed in Section 122(9) and there is no point in having two separate proceedings when one notice under Section 122(9) itself can suffice. In support of this contention, the learned counsel placed reliance on Commissioner Inland Revenue, T.R.O. Faisalabad v. Faqir Hussain and another (2019 PTD 1828), Commissioner Inland Revenue, Multan Zone v. Falah ud Din Qureshi (2021 PTD 192), Commissioner Inland Revenue, Zone-I, Regional Tax Office, Sukkur v. Messrs Ranipur CNG Station, Ranipur (2017 PTD 1839) and Commissioner Inland Revenue Zone Bahawalpur, Regional Tax Office, Bahawalpur v. Messrs Bashir Ahmed (deceased) through LRs (2021 SCMR 1290). He further relied on the Explanation introduced in Section 111 in the year 2021, as further amended in the year 2022, which provides that a notice under Section 122(9) would be sufficient and no separate notice is required for the purposes of proceedings under Section 111.

4. On the other hand, the learned counsel for the respondent taxpayers submitted that the proceedings under Section 122(5) can only be initiated if there is "definite information". The information provided under Section 111 is not definite information but mere information, and unless it solidifies into definite information, Section 122(5) cannot be attracted. He referred to Section 111 to state that once the tax department takes action on any of the grounds mentioned in Section 111(1)(a) to (d), an explanation is called from the taxpayer and then an opinion is formed by the Commissioner. In case the taxpayer is unable to explain the said income, the same becomes taxable income of the taxpayer, but in case there is sufficient explanation rendered by the taxpayer, the said proceedings can be dropped. Therefore, till such time these proceedings are given effect to, it cannot be said that the grounds mentioned in Section 111 amount to "definite information" and Section 122(5) cannot be attracted. As to the effect of the Explanation added in Section 111, he contended that the jurisprudence so far has settled that an Explanation has prospective effect and will not affect the cases for the tax years prior to the year 2021. He then submitted that since the Explanation is not applicable to the matters at hand, therefore, its effect is best to be discussed in an appropriate case.

5. We have heard the learned counsel for the parties and have gone through the record of the cases. The questions requiring determination in the instant matters are two-fold and connected: (i) whether a separate notice is required under Section 111 of the Ordinance or whether a notice under Section 122(9) is enough to initiate proceedings for amendment of the assessment on the grounds mentioned in Section 111 of the Ordinance; and (ii) the effect of the Explanation introduced in Section 111 of the Ordinance to the matters at hand.

6. In order to answer the above questions, it is important to understand the scheme behind Section 111 and its effect on amendment of assessments under Section 122 of the Ordinance. Section 111(1) provides that where any of the grounds in Section 111(1)(a) to (d) are applicable, and the taxpayer offers no explanation or the explanation provided, in the opinion of the Commissioner, is not satisfactory, this unexplained income or value of asset(s) shall be included in the income of the person chargeable to tax. For ease of reference, Section 111 (1) of the Ordinance is reproduced below[4]:

> 111. Unexplained income or assets.---(1) Where -
>
> (a) any amount is credited in a person's books of account;

(b) a person has made any investment or is the owner of any money or valuable article;

(c) a person has incurred any expenditure; or

(d) any person has concealed income or furnished inaccurate particulars of income including -

(i) the suppression of any production, sales or any amount chargeable to tax; or

(ii) the suppression of any item of receipt liable to tax in whole or in part,

and the person offers no explanation about the nature and source of the amount credited or the investment, money, valuable article, or funds from which the expenditure was made suppression of any production, sales, any amount chargeable to tax and of any item of receipt liable to tax or the explanation offered by the person is not, [in the Commissioner's opinion, satisfactory, the amount credited, value of the investment, money, value of the article, or amount of expenditure suppressed amount of production, sales or any amount chargeable to tax or of any item of receipt liable to tax shall be included in the person's income chargeable to tax under head "Income from Other Sources" to the extent it is not adequately explained][5]:

Provided that where a taxpayer explains the nature and source of the amount credited or the investment made, money or valuable article owned or funds from which the expenditure was made, by way of agricultural income, such explanation shall be accepted to the extent of agricultural income worked back on the basis of agricultural income tax paid under the relevant provincial law.

Therefore, once the department has information resulting in an impression or understanding that the grounds in Section 111(1)(a) to (d) relating to unexplained income or asset are attracted, an explanation is called from the taxpayer. At this stage, the information available with the department is mere information. If, however, the taxpayer fails to render any explanation, or the explanation offered by the taxpayer is not satisfactory in the opinion of the Commissioner, the said liability becomes unexplained income and is to be added to the income of the taxpayer chargeable to tax. If the explanation offered is satisfactory, the said proceedings can be dropped and no action is then required. Therefore, through the opportunity of an explanation, the taxpayer can contest the allegations put to the taxpayer with regards to any of the grounds mentioned in Section 111(1) (a) to (d), whereafter, an opinion is to be formed by the Commissioner based on the said explanation, if any. As such, the said provision is essentially of an inquisitorial nature where the taxpayer is confronted with the information available with the department and an explanation is sought, and the resulting opinion of the Commissioner is not an adverse order per se but can be used to pass an adverse order against the taxpayer by adding the unexplained income to the income of the taxpayer chargeable to tax. The other provisions of Section 111 also do not empower the Commissioner to pass an adverse order and only provide statutory instructions as to how the unexplained income or asset, provided an opinion under Section 111(1) is given by the Commissioner to this effect, is to be added to the income of the taxpayer chargeable to tax. Therefore, the essence of the proceedings under Section 111 lies within Section 111(1) of the Ordinance, wherein the taxpayer is confronted with the information available with the department, and the Commissioner forms an opinion as to the unexplained income or assets of the taxpayer or otherwise.

7. It is settled law that within the contemplation of Section 111(1), an explanation is to be called from a taxpayer by issuing a specific notice under Section 111 of the Ordinance, confronting the taxpayer with the information gathered by the department and specifying which of the grounds in Section 111(1) is applicable.[6] It is only after this that an appropriate order can be passed under this provision in the form of an opinion of the Commissioner, thus concluding the proceedings under Section 111.

8. On the other hand, Section 122 of the Ordinance provides for amendment of assessments. The provisions of Section 122 relevant to the matters at hand are reproduced below for reference[7]:

S. 122. Amendment of assessments.---

(1) Subject to this section, the Commissioner may amend an assessment order treated as issued under section 120 or issued under section 121, or, by making such alterations or additions as the Commissioner considers necessary.

...

(5) An assessment order in respect of a tax year, or an assessment year, shall only be amended under subsection (1) and an amended assessment for that year shall only be further amended under subsection (4)

where, on the basis of [definite information acquired from an audit or otherwise][8], the Commissioner is satisfied that -

(i) any income chargeable to tax has escaped assessment; or

(ii) total income has been under-assessed, or assessed at too low a rate, or has been the subject of excessive relief or refund; or

(iii) any amount under a head of income has been mis-classified.

...

(8) For the purposes of this section, "definite information" includes information on sales or purchases of any goods made by the taxpayer, receipts of the taxpayer from services rendered or any other receipts that may be chargeable to tax under this Ordinance, and on the acquisition, possession or disposal of any money, asset, valuable article or investment made or expenditure incurred by the taxpayer.

(9) No assessment shall be amended, or further amended, under this section unless the taxpayer has been provided with an opportunity of being heard.

In view of the above, under Section 122(1) of the Ordinance, the Commissioner has been empowered to amend an assessment order treated as issued under Sections 120 or 121 by making such alterations or additions as the Commissioner considers necessary. However, under Section 122(5), an assessment order shall only be amended under Section 122(1) or an amended assessment can only be further amended under Section 122(4) where, on the basis of definite information acquired from an audit or otherwise, the Commissioner is satisfied that any of the grounds in the said provision are satisfied. Section 122(8) provides what constitutes definite information for the purposes of this provision. Finally, Section 122(9) stipulates that no assessment shall be amended, or further amended, under Section 122 unless the taxpayer has been provided with the opportunity of being heard.

9. Therefore, pursuant to Section 122(5) of the Ordinance, the terminus a quo for initiation of proceedings under Section 122 is when the Commissioner, on the basis of definite information acquired from an audit or otherwise, is of the opinion that any of the grounds mentioned in Section 122(5)(i), (ii) or (iii) is applicable. Thereafter, a notice under Section 122(9) of the Ordinance, specifying the above ground(s), is sent to the taxpayer. If the taxpayer satisfactorily responds to the notice sent under Section 122(9), the proceedings can be dropped. Where, however, the response is not satisfactory, and the Commissioner is satisfied that any of the grounds in Section 122(5) are applicable, the Commissioner can amend the assessment order under Section 122(1) or further amend an amended assessment under Section 122(4) read with Section 122(5). As such, for initiation of proceedings under Section 122, the Commissioner must assess if any of the grounds under Section 122(5) are applicable, and such an assessment is to be based on definite information acquired from an audit or otherwise, which is the prerequisite to attract the provisions of Section 122(5) of the Ordinance.

10. It is in this sequence of proceedings that the initiation and culmination of proceedings under Section 111 of the Ordinance becomes necessary before action can be taken under Section 122 to amend assessments on the basis of proceedings undertaken under Section 111. As noted above, the information available with the department under Section 111(1) is mere information. It is only after the taxpayer is confronted with this information through a separate notice by calling for an explanation, and when no explanation is offered or the explanation is not satisfactory in the opinion of the Commissioner under Section 111(1), that it transforms or crystallizes into "definite information" for the purposes of action under Section 122(5) for amendment of assessment under Section 122. The taxpayer will then be confronted with the grounds applicable under Section 122(5) through a notice under Section 122(9) of the Ordinance. As such, where the Commissioner has formed an opinion against the taxpayer as to the fulfilment of one of the grounds mentioned in Section 111(1)(a) to (d) of the Ordinance, and is of the view that any of the grounds in Section 122(5) is applicable, the process under Section 122 is to be initiated to amend assessments through a notice under Section 122(9). Thus, unless the proceedings under Section 111(1) are initiated and completed, Section 122(5) cannot be

given effect to and no notice under Section 122(9) can be issued for the purposes of amending an assessment through an addition contemplated under Section 111. It is to be noted that the present cases are related to tax years up till 2020. After the amendment introduced in Section 122(5) of the Ordinance through the Finance Act, 2020, the words "definite information acquired from an audit or otherwise" have been substituted with "audit or on the basis of definite information". Therefore, the interpretation rendered above as to the applicability of Section 122(5) may not be applicable to cases post 2020 and the effect of the substituted expression will have to be determined in an appropriate case in the future.

11. Therefore, to answer the first question, and as applicable to the matters at hand, before an assessment can be amended under Section 122 on the basis of Section 111, the proceedings under Section 111(1) are to be initiated, the taxpayer is to be confronted with the information and the grounds applicable under Section 111(1) through a separate notice under the said provision, and then the proceedings are to be culminated through an appropriate order in the shape of an opinion of the Commissioner. This then becomes definite information for the purposes of Section 122(5), provided the grounds mentioned in Section 122(5) are applicable. The taxpayer is then to be confronted with these grounds through a notice under Section 122(9) and only then can an assessment be amended under Section 122.[9] This view has also been recently taken by this Court in Bashir Ahmed[10] wherein it has also been held that a notice under Section 111 can be simultaneously issued with a notice under Section 122(9), however, proceedings under Section 111 have to be finalized first in terms of an opinion of the Commissioner so as to constitute definite information, as is required under Section 122(5) of the Ordinance.

12. We, however, underline and clarify that even where a notice under Section 111 is issued simultaneously with a notice to amend an assessment under Section 122(9) of the Ordinance, no proceedings can be undertaken under the latter until the proceedings under Section 111 are finalized and result in an opinion against the taxpayer. This is because, even if some basis for action under Section 111 is mentioned in a notice under Section 122(9), it cannot constitute definite information for the purposes of Section 122(5). The proceedings under the notice issued under Section 122(9) can only be formally initiated when the requirement of definite information is satisfied under Section 122(5) after finalization of the proceedings under Section 111 through an opinion of the Commissioner. Therefore, where no opinion is formed against the taxpayer under Section 111, the proceedings under both provisions i.e., Sections 111 and 122 would lapse, and the notice under Section 122(9) would be of no legal effect. Where, however, there is an opinion formed against the taxpayer as definite information for the purposes of Section 122(5), the proceedings on the notice issued under Section 122(9) can formally proceed and shall be deemed to have commenced. It must also be noted that where the opinion formed against the taxpayer under Section 111 is materially different from what has been confronted to the taxpayer through the notice already issued under Section 122(9), and the Commissioner is of the view that another or different ground under Section 122(5) is applicable, a fresh or supplementary show cause notice under Section 122(9) must be issued to the taxpayer by confronting such ground(s) to the taxpayer. This is in view of the right to be treated in accordance with the law, and the principles of fair trial and due process enshrined in Articles 4 and 10A of the Constitution[11], respectively, and in terms of settled law that once a show cause notice is issued, the original adjudication on the said show cause notice can only be based on the grounds and allegations levelled therein.[12]

13. Adverting to the second issue at hand as to the effect of the Explanation introduced in Section 111 of the Ordinance to the instant cases, the Explanation was added in Section 111 pursuant to the Finance Act, 2021 and is reproduced below for reference:

Explanation.---For the removal of doubt, a separate notice under this section is not required to be issued if the explanation regarding nature and sources of amount credited or the investment of money, valuable article, or the funds from which expenditure was made has been confronted to the taxpayer through a notice under subsection (9) of section 122 of this Ordinance.

The Explanation was further substituted through the Finance Act, 2022 as under:

Explanation.---For the removal of doubt, it is clarified that a separate notice under this section is not required to be issued if the explanation regarding nature and sources of;

(i) any amount credited in a person's books of account; or

(ii) any investment made or ownership of money or valuable article; or

(iii) funds from which expenditure was made; or

(iv) suppression of any production, sales, or any amount chargeable to tax; or

(v) suppression of any item of receipt liable to tax in whole or in part has been confronted to the taxpayer through a notice under subsection (9) of section 122 of the Ordinance.

On a plain reading of the aforesaid Explanation, it appears that it is couched in clarificatory and declaratory terms for "removal of doubt". However, we note that the intention behind the Explanation and the effect of adding the Explanation is to take away the right to a separate notice and proceedings under Section 111 if the grounds under Section 111(1)(a) to (d) are confronted to the taxpayer through a notice under Section 122(9) of the Ordinance. Therefore, in essence, it abridges the right to a separate notice and proceedings under Section 111 of the Ordinance, which was the requirement of the law as noted above. As a consequence, the Explanation takes away a substantive right of separate proceedings of the taxpayer, which otherwise existed prior to the introduction of the Explanation in Section 111.

14. Before dilating upon the applicability of the Explanation to the matters at hand, it would be appropriate to understand the rationale behind introducing an Explanation in an enactment. The purpose of an Explanation is ordinarily to explain some concept or expression or phrase occurring in the main provision. It is not uncommon for the legislature to accord either an extended or restricted meaning to such concept or expression by inserting an appropriate Explanation.[13] Such a clarificatory provision is to be interpreted according to its own terms having regard to its context and not as to widen the ambit of the provision.[14] As a general rule, an explanation added to a statutory provision is not a substantive provision in any sense of the term but as the plain meaning of the word itself shows, it is merely meant to explain or clarify certain ambiguities which may have crept in the statutory provision.[15] The object of adding an Explanation to a statutory provision is only to facilitate its proper interpretation and to remove confusion and misunderstanding as to its true nature. It is relied upon only as a useful guide or in aid to the construction of the main provision.[16] It is in this view of its effect that courts have normally given retrospective effect to such clarificatory or declaratory provisions in the shape of an Explanation.[17]

15. However, where the effect of the Explanation warps out of its normal purpose explained above, and acts as a substantive enactment or deeming provision, or enlarges substantive provisions of law or creates new liabilities, such an Explanation cannot be given retrospective effect unless the express language of the Explanation warrants such an interpretation.[18] It is settled law that a change in substantive law which divests

and adversely affects vested rights of the parties shall always have prospective application unless by express word of the legislation and/or by necessary intendment/implication such law has been made applicable retrospectively.[19] As a cardinal principle of interpretation of statutes, tax statutes operate prospectively and not retrospectively unless clearly indicated by the legislature, therefore, retrospectivity cannot be presumed.[20] Where an insertion or deletion of any provision in the rules or the law is merely procedural in nature, the same would apply retrospectively but not if it affects substantive rights which already stood accrued at the time when the un-amended rule or provision was in vogue.[21] A provision curtailing substantive rights does not have retroactive operation unless the legislature elects to give it retrospective effect.[22] Thus, where existing rights are affected or giving retroactive operation causes inconvenience or injustice, the Court will not favour an interpretation giving retrospective effect even where the provision is procedural.[23] Applying this to the instant case, and having established that the Explanation added in Section 111 of the Ordinance divests and affects a substantive right of the taxpayer to a separate notice and proceedings under Section 111, the same would not have retrospective effect and would apply prospectively. Therefore, the Explanation would Gnot be applicable to the matters at hand as they pertain to tax years before the Explanation was introduced in Section 111.

16. However, in order to clarify, even if the Explanation was applicable to the instant matters, the proceedings under Section 111 would still require to be taken up first and finalized before the proceedings under Section 122(5) can formally proceed. This is in line with the scheme of Section 111 and its effect on Section 122, as explained above. The effect of the Explanation, therefore, is only to dispense with the requirement of a separate notice under Section 111, however, it cannot subsume two different and distinguishable proceedings under Sections 111 and 122. As such, while the Explanation dispenses with the requirement of a separate notice under Section 111, it does not dispense with the requirement that in case proceedings are initiated under Section 122(5) on the basis of definite information to be provided through Section 111, the proceedings under Section 111 are to be concluded first in the manner provided under the law and till such time, the proceedings under Section 122(9) cannot be given effect to.

17. Therefore, where one notice is issued under Section 122(9) which encompasses both the grounds of Section 111(1) and Section 122(5), the proceedings under Section 111 will be taken up first. The taxpayer, in response, is to provide an explanation, as envisaged under Section 111(1). If the response to the grounds under Section 111 is satisfactory, then the proceedings can be dropped. However, where the response is not satisfactory, the Commissioner will then form an opinion, as is required under Section 111, which can only be taken as definite information for the purposes of Section 122(5) for amendment of the assessment. In view of the scheme of Section 111 and its effect on Section 122, it is imperative that the taxpayer is confronted with this opinion, providing the taxpayer with an opportunity to fully and finally understand and respond to the allegations against the taxpayer with respect to the grounds the Commissioner understands are applicable under Section 122(5) based on this opinion. As held above, it is only after the opinion is given by the Commissioner under Section 111 (1) that the proceedings under Section 122 can be formally taken up and proceeded with. The taxpayer can then file a response to the grounds alleged under Section 122(5) under the same show cause notice issued under Section 122(9), by filing a supplementary response to the show cause notice. It is after considering this response that an assessment can be amended under Section 122, provided the Commissioner is still satisfied that any of the grounds under Section 122(5) are still applicable. We are also cognizant of the fact that two provisos[24] have been added after Section 122(9) which provide for a time period from the date of issuance a show cause notice for making an order under Section 122. In view of what has been held above, the said time period is to be considered as commencing on the day that the taxpayer is

confronted with the opinion formed by the Commissioner under Section 111(1), as it is only then that the proceedings under Section 122 are to be formally taken up. In our view, this reconciliation harmonizes Section 111, its Explanation and Section 122(5) of the Ordinance.

18. Our view that the process could only be lawfully undertaken in two steps is further fortified from Section 114(6A) of the Ordinance, which extends a right to the taxpayer that the taxpayer can voluntarily file a revised return and deposit the tax before the issuance of a notice under Section 122(9) of the Ordinance, and consequently avoid the penalty stipulated in Section 182[25] of the Ordinance vis-à-vis the provisions of Section 111 of the Ordinance. If it is held that both the proceedings under Sections 111 and 122 are now subsumed, the taxpayer would be deprived of this right which can neither be the legislative intent and nor legally justified. Accordingly, this right, which the legislature has thoughtfully extended to the taxpayers, could only be protected and preserved if the proceedings under Section 111 of the Ordinance are initiated first and the taxpayer could opt to either revise his return with voluntary payment of tax without penalty or contest the proceedings and forego the said right.

19. Therefore, as far as the cases prior to the Explanation are concerned, a separate notice is required to be issued under Section 111 before proceedings can be initiated under Section 122. The simultaneity of notices issued under Sections 111 and 122(9) is not of much consequence and the proceedings under Section 111 have to proceed first and be finalized before proceedings under Section 122 are formally taken up. After the introduction of the Explanation in Section 111 in the year 2021, a notice encompassing both the grounds under Section 111(1) and Section 122(5) can be issued under Section 122(9), however, the proceedings under Section 111 still have to be concluded first and thereafter the remaining part of the notice under Section 122(9) can be given effect to.

20. For the reasons given above, these appeals are hereby dismissed.

MWA/C-5/SC Appeals dismissed.

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[1] Passed on the basis of the judgment of the Lahore High Court in Commissioner Inland Revenue v. Faqir Hussain, 2019 PTD 1828 which had earlier decided the same issue in favour of the taxpayers as the consolidated judgment dated 09.06.2022 impugned herein.

[2] The tax years in these cases range from 2007 to 2020, however, we have noted that no substantive change was made in the provisions relevant to these matters until 2020.

[3] It is important to underline that these matters pertain to tax years prior to the amendments made in Section 122(5) of the Ordinance through the Finance Act, 2020 by substituting "audit or on the basis of definite information" for "definite information acquired from an audit or otherwise".

[4] The provision as it stood prior to the amendments made through the Finance Act, 2020 has been reproduced. However, it is to be noted that the provision is to apply to the relevant tax years in accordance with how the provision stood at the relevant time.

[5] Substituted through the Finance Act, 2020 by "in the Commissioner's opinion, satisfactory -

(a) the amount credited, value of the investment, money, value of the article, or amount of expenditure shall be included in the person's income chargeable to tax under the head "Income from Other Sources" to the extent it is not adequately explained; and

(b) the suppressed amount of production, sales or any amount chargeable to tax or of any item of receipt liable to tax shall be included in the person's income chargeable to tax under the head "Income from Business" to the extent it is not adequately explained."

[6] Commissioner Inland Revenue v. Bashir Ahmed, 2021 SCMR 1290; Commissioner Inland Revenue v. Faqir Hussain, 2019 PTD 1282; Commissioner Inland Revenue v. Ranipur CNG Station, 2017 PTD 1839 and Commissioner Inland Revenue v. Muhammad Shafique, 2015 PTD 1823.

[7] The provision as it stood prior to the amendments made through the Finance Act, 2020 has been reproduced. However, it is to be noted that the provision is to apply to the relevant tax years in accordance with how the provision stood at the relevant time.

[8] Expressions "audit or on the basis of definite information" substituted through Finance Act, 2020 dated 30th June, 2020.

[9] Commissioner Inland Revenue v. Falah, 2021 PTD 192; Commissioner Inland Revenue v. Faqir Hussain, 2019 PTD 1828; Commissioner Inland Revenue v. Ranipur CNG Station, 2017 PTD 1839.

[10] Commissioner Inland Revenue v. Bashir Ahmed, 2021 SCMR 1290.

[11] The Constitution of the Islamic Republic of Pakistan, 1973.

[12] Commissioner Inland Revenue v. RYK Mills, 2023 SCMR 1856; Collector Central Excise v. Rahm Din, 1987 SCMR 1840 and Commissioner Inland Revenue v. Rose Food Industries, 2023 SCMR 2070.

[13] M.N. Rao and Amita Dhanda in N S Bindra's - Interpretation of Statutes (12th Edition, 2016) and Rehman Cotton Mills v. Federation of Pakistan, 2016 PTD 1256.

[14] M. P. Tandon - Interpretation of Statutes (12th Edition, 2019).

[15] Rehman Cotton Mills v. Federation of Pakistan 2016 PTD 1256.

[16] Hussain Patel v. Habib PLD 1981 SC 1 and Chief Administrator Auqaf v. Koura PLD 1991 SC 596

[17] Hamid Ashraf v. Commissioner Inland Revenue 2020 SCMR 843; Commissioner of Income Tax v. Asbestos Cement Industries 1993 SCMR 1276 and Kohinoor Sugar Mills v. Federation of Pakistan 2018 PTD 821

[18] Commissioner Inland Revenue v. Trillium Pakistan 2019 SCMR 1643 and Commissioner of Income Tax v. Nazir Ahmed and Sons 2004 PTD 921.

[19] Controller General of Accounts v. Abdul Waheed 2023 SCMR 111; Tariq Badar v. National Bank of Pakistan 2013 SCMR 314; Commissioner of Income Tax v. Eli Lilly Pakistan 2009 SCMR 1279; Hassan v. Fancy Foundation PLD 1975 SC 1; Province of East Pakistan v. Sharafatullah PLD 1970 SC 514 and Nagina Silk Mill v. Income Tax Officer PLD 1963 SC 322.

[20] Rajby Industries v. Federation of Pakistan 2023 SCMR 1407; Member (Taxes) Board of Revenue v. Qaisar Abbas 2019 SCMR 446; Zila Council Jhelum v. Pakistan Tobacco Company PLD 2016 SC 398 and Commissioner of Income Tax v. Eli Lilly Pakistan 2009 SCMR 1279.

[21] Controller General of Accounts v. Abdul Waheed 2023 SCMR 111; Manzoor Ali v. United Bank 2005 SCMR 1785; Malik Gul Hassan v. Allied Bank of Pakistan 1996 SCMR 237 and Adnan Afzal v. Sher Afzal PLD 1969 SC 187.

[22] Badshah Gul Wazir v. Government of Khyber Pakhtunkhwa 2015 SCMR 43.

[23] Adnan Afzal v. Capt. Sher Afzal PLD 1969 SC 187 and Gul Hasan v. Allied Bank of Pakistan 1996 SCMR 237

[24] The following two provisos were added after Section 122(9) through the Finance Act, 2021 and further amended through the Finance Act, 2022. -

"Provided that order under this section shall be made within one hundred and eighty days of issuance of show cause notice or within such extended period as the Commissioner may, for reasons to be recorded in writing, so however, such extended period shall in no case exceed ninety days. This proviso shall be applicable to a show cause notice issued on or after the first day of July, 2021.

Provided further that any period during which the proceedings are adjourned on account of a stay order or Alternative Dispute Resolution proceedings or agreed assessment proceedings under section 122D or the time taken through adjournment by the taxpayer not exceeding sixty days shall be excluded from the computation of the period specified in the first proviso".

[25] Per Serial No. 12 of the Table provided in Section 182 of the Ordinance, for an offence under Section 111, the penalty may amount to one hundred thousand rupees or an amount equal to the tax which the person sought to evade, whichever is higher.

**2024 S C M R 741**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, Jamal Khan Mandokhail and Athar Minallah, JJ**

**COMMISSIONER INLAND REVENUE, ZONE-IV, KARACHI---Appellants**

**Versus**

**Messrs A.P. MOLLER MAERSK and another---Respondents**

C.Ps. Nos. 560-K to 589-K of 2019, decided on 12th February, 2024.

(Against the consolidated judgment of High Court of Sindh at Karachi dated 31.05.2019, passed in ITRAs No.22 of 2014, etc.).

**(a) Income Tax Ordinance (XLIX of 2001)---**

----S.107---Treaties for the avoidance of double taxation, interpretation of---Scope---International tax treaties, conventions or agreements, given their unique nature, require a distinct interpretive approach compared to the one used while interpreting domestic legislation---These agreements being international treaties are governed by the rules of interpretation outlined in the Vienna Convention on the Law of Treaties---Tax treaties differ from domestic tax laws in language, application, and purpose---These treaties are relieving in nature and seek to avoid double taxation, while domestic tax law imposes tax in specific situations---Tax treaties require a broad purposive interpretation, and their interpretation may be more liberal than domestic law---Treaty interpretation is a separate subject from statutory interpretation, accentuating the need to interpret tax treaties independently of domestic law---Role of a State in a bilateral agreement is more of implementing the terms of such agreement rather than that of interpreting the same and that too in a unilateral manner---Given that the primary purpose of tax treaties is to avoid and relieve double taxation through equitable and acceptable distribution of tax claims between the countries, it is important that the provisions of these treaties are interpreted in a common and workable manner, taking into account international tax language, legal decisions of other countries, model treaties, along with their commentaries, developed by the Organization for Economic Cooperation and Development ("OECD") and the United Nations ("UN"), and scholarly academic works where appropriate.

Snamprogetti Engineering B.V. v. Commissioner of Inland Revenue 2023 SCMR 1055 ref.

**(b) Income Tax Ordinance (XLIX of 2001)---**

----S. 107---Convention between the Islamic Republic of Pakistan and the Kingdom of Denmark for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, Art. 8---Convention between the Kingdom of Belgium and the Islamic Republic of Pakistan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, Art. 8---Income arising from container detention charges ("CDC"), container service charges ("CSC") and terminal handling charges ("THC")---Such income falls within the category of "profits from the operation of ships in international traffic" in the context of double taxation conventions concluded between Pakistan and Denmark, as well as between Pakistan and Belgium.

The Commentary on Article 8 of the OECD Model Convention ("OECD MC") provides guidance about qualifying activities and related profits with respect to income falling under the head of "profits from the operation of ships in international traffic". The expression "profits from the operation of ships in international traffic" also covers profits from activities directly connected with such operations as well as profits from activities which are not directly connected with the operation of the enterprise's ship in international traffic as long as they are ancillary to such operation – activities that the enterprise does not need to carry on for the purposes of its own operation of ships in international traffic but which make a minor contribution relative to such operation and are so closely related to such operation that they should not be regarded as a separate business or source of income of the enterprise should be considered to be ancillary to the operation of ships in international traffic.

The objective scope of Article 8 of the OECD MC and the UN Model Convention ("UN MC") with its reference to "profits from the operation of ships in international traffic" covers not only profits directly obtained by the enterprise from the transportation of passengers or cargo by ships that it operates in international traffic, but also, profits from activities directly connected with such operations as well as profits from activities which are not directly connected with the operation of the enterprise's ships in international traffic as long as they are ancillary to such operation. Activities are to be considered ancillary to the operation of ships in international traffic if (i) the enterprise does not need to undertake them for the purposes of its own operation of ships in international traffic but which otherwise (ii) make a minor contribution relative to such

operation and (iii) are so closely related to such operation that they should not be regarded as a separate business or source of income. Article 8 OECD and UN MC therefore applies not only to profits directly obtained in international traffic e.g. transport of passengers or cargo, sales of tickets of the enterprise, leasing of ships, but also to profits directly connected with international traffic and to profits ancillary to international traffic e.g. inland transport, interest, code sharing and slot chartering, haulage services and catering services, provision of goods and services to other enterprises, sales of tickets on behalf of other enterprises, advertising on behalf of other enterprises, letting of immovable property, rental of containers.

Georg Kofler, in Reimer and Rust (eds), Klaus Vogel on Double Taxation Conventions (5th edn 2021) vol 1, art 8, paras 33, 35 ref.

Profits arising from short-term storage of containers or from detention charges for the late return of containers, are covered within the purview of “profits from the operation of ships in international traffic”. Further, special remuneration for services ancillary to container operations are covered within the ambit of shipping income from international traffic. Income derived from services provided for cargo handling is also considered part of shipping income from international traffic when directly connected or ancillary to the operation of ships in international traffic.Thus, profits arising from container detention charges (“CDC”), container service charges (“CSC”) and terminal handling charges (“THC”) are connected with and ancillary to the operation of ships in international traffic. Consequently, these profits squarely fall within the purview of the expression “profits from the operation of ships in international traffic”. Therefore, CDC, CSC, and THC collected by the respondents (non-resident cargo shipping companies incorporated in Denmark and Belgium) are part of the revenue earned in shipping in international traffic and are to be dealt with in accordance with the provisions of the Pakistan-Denmark Double Taxation Convention and the Pakistan-Belgium Double Taxation Convention, as the case may be.

Dr. Shahnawaz, Advocate Supreme Court and Abdul Wahid, Addl. Commissioner, FBR for Petitioner (in all cases).

Khalid Javed Khan, Advocate Supreme Court for Respondents (Through V.L. Karachi Registry) (In all cases).

Date of hearing: 12th January, 2024.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The question before us is whether income arising from container detention charges ("CDC"), container service charges ("CSC") and terminal handling charges ("THC") falls within the category of "profits from the operation of ships in international traffic" in the context of double taxation conventions concluded between Pakistan and Denmark, as well as between Pakistan and Belgium.

2. The respondents are non-resident companies, one incorporated in Denmark and the other in Belgium. They are involved in cargo shipping activities, conducting their business operations within Pakistan through the authorized agent, M/s Maersk Pakistan (Private) Limited. The respondents filed income tax returns, accounting for income derived from freight charges, CDC, CSC and THC. They claimed entitlement to tax benefits under Article 8 of the Convention between the Islamic Republic of Pakistan and the Kingdom of Denmark for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income ("Pakistan-Denmark Convention"), and similarly, under Article 8 of the Convention between the Kingdom of Belgium and the Islamic Republic of Pakistan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income ("Pakistan-Belgium Convention"), as the case may be.

3. The Deputy Commissioner Inland Revenue disagreed with the aforementioned assessment, asserting that CDC, CSC, and THC were not eligible under the beneficial provisions of the Pakistan-Denmark Convention and the Pakistan-Belgium Convention. The Deputy Commissioner reasoned that these charges were not explicitly covered under Article 8 of either Convention, which addresses beneficial taxation in relation to "profits from the operation of ships in international traffic". The respondents remained unsuccessful both in the appeal before the Commissioner Inland Revenue (Appeals) and in the subsequent appeal before the Appellate Tribunal Inland Revenue. Nevertheless, the High Court, in its decision given in Income Tax References filed by the respondents, concluded that profits arising from CDC, CSC, and THC fell within the scope of the term "profits from the operation of ships in international traffic" as stipulated in Article 8 of the two Conventions. Consequently, such profits were deemed eligible for the benefit of favourable taxation. The Department is now seeking leave to appeal the High Court's determination, challenging the inclusion of CDC, CSC, and THC under the umbrella of "profits from the operation of ships in international traffic" and their eligibility for beneficial taxation envisaged in Article 8 of the two Conventions.

4. We have heard the arguments of the learned counsel for the parties and have carefully gone through the record.

5. The respondents, being tax residents of Denmark and Belgium, are entitled to the benefits and concessions under the Pakistan-Denmark Convention and the Pakistan-Belgium Convention, as the case may be, in line with the provisions of Section 107 of the Income Tax Ordinance 2001 ("Ordinance"). Under subsection 2(c) of Section 107 of the Ordinance, the taxability of the respondents' income is to be determined under the provisions contained in the two Conventions which override the Ordinance. These Conventions provide for allocation of taxing jurisdiction to the contracting States in respect of different heads of income. With respect to the income falling under the head of "profits from the operation of ships in international traffic" which is dealt with under Article 8 in both the Conventions, the allocation of jurisdiction to the contracting States is not identical. The Pakistan-Belgium Convention assigns the sole right to tax profits from operating ships in international traffic to the residence State. In contrast, the Pakistan-Denmark Convention permits the source State to tax these profits, but only to the extent derived from sources within that State, in accordance with its domestic law. However, this difference is not relevant for the purposes of the dispute before us. The issue before us, common to both the Conventions, relates to the nature of profits arising from CDC, CSC, and THC: whether these profits fall within the scope of the term "profits from the operation of ships in international traffic" or not. If this question is decided in the affirmative, the respondents' profits resulting from CDC, CSC, and THC will be subjected to taxing provisions contained in Article 8 of the respective Conventions. Otherwise, profits resulting from CDC, CSC, and THC will not be considered as shipping income eligible to be dealt with under Article 8 of the two Conventions.

6. Notably, the matter at hand involves the interpretation of international tax conventions. Recently, this Court in Snamprogetti[1] emphasized the distinctiveness of international tax treaties, their specific interpretive framework, and the importance of equitable outcomes in cross-border taxation. International tax treaties, conventions or agreements, given their unique nature, as held in Snamprogetti, require a distinct interpretive approach compared to the one used while interpreting domestic legislation. These agreements being international treaties are governed by the rules of interpretation outlined in the Vienna Convention on the Law of Treaties. Tax treaties differ from domestic tax laws in language, application, and purpose. These treaties are relieving in nature and seek to avoid double taxation, while domestic tax law imposes tax in specific situations. Tax treaties require a broad purposive interpretation, and their interpretation may be more liberal than domestic law. Treaty interpretation is a separate subject from statutory interpretation, accentuating the need to interpret tax treaties independently of domestic law. The role of a State in a bilateral agreement is more of implementing the terms of such agreement rather than that of interpreting the same and that too in a unilateral manner. Given that the primary purpose of tax treaties is to avoid and relieve double taxation through equitable and acceptable distribution of tax claims between the countries, it is important that the provisions of these treaties are interpreted in a common and workable manner, taking into account international tax language, legal decisions of other countries, model treaties[2], along with their commentaries, developed by the Organization for Economic Cooperation and Development ("OECD")[3] and the United Nations ("UN")[4], and scholarly academic works where appropriate.

7. We see that the operation of ships in international traffic has been given special tax treatment in Pakistan-Denmark Convention and the Pakistan-Belgium Convention in accord with the OECD Model Convention ("OECD MC") and the UN Model Convention ("UN MC"). The general policy underlying the special rule for international shipping and the deviation from the allocation of taxing rights based on the permanent establishment principle has its roots at the very beginning of tax treaty law. Maritime shipping was viewed as an activity that warrants a special rule. Having regard to the distinct nature of activities carried on by shipping (air transport was also added to this category later) entities which operate across different routes spread across several countries and the complexity of apportioning profits arising from such business across numerous countries, it was felt that general provisions dealing with business profits would result in taxation of fragmented profits in numerous countries, thereby possibly leading to double taxation. Accordingly, it was considered necessary to introduce a separate provision in the OECD MC, and also in the UN MC, to specifically deal with profits from operations of shipping and air transport business in international traffic. The provision relating to shipping and air transport takes precedence over the general rule relating to business profits and the permanent establishment principle is not applied to profits falling within its scope of application i.e. profits arising from the operation of ships and aircraft in international traffic. More importantly, this provision also takes into account the fact that shipping and air transport enterprises invariably carry on a large variety of activities to permit, facilitate or support their international traffic operations.[5]

8. The issue before us pertains to the characterization of income arising from CDC, CSC, and THC. Let us have a look at the meaning of CDC, CSC, and THC in order to understand the nature of these incomes. The High Court has observed, and there exists no contention between the parties on this point, that CDC is the amount collected on account of rent of container, which is charged if a customer holds the said container beyond the stipulated time required to discharge the goods at the intended port of disembarkation; CSC is collected by shipping lines on account of services in respect of containers which may be required due to discharge of goods at the destination; and THC is collected by shipping lines on account of terminal charges incurred at the port of disembarkation. With this understanding of the aforementioned sources of income viz. CDC, CSC and THC, we proceed to examine whether such income aligns with the expression "profits from the operation of ships in international traffic".

9. The Commentary on Article 8 of the OECD MC provides guidance about qualifying activities and related profits with respect to income falling under the head of "profits from the operation of ships in international traffic". It provides that the profits covered consist in the first place of the profits directly obtained by the enterprise from the transportation of passengers or cargo by ships that it operates in international traffic such as any activity carried on primarily in connection with the transportation, by the enterprise, of passengers or cargo by ships that it operates in international traffic. It is then recognized that with the evolution of international transport, shipping enterprises invariably carry on a large variety of activities to permit, facilitate or support their international traffic operations. The expression "profits from the operation of ships in international traffic" therefore also covers profits from activities directly connected with such operations as well as profits from activities which are not directly connected with the operation of the enterprise's ship in international traffic as long as they are ancillary to such operation - activities that the enterprise does not need to carry on for the purposes of its own operation of ships in international traffic but which make a minor contribution relative to such operation and are so closely related to such operation that they should not be regarded as a separate business or source of income of the enterprise should be considered to be ancillary to the operation of ships in international traffic.[6] We also note that since 2017, the UN MC Commentary fully reproduces the OECD guidance.

10. The objective scope of Article 8 of the OECD MC and the UN MC with its reference to "profits from the operation of ships in international traffic" covers not only profits directly obtained by the enterprise from the transportation of passengers or cargo by ships that it operates in international traffic, but also, profits from activities directly connected with such operations as well as profits from activities which are not directly connected with the operation of the enterprise's ships in international traffic as long as they are ancillary to such operation. Activities are to be considered ancillary to the operation of ships in international traffic if (i) the enterprise does not need to undertake them for the purposes of its own operation of ships in international traffic but which otherwise (ii) make a minor contribution relative to such operation and (iii) are so closely related to such operation that they should not be regarded as a separate business or source of income. Article 8 OECD and UN MC therefore applies not only to profits directly obtained in international traffic e.g. transport of passengers or cargo, sales of tickets of the enterprise, leasing of ships, but also to profits directly connected with international traffic and to profits ancillary to international traffic e.g. inland transport, interest, code sharing and slot chartering, haulage services and catering services, provision of goods and services to other enterprises, sales of tickets on behalf of other enterprises, advertising on behalf of other enterprises, letting of immovable property, rental of containers.[7]

11. The issue in question concerns income arising from three sources: CDC, CSC, and THC. Notably, two of these sources involve charges imposed for services related to containers, whereas the third pertains to charges associated with terminal services for cargo handling. In the context of such income sources, Vogel, a recognized authority, emphasizes the widespread use of containers in international transport. Profits arising from short-term storage of containers or from detention charges for the late return of containers, according to Vogel, are covered within the purview of "profits from the operation of ships in international traffic". Further, special remuneration for services ancillary to container operations are covered within the ambit of shipping income from international traffic. Income derived from services provided for cargo

handling is also considered part of shipping income from international traffic when directly connected or ancillary to the operation of ships in international traffic.[8]

12. We thus reach the conclusion that profits arising from CDC, CSC and THC are connected with and ancillary to the operation of ships in international traffic. Consequently, these profits squarely fall within the purview of the expression "profits from the operation of ships in international traffic". Therefore, CDC, CSC, and THC collected by the respondents are part of the revenue earned in shipping in international traffic and are to be dealt with in accordance with the provisions of the Pakistan-Denmark Double Taxation Convention and the Pakistan-Belgium Double Taxation Convention, as the case may be. As a result, we do not feel inclined to interfere with the judgment of the High Court. These petitions are therefore dismissed.

MWA/C-1/SC Petitions dismissed.

1 Snamprogetti Engineering B.V. v Commissioner of Inland Revenue, 2023 SCMR 1055.

2 Model treaties provide standard frameworks of guidance for treaty negotiation and are of high persuasive value in terms of de fining the parameters of double taxation treaties and have world-wide recognition as basic documents of reference in the negotiation, application and interpretation of multilateral or bilateral tax conventions.

3 OECD Model Tax Convention on Income and on Capital.

4 United Nations Model Double Taxation Convention between Developed and Developing Countries.

5 Georg Kofler, in Reimer and Rust (eds), *Klaus Vogel on Double Taxation Conventions* (5th edn 2021) vol 1, art 8, paras 7, 33. See also Shefali Goradia, 'Taxation of Services' in Guglielmo Maisto (ed), *Current Tax Treaty Issues,* vol 18 (IBFD EC and International Tax Law Series 2020) 535-536; Ola Ostaszewska and Belema Obuoforibo (eds), *Roy Rohatgi on International Taxation*, vol 1 (IBFD 2018) 187.

6 OECD MC Commentary, art 8.

7 Georg Kofler, in Reimer & Rust (eds), Klaus Vogel on Double Taxation Conventions (5th edn 2021) vol 1, art 8, paras 33, 35.

8 ibid, paras 44-46.

**2024 S C M R 775**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, Jamal Khan Mandokhail and Athar Minallah, JJ**

**TAHIR SADIQ---Petitioner**

**Versus**

**FAISAL ALI and others---Respondents**

Civil Petitions Nos. 150 and 152 of 2024, decided on 29th January, 2024.

(Against the judgments of the Lahore High Court, Lahore dated 16.01.2024, passed in W.Ps. Nos. 2974 and 2994 of 2024).

**(a) Constitution of Pakistan---**

----Arts. 17(2), 19, 62 & 63---Elections Act (XXXIII of 2017), S. 62---Elections---Right to vote for a candidate of one's choice---Scope---Interpretation of elections laws in favour of enfranchisement rather than disenfranchisement---Nomination papers for elections---Acceptance or rejection---Principles.

The courts, in their role as guardians of democracy and fundamental rights, should approach electoral matters with circumspection, ensuring that their interventions uphold the democratic principles upon which the nation thrives and the fundamental rights of citizens to contest elections and vote for the candidates of their choice. The right to vote freely for the candidate of one's choice is the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. The working of democracy depends on whether the people can decide the fate of the elected form of government. It depends on the choices that people make in different ways. This choice of people cannot be compromised, as their mandate in elections

changes the destinies of government. Through the electoral process and voting, citizens participate in democracy. By voting, citizens take part in the public affairs of the country. Thus, citizens by voting enjoy their right to choose the composition of their government by exercising their choice and ability to participate.

Reynolds v. Sims (1964) 377 U.S. 533 and Anoop Baranwal v. Union of India (2023) 6 SCC 161 ref.

The right to form or be a member of a political party under Article 17(2) of the Constitution includes not only the right to contest elections but also the right to vote for the candidate of one's choice. When viewed against the backdrop of the constitutional value of 'political justice', Article 17(2) remains hollow unless it also recognizes the right of citizens to choose their representatives fairly and freely from amongst the candidates. The right of citizens to participate in national elections as voters is the core of the democratic form of government. This right is also an expression of the choice of the citizens, which finds further support under Article 19 of the Constitution. In exercise of these fundamental rights, citizens shape their destiny by forming the government they want.

Wesberry v. Sanders (1964) 376 U.S. 1; Javed Jabbar v. Federation of Pakistan PLD 2003 SC 955; Pakistan Muslim League (Q) v. Chief Executive of Islamic Republic of Pakistan PLD 2002 SC 994; Nawaz Sharif v. President of Pakistan PLD 1993 SC 473; Province of Sindh v. M.Q.M. PLD 2014 SC 531; Nasir Iqbal v. Federation of Pakistan PLD 2014 SC 72 and Arshad Mehmood v. Delimitation Authority PLD 2014 Lah. 221 ref.

It is in this context of both the right of the candidates to contest the election and the right of the voters to vote for the candidate of their choice that the qualification and disqualification of a candidate become material. The aim of prescribing qualifications and disqualifications for candidacies to contest elections is to maintain the integrity and effectiveness of the political process. They are designed to ensure that individuals holding public office meet certain standards. In a well functioning democracy, the criteria for qualifications and disqualifications are clearly defined, publicly known and uniformly applied. Qualifications and disqualifications of a candidate for the electoral process must therefore be clearly spelled out in the Constitution or the law. Otherwise, electoral laws must be interpreted in favour of enfranchisement rather than disenfranchisement so that maximum choice remains with the voters to elect their future leadership. With this approach rooted in the high constitutional rights and values, the courts are to deal with the matters of acceptance or rejection of the nomination papers filed for contesting elections.

**(b) Elections Act (XXXIII of 2017)---**

----Ss. 62, 231 & 232---Constitution of Pakistan, Arts. 62 & 63---Criminal Procedure Code (V of 1898), S. 87---Elections for seat of National Assembly---Nomination papers---Proclaimed offender---Nomination papers of petitioner (candidate) rejected by the High Court on the ground that he was a proclaimed offender in a criminal case---Validity---Counsel for the Election Commission of Pakistan (ECP) could not show any proclamation issued against the petitionerunder Section 87 of the Code of Criminal Procedure 1898 ("Cr.P.C.")---Objector, too had no document to establish that the petitioner was a proclaimed offender---In the absence of proceedings taken under Section 87, Cr.P.C, an accused cannot be said or treated to be a proclaimed offender---Further, as the rule of declining discretionary reliefs to a proclaimed offender is one of propriety when the same is confronted with a right, it is the right, not the rule of propriety, that prevails---The disadvantage, if any, forbeing a proclaimed offender ordinarily relates only to the case in which a person has been so proclaimed, and not to the other cases or matters which have no nexus to that case, for instance the civil right of a person to contest an election---In the absence of any contrary provision in the Constitution or the Elections Act 2017 ("Act"), status of being a proclaimed offender in a criminal case does not affect said right of a

person---Counsel for the ECP could not point out any provision either in the Constitution or in the Act that empowers the Returning Officers to reject the nomination papers of the candidates on the ground of their being proclaimed offenders---Since there is no law that makes a proclaimed offender disqualified from contesting election, the Returning Officers, the Appellate Tribunals or the Courts cannot on their own create such additional disqualification, without the backing of law---Articles 62 and 63 of the Constitution read with Sections 231 and 232 of the Act provide for qualification and disqualification of a candidate, which does not mention that a "proclaimed offender" is disqualified from being elected or from being a member of Parliament---Grounds provided for rejection of a nomination paper in Section 62(9) of the Act also do not empower the Returning Officers to reject the nomination paper of a candidate on the ground of his being a proclaimed offender---Petitions were converted into appeals and the same were allowed; the impugned orders of the High Court were set aside and the nomination paper of the petitioner for the seat of a Member of the National Assembly stood accepted.

Parvez Elahi v. E.C.P. 2024 SCP 41; Khan Mir v. Amal Sherin 1989 SCMR 1987; Muhammad Shafi v. State 2016 SCMR 1593 and Nawazish Ali v. E.C.P. 2018 CLC 1301 and Umar Aslam v. E.C.P. 2024 SCP 40 ref.

Muhammad Shahzad Shaukat, Advocate Supreme Court and Ch. Akhtar Ali, Advocate-on-Record for Petitioner.

Muhammad Arshad, DG (Law) and Falak Sher, Consultant Law for the ECP.

Syed Azmat Ali Bokhari, Advocate Supreme Court and Faisal Ali, in person (for the objector).

Date of hearing: 29th January, 2024.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**Elections stand as a manifestation of the collective will of a nation, reflecting the diverse voices and choices of its citizens. In this democratic process, individuals exercise their right to vote, contributing to the formation of a representative government. The rights involved are not only of those participating in the elections but also of the public. The courts, in their role as guardians of democracy and fundamental rights, should approach electoral matters with circumspection, ensuring that their interventions uphold the democratic principles upon which the nation thrives and the fundamental rights of citizens to contest elections and vote for the candidates of their choice. 'The right to vote freely for the candidate of one's choice is the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.'[1] The working of democracy depends on whether the people can decide the fate of the elected form of government. It depends on the choices that people make in different ways. This choice of people cannot be compromised, as their mandate in elections changes the destinies of government. Through the electoral process and voting, citizens participate in democracy. By voting, citizens take part in the public affairs of the country. Thus, citizens by voting enjoy their right to choose the composition of their government by exercising their choice and ability to participate.[2]

2. 'No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.'[3] The right to form or be a member of a political party under Article 17(2) of our Constitution[4] includes not only the right to contest elections[5] but also the right to vote[6] for the candidate of one's choice. When viewed against the backdrop of the constitutional value of 'political justice', Article 17(2) remains hollow unless it

also recognizes the right of citizens to choose their representatives fairly and freely from amongst the candidates. The right of citizens to participate in national elections as voters is the core of the democratic form of government. This right is also an expression of the choice of the citizens, which finds further support under Article 19 of the Constitution.[7] In exercise of these fundamental rights, citizens shape their destiny by forming the government they want.

3. It is in this context of both the right of the candidates to contest the election and the right of the voters to vote for the candidate of their choice that the qualification and disqualification of a candidate become material. The aim of prescribing qualifications and disqualifications for candidacies to contest elections is to maintain the integrity and effectiveness of the political process. They are designed to ensure that individuals holding public office meet certain standards. In a well-functioning democracy, the criteria for qualifications and disqualifications are clearly defined, publicly known and uniformly applied. Qualifications and disqualifications of a candidate for the electoral process must therefore be clearly spelled out in the Constitution or the law. Otherwise, electoral laws must be interpreted in favour of enfranchisement rather than disenfranchisement so that maximum choice remains with the voters to elect their future leadership.[8] With this approach rooted in the high constitutional rights and values, the courts are to deal with the matters of acceptance or rejection of the nomination papers filed for contesting elections.

4. Briefly, the facts of the case are that the nomination paper of the petitioner for the seat of a Member of the National Assembly from NA-49, Attock-I, was rejected by the Returning Officer on 30 December 2023, mainly on the ground that the petitioner was a 'proclaimed offender'. However, on appeals of the petitioner, the Appellate Tribunal accepted his nomination paper, on 6 January 2024. Thereafter, the respondent filed writ petitions before the Lahore High Court, which were decided vide the impugned orders dated 16 January 2023, and the nomination paper of the petitioner was once again rejected on the ground that the petitioner was a proclaimed offender. Hence, these petitions.

5. We have heard the learned counsel for the petitioner and the Election Commission of Pakistan ("ECP") as well as the objector who appeared in person and examined the record of the case.

6. Since the petitioner's nomination paper has been rejected on the ground of his being a proclaimed offender, we in the course of the hearing asked the learned counsel for the ECP to show the order made and the proclamation issued against the petitioner under Section 87 of the Code of Criminal Procedure 1898 ("Cr.P.C.") but he was unable to refer to any such order and proclamation. We then called upon the objector, who was present in court, to tell us the source of his objection. He frankly submitted that some of his friends had mentioned it to him, but he has no document to establish that the petitioner is a proclaimed offender. Hence, there is nothing on the record that the petitioner is a proclaimed offender. Needless to say, in the absence of proceedings taken under Section 87, Cr.P.C, an accused cannot be said or treated to be a proclaimed offender.[9] Further, as the rule of declining discretionary reliefs to a proclaimed offender is one of propriety when the same is confronted with a right, it is the right, not the rule of propriety, that prevails.[10] It is also important to note that the disadvantage, if any, for being a proclaimed offender ordinarily relates only to the case in which a person has been so proclaimed, and not to the other cases or matters which have no nexus to that case. For instance, a proclaimed

offender is not disentitled to institute or defend a civil suit, or an appeal arising therefrom, regarding his civil rights and obligations. The same is the position with the civil right of a person to contest an election; in the absence of any contrary provision in the Constitution or the Elections Act 2017 ("Act"), his status of being a proclaimed offender in a criminal case does not affect his said right.[11]

7. The learned counsel for the ECP could not point out any provision either in the Constitution or in the Act that empowers the Returning Officers to reject the nomination papers of the candidates on the ground of their being proclaimed offenders. Since there is no law that makes a proclaimed offender disqualified from contesting election, the Returning Officers, the Appellate Tribunals or the Courts cannot on their own create such additional disqualification, without the backing of law.[12] As per the constitutional command of Article 4 of the Constitution, they all are bound to treat every citizen in accordance with law and cannot prevent or hinder a person from doing that which is not prohibited by law.

8. Articles 62 and 63 of the Constitution read with Sections 231 and 232 of the Act provide for qualification and disqualification of a candidate, which does not mention that a "proclaimed offender" is disqualified from being elected or from being a member of Parliament. The grounds provided for rejection of a nomination paper in Section 62(9) of the Act also do not empower the Returning Officers to reject the nomination paper of a candidate on the ground of his being a proclaimed offender. Although no provision of the Act has been pointed out to us that requires the necessary presence of the candidate during the electoral process, we may observe that if there is any such provision, the absence of the candidate may have its own consequences under that provision, but his nomination paper cannot be rejected on such ground unless the legislature so provides in Section 62(9) of the Act. Therefore, the High Court is found to have made a legal error in rejecting the petitioner's nomination paper on the ground of his being allegedly a proclaimed offender. Because of the current stage in the electoral process, we allowed interim relief to the petitioner on 26 January 2024. ECP shall be free to recover the expenses incurred in this case, if any, from the objector.

9. In view of the above legal position, these petitions are converted into appeals and the same are allowed. The impugned orders of the High Court are set aside and the nomination paper of the petitioner for the seat of a Member of the National Assembly from NA-49, Attock-I, stands accepted. The ECP shall ensure that all the necessary steps to be taken in the electoral process are completed forthwith so that the petitioner can contest the election on the scheduled date for the said seat, without fail.

MWA/T-1/SC Appeals allowed.

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1 Reynolds v Sims (1964) 377 U.S. 533.

2 Anoop Baranwal v. Union of India (2023) 6 SCC 161.

3 Wesberry v. Sanders (1964) 376 U.S. 1.

4 The Constitution of the Islamic Republic of Pakistan.

5 Javed Jabbar v. Federation of Pakistan PLD 2003 SC 955; Pakistan Muslim League (Q) v. Chief

Executive of Islamic Republic of Pakistan PLD 2002 SC 994 and Nawaz Sharif v. President of Pakistan PLD 1993 SC 473.

[6] Province of Sindh v. M.Q.M. PLD 2014 SC 531; Nasir Iqbal v. Federation of Pakistan PLD 2014 SC 72 and Arshad Mehmood v. Delimitation Authority PLD 2014 Lah 221.

[7] Ibid.

[8] Parvez Elahi v. E.C.P. 2024 SCP 41.

[9] Khan Mir v. Amal Sherin 1989 SCMR 1987.

[10] Muhammad Shafi v. State 2016 SCMR 1593.

[11] We approve the similar view taken by a Division Bench of the Lahore High Court in Nawazish Ali v. E.C.P. 2018 CLC 1301.

[12] Umar Aslam v. E.C.P. 2024 SCP 40.

**2024 S C M R 826**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, Amin-ud-Din Khan and Jamal Khan Mandokhail, JJ**

**AMIR SULTAN and 2 others---Petitioners**

**Versus**

**ADJUDICATING AUTHORITY-III EOBI, ISLAMABAD and others---Respondents**

C.P. No.3531 of 2021, C.Ps. Nos. 408, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2468, 2469, 2470, 2471, 2472, 2473 of 2023 and C.P. No. 3495 of 2023, decided on 18th February, 2024.

(Against the judgment of Islamabad High Court, Islamabad dated 27.04.2021 passed in W.P. No. 2502 of 2020 etc.)

**(a) Employees' Old-Age Benefits Act (XIV of 1976)---**

----S. 22 & Preamble---Employees' Old-Age Benefits Act, 1976---Liberal interpretation---Employees' Old-Age Benefits Act, 1976 is a beneficial statute intended to provide security and old-age benefits to employees of industrial, commercial or other organizations covered by it and, therefore, its provisions have to be construed liberally in order to advance its objective.

Don Basco High School v. The Assistant Director EOBI, PLD 1989 SC 128 and Lahore Race Club v. Deputy Director EOBI, 1998 SCMR 1571 ref.

**(b) Employees' Old-Age Benefits Act (XIV of 1976)---**

----S. 22(2)---Old age pension---Exception under Section 22(2) of the Employees' Old-Age Benefits Act, 1976 ("the EOB Act, 1976)---Applicability---Stage when the exception under Section 22(2) of the EOB Act, 1976 becomes applicable---To avail the exception under Section 22(2) of the the EOB Act, 1976, the insured person must satisfy that he was in employment in the industry or establishment on the first day of July 1976 or on the day the Act became applicable to such an industry or establishment and was of the age mentioned in Section 22(2)(i) and (ii) of the Act.

Section 22(1) of the Employees' Old-Age Benefits Act, 1976 ("the Act") provides that an insured person is entitled to monthly old-age pension if (i) he is over sixty years of age, or over fifty-five years of age in the case of a woman, and (ii) the contribution in respect of such insured person was paid by the employer for not less than fifteen years. It is only when both these conditions are fulfilled that an insured person is entitled to monthly old-age pension under the said provision. An exception is provided under Section 22(2) of the Act whereby the number of years of contribution paid by the employer on behalf of the insured person is reduced to seven and five years, respectively instead of fifteen years under section 22(2) if on the first day of July, 1976 or on any day thereafter on which the Act becomes applicable to an industry or establishment; (i) the insured person is over forty years of age, or over thirty-five years of age in the case of a woman or (ii) the insured person is over forty-five years of age, or over forty years in the case of a woman.

The first cut-off date i.e., first day of July 1976 is the date when the Act was implemented. As per section 9 of the Act, the first contribution was paid by the employer on the said date. The second cut-off date is when the Act becomes applicable to an industry or establishment. Section 1(4) of the Act provides three different modes through which the Act becomes applicable to an industry or establishment. It is at these two points in time when the age of the insured person in terms of Section 22(2)(i) and (ii) becomes relevant for invoking the exception of reduced years of contribution under the said provision. The age of the insured person alone is not the determining factor for the case to fall within the exception under Section 22(2) but it is also that the age must be so at the relevant cut-off dates mentioned above. As such, an insured person cannot avail the exception under Section 22(2) if he was employed after the cut-off date, i.e., first day of July 1976 or after the date when the Act became applicable to the industry or establishment under Section1(4) of the Act. Therefore, to avail the exception under Section 22(2) of the Act, the insured person must satisfy that he was in employment in the industry or establishment on the first day of July 1976 or on the day the Act became applicable to such an industry or establishment and was of the age mentioned in Section 22(2)(i) and (ii) of the Act.

For the Petitioner(s):

Haroon Irshad Janjua, Advocate Supreme Court.

Ch. Akhtar Ali (in C.P. No. 3531 of 2023).

Muhammad Tariq, Advocate Supreme Court (in C.P. No. 3495 of 2023).

Muhammad Umer Riaz, Advocate Supreme Court.

Khurram M. Qureshi, Advocate Supreme Court

Barrister Abu Bakar along with Muhammad Amin, Deputy Director General, EOBI and Abdul Ahad, Director (Law) EOBI.

Ghulam Muhammad, Director (Operations), EOBI (in C.P. No. 408 of 2023, C.P's Nos. 2451-2458 of 2023 and C.P's Nos. 2469-2473 of 2023).

For the Respondent(s):

Mukhar Ahmed Maneri, Advocate Supreme Court (in C.P. No. 3531 of 2023 and C.P. No. 3495 of 2023).

Raja Muhammad Rafiq Janjua, Advocate High Court along with Private Respondents (in C.Ps. Nos. 408, 2451-2458 and 2469-2473 of 2023).

Date of hearing: 18th January, 2024.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**Under Section 22(1) of the Employees' Old-Age Benefits Act, 1976[1] ("Act") an insured person[2] is entitled to monthly old-age pension at the rate specified in the Schedule to the Act; (i) if he is sixty years of age or fifty five years in case of a woman and (ii) contribution[3] in respect of him were paid for not less than fifteen years. Section 22(2) of the Act provides an exception to the above to the effect that an insured person will also be entitled to an old-age pension if he on 1st July 1976 or on any day thereafter on which this Act becomes applicable to the industry or establishment was (i) over forty years of age or thirty five years in case of a woman, and contribution in respect of him was paid for not less than seven years or (ii) over forty five years of age or forty years in case of a woman, and contribution in respect of him was paid for not less than five years.

2. What requires determination by us is the stage when the exception under Section 22(2) of the Act becomes applicable. Whether the exception is based on the age of the insured person, as given under Section 22(2)(i) and (ii), whenever he enters insurable employment in an industry or establishment or whether the exception applies when the age of the insured person is as per Section 22(2)(i) and (ii) on the cut off dates i.e., first day of July 1976, or when the Act becomes applicable to the said industry or establishment.

3. This question arises before us out of two sets of judgments from different High Courts. Through judgments dated 27.04.2021[4] and 19.06.2023[5] passed by the Islamabad High Court and the Peshawar High Court, Peshawar, respectively, the matter was decided in favour of the Employees' Old-Age Benefits Institution ("EOBI") and against the insured persons ("respondents"). Through judgments dated 03.04.2023[6] and 30.11.2022[7] passed by the Islamabad High Court and the Sindh High Court, Karachi, respectively, the matter was decided against the EOBI and in favour of the respondents. Hence there have been conflicting opinions of the respective High Courts on the interpretation of Section 22(2) of the Act.

4. The learned counsel for EOBI submits that the exception in Section 22(2) of the Act has limited application and can only be availed by an insured person, who is of the age as mentioned in Section 22(2)(i) and (ii) at two cut off dates; (i) on the first day of July, 1976 or (ii) when thereafter the Act becomes applicable to an industry or establishment. As such, he submits that the exception is only a one-time concession granted on the above two cut- off dates.

5. On the other hand, the learned counsel for the respondents submit that exception under Section 22(2) of the Act is automatically attracted when a person enters insurable employment in an industry or establishment at the age mentioned in Section 22(2)(i) or (ii) irrespective of the cut-off dates mentioned above.

6. We have heard the learned counsel for the parties, have gone through the relevant provisions of the Act and have perused the record with their able assistance.

7. Under Article 38 of the Constitution[8], it is the duty of the State to promote social and economic well-being of the people by, inter alia, providing for all persons employed in the service of Pakistan or otherwise, social security by compulsory social insurance or other means. It was in discharge of this responsibility that the Act was enacted by the Federal Legislature under entry 26 of the erstwhile Concurrent List of the Constitution and implemented on 1st July, 1976[9] to provide old-age benefits to persons employed in industrial, commercial and other organizations.[10] The Act is a beneficial statute intended to provide security and old-age benefits to employees of industrial, commercial or other organizations covered by it and, therefore, its provisions have to be construed liberally in order to advance its objective.[11] With this understanding, we move to decide the present case.

8. The Act applies to every industry or establishment as described in Section 1(4) of the Act. Further, as the matter relates to the applicability of Section 22(1) and (2) of the Act, these provisions are being reproduced hereunder for ready reference:

1. Short title, extent, commencement and application.---(1) This Act may be called the Employees' Old-Age Benefits Act, 1976.

(2) It extends to the whole of Pakistan.

(3) It shall come into force at once.

(4) It applies to every industry or establishment-

(i) wherein ten or more persons are employed by the employer, directly or through any other person, whether on behalf of himself or any other person, or were so employed on any day during the preceding twelve months, and shall continue to apply to every such industry or establishment even if the number of persons employed therein is, at any time after this Act becomes applicable to it, reduced to less than ten; or

(ia) wherein less than ten persons are employed if such industry or establishment voluntarily applies for application of this Act and this Act shall apply to such industry or establishment from the date of submission of an application by such industry or establishment; or

(ii) which the Federal Government may, by notification in the official Gazette, specify in this behalf.

22. Old-age pension.- (1) An insured person shall be entitled to a monthly old-age pension at the rate specified in the Schedule:

Provided that-

(a) he is over sixty years of age, or fifty-five years in the case of a women; and

(b) contribution in respect of him were paid for not less than fifteen years.

...

(2) If an insured person was on the first day of July, 1976 or is on any day thereafter on which this Act becomes applicable to an industry or establishment,-

(i) over forty years of age, or thirty-five years in the case of a woman, clause (b) of subsection (1) shall have effect as if for the word "fifteen" therein the word "seven" were substituted; or

(ii) over forty-five years of age, or forty years in the case of a woman, clause (b) of subsection (1) shall have effect as if for the word "fifteen" therein the word "five" were substituted.

9. Section 22(1) provides that an insured person is entitled to monthly old-age pension if (a) he is over sixty years of age, or over fifty-five years of age in the case of a woman, and (b) the contribution in respect of such insured person was paid by the employer for not less than fifteen years. It is only when both these conditions are fulfilled that an insured person is entitled to monthly old-age pension under the said provision. An exception is provided under Section 22(2) of the Act whereby the number of years of contribution paid by the employer on behalf of the insured person is reduced to seven and five years, respectively instead of fifteen years under section 22(2) if on the first day of July, 1976 or on any day thereafter on which the Act becomes

applicable to an industry or establishment; (i) the insured person is over forty years of age, or over thirty-five years of age in the case of a woman or (ii) the insured person is over forty-five years of age, or over forty years in the case of a woman.

10. The first cut-off date i.e., first day of July 1976 is the date when the Act was implemented. As per section 9 of the Act, the first contribution was paid by the employer on the said date. The second cut-off date is when the Act becomes applicable to an industry or establishment. Section 1(4) of the Act provides three different modes through which the Act becomes applicable to an industry or establishment. It is at these two points in time when the age of the insured person in terms of Section 22(2)(i) and (ii) becomes relevant for invoking the exception of reduced years of contribution under the said provision. The age of the insured person alone is not the determining factor for the case to fall within the exception under Section 22(2) but it is also that the age must be so at the relevant cut-off dates mentioned above. As such, an insured person cannot avail the exception under Section 22(2) if he was employed after the cut-off date, i.e., first day of July 1976 or after the date when the Act became applicable to the industry or establishment under Section 1(4) of the Act. Therefore, to avail the exception under Section 22 (2) of the Act, the insured person must satisfy that he was in employment in the industry or establishment on the first day of July 1976 or on the day the Act became applicable to such an industry or establishment and was of the age mentioned in Section 22(2)(i) and (ii) of the Act.

11. For the above reasons, the petitions filed by the EOBI are converted into appeals and allowed, whereas the petitions filed by the respondents (insured persons) are dismissed and leave to appeal therein refused. However, if any of the respondents can establish that they were entitled to the exception provided in Section 22(2) of the Act in view of what has been held above, he or she may move an appropriate application before the EOBI seeking such an exception, and the EOBI shall decide the said application in terms of this judgment through a speaking order.

MWA/A-8/SC Order accordingly.

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[1] The Act was implemented from 1st day of July 1976, this is because as per Section 9 of the Act the contribution was payable from 1st July 1976.

[2] means an employee who is or was in "insurable employment" see Section 2(i) of the Act.

[3] means the sum of money payable to the institution by the employer or by the Federal Government in respect of an insured person under the provisions of the Act.

[4] Writ Petition No. 2502/2020.

[5] Writ Petition No. 2746-P/2021.

[6] Writ Petition No. 3570/2022.

[7] Constitution Petition No. D-2788/2020.

[8] The Constitution of the Islamic Republic of Pakistan, 1973.

[9] See footnote 1

[10] See the Preamble to the EOB Act and also Employees Old-Age Benefits Institution v. National Industrial Relations Commission, 1988 SCMR 765.

[11] Don Basco High School v. The Assistant Director EOBI, PLD 1989 SC 128 and Lahore Race Club v. Deputy Director EOBI 1998 SCMR 1571.

**2024 S C M R 853**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, Jamal Khan Mandokhail and Athar Minallah, JJ**

**COMMISSIONER INLAND REVENUE, LARGE TAXPAYERS OFFICE, ISLAMABAD ---Petitioner**

**Versus**

**PAKISTAN OILFIELDS LTD., RAWALPINDI and others---Respondents**

Civil Petitions Nos. 3472 to 3475 of 2023, decided on 29th February, 2024.

(Against the orders of Islamabad High Court, Islamabad, all dated 08.08.2023 passed in W.Ps. Nos. 2436 to 2439 of 2023).

**(a) Constitution of Pakistan---**

----Arts. 185(3) & 199---Interim order passed by the High Court---Interference by the Supreme Court---Scope---Established practice and policy of the Supreme Court is that it does not ordinarily intervene in the interim orders of the High Courts---Such intervention is warranted only in exceptional circumstances, such as cases involving a flagrant violation of law, a clear wrongful exercise of jurisdiction or a manifest grave injustice.

Attiq ur Rehman v. Tahir Mehmood 2023 SCMR 501 and Province of Sindh v. Sartaj Hyder 2023 SCMR 459 ref.

**(b) Income Tax Ordinance (XLIX of 2001)---**

----S. 4C [as amended by the Finance Act 2023]---Constitution of Pakistan, Art. 199(4)---Supertax under Section 4C of the Income Tax Ordinance, 2001---Recovery of---High Court granting interim relief against collection of super tax---Constitutionality---Violation of the constitutional requirement of granting interim relief under Article 199(4) of the Constitution---Plain reading of Article 199(4) of the Constitution shows that where the making of an interim order would have the effect of impeding the assessment or collection of public revenues, the High Court shall not make an interim order unless: (i) the prescribed law officer has been given notice of the application for interim relief and he or any person authorized has had an opportunity of being heard; and (ii) the High Court, for reasons to be recorded in writing, is satisfied that the interim order would have the effect of suspending an order or proceeding which on the face of the record is without jurisdiction---Use of the negative language, i.e., “shall not”, in Article 199(4) leaves no doubt that its provisions are mandatory and an interim order passed without adhering to the procedure provided therein will be illegal and without jurisdiction---In the present case, it is an admitted fact that the High Court did not give notice of the application for interim relief and provide an opportunity of hearing to the prescribed law officer, i.e., the Attorney-General, nor did the High Court record its finding, and the reasons therefor, that the interim order would have the effect of suspending an order or proceeding which on the face of the record is without jurisdiction---Both the mandatory requirements of Article 199(4) were not complied with by the High Court in making the impugned orders, which failure makes these orders illegal and without jurisdiction---Present case, thus, involves a flagrant violation of law and a clear wrongful exercise of jurisdiction, which warrants interference by the Supreme Court in theimpugned interim order---Petitions were converted into appeals and allowed; the impugned orders were set aside with the directions that the respondents’ (tax payers’) applications for interim relief shall be decided by the High Court after affording a fair and reasonable opportunity of hearing as envisaged under Article 199(4) of the Constitution; that the High Court shall also identify the order or proceedings under challenge in terms of Article 199(4)(b)(ii) of the Constitution; that the High Court will also attend to the other contention of the counsel for the petitioner (tax department) regarding suspension of legislation through an interim order in the light of the law cited by her.

**(c) Interpretation of statutes---**

----Provision couched in a negative language---Where any provision couched in a negative language requires an act to be done in a particular manner then it should be done in the manner as required by the statute otherwise such act will be illegal and without jurisdiction.

Atta Muhammad v. Settlement Commissioner PLD 1971 SC 61; Shujat Hussain v. State 1995 SCMR 1249 and Province of Punjab v. Javed Iqbal 2021 SCMR 328 ref.

Ms. Asma Hamid, Advocate Supreme Court, assisted by Hassan Ali and Mustafa Khalid, Advocates and Ch. Akhtar Ali, Advocate-on-Record for Petitioner.

Salman Akram Raja, Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Respondents.

Date of hearing: 29th February, 2024.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**Through the present petitions, the petitioner seeks leave to appeal against the order of the Islamabad High Court, dated 08.08.2023, whereby it has, as interim relief, restrained the petitioner from recovering the supertax under Section 4C of the Income Tax Ordinance, 2001 as amended by the Finance Act, 2023.

2. Arguing against the legality of the impugned orders, the learned counsel for the petitioner made two main contentions: (i) that the High Court did not adhere to the mandatory procedure prescribed in Article 199(4) of the Constitution of the Islamic Republic of Pakistan ("Constitution") for making interim orders in matters relating to assessment and collection of public revenue; (ii) that by making the impugned orders, the High Court virtually suspended the operation of the legislation, i.e., Section 4C of the Income Tax Ordinance, 2001 ("Ordinance"), which could not have been legally done. In support of her contentions, she placed reliance on Federation of Pakistan v. Aitzaz Ahsan (PLD 1989 SC 61), Aijaz Jatoi v. Liaquat Jatoi (1993 SCMR 2350) and Asstt. Collector v. Dunlop India Ltd. (AIR 1985 SC 330). On the other hand, the learned counsel for the respondents submitted that the respondents challenged the amendment[1] to Section 4C of the Ordinance through Finance Act, 2023 only to the extent of its retrospective applicability. He submits that a similar challenge to the extent of retrospectivity of the unamended Section 4C of the Ordinance was read down by the Islamabad High Court in its judgment dated 20.07.2023 passed in Fauji Fertilizer[2].

3. We have considered the respective contentions of the learned counsel for the parties and have examined the record.

4. At the outset, it is important to note that the present petitions challenge the interim orders of the High Court, and we are fully cognizant of the established practice and policy of this Court, whereby it does not ordinarily intervene in the interim orders of the High Courts.[3] Such intervention is warranted only in exceptional circumstances, such as cases involving a flagrant violation of law, a clear wrongful exercise of jurisdiction or a manifest grave injustice.[4] In the present case, the exceptional circumstance is the alleged violation of the constitutional requirement of granting interim relief under Article 199(4) of the Constitution. Hence we proceed to examine the impugned order on merit.

5. To appreciate the contention of the learned counsel for the petitioner it would be expedient to reproduce Article 199(4) of the Constitution for ready reference:

(4) Where-

(a) an application is made to a High Court for an order under paragraph (a) or paragraph (c) of clause (1), and

(b) the making of an interim order would have the effect of prejudicing or interfering with the carrying out of a public work or of otherwise being harmful to public interest or State property or of impeding the assessment or collection of public revenues, the Court shall not make an interim order unless the prescribed law officer has been given notice of the application and he or any person authorized by him in that behalf has had an opportunity of being heard and the Court, for reasons to be recorded in writing, is satisfied that the interim order-

(i) would not have such effect as aforesaid; or

(ii) would have the effect of suspending an order or proceeding which on the face of the record is without jurisdiction.

(Emphasis added)

A plain reading of the above provisions shows that where the making of an interim order would have the effect of impeding the assessment or collection of public revenues, the High Court shall not make an interim order unless: (i) the prescribed law officer has been given notice of the application for interim relief and he or any person authorized has had an opportunity of being heard; and (ii) the High Court, for reasons to be recorded in writing, is satisfied that the interim order would have the effect of suspending an order or proceeding which on the face of the record is without jurisdiction.

6. It is a well-established principle that where any provision couched in a negative language requires an act to be done in a particular manner then it should be done in the manner as required by the statute otherwise such act will be illegal and without jurisdiction.[5] The use of the negative language, i.e., "shall not", in Article 199(4) leaves no doubt that its provisions are mandatory and an interim order passed without adhering to the procedure provided therein will be illegal and without jurisdiction. In the present case, it is an admitted fact that the High Court did not give notice of the application for interim relief and provide an opportunity of hearing to the prescribed law officer, i.e., the Attorney-General,[6] nor did the High Court record its finding, and the reasons therefor, that the interim order would have the effect of suspending an order or proceeding which on the face of the record is without jurisdiction. Both the mandatory requirements of Article 199(4) were not complied with by the High Court in making the impugned orders, which failure makes these orders illegal and without jurisdiction. The present case, thus, involves a flagrant violation of law and a clear wrongful exercise of jurisdiction, which warrants interference by this Court in the impugned interim order. We observe, with respect, that the High Court acted with undue haste in making the impugned interim orders without giving notice and without providing an opportunity of hearing to the prescribed law officer. The impugned interim orders suffer from this inherent vice and deserve to be set aside on this account alone.

7. For the above reasons, we convert these petitions into appeals and allow them. The impugned orders are set aside. The respondents' applications for interim relief shall be decided by the High Court after affording a fair and reasonable opportunity of hearing as envisaged under Article 199(4) of the Constitution. The High Court shall also identify the order or proceedings under challenge in terms of Article 199 (4) (b) (ii) of the Constitution. The High Court will also attend to the other contention of the learned counsel for the petitioner regarding suspension of legislation through an interim order in the light of the law cited by her. Given that the matter pertains to the assessment and collection of public revenue, we expect that the High Court will decide not only the applications for interim relief but also the writ petitions as expeditiously as possible.

MWA/C-9/SC Appeals allowed.

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1 Mainly regarding rates of tax

2 *Fauji Fertilizer v. Federation of Pakistan* (W.P. 4027 of 2022)

3 Attiq ur Rehman v. Tahir Mehmood 2023 SCMR 501 (several previous cases are cited in it).

[4] Province of Sindh v. Sartaj Hyder 2023 SCMR 459 (several previous cases are cited in it).

[5] Atta Muhammad v. Settlement Commissioner PLD 1971 SC 61; Shujat Hussain v. State 1995 SCMR 1249 and Province of Punjab v. Javed Iqbal 2021 SCMR 328.

[6] Article 199(5). In this Article, unless the context otherwise requires,-... "prescribed law officer" means (a) in relation to an application affecting the Federal Government or an authority of or under the control of the Federal Government, the Attorney-General, and (b) in any other case, the Advocate-General for the Province in which the application is made.

**2024 S C M R 947**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, Jamal Khan Mandokhail and Athar Minallah, JJ**

**PROVINCE OF PUNJAB through Secretary C&W, Lahore and others---Appellants**

**Versus**

**Messrs HAROON CONSTRUCTION COMPANY, GOVERNMENT CONTRACTOR and others---Respondents**

C.P.L.As. Nos. 2226-L of 2021 to C.P.L.A. No. 2241-L of 2021, C.P.L.As. Nos. 2253-L of 2021 to C.P.L.A. No. 2255-L of 2021, C.P.L.A. No. 2270-L of 2021, C.P.L.A. No. 2277-L of 2021, C.P.L.As. Nos. 371-L of 2022 to C.P.L.A. No. 373-L of 2022 and C.P.L.A. No. 3396-L of 2022, decided on 20th February, 2024.

(Against the judgment(s) of Lahore High Court Lahore all dated 30.09.2021, passed in I. C.A. No.18231 of 2021, etc.).

**(a) Punjab Procurement Rules, 2014---**

----Rr.27 & 56---Tenders for construction works---Bidding documents---Additional performance security imposed by procuring agency---Legality---Bidding documents should comply with the Punjab Procurement Rules, 2014 (Rules) especially Rules 27 and 56---Procuring agency cannot introduce additional security in violation of the Rules---Procuring agency cannot require the bidder to pay additional performance security over and above the bid security and performance guarantee provided under Rules 27 and 56 of the Rules.

The imposition of additional security not only disincentivizes the contractors trying to submit competitively low bids, but it also defies logic as the successful bidder has to give lesser security than the lowest bidder, who might not be a successful bidder, eventually. Where the lowest bidder becomes the successful bidder, he will have to furnish two securities while any other bidder who is not the lowest bidder, but has been declared successful bidder, must only furnish one security. This incongruence in the bidding documents leads to discrimination and offends the principles of public procurement. Therefore, compliance to the regulator framework becomes mandatory in public procurement to uphold the foundational principles of public procurement. Therefore, in the present case the insertion of additional performance security in the Bid Document and the follow up clauses dealing with the consequence of non-payment of additional performance security in the bidding document are beyond the scope of the Punjab Procurement Rules, 2014 (Rules) being inconsistent with Rules 27 and 56 of the Rules. Consequently, the Supreme Court set aside the demand raised for the payment of additional performance security by the procurement agencies as being unlawful and violative of the Rules, and directed that any additional security to be imposed on a contractor can only be introduced through Rules to be framed by the Government so that the principles of procurement are met and there is transparency, level playing-field and non-discrimination in public procurement.

**(b) Punjab Procurement Rules, 2014---**

---R.68---Procurement---Bidding documents, dispute over---Mediation---Significance of mediation and pro mediation bias of courts explained.

Courts must encourage out of court settlements through Alternate Dispute Resolution (“ADR”), in particular mediation. The essence of mediation lies in its voluntary and confidential process, where a neutral third party, the mediator, assists disputants in reaching a consensus. Unlike in litigation, where the outcome is often a zero-sum game, mediation thrives on the principle of win-win solutions, preserving relationships and allowing for creative resolutions that legal parameters might not accommodate.

Justice Sandra Day O'Connor, Speech at the Minnesota Conference for Women in the Law, April 1985 ref.

Mediation, as a form of alternative dispute resolution (ADR), has garnered widespread acclaim for its efficiency, cost-effectiveness, and ability to facilitate amicable settlements. In contrast to the adversarial nature of litigation, mediation embodies a collaborative approach, encouraging parties to find mutually beneficial solutions. The courts should not only encourage mediation but also exhibit a pro-settlement bias and a pro-mediation bias. Pro-mediation bias or pro-settlement bias means a predisposition or preference within the legal system for resolving disputes through mediation rather than through litigation or other forms

of dispute resolution. This bias is not about favoring one party over another but rather about favoring the process of mediation itself as a preferred method of dispute resolution. This bias is grounded in the belief that settlements are generally more efficient and satisfactory for all parties involved compared to outcomes determined by a court. Courts may exhibit a pro-settlement bias by encouraging parties to settle even before the case goes to trial or during the litigation process.

By fostering a pro-settlement bias, courts can contribute to a more harmonious and efficient dispute resolution landscape, where parties are empowered to resolve conflicts collaboratively and constructively. Encouraging mediation aligns with the broader goals of justice systems worldwide: to resolve disputes in a manner that is fair, efficient, and conducive to the long-term well-being of all involved parties.

Final Report to the Lord Chancellor on the Civil Justice System in England and Wales, HMSO, July 1996 ref.

Ms. Samia Khalid, Addl. A.G. Pb., Zakir Shah, SLO, C&W., Rana Azhar, S.E. Highway and Muhammad Usama, XEN, Mian Muhammad Kashif, Advocate Supreme Court, Assisted by: Ms Alizeh Akbar, Advocate (in C.P. No. 2277-L of 2021) and Ch. Muhammad Sarwar, Advocate Supreme Court (in C.P. No. 3396-L of 22) for Petitioners.

Mian Muhammad Kashif, Advocate Supreme Court and Ch. Muhammad Sarwar, Advocate Supreme Court for Respondents (in C.P. No. 2228-L of 2021).

Muhammad Younis, Contractor (In person)

Date of hearing: 20th February, 2024.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**Brief facts of the case are that through public advertisement made by different procuring agencies[1] i.e., Communication and Works Department and Irrigation Department of the Government of the Punjab and Punjab Local Government, tenders were sought for various construction works. In pursuance thereof, the contractors submitted their bids. Clause 26(A) of the General Directions for the Guidance of the Tenderers (Bid Document) provided that if there is a difference between the total tendered amount and the approved estimated amount, the lowest bidder shall deposit additional performance security ranging from 5% to 10% of the difference. Through impugned letters dated 29.12.2020 and 18.01.2021 issued by the Executive Engineer, Highway Division, Gujranwala and Narowal, respectively, demand was raised against the contractors for the payment of additional performance security. The contractors challenged the said demand before the High Court, where the claim of the contractors was dismissed vide impugned judgment while interpreting Rule 56 of the Punjab Procurement Rules, 2014 ("Rules"). The private contractors, the Provincial Government and the procuring agencies are all aggrieved of the impugned judgement for different reasons but primarily regarding the interpretation of Rule 56 of the Rules, hence these petitions.

2. The central question before us is whether the procuring agency could require the bidder to pay additional performance security over and above the bid security and performance guarantee provided under Rules 27 and 56 of the Rules. In other words, can the bidding documents include terms and conditions of the tender which are over and above or inconsistent with the Rules.

3. Learned Additional Advocate General representing the Provincial Government and the procuring agencies submits that the Punjab Procurement Regulatory Authority Act 2009 ("Act") and the Rules do not bar the procuring agency from including additional performance security in the bidding documents and therefore there is no violation of the Rules. Clauses 26(A), 26(B) and 15 of the bidding documents provide for the additional performance security, its rates and the consequence of on non-payment of the said security.

4. On the other hand, learned counsel for the private contractors submit that the bidding documents are to be regulated by the Act, as well as, the Rules and in the presence of Rules 27 and 56 the bidding documents cannot provide for additional security by violating the upper limit on securities provided under the Rules. He submits that Rule 27 provides that bid security shall not exceed 5% of the estimated price while Rule 56 provides that performance guarantee dealing with the successful bidder shall not exceed 10% of the contract

amount and there is no provision under the Rules for any additional performance security at any stage of the bidding.

5. We have gone through the provisions of the Act, as well as the Rules. The preamble to the Act provides for the establishment of the Procurement Regulatory Authority for regulating procurement of goods, services and works in the public sector. Public procurement[2] means procurement of goods, works or services by a procuring agency wholly or partly financed out of the Provincial Consolidated Fund or the Public Account of the Province or funds of a procuring agency. Procuring agency[3] means a department of the government or an autonomous body of the government, a local government, etc. The functions and powers entrusted to the Authority under the Act are geared towards improving governance, management, transparency, accountability and quality of public procurement. These functions and powers include: monitoring the application of laws, rules, regulations relating to public procurement; making regulations and laying down codes of ethics and procedures for public procurement; establishing performance indicators for public procurement; preparing standard documents to be used in connection with public procurement; presenting an annual report to the government regarding overall functioning of the public procurement system; and make rules for carrying out the purposes of the Act.

6. The Rules promulgated by the Government for carrying out the purposes of the Act, inter alia, define; "bidding documents", "bid security" and "performance guarantee[4]." Rule 4 lays down the principles of procurement i.e., (i) procurement to be in a fair and transparent manner (ii) the object of procurement is to bring value for money to the procuring agency and (iii) the procurement process be efficient and economical. Under the Rules the procuring agency is to use standard bidding documents as and when notified under the regulations and until the standard bidding documents are specified under the regulations, a procuring agency may use bidding documents already in use of the procuring agency to the extent that they are not inconsistent with the Rules.[5] And any violation of these Rules amounts to mis-procurement[6]. Rules 27 and 56 provide for bid security and performance guarantee in the following manner:

27. Bid security.---The procuring agency may require the bidders to furnish a bid security not exceeding five per cent of the estimated price.

Explanation.---In this rule, the words 'estimated price' mean the price of procurement estimated by the procuring agency before initiation of the process of procurement.

56. Performance guarantee.---Where needed and clearly expressed in the bidding documents, the procuring agency shall require the successful bidder to furnish a performance guarantee which shall not exceed ten percent of the contract amount.

7. The above regulatory framework provides a stable and predictable environment for both the procuring agency and the contractor. Deviating from this framework can create uncertainty and confusion, potentially deterring qualified bidders from participating in the procurement process and possibly leading to disputes or litigation. One of the fundamental principles of public procurement is compliance with the law. Procurement activities must adhere to the legal and regulatory framework established by the law. Introducing new terms and conditions outside or inconsistent to the regulatory framework under the law can compromise the fairness and transparency of the public procurement process. It could lead to perceptions or instances of bias, unfair advantage, or discrimination against certain bidders, which undermines the integrity of the public procurement process.

8. According to Organization for Economic Co-operation and Development ("OECD"), public procurement is the regulation of principles, rules and procedures applied to States in order to implement efficient processes when acquiring goods, services or works, and comply with its' policy objectives.[7] It is within this context that the OECD Principles for Enhancing Integrity in Public Procurement come into play which are primarily directed at policy makers in governments at the national level, but may also offer guidance for sub-national government and state-owned enterprises. These Principles provide a policy instrument for enhancing integrity in the entire public procurement cycle and take a holistic view by addressing various risks to integrity, from needs assessment, through the award stage, contract management and up to final payment. These twelve (12) Principles[8] are anchored in four pillars[9] namely transparency, good management, prevention of misconduct

and accountability and control in order to enhance integrity in public procurement and, inter alia, include; (i) Transparency; providing an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment for potential suppliers, (ii) Integrity; preserving the integrity of the public procurement system through general standards and procurement specific safeguards, (iii) Access; facilitating access to procurement opportunities for potential competitors of all sizes, (iv) Balance; recognizing that any use of the public procurement system to pursue secondary policy objectives should be balanced against the primary procurement objective, (v) Participation; fostering transparent and effective stakeholder participation, (vi) Efficiency; developing processes to drive efficiency throughout the public procurement cycle while satisfying the needs of the government and its citizens, (vii) E -procurement; improving the public procurement system by harnessing the use of digital technologies to support appropriate e-procurement innovation through the procurement cycle, (viii) Capacity; developing a procurement workforce with the capacity to continuously deliver value for money efficiently and effectively, (ix) Evaluation; driving performance improvements through evaluation of the effectiveness of the public procurement system from individual procurements to the system as a whole, at all levels of government where feasible and appropriate, (x) Risk Management; integrating risk management strategies for mapping, detecting and mitigating throughout the public procurement cycle, (xi) Accountability; applying oversight and control mechanisms to support accountability throughout the public procurement cycle, including appropriate complaint and sanction processes, (xii) Integration; supporting integration of public procurement into overall public finance management, budgeting and service delivery processes.

9. The regulatory framework under the Act and the Rules closely monitors and regulates public procurement and provides for the bidding documents, the steps to be taken during public procurement and the securities that can be furnished by a contractor, which include bid security and performance guarantee. The Authority under the Act is to lay special emphasis on the governance, management, transparency, accountability, and quality of public procurement. While the global guideline on public procurement developed by OECD mentions fundamental pillars of public procurement as: transparency, good management, prevention of misconduct and accountability and control. Therefore, to enhance integrity in public procurement; transparency, level playing-field, standardization of bidding documents and uniformity of compliance of the regulatory framework are essential ingredients that cannot be waived or comprised. It is to uphold these guiding principles that the procuring agency cannot go beyond the regulatory framework and introduce terms in the bidding documents that are inconsistent to the regulatory regime under the Act, Rules, etc. In this case strangely the additional performance security is sought from the lowest bidder and not from the successful bidder who is to deposit only performance guarantee (mentioned in the bidding document as performance security). The imposition of additional security not only disincentivizes the contractors trying to submit competitively low bids, but it also defies logic as the successful bidder has to give lesser security than the lowest bidder, who might not be a successful bidder, eventually. Where the lowest bidder becomes the successful bidder, he will have to furnish two securities while any other bidder who is not the lowest bidder, but has been declared successful bidder, must only furnish one security. This incongruence in the bidding documents leads to discrimination and offends the principles of public procurement discussed above. Therefore, compliance to the regulator framework becomes mandatory in public procurement to uphold the foundational principles of public procurement. Therefore, insertion of additional performance security in clause 26(A) and the follow up clauses 26(B) and 15 dealing with the consequence of non-payment of additional performance security in the bidding document are beyond the scope of the Rules being inconsistent with Rules 27 and 56 of the Rules. Consequently, the demand raised for the payment of additional performance security vide letters 29.12.2020 and 18.01.2021 by the procurement agencies along with the above clauses are set aside being unlawful and violative of the Rules. Any additional security to be imposed on a contractor can only be introduced through Rules to be framed by the Government so that the principles of procurement are met and there is transparency, level playing-field and non-discrimination in public procurement.

10. We have notice that Rule 68 of the Rules provides that after the coming into force of the procurement contract, disputes between the parties to the contract shall be settled through mediation or arbitration. The words of Justice Sandra Day O'Connor are telling: "The courts of this country should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried."[10] Even though in the instant case alternate dispute resolution mechanism was not available as interpretation of the Act and the Rules were involved, which is best left to the court of law, we wish to underline that courts must encourage out of court settlements through Alternate Dispute Resolution ("ADR"), in particular mediation. The essence of mediation lies in its voluntary and confidential process, where a neutral third party, the mediator, assists disputants in reaching a consensus. Unlike in litigation, where the outcome is often a zero-sum game, mediation thrives on the principle of win-win solutions, preserving relationships and allowing for creative resolutions that legal parameters might not accommodate. "The notion that ordinary people want black-robed judges, well-dressed lawyers, and fine paneled courtrooms as settings to resolve their disputes is incorrect. People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible."[11]

11. Mediation, as a form of alternative dispute resolution (ADR), has garnered widespread acclaim for its efficiency, cost-effectiveness, and ability to facilitate amicable settlements. In contrast to the adversarial nature of litigation, mediation embodies a collaborative approach, encouraging parties to find mutually beneficial solutions. The courts should not only encourage mediation but also exhibit a pro-settlement bias and a pro-mediation bias. By Pro-mediation bias or pro-settlement we mean a predisposition or preference within the legal system for resolving disputes through mediation rather than through litigation or other forms of dispute resolution. This bias is not about favoring one party over another but rather about favoring the process of mediation itself as a preferred method of dispute resolution. This bias is grounded in the belief that settlements are generally more efficient and satisfactory for all parties involved compared to outcomes determined by a court.

12. Prominent legal scholars and jurists, including the likes of Roger Fisher and William Ury, authors of the seminal work "Getting to Yes," advocate for mediation. They emphasize its potential to produce outcomes that are more satisfactory to all parties involved, compared to the often rigid and polarizing verdicts of court proceedings. Their work underscores the importance of interests over positions, encouraging parties to seek common ground rather than entrenching themselves in adversarial stances. For instance, in "Judging Civil Justice," legal scholar Hazel Genn discusses the encouragement of settlement as a way to reduce court caseloads and promote the efficient use of judicial resources. Courts may exhibit a pro-settlement bias by encouraging parties to settle even before the case goes to trial or during the litigation process.

13. By fostering a pro-settlement bias, courts can contribute to a more harmonious and efficient dispute resolution landscape, where parties are empowered to resolve conflicts collaboratively and constructively. Encouraging mediation aligns with the broader goals of justice systems worldwide: to resolve disputes in a manner that is fair, efficient, and conducive to the long-term well-being of all involved parties. "In the future, it is likely that the traditional trial will be the exception rather than the rule."[12]

14. In this view of the matter, the impugned judgments are set aside and C.P.L.A.2226-L/2021 to C.P.L.A.2241-L/2021, C.P.L.A.2253-L/ 2021 to C.P.L.A.373-L/2022 are dismissed and leave declined;

whereas C.P.L.A.2277-L/2021 and C.P.L.A.3396-L/2022 are converted into appeals and allowed in the above terms.

MWA/P-8/SC Order accordingly.

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[1] See Section 2(l) of the Act.

[2] Section 29(n) of the Act

[3] Section 2(l) of the Act

[4] Rules 2(g), (h) and (w).

[5] Rule 25 (5) & (6)

[6] Rule 69

[7] Arciniegas Parra Juan David and Kabir Duggal, 'Public Procurement' Jus Mundi ≤ https://jusmundi.com/en/document/publication/en-public-procurement>

[8] OECD, OCED Recommendation of the Council on Public Procurement (2015) ≤ https://www.oecd.org/gov/public-procurement/OECD-Recommendation-on-Public-Procurement.pdf>

[9] OECD, OECD Principles for Integrity in Public Procurement (2009) < https://www.oecd.org/gov/ethics/48994520.pdf>

[10] Justice Sandra Day O'Connor, Speech at the Minnesota Conference for Women in the Law, April 1985

[11] Attributed to: Warren E. Burger, former Chief Justice of the United States

[12] Lord Woolf, Harry, “Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales.” HMSO, July 1996.

**2024 S C M R 982**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, Muhammad Ali Mazhar and Athar Minallah, JJ**

**NATIONAL BANK OF PAKISTAN through President and another---Petitioners**

**Versus**

**MUHAMMAD ADEEL and others---Respondents**

C.P.L.A. No. 1800-L of 2018 and C.P.L.A. No. 1364 of 2023, decided on 13th March, 2024.

(Against the judgment of Lahore High Court, Lahore dated 06.06.2018, passed in I. C.A. No. 179944 of 2018 and order dated 06.02.2023 passed in I.C.A. No. 17830 of 2021).

**(a) Law Reforms Ordinance (XII of 1972)---**

----S. 3(2), proviso---Intra Court Appeal (ICA)---Maintainability---Test to determine whether remedy of ICA is available---Main test to determine whether an ICA is available under the proviso to Section 3(2) of the Law Reforms Ordinance, 1972 ('the Ordinance') is to see whether the proceedings, in which the original order has been passed, provide for an appeal, revision or review (collectively referred to as "appeal," for convenience) to any Court, Tribunal or authority against the original order---Applying this test what needs to be seen and verified is whether the proceedings provided for an appeal against the original order and not whether parties to the proceedings enjoyed the right to appeal against the original order---Proviso under Section 3(2) of the Ordinance is proceedings specific and not parties specific---So it matters less if one of the parties to the proceedings is not entitled to right of appeal against the original order passed in the said proceedings.

Karim Bibi v. Hussain Bakhsh PLD 1984 SC 344 and Muhammad Abdullah v. Deputy Settlement Commissioner, Centre-I, Lahore PLD 1985 SC 107 ref.

**(b) National Bank of Pakistan (Staff) Service Rules, 1973---**

----R. 40---Law Reforms Ordinance (XII of 1972), S. 3(2), proviso---Intra Court Appeal (ICA) filed by the bank---Maintainability---In the instant case, the proceedings under the National Bank of Pakistan (Staff) Service Rules, 1973, provide for an appeal under Rule 40 against the original order---This is sufficient to disentitle the parties to maintain an intra-court appeal, irrespective of the fact that one or more of the parties to the proceedings did not have a right of appeal against original order---Therefore, ICA is not maintainable in the present case---Petition was dismissed and leave was declined.

National Electric Power Regulatory Authority v. Faisalabad Electric Supply Company Ltd. PLD 2015 Lah. 661 disapproved.

Umer Abdullah, Advocate Supreme Court (in C.P. 1800-L of 2018) and Junaid Jabbar Khan, Advocate Supreme Court (in C.P. No. 1364 of 2023) for Petitioners.

Umer Abdullah, Advocate Supreme Court (in C.P. No. 1364 of 2023) and Junaid Jabbar Khan, Advocate Supreme Court (in C.P. No. 1800-L of 2018) for Respondents.

Date of hearing: 13th March, 2024.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**C.P.L.A. No. 1800-L of 2018: Brief facts of the case are that the respondent being an employee of the petitioner bank was promoted to the post of Officer Grade-I w.e.f. 01.01.2014. Aggrieved of the said order, as the petitioner sought promotion w.e.f. 03.03.2011, he filed an appeal under Rule 40 of the National Bank of Pakistan (Staff) Service Rules, 1973 ("Rules"). The said appeal was dismissed vide order dated 12.08.2016 against which the respondent preferred a writ petition before the High Court, which was allowed vide order dated 22.02.2018. Against the said order the petitioner-bank filed an intra-court appeal ("ICA"), which was dismissed on the ground of maintainability, being hit by the proviso to Section 3(2) of the Law Reforms Ordinance, 1972 ("Ordinance") through the impugned judgment dated 6 June 2018. Hence, the instant petition.

2. Learned counsel for the petitioner-bank submits that the intra-court appeal was maintainable before the High Court because under Rule 40 only an employee can file an appeal but no such remedy is available to the petitioner-bank, therefore, proviso to Section 3(2) of the Ordinance is not attracted in the present case and the petitioner-bank can file an ICA before the High Court. In support of this contention learned counsel placed

reliance on National Electric Power Regulatory Authority v. Faisalabad Electric Supply Company Ltd. (PLD 2015 Lahore 661), Secretary to the Government of Punjab, Revenue Department and others v. Sajjad Ahmad and another (2012 SCMR 114), Syed Arif Raza Rizvi v. Messrs Pakistan International Airlines through Chairman/M.D. Karachi (PLD 2001 SC 182) and Federal Board of Revenue through Chairman, Islamabad and others v. Abdul Ghani and another (2021 SCMR 1154).

3. Learned counsel for the respondent on the other hand submits that proviso to Section 3(2) of the Ordinance does not create any distinction as to the availability of appeal, review or revision to any of the parties but simply provides that if the proceedings in which the original order has been passed provides for an appeal, revision or review, no ICA is provided before the High Court. In support of this contention learned counsel placed reliance on JS Bank Limited v. Province of Punjab (2021 SCMR 1617) and a recent unreported judgment of this Court dated 16.11.2023 passed in Civil Petition No.835 of 2021 titled (2024 SCMR 472) "International Islamic University, Islamabad through its Rector and another v. Syed Naveed Altaf and others". He finally contends that the ICA filed by the petitioner-bank before the High Court was not maintainable.

4. We have heard the learned counsel for the parties and have gone through the case law presented by them. Section 3 of the Ordinance provides as follows:

3. Appeal to High Court in certain cases.---(1) An appeal shall lie to a Bench of two or more Judges of a High Court from a decree passed or final order made by a single Judge of that Court in the exercise of its original civil jurisdiction.

(2) An appeal shall also lie to a Bench of two or more Judges of a High Court from an order made by a single Judge of that Court under clause (1) of Article 199 of the Constitution of the Islamic Republic of Pakistan] not being an order made under sub-paragraph (i) of paragraph (b) of that clause:---

Provided that the appeal referred to in this subsection shall not be available or competent if the application brought before the High Court under Article 199 arises out of any proceedings in which the law applicable provided for at least one appeal or one revision or one review to any court, tribunal or authority against the original order. (emphasis supplied)

The main test to determine whether an ICA is available under the proviso to Section 3(2) of the Ordinance is to see whether the proceedings, in which the original order has been passed, provide for an appeal, revision or review (collectively referred to as "appeal," for convenience) to any Court, Tribunal or authority against the original order. Applying this test what needs to be seen and verified is whether the proceedings provided for an appeal against the original order and not whether parties to the proceedings enjoyed the right to appeal against the original order. The proviso under Section 3(2) of the Ordinance is proceedings specific and not parties specific. So it matters less if one of the parties to the proceedings is not entitled to right of appeal against the original order passed in the said proceedings. See[1] Karim Bibi v. Hussain Bakhsh (PLD 1984 SC 344) and Muhammad Abdullah v. Deputy Settlement Commissioner, Centre-I, Lahore (PLD 1985 SC 107).

5. In the instant case, the proceedings under the National Bank of Pakistan (Staff) Service Rules, 1973, provide for an appeal under Rule 40 against the original order. This is sufficient to disentitle the parties to maintain an intra-court appeal, irrespective of the fact that one or more of the parties to the proceedings did not have a right of appeal against original order. Therefore, ICA is not maintainable in the present case. The case law relied upon by the learned counsel for the petitioner-bank is not relevant to the issue, except the High Court judgment passed in National Electric Power Regulatory Authority v. Faisalabad Electric Supply Company Ltd. (PLD 2015 Lahore 661),[2] which does not correctly interpret the proviso to Section 3(2) of the Ordinance and is therefore disapproved.

6. In view of the above, leave is declined, and this petition is dismissed.

C.P.L.A.1364/2023:

7. As the CPLA No.1800-L/2018 filed by the respondent-bank has been dismissed vide order of even date, the petitioner can approach the respondent-bank for the redressal of his grievance. The respondent-bank is directed to decide the same through a speaking order preferably within a period of two months from the receipt of this Order. This petition is disposed of in the above terms.

MWA/N-4/SC Order accordingly.

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[1] Four Member Benches.

[2] of which one of us (Syed Mansoor Ali Shah, J.) was a member.

**2024 S C M R 997**

**[Supreme Court of Pakistan]**

**Present: Umar Ata Bandial, C.J., Syed Mansoor Ali Shah and Ayesha A. Malik, JJ**

**ZULFIQAR ALI BHATTI---Appellant**

**Versus**

**ELECTION COMMISSION OF PAKISTAN and others---Respondents**

Civil Appeal No. 142 of 2019

(Against the order (notification) dated 18.01.2019, of the Election Commission of Pakistan).

Civil Petition No. 1369 of 2019

(Against the order of the Islamabad High Court, dated 15.02.2019, passed in W.P. No. 312/2019).

Civil Appeal No. 142 of 2019 and Civil Petition No. 1369 of 2019, decided on 2nd November, 2022.

**(a) Constitution of Pakistan---**

----Arts. 218 & 225---Expressions election and conduct the election as used in Articles 218 & 225 of the Constitution---Meaning---Both expressions have been used in Articles 218 & 225 of the Constitution in a wide sense to connote the entire election process consisting of several steps starting with the issuance of the election programme and culminating with the declaration of the returned candidate, which includes filing of the nomination papers, scrutiny of the nomination papers, withdrawal of the candidates, holding the poll, counting of the votes, consolidation of the result and declaration of the returned candidates, etc.---In this wide sense, the process of conducting the election starts with the issuance of the election programme and stands completed on the publication of the names of the returned candidates in the official gazette.

Election Commission v. Javaid Hashmi PLD 1989 SC 396 ref.

**(b) Constitution of Pakistan---**

---Arts. 4,17(2), 218(3) & 222(d)---Elections Act (XXXIII of 2017), S. 8(c)---Election Commission---Powers and duties as to conducting elections---Law enacted by Parliament to regulate duties and power of the Election Commission---Scope---Under Article 218(3) of the Constitution the Election Commission does not have such general and inherent power which is absolute or superior to the law enacted by the Parliament---General power under Article 218(3) of the Constitution and section 8(c) of the Elections Act, 2017 can be exercised by the Election Commission within two parameters: (i) during the election process, which starts with the issuance of the election programme and culminates with the publication of the name of thereturned candidates in the official gazette, and (ii) when there is no express provision in the law enacted by the Parliament to deal with the matter or issue that arises during the performance of constitutional duty of conducting the elections honestly, justly, fairly and in accordance with law---Scope of the general powers of the Election Commission under Article 218(3) of the Constitution and section 8(c) of the Elections Act, 2017 stated.

Reading of clause (d) of Article 222 of the Constitution makes it clear that the Parliament can enact a law that regulates the conduct of elections and such law would consequentially also regulate the constitutional duty and power of the Election Commission to conduct the election. However, Parliament cannot, by enacting a law, confer any of the duties and functions of the Election Commission entrusted to it under Part VIII of the Constitution to any other executive or judicial authority or office, either entirely or partly.

Province of Sindh v. M.Q.M. PLD 2014 SC 531 and Election Commission v. Province of Punjab PLD 2014 SC 668 ref.

So far as the general power of the Election Commission under Article 218(3) is concerned, the expression and in accordance with law used in that very Article clearly suggests that it is to be exercised to ensure that the election is conducted in accordance with the law enacted by the Parliament, and not in suppression thereof. The Election Commission, thus, cannot exercise its general power in a manner that would make the conduct of election otherwise than in accordance with the law enacted by the Parliament, that is, in violation or breach of such law. Therefore, a law enacted by the Parliament that regulates the conduct of elections and consequentially the constitutional duty and power of the Election Commission to conduct the election, is not hit by the provisions of the latter part of Article 222 of the Constitution; as the requirement for the Election Commission to conduct

the election in accordance with law while performing its constitutional duty has been prescribed by the Constitution itself, not by a law enacted by the Parliament.

However, where the law enacted by the Parliament does not cover an unforeseen matter or issue that may arise during the election process, the Election Commission is to exercise its general power under Article 218(3) of the Constitution, in the same manner as all other discretionary powers are exercised, that is, fairly, reasonably and judiciously in accordance with the principles of equity, justice and good conscience. While exercising its general power in such a situation, the Election Commission must remember the fundamental principle that the general, plenary and inherent powers are exercised to supplement, not supplant or supersede, the law. Such powers cannot be exercised to defeat the express provisions of law but are invoked only when there is no specific provision of law on the matter or issue that needs to be dealt with.

Messrs Conforce v. Syed Ali PLD 1977 SC 599; Roazi Khan v. Nasir 1997 SCMR 1849 and Muhammad Sadiq v. Bashiran PLD 2000 SC 820 ref.

Accepting the contention that the Election Commission has such general and inherent power under Article 218(3) of the Constitution which is absolute or superior to the law enacted by the Parliament, would be tantamount to going against the constitutional mandate of the rule of law ensured under Article 4 of the Constitution. In the matter of elections, the right of the citizens to vote and contest elections cannot be entirely left to be dealt with at the discretion of the Election Commission under its general and inherent power by construing such power to be above the law enacted by the Parliament.

Province of Sindh v. M.Q.M. PLD 2014 SC 531 and Javed Jabbar v. Federation of Pakistan PLD 2003 SC 955 ref.

Thus, on the question of the status of the general power of the Election Commission under Article 218(3) of the Constitution vis- -vis a law enacted by the Parliament, it is safe to conclude that this power operates in the area uncovered by such law. Alike is the scope and applicability of the powers of the Election Commission under Section 8(c) of the Elections Act, 2017 which is also evident from the opening words of Section 8, Save as otherwise provided . These words indicate that if something otherwise is provided in the Elections Act, then this Section will not apply. Further, the amplitude of the power of the Election Commission under Section 8(c), like its general power under Article 218(3) of the Constitution, is extended to the performance of its executive duty to conduct the election and thus it can be exercised only at any stage of the election process, not after the completion thereof. In other words, one can say, the general power under Article 218(3) of the Constitution and Section 8(c) of the Elections Act can be exercised by the Election Commission within two parameters: (i) during the election process, which starts with the issuance of the election programme and culminates with the publication of the name of thereturned candidates in the official gazette, and (ii) when there is no express provision in the law enacted by the Parliament to deal with the matter or issue that arises during the performance of constitutional duty of conducting the elections honestly, justly, fairly and in accordance with law.

Mohinder Singh v. Chief Election Commissioner AIR 1978 SC 851; A.C. Jose v. Sivan Pillai AIR 1984 SC 921; Kanhiya Lal v. R.K. Trivedi AIR 1986 SC 111; Special Reference No.1 of 2002 AIR 2003 SC 87; Bartha Ram v. Lala Mehar 1995 SCMR 684 and Muhammad Salman v. Naveed Anjum 2021 SCMR 1675 ref.

**(c) Constitution of Pakistan---**

----Arts. 4 & 187(1)---Power of the Supreme Court to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it---Scope---No person, authority, tribunal or court exercising executive or judicial powers can take any action against any person in contravention of the law---Said principle equally applies to the Supreme Court in exercising its general and inherent power under Article 187(1) of the Constitution---Under Article 187(1), the Court can issue any direction, order or decree to do complete justice between the parties in any case or matter pending before it, but cannot pass an order in contravention of any of the fundamental rights or any constitutional provision or any relevant statutory law.

Dossani Travels v. Travels Shop PLD 2014 SC 1 and Prem Chand v. Excise Commissioner AIR 1963 SC 996 ref.

**(d) Elections Act (XXXIII of 2017)---**

----Ss. 8(c), 9(1) & 88---Constitution of Pakistan, Art. 218(3)---Election Commission, powers of---Tampering with the election record---Order for re-poll at certain polling stations after the consolidation of the final result of the poll by the Returning Officer---Legality---Whether the Election Commission of Pakistan (ECP) has the power to order a re-poll in one or more polling stations or in the whole constituency, under Article 218(3) of the Constitution read with section 8(c) or section 9(1) of the Elections Act 2017, on the ground of tampering made with the election record (polling bags, ballot papers, etc.) after the consolidation of the final result of the poll by the Returning Officer under Section 95 and the publication of the name of the returned candidate in the official gazette under section 98 of the Elections Act, 2017.

Election Commission made an order ( impugned order ), under Article 218(3) of the Constitution read with Section 8(c) of the Elections Act, 2017( Elections Act ) to hold a re-poll in the 20 polling stations of which record had been tampered with. The Election Commission passed the impugned order after the consolidation of the final result of the poll by the Returning Officer under Section 95 of the Elections Act and the publication of the name of the appellant as a returned candidate in the official gazette under Section 98 of the Elections Act, when the election process has been completed. But as the notification of the appellant as a returned candidate had been issued under the interim order of the Supreme Court, the same could not have concluded the election process to create a bar on the exercise of its general power by the Election Commission under Article 218(3) of the Constitution read with Section 8(c) of the Elections Act. The objection that the Election Commission exercised its power in the present case after the completion of the election process is, therefore, not sustainable.

The matter of directing a re-poll or a fresh poll by the Election Commission in the process of conducting the election has expressly been dealt with in the Elections Act. There are three provisions in the Elections Act that deal with this matter in relation to the duty and power of the Election Commission to conduct the election , which are Sections 9, 88 and 121 of the Elections Act. As the matter of directing a re-poll by the Election Commission in the process of conducting the election has expressly been dealt with in the Elections Act, the Election Commission was not justified to invoke and exercise its general power under Article 218(3) read with Section 8(c) of the Elections Act in the present matter.

A reading of Section 88 of the Elections Act shows that the tampering with the ballot box referred to therein relates to the polling day, not thereafter. Secondly, the power of the Election Commission to direct a fresh poll at the relevant polling station is not to be exercised if the Election Commission is satisfied that the result of the election has been determined by the polling that has already taken place at that polling station (before stopping the poll by the Presiding Officer), along with the result of the polling at other polling stations in the same constituency. In the present case, as per the report of the Returning Officer as well as the report of the Inquiry Committee constituted by the Election Commission, the tampering with the election record had taken place not on the polling day, rather it was made after the consolidation of the final result of the poll by the Returning Officer under Section 95 of the Elections Act. The impugned order passed by the Election Commission can, therefore, not sustain within the scope of the provisions of Section 88 of the Elections Act.

In the present case, as the illegality of tampering with the election record had been committed after the consolidation of the final result of the poll by the Returning Officer under Section 95 of the Elections Act, the Election Commission could not have invoked and exercised its power under Section 9(1) of the Elections Act; for such illegality had not affected the result of the poll already consolidated by the Returning Officer under Section 95 of the Elections Act. Further, the fact that who, the appellant or the respondent, was responsible for the tampering made with the election record after the consolidation of the final result of the poll, could not have been decided, nor has it been decided, by the Election Commission within the scope of summary enquiry under Section 9(1) of the Elections Act. This fact could only have been decided by the Election Tribunal in a full-fledged trial. Without deciding that fact, ordering a repoll in 20 polling stations is tantamount to punishing the appellant without determining his fault, and awarding the suspected culprit, if he were the respondent. In such an uncertain situation, the Election Commission should not have vitiated the official acts of the election officials, which were the counting of votes and the consolidation of the final result of the poll, as they had a presumption of regular performance as per Article 129(e) of the Qanun-e-Shahadat 1984. The impugned order is, therefore, not sustainable under Section 9(1) of the Elections Act. The re-poll held in pursuance of the

impugned order and the subsequent notification of the respondent as a returned candidate are quashed. The respondent shall be de-notified, while the appellant re-notified, as a returned candidate. Appeal is allowed.

Behram Khan v. Abdul Hameed PLD 1990 SC 352; Ejaz Shafi v. Ashraf Shah 1996 SCMR 605 and Jam Madad Ali v. Asghar Ali Junejo 2016 SCMR 251 ref.

**(e) Administration of justice---**

----Wrong or inapplicable provision of law mentioned by the Court---Effect---Mentioning of a wrong or inapplicable provision of law or non-mentioning of the applicable provision of law while exercising a jurisdiction or a power which is otherwise vested in a court, tribunal or authority, does not by itself have fatal consequences.

Naseer Ahmed v. Returning Officer 2023 SCMR 179; Olas Khan v. NAB PLD 2018 SC 40; Saadat Khan v. State 2018 SCMR 387 and Commissioner of Income Tax v. Abdul Ghani PLD 2007 SC 308 ref.

**(f) Elections Act (XXXIII of 2017)---**

----Ss.9(1), 139, 142 & 154(1)(b)(i)---Power of the Election Commission to declare a poll void---Scope of section 9 of the Elections Act, 2017 stated.

The opening expression used in Section 9(1) of the Elections Act, 2017 ( the Elections Act ), Notwithstanding anything contained in this Act , shows that the jurisdiction of the Election Commission under this Section has an overriding effect against any other provision of the Elections Act. Thus, the Election Commission is competent to exercise its jurisdiction under this Section, notwithstanding the availability of the remedy of the election petition under Section 139 read with Section 142 and the jurisdiction of the Election Tribunal to grant the same relief under Section 154(1)(b)(i) of the Elections Act. To the extent of the grounds specified in Section 9(1) upon which the Election Commission can exercise its power to order a re-poll, the jurisdiction of the Election Commission and the Election Tribunal is, therefore, concurrent. The Election Commission can exercise its jurisdiction under Section 9(1) of the Elections Act, to order a re-poll if:

i. There have been grave illegalities or violations of the provisions of the Elections Act or the Rules made thereunder;

ii. Such illegalities or violations are evident from facts apparent on the face of the record; and

iii. Such illegalities or violations have materially affected the result of the poll at one or more polling stations or in the whole constituency.

Aftab Mirani v. Muhammad Ibrahim PLD 2008 SC 779 ref.

Although the ground of grave illegalities or violations of the provisions of the Elections Act or the Rules made thereunder in the election process is common for the exercise of their respective jurisdictions by the Election Commission and the Election Tribunal, the difference lies in the nature of proof of those illegalities and violations, and in the scope of enquiry. The words from facts apparent on the face of the record used in Section 9(1) restrict the jurisdiction of the Election Commission to such grave illegalities or violations of the Elections Act or the Rules which are evident from the facts apparent on the face of the record . The Election Commission can, therefore, exercise its jurisdiction under Section 9(1) only when the allegation or issue of grave illegalities or violations of the Elections Act does not require a full-fledged trial and recording of pro and contra evidence of the contesting parties, which can only be undertaken by the Election Tribunal.

Salahuddin Tirmizi v. Election Commission PLD 2008 SC 735 ref.

Khurshid Kasuri v. Returning Officer 1994 CLC 296 approved.

Although the Election Commission has the power, under Section 9(1) of the Elections Act, to conduct such enquiry as it may deem necessary for its satisfaction about the alleged grave illegalities or violations, in addition to the facts apparent on the face of the record , but before initiating such inquiry by the Election Commission the facts apparent on the face of the record must prima facie indicate the commission of some grave illegality or violation of the Elections Act or the Rules made thereunder, during the election process. The Election Commission cannot initiate a roving enquiry to search for some illegalities or violations, on bald and vague allegations unsupported by prima facie proof, in the exercise of its jurisdiction under Section 9(1) of the Elections Act.

Further, the enquiry which the Election Commission can conduct under Section 9 can only be of a summary nature, notwithstanding the omission of the word summary in Section 9(1), as the Election Commission can make an order for re-poll under this Section before the expiration of sixty days after publication of the name of the returned candidate under Section 98 of the Elections Act, not thereafter. Where the Election Commission does not finally dispose of a case initiated under Section 9(1) within the said period, the proceedings stand abated and the election of the returned candidate is deemed to have become final, subject to the decision of the Election Tribunal on the election petition, if any, as per section 9(3) of the Elections Act. Moreover, as the dismissal of a petition or the abatement of proceedings of a case under Section 9 by the Election Commission does not bar the reagitation before and trial by the Election Tribunal, of the same grounds of grave illegalities or violations of the Elections Act or the Rules made thereunder, the legislature cannot be presumed to have intended two full-fledged trials of the same issue before both forums: the Election Commission and the Election Tribunal. Therefore, the enquiry to be conducted by the Election Commission under Section 9(1) can only be of a summary nature, notwithstanding the omission of the word summary in this Section.

Aftab Mirani v. Muhammad Ibrahim PLD 2008 SC 779 ref.

The second restriction on the exercise of power under Section 9(1) by the Election Commission is that by reason of the grave illegalities or violation of the provisions of the Elections Act or the Rules, the result of the poll at one or more polling stations or in the whole constituency must have been materially affected. Any illegality or violation which does not relate to holding and conducting the poll in the election process, and has thus not affected the result of the poll, cannot form the basis for invoking and exercising the power under Section 9(1) by the Election Commission. The grave illegalities or violations must be such that have materially affected the result of the poll. Although such illegalities or violations may have been committed at any stage of the election process, but not later than the final consolidation of the result of the poll by the Returning Officer under Section 95 of the Elections Act; as any illegality or violation committed after the consolidation of the final result by the Returning Officer cannot be said to have materially affected the result of the poll. It, therefore, does not fall within the scope of the provisions of Section 9(1) of the Elections Act and cannot be a subject of enquiry by the Election Commission to exercise jurisdiction under this Section.

Muhammad Salman v. Naveed Anjum 2021 SCMR 1675 ref.

Any fact-finding enquiry or departmental regular enquiry may be got conducted by the Election Commission, in the matter of any illegality or violation committed after the consolidation of the final result to take appropriate administrative or criminal action against the delinquent election officials, but not for an action under Section 9(1) of the Elections Act.

**(g) Appeal---**

----Scope---If a court, tribunal or authority not having jurisdiction wrongly assumes and exercises such a jurisdiction and makes an order without jurisdiction, an appeal lies from that order in the same manner as an appeal lies from an order with jurisdiction.

Muhammad Ashfaq v. State PLD 1973 SC 368; Sabir Shah v. Shad Muhammad PLD 1995 SC 66; MEPCO v. Muhammad Ashiq PLD 2006 SC 328 and Naseer Ahmed v. Returning Officer 2023 SCMR 179 ref.

Shahzad Shaukat, Advocate Supreme Court for Appellant.

Muhammad Arshad, DG Law for Respondent No. 1 (Election Commission).

Mian Abdul Rauf, Advocate Supreme Court and Mubeen-ud-Din Qazi, Advocate Supreme Court for Respondent No. 6 (Amir Sultan Cheema).

Date of hearing: 2nd November, 2022.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**The question before us, in the present case, is whether the Election Commission of Pakistan has the power to order a re-poll in one or more polling stations or in the whole constituency, under Article 218(3) of the Constitution of the Islamic Republic of Pakistan 1973 read with Section 8(c) or Section 9(1) of the Elections Act 2017, on the ground of tampering made with the election record (polling bags, ballot papers, etc.) after the consolidation of the final result of the poll by the Returning

Officer under Section 95 and the publication of the name of the returned candidate in the official gazette under Section 98 of the Elections Act 2017.

2. The background facts of the case in which the said question has arisen for our consideration are that Mr. Zulfiqar Ali Bhatti ("appellant") and Mr. Amir Sultan Cheema ("respondent"), along with several other candidates, contested the general election of 2018 for the membership of the National Assembly of Pakistan from the constituency of NA 91 Sargodha-IV. In the poll held on 25-07-2018, the appellant secured 1,10,654 votes and the respondent 1,10,567 votes. The respondent made an application, on 27.07.2018, to the Returning Officer for recounting the votes, under Section 95(5) of the Elections Act 2017 ("Elections Act"). The Returning Officer dismissed the application on 29.07.2018 and consolidated the final result of the poll on that day. On 30.07.2018, the respondent filed a petition before the Election Commission of Pakistan ("Election Commission") for setting aside the order of the Returning Officer and accepting his application for recounting the votes. The Election Commission, by its order dated 31.07.2018, disposed of the respondent's petition while directing him to approach the appropriate forum (Election Tribunal) through an election petition, for the redressal of his grievance. The respondent, however, challenged the orders of the Returning Officer and the Election Commission in the Lahore High Court through a writ petition. The High Court allowed the writ petition on 03.08.2018, set aside the order of the Returning Officer and directed the Returning Officer to undertake the recount of the votes in the polling stations to be indicated by the respondent. The appellant challenged the order of the High Court in this Court through a petition for leave to appeal. This Court, vide its order dated 10.08.2018, granted the leave, suspended the operation of the impugned order and directed the Election Commission to issue the notification of the appellant as a returned candidate, which was issued on the same day. Given the issuance of the said notification, the respondent filed the election petition before the Election Tribunal, on 19.09.2018. However, during the pendency of the election petition, this Court disposed of the appeal of the appellant vide a consent order dated 10.10.2018, directing the Returning Officer to recount the votes of the whole constituency and submit a report of the recount to the Election Commission.

3. In the course of the proceedings of the recount, the Returning Officer found that the election record (seals of gunny bags and poling bags, and stamps on ballot papers) of 20 polling stations had been tampered with, after the consolidation of the final result of the poll. He, therefore, declined to consolidate the result of the recount and reported the matter to the Election Commission vide his report dated 30.11.2018. He also advised the respondent to approach the Election Tribunal where his election petition was then sub judice. On the report of the Returning Officer, the Election Commission constituted a Technical Inquiry Committee on 10.12.2018, to carry out the requisite "Fact Finding Inquiry". The Inquiry Committee, in its report dated 09.01.2019, endorsed the fact reported by the Returning Officer regarding tampering with the election record. On the basis of the report of the Inquiry Committee, the Election Commission made an order on 14.01.2019, which was notified on 18.01.2019 ("impugned order"), under Article 218(3) of the Constitution of the Islamic Republic of Pakistan 1973 ("Constitution") read with Section 8(c) of the Elections Act,[1] to hold a re-poll in the 20 polling stations of which record had been tampered with.

4. In view of the order of the Election Commission for holding a re-poll in 20 polling stations, the respondent withdrew his election petition on 25.01.2019, while the appellant challenged this order of the Election Commission in the Islamabad High Court through a writ petition filed under Article 199 of the Constitution as well as in this Court through the present appeal filed under Section 9(5) of the Elections Act, by way of abundant caution due to ambiguity in ascertaining the appropriate remedy. The Islamabad High Court dismissed the writ petition of the appellant, vide its order dated 15.02.2019, on the ground that the appellant had availed the alternate statutory remedy of appeal before this Court, and observed that the appellant may re-agitate the matter in writ jurisdiction if his appeal filed in this Court under Section 9(5) of the Elections Act is dismissed on the ground of maintainability. The appellant filed the petition for leave to appeal against that order of the Islamabad High Court also, in this Court. Both the appeal and the petition for leave to appeal of the appellant are being decided by this judgment.

5. It would be pertinent to mention here that in pursuance of the impugned order of the Election Commission, the re-poll in 20 polling stations was held on 02.02.2019 and after consolidating the result of this re-poll in 20

polling stations with the result of the first poll in other polling stations, the respondent was notified as a returned candidate on 19.02.2019. The durability of this superstructure built upon the impugned order is, however, dependent upon the validity of that order.

6. We have considered the arguments of the learned counsel for the parties, read the case law cited by them and examined the record of the case.

Scope of the powers of the Election Commission under Article 218(3) of the Constitution and Section 8(c) of the Elections Act

7. As the Election Commission and the respondent have mainly referred to the provisions of Article 218(3) of the Constitution and Section 8(c) of the Elections Act, to establish that the Election Commission had the power to make the impugned order, it would be appropriate to reproduce the provisions thereof here for ease of reference, before embarking the discussion on the question under consideration with reference to these provisions:

Article 218. Election Commission.

(3) It shall be the duty of the Election Commission to organize and conduct the election and to make such arrangements as are necessary to ensure that the election is conducted honestly, justly, fairly and in accordance with law, and that corrupt practices are guarded against.

Section 8. Power of Commission to ensure fair election.

Save as otherwise provided, the Commission may-

(c) issue such instructions, exercise such powers and make such consequential orders as may in its opinion, be necessary for ensuring that an election is conducted honestly, justly, fairly and in accordance with the provisions of this Act and the Rules.

A bare reading of Section 8(c) of the Elections Act shows that it merely reiterates the power that is vested in the Election Commission under Article 218(3) of the Constitution by substituting the words "make such arrangements" with the words "issue such instructions, exercise such powers and make such consequential orders" that are necessary to ensure that the election is conducted honestly, justly, fairly and in accordance with law. This reiteration of the power of the Election Commission by a sub-constitutional law is of little legal significance, in view of the conferment of that power already by the supreme law of the land - the Constitution. Therefore, we basically need to understand the scope of the constitutional provision.

8. Article 218(3) of the Constitution entrusts the Election Commission with the duty "to organize and conduct the election", and empowers it, in general terms, "to make such arrangements as are necessary to ensure that the election is conducted honestly, justly, fairly and in accordance with law, and that corrupt practices are guarded against".[2] The power so conferred is restricted to the fulfillment of the duty specified, that is, "to organize and conduct the election".[3] Therefore, in order to understand the amplitude of this power, we need to find out the meaning of the term "election" as used in Article 218(3) and to ascertain when the duty of the Election Commission to "conduct the election", as entrusted to it under this Article, starts and when it stands completed. Secondly, it also requires determination whether the duty of the Election Commission to conduct the election and the power to make the necessary arrangements therefor can be regulated by a law enacted by the Parliament; if so, what would be the status of the general power of the Election Commission under Article 218(3) of the Constitution vis- -vis such law.

9. So far as the first question is concerned, the meaning of the term "election" and of the expression "conduct the election" as used in Articles 218 and 225 of the Constitution has already been expounded by a four-member Bench of this Court in Javaid Hashmi case[4]. The words "election" and "conduct the election", as expounded in that case as well as in the other cases approvingly cited therein, have been used in Articles 218 and 225 of the Constitution in a wide sense to connote the entire election process consisting of several steps starting with the issuance of the election programme and culminating with the declaration of the returned candidate, which include filing of the nomination papers, scrutiny of the nomination papers, withdrawal of the candidates, holding the poll, counting of the votes, consolidation of the result and declaration of the returned candidates, etc. In this

wide sense, the process of conducting the election starts with the issuance of the election programme and stands completed on the publication of the names of the returned candidates in the official gazette.[5]

10. On the second question about regulating the constitutional duty and power of the Election Commission as to conducting the election, by a law enacted by the Parliament, we could not lay our hands on any judgment of this Court that has specifically taken up and dealt with this question. It, therefore, requires us to make a thorough examination of the operational scheme of the constitutional provisions contained in Part VIII of the Constitution on the subject of "Elections", as we can correctly understand the meaning and scope of a particular provision on the subject of "Elections" only when we read this Part of the Constitution as an integrated whole.

11. Part VIII of the Constitution is divided into two Chapters and contains fifteen Articles (213-226). Chapter I, comprised of Articles 213 to 221, mainly contains the provisions on the matters of the constitution of the Election Commission, the appointment of the Chief Election Commissioner and four members of the Election Commission, the term of their office, the procedure for their removal from office, the appointment of the officers and staff of the Commission, and duties of the Election Commission. While the core matters relating to the subject of "Election" that have been provided for in Chapter II (Articles 222 to 226) are the enactment of electoral laws by the Parliament, the time of general election and bye-election, the appointment of the care-taker Cabinet, and the establishment of special tribunals for resolution of election disputes by law enacted by the Parliament.

12. 'Broadly speaking, before an election machinery can be brought into operation, there are three requisites', as said by Justice Fazal Ali, 'which require to be attended to, namely, (1) there should be a set of laws and rules making provisions with respect to all matters relating to, or in connection with, elections, and it should be decided as to how these laws and rules are to be made; (2) there should be an executive charged with the duty of securing the due conduct of elections; and (3) there should be a judicial tribunal to deal with disputes arising out of or in connection with elections.'[6] On reading the provisions of Part VIII of the Constitution, we can say that, in general, Article 222 of the Constitution deals with the first of these requisites, Articles 218 and 219 with the second, and Article 225 with the third requisite.

13. The most relevant provision of Article 222, in our view, to the question being considered is that of clause (d) thereof, which is reproduced here for ready reference:

222. Electoral laws.

Subject to the Constitution, Majlis-e-Shoora (Parliament) may by law provide for:

(a) .....

(b) .....

(c) .....

(d) the conduct of elections and election petitions; the decision of doubts and disputes arising in connection with elections;

(e) .....

(f) .....

but no such law shall have the effect of taking away or abridging any of the powers of the Commissioner or the Election Commission under this Part.

The reading of clause (d) of Article 222 of the Constitution makes it clear that the Parliament can enact a law that regulates the conduct of elections and such law would consequentially also regulate the constitutional duty and power of the Election Commission to conduct the election. The confusion as to the scope of the general power of the Election Commission under Article 218(3) is, however, caused by the latter part of Article 222 which says that "no such law shall have the effect of taking away or abridging any of the powers of the Commissioner or the Election Commission under this Part". Although Article 218, as well as Article 219 of the Constitution which list out the functions of the Election Commission, uses the term "duty" for the Election Commission in relation to the conduct of the election, and the word "powers" or "power" has at no other place been expressly used in Part VIII of the Constitution for the Election Commission, we find no difficulty in construing that the "powers" referred to in Article 222 are those "duties" and "functions" the performance of which has specifically been entrusted to the Election Commission under this Part of the Constitution. For, in

legal parlance, the words "power", "duty" and "function" are often used interchangeably, and the use of any one of these words is ordinarily understood to include the others, such as the word "function" is said to include "power" and "duty"[7]. The latter part of Article 222, therefore, operates against the taking away or abridging any of the "duties" and "functions" of the Election Commission that has been entrusted to the Election Commission under Part VIII of the Constitution. The Parliament cannot, by enacting a law, confer any of such duties and functions of the Election Commission to any other executive or judicial authority or office,[8] either entirely or partly. This is what, in our view, is meant by the latter part of Article 222.

14. So far as the general power of the Election Commission under Article 218(3) is concerned, the expression "and in accordance with law" used in that very Article clearly suggests that it is to be exercised to ensure that the election is conducted in accordance with the law enacted by the Parliament, and not in suppression thereof. The Election Commission, thus, cannot exercise its general power in a manner that would make the conduct of election otherwise than in accordance with the law enacted by the Parliament, that is, in violation or breach of such law. Therefore, a law enacted by the Parliament that regulates the conduct of elections and consequentially the constitutional duty and power of the Election Commission to conduct the election, is not hit by the provisions of the latter part of Article 222 of the Constitution; as the requirement for the Election Commission to conduct the election "in accordance with law" while performing its constitutional duty has been prescribed by the Constitution itself, not by a law enacted by the Parliament.

15. However, where the law enacted by the Parliament does not cover an unforeseen matter or issue that may arise during the election process, the Election Commission is to exercise its general power under Article 218(3) of the Constitution, in the same manner as all other discretionary powers are exercised, that is, fairly, reasonably and judiciously in accordance with the principles of equity, justice and good conscience. While exercising its general power in such a situation, the Election Commission must remember the fundamental principle that the general, plenary and inherent powers are exercised to supplement, not supplant or supersede, the law. Such powers cannot be exercised to defeat the express provisions of law but are invoked only when there is no specific provision of law on the matter or issue that needs to be dealt with.[9]

16. Accepting the contention that the Election Commission has such general and inherent power under Article 218(3) of the Constitution which is absolute or superior to the law enacted by the Parliament, would be tantamount to going against the constitutional mandate of the rule of law ensured under Article 4 of the Constitution. Article 4 of the Constitution declares it firmly that to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan. Given this constitutional mandate, in the matter of elections, the right of the citizens to vote[10] and contest elections[11] cannot be entirely left to be dealt with at the discretion of the Election Commission under its general and inherent power by construing such power to be above the law enacted by the Parliament.

17. Article 4 of the Constitution is the bedrock of the rule of law, and an antithesis to the rule of men, in our country. It is a restraint on the executive and judicial organs of the State to abide by the rule of law.[12] No person, authority, tribunal or court exercising executive or judicial powers can take any action against any person in contravention of the law. This principle equally applies to this Court in exercising its general and inherent power under Article 187(1) of the Constitution. Under this Article, the Court can issue any direction, order or decree to do complete justice between the parties in any case or matter pending before it, but cannot pass an order in contravention of any of the fundamental rights or any constitutional provision or any relevant statutory law.[13]

18. Thus, we can safely conclude on the question of the status of the general power of the Election Commission under Article 218(3) of the Constitution vis- -vis a law enacted by the Parliament, that this power operates in the area uncovered by such law.[14] Alike is the scope and applicability of the powers of the Election Commission under Section 8(c) of the Elections Act, which is also evident from the opening words of Section 8, "Save as otherwise provided". These words indicate that if something otherwise is provided in the Elections Act, then this Section will not apply.[15] Further, the amplitude of the power of the Election Commission under this Section, like its general power under Article 218(3), is extended to the performance of its executive duty to "conduct the election" and thus it can be exercised only at any stage of the election process,[16] not after the completion thereof.

19. In other words, we can say, the general power under Article 218(3) of the Constitution and Section 8(c) of the Elections Act can be exercised by the Election Commission within two parameters: (i) during the election process, which starts with the issuance of the election programme and culminates with the publication of the name of the returned candidates in the official gazette, and (ii) when there is no express provision in the law enacted by the Parliament to deal with the matter or issue that arises during the performance of constitutional duty of conducting the elections honestly, justly, fairly and in accordance with law.[17]

Applicability of Article 218(3) of the Constitution and Section 8(c) of the Elections Act to the present case

20. In the present case, the Election Commission passed the impugned order after the consolidation of the final result of the poll by the Returning Officer under Section 95 and the publication of the name of the appellant as a returned candidate in the official gazette under Section 98 of the Elections Act, when the election process has been completed. But as the notification of the appellant as a returned candidate had been issued under the interim order of this Court, the same could not have concluded the election process to create a bar on the exercise of its general power by the Election Commission under Article 218(3) of the Constitution read with Section 8(c) of the Elections Act. The objection that the Election Commission exercised its power in the present case after the completion of the election process is, therefore, not sustainable.

21. The second limitation on the exercise of its general power by the Election Commission under Article 218(3) of the Constitution read with Section 8(c) of the Elections Act is, however, found attracted. The matter of directing a re-poll or a fresh poll by the Election Commission in the process of conducting the election has expressly been dealt with in the Elections Act. There are three provisions in the Elections Act that deal with this matter in relation to the duty and power of the Election Commission to "conduct the election", which are Sections 9, 88 and 121 of the Elections Act.[18] As the matter of directing a re-poll by the Election Commission in the process of conducting the election has expressly been dealt with in the Elections Act, the Election Commission was not justified to invoke and exercise its general power under Article 218(3) read with Section 8(c) of the Elections Act in the present matter.

22. However, we are cognizant of the well-settled legal position that the mentioning of a wrong or inapplicable provision of law or non-mentioning of the applicable provision of law while exercising a jurisdiction or a power which is otherwise vested in a court, tribunal or authority, does not by itself have fatal consequences.[19] Therefore, we proceed to examine whether the impugned order could have been passed by the Election Commission under Section 9 or 88 of the Elections Act and can be sustained under any of these provisions of the law.[20]

Scope of Section 88 of the Elections Act and its applicability to the present case

23. We shall discuss the scope and applicability of Section 9 later. First, we consider the provisions of Section 88, which are reproduced here for ease of reference:

88. Stopping of the poll.---(1) The Presiding Officer shall stop the poll and inform the Returning Officer that he has done so if-

(a) the poll at the polling station is, at any time, so interrupted or obstructed for reasons beyond the control of the Presiding Officer that it cannot be resumed during the polling hours fixed under section 70; and

(b) any ballot box used at the polling station is unlawfully taken out of the custody of the Presiding Officer, or is accidentally or intentionally destroyed, or is lost or is damaged or tampered with to such an extent that the result of the poll at the polling station cannot be ascertained.

(2) Where a poll has been stopped under subsection (1), the Returning Officer shall immediately report the circumstances to the Commission and the Commission shall direct a fresh poll at that polling station unless it is satisfied that the result of the election has been determined by the polling that has already taken place at that polling station, along with the result of the polling at other polling stations in the same constituency.

(3) .....

(4) .....

(Emphasis added)

A reading of Section 88 shows that the tampering with the ballot box referred to therein relates to the polling day, not thereafter. Secondly, the power of the Election Commission to direct a fresh poll at the relevant polling

station is not to be exercised if the Election Commission is satisfied that the result of the election has been determined by the polling that has already taken place at that polling station (before stopping the poll by the Presiding Officer), along with the result of the polling at other polling stations in the same constituency.

24. In the present case, as per the report of the Returning Officer as well as the report of the Inquiry Committee constituted by the Election Commission, the tampering with the election record had taken place not on the polling day, rather it was made after the consolidation of the final result of the poll by the Returning Officer under Section 95 of the Elections Act. The impugned order passed by the Election Commission can, therefore, not sustain within the scope of the provisions of Section 88 of the Elections Act.

Scope of Section 9 of the Elections Act and its applicability to the present case

25. The scope of Section 9 of the Elections Act as well as that of its predecessor provision, that is, Section 103AA of the Representation of People Act 1976, has been a subject of detailed discussion by this Court in several cases. We would, therefore, refer to its scope here succinctly. Before doing that, we think, it would be appropriate to cite the relevant part of Section 9 here, for ease of reference:

9. Power of the Commission to declare a poll void.---(1) Notwithstanding anything contained in this Act, if, from facts apparent on the face of the record and after such enquiry as it may deem necessary, the Commission is satisfied that by reason of grave illegalities or such violations of the provisions of this Act or the Rules as have materially affected the result of the poll at one or more polling stations or in the whole constituency including implementation of an agreement restraining women from casting their votes, it shall make a declaration accordingly and call upon the voters in the concerned polling station or stations or in the whole constituency as the case may be, to recast their votes in the manner provided for bye-elections.

Explanation

(2)

(3) Notwithstanding the publication of the name of a returned candidate under section 98, the Commission may exercise the powers conferred on it by subsection (1) before the expiration of sixty days after such publication; and, where the Commission does not finally dispose of a case within the said period, the election of the returned candidate shall be deemed to have become final, subject to the decision of an Election Tribunal on an election petition, if any.

(4) While exercising the powers conferred on it by subsection (1), the Commission shall be deemed to be an Election Tribunal to which an election petition has been presented and shall, notwithstanding anything contained in Chapter IX, regulate its own procedure.

(5) Any person aggrieved by a declaration of the Commission under this section may, within thirty days of the declaration, prefer an appeal to the Supreme Court.

The opening expression used in Section 9(1), "Notwithstanding anything contained in this Act", shows that the jurisdiction of the Election Commission under this Section has an overriding effect against any other provision of the Elections Act. Thus, the Election Commission is competent to exercise its jurisdiction under this Section, notwithstanding the availability of the remedy of the election petition under Section 139 read with Section 142 and the jurisdiction of the Election Tribunal to grant the same relief under Section 154(1)(b)(i) of the Elections Act. To the extent of the grounds specified in Section 9(1) upon which the Election Commission can exercise its power to order a re-poll, the jurisdiction of the Election Commission and the Election Tribunal is, therefore, concurrent.[21] The Election Commission can exercise its jurisdiction under Section 9(1) of the Elections Act, to order a re-poll if:

i. There have been grave illegalities or violations of the provisions of the Elections Act or the Rules made thereunder;

ii. Such illegalities or violations are evident from facts apparent on the face of the record; and

iii. Such illegalities or violations have materially affected the result of the poll at one or more polling stations or in the whole constituency.

Although the ground of grave illegalities or violations of the provisions of the Elections Act or the Rules made thereunder in the election process is common for the exercise of their respective jurisdictions by the Election

Commission and the Election Tribunal, the difference lies in the nature of proof of those illegalities and violations, and in the scope of enquiry.

26. The words "from facts apparent on the face of the record" used in Section 9(1) are of vital importance in this regard. They restrict the jurisdiction of the Election Commission to such grave illegalities or violations of the Elections Act or the Rules which are evident "from the facts apparent on the face of the record". The Election Commission can, therefore, exercise its jurisdiction under Section 9(1) only when the allegation or issue of grave illegalities or violations of the Elections Act does not require a full-fledged trial and recording of pro and contra evidence of the contesting parties,[22] which can only be undertaken by the Election Tribunal.[23]

27. We are aware of the power of the Election Commission, under Section 9(1) of the Elections Act, to conduct such enquiry as it may deem necessary for its satisfaction about the alleged grave illegalities or violations, in addition to the "facts apparent on the face of the record", but before initiating such inquiry by the Election Commission the facts apparent on the face of the record must prima facie indicate the commission of some grave illegality or violation of the Elections Act or the Rules made thereunder, during the election process.[24] The Election Commission cannot initiate a roving enquiry to search for some illegalities or violations, on bald and vague allegations unsupported by prima facie proof, in the exercise of its jurisdiction under Section 9(1) of the Elections Act.

28. Further, the enquiry which the Election Commission can conduct under this Section can only be of a summary nature, notwithstanding the omission of the word "summary" in Section 9(1),[25] as the Election Commission can make an order for re-poll under this Section before the expiration of sixty days after publication of the name of the returned candidate under Section 98 of the Elections Act, not thereafter. Where the Election Commission does not finally dispose of a case initiated under Section 9(1) within the said period, the proceedings stand abated and the election of the returned candidate is deemed to have become final, subject to the decision of the Election Tribunal on the election petition, if any, as per section 9(3) of the Elections Act. Moreover, as the dismissal of a petition or the abatement of proceedings of a case under Section 9 by the Election Commission does not bar the re-agitation before and trial by the Election Tribunal, of the same grounds of grave illegalities or violations of the Elections Act or the Rules made thereunder,[26] the legislature cannot be presumed to have intended two full-fledged trials of the same issue before both forums: the Election Commission and the Election Tribunal. Therefore, we are of the opinion that the enquiry to be conducted by the Election Commission under Section 9(1) can only be of a summary nature, notwithstanding the omission of the word "summary" in this Section.

29. The second restriction on the exercise of power under Section 9(1) by the Election Commission is that by reason of the grave illegalities or violation of the provisions of the Elections Act or the Rules, the result of the poll at one or more polling stations or in the whole constituency must have been materially affected. Any illegality or violation which does not relate to holding and conducting the poll in the election process, and has thus not affected the result of the poll, cannot form the basis for invoking and exercising the power under Section 9(1) by the Election Commission. The grave illegalities or violations must be such that have materially affected the result of the poll.[27] Although such illegalities or violations may have been committed at any stage of the election process, but not later than the final consolidation of the result of the poll by the Returning Officer under Section 95 of the Elections Act; as any illegality or violation committed after the consolidation of the final result by the Returning Officer cannot be said to have materially affected the result of the poll. It, therefore, does not fall within the scope of the provisions of Section 9(1) of the Elections Act and cannot be a subject of enquiry by the Election Commission to exercise jurisdiction under this Section.

30. Needless to mention that any fact-finding enquiry or departmental regular enquiry may be got conducted by the Election Commission, in the matter of any illegality or violation committed after the consolidation of the final result to take appropriate administrative or criminal action against the delinquent election officials, but not for an action under Section 9(1) of the Elections Act.

31. In the present case, the bar of exercising the powers by the Election Commission before the expiration of sixty days after publication of the name of the appellant as a returned candidate under Section 98 of the Elections Act, was not attracted as the said publication had been made under an interim order of this Court. However, as

the illegality of tampering with the election record had been committed, in the present case, after the consolidation of the final result of the poll by the Returning Officer under Section 95 of the Elections Act, the Elections Commission could not have invoked and exercised its power under Section 9(1) of the Elections Act; for such illegality had not affected the result of the poll already consolidated by the Returning Officer under Section 95 of the Elections Act. Further, the fact that who, the appellant or the respondent, was responsible for the tampering made with the election record after the consolidation of the final result of the poll, could not have been decided, nor has it been decided, by the Election Commission within the scope of summary enquiry under Section 9(1) of the Elections Act. This fact could only have been decided by the Election Tribunal in a full-fledged trial. Without deciding that fact, ordering a re-poll in 20 polling stations is tantamount to punishing the appellant without determining his fault, and awarding the suspected culprit, if he were the respondent.[28] In such an uncertain situation, the Election Commission should not have vitiated the official acts of the election officials, which were the counting of votes and the consolidation of the final result of the poll, as they had a presumption of regular performance as per Article 129(e) of the Qanun-e-Shahadat 1984. The impugned order is, therefore, not sustainable under Section 9(1) of the Elections Act.

Conclusion

32. For all that has been discussed and said above, we conclude that the Election Commission had no power to order a re-poll in the 20 polling stations, under Article 218(3) of the Constitution read with Section 8(c) or Section 9(1) of the Elections Act, on the ground of tampering made with the election record after the consolidation of the final result of the poll by the Returning Officer under Section 95 of the Elections Act. The impugned order of the Election Commission is not sustainable and is liable to be set aside by this Court in the exercise of its appellate jurisdiction under Section 9(5) of the Elections Act. Needless to restate the well-settled principle that if a court, tribunal or authority not having jurisdiction wrongly assumes and exercises such a jurisdiction and makes an order without jurisdiction, an appeal lies from that order in the same manner as an appeal lies from an order with jurisdiction.[29] The appeal of the appellant is, therefore, allowed and the impugned order is set aside. Consequentially, the superstructure built upon the impugned order also crumbles and falls down. The re-poll held in pursuance of the impugned order and the subsequent notification of the respondent as a returned candidate are quashed. The respondent shall be de-notified, while the appellant re-notified, as a returned candidate.

33. The Islamabad High Court rightly dismissed the writ petition of the appellant, on the ground of the availability of the adequate statutory remedy of appeal before this Court. The petition for leave to appeal of the appellant filed against the order of the Islamabad High Court is meritless and is therefore dismissed; it was mistakenly mentioned as allowed in the short order, which shall stand corrected accordingly.

MWA/Z-9/SC Order accordingly.

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[1] These provisions have not been mentioned in the order dated 14.01.2018 and the notification dated 18.01.2018. The Election Commission has referred to these provisions in its concise statements (C.M.A. No. 1727/2019 and C.M.A. No.2577/2022) filed in the present appeal.

[2] Workers' Party v. Federation of Pakistan PLD 2012 SC 681. Paras 40 and 41

[3] Ibid

[4] Election Commission v. Javaid Hashmi PLD 1989 SC 396.

[5] See Sections 5(4), 57 and 98 of the Elections Act.

[6] Ponnuswami v. Returning Officer AIR 1952 SC 64.

[7] Nazar Hussain v. State PLD 2010 SC 1021; Gadoon Textile v. WAPDA 1997 SCMR 641 per Fazal Karim J. and Al-Jehad Trust v. Federation of Pakistan PLD 1997 SC 84 per Ajmal Mian J.

[8] Province of Sindh v. M.Q.M. PLD 2014 SC 531; Election Commission v. Province of Punjab PLD 2014 SC 668.

[9] Messrs Conforce v. Syed Ali PLD 1977 SC 599; Roazi Khan v. Nasir 1997 SCMR 1849 and Muhammad Sadiq v. Bashiran PLD 2000 SC 820.

[10] Province of Sindh v. M.Q.M. PLD 2014 SC 531 - Right to vote was held to be guaranteed by Article 17(2) of the Constitution.

[11] Javed Jabbar v. Federation of Pakistan PLD 2003 SC 955 - Right to contest elections was held to be guaranteed by Article 17(2) of the Constitution.

[12] Federation of Pakistan v. Nawaz Sharif PLD 2009 SC 644.

[13] Dossani Travels v. Travels Shop PLD 2014 SC 1 and Prem Chand v. Excise Commissioner AIR 1963 SC 996.

[14] We are fortified in our view by the opinion of Justice Krishna Iyer expressed in Mohinder Singh v. Chief Election Commissioner AIR 1978 SC 851 while construing Article 324(1) of the Indian Constitution, which contains provisions similar, in substance, to that of Article 218(3) of our Constitution as to the entrustment of duty of conducting the elections to the Election Commission. His view was later-on reiterated and followed in A.C. Jose v. Sivan Pillai AIR 1984 SC 921, Kanhiya Lal v. R.K. Trivedi AIR 1986 SC 111 and Special Reference No.1 of 2002 AIR 2003 SC 87.

[15] Bartha Ram v. Lala Mehar 1995 SCMR 684.

[16] Ibid

[17] See Muhammad Salman v. Naveed Anjum 2021 SCMR 1675 (Majority opinion) paras 25 and 42, wherein it was held that in view of the express provisions of Articles 63 and 63A in the Constitution as to the power of the Election Commission on the matter of disqualification as well as in view of the legal framework provided in the Elections Act on this matter, the general or inherent power of the Election Commission under Article 218(3) of the Constitution cannot be exercised on the matter of qualification or disqualification of a returned candidate.

[18] We are not concerned with the powers of the Election Tribunal in this regard and have therefore not referred to them here.

[19] Naseer Ahmed v. Returning Officer 2023 SCMR 179 (citation on the official website of this Court); Olas Khan v. NAB PLD 2018 SC 40; Saadat Khan v. State 2018 SCMR 387 and Commissioner of Income Tax v. Abdul Ghani PLD 2007 SC 308.

[20] Section 121 of the Elections Act relates to power of the Election Commission as to directing a fresh poll in the conducting of election to the Senate, which is not relevant for present matter.

[21] Aftab Mirani v. Muhammad Ibrahim PLD 2008 SC 779.

[22] Salahuddin Tirmizi v. Election Commission PLD 2008 SC 735.

[23] The similar view of a Full Bench of the Election Commission, comprising of Justices Naimuddin, Riaz Ahmad and Bashir Jehangiri, expressed in Khurshid Kasuri v. Returning Officer 1994 CLC 296 on the provisions of Section 103AA of the ROPA 1976 (predecessor provisions of Section 9 of the Elections Act) is approved.

[24] Ibid

[25] The word "summary" was mentioned in the predecessor provision of Section 9(1), that is Section 103AA of the ROPA 1976.

[26] Aftab Mirani v. Muhammad Ibrahim PLD 2008 SC 779.

[27] See Muhammad Salman v. Naveed Anjum 2021 SCMR 1675 (Majority opinion) para 41.

[28] Behram Khan v. Abdul Hameed PLD 1990 SC 352; Ejaz Shafi v. Ashraf Shah 1996 SCMR 605 and Jam Madad Ali v. Asghar Ali Junejo 2016 SCMR 251.

[29] Muhammad Ashfaq v. State PLD 1973 SC 368; Sabir Shah v. Shad Muhammad PLD 1995 SC 66 per Fazal Karim J.; MEPCO v. Muhammad Ashiq PLD 2006 SC 328. See also Naseer Ahmed v. Returning Officer 2023 SCMR 179 (citation on the official website of this Court)

**2024 S C M R 1037**

**[Supreme Court of Pakistan]**

**Present: Umar Ata Bandial, C.J., Syed Mansoor Ali Shah and Ayesha A. Malik, JJ**

**COMMISSIONER, RAWALPINDI/ PROVINCE OF THE PUNJAB and others---Petitioners**

**Versus**

**NASEER AHMED and others---Respondents**

Civil Petitions Nos. 1441 to 1449 of 2021, decided on 11th September, 2023.

(Against the order of judgment of Lahore High Court, Rawalpindi Bench, dated 02.02.2021, passed in W.P. No.2038 of 2020 and other connected matters).

**(a) Interpretation of statutes---**

----Time limit for performing a certain act under a statute---When a statute is silent about limitation, a reasonable time limit is to be supplied by the Courts.

Federal Land Commission v. Habib Ahmed PLD 2011 SC 842 and Commissioner Inland Revenue v. Yasmeen Bano 2020 SCMR 1120 ref.

**(b) Land Acquisition Act (I of 1894)---**

----Ss. 4, 5 & 17(1)---Land acquisition---Preliminary notification under section 4 of the Land Acquisition Act, 1894 ("Act")---Addendum or corrigendum notification to a preliminary notification under section 4 of the Act---Time limit---Where any notification is issued to amend, vary or add to the earlier (preliminary) notification issued under section 4 of the Act, the same is to be issued within a reasonable time which shall be determined according to the specific facts and circumstances of the case---Furthermore addendum or corrigendum to a notification under section 4 can only be issued before the next step in the acquisition process is undertaken i.e. before the issuance of a notification under section 5 or under section 17(4) of the Act, though fresh acquisition proceedings can be initiated by issuing a fresh notification under section 4 of the Act if some more land is needed or likely to be needed later for the same purpose.

Anwar Ali Sahto v. Federation of Pakistan 2002 PLC (C.S.) 526; Phoenix Security v. Pir Muhammad 2020 SCMR 132 and Khyber Zaman v. Governor, State Bank 2005 SCMR 235 ref.

**(c) Land Acquisition Act (I of 1894)---**

----Ss. 4, 5 & 17(1)---Land acquisition---Date of notification under section 4 of the Land Acquisition Act, 1894 ("Act")---Scope---Said date will not necessarily be the date of the first notification issued under section 4 of the Act, instead, it will be whenever the complete and final land is notified---In instances where addendums or corrigenda to a notification under Section 4 are issued, the indicator of the finality of the land notified would be when, after the issuance of an addendum or corrigendum, the public functionaries move forward with the acquisition proceedings by either issuing a notification under section 5 or under section 17(4) of the Act---Therefore, the date of the last addendum or corrigendum issued in relation to the notification under section 4 of the Act before any step is taken to advance the acquisition proceedings to the next stage, is deemed to be the date of the notification under section 4 of the Act for the purposes of the acquisition proceedings under the Act---This is because the complete land under the said provision becomes finally notified through the addendum or corrigendum and, after this, the state functionaries take the next step in the acquisition proceedings.

**(d) Land Acquisition Act (I of 1894)---**

----Ss. 4 & 23---Constitution of Pakistan, Arts. 23 & 24---Land acquisition---Compensating land owners---Interpretation and applicability of the provisions of the Land Acquisition Act, 1894 must be in consonance with the spirit of Articles 23 and 24 of the Constitution and the object of the Act, which require properly and adequately compensating landowners whose lands are being acquired thereunder.

Federal Government v. Mst. Zakia Begum 2023 SCP 57; Land Acquisition Collector v. Iqbal Begum PLD 2010 SC 719 and Nisar Ahmad v. Collector, Land Acquisition PLD 2005 SC 25 ref.

**(e) Land Acquisition Act (I of 1894)---**

----Ss. 4 & 23---Land acquisition---Preliminary notification under Section 4 of the Land Acquisition Act, 1894 ("Act")---Addendum or corrigendum notification, issuance of---Market value of land, determination of---Where a notification under Section 4 of the Act is subsequently amended, varied or added to through an addendum or

corrigendum, the date of the publication of the intial notification under Section 4 cannot be taken as the material date for the purposes of considering the market value of the land for determining compensation under Section 23(1) of the Act---Such an interpretation would not only be against the Constitutional mandate by upsetting the balance the Constitution seeks to maintain through adequately and properly compensating the owners of the land that is being acquired, it would also be against the object of the Act to that effect---Instead, in such circumstances, the date of publication of the subsequent addendum or corrigendum, finally notifying the complete land under Section 4 of the Act, must be considered to determine the market value of the land for the purposes of compensation.

**(f) Land Acquisition Act (I of 1894)---**

----Ss. 4, 18 & 23---Constitution of Pakistan, Art. 199---Land acquisition---Compensation for land owners---Interference by High Court in its Constitutional jurisdiction---Scope---Interference on the matter of determination of fair compensation is not ordinarily warranted under the judicial review jurisdiction of the High Court under Article 199 of the Constitution and such matter is best decided by a civil court in its reference jurisdiction under Section 18 of the Land Acquisition Act, 1894 after recording the respective evidence of the parties---However, where the acquisition authorities under the Act have misdirected themselves on a point of law, which does not require any factual determination, the High Court must intervene to correct the legal error and set the course of law right.

Barrister Qasim Chohan, Addl. A.G. Punjab, Sh. Moeen-ud-Din, Chief Potohar, Sehar Ch., Law Officer, Irrigation, Mumtaz Watoo, XEN Small Dam and Syed Farhat Abbas, SDO for Petitioners.

Sardar Abdul Raziq Khan, Advocate Supreme Court for Respondents Nos. 1 and 2 (in C.P. No. 1441 of 2021).

Mrs. Hifza Ibrar Bukhari, Advocate Supreme Court for Respondent No.2 (in C.P. No. 1444 of 2021).

Khurram Masood, Advocate Supreme Court for Respondents (in C.P. No. 1446 of 2021).

Atiq-ur-Rehman Kayani, Advocate Supreme Court for Respondents Nos. 1-9 (in C.P. No. 1449 of 2021).

Nemo (for all other respondents)

Assisted by: Waqas Ali Mazhar, Research Officer, SCRC and Muhammad Hassan Ali, Law Clerk.

Date of hearing: 15th February, 2022.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**The petitioners seek leave to appeal against a consolidated judgment of the Lahore High Court, dated 02.2.2021 ("impugned judgment") whereby the High Court, while accepting the writ petitions of the respondents, has set aside the notifications issued in respect of the acquisition of land owned by the respondents and others.

2. Briefly, the facts of the case are that the Executive Engineer, Small Dams Division, Islamabad requested for acquisition of land in District Rawalpindi for the construction of the Dadhocha Dam ("the Dam"). A preliminary notification under Section 4(1) of the Land Acquisition Act of 1894 ("Act") was issued on 02.11.2010, published in the official Gazette on 03.11.2010, for acquiring land measuring 7977- Kanals 10-Marlas in Tehsil Rawalpindi, District Rawalpindi ("Preliminary Notification"). After publication of the Preliminary Notification, the District Price Assessment Committee, Rawalpindi ("DPAC"), in its meeting held on 17.9.2011, approved the estimated cost of the land to be acquired by fixing the market value of the land to be between Rs.60,000/- to Rs.1,00,000/- per Kanal. For various reasons, no further steps were taken by the petitioners in relation to the acquisition up till the issuance of an addendum to the Preliminary Notification on 12.3.2020, published in the official Gazette on 13.3.2020, whereby the land to be acquired in Tehsil Rawalpindi was increased from 7977-Kanals 10-Marlas to 14720-Kanals 17-Marlas ("Addendum Notification"). A meeting of the DPAC was held again on 20.3.2020 to consider the price of the land and it approved the same valuation as had already been approved by the DPAC in 2011. Subsequently, a notification under Sections 17(4) and 6 of the Act was issued on 21.4.2020, published in the official Gazette on 24.4.2020, whereby urgency was invoked to expedite the process of acquisition of the land, and the provisions of Sections 5 and 5-A of the Act were held not to be applicable ("Urgency Notification").

3. The respondents challenged the acquisition proceedings, the above notifications and the acts taken thereunder, by filing writ petitions. Meanwhile, the award was announced on 13.8.2020 ("Award") on the basis

of the same valuation of land as determined by the DPAC in 2011, and endorsed in 2020, thereby, concluding the acquisition proceedings after nearly 10 years. The writ petitions were allowed by the High Court through the impugned judgment and the notifications were set aside; however, the petitioners were set at liberty to initiate fresh proceedings for acquisition of the land for construction of the Dam by way of issuing a new notification under Section 4 of the Act. Hence, the petitioners have filed the present petitions seeking leave to appeal from the said impugned judgment.

4. The learned counsel for the petitioners has argued that preliminary notifications under Section 4 of the Act were issued in the year 2010 to acquire (i) land measuring 7977-Kanals 10-Marlas in Tehsil Rawalpindi, (ii) land measuring 170-Kanals 11-Marlas in Tehsil Kahuta and (iii) land measuring 10418-Kanals 05-Marlas in Tehsil Kallar Syedan, of District Rawalpindi; that the acquisition proceedings could not proceed further due to certain disputes as to the construction of the Dam at the proposed location; that after resolution of those disputes, land measuring 10418-Kanals 05-Marlas of Tehsil Kallar Syedan notified in 2010 was reduced to 1820-Kanals 15-Marlas and in lieu of the said land, through the Addendum Notification issued in 2020, acquisition of land in Tehsil Rawalpindi was increased from 7977-Kanals 10-Marlas to 14720-Kanals 17-Marlas for construction of the Dam; and that the value of the land was assessed according to the market value prevailing at the time of issuance of the Preliminary Notification as per Section 23 of the Act, and the Award was then passed after fulfilling all the legal formalities.

5. While explaining the delay in the proceedings, he has submitted that pursuant to the issuance of the Preliminary Notification, the Defence Housing Authority ("DHA") approached the Government of Punjab with a request to shift the site for the construction of the Dam about 06 kilometers upstream. The Government of Punjab constituted a Committee on 04.2.2011 to consider the request, which recommended the original site of the Dam. The Government of Punjab then constituted another Committee to give a fresh recommendation vis--vis the feasibility of the site for construction of the Dam, which also recommended the original site. The matter then ended up before this Court and was finally disposed of vide order dated 30.4.2019 passed in Civil Review Petition No. 742 of 2015, whereafter further steps under the Act were taken to conclude the acquisition proceedings as expeditiously as possible by invoking the urgency provisions of the Act.

6. On the other hand, the learned counsel for the respondents (landowners) has supported the impugned judgment. He has contended that after the issuance of the Preliminary Notification, the petitioners went into deep slumber and no further steps were taken for acquisition of the land; and that after a lapse of more than 09 years, instead of initiating fresh acquisition proceedings, the petitioners issued the Addendum Notification in order to deprive the respondents and other landowners of fair compensation in view of the escalation in prices of the land during the said period, therefore, the High Court has rightly declared the notifications as redundant and illegal.

7. We have considered the respective contentions of the learned counsel for the parties and have examined the record of the case with their able assistance. It appears that the High Court has set aside the acquisition proceedings due to the inordinate delay in the issuance of the Addendum Notification. Therefore, the present case requires determination on the following questions:

(i) Whether the District Collector had the lawful authority to issue the Addendum Notification and if he had such authority, whether such authority has been exercised in a proper and legal manner under the law; and

(ii) What is the legal effect of the issuance of the Addendum Notification on the acquisition proceedings, particularly on the determination of compensation?

We shall take up and decide the above questions in seriatim.

Authority to issue the Addendum Notification and its exercise

8. The Act neither provides for nor prohibits issuance of an addendum to a notification already issued under Section 4 of the Act. However, as per Section 20 of the Punjab General Clauses Act 1956 ("1956 Act"); where a power to issue a notification is conferred under an Act, then that power includes a power, exercisable in the like manner and subject to the like sanctions and conditions (if any), to add to, amend, vary or rescind any such notification so issued. A similar provision is also contained in Section 21 of the [Federal] General Clauses Act 1897. Therefore, in the absence of any provision in the Act that either expressly or by necessary implication

prohibits the issuance of an addendum to a notification issued under Section 4, the District Collector is found to have the lawful authority, by virtue of Section 20 of the 1956 Act, to issue an addendum to the notification issued under Section 4 of the Act, as in the instant case, provided it was issued in the like manner and subject to the like sanctions and conditions under Section 4 of the Act.

9. Section 4 of the Act does not provide for any time limit for issuance of a notification under the said provision and stipulates that 'whenever' it appears to the Collector that land in a locality is needed or likely needed for public purpose or for a company, a notification to that effect shall be published in the official Gazette. The term 'whenever' denotes that a notification under Section 4 of the Act in the first instance will be issued whenever the land is needed or likely to be needed for a public purpose or a company and therefore, complete discretion is extended to the Collector with regards to when it is required whereupon the notification shall be issued. However, the same connotation cannot be extended to the said term when an addendum or corrigendum is issued by the Collector, by exercising powers under Section 20 of the 1956 Act, in relation to the said notification. Such an interpretation would amount to conferring unlimited and unfettered powers to the Government to finalize/ conclude the acquisition proceedings which would result in uncertainty as to whether the land would be acquired or not and therefore, would be against the spirit of Article 23 of the Constitution[1] that provides for the fundamental right of citizens to acquire, hold and dispose of property. Therefore, for the purpose of issuing any such notification to add to, amend or vary a notification already issued under Section 4 of the Act, it is necessary to interpret the term 'whenever' appearing in Section 4, being a condition stipulated under the said provision while exercising the powers conferred under Section 20 of the 1956 Act.

10. It is settled law that when a statute is silent about limitation, a reasonable time limit is to be supplied by the Courts.[2] In Mehraj[3] this Court interpreted the phrase 'at any time' appearing in Section 5 of the Act to mean 'within a reasonable time' and even though reasonable time was not definitively dealt with by providing a time limit, it was held that it would be determined according to the facts and circumstances of the case. Notably, the issuance of a notification under Section 5, after a notification under Section 4 is issued, is continuation of the acquisition proceedings, similarly, an addendum or a corrigendum to the notification under Section 4 of the Act is also furtherance of the acquisition proceedings. The term 'whenever'[4] appearing in Section 4 of the Act is also synonymous to 'at any time' appearing under Section 5. Therefore, the same interpretation is to be extended to 'whenever' appearing in Section 4 of the Act when an addendum or corrigendum is issued in relation thereto.[5] Hence, where any notification is issued to amend, vary or add to the earlier notification issued under Section 4 of the Act, the same is to be issued within a reasonable time which shall be determined according to the specific facts and circumstances of the case.

11. However, it must be noted that an addendum or corrigendum to a notification under Section 4 cannot be issued after a notification under Section 5 or Section 17(4) of the Act has been issued pursuant to the said notification under Section 4, though fresh acquisition proceedings can be initiated by issuing a fresh notification under Section 4 of the Act if some more land is needed or likely to be needed later for the same purpose. This is because the next step after the issuance of a notification under Section 4 in an acquisition proceeding, as shall be explained later herein, is either to issue a notification under Section 5 in the ordinary acquisition process or to issue a notification under Section 17(4) for urgent acquisition of the land. After the issuance of a notification either under Section 5 or under Section 17(4), the same acquisition proceeding cannot revert to the initial stage of issuing a premilinary notification under Section 4 of the Act. An addendum or corrigendum to a notification under Section 4 can thus only be issued before the next step in the acquisition process is undertaken i.e. before the issuance of a notification under Section 5 or under Section 17(4) of the Act.

12. Coming to the instant case, in the normal course of acquisition such an inordinate delay in issuing the Addendum Notification, as has occurred in the present case, could not have been sustained. However, in the instant case, after the Preliminary Notification was issued and the request for shifting the Dam to an alternate location was rejected, the matter then ended up before this Court and was finally disposed of vide order dated 30.4.2019 passed in Civil Review Petition No. 742 of 2015 with the outcome that the Dam will be built on the original site. In these circumstances, the acquisition proceedings could not have continued while the matter was under adjudication and there was uncertainty as to the site of the Dam. The Addendum Notification was then

subsequently issued after the matter was conclusively disposed of by this Court. No further steps in the acquisition proceedings had been taken between the issuance of the Preliminary Notification and the issuance of the Addendum Notification, therefore, the matter was still in the initial preliminary notification stage under Section 4 of the Act. If the next step in the acquisition proceedings, through the issuance of a notification under Section 5 or Section 17(4), had been taken after the issuance of the Preliminary Notification, then the Addendum Notification to the Preliminary Notification under Section 4 of the Act could not have been issued or sustained. This is because once steps are taken to advance the acquisition proceedings to the next stage, they cannot be reverted to the previous stage, though fresh acquisition proceedings can be initiated by issuing a fresh notification under Section 4 of the Act if more land is needed or likely to be needed for the same purpose later, as stated above. Therefore, in the said circumstances, the Addendum Notification was issued within a reasonable time and cannot be set aside being based on mala fide. The Collector is, therefore, found to have exercised his legal authority to issue the Addendum Notification to the Preliminary Notification in a proper and legal manner under the law, in the circumstances of the case. Invoking urgency through the subsequent Urgency Notification is also found to be a reasonable decision in view of the delay already occurred due to the prolonged litigation regarding the location of the Dam and the urgent need of building dams in Pakistan.

The legal effect of issuance of an addendum notification on the acquisition proceedings.

13. Moving on to the second question, we are of the view that in order to ascertain the legal effect of the Addendum Notification on the subsequent acquisition proceedings, particularly on the determination of compensation, it is necessary to understand the significance of the notification under Section 4 of the Act in terms of the land notified thereunder. Section 4 of the Act provides for the initiation of the acquisition process through publication of a preliminary notification in the official Gazette, notifying the land that is needed or likely to be needed for any public purpose or for a company. Thereafter, either of two routes (normal or urgent) leading up to a declaration under Section 6 can be adopted, which, as per Section 6(3), is conclusive evidence that the land is needed for a public purpose, or for a company, and the Commissioner can then acquire the land in the manner provided thereafter in the Act.

14. Firstly, after a certain land in a locality is notified through a notification under Section 4 of the Act, following the normal route the Commissioner issues a notification under Section 5 specifying the particular land of that locality to be acquired as included in the locality already notified under Section 4. Thereafter, under Section 5-A, any persons interested in that land can file objections to its acquisition before the Collector within 30 days after the issuance of the notification under Section 5. Under subsection (2) of Section 5-A, the Collector is to provide an opportunity of hearing to any such objector and after making such further inquiry, if any, as he thinks necessary, he is to submit the case for decision of the Commissioner, together with the record of the proceedings held by him and a report containing his recommendations on the objections. When the Commissioner is satisfied, after considering the report, if any, made by the Collector under subsection (2) of Section 5-A, that any land is needed for a public purpose, or for a company, he makes a declaration to this effect under Section 6 of the Act, which declaration is then published in the official Gazette. Notably, Section 6(4) of the Act also stipulates that where the area of the land in the said declaration is less than the area of land previously notified under Section 4, then such previous notification, so far as it relates to the excess area, shall be deemed to have been superseded by the said declaration. Thus, a notification under Section 5 can only be issued in relation to the land that has been previously notified under Section 4, and it also appears that a final declaration under Section 6 can also be issued only with regards to the land that has been previously notified under Section 4 of the Act.

15. The urgent route is adopted through the issuance of a notification under Section 17(4) of the Act. Under this Section, the Commissioner can dispense with the applicability of the provisions of Sections 5 and 5-A if he is of the opinion that the land is urgently required and can make a final declaration under Section 6 at any time after the publication of the notification under Section 4. This also makes it apparent that where a notification under Section 17(4) is issued, it shall be with regards to the land already notified under Section 4, after which a formal declaration can be issued under Section 6 of the Act at any time.

16. In view of the above, it is evident that the acquisition process cannot be initiated, formalized and then concluded unless a notification under Section 4 of the Act notifying the complete and final land to be acquired is issued. Hence, it follows that the date of the notification issued under Section 4 will not necessarily be the date of the first notification issued under the said provision, instead, it will be whenever the complete and final land is notified. In instances where addendums or corrigenda to a notification under Section 4 are issued, the indicator of the finality of the land notified would be when, after the issuance of an addendum or corrigendum, the public functionaries move forward with the acquisition proceedings by either issuing a notification under Section 5 or under Section 17(4) of the Act. Therefore, the date of the last addendum or corrigendum issued in relation to the notification under Section 4 of the Act before any step is taken to advance the acquisition proceedings to the next stage, is deemed to be the date of the notification under Section 4 of the Act for the purposes of the acquisition proceedings under the Act. This is because the complete land under the said provision becomes finally notified through the addendum or corrigendum and, after this, the state functionaries take the next step in the acquisition proceedings.

17. In the instant case, the Collector issued the Addendum Notification to the Preliminary Notification by adding land to be acquired in addition to the land already notified under the latter notification, thereby, notifying the complete and final land that is needed or likely to be needed for the construction of the Dam. Thereafter, the next step in the process of acquisition was undertaken through the issuance of the Urgency Notification under Section 17(4) of the Act. No further steps to take the acquisition proceedings to the next stage had been taken after the issuance of the Preliminary Notification and before the issuance of the Addendum Notification. Therefore, the Addendum Notification did not have the effect of reverting the acquisition proceedings to the previous stage, in which case, the Addendum Notification could not have been sustained and fresh acquisition proceedings through the issuance of a fresh preliminary notification under Section 4 of the Act would have had to be initiated to acquire the land added through the Addendum Notification. Hence, in the present case, with the issuance of the Addendum Notification, the notification issued under Section 4 became final and complete in terms of the land notified thereunder. Therefore, the date of issuance of the Addendum Notification shall be taken as the date on which the notification under Section 4 of the Act is deemed to have been issued.

18. Consequently, the issuance of an addendum notification would also affect the date of the publication of the notification under Section 4 that is referred to in Section 23(1) of the Act. The provisions of Section 23(1) of the Act prescribe that in determining the amount of compensation to be awarded for the land acquired, the market value of the acquired land at the date of the publication of the notification under Section 4 shall be taken into consideration. Since a notification under Section 4 becomes complete on the date when the complete and final land is notified thereunder, it is the date of the publication of the addendum or the corrigendum, or the last addendum or corrigendum if there are more than one, by virtue of which the complete land is finally notified, that is to be taken as the date of the publication of the notification under Section 4 referred to in Section 23(1) of the Act for the purposes of considering the market value of the acquired land while determining compensation.

19. Depriving a person of his/her property through acquisition by virtue of Article 24 of the Constitution is an exception to the fundamental right of every citizen to acquire, hold and dispose of property, as guaranteed under Article 23. By virtue of Article 24, the Constitution provides for a balance between the citizen's right to rehabilitate or resettle or acquire alternate land and the State's power of eminent domain, as it stipulates that along with such acquisition being only for a public purpose, it can only be undertaken under an authority of law that provides for compensation, which in this instance is the Act. The right to compensation under an authority of law has a Constitutional underpinning that is the protection given to the right to own property.[6] The main object of the Act, therefore, is to provide complete indemnity to the landowners and no property can be acquired without proper and adequate compensation[7] so that the opportunity to rehabilitate or resettle or acquire alternate land is not lost. Landowners are entitled to the maximum possible benefit in the circumstances of each case as such acquisition is not by way of mutual negotiations but under State power conferred on public functionaries.[8] The interpretation and applicability of the provisions of the Act must, therefore, be in

consonance with the spirit of Articles 23 and 24 of the Constitution and the object of the Act, which require properly and adequately compensating landowners whose lands are being acquired thereunder.

20. Therefore, where a notification under Section 4 of the Act is subsequently amended, varied or added to through an addendum or corrigendum, the date of the publication of the initial notification under Section 4 cannot be taken as the material date for the purposes of considering the market value of the land for determining compensation under Section 23(1) of the Act. Such an interpretation would not only be against the Constitutional mandate by upsetting the balance the Constitution seeks to maintain through adequately and properly compensating the owners of the land that is being acquired, it would also be against the object of the Act to that effect. Instead, in such circumstances, the date of publication of the subsequent addendum or corrigendum, finally notifying the complete land under Section 4 of the Act, must be considered to determine the market value of the land for the purposes of compensation. As such, in the present case, the assessment of the market value of the land by the DPAC as on the date of the publication of the Preliminary Notification instead of the date of the publication of the Addendum Notification, cannot be sustained. The Award, having been announced on the basis of this legally wrong assessment, therefore, also becomes redundant and unsustainable.

Conclusion

21. In view of the above answers to the two questions of law, we find that though the Preliminary Notification, the Addendum Notification and the Urgency Notification were validly issued in the present case, the Award was not passed in accordance with law. We are cognizant of the legal position that interference on the matter of determination of fair compensation is not ordinarily warranted under the judicial review jurisdiction of the High Court under Article 199 of the Constitution and such matter is best decided by a civil court in its reference jurisdiction under Section 18 of the Act after recording the respective evidence of the parties. However, where the acquisition authorities under the Act have misdirected themselves on a point of law, which does not require any factual determination, the High Court must intervene to correct the legal error and set the course of law right. In the present case, it is an admitted position that the assessment of the market value of the acquired land was made by the DPAC as per the date of the Preliminary Notification instead of the date of the Addendum Notification, which was a clear legal error. The Award was made passed on the basis of the said legally wrong assessment, and thus suffered from the same legal error. The Award is thus found to have been passed without lawful authority and of no legal effect in terms of Article 199 (1) (a) (ii) of the Constitution.

22. Therefore, we convert these petitions into appeals and partly allow the same by holding that the Preliminary Notification, the Addendum Notification and the Urgency Notification were validly issued and shall remain operative. However, the Award is set aside with the direction to the petitioners to determine the compensation of the acquired land afresh, treating the date of the publication of the Addendum Notification as the date of the publication of the notification under Section 4 referred to in Section 23(1) of the Act, for assessing the market value of the acquired land. It goes without saying that while determining compensation and announcing the award afresh, other matters/factors prescribed under the law for determining the compensation, including the potential value of the land and the escalation in prices of the land from the date of the publication of the Addendum Notification to the date of announcing the new award, shall also be considered and taken into account.

MWA/C-22/SC Order accordingly.

**2024 S C M R 1071**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, Sayyed Mazahar Ali Akbar Naqvi and Syed Hasan Azhar Rizvi, JJ**

**MUHAMMAD ATIF---Petitioner**

**Versus**

**The STATE and another---Respondents**

Crl.P. No. 298 of 2023, decided on 31st October, 2023.

(Against the order of Lahore High Court, Lahore, dated 16.03.2023, passed in Crl. Misc. No.3167-B of 2023).

**(a) Criminal Procedure Code (V of 1898)---**

----S. 497---Constitution of Pakistan, Articles 4, 9, 10A, 25 & 185(3)---Bail---Rule of consistency---Benchmark for applying the rule of consistency in granting bail to an accused stated.

The rule of consistency applied in bail matters is premised on the fundamental right to equality before the law guaranteed under Article 25 of the Constitution of Pakistan. This right to equality before the law ensures that persons similarly placed in similar circumstances are to be treated in the same manner. In other words, among equals the law should be equally administered; the like should be treated alike. Article 25 of the Constitution does not prohibit different treatment to persons who are not similarly placed or who are not in similar circumstances. To claim equality before the law an accused person must therefore show that he and his coaccused who has been granted bail are similarly placed in similar circumstances. In other words, he must show that the prosecution case, as a whole, against him is at par with that against his co-accused who has been granted bail, and not distinguishable in any substantial aspect. The rule of consistency is also pillared on Articles 4 and 10A of the Constitution ensuring that level playing field and fairness is maintained in adjudicating cases of co-accused. The right to liberty under Article 9 of the Constitution has to be extended fairly and without discrimination to an applicant seeking bail. The rule of consistency in bail matters is fundamental to ensuring fairness, reducing arbitrary decision-making, and maintaining public confidence in the criminal justice system. It's a key aspect of the rule of law, ensuring that all individuals are treated equally under the law.

Fida Hussain v. State PLD 2002 SC 46; Abdul Jalil v. N.W.F.P. Forest Development Corporation 2010 SCMR 1933 and Tariq Nawaz v. Government of Pakistan 2001 PLC (C.S.) 57 ref.

The rule of consistency in bail matters is attracted and applied after the grant of bail to a co-accused. Grant of bail by a court considers several factors like the contents of the FIR, the incriminating material collected by the police during investigation, the past history of the accused, etc. The grounds which form the basis for the grant of bail to a co-accused is thus the benchmark for grant of bail to the accused under the rule of consistency. The benchmark for applying the rule of consistency is not only the role attributed to the accused in the FIR but also the material collected in the investigation. Therefore, the court has to assess whether the role of the accused in the FIR, examined in the background of the material collected by the Police is the same as that of the co-accused, who has been granted bail. It is this congruence in the case of the co-accused and the accused that attracts the rule of consistency.

To decide upon the applicability of the rule of consistency for granting bail under Section 497(2), Cr.P.C., the courts have to examine the whole material available on the record of the case. Without doing so, it cannot be determined whether the accused who claims the benefit of this rule and his co-accused who has been granted bail are similarly placed in similar circumstances.

Shahid Farooq v. State 2011 SCMR 1619 ref.

**(b) Criminal Procedure Code (V of 1898)---**

----S. 497(1)---Constitution of Pakistan, Art. 185(3)---Bail---Offences falling within the prohibitory clause of Section 497(1), Cr.P.C.---In the offences that fall within the prohibitory clause of Section 497,(1), Cr.P.C., the post-arrest bail is granted on three grounds: (i) under the first proviso to Section 497(1), Cr.P.C., on the ground of the accused being a minor, or a woman, or a sick or infirm person; (ii) under the third proviso to Section 497(1), Cr.P.C., on the ground of delay in the conclusion of the trial beyond the period prescribed for no fault of the accused; and (iii) under Section 497(2), Cr.P.C., on the ground that there are no reasonable grounds for

believing that the accused has committed the offence, but rather there are sufficient grounds for further inquiry into his guilt.

Raza Bukhari v. State PLD 2022 SC 743 ref.

**(c) Criminal Procedure Code (V of 1898)---**

----S. 497(1)---Constitution of Pakistan, Art. 185(3)---Bail---Whether or not there exist any "reasonable grounds" for believing that the accused has committed the alleged offence---For the determination of the question under Section 497(2), Cr.P.C., as to whether or not there exist any "reasonable grounds" for believing that the accused has committed the alleged offence, the courts have to appraise although tentatively the whole material available on the record of the case---This question cannot be determined by merely examining the contents of the FIR---Essentially, it is the tentative assessment of the evidence collected in the investigation both for and against the accused that is determinative of the said question.

Manzoor v. State PLD 1972 SC 81 and Khalid Gillani v. State PLD 1978 SC 256 ref.

**(d) Criminal Procedure Code (V of 1898)---**

----S. 497(2)---Penal Code (XLV of 1860), Ss. 302, 148 & 149---Constitution of Pakistan, Art. 185(3)---Qatl-i-amd, rioting armed with deadly weapons, unlawful assembly---Bail, refusal of---Rule of consistency not applicable---Courts below have granted the post-arrest bail to the two co-accused persons under Section 497(2), Cr.P.C. after making a tentative assessment of the evidence collected in the investigation both for and against them---Tentative assessment of that evidence has led them to the finding that there are no reasonable grounds for believing that the said co-accused have committed the offence of murder of the complainant's son, but rather there are sufficient grounds for further inquiry into their guilt---Material collected in the investigation in the case of two co-accused shows that they were not present on the scene of the crime---This is not so in the case of the petitioner/accused---Therefore, material collected in the investigation against the present petitioner is different from that collected against them---Ground on which they have been granted bail is not available to the petitioner---Case against the petitioner is therefore not at par with that against those co-accused persons but rather is distinguishable in a substantial aspect---Allegation made against the petitioner of being present on the spot and having made fires on the deceased sons of the complainant by his firearm is not only supported by the statements of the eye-witnesses but also corroborated by the recovery of the weapon of offence effected from him in the investigation---There is, as such, sufficient incriminating material available on the record of the case to connect the petitioner with the commission of the alleged offence, and his case does not come within the scope of the provisions of Section 497(2), Cr.P.C., nor does the rule of consistency apply to him---High Court had righty refused post-arrest bail to the petitioner---Petition for leave to leave was dismissed, leave was refused and petitioner was refused bail.

Barrister Usman G. Rashid Cheema, Advocate Supreme Court for Petitioner.

Ch. Muhammad Sarwar Sidhu, APG, Punjab, along with Asghar Ali, Investigating Officer for the State.

Mudassar Khalid Abbasi, Advocate Supreme Court for the Complainant.

Date of hearing: 31st October, 2023.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The petitioner seeks leave to appeal against an order of the Lahore High Court, dated 16.03.2023, whereby the post-arrest bail has been declined to him in case FIR No. 209/2021 registered at Police Station, Jinnah Road, District Gujranwala, for the offences punishable under Sections 302, 148 and 149 of the Pakistan Penal Code ("P.P.C.").

2. Briefly, as per the crime report (FIR), the allegation against the petitioner is that on 3 April 2021 at about 09:00 a.m., he and other accused persons, namely, Umar Farooq, Zain, Goga, Farooq, Khalid and one unknown person, committed the murder of Zain Ahmad, aged 20/21 years, and Qais Ahmad, aged 15/16 years, the sons of the complainant. In the investigation, the accused Farooq and Khalid were found not present on the spot at the time of occurrence. On this ground, they have been admitted to post-arrest bail by the courts below.

3. The learned counsel for the petitioner has argued that the role attributed to the present petitioner in the FIR is similar to that of the accused, Khalid and Farooq, who have been granted post-arrest bail; therefore, the petitioner is also entitled to the concession of bail on the basis of rule of consistency. On the other hand, the

learned counsel for the State and the complainant have submitted that the rule of consistency does not apply to the petitioner as his case is distinguishable from that of those accused persons. Both sides have also relied upon several cases in support of their respective contentions.

4. We have considered the arguments of the learned counsel for the parties, read the cases cited by them and examined the record of the case.

5. From the respective contentions of the parties, the question of law that has arisen for our consideration is: what is the benchmark for applying the rule of consistency in granting bail to an accused? In other words, what is that has to be compared between the case of the accused and the co-accused in order to determine consistency for the purpose of determining the applicability of the rule of consistency in granting bail under Section 497(2) of the Code of Criminal Procedure ("Cr.P.C."); whether it is merely the role attributed to the accused and the co-accused in the FIR? or whether the role has to be assessed by compositely considering the FIR and the material collected during investigation by the Police?

6. The rule of consistency applied in bail matters is premised on the fundamental right to equality before the law guaranteed under Article 25 of the Constitution of Pakistan.[1] This right to equality before the law ensures that persons similarly placed in similar circumstances are to be treated in the same manner. In other words, among equals the law should be equally administered; the like should be treated alike.[2] Article 25 of the Constitution does not prohibit different treatment to persons who are not similarly placed or who are not in similar circumstances. To claim equality before the law an accused person must therefore show that he and his co-accused who has been granted bail are similarly placed in similar circumstances. In other words, he must show that the prosecution case, as a whole, against him is at par with that against his co-accused who has been granted bail, and not distinguishable in any substantial aspect. The rule of consistency is also pillared on Articles 4 and 10A of the Constitution ensuring that level playing field and fairness is maintained in adjudicating cases of co-accused. The right to liberty under Article 9 of the Constitution has to be extended fairly and without discrimination to an applicant seeking bail. The rule of consistency in bail matters is fundamental to ensuring fairness, reducing arbitrary decision-making, and maintaining public confidence in the criminal justice system. It's a key aspect of the rule of law, ensuring that all individuals are treated equally under the law.

7. The rule of consistency in bail matters is attracted and applied after the grant of bail to a co-accused. Grant of bail by a court considers several factors like the contents of the FIR, the incriminating material collected by the police during investigation, the past history of the accused, etc. The grounds which form the basis for the grant of bail to a co-accused is thus the benchmark for grant of bail to the accused under the rule of consistency. Therefore, the court has to assess whether the role of the accused in the FIR, examined in the background of the material collected by the Police is the same as that of the co-accused, who has been granted bail. It is this congruence in the case of the co-accused and the accused that attracts the rule of consistency.

8. The offence of Qatl-i -Amd (intentional murder) involved in the present case, being punishable with death or imprisonment for life under Section 302, P.P.C., falls within the prohibitory clause of Section 497(1), Cr.P.C. In the offences that fall within the prohibitory clause of Section 497(1), Cr.P.C., the post-arrest bail is granted on three grounds: (i) under the first proviso to Section 497(1), Cr.P.C., on the ground of the accused being a minor, or a woman, or a sick or infirm person; (ii) under the third proviso to Section 497(1), Cr.P.C., on the ground of delay in the conclusion of the trial beyond the period prescribed for no fault of the accused; and (iii) under Section 497(2), Cr.P.C., on the ground that there are no reasonable grounds for believing that the accused has committed the offence, but rather there are sufficient grounds for further inquiry into his guilt.[3] The accused, Farooq and Khalid, have been granted bail on the third ground, i.e., under Section 497(2), Cr.P.C.

9. For the determination of the question under Section 497(2), Cr.P.C., as to whether or not there exist any "reasonable grounds" for believing that the accused has committed the alleged offence, the courts have to appraise although tentatively the whole material available on the record of the case.[4] This question cannot be determined by merely examining the contents of the FIR. Essentially, it is the tentative assessment of the evidence collected in the investigation both for and against the accused that is determinative of the said question.[5] Likewise, to decide upon the applicability of the rule of consistency for granting bail under Section 497(2), Cr.P.C., the courts have to examine the whole material available on the record of the case.[6] Without

doing so, it cannot be determined whether the accused who claims the benefit of this rule and his co-accused who has been granted bail are similarly placed in similar circumstances. We have, therefore, no doubt in our minds in holding that the benchmark for applying the rule of consistency is not only the role attributed to the accused in the FIR but also the material collected in the investigation. The petitioner's stance to only look at the role attributed to him in the FIR and to those of his co-accused, Farooq and Khalid, who have been granted bail under Section 497(2), Cr.P.C. for determining the applicability of the rule of consistency is not legally tenable.

10. The cases referred to by the learned counsel for the petitioner have distinguished facts and circumstances. In Fazal,[7] the bail to the co-accused had been granted on the ground of delay in the conclusion of the trial, which ground was also available to the petitioner; hence, he was granted bail by this Court on the same ground on the rule of consistency. In Abdus Sattar,[8] the co-accused had been granted bail because the role attributed to him attracted the offence of causing grievous hurt punishable under the erstwhile Section 325, P.P.C., which offence did not fall within the prohibitory clause of Section 497(1), Cr.P.C., and the petitioner who was granted bail by this Court had also been alleged to have committed the said offence. The offence of murder punishable under the erstwhile Section 302, P.P.C., was not attributed to either of them. Similar were the facts in Abid.[9]

11. In the present case, the courts below have granted the post-arrest bail to the accused, Farooq and Khalid, under Section 497(2), Cr.P.C. after making a tentative assessment of the evidence collected in the investigation both for and against them. The tentative assessment of that evidence has led them to the finding that there are no reasonable grounds for believing that the said accused have committed the offence of murder of the complainant's son, but rather there are sufficient grounds for further inquiry into their guilt. The material collected in the investigation in the case of Farooq and Khalid shows that they were not present on the scene of the crime. This is not so in the case of the petitioner. Therefore, material collected in the investigation against the present petitioner is different from that collected against them. The ground on which they have been granted bail is not available to the petitioner. The case against the petitioner is therefore not at par with that against those accused persons but rather is distinguishable in a substantial aspect. The allegation made against the petitioner of being present on the spot and having made fires on the deceased sons of the complainant by his firearm is not only supported by the statements of the eye-witnesses but also corroborated by the recovery of the weapon of offence effected from him in the investigation. There is, as such, sufficient incriminating material available on the record of the case to connect the petitioner with the commission of the alleged offence, and his case does not come within the scope of the provisions of Section 497(2), Cr.P.C., nor does the rule of consistency apply to him.

12. For the above reasons, we find no legal fault in the order of the High Court declining post-arrest bail to the petitioner. The petition is found meritless. It is, therefore, dismissed and the leave to appeal is declined. However, it is clarified that the observations and findings made in this order, as well as in the orders of the courts below in the bail declining orders passed on the applications of the petitioner, or in the bail granting orders passed on the applications of the accused, Farooq and Khalid, are tentative, which shall have no effect upon the final determination of the case by the trial court on conclusion of the trial.

MWA/M-57/SC Bail refused.

**2024 S C M R 1284**

**[Supreme Court of Pakistan]**

**Present: Sardar Tariq Masood, ACJ, Syed Mansoor Ali Shah and Athar Minallah, JJ**

**IMRAN AHMED KHAN NIAZI and another---Petitioners**

**Versus**

**The STATE and another---Respondents**

Crl. Ps. Nos. 1276 and 1320 of 2023, decided on 22nd December, 2023.

(Against the orders of Islamabad High Court, Islamabad, dated 27.10.2023 passed in Crl. Misc. No. 1354-B of 2023 and dated 08.11.2023 passed in Crl. Misc. No. 1664-B of 2023).

**(a) Criminal Procedure Code (V of 1898)---**

----S. 497---Constitution of Pakistan, Art. 185(3)---Bail petition before the Supreme Court---Material available on record, appraisal of---Scope---At bail stage Court cannot indulge in the exercise of a deeper appraisal of the material available on record of the case but is to determine it only tentatively by looking at such material.

**(b) Criminal Procedure Code (V of 1898)---**

----S. 497(2)---Official Secrets Act (XIX of 1923), Ss. 5 & 9---Penal Code (XLV of 1860), S. 34---Constitution of Pakistan, Art. 185(3)---Communicating information contained in a secret classified Cypher Telegram received from Pakistan's Ambassador to a foreign country to unauthorized persons, common intention---Bail, grant of---Further inquiry---Right of bail for political leaders and political workers during elections period---Scope---[Per Syed Mansoor Ali Shah, J: There was no sufficient incriminating material available, at present stage, which could show that the petitioner (former Prime Minister) communicated the information contained in the Cypher Telegram to the public at large with the intention or calculation, directly or indirectly, in the interest or for the benefit of a foreign power nor the disclosed information related to any of the defence installations or affairs, nor did he disclose any secret official code to the public at large---There were no reasonable grounds for believing, at present stage, that the petitioners (former Prime Minister and Foreign Minister) committed the offence punishable under clause (b) of Section 5(3) of the Official Secrets Act, 1923 ( Act ) but rather that there were sufficient grounds for further inquiry into their guilt of the said offence, which was to be finally decided by the Trial Court after recording of the evidence of the parties]---[Per Athar Minallah, J: Incarceration of a political competitor during the period of elections, except when it is necessary due to exceptional circumstances, gravely affects the fundamental rights of the voters and prejudices the genuineness and integrity of the elections---As far as the question as to why political leaders and political workers should be extended preferential treatment, the answer is that there is a higher and greater interest of the people at large involved which is always given preference over other interests---There cannot be a greater public interest than ensuring genuine elections and if the incarcerated person intends to contest elections or the standing of a political party is dependent upon the latter then this ought to be considered a ground for the grant of bail during the election period---Concession of bail in such an eventuality should be considered favorably as a rule and declined in exceptional circumstances---Pakistan s unflattering electoral history and oppressive treatment of political dissidents during the period of elections necessitates considering the grant of bail favorably as a rule---In the present case the petitioners were alleged to be involved in an offence which does not fall under the category of offences that threaten the society such as rape, child abuse, homicide etc.---Investigation has been completed and trial is in progress---Trial is entirely dependent on documentary evidence---Incarceration of the petitioners will not serve any useful purpose----Moreover, their release on bail during the period of elections would ensure 'genuine elections' and thus enable the people to exercise the right to express their will effectively and meaningfully---There were no exceptional circumstances to decline the concession of bail ]---Petitions were converted into appeals and allowed, and bail applications of the petitioners were accepted.

For the Petitioners:

Hamid Khan, Sr. Advocate Supreme Court (Through V.L. Lahore Registry)

Salman Safdar, Advocate Supreme Court.

Syed Mohammad Ali Bokhari, Advocate Supreme Court.

Niazullah Khan Niazi, Advocate Supreme Court, Qamar Inayat Raja, Advocate Supreme Court, Barrister Tamur, Advocate.

Barrister Faiza, Advocate.

Syed Rifaqat Hussain Shah, Advocate-on-Record.

For the Respondents:

Javaid Iqbal Wains, Addl.AGP.

Raja Rizwan Abbasi, Advocate Supreme Court.

Mudassar Hussain Malik, Advocate Supreme Court and Syed Zulifqar Abbas Naqvi, Advocate Supreme Court.

Shah Khawar, Advocate Supreme Court.

Mian Sabir, I.O.

Date of hearing: 22nd December, 2023.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**Through the present petitions, the petitioners seek leave to appeal against the orders of the Islamabad High Court, dated 27.10.2023 and 08.11.2023, whereby the post-arrest bail has been declined to them in case FIR No. 06/2023 registered at Police Station, CTW/FIA, Islamabad, for the offences punishable under Sections 5 and 9 of the Official Secrets Act 1923 read with Section 34 of the Pakistan Penal Code, 1860.

2. Briefly, as per the crime report (FIR), the allegation against the petitioner Imran Ahmed Khan Niazi, a former Prime Minister of Pakistan, is that he communicated the information contained in a secret classified document (a Cypher Telegram received from Parep Washington, USA) to unauthorized persons, i.e., the public at large, by twisting the facts to achieve his ulterior motives and personal gains in a manner prejudicial to the interests of the State security, and had also illegally retained a copy of the said document. While the petitioner Makhdoom Shah Mahmood Qureshi, a former Foreign Minister, is alleged to have abetted him in so doing. By these actions, it is alleged, the petitioners have directly/indirectly benefited the interest of foreign powers and caused loss to the State of Pakistan.

3. We have heard the arguments of the learned counsel for the parties at some length, read the cases cited by them and examined the record of the case.

4. The offences of wrongful communication of the official confidential information, etc., as defined in defined in clauses (a) to (d) of Section 5(1) of the Official Secrets Act 1923 ("Act") are generally punishable, under clause (b) of Section 5(3), with imprisonment for a term which may extend to two years, or with fine, or with both, and are bailable under clause (b) of Section 12(1) of the Act. It is only when an offence is committed in contravention of clause (a) of Section 5(1) and is intended or calculated to be, directly or indirectly, in the interest or for the benefit of a foreign power, or is in relation to any of the defense installations or affairs[1], or in relation to any secret official code, that it is punishable under clause (b) of Section 5(3) of the Act, with death or with imprisonment for a term which may extend to fourteen years. Such an offence is non-bailable and also falls within the prohibitory clause of Section 497(1) of the Code of Criminal Procedure 1898 ("Cr.P.C."). In respect of such offences, other than the provisos to Section 497(1), bail is granted under Section 497 (2), Cr.P.C., if it appears to Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed such an offence but rather that there are sufficient grounds for further inquiry into his guilt.

5. The only question, therefore, before us in the present case is that whether there are not reasonable grounds for believing, at this stage, that the petitioners have committed the offence punishable under clause (b) of Section 5(3) of the Act but rather that there are sufficient grounds for further inquiry into their guilt of the said offence. In this regard, we are cognizant of the one of the elementary principles of the law of bail that to answer the said question, the Court cannot indulge in the exercise of a deeper appraisal of the material available on record of the case but is to determine it only tentatively by looking at such material.

6. Having so examined the material available on record, we find that there is no sufficient incriminating material available, at this stage, which could show that the petitioner, Imran Ahmed Khan Niazi communicated the information contained in the Cypher Telegram received from Parep Washington, USA to the public at large

with the intention or calculation, directly or indirectly, in the interest or for the benefit of a foreign power nor the disclosed information relates to any of the defence installations or affairs, nor did he disclose any secret official code to the public at large. We, therefore, are of the tentative opinion that there are not reasonable grounds for believing, at this stage, that the petitioners have committed the offence punishable under clause (b) of Section 5(3) of the Act but rather that there are sufficient grounds for further inquiry into their guilt of the said offence, which is to be finally decided by the learned trial court after recording of the evidence of the parties. The discretion exercised by the High Court in declining bail to the petitioners is found to have been exercised perversely, that is, against the weight of the material available on record of the case, which warrants interference by this Court.

7. For the above reasons, these petitions are converted into appeals and the same are allowed. The impugned orders are set-aside. The bail applications of the petitioners are accepted subject to their furnishing of bail bonds in the sum of one million with two sureties each in the like amount to the satisfaction of the learned trial court.

8. Needless to mention that the observations made in this order are of tentative nature which shall not in any manner influence the trial court, and that this concession of bail may be cancelled, if the petitioners misuse it in any manner, including causing delay in the expeditious conclusion of the trial.

Sd/-

Sardar Tariq Masood,

ACJ

Sd/-

Judge

I agree. However, I have appended a separate note.

Sd/-

**Judge**

**ATHAR MINALLAH, J.---**The two petitioners, Imran Ahmad Khan Niazi and Shah Mahmood Qureshi, had sought bail but it was concurrently declined by the trial court and the High Court respectively. They have now sought leave of this Court for restoring their liberty by ordering their release pursuant to grant of the concession of bail. Both the petitioners intend to contest the forthcoming elections which are scheduled to be held on February 08, 2024. The Election Commission of Pakistan, in exercise of powers conferred under the Election Act 2017 ('Act of 2017'), has announced and duly notified the election schedule. Mr. Imran Ahmad Khan Niazi had formed the political party, Pakistan Tehreek-e-Insaf, and was elected as the Leader of the House in the National Assembly after the last general elections held in 2018 and, pursuant thereto, he had served as the Prime Minister of the country. Mr. Shah Mahmood Qureshi is one of the most senior office bearers of the party. The questions of public importance that have arisen for the consideration of this Court are; whether, during the election period, candidates who intend to contest the elections or who are affiliated with a political party and their participation in the political process is important for the registered voters, should remain incarcerated, or, whether, in such an eventuality granting bail ought to be considered favorably as a rule and declined only in exceptional circumstances e.g when there is likelihood of abscondence or there is threat to the society because there are grounds to believe that the accused may repeat the offence. In order to answer the questions it is essential to determine the rights of stakeholders involved in such peculiar circumstances and also examine the significance of the chequered history of the electoral process during the past seven decades.

2. The Constitution of the Islamic Republic of Pakistan, 1973 ('Constitution') unequivocally contemplates that the authority of the government is solely premised on the will of the people. The will of the people is essentially expressed through exercising the right to participate in the political process and to vote on the day fixed for polls. Elections are the primary and exclusive mode which facilitates and enables the citizen, particularly the registered voter, to choose the person who would represent them and through whom the latter would participate in the governance of the State and exercise the authority of the government. This is one of the most fundamental right of every citizen recognized by the framers of the Constitution. There are other equally important rights associated with or implicit in the right of a citizen to vote and they, inter alia, include the right to meaningfully participate in the political process, freedom of expression, assembly, association and movement. The

importance of the right of access to information regarding the competing political parties, their manifestos and candidates cannot be overstated. Each party and candidate must enjoy an equal and non-discriminatory opportunity to effectively function without any fear or threat of intimidation. The United Nations has explicitly recognized the concept of an 'informed choice' as an integral part of 'free choice'.[1] It has been emphasized that 'if elections are to be genuine then they must demonstrably reflect the will of the people. 'Voters can neither formulate nor express that will without access to information about the candidates, the parties and the process'.[2] In order to achieve these fundamental tenets it is not enough to hold elections but to ensure that the citizens have a fair opportunity to express their will by exercising their electoral rights through 'genuine elections'. Our Constitution, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights unambiguously recognize 'genuine elections' as the only true manifestation of the expression of the will of the people.

3. The essential characteristics of a 'genuine election' have been described as a political process which would 'reveal and give effect to the freely expressed will of the people. Sham elections, designed temporarily to quell internal dissent or to distract international scrutiny obviously do not meet the international standards'.[3] Genuine elections can only be ensured if they offer an actual and free choice to an informed voter. Discrimination or intimidation on the basis of political opinions are alien to the concept of genuine elections and even such a perception would be sufficient to compromise the integrity of the electoral process and relegate it to the status of sham elections. Every candidate and political party must have an equal opportunity to reach out to the citizens and to have access to the public resources, including the print and electronic media. The framework of the Constitution has created and guarantees a political right in favor of every citizen to govern the State and exercise the authority of the government through their chosen representatives. Implicit in this fundamental right is the expression of the will of the people. 'The ultimate indication of whether elections are free is the extent to which they facilitate the free expression of the political will of the people concerned. It is, after all, this will which, according to the Universal Declaration (art 21, para 3), is the very basis of legitimate government authority'.[4] The concept of facilitating the effective and meaningful expression of the political will of the people through 'genuine elections' is thus embedded in the scheme of the Constitution and the edifice of the fundamental rights is built upon it. The test of 'genuine elections' is the ability of the voter, political worker, candidate and political party to effectively exercise and enjoy the aforementioned rights without discrimination or any threat of intimidation, direct or indirect. The concept of genuine election is the key to leveling the playing field for all the stakeholders. When all the political competitors do not enjoy the same advantages and disadvantages during the election period, then the fundamental rights of the citizens are breached and, simultaneously, the Constitution is gravely violated. It is, therefore, inevitable to ensure that every political competitor is treated equally without discrimination and everyone has the same chance to succeed. Incarceration of a political competitor during the period of elections, except when it is necessary due to exceptional circumstances, gravely affects the fundamental rights of the voters and prejudices the genuineness and integrity of the elections. As far as the question is concerned as to why political leaders and political workers should be extended preferential treatment, the answer, as already discussed, is that there is a higher and greater interest of the people at large involved which is always given preference over other interests. Moreover, unnecessary incarceration, which would not serve any useful purpose in itself, becomes a ground for releasing an ordinary accused on bail unless the offence alleged to have been committed is heinous or there are exceptional circumstances for refusing extension of bail. There cannot be a greater public interest than ensuring genuine elections and if the incarcerated person intends to contest elections or the standing of a political party is dependent upon the latter then in my opinion this ought to be considered a ground for the grant of bail during the election period. The concession of bail in such an eventuality should be considered favorably as a rule and declined in exceptional circumstances. The strict application of this principle is also essential keeping in view the chequered electoral history during the past seven decades.

4. The process of democratization and democracy itself were gravely undermined from the very inception of Pakistan as an independent sovereign State. The undemocratic elite had struck for the first time when the Constituent Assembly was dissolved and later the unconstitutionality was legitimized by the Federal Court by

contriving the doctrine of necessity. It laid the foundations for repression against political opponents. Almost all the elected Prime Ministers remained incarcerated after being prematurely removed from office. Prime Ministers were disqualified and political opponents were persecuted for dissent and prevented from competing in elections by denying a level playing field. The last general elections held in 2018 was an example of denying equal treatment to a particular political party. One of the Prime Ministers was even sent to the gallows and people were later restrained from attending his funeral. Half of the nation's life has been spent under military dictators who did not face a days incarceration for abrogating the Constitution, toppling elected Prime Ministers and subjecting political workers to the worst form of oppression. In stark contrast, the elected Prime Ministers and chosen representatives were prevented from participating in the electoral process by keeping them incarcerated or forcing them into exile. The incarceration of political leadership belonging to Baluchistan, the then North West Frontier Province or Sindh for their political dissent and opinions cannot be erased from history books. The notion of 'genuine election' has remained illusory in the past seven decades and it definitely has profound consequences for the democratic process and the rights of the people. It is the duty of the Election Commission and the respective Governments to ensure that the people are facilitated in expressing their will through 'genuine election'. It is also their duty to ensure that there is no perception of oppression or repressive actions against one political party while others are treated favourably. The unflattering electoral history and oppressive treatment of political dissidents during the period of elections necessitates considering the grant of bail favorably as a rule.

5. The petitioners are alleged to be involved in an offence which does not fall under the category of offences that threaten the society such as rape, child abuse, homicide etc. The investigation has been completed and trial is in progress. The trial is entirely dependent on documentary evidence. The incarceration of the petitioners will not serve any useful purpose. Moreover, their release on bail during the period of elections would ensure 'genuine elections' and thus enable the people to exercise the right to express their will effectively and meaningfully. There are no exceptional circumstances to decline the concession of bail.

Sd/-

Athar Minallah, J

Judge

MWA/I-1/SC Bail granted.

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[1] i.e., in relation to any work of defence, arsenal, naval, military or air force establishment or station, mine, mine-field, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval, military or air force affairs of Pakistan.

[1] Article 87; Human Rights and Elections, a Handbook on the Legal, Technical and Human Rights Aspects of Elections; Centre for Human Rights, UN. (Handbook)

[2] Human Rights and Elections, A Handbook on the Legal, Technical and Human Rights Aspects of Elections, Centre For Human Rights, United Nations.

[3] Article 77 of the Handbook.

[4] Article 62 of the Handbook

**2024 S C M R 1714**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, Naeem Akhtar Afghan and Shahid Bilal Hassan, JJ**

**ASMA HALEEM---Petitioner**

**Versus**

**ABDUL HASEEB CHAUDHRY and others---Respondents**

C.P.L.A. No. 3300 of 2024, decided on 30th July, 2024.

(Against the judgment of Islamabad High Court, Islamabad dated 02.07.2024 passed in C.R. No. 111 of 2023).

**Partition Act (IV of 1893)---**

----S.4---Supreme Court Rules, 1980, O. XXVIII, R.3---Specific Relief Act (I of 1877), Ss. 8 & 54---Constitution of Pakistan, Art. 185 (3)---Joint dwelling housing, partition of---Frivolous and vexatious cases---Imposing of costs---Petitioner/plaintiff filed suit for partition of suit house and Trial Court after passing preliminary decree appointed Court auctioneer to auction the property---Petitioner/plaintiff objected to auction report submitted by Court auctioneer, which objections were turned down by Trial Court but Lower Appellate Court allowed the same---High Court in exercise of revisional jurisdiction set aside the order passed by Lower Appellate Court---Validity---Petition filed by petitioner/plaintiff before Supreme Court was frivolous and vexatious and process of Court was abused by petitioner/plaintiff just to pressurize the other side and delay the matter on one pretext or the other, depriving her siblings and mother from lawful auction of such property---Supreme Court declined to interfere in judgment passed by High Court and to curb practice of instituting frivolous and vexatious cases imposed costs under Order XXVII, Rule 3 of Supreme Court Rules, 1980, which had laid down foundation for expeditious justice and to promote smart legal system, enhancing access to justice by entertaining genuine claims---Petition for leave to appeal was dismissed and leave was refused.

Qazi Naveed ul Islam v. District Judge, Gujrat PLD 2023 SC 298 rel.

Abdul Wahid Qureshi and Tariq Aziz, Advocate-on-Record for Petitioner.

Respondents not represented.

Date of hearing: 30th July, 2024.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**Brief facts of the case are that the petitioner filed a suit for partition, permanent, possession, permanent and mandatory injunction regarding the built-up property constructed house two floors over land measuring 1 Kanal numbered as Plot No. 7-M, Raja Akhtar Road, Korang Valley, Shahpur, Barakahu, Islamabad. The suit property was owned by the father of the parties and after necessary proceedings, the trial court issued a preliminary decree vide order dated 13.01.2020 and appointed a local commission. Subsequently, reserve price of the suit property was fixed by the trial court which was objected by the petitioner on 16.03.2020. Thereafter, a court auctioneer was appointed by the trial court who conducted the auction proceedings and submitted his final report to the court on 18.03.2023 which was also objected by the petitioner. The said objections were turned down by the trial court vide order dated 12.04.2023 against which the petitioner preferred an appeal which was allowed vide order dated 08.07.2023. A revision petition was filed by the respondent No. 7 before the Islamabad High Court, Islamabad which was allowed vide judgment dated 02.07.2024 ("impugned judgment"). Hence, the instant petition for leave to appeal.

2. We have heard the learned counsel for the petitioner at some length and have gone through the impugned judgment of the High Court, examined the law on the subject and the record of the case. We have not been able to take any exception to the impugned judgment and are of the view that the present petition is completely frivolous and vexatious and the process of the court has been abused by the petitioner just to pressurize the other side and delay the matter on one pretext or the other, thereby depriving her siblings and mother from the lawful auction of the said suit property. Therefore, it does not warrant any interference.

3. Before parting with this Order, it is significant to highlight that according to the statistics provided by the Law and Justice Commission of Pakistan, there are about 2.2 million (2,255,295) cases pending before all courts in the country.[1] Such frivolous, vexatious and speculative litigation unduly burdens the courts giving artificial rise to pendency of cases which in turn clogs the justice system and delays the resolution of genuine disputes. Such litigation is required to be rooted out of the system and strongly discouraged and one of the ways to curb such practice of instituting frivolous and vexatious cases is by imposing of costs under Order XXVIII, Rule 3 of the Supreme

Court Rules, 1980 which lay the foundation for expeditious justice and promote a smart legal system, enhancing access to justice by entertaining genuine claims.[2] In view of the aforesaid, leave is, therefore, declined and this petition is dismissed with costs of Rs. 50,000/- to be paid to the respondents and in case of its failure, the same shall be recoverable as a money decree. Copy of this Order be dispatched to the respondents for information.

MH/A-28/SC Petition dismissed.

**2024 S C M R 1806**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, Athar Minallah and Malik Shahzad Ahmad Khan, JJ**

**KHALID alias MUHAMMAD KHALID and others---Petitioners**

**Versus**

**COLLECTOR OF CUSTOMS (ADJUDICATION), CUSTOM HOUSE, LAHORE and others---Respondents**

Civil Petition No.3391 of 2024, decided on 9th August, 2024.

(Against order of the Lahore High Court, Lahore dated 28.06.2024 passed in W.P No.20130 of 2024).

**Customs Act (IV of 1969)---**

----Ss. 194-A & 194-B---Constitution of Pakistan, Art. 199---Customs Appellate Tribunal---Power of Appellate Tribunal to execute orders passed by it---Customs Appellate Tribunal has the power to execute orders passed in exercise of its appellate jurisdiction under Sections 194-A and 194-B of the Customs Act 1969---Since an adequate remedy is provided by law, the writ jurisdiction of the High Court is not to be invoked for the execution of such orders.

There is no provision in the Customs Act, 1969 that specifically provides for the power of the Customs Appellate Tribunal ('Tribunal') to execute its orders. However, it is a well-established principle of statutory construction that where a statute confers jurisdiction, it also grants, by necessary implication, the powers to do all such acts or employ all such means as are essentially necessary for its execution. An express grant of statutory power carries with it, by necessary implication, the authority to do all such acts that are necessary to make such a grant effective. A statute that expressly confers a substantive power upon a court or tribunal also impliedly grants all incidental and ancillary powers necessary for the effective exercise of that substantive power. These incidental and ancillary powers thus necessarily flow from the express substantive power. [p. 1809] A

Maxwell on Interpretation of Statutes (11th Ed.) p. 350; Commissioner, Khairpur v. Ali Sher Sarki PLD 1971 SC 242 and Sutherland Statutory Construction (3rd Ed.), Articles 5401 and 5402 ref.

There is no doubt that the Tribunal functions as a judicial body within the limits of its jurisdiction. It has all the powers expressly conferred upon it by the statute, i.e., the Customs Act, 1969. Furthermore, being a judicial body, it also possesses all those incidental and ancillary powers necessary for the exercise of the jurisdiction conferred upon it and to make fully effective the grant of statutory substantive powers. Such powers are recognized as incidental and ancillary, not because they are inherent in the Tribunal or because its jurisdiction is plenary, but because it is the legislative intent that the power expressly granted in the assigned field of jurisdiction is efficaciously and meaningfully excercised. [p. 1810] B

Union of India v. Paras Laminates (1990) 4 SCC 453 and Income Tax Officer v. Mohammed Kunhi AIR 1969 SC 430 ref.

A statutory tribunal that has been conferred the power to adjudicate a dispute and pass an order on it also has the power to implement that order. Even if this power has not been specifically spelled out in the statute, it must be deemed to have been impliedly conferred upon the statutory tribunal. Courts and statutory tribunals must be held to possess the power to execute their own orders; for when a court or tribunal is conferred jurisdiction or substantive power to make an order, the power to execute such an order, being ancillary and incidental, is also impliedly conferred by the statute. This is necessary because the jurisdiction or substantive power would be useless if the order passed in exercise thereof could not be executed and enforced. The same principle applies to the jurisdiction and substantive power of the Tribunal under Sections 194-A and 194-B of the Customs Act, 1969. The power to execute an order passed under these express provisions of the Customs Act, 1969 being ancillary and incidental, is also impliedly conferred upon the Tribunal by the Customs Act, 1969. Thus, the Tribunal has the power to execute orders passed in exercise of its appellate jurisdiction under Sections 194-A and 194-B of the Customs Act, 1969. Consequently, since an adequate remedy is provided by law, the writ jurisdiction of the High Court cannot be invoked for executing orders passed by the Tribunal.

State of Karnataka v. Vishwabharathi House Building Coop. Society (2003) 2 SCC 412 and Messrs Hal v. Commissioner of Commercial Taxes 2014 SCC Online Orissa 71 ref.

Abdul Rehman Khan, Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Petitioners.

Raja Muhammad Shafqat Abbasi, D.A.G. Saleem Ahmed Malik, Superintendant Customs Enforcement, Lahore, Huriya Fatima, Legal Advisor, FBR Waheed Iqbal Bhatti, Inspector for Respondents.

Nadeem Mehmood Mian, Advocate Supreme Court (for private respondent) (From Lahore via video-link).

Date of hearing: 9th August, 2024.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The short but important question of law involved in the present case is whether the Customs Appellate Tribunal ("Tribunal") has the power to execute orders passed in exercise of its appellate jurisdiction under Sections 194-A and 194-B of the Customs Act 1969 ("Customs Act"), or whether the writ jurisdiction of the High Court is to be invoked for the execution of such orders. This question has arisen in the following factual context.

2. The officials of the Customs Collectorate (Enforcement), Lahore, seized a certain quantity of gold, alleged to be smuggled, along with a vehicle transporting the said gold, from the possession of Umer Farooq and Mussarat Shaheen (appellants 3 and 2). During the investigation, Muhammad Khalid (appellant 1) claimed ownership of the seized gold and asserted that Umer Farooq was merely his representative, who was transporting the gold to his shop in Faisalabad. All three appellants were charged with contravening several provisions of the Customs Act and the Imports and Exports (Control) Act 1950. By its order dated 29 November 2021, the Collector of Customs (Adjudication), Lahore, confiscated the seized gold and car, allowing the release of the car subject to the payment of a redemption fine. The appellants appealed this order before the Tribunal under Section 194-A of the Customs Act. By its judgment dated 20 December 2022, the Tribunal partially allowed the appeal to the extent of certain pieces of gold that were not found to be of foreign origin and ordered their unconditional release. The Tribunal also ordered the release of the car to its lawful owner upon payment of the redemption fine at the rate of 20% of the customs value. The order of the Collector (Adjudication) was maintained regarding the pieces of seized gold found by the Tribunal to be of foreign origin.

3. Both the appellants and the Collector of Customs preferred customs references against the Tribunal's judgment. During the pendency of these references, the appellants submitted an application to the Collector of Customs (Enforcement), Lahore, seeking implementation of the Tribunal's judgment and contending that its operation had not been stayed by the High Court in the reference proceedings. Receiving no response from the Collector of Customs (Enforcement), the appellants filed a writ petition in the Lahore High Court, praying that the Collector of Customs (Enforcement) be directed to comply with the Tribunal's judgment. The Lahore High Court dismissed the writ petition by its order dated 28 June 2024 ("impugned order"), observing inter alia that the appellants could not seek implementation of the Tribunal's judgment since they themselves had assailed it in the reference proceedings. Hence, the appellants have approached this Court through the present petition for leave to appeal.

4. We have heard the arguments of the learned counsel for the parties and have examined the record of the case.

A

5. As per the facts presented before us, the Tribunal's judgment has not been stayed by the High Court in the reference proceedings. The Tribunal's judgment is, thus, fully operative and executable.[1] In this regard, there is also a Customs General Order (CGO) No. 2 of 2024, issued by the Federal Board of Revenue in exercise of its powers under Section 223 of the Customs Act, which directs customs officials to implement orders passed by the Tribunal or any other adjudicating forum, except where stay orders have been issued by the next appellate forum. The issue, however, arises when, despite this legal position, the customs officials fail to

implement the orders of the Tribunal, even though their operation has not been suspended in the reference proceedings, as in the present case. What remedy is then available to redress the grievance of the person seeking implementation of the Tribunal's order? Does the Tribunal that passed the order have the power to execute and ensure its implementation?

6. There is no provision in the Customs Act that specifically provides for the power of the Tribunal to execute its orders. However, it is a well-established principle of statutory construction, as stated by Maxwell[2] and approvingly cited by this Court in Ali Sher Sarki,[3] that where a statute confers jurisdiction, it also grants, by necessary implication, the powers to do all such acts or employ all such means as are essentially necessary for its execution. An express grant of statutory power carries with it, by necessary implication, the authority to do all such acts that are necessary to make such a grant effective.[4] A statute that expressly confers a substantive power upon a court or tribunal also impliedly grants all incidental and ancillary powers necessary for the effective exercise of that substantive power. These incidental and ancillary powers thus necessarily flow from the express substantive power.

7. There is no doubt that the Tribunal functions as a judicial body within the limits of its jurisdiction. It has all the powers expressly conferred upon it by the statute, i.e., the Customs Act. Furthermore, being a judicial body, it also possesses all those incidental and ancillary powers necessary for the exercise of the jurisdiction conferred upon it and to make fully effective the grant of statutory substantive powers. Such powers are recognized as incidental and ancillary, not because they are inherent in the Tribunal or because its jurisdiction is plenary, but because it is the legislative intent that the power expressly granted in the assigned field of jurisdiction is efficaciously and meaningfully exercised. The powers of the Tribunal are, no doubt, limited. Its area of jurisdiction is clearly defined, but within the bounds of its jurisdiction, it has all the powers expressly and impliedly granted. The implied grant is, of course, limited by the express grant and, therefore, can only include such powers as are truly incidental and ancillary for doing all such acts or employing all such means as are reasonably necessary to make the grant effective.[5]

8. As held in Vishwabharathi[6] by the apex court of a neighbouring jurisdiction, a statutory tribunal that has been conferred the power to adjudicate a dispute and pass an order on it also has the power to implement that order. Even if this power has not been specifically spelled out in the statute, it must be deemed to have been impliedly conferred upon the statutory tribunal. Courts and statutory tribunals must be held to possess the power to execute their own orders; for when a

court or tribunal is conferred jurisdiction or substantive power to make an order, the power to execute such an order, being ancillary and incidental, is also impliedly conferred by the statute. This is necessary because the jurisdiction or substantive power would be useless if the order passed in exercise thereof could not be executed and enforced. The same principle applies to the jurisdiction and substantive power of the Tribunal under Sections 194-A and 194-B of the Customs Act. The power to execute an order passed under these express provisions of the Customs Act, being ancillary and incidental, is also impliedly conferred upon the Tribunal by the Customs Act. We thus conclude that the Tribunal has the power to execute orders passed in exercise of its appellate jurisdiction under Sections 194-A and 194-B of the Customs Act. Consequently, since an adequate remedy is provided by law, the writ jurisdiction of the High Court cannot be invoked for executing orders passed by the Tribunal.

9. In view of this legal position, we maintain the impugned order of the High Court dismissing the writ petition of the appellants, but for the reasons stated above. The petition is dismissed and leave to appeal is

declined. The appellants, however, may approach the Tribunal for execution of the order passed by it, if so advised.

10. A copy of this order shall be sent to the Member (Customs), Federal Board of Revenue, for information and for issuing an appropriate warning or taking suitable action against customs officials who are not adhering to CGO No. 2 of 2024.

MWA/K-11/SC Petition dismissed.

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[1] Abdul Hafeez Abbasi v. Managing Director, PIAC 2002 SCMR 1034. In this case relating to Federal Service Tribunal, the Court observed: "[A]after passing of judgment dated 29-5-2001 by Federal Service Tribunal, PIAC had an obligation to honour it and re-instate the employees ... or if PIAC had any reservation in not implementing the judgment then a stay order should have been obtained by them from this Court. Admittedly no stay order was obtained by PIAC, therefore, the judgment of Federal Service Tribunal remained operative.

[2] Maxwell on Interpretation of Statutes, (11th Ed.) p. 350.

[3] Commissioner, Khairpur v. Ali Sher Sarki PLD 1971 SC 242.

[4] Sutherland Statutory Construction, (3rd Ed.), Articles 5401 and 5402.

[5] Union of India v. Paras Laminates (1990) 4 SCC 453. See also Income Tax Officer v. Mohammed Kunhi AIR 1969 SC 430.

[6] State of Karnataka v. Vishwabharathi House Building Coop. Society (2003) 2 SCC 412. See also M/s Hal v. Commissioner of Commercial Taxes 2014 SCC Online Orissa 71 (DB).

**2024 S C M R 1831**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, Athar Minallah and Malik Shahzad Ahmad Khan, JJ**

**SUPERINTENDENT OF POLICE, HEADQUARTERS, LAHORE and others---Petitioners**

**Versus**

**IJAZ ASLAM and others---Respondents**

Civil Petitions Nos. 3105-L to 3114-L and 3119-L to 3122-L of 2023, decided on 7th August, 2024.

(On appeal against the judgment dated 16.05.2023 passed by the Punjab Service Tribunal, Lahore in Appeals Nos. 3482 to 3488, 4259, 4571 of 2022 and 435 to 439 of 2023).

**(a) Civil service---**

----Service matters---Punishment, award of---Institutional autonomy---Concept of institutional autonomy in matters relating to award of punishment and limited circumstances in which courts/tribunals can interfere in the same.

Courts are tasked with a delicate balancing act: respecting the institutional autonomy of public sector institutions, while ensuring these institutions operate within the bounds of the law and do not infringe upon individual rights or the public interest. The imposition of punishment under the law is primarily the function of the competent authority and the role of the Tribunal or Court is rather secondary unless it is found to be against the law or is unreasonable. This is because the department/ competent authority, being the fact-finding authority, is best suited to decide the particular penalty to be imposed keeping in view a host of factors such as the nature and gravity of the misconduct, past conduct, the nature and the responsibility of the duty assigned to the delinquent, previous penalty, if any, and the discipline required to be maintained in the department, as well as any extenuating circumstances. The underlying rationale is based on the concept of institutional autonomy which provides for a degree of self-governance and independence by a public sector institution. This autonomy is essential for ensuring that such institutions can function effectively, impartially, and according to their legal mandates. The autonomy of public institutions is not just a matter of administrative convenience, but a fundamental requirement for the effective functioning of a democratic society, as public sector organizations are guardians of the public interest. The role of the courts is not to second-guess institutions as certain matters are the province of institutions themselves. Thus, as long as the institutions pursue their institutional purpose and function, and as long as they abide by law, professional norms and best practices, they are largely entitled to regulate themselves. Institutional decisions are, however, subject to judicial oversight and can be corrected if they suffer from any illegality, irrationality or procedural impropriety. Other than that, the courts must give deference to the institutional decisions and desist from second guessing them on the basis of their own subjective standards of leniency, compassion or fairness. Such decisions are best left to the institutions owing to their policy-making prerogatives and expertise.

Divisional Superintendent v. Nadeem Raza 2023 SCMR 803; Secretary Government of Punjab v. Khalid Hussain 2013 SCMR 817; Vice Chancellor Agriculture University v. Muhammad Shafiq 2024 SCMR 527 and Randy J. Kozel, 'Institutional Autonomy and Constitutional Structure' 112 Michigan Law Review 957 (2014)<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1014&context=mlr> accessed 21 August, 2024 ref.

**(b) Punjab Police (Efficiency and Discipline) Rules, 1975---**

----R. 4(1)(b)(iv)---Driver constables in police department---Appointments made on basis of fake and bogus driving licenses---Dismissal from service---“Doctrine of unclean hands”---Scope and applicability---Admittedly the respondents were dismissed from service based on an established charge of misconduct after a proper regular departmental inquiry was conducted by the competent authority---Findings in the inquiry report were not only accepted by the competent authority but had also been affirmed by the appellate authority of the same department---In the instant case, the major penalty of dismissal from service was imposed by the competent authority in accordance with law and the relevant rules---Fact that the respondents procured their appointment based on bogus and fake driving licenses could not be condoned---Reasoning

given in the impugned judgment justifying their reinstatement on the ground that the respondents worked for 14 years and had subsequently obtained new licenses was not sufficient and did not wash away their act of submitting fake and bogus licenses and thus managing their appointments fraudulently---Once the appointment was sought on the basis of bogus licenses, such appointment could not be legitimized---This was based on the principle referred to as the "doctrine of unclean hands."---This legal doctrine holds that a person who has acted unethically, deceitfully, or with dishonesty should not be entitled to the benefits derived from such actions---When applied to employment, particularly in sensitive roles like the police service, this principle asserts that someone who gains their position through fraudulent means—such as by falsifying documents—cannot be trusted to uphold the integrity and responsibilities of that position---Furthermore, discovering the fraud, even several years after the fact, could still be ground for disciplinary action because the initial appointment was obtained illegitimately---The rationale was that trust and integrity are foundational to public service roles, and a breach of this nature undermined the trust necessary for the role and could potentially have legal and institutional consequences---Said principle maintains that the integrity of the institution and the trust placed in its officials are paramount, and therefore, any breach, regardless of when discovered, must be addressed decisively---Respondents knew that they had submitted fake and bogus licenses during the recruitment process---Thus, the Tribunal had failed to take into consideration the fact that the basic qualification/eligibility to the post of driver constable was a genuine license which the respondents did not meet---In the absence of the same, the Tribunal acted in an arbitrary and whimsical manner overlooking the specific facts and circumstances by granting relief to the respondents in violation of the law---Petition was converted into an appeal and allowed; the impugned judgment was set aside and the dismissal orders of the respondents passed by the department were upheld.

Secretary Education v. Noor-Ul-Amin 2022 PLC (C.S.) 132 and Anwar Ali v. Chief Executive Officer HESCO 2009 PLC (C.S.) 963 ref.

**(c) Void order---**

----When the basic order is without lawful authority, then the entire superstructure raised thereon falls to the ground automatically.

Vice Chancellor Agriculture University v. Muhammad Shafiq 2024 SCMR 527; Pakistan Peoples Party Parliamentarians v. Federation of Pakistan PLD 2022 SC 574 and Atta-ur-Rehman v. Umar Farooq PLD 2008 SC 663 ref.

**(d) Punjab Service Tribunals Act (IX of 1974)---**

----S. 5---Service Tribunal---Relief, grant of---Parameters---Grounds of leniency and compassion---No court has the jurisdiction to grant arbitrary relief without the support of any power granted by the Constitution or the law---Any relief granted on the touchstone of subjective standards of leniency and compassion, rather than the law, cannot be sustained---Any such subjective decision disregards the importance of institutional autonomy; which rests on well-thought out values, ethos, policies and internal disciple of the institution.

Divisional Superintendent, Postal Services v. Zafarullah 2021 SCMR 400; Government of Pakistan v. Nawaz Ali Sheikh 2020 SCMR 656; Chief Postmaster v. Muhammad Afzal 2020 SCMR 1029 and Dr. A.Q. Khan Research Laboratories v. Hamid Ullah 2010 SCMR 302 ref.

**(e) Constitution of Pakistan---**

----Art. 25---Civil service---Discrimination---Relief sought on plea of discrimination---Scope---Article 25 of the Constitution has no application to a claim based upon other unlawful acts and illegalities---It only comes into operation when some persons are granted a benefit in accordance with law but others, similarly placed and in similar circumstances are denied that benefit---But where a person gains, or is granted, a benefit illegally, other persons cannot plead, nor can the courts accept such a plea, that the same benefit must be allowed to them also in violation of law.

Muhammad Yasin v. D.G. Pakistan Post Office 2023 SCMR 394 ref.

Baleegh-uz-Zaman, Addl. A.G. and Riasat Ali, D.S.P. for the Petitioners.

Muhammad Arshad Bhatti, Advocate Supreme Court for Respondents (via video link from Lahore).

Date of hearing: 7th August, 2024.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The brief facts giving rise to the instant petition are that driver constables ("respondents") were appointed by the District Police, Lahore in the year 2007. Subsequently, on the basis of a complaint, an investigation into the genuineness of their LTV driving licenses ("licenses") was carried out and after necessary verification, it was found that the traffic police had no record of their driving licenses and the same were found fake and bogus. Upon receiving the said information, show cause notices were issued to the respondents in the year 2015. Thereafter, regular departmental inquiry proceedings were initiated under the Punjab Police (E & D) Rules, 1975 ("Rules") during which the respondents admitted that they had not participated in any visual or physical test to get the licenses and that the same were obtained through an agent.[1] Upon receipt of the inquiry report, the respondents were dismissed from service under Rule 3 of the Rules vide orders dated 21.09.2021. Subsequently, the respondents filed departmental appeals which were dismissed vide orders dated 04.03.2022. Instead of approaching the Tribunal, they first preferred revision petitions, which were dismissed in the year 2022, respectively. Feeling aggrieved, they filed service appeals before the Punjab Service Tribunal, Lahore ("Tribunal") which were allowed vide judgment dated 16.05.2023 ("impugned judgment") and the respondents stood reinstated into service. Hence, the present petitions.

2. Learned counsel for the petitioners submits that the respondents' appointments were made on the basis of fake and bogus licenses and despite being given an opportunity to provide a defense, they failed to rebut the allegations levelled against them. On the contrary, learned counsel for the respondents submits that they were unaware of the fake and bogus nature of their licenses and applied for new licenses as soon as they were made aware of the same.

3. The two reasons given by the Tribunal for reinstating the respondents in service were that (i) the disciplinary proceedings instituted against the respondents were based on vague allegations and the same could not sustain and, (ii) the disciplinary action was taken against the respondents after they had served the department for more than 14 years, after having subsequently obtained new licenses.

4. We have heard the learned counsel at length and have gone through the impugned judgment, examined the law on the subject and the record of the case.

5. At the outset, it is significant to underline that courts are tasked with a delicate balancing act: respecting the institutional autonomy of public sector institutions, while ensuring these institutions operate within the bounds of the law and do not infringe upon individual rights or the public interest. The imposition of punishment under the law is primarily the function of the competent authority i.e., Police department in this case, and the role of the Tribunal or Court is rather secondary unless it is found to be against the law or is unreasonable.[2] This is because the department/ competent authority, being the fact-finding authority, is best suited to decide the particular penalty to be imposed keeping in view a host of factors such as the nature and gravity of the misconduct, past conduct, the nature and the responsibility of the duty assigned to the delinquent, previous penalty, if any, and the discipline required to be maintained in the department, as well as any extenuating circumstances.[3] The underlying rationale is based on the concept of institutional autonomy which provides for a degree of self-governance and independence by a public sector institution. This autonomy is essential for ensuring that such institutions can function effectively, impartially, and according to their legal mandates. The autonomy of public institutions is not just a matter of administrative convenience, but a fundamental requirement for the effective functioning of a democratic society, as public sector organizations are guardians of the public interest.[4] The role of the courts is not to second-guess institutions as certain matters are the province of institutions themselves.[5] Thus, as long as the institutions pursue their institutional purpose and function, and as long as they abide by law, professional norms and best practices, they are largely entitled to regulate themselves.[6] Institutional decisions are, however, subject to judicial oversight and can be corrected if they suffer from any illegality, irrationality or procedural impropriety. Other than that, the courts must give deference to the institutional decisions and desist from second-guessing them

on the basis of their own subjective standards of leniency, compassion or fairness. Such decisions are best left to the institutions owing to their policy-making prerogatives and expertise.

6. It is an admitted position that the respondents were dismissed from service based on an established charge of misconduct[7] after a proper regular departmental inquiry was conducted by the competent authority. The findings in the inquiry report were not only accepted by the competent authority but have also been affirmed by the appellate authority of the same department. In the instant case, the major penalty of dismissal from service was imposed by the competent authority in accordance with law and the relevant rules. The fact that the respondents procured their appointment based on bogus and fake driving licenses cannot be condoned. The reasoning given in the impugned judgment justifying their reinstatement on the ground that the respondents worked for 14 years and had subsequently obtained new licenses is not sufficient and does not wash away their act of submitting fake and bogus licenses and thus managing their appointments fraudulently.[8] It is well settled law that when the basic order is without lawful authority, then the entire superstructure raised thereon falls to the ground automatically.[9] Once the appointment was sought on the basis of bogus licenses, such appointment cannot be legitimized. The principle at work here is often referred to as the "doctrine of unclean hands." This legal doctrine holds that a person who has acted unethically, deceitfully, or with dishonesty should not be entitled to the benefits derived from such actions. When applied to employment, particularly in sensitive roles like the police service, this principle asserts that someone who gains their position through fraudulent means-such as by falsifying documents-cannot be trusted to uphold the integrity and responsibilities of that position. Furthermore, discovering the fraud, even several years after the fact, can still be ground for disciplinary action because the initial appointment was obtained illegitimately. The rationale is that trust and integrity are foundational to public service roles, and a breach of this nature undermines the trust necessary for the role and could potentially have legal and institutional consequences. The principle maintains that the integrity of the institution and the trust placed in its officials are paramount, and therefore, any breach, regardless of when discovered, must be addressed decisively.

7. It is also pertinent to note that there is no cavil to the proposition that under Section 5 of the Punjab Service Tribunal Act, 1974 ("Act"), the Tribunal enjoys powers to set aside, confirm, vary or modify any order passed by the departmental authorities. However, such power is required to be exercised carefully, judiciously and after recording cogent reasons for the same keeping in view and considering the specific facts and circumstances of each case.[10] All Courts and Tribunals seized of matters before them are required to pass orders strictly in accordance with the parameters of the Constitution, the law and the rules and regulations lawfully framed under the law. No court has the jurisdiction to grant arbitrary relief without the support of any power granted by the Constitution or the law.[11] Any relief granted on the touchstone of subjective standards of leniency and compassion, rather than the law, cannot be sustained. Any such subjective decision disregards the importance of institutional autonomy; which rests on well-thought out values, ethos, policies and internal disciple of the institution. The impugned judgment has also erred in law by failing to take into account the entire evidence available on record which revealed that the respondents knew that they had submitted fake and bogus licenses during the time of the recruitment process and admitted that they had not participated in any visual or physical test to get the licenses during the regular departmental inquiry proceedings. It is admitted that the respondents knew that they had submitted fake and bogus licenses during the recruitment process.[12] Thus, the Tribunal has failed to take into consideration the fact that the basic qualification/

eligibility to the post of driver constable was a genuine license which the respondents did not meet. In the absence of the same, the Tribunal acted in an arbitrary and whimsical manner overlooking the specific facts and circumstances by granting relief to the respondents in violation of the law.

8. Moreover, the ground of discrimination as alleged[13] by the respondents is also untenable in law as Article 25 of the Constitution has no application to a claim based upon other unlawful acts and illegalities. It only comes into operation when some persons are granted a benefit in accordance with law but others, similarly placed and in similar circumstances are denied that benefit. But where a person gains, or is granted, a benefit illegally, other persons cannot plead, nor can the courts accept such a plea, that the same benefit must be allowed to them also in violation of law.[14] Therefore, in the given circumstances, when it has been established on record that the respondents were guilty of misconduct, there lies no basis to show leniency in their favour, hence the reasoning given by the Tribunal in the impugned judgment is misplaced.

9. In view of the aforesaid, the impugned judgment is set aside and the dismissal orders of the respondents dated 21.09.2021 passed by the department are upheld. The present petition is, therefore, converted into an appeal and allowed.

MWA/S-27/SC Appeal allowed.

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1 Order of the Deputy Inspector General (Operations), Lahore dated 04.03.2022, para 4(v).

2 Divisional Superintendent v. Nadeem Raza 2023 SCMR 803; Secretary Government of Punjab v. Khalid Hussain 2013 SCMR 817.

3 Divisional Superintendent v. Nadeem Raza 2023 SCMR 803.

4 Vice Chancellor Agriculture University v. Muhammad Shafiq 2024 SCMR 527.

5 Randy J. Kozel, 'Institutional Autonomy and Constitutional Structure' 112 Michigan Law Review 957 (2014) < https://repository.law.umich.edu/cgi/ viewcontent.cgi?article=1014&context=mlr> accessed 21 August, 2024.

6 Ibid.

7 Rule 2(iii) of the Rules define "misconduct" as "a conduct prejudicial to good order or discipline in the Police Force, or contrary to Government Servants (Conduct) Rules or unbecoming of a Police Officer and a gentleman, any commission or omission which violates any of the provisions of law and rules regulating, the function and duty of a Police Officer to bring to attempt to bring political or other outside influence directly or indirectly to bear on the Government or any Government Officer in respect of any matter relating to the appointment, promotion, transfer, punishment, retirement or other conditions of service of a Police Officer."

8 Secretary Education v. Noor-Ul-Amin 2022 PLC (C.S.) 132; Anwar Ali v. Chief Executive Officer HESCO 2009 PLC (C.S.) 963.

9 Vice Chancellor Agriculture University v. Muhammad Shafiq 2024 SCMR 527; Pakistan Peoples Party Parliamentarians v. Federation of Pakistan PLD 2022 SC 574 and Atta-ur-Rehman v. Umar Farooq PLD 2008 SC 663.

10 Divisional Superintendent, Postal Services v. Zafarullah, 2021 SCMR 400; Deputy Postmaster v. Habib Ahmed, 2021 SCMR 584; Government of Pakistan v. Nawaz Ali Sheikh, 2020 SCMR 656; Chief Postmaster v. Muhammad Afzal, 2020 SCMR 1029; Dr. A.Q Khan Research Laboratories v. Hamid Ullah, 2010 SCMR 302.

[11] Divisional Superintendent, Postal Services v. Zafarullah, 2021 SCMR 400; Government of Pakistan v. Nawaz Ali Sheikh, 2020 SCMR 656; Chief Postmaster v. Muhammad Afzal, 2020 SCMR 1029; Dr. A.Q Khan Research Laboratories v. Hamid Ullah, 2010 SCMR 302.

[12] Order of the Deputy Inspector General (Operations), Lahore dated 04.03.2022, para 4(iii).

[13] Taken by the respondents in their grounds of appeal before the Tribunal dated 05.08.2022 and the revision petition before the Capital City Police Officer, Lahore.

[14] Muhammad Yasin v. D.G. Pakistan. Post Office 2023 SCMR 394.

**P L D 2024 Supreme Court 67**

**Present: Syed Mansoor Ali Shah, Syed Hasan Azhar Rizvi and Irfan Saadat Khan, JJ**

**BASHIR AHMAD---Petitioner**

**Versus**

**ADDITIONAL DISTRICT JUDGE, HAFIZABAD and others---Respondents**

C.P. No. 5918 of 2021, decided on 3rd November, 2023.

(Against the order of the Lahore High Court, Lahore, dated 06.10.2021, passed in W.P. No. 50349 of 2019).

**(a) Constitution of Pakistan---**

----Arts. 4 & 10A---Fair trial---Scope---Duty of Courts to deal with everyone in accordance with law---Courts, from top to bottom, must always remember that while dealing with matters of life, liberty, body, reputation or property of all persons must be dealt with in accordance with law, and that every person appearing before them is entitled to a fair trial and due process for the determination of his civil rights and obligations or in any criminal charge against him.

Maxwell v. Department of Trade 1974 QB 523 per Lawton, L.J. ref.

**(b) Family Courts Act (XXXV of 1964)---**

----S. 5 & Sched.---Constitution of Pakistan, Arts. 4 & 10A---Maintenance of minor---Grandfather, obligation of---Scope---Decree for maintenance of minor passed against the father of a child by the Family Court---Such decree cannot be executed against the grandfather---Child has to institute a suit for maintenance against his grandfather, in case no property of his father, the judgment debtor, is found for the execution of the decree.

Under the Islamic law of maintenance of the children, if the father of a child has died or the father, being a poor person, has no financial resources to maintain his child, the obligation to maintain such child passes on to his grandfather provided he is financially in easy circumstances. Thus, obligation of a grandfather to maintain his grandchild is dependant upon two conditions: (i) the father of the child must be a poor person who has no financial resources to maintain that child, and (ii) the grandfather of the child must be a person who is financially in easy circumstances. In case either of these conditions is not fulfilled, the grandfather is not under any obligation to maintain his grandchild. These two conditions are thus also the grounds of defence available to a grandfather against whom his grandchild makes a claim of maintenance. The grandfather must be provided with

an opportunity to defend the claim made against him by rebutting the existence of either of these two facts. This is the requirement of the fundamental right guaranteed by Article 10A of the Constitution of Pakistan, which mandates that for the determination of his civil rights and obligations, a person shall be entitled to a fair trial and due process.

Rehmat Bibi v. Mohammad Ali PLD 1971 Lah. 151 and Nizam Khan v. Additional District Judge PLD 1976 Lah. 930 ref.

The matter of providing maintenance to his grandchild is a matter of civil obligation; for its determination, the grandfather must be provided with a fair trial and due process. Both the above conditions, the fulfillment of which brings a grandfather under obligation to maintain his grandchild, are factual propositions, not legal ones. Their existence or non-existence can, therefore, only be proved through producing their respective evidence by the parties in a properly instituted suit for maintenance. Such evidence cannot be recorded in the execution proceeding nor can any determination be made therein by the executing court on these facts. The recording of evidence and making of findings on these facts in an execution proceeding would be a useless exercise, as despite making a positive finding, an executing court cannot modify the decree nor can it execute the decree against a person who was not a party to the suit. Further, the Family Courts Act, 1964 prescribes a procedure for how the claims of maintenance are to be entertained and decided by the Family Courts. Such a claim made against a grandfather operates against his property; he is, therefore, entitled to be dealt with the procedure prescribed by law, i.e., the Family Courts Act, as per Article 4 of the Constitution. Therefore, a decree for maintenance passed against the father of a child cannot be executed against the grandfather, and the child has to institute a suit for maintenance against his grandfather, in case no property of his father, the judgment debtor, is found for the execution of the decree.

Naseem Akhtar v. Shalimar General Insurance 1994 SCMR 22; Province of Punjab v. Burewala Textile Mills 2001 SCMR 396; Tariq Khan v. Jawad Asami 2007 SCMR 818; Attiq-ur-Rehman v. Sajad Hussain 2009 SCMR 684; Humayun Hassan v. Arslan Humayun PLD 2013 SC 557; Ahmed Nawaz v. Province of Punjab 2015 SCMR 823 and Shajar Hussain v. Abdul Majeed 2006 SCMR 913 ref.

Nawazish Ali v. Family Judge 2021 CLC 1841 approved

Mavra Arshad v. Ehsan Ghani 2005 SCMR 1293 distinguished.

In the present case, the petitioner (grandfather) was neither a party to the suit instituted by his grandchild against his father nor was any decree passed against him. A decree that was not passed against the petitioner cannot be executed against him or his property. The order, whereby the executing court attached the property of the petitioner, and the order, whereby his application for the release of the attached property was dismissed, both are illegal. Petition for leave to appeal was converted into appeal and allowed accordingly with the observation that the minor decree-holder, if so advised, is at liberty to institute a suit for maintenance against the petitioner, his grandfather, in accordance with the law, and if such a suit is instituted, the Family Court may make an appropriate order for interim maintenance of the minor at an appropriate stage of the suit if it is satisfied that the two conditions which make a grandfather liable for providing maintenance to his minor grandchild are prima facie fulfilled.

Muhammad Shahid Tasawar Rao, Advocate Supreme Court for Petitioner.

Khalid Pervaiz Warraich, Advocate Supreme Court for Respondents.

Date of hearing: 3rd November 2023.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**'Doing what is right may still result in unfairness if it is done in the wrong way.'[1] The right thing must be done in the right way. Just ends are not justified unjust means. The present case is a classic instance of doing a right thing in a wrong way. In their urge to provide a child with due maintenance at the earliest, the courts below have circumvented the due process of law, and instead of achieving the desired result, have thrown the parties into a protracted, unnecessary litigation. Courts in this country, from top to bottom, must always remember that while dealing with matters of life, liberty, body, reputation or property of all persons must be dealt with in accordance with law,[2] and that every person appearing before them is entitled

to a fair trial and due process for the determination of his civil rights and obligations or in any criminal charge against him.[3]

2. Briefly, the facts necessary to state for the decision of the present petition are that in the year 2018, the petitioner's grandson, Muhammad Rehan, then aged about 3 years, instituted a family suit through his mother, Aziz Fatima, for his maintenance against his father and the petitioner's son, Ansar Abbas. The suit was decreed and a petition was filed for the execution of the decree against the judgment debtor, Ansar Abbas. Despite issuing the warrant of his arrest, the presence of the judgment debtor could not be procured to pay the decretal amount nor could the decree holder trace out any of his property. The decree holder found the revenue record of the property owned by the petitioner, his grandfather, and requested the executing court to attach that property for recovery of the decretal amount, which was accepted by the executing court, and the petitioner's property was attached vide order dated 07.09.2018. The petitioner filed an application for the release of his property from attachment, pleading that he had neither been a party to the suit nor had any decree been passed against him. The executing court dismissed this application of the petitioner by its order dated 17.10.2018. The petitioner challenged the orders of the executing court in the High Court invoking its writ jurisdiction. Through the impugned order, the High Court dismissed his writ petition; hence, this petition for leave to appeal.

3. We have heard the learned counsel for the parties, read the cases cited by them and examined the record of the case.

4. Under the Islamic law of maintenance of the children, if the father of a child has died or the father, being a poor person, has no financial resources to maintain his child, the obligation to maintain such child passes on to his grandfather provided he is financially in easy circumstances.[4] This statement of Islamic law is not disputed before us. The matter of contention between the parties that requires determination by us is: whether a decree for maintenance passed against the father of a child can be executed against the grandfather or the child has to institute a suit for maintenance against his grandfather, in case no property of his father, the judgment debtor, is found for the execution of the decree.

5. As it is evident from the above statement of the Islamic law of maintenance of the children, the obligation of a grandfather to maintain his grandchild is dependant upon two conditions: (i) the father of the child must be a poor person who has no financial resources to maintain that child, and (ii) the grandfather of the child must be a person who is financially in easy circumstances. In case either of these conditions is not fulfilled, the grandfather is not under any obligation to maintain his grandchild. These two conditions are thus also the grounds of defence available to a grandfather against whom his grandchild makes a claim of maintenance.

6. A child who claims his maintenance from his grandfather has to prove these two conditions, and the grandfather must be provided with an opportunity to defend the claim made against him by rebutting the existence of either of these two facts. This is the requirement of the fundamental right guaranteed by Article 10A of

the Constitution of Pakistan, which mandates that for the determination of his civil rights and obligations, a person shall be entitled to a fair trial and due process. The matter of providing maintenance to his grandchild is a matter of civil obligation; for its determination, the grandfather must be provided with a fair trial and due process.

Both the above conditions, the fulfillment of which brings a grandfather under obligation to maintain his grandchild, are factual propositions, not legal ones. Their existence or non-existence can, therefore, only be proved through producing their respective evidence by the parties in a properly instituted suit for maintenance. Such evidence cannot be recorded in the execution proceeding nor can any determination be made therein by the executing court on these facts. The recording of evidence and making of findings on these facts in an execution proceeding would be a useless exercise, as despite making a positive finding, an executing court cannot modify the decree[5] nor can it execute the decree against a person who was not a party to the suit.[6] Further, the Family Courts Act 1964 prescribes a procedure for how the claims of maintenance are to be entertained and decided by the Family Courts. Such a claim made against a grandfather operates against his property; he is, therefore, entitled to be dealt with the procedure prescribed by law, i.e., the Family Courts Act, as per Article 4 of the Constitution.

7. We, therefore, hold that a decree for maintenance passed against the father of a child cannot be executed against the grandfather, and the child has to institute a suit for maintenance against his grandfather, in case no property of his father, the judgment debtor, is found for the execution of the decree.[7] The case of Mavra Arshad[8] relied upon by the respondents does not advance but rather contradicts their stance as in that case, the grandfather was a party to the suit as a defendant, along with the father of the child.

8. In the present case, the petitioner was neither a party to the suit instituted by his grandchild against his father nor was any decree passed against him. A decree that was not passed against the petitioner cannot be executed against him or his property. The order dated 07.09.2018, whereby the executing court attached the property of the petitioner, and the order dated 17.10.2018, whereby his application for the release of the attached property was dismissed, both are illegal. By dismissing the writ petition of the petitioner filed against those orders, the High Court has failed to exercise the remedial jurisdiction vested in it under Article 199(1)(a)(ii) of the Constitution. The present petition is, therefore, converted into an appeal and the same is allowed. By setting aside the impugned order, the writ petition of the petitioner is accepted, declaring that the orders of the executing court, dated 07.09.2018 and 17.10.2018, were made without lawful authority and are therefore of no legal effect. Consequently, the application of the petitioner for the release of his property from the attachment stands allowed. It is, however, clarified that the minor decree-holder, if so advised, is at liberty to institute a suit for maintenance against the petitioner, his grandfather, in accordance with the law, and if such a suit is instituted, the Family Court may make an appropriate order for interim maintenance of the minor at an appropriate stage of the suit if it is satisfied that the two conditions which make a grandfather liable for providing maintenance to his minor grandchild are prima facie fulfilled.

MWA/B-5/SC Appeal allowed.

**P L D 2024 Supreme Court 102**

**Present: Umar Ata Bandial, C.J., Ijaz ul Ahsan and Syed Mansoor Ali Shah, JJ**

**IMRAN AHMAD KHAN NIAZI ---Petitioner**

**Versus**

**FEDERATION OF PAKISTAN through Secretary, Law and Justice Division, Islamabad and another---Respondents**

Constitution Petition No. 21 of 2022 and C.M.A. No. 5029 of 2022 in Constitution Petition No. 21 of 2022, decided on 30th October, 2023.

Per Umar Ata Bandial, CJ.; Ijaz ul Ahsan, J. agreeing; Syed Mansoor Ali Shah, J. dissenting. [Majority view]

**(a) National Accountability Ordinance (XVIII of 1999)---**

----Ss. 4, 5(n), 5(o), 9(a)(v), 14, 21(g) & 25(b)---National Accountability (Amendment) Act (XI of 2022), Ss. 2, 8, 10 & 14---National Accountability (Second Amendment) Act (XVI of 2022), Ss. 2, 3 & 14---Constitution of Pakistan, Arts. 9, 14, 23, 24 & 184(3)---Constitutional petition filed before the Supreme Court challenging amendments made to the National Accountability Ordinance, 1999 ("NAB Ordinance") by the National Accountability (Amendment) Act, 2022 ("First Amendment") and the National Accountability (Second Amendment) Act, 2022 ("Second Amendment") (collectively referred to as the "2022 Amendments")---Maintainability---The 2022 Amendments have rendered the NAB toothless in accomplishing its objective of eradicating corruption and corrupt practices and holding accountable all those persons accused of such practices and have left public property belonging to the people of Pakistan vulnerable to waste and malfeasance by the holders of public office, thereby ex-facie violating Articles 9, 14, 23 and 24 of the Constitution---Detailed reasons for finding the present Constitutional petition as maintainable stated.

Acts of corruption and corrupt practices do infringe the Fundamental Rights of the public and thus meet the test of Article 184(3) of the Constitution.

(Suo Motu Case No.19 of 2016) 2017 SCMR 683; Corruption in Hajj Arrangements in 2010's case PLD 2011 SC 963; Bank of Punjab v. Haris Steel Industries (Pvt.) Ltd. PLD 2010 SC 1109 ref.

The National Accountability (Amendment) Act, 2022 ("First Amendment") and the National Accountability (Second Amendment) Act, 2022 ("Second Amendment") (collectively referred to as the "2022 Amendments") have limited the NAB's jurisdiction thus excluding hundreds of pending references from trial before any forum and have also made the proof of the offence of corruption and corrupt practices significantly harder for references that satisfy the jurisdictional requirements of Section 4 and Section 5(o) of the National Accountability Ordinance, 1999 ("NAB Ordinance").

The 2022 Amendments exclude the jurisdiction of the NAB to investigate and prosecute holders of public office in two significant respects thereby ex-facie violating Articles 9, 14, 23 and 24 of the Constitution by exonerating the holders of public office from their alleged acts of corruption and corrupt practices by failing to provide a forum for their trial. The 2022 Amendments have therefore rendered the NAB toothless in accomplishing its objective of 'eradicat[ing] corruption and corrupt practices and hold[ing] accountable all those persons accused of such practices' and have left public property belonging to the people of Pakistan vulnerable to waste and malfeasance by the holders of public office. Such interference in the NAB's jurisdiction and powers most certainly affects the Fundamental Rights of the people at large. Present Constitutional petition fulfils the requirements of Article 184(3) of the Constitution and so is maintainable.

Progress Report of NAB in OGRA's case 2015 SCMR 1813 ref.

**(b) Constitution of Pakistan---**

----Art. 184(3)---Constitutional petition under Art. 184(3) of the Constitution filed before the Supreme Court---Antecedents or standing of the petitioner---Not relevant---When the Supreme Court exercises jurisdiction under Article 184(3) of the Constitution it is not concerned with the antecedents or standing of the person who

has filed the petition because that person is merely acting as an informant---Instead, the Court favours a substantive approach focusing more on the content of the petition and whether the same crosses the threshold set out in Article 184(3)---Locus standi (of petitioner) is not an impediment when the Court is exercising original jurisdiction (under Art. 184(3) of the Constitution).

Muhammad Yasin v. Federation of Pakistan PLD 2012 SC 132 and Muhammad Ashraf Tiwana v. Federation of Pakistan 2013 SCMR 1159 ref.

**(c) Constitution of Pakistan---**

----Art. 184(3)---Constitutional jurisdiction of the Supreme Court under Art. 184(3) of the Constitution---Scope---Vires of legislation---Supreme Court can consider and decide the vires of legislation in its original jurisdiction.

Mehram Ali v. Federation of Pakistan PLD 1998 SC 1445; Liaquat Hussain v. Federation of Pakistan PLD 1999 SC 504; Mobashir Hassan v. Federation of Pakistan PLD 2010 SC 265; Baz Muhammad Kakar v. Federation of Pakistan PLD 2012 SC 923 and Zulfiqar Ahmed Bhutta v. Federation of Pakistan PLD 2018 SC 370 ref.

**(d) National Accountability Ordinance (XVIII of 1999)---**

----Ss. 4, 5(n), 5(o), 9(a)(v), 14, 21(g) & 25(b)---National Accountability (Amendment) Act (XI of 2022), Ss. 2, 8, 10 & 14---National Accountability (Second Amendment) Act (XVI of 2022), Ss. 2, 3 & 14---Penal Code (XLV of 1860), S. 21---Prevention of Corruption Act (II of 1947), Ss. 2 & 5---Constitution of Pakistan, Arts. 9, 14, 23, 24, 25, 62(1)(f), 175(3), 184(3) & 260(1)---Constitutional petition filed before the Supreme Court challenging amendments made to the National Accountability Ordinance, 1999 ("NAB Ordinance") by the National Accountability (Amendment) Act, 2022 ("First Amendment") and the National Accountability (Second Amendment) Act, 2022 ("Second Amendment") (collectively referred to as the "2022 Amendments")---Vires of the "2022 Amendments"---Supreme Court declared sections 2, 8, 10 & 14 of the First Amendment and sections 2, 3 & 14 of the Second Amendment as ultra vires the Constitution---Detailed reasons for finding the said sections as ultra vires the Constitution stated.

The National Accountability (Amendment) Act, 2022 ("First Amendment") and the National Accountability (Second Amendment) Act, 2022 ("Second Amendment") (collectively referred to as the "2022 Amendments") have brought about the following modifications in the National Accountability Ordinance, 1999 ("NAB Ordinance"):

i. Section 3 of the Second Amendment has changed the definition of 'offence' in Section 5(o) of the NAB Ordinance by inserting a minimum pecuniary jurisdiction of Rs.500 million below which value the NAB cannot take cognizance of the offence of corruption and corrupt practices;

ii. Section 2 of the First Amendment by inserting subsections (a)-(f) into Section 4 of the NAB Ordinance and Section 2 of the Second Amendment by adding subsection (g) in Section 4 of the NAB Ordinance has excluded certain holders of public office from application of the NAB Ordinance and thereby limited its effect;

iii. Section 8 of the First Amendment has inserted new ingredients in the offence under Section 9(a)(v) of the NAB Ordinance and added explanations thereto. Section 9(a)(v) criminalizes the act of holding assets beyond means;

iv. Section 10 of the First Amendment has deleted Section 14 of the NAB Ordinance which provides evidentiary presumptions that may be drawn against the accused;

v. Section 14 of the First Amendment has deleted Section 21(g) of the NAB Ordinance which permitted foreign evidence to be admissible in legal proceedings under the mutual legal assistance regime; and

vi. Section 14 of the Second Amendment has added a second proviso to Section 25(b) of the NAB Ordinance whereby an accused who enters into a plea bargain duly approved by the Accountability Court under Section 25(b) can renege from the same if he has not paid the full amount of the bargain settlement as approved by the Accountability Court.

Section 3 of the Second Amendment

Section 3 of the Second Amendment has amended Section 5(o) of the NAB Ordinance to set the minimum pecuniary jurisdiction of the NAB at Rs.500 million for inquiring into and investigating cases involving the commission of the offence of corruption and corrupt practices. As a result, offences that cause loss valued at less than Rs.500 million no longer come within the ambit of the NAB. The principal focus of the NAB is to mainly prosecute mega scandals. Whilst the judgments of the Superior Courts indicate that the minimum pecuniary threshold of NAB should be Rs.100 million (except in limited circumstances where offences less than Rs.100 million cannot be prosecuted by any other accountability agency), Section 3 of the Second Amendment has increased this minimum threshold to Rs.500 million. No cogent argument was put forward by counsel for the respondent Federation as to why Parliament has fixed a higher amount of Rs.500 million for the NAB to entertain complaints and file corresponding references in the Accountability Courts when the Superior Courts have termed acts of corruption and corrupt practices causing loss to the tune of Rs.100 million as mega scandals.

State v. Hanif Hyder 2016 SCMR 2031; Amjad Hussain v. National Accountability Bureau 2017 YLR 1 and Iftikhar Ali Haideri v. National Accountability Bureau 2019 YLR 255 ref.

Counsel for the respondent Federation submitted that merely because the minimum pecuniary threshold of the NAB has been increased does not mean that holders of public office stand absolved; that other accountability fora exist in the country where the trials of the accused holders of public office who have been removed from the jurisdiction of the NAB can be held. Counsel referred to the provisions of Prevention of Corruption Act, 1947 ("1947 Act") and Pakistan Penal Code, 1860 ("P.P.C.") amongst other laws. However, on a careful examination of these legislations it becomes clear that the two are applicable only to public servants. Under the Constitution persons in the service of Pakistan are those who are holding posts in connection with the affairs of the Federation or Province. As a result, such persons are either dealing with the property of the Federal/Provincial Government or with the pecuniary interests of the Federal/Provincial Government. They, therefore, come within the definition of public servant set out in the Pakistan Penal Code, 1860 ('P.P.C.") and adopted by the Prevention of Corruption Act, 1947 ('the 1947 Act') and so can be prosecuted under these laws for the offence of corruption and corrupt practices. However, elected holders of public office do not qualify as public servants under the guise of being in the service of Pakistan because Article 260 of the Constitution specifically excludes them from such service. Resultantly elected holders of public office are not triable either under the 1947 Act or the P.P.C. for the offence of corruption and corrupt practices.

R.S. Nayak v. A.R. Antulay AIR 1984 SC 684 and Zakir Hossain Sarkar v. State (70) DLR (2018) 203 ref.

By virtue of Section 3 of the Second Amendment elected holders of public office have been granted both retrospective and prospective exemption from accountability laws. Once excluded from the jurisdiction of the NAB no other accountability fora can take cognizance of their alleged acts of corruption and corrupt practices. Such blanket immunity offends Articles 9, 14, 23 and 24 of the Constitution because it permits and encourages the squandering of public assets and wealth by elected holders of public office as there is no forum for their accountability. This in turn affects the economic well-being of the State and ultimately the quality and dignity of the people's lives because as more resources are diverted towards illegal activities less resources remain for the provision of essential services to the people such as health facilities, education institutes and basic infrastructure etc. The immunity also negates Article 62(1)(f) of the Constitution which mandates that only 'sagacious, righteous, non-profligate, honest and ameen' persons enter Parliament. It also offends the equal treatment command of Article 25 of the Constitution as differential treatment is being meted out to persons in the service of Pakistan than to elected holders of public office. This is because persons in the service of Pakistan can still be prosecuted for the offence of corruption and corrupt practices under the 1947 Act as they fall within the definition of public servants.

Section 3 of the Second Amendment is ultra vires the Constitution and of no legal effect on account of absolving persons accused of the offence of corruption and corrupt practices without a judicial verdict which

amounts to legislative judgment. Since persons in the service of Pakistan can be tried for offences contained in Section 9(a)(i)-(v) of the NAB Ordinance under the 1947 Act, the bar
of Rs.500 million shall continue for such offences. To this extent Section 3 of the Second Amendment is declared to be intra vires the Constitution. However, on account of the fact that persons in the service of Pakistan cannot be tried for the offences noted in Section 9(a)(vi)-(xii) under the 1947 Act or any other accountability law the bar of Rs.500 million will not apply to them for such offences. Section 3 of the Second Amendment is therefore declared to be void and without legal effect for these offences for discharging the accused without trial which is tantamount to legislative judgment and is held to be so from the date of commencement of the Second Amendment.

Province of Punjab v. National Industrial Cooperative Credit Corporation 2000 SCMR 567 ref.

Section 2 of the 2022 Amendments

Section 2 of the 2022 Amendments has altered Section 4 of the NAB Ordinance. Section 2 of the 2022 Amendments is an attempt by Parliament to rein in the unguided powers of the NAB and to protect the bureaucracy from unnecessary harassment. However, the exceptions granted by Section 2 operate as an enmasse exemption for holders of public office from facing accountability. The freshly inserted condition that the NAB shall provide evidence of monetary or other material benefit received by the holder of public office or a person acting on his behalf to overcome the exceptions listed in Section 2 of the 2022 Amendments cannot be satisfied in the references already pending before the Accountability Courts. Therefore, where such condition will not be met by the NAB the result will be (and in fact has been) that references will be returned. Section 2 of the 2022 Amendments affects the same Fundamental Rights i.e., Articles 9, 14, 23 and 24 and raises the same problems in terms of the accountability of elected holders of public office as Section 3 of the Second Amendment, namely, that whilst persons in the service of Pakistan may still be investigated and prosecuted under the 1947 Act for the offences listed in Section 9(a)(i)-(v) of the NAB Ordinance, elected holders of public office will not be amenable to the jurisdiction of any other accountability fora for the offence of corruption and corrupt practices.

Section 2 of the 2022 Amendments is also declared to be void from the date of commencement of the 2022 Amendments. Section 2 of the 2022 Amendments insofar as these pertain to the offences set out in Section 9(a)(i)-(v) of the NAB Ordinance are declared to be intra vires the Constitution because persons in the service of Pakistan can be prosecuted for these offences under the 1947 Act. However, Section 2 is ultra vires the Constitution from the date of commencement of the 2022 Amendments for the offences listed in Section 9(a)(vi)-(xii) of the NAB Ordinance because persons in the service of Pakistan cannot be tried for such offences under the 1947 Act or any other accountability law.

Sections 8 and 10 of the First Amendment

Section 8 of the First Amendment has significantly altered Section 9 of the NAB Ordinance which lays down various categories of the offence of corruption and corrupt practices. Apart from reducing the circumstances in which the offence of assets beyond means can be made out against the holder of a public office, the First Amendment has made another material change in Section 9(a)(v) of the NAB Ordinance, namely, the obligation on the NAB to prove that an accused has accumulated substantially disproportionate assets 'through corrupt and dishonest means.' This element was previously not a part of Section 9(a)(v). Prior to First Amendment the NAB was not required to demonstrate that the accused had obtained the resources or property 'through corrupt and dishonest means' because the mere presence of disproportionate assets led to the presumption that the accused had engaged in corrupt and dishonest conduct. Such a presumption is provided in Section 14(c) of the NAB Ordinance. The fact of the matter is that the proof of acquisition of assets 'through corrupt and dishonest means' itself constitutes a complete offence. Therefore, by changing Section 9(a)(v), the First Amendment has amalgamated two separate offences into one. As a result, the original offence contained in Section 9(a)(v) has now been rendered redundant. To further ensure the futility of the said offence all of the evidentiary presumptions contained in Section 14 of the NAB Ordinance sustaining the erstwhile offence under Section 9(a)(v) and the remaining offences in the NAB Ordinance have been omitted by Section 10 of the First Amendment.

Further, by the insertion of Explanation II to Section 9(a)(v) of the NAB Ordinance entries in bank statements have been removed from the scope of assets whereas banking transactions can only be regarded as assets if there is evidence of the creation of a corresponding asset through specific transactions. The source, object and quantum of credits/receipts in the bank accounts can now no longer be shown for proving the creation of assets. Nor can debit transfers from one account to another be used to show accumulation of money for the creation of an asset. It goes without saying that bank records are usually the most pivotal evidence in financial crimes. However, by virtue of Explanation II limited resort can be made to them. If accused persons cannot be held to account for owning or possessing assets beyond their means, the natural corollary will be that public assets and wealth will become irrecoverable which would encourage further corruption. This will have a direct adverse effect on the peoples' right to life and to public property because the economic well-being of the State will be prejudiced.

The amended Section 9(a)(v) and the omission of Section 14(c) would treat similarly placed persons differently because while elected holders of public office are relieved from prosecution for the offence under Section 9(a)(v), persons in the service of Pakistan will still have to go through the rigors of trial under the 1947 Act for the same offence. This would offend the equal treatment command of Article 25 of the Constitution.

The phrase 'through corrupt and dishonest means' used in Section 9(a)(v) along with its Explanation II is struck down from the NAB Ordinance from the date of commencement of the First Amendment for being unworkable. Additionally, Section 14 in its entirety is restored to the NAB Ordinance from the date of commencement of the First Amendment. Sections 8 and 10 of the First Amendment are declared invalid to this extent.

The amendments made in Section 9(a)(v) of the NAB Ordinance by Section 8 of the First Amendment are upheld in their entirety as persons in the service of Pakistan can be tried for the same offence under the 1947 Act. However, Section 10 of the First Amendment is struck down from the date of commencement of the First Amendment and Section 14(a), (b) and (d) stand restored to the NAB Ordinance because such presumptions do not exist in any other accountability law.

Section 14 of the First Amendment

Section 14 of the First Amendment has omitted Section 21(g) of the NAB Ordinance, which dealt with International Cooperation Request for mutual legal assistance. It is a common fact that many accused persons being tried under the NAB Ordinance have stashed their wealth and assets abroad in tax havens under fiduciary instruments. However, after the omission of the said provision the admissibility of foreign public documents shall be governed by Article 89(5) of the Qanun-e-Shahadat Order, 1984 ("1984 Order"). The process of admitting foreign public documents under the 1984 Order is protracted and cumbersome because it requires either the production of the original document or a copy which is certified not only by the legal keeper of the document but also by the Embassy of Pakistan. Further, the character of the document needs to be established in accordance with the law of the foreign country. Additionally, foreign private documents would need to be established through the procedure set out in Articles 17 and 79 of the 1984 Order which would require that two attesting witnesses from the foreign country enter personal appearance for proving the execution of the foreign private document. Such a process naturally entails time as the foreign evidence needs to pass through red tape. It therefore defeats the purpose for which Section 21(g) was inserted into the NAB Ordinance. By deleting Section 21(g) from the NAB Ordinance, Section 14 of the First Amendment has made it near impossible for relevant and

necessary foreign evidence to be used in the trials of accused persons. It therefore offends the Fundamental Rights of the people to access justice and protect public property from waste and malfeasance.

Section 21(g) is hereby restored in the NAB Ordinance for both elected holders of public office and persons in the service of Pakistan with effect from the date of commencement of the First Amendment for facilitating peoples right to access justice and for protecting their public property from squander. Accordingly, Section 14 of the First Amendment is struck down for being illegal.

Section 14 of the Second Amendment

Section 14 of the Second Amendment has inserted two new provisos to Section 25(b) of the NAB Ordinance, which provision pertains to plea bargains entered into by accused persons. Despite the benign purposes behind introducing the second proviso to Section 25(b), the actual effect of it is that it nullifies Section 25(b) itself which was inserted in the NAB Ordinance to facilitate early recovery of the ill-gotten wealth through settlement where practicable because it places no restrictions on the accused from revoking the plea bargain entered into by him. Further, the second proviso gives the accused an uninhibited right to withdraw from a plea bargain without obtaining the approval of the Accountability Court which in the first place approved the plea bargain. The exclusion of the Accountability Court by the second proviso to Section 25(b) of the NAB Ordinance therefore undermines the independence of the Judiciary and is violative of Article 175(3) of the Constitution. Furthermore allowing an accused person to renege from his plea bargain would be tantamount to conferring an unlawful benefit on him i.e., he would escape the consequences (disqualification to contest elections or to hold public office) stipulated in Section 15(a) of the NAB Ordinance.

The second proviso to Section 25(b) is struck down from the NAB Ordinance from the date of commencement of the Second Amendment. As a result, Section 14 of the Second Amendment is declared to be void and of no legal effect to this extent.

Supreme Court directed that all orders passed by the NAB and/or the Accountability Courts placing reliance on the struck down Sections are declared null and void and of no legal effect. Therefore, all inquiries, investigations and references which have been disposed of on the basis of the struck down Sections are restored to their positions prior to the enactment of the 2022 Amendments and shall be deemed to be pending before the relevant fora. The NAB and all Accountability Courts shall proceed with the restored proceedings in accordance with law. The NAB and/or all other fora shall forthwith return the record of all such matters to the relevant fora and in any event not later than seven days from date of present judgment which shall be proceeded with in accordance with law from the same stage these were at when the same were disposed of/closed/returned. Constitutional petition was allowed.

**(e) Interpretation of statutes---**

----Proviso to a section---Scope---Whilst a proviso can qualify or create an exception to the main section it cannot nullify the same.

Muhammad Anwar Kurd v. State 2011 SCMR 1560 ref.

Per Syed Mansoor Ali Shah, J; dissenting with Umar Ata Bandial, CJ. [Minority view]

**(f) Constitution of Pakistan---**

----Art. 184(3) & Part.II, Chapt. 1---Legislation---Judicial review---Scope---Courts can judicially review the acts of the legislators if they offend the Constitution, in particular the fundamental rights guaranteed by the Constitution---While examining this conflict of rights and the legislation, the courts must consider that they are dealing with a legislative document that represents multiple voices, myriad policy issues and reflective of public ethos and interests, voiced through the chosen representatives of the people; and remembering that undermining the legislature undermines democracy---With this background, only if such a legislation is in conflict and in violation of the fundamental rights or the express provisions of the Constitution, can the courts interfere and overturn such a legislation.

**(g) Constitution of Pakistan---**

----Art. 184(3)--- Legislation--- Judicial review--- Scope--- Judicial restraint, doctrine of---Courts have formulated the doctrine of judicial restraint which urges Judges considering constitutional questions to give deference to the views of the elected branches and invalidate their actions only when constitutional limits have clearly been violated---As the legislative acts of a legislature are the manifestation of the will of the people exercised through their chosen representatives, the courts tread carefully to judicially review them and strike them down only when their constitutional invalidity is clearly established beyond any reasonable doubt-

--Reasonable doubt is resolved in favour of the constitutional validity of the law enacted by a competent legislature by giving a constitution-compliant interpretation to the words that create such doubt.

Jurists Foundation v. Federal Government PLD 2020 SC 1 and LDA v. Imrana Tiwana 2015 SCMR 1739 ref.

**(h) National Accountability Ordinance (XVIII of 1999)---**

----Ss. 4, 5(n), 5(o), 9(a)(v), 14, 21(g) & 25(b)---National Accountability (Amendment) Act (XI of 2022), Ss. 2, 8, 10 & 14---National Accountability (Second Amendment) Act (XVI of 2022), Ss. 2, 3 & 14---Penal Code (XLV of 1860), S. 21---Prevention of Corruption Act (II of 1947), Ss. 2 & 5---Qanun-e-Shahadat (10 of 1984), Art.122---Constitution of Pakistan, Arts. 9, 14, 23, 24, 25, 175(3) & 184(3)---Constitutional petition filed before the Supreme Court challenging amendments made to the National Accountability Ordinance, 1999 ("NAB Ordinance") by the National Accountability (Amendment) Act, 2022 ("First Amendment") and the National Accountability (Second Amendment) Act, 2022 ("Second Amendment") (collectively referred to as the "2022 Amendments")---Vires of the "2022 Amendments"---The 2022 Amendments in no way take away or abridge any of the fundamental rights guaranteed by the Constitution to the people of Pakistan---Even after the 2022 Amendments elected holders of public offices (members of Parliament, Provincial Assemblies and Local Government Bodies, etc.) are still triable under the Prevention of Corruption Act 1947 ('PCA') and the Pakistan Penal Code 1860 ('P.P.C.')---Changes brought about by the 2022 Amendments relate to criminal law, criminal procedure and rules of evidence and fall within the legislative competence of the Parliament and in no way take away or abridge any of the fundamental rights---If Parliament can enact the NAB Ordinance in the exercise of its ordinary legislative power, it can surely amend the same in the exercise of the same legislative power---Detailed reasons given by His Lordship for disagreeing with the majority view stated.

The Parliament has, through the impugned National Accountability (Amendment) Act, 2022 ("First Amendment") and the National Accountability (Second Amendment) Act, 2022 ("Second Amendment") (collectively referred to as the "2022 Amendments"), merely changed the forums for investigation and trial of the offences of corruption involving the amount or property less than Rs.500 million. After the amendment, the cases of alleged corruption against the holders of public offices that involve the amount or property of value less than Rs.500 million are to be investigated by the anti-corruption investigating agencies and tried by the anti-corruption courts of the Federation and Provinces respectively, under the Prevention of Corruption Act 1947 and the Pakistan Criminal Law Amendment Act 1958, instead of the National Accountability Ordinance, 1999 ("NAB Ordinance"). This matter undoubtedly falls within the exclusive policy domain of the legislature, not justiciable by the courts. This and other challenged amendments, which relate to certain procedural matters, in no way take away or abridge any of the fundamental rights guaranteed by the Constitution to the people of Pakistan.

The majority view in the present case is not correct as even after the challenged amendments:

(i) the elected holders of public offices (members of Parliament, Provincial Assemblies and Local Government Bodies, etc.) are still triable under the Prevention of Corruption Act 1947 ('PCA') and the Pakistan Penal Code 1860 ('P.P.C.') for the alleged offences of corruption and corrupt practices and no one goes home scot-free. They are still triable under other laws. This aspect has been seriously misunderstood by the majority;

(ii) the challenged amendment of adding the threshold value of Rs.500 million for an offence to be investigated and tried under the NAB Ordinance, simply changes the forums for investigation and trial of the alleged offences of corruption and corrupt practices involving the amount or property less than Rs.500 million. The matter of defining a threshold of value for the investigation and trial of offences under the NAB Ordinance is undoubtedly a policy matter that falls within the exclusive domain of the legislature (Parliament), not of the courts. If a legislature has the constitutional authority to pass a law with regard to a particular subject, it is not for the courts to delve into and scrutinize the wisdom and policy which led the legislature to pass that law; and

(iii) the said and other challenged amendments (law made by the Parliament) do not take away or abridge any of the fundamental rights guaranteed under Articles 9, 14, 23, 24 and 25 of the Constitution. The majority view has assumed the right to accountability of the elected holders of public offices through criminal prosecution as included in the fundamental rights to life, dignity and property guaranteed by Articles 9, 14 and 24 of the Constitution, without making any discussion for establishing its close relationship of such an extent with those fundamental rights that makes this right to be an integral part of them.

Mobashir Hassan v. Federation of Pakistan PLD 2010 SC 265 distinguished.

The omission of Section 14 of the NAB Ordinance by the 2022 Amendments has made no substantial effect in view of the provisions of Article 122 of the Qanun-e- Shahadat 1984. Clauses (a), (b) and (d) of the omitted Section 14 of the NAB Ordinance relate to the intention of the accused other than that which the character and circumstances of the act proved against him by the prosecution suggest. These clauses are, therefore, merely descriptive instances of the applicability of Article 122 read with its illustration (a) of the Qanun-e-Shahadat. And clause (c) of the omitted Section 14 of the NAB Ordinance that relates to possessing assets disproportionate to known sources of income is the descriptive instance of the applicability of Article 122 read with its illustration (b) of the Qanun-e-Shahadat. Notwithstanding such an innocuous effect, the change in the rules of evidence squarely falls within the scope of the legislative competence of the Parliament under Article 142(b) of the Constitution and unless such change offends any of the fundamental rights, it is not justiciable in courts.

Pir Mazharul Haq v. State PLD 2005 SC 63; Mansur-Ul-Haque v. Government of Pakistan PLD 2008 SC 166; State v. Idrees Ghauri 2008 SCMR 1118; Qasim Shah v. State 2009 SCMR 790; Rehmat v. State PLD 1977 SC 515 and Hashim Babar v. State 2010 SCMR 1697 ref.

Similar is the position with the addition of words "through corrupt and dishonest means" by the challenged amendments in Section 9(a)(v) of the NAB Ordinance: It also has no substantial effect on the mode of proving the offence of unaccounted assets possessed by a holder of public office beyond his known sources of income; as when the prosecution succeeds in proving that the particular assets of the accused are disproportionate to his known sources of income (legal means) and are thus acquired through some corrupt and dishonest means, the burden of proving the "fair and honest means" whereby the accused claims to have acquired the same, being within his knowledge, are to be proved by him as per provisions of Article 122, read with its illustration (b), of the Qanun-e-Shahadat.

The majority view has also declared ultra vires the Constitution the addition of Explanation II to Section 9(v) of the NAB Ordinance; the omission of clause (g) of Section 21; and the addition of second proviso to Section 25(b). However in declaring these amendments as ultra vires the Constitution, the majority view has not explained how they infringe any of the fundamental rights or any other provision of the Constitution, nor could the counsel for the petitioner point out in his arguments any such infringement. These amendments being related to "criminal law, criminal procedure and evidence" fall within the legislative competence of the Parliament as per Article 142(b) of the Constitution and in no way take away or abridge any of the fundamental rights in terms of Article 8(2) of the Constitution.

The mode of holding the elected representatives accountable for the offences of corruption and corrupt practices through criminal prosecution has not been provided by the Constitution but by the sub constitutional laws - the P.P.C., the PCA and the NAB Ordinance. If Parliament can enact these laws in the exercise of its ordinary legislative power, it can surely amend them in the exercise of the same legislative power. The argument cannot be acceded to that Parliament after enacting these laws has no power to amend, modify or repeal them.

The counsel for the petitioner could not explain how the right to accountability of the elected holders of public offices through criminal prosecution under the NAB Ordinance is an integral part of the fundamental rights to life, dignity, property and equality or how it partakes of the same basic nature and character as the said fundamental rights so that the exercise of such right is in reality and substance nothing but an instance of the exercise of these fundamental rights. Nor could he establish that the "direct and inevitable effect" of the challenged amendments constitutes an infringement of these fundamental rights. The "effect" of the

challenged amendments on these fundamental rights portrayed by him is so "remote and uncertain" that if such effect is accepted as an infringement of the fundamental rights then there would hardly be left any space and scope for Parliament to make laws on any subject; as all laws enacted by Parliament would "ultimately" reach any of the fundamental rights, particularly rights to life or property, in one way or the other through such a long winding conjectural path of farfetched "in turn" effects. Constitutional petition was dismissed.

Corruption in Hajj Arrangements' case 2010 PLD 2011 SC 963 and Bank of Punjab v. Haris Steel Industries PLD 2010 SC 1109 distinguished.

**(i) Penal Code (XLV of 1860)---**

----S. 21---Public servant---Scope---Every officer remunerated by the fees or commission for the performance of any public duty is a public servant under Section 21, P.P.C., irrespective of the fact whether the fee is paid by the Government or by any other public body or by an Act of Parliament under the Constitution.

Henly v. Mayor of Lyme (1928) 5 Bing 91 and R v. Whittaker (1914) 3 KB 1283 ref.

**(j) Penal Code (XLV of 1860)---**

----S. 21---Prevention of Corruption Act (II of 1947), Ss. 2 & 5---Public servant---Scope---Member of Parliament---To fall within the scope of the definition of "public servant" a person should be an officer; he should perform any public duty; and he should be remunerated by fees or commission for the performance of that public duty---Member of Parliament is "holder of an office" and is thus an "officer" within the meaning and scope of this term used in clause ninth of Section 21, P.P.C.---Person in his position as a member of Parliament does perform a "public duty"---Furthermore a member of Parliament is, remunerated by fees (salary and allowances) for the performance of public duties---Member of Parliament, thus, fulfills all the three conditions to fall within the scope of the definition of "public servant" provided in the second limb of the latter part of clause ninth of Section 21, P.P.C., and is, therefore, triable as a "public servant" for the alleged commission of an offence of corruption and corrupt practices (criminal misconduct) under the Pakistan Penal Code, 1860 and the Prevention of Corruption Act, 1947.

McMillan v. Guest (1942) AC 561; Shorter Oxford English Dictionary, 6th ed., p. 1988; G.W. Railway Co. v. Bater [1920] 3 KB 266; G.W. Railway v. Bater [1922] 2 AC 1; Kanta Kathuria v. Manakchand Surana AIR 1970 SC 694; American Jurisprudence, 2nd ed. Vol. 63A, p. 667; Grahm Zellic, Bribery of Members of Parliament and the Criminal Law, Public Law (1979) 31 at p. 37; L.K. Advani v. C.B.I. 1997 Cri.LJ 2559; Anti Corruption Commission v. Shahidul Islam (6 SCOB [2016] AD 74; R v. Boston [1923] HCA 59; Narsimha Rao v. State AIR 1998 SC 2120; The Members of Parliament (Salaries and Allowances) Act, 1974; R v. Postmaster-General (1876) 1 QBD 663; National Embroidery Mills Ltd. v. Punjab Employees' Social Security Institution 1993 SCMR 1201; Accountant General, Bihar v. N. Bakshi AIR 1962 SC 505; Khurshid Soap and Chemical Industries v. Federation of Pakistan PLD 2020 SC 641; Abul Monsur v. State PLD 1961 Dacca 753; Mujibur Rahman v. State PLD 1964 Dacca 330; Emperor v. Sibnath Banerji AIR 1945 PC 156 and Shiv Bahadur Singh v. State of Vindhya Pradesh AIR 1953 SC 394 ref.

**(k) Constitution of Pakistan---**

----Art. 184(3)---Legislation---Judicial review---Scope---Courts cannot force the legislature to act upon their recommendations nor can they strike down any law competently enacted by the legislature which does not commensurate with their recommendations.

**(l) Constitution of Pakistan---**

----Art. 175(3)---Trichotomy of power, principle of---Scope---Constitution of Pakistan is based on the principle of trichotomy of power in which legislature, executive and judiciary have their separately delineated functions---Legislature is assigned the function to legislate laws, the executive to execute laws and the judiciary to interpret laws---None of these three organs are dependent upon the other in the performance of its functions nor can one claim superiority over the others---Each enjoys complete independence in their own sphere and is the master in its own assigned field under the Constitution---Any one of these three organs cannot usurp or interfere in the exercise of each other's functions, nor can one encroach upon the field of the others---This trichotomy of power is so important that it is said to be a basic feature of the Constitution, a

cornerstone of the Constitution, a fundamental principle of the constitutional construct, and one of the foundational principles of the Constitution.

Government of Balochistan v. Azizullah Memon PLD 1993 SC 341; Liaqat Hussain v. Federation of Pakistan PLD 1999 SC 504; Registrar, SCP v. Wali Muhammad 1997 SCMR 141; Mobashir Hassan v. Federation of Pakistan PLD 2010 SC 265; Government of KPK v. Saeed-Ul-Hassan 2021 SCMR 1376; Jurists Foundation v. Federal Government PLD 2020 SC 1; Dossani Travels v. Travels Shop PLD 2014 SC 1 and Mamukanjan Cotton Factory v. Province of Punjab PLD 1975 SC 50 ref.

**(m) Legislation---**

----Legislative power of Parliament---Scope---Doctrines of exhaustion and functus officio---Not applicable---What Parliament has done, Parliament can undo---Legislative power of Parliament does not exhaust by enactment of any law nor does Parliament become functus officio by making a law, on a particular subject---Doctrines of exhaustion and functus officio are not applicable to legislative powers---Legislature that has made any law is competent to change, annul, re-frame or add to that law---Even the legislature of today cannot enact a law, whereby the powers of a future legislature or of its own to amend a law are curtailed.

M.P. High Court Bar Association v. Union of India AIR 2005 SC 4114; Khan Asfandyar Wali v. Federation of Pakistan PLD 2001 SC 607 and LDA v. Imrana Tiwana 2015 SCMR 1739 ref.

**(n) Constitution of Pakistan---**

----Part.II, Chapt. 1---Fundamental rights, interpretation of---Progressive, liberal and dynamic approach---Fundamental rights guaranteed in the Constitution, an organic instrument, are not capable of precise or permanent definition delineating their meaning and scope for all times to come---With the passage of time, changes occur in the political, social and economic conditions of the society, which requires re-evaluation of their meaning and scope in consonance with the changed conditions---Therefore, keeping in view the prevailing socio-economic and politico-cultural values and ideals of the society, the courts are to construe the fundamental rights guaranteed in the Constitution with a progressive, liberal and dynamic approach---But this does not mean that the judges are at liberty to give any artificial meaning to the words and expressions used in the provisions of the fundamental rights, on the basis of their subjective ideological considerations---Progressive, liberal and dynamic approach in construing fundamental rights guaranteed in the Constitution must be guided by an objective criterion, not by subjective inclination.

Nawaz Sharif v. President of Pakistan PLD 1993 SC 473 ref.

**(o) Constitution of Pakistan---**

----Part.II, Chapt. 1---Fundamental rights---New rights---Objective criterion for recognizing new rights as fundamental rights---Objective criterion in such regard is to see whether the claimed right is an integral part of a named fundamental right or partakes of the same basic nature and character as the named fundamental right so that the exercise of such right is in reality and substance nothing but an instance of the exercise of the named fundamental right---Right is an integral part of a named fundamental right which gives life and substance to the named fundamental right.

Maneka Gandhi v. Union of India AIR 1978 SC 597 and Griswold v. Connecticut (1965) 381 US 479 ref.

**(p) Constitution of Pakistan---**

----Art. 184(3)---Legislation---Judicial review---Scope---Locus standi of a Parliamentarian to challenge the constitutional validity of an Act of Parliament---Parliament is a constitutional body, but being comprised of the chosen representatives of the people of Pakistan it attains the status of a prime constitutional body---Any action made or decision taken by the majority of a constitutional body is taken to be and treated as an action or decision of that body as a whole comprising of all its members, not only of those who voted for that action or decision---Any member of a constitutional body who was in the minority in making that decision can not challenge the validity of that decision in court---Principle that decisions taken by a majority of members in a constitutional body (like a parliament or legislature) usually cannot be directly challenged in court by those in the minority is rooted in the doctrine of parliamentary sovereignty and the separation of powers---Democratic systems are often built on the principle of majority rule; this ensures that decisions reflect the will of the

majority while still respecting the rights of the minority---Allowing minority members to easily challenge majority decisions would undermine this fundamental democratic principle.

**(q) National Accountability Ordinance (XVIII of 1999)---**

----Ss. 9 & 10---Prevention of Corruption Act (II of 1947), Ss. 2 & 5---Judges of the constitutional courts and Members of the Armed Forces---Accountable and fully liable under the National Accountability Ordinance, 1999 and the Prevention of Corruption Act, 1947, like any other public servant of Pakistan.

Khan Asfandyar Wali v. Federation of Pakistan PLD 2001 SC 607 ref.

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For NAB/Respondent No.02:

Mumtaz Yousf, Addl. Prosecutor General.

Muhammad Sattar Awan, Deputy Prosecutor General.

Qazi Babar Irshad, Special Prosecutor General.

Barrister Syeda Jugnu Kazmi, Special Prosecutor General.

Dates of hearing: 19th, 29th, July, 5th, 19th August, 1st September, 4th, 5th, 6th, 10th, 11th, 12th, 18th, 19th, 24th October, 8th, 9th, 10th, 14th, 15th, 16th, 17th, November, 6th, 7th, 8th, 12th, 13th, 14th, December, 2022, 10th, 11th, 12th, 17th, 18th, 19th, January, 7th, 8th, 9th, 10th, 14th, 15th, 16th, 21st, 22nd, 23rd February, 14th, 15th, 16th, March, 16th, May, 18th, 29th, 30th, 31st August, 1st and 5th September, 2023.

**JUDGMENT**

**UMAR ATA BANDIAL, C.J.---**

Surah Al-Anfal, Verse 27:

"O ye that believe! betray not the trust of Allah and the Messenger, nor misappropriate knowingly things entrusted to you."

(Translation by Yusuf Ali)

Through the present Constitution Petition No.21 of 2022 the petitioner has challenged the amendments made to the National Accountability Ordinance, 1999 ("NAB Ordinance") by the National Accountability (Amendment) Act, 2022 ("First Amendment") and the National Accountability (Second Amendment) Act, 2022 ("Second Amendment") (collectively referred to as the "2022 Amendments").

Origins and Content of the Unamended NAB Ordinance

2. Before delving into the facts giving rise to the present petition it would be appropriate to briefly set out the origins and history of the NAB Ordinance. The NAB Ordinance was a successor of the Ehtesab Act, 1997 and was promulgated by the then Chief Executive of Pakistan, General Pervez Musharraf, on 16.11.1999 with

retrospective effect from 01.01.1985. The NAB Ordinance is a special law enacted to 'eradicate corruption and corrupt practices and hold accountable all those persons accused of such practices.' To achieve its purposes the NAB Ordinance:

i. Set up Special Courts for conducting trials of the offence of corruption and corrupt practices [refer Sections 5(g) and 16 of the NAB Ordinance prior to the 2022 Amendments];

ii. Defined the categories of holders of public office who are subject to the NAB Ordinance. The two main categories are parliamentarians ("elected holders of public office") and 'persons in the service of Pakistan' [refer Section 5(m) of the NAB Ordinance prior to the 2022 Amendments];

iii. Expanded the class of persons who could be investigated and prosecuted for the offence of corruption and corrupt practices [refer Section 5(o) of the NAB Ordinance prior to the 2022 Amendments];

iv. Set up the NAB for the purposes of conducting pre-trial inquiries and investigations in relation to the offence of corruption and corrupt practices and to prosecute the same [refer Section 6 of the NAB Ordinance prior to the 2022 Amendments];

v. Retained certain categories of the offence of corruption and corrupt practices from previous accountability laws whilst also adding certain new categories such as 'misuse of authority' and 'wilful default' [refer Section 9 (a) (vi) and (viii) of the NAB Ordinance prior to the 2022 Amendments];

vi. Declared the offence of corruption and corrupt practices non-bailable [refer Section 9(b) of the NAB Ordinance prior to the 2022 Amendments];

vii. Retained certain evidentiary presumptions against accused persons whilst also adding a new category of presumption for persons accused of misusing their authority [refer Section 14 of the NAB Ordinance prior to the 2022 Amendments];

viii. Permitted the Chairman NAB or any authorised officer of the Federal Government to seek mutual legal assistance from foreign States [refer Section 21 of the NAB Ordinance prior to the 2022 Amendments]; and

ix. Introduced the concept of a plea bargain [refer Section 25(b) of the NAB Ordinance prior to the 2022 Amendments].

3. The vires of the NAB Ordinance were challenged soon after its promulgation but the Court in Khan Asfandyar Wali v. Federation of Pakistan (PLD 2001 SC 607) upheld its provisions albeit with certain directions and observations. Since then despite three elected governments coming into power the NAB Ordinance has not been repealed and it remains the premier accountability law in the country.

Factual Background

4. With the above context we can now lay down the facts relevant to the present petition. On 22.06.2022 the First Amendment to the NAB Ordinance became an Act of Parliament. Its essential features are:

i. Its provisions have deemed effect from the date of commencement of the NAB Ordinance i.e., 01.01.1985 [refer Section 1(2) of the First Amendment];

ii. It excludes the decisions, advice, reports, opinions tendered by and works, functions, projects, schemes executed by holders of public office and public/ governmental bodies from the ambit of the NAB unless there is proof of the holders of public office or persons acting on their behalf having received any monetary or material benefit from the decisions, advice, reports, opinions, works, functions, projects or schemes [refer Section 2 of the First Amendment];

iii. It has defined 'public at large' to mean at least 100 persons [refer Section 3 of the First Amendment];

iv. It has altered the ingredients of the offences listed in Section 9(a)(v), (vi) and (ix) of the NAB Ordinance [refer Section 8 of the First Amendment];

v. It has given Accountability Courts the power to grant bail to accused persons [refer Section 8 of the First Amendment];

vi. It has omitted Section 14 of the NAB Ordinance which allowed the Accountability Court to draw various evidentiary presumptions against the accused [refer Section 10 of the First Amendment];

vii. It has omitted Section 21(g) of the NAB Ordinance which allowed evidentiary material transferred by a foreign Government to be receivable as evidence in legal proceedings notwithstanding the provisions of the Qanun-e-Shahadat Order, 1984 [refer Section 14 of the First Amendment]; and

viii. It has reduced the period of custody of the accused for the purposes of inquiry and investigation from 90 days to 14 days [refer Section 16 of the First Amendment].

5. On 25.06.2022 the petitioner filed the titled Constitution Petition with the prayer that the First Amendment be struck down (albeit with the exception of a few beneficial changes) for violating the Fundamental Rights of the people of Pakistan enshrined in Articles 9 (security of person), 14 (inviolability of dignity of man), 19A (right to information), 24 (protection of property rights) and 25 (equality of citizens) of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution").

6. The first hearing in the case took place on 19.07.2022. During the course of the petitioner's arguments the Second Amendment also became an Act of Parliament on 12.08.2022. The significant features of this amendment are:

i. Its provisions have deemed effect from the date of commencement of the NAB Ordinance i.e., 01.01.1985 [refer Section 1(2) of the Second Amendment];

ii. It has enlarged the category of holders of public office and public/ governmental bodies excluded from the jurisdiction of the NAB [refer Section 2 of the Second Amendment];

iii. It has limited the pecuniary jurisdiction of the NAB to cases involving loss of Rs.500 million or more thereby rendering the NAB incompetent to investigate and prosecute offences of corruption and corrupt practices which have caused a loss of less than Rs.500 million [refer Section 3 of the Second Amendment]; and

iv. It has provided accused persons with the opportunity to renege from the plea bargains entered into by them and approved by the Accountability Court if they fail to make the complete payment as approved by the Accountability Court [refer Section 14 of the Second Amendment].

The petitioner filed an application on 31.08.2022 for amending his Constitution Petition to also challenge the Second Amendment on the touchstone of the Fundamental Rights already raised in respect of the First Amendment. This application was allowed by the Court on 01.09.2022 with the consent of the learned counsel for the respondent Federation. Thereafter, the proceedings continued for more than a year and comprised of 53 hearings in total. During this period of one year two further amendments were passed in relation to the NAB Ordinance, namely:

i. The National Accountability (Amendment) Act, 2023 which became an Act of Parliament on 29.05.2023 ("2023 Act"). This Act has primarily amended Section 4 of the NAB Ordinance to provide a transfer mechanism for pending inquiries, investigations and references to the relevant agency, authority, department, court, tribunal or forum [refer Section 2 of the 2023 Act]; and

ii. The National Accountability (Amendment) Ordinance, 2023 which was promulgated on 03.07.2023 ("2023 Ordinance") by the President. The main feature of this Ordinance is that it has re-inserted the evidentiary presumptions against the accused for certain categories of the offence of corruption and corrupt practices [refer Section 2 of the 2023 Ordinance]. Although this Ordinance has retrospective effect from the date of commencement of the NAB Ordinance the restoration of the presumptions will have no effect on the references that have already been returned by the Accountability Courts to the NAB due to the 2022 Amendments. The 2023 Ordinance has therefore brought about only a cosmetic change in the NAB Ordinance and it does not rectify the deficiency created by the omission of the presumptions by the First Amendment.

Although learned counsel for the petitioner filed his written submissions on the amendments brought about in the NAB Ordinance by the 2023 Act, the primary focus of the proceedings remained the 2022 Amendments and this judgment shall also only examine the vires of the 2022 Amendments though mention may be made of the 2023 Act and the 2023 Ordinance in passing.

7. It is also pertinent to mention here that as a result of the 2022 Amendments a large number of references filed by the NAB in the Accountability Courts were affected. The data, as provided by the Addl. Prosecutor General, NAB, is set out below:

i. 386 references were returned by the Accountability Courts to NAB in 2022 whereas 212 references were returned in 2023. Therefore, a total of 598 references have been returned so far. Of these 35 references pertain to elected holders of public office;

ii. The public money involved in the returned references is more than Rs. 150 billion;

iii. 327 of the 386 references were returned in 2022 due to the minimum pecuniary jurisdiction of the NAB being increased to Rs.500 million under the Second Amendment;

iv. Out of the 598 returned references only 54 have yet been transferred to other courts for further action of which 17 have been transferred to the Custom Court and 4 to the Banking Court. As a result, 544 references are with the NAB in storage; and

v. 127 references remain with the Accountability Courts after the 2022 Amendments.

Comparative Table of the 2022 Amendments

8. Before we examine the contentions of the learned counsel for the parties, a comparative table detailing the pivotal changes brought about in the content of the NAB Ordinance by the 2022 Amendments is produced below:

| NAB Ordinance Prior to the 2022 Amendments | 2022 Amendments |
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| 4. Application: It extends to the whole of Pakistan and shall apply to all persons in Pakistan, all citizens of Pakistan and persons who are or have been in the service of Pakistan wherever they may be, including areas which are part of Federally and Provincially Administered Tribal Areas. | 4. Application: (1) This Ordinance extends to the whole of Pakistan and shall apply to all persons, including those persons who are or have been in the service of Pakistan, except persons and transactions specified in subsection (2). (2) The provisions of this Ordinance shall not be applicable to the following persons or transactions, namely:- (a) all matters pertaining to Federal, Provincial or Local taxation, other levies or imposts, including refunds, or loss of exchequer pertaining to taxation, transactions or amounts duly covered by amnesty schemes of Government of Pakistan; (b) decisions of Federal or Provincial Cabinet, their Committees or Sub-Committees, Council of Common Interests (CCI), National Economic Council (NEC), National Finance Commission (NFC), Executive Committee of the National Economic Council (ECNEC), Central Development Working Party (CDWP), Provincial Development Working Party (PDWP), Departmental Development Working Party (DDWP), Board of Directors of State Owned Enterprises (SOEs), Board of Trustees/Directors of all Statutory Bodies, the State Bank of Pakistan and such other bodies except where the holder of the public office has received a monetary gain as a result of such decision; (c) any person or entity who, or transaction in relation thereto, which are not |

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| | directly or indirectly connected with the holder of a public office except offences falling under clauses (ix), (x) and (xi) of subsection (a) of section 9; (d) procedural lapses in performance of any public or governmental work or function, project or scheme, unless there is evidence to prove that a holder of public office or any other person acting on his behalf has been conferred or has received any monetary or other material benefit from that particular public or governmental work or function, whether directly or indirectly on account of such procedural lapses, which the said recipient was otherwise not entitled to receive; (e) a decision taken, an advice, report or opinion rendered or given by a public office holder or any other person in the course of his duty, unless there is sufficient evidence to show that the holder of public office or any other person acting on his behalf received or gained any monetary or other material benefit, from that decision, advice, report or opinion, whether directly or indirectly, which the said recipient was otherwise not entitled to receive; (f) all matters, which have been decided by, or fall within the jurisdiction of a regulatory body established under a Federal or Provincial law; and (g) all matters where the funds, property or interest not involving or belonging to the appropriate government, except for the offences under clauses (ix), (x) or (xi) of subsection (a) of section 9. |
| 5. Definitions: … (n) "Offence" means the offences of corruption and corrupt practices and other offences as defined in this Ordinance and includes the offences specified in the Schedule to this Ordinance. | 5. Definitions: … (o) "Offence" means the offences of corruption and corrupt practices and other offences as defined in this Ordinance of value not less than five hundred million rupees and includes the offences specified in the Schedule to this Ordinance; |
| 9. Corruption and Corrupt Practices: (a) A holder of a public office, or any other person, is said to commit or to have committed the offence of corruption and corrupt practices- - ….. (v) if he or any of his dependents or benamidars owns, possesses, or has acquired right or title in any assets or holds irrevocable power of attorney in respect of any assets or pecuniary resources disproportionate to his known sources of income, which he cannot | 9. Corruption and Corrupt Practices: (a) A holder of a public office, or any other person, is said to commit or to have committed the offence of corruption and corrupt practices--- … (v) if he or any of his dependents or other benamidars, through corrupt and dishonest means, owns, possesses or acquires rights or title in assets substantially disproportionate to his known sources of income which he cannot reasonably account for. Explanation I.- The |

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| reasonably account for or maintains a standard of living beyond that which is commensurate with his sources of income; | valuation of immovable property shall be reckoned on the date of purchase either according to the actual price shown in the relevant title documents or the applicable rates prescribed by District Collector or the Federal Board of Revenue whichever is higher. No evidence contrary to the later shall be admissible. Explanation II.- For the purpose of calculation of movable assets, the sum total of credit entries of bank account shall not be treated as an asset. Bank balance of an account on the date of initiation of inquiry may be treated as a movable asset. A banking transaction shall not be treated as an asset unless there is evidence of creation of corresponding asset through that transaction. |
| 14. Presumption against accused accepting illegal gratification: a. Where in any trial of an offence under clauses (i), (ii), (iii) and (iv) of subsection (a) of section 9 it is proved that an accused person has accepted or obtained, or has agreed to accept or attempted to obtain, for himself or for any other person any gratification, other than legal remuneration, or any valuable thing, or any pecuniary advantage from a person or any agent of a person, for any favour shown or promised to be shown by the accused, it shall be presumed, unless the contrary is proved, that he accepted or obtained, or agreed to accept or attempted to obtain, that gratification or that valuable thing or pecuniary advantage for himself or some other person, as the case may be, as a motive or a reward such as is specified in sections 161 to 163 of the Pakistan Penal Code, 1860, (Act XLV of 1860), or, as the case may be, without consideration, or for a consideration which he believed to be inadequate. b. Wherein any trial of an offence punishable under section 165A of the Pakistan Penal Code, 1860 (Act XLV of 1860) it is proved that any gratification, other than legal remuneration or any valuable thing has been given, or offered to be given, or attempted to be given, by any accused person, it shall be presumed, unless the contrary is proved, that he gave or offered to give, or attempted to give, that gratification, or that valuable thing, as the case may be, as a motive | Section 14 omitted. |

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| or a reward such as is specified in sections 161 to 163 of the said Code, or, as the case may be without consideration or for a consideration which he believed to be inadequate. c. In any trial, of an offence punishable under clause (v) of subsection (a) of section 9 of this Ordinance, the fact that the accused person or any other person on his behalf, is in possession, for which the accused person cannot satisfactorily account, of assets or pecuniary resources disproportionate to his known source of income, or that such person has, at or about the time of the commission of the, offence with which he is charged, obtained an accretion to his pecuniary resources or property for which he cannot satisfactorily account, the Court shall presume, unless the contrary is proved, that the accused person is guilty of the offence of corruption and corrupt practices and his conviction therefor shall not be invalid by reason only that it is based solely on such a presumption. d. In any trial of an offence under clauses (vi) and (vii) of section 9 the burden of proof that he used his authority, or issued any directive, or authorized the issuance of any policy or statutory rule or, order (SRO), or made any grant or allowed any concession, in the public interest, fairly, justly, and for the advancement of the purpose of the enactment under which the authority was used, directive or policy or rule or order was issued or grant was made or concession was allowed shall lie on the accused, and in the absence of such proof the accused shall be guilty of the offence, and his conviction shall not be invalid by the reason that it is based solely on such presumption: Provided that the prosecution shall first make out a reasonable case against the accused charged under clause (vi) or clause (vii) of subsection (a) of section 9. | |
| 21. International Cooperation Request for mutual legal assistance: The Chairman NAB or any officer authorized by the Federal Government may request a Foreign State to do any or all of the following acts in accordance with the law of such State:-- ….. (g) Notwithstanding anything contained in the Qanun-e-Shahadat Order 1984 (P.O. 10 of | Section 21(g) omitted. |

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|---|---|
| 1984) or any other law for the time being in force all evidence, documents or any other material transferred to Pakistan by a Foreign Government shall be receivable as evidence in legal proceedings under this Ordinance; | |
| 25. Voluntary return and plea bargain: … (b) Where at any time after the authorization of investigation, before or after the commencement of the trial or during the pendency of an appeal, the accused offers to return to the NAB the assets or gains acquired or made by him in the course, or as a consequence, of any offence under this Ordinance, the Chairman, NAB, may, in his discretion, after taking into consideration the facts and circumstances of the case, accept the offer on such terms and conditions as he may consider necessary, and if the accused agrees to return to the NAB the amount determined by the Chairman, NAB, the Chairman, NAB, shall refer the case for the approval of the Court, or as the case may be, the Appellate Court and for the release of the accused. | 25. Voluntary return and plea bargain: … (b) Where at any time after the authorization of investigation, before or after the commencement of the trial or during the pendency of an appeal, the accused offers to return to the NAB the assets or gains acquired or made by him in the course, or as a consequence, of any offence under this Ordinance, the Chairman, NAB, may, in his discretion, after taking into consideration the facts and circumstances of the case, accept the offer on such terms and conditions as he may consider necessary, and if the accused agrees to return to the NAB the amount determined by the Chairman, NAB, the Chairman, NAB, shall refer the case for the approval of the Court, or as the case may be, the Appellate Court and for the release of the accused: Provided that statement of an accused entering into plea bargain or voluntary return shall not prejudice case of any other accused: Provided further that in case of failure of accused to make payment in accordance with the plea bargain agreement approved by the Court, the agreement of plea bargain shall become inoperative to the rights of the parties immediately. |

9. It may be noticed from the provisions produced above that the 2022 Amendments have indeed brought about a significant change in the legal position under the NAB Ordinance. Whereas prior to the 2022 Amendments the NAB Ordinance applied to all persons in Pakistan after the 2022 Amendments the scope of NAB Ordinance has been significantly restricted with nearly all holders of public office exempted from its application unless there is proof of any monetary or material benefit being received by them or a person acting on their behalf. However, even if the NAB manages to overcome the exceptions listed in the amended Section 4 of the NAB Ordinance the jurisdictional hurdle of an accused having caused a minimum loss of Rs.500 million or more would still need to be crossed. If that is not done the accused will be ousted from the jurisdiction of the NAB. Therefore, it is only when the requirements of Section 4 and Section 5(o) of the NAB Ordinance (as altered by the 2022 Amendments) are satisfied can the accused person be inquired/ investigated into by the NAB and be tried in the Accountability Court.

10. However, by the addition of the new conditions in and explanations to Section 9(a)(v) coupled with the omission of Section 21(g) that permitted the admission of foreign evidentiary material in legal proceedings under the mutual legal assistance regime set up by the United Nations Convention against Corruption, the burden cast on the prosecution to establish that a holder of public office has accumulated unaccounted domestic (or foreign) assets beyond his means has been made formidable. Along with that the presumption noted in Section 14(c) has also been deleted. The result of these amendments relating to proof of the offence

of accumulated assets beyond means will be that in the future few persons will be prosecuted for such an offence by the NAB with still lesser convictions under Section 9(a)(v). The above result is in addition to the effect that the 2022 Amendments envisage the return of pending inquiries, investigations and references but do not provide any mechanism for then transferring them to the relevant agency, authority, department, court, tribunal or forum. That procedure was provided for the first time by the 2023 Act. However, the 2023 Act is applicable to only those inquiries, investigations and references of which either the NAB or the Accountability Court is seized. As noted above, there are hundreds of references that have been returned by the Accountability Courts to the NAB pursuant to the 2022 Amendments and prior to the 2023 Act. These references returned in the interregnum between the two amendments have gone into limbo, a fact affirmed by the record supplied by the Additional Prosecutor General, NAB.

11. At this stage it would also be appropriate to note that the offence of corruption and corrupt practice is an umbrella term used to describe different categories of offences noted in Section 9(a) of the NAB Ordinance. The 2022 Amendments have changed three such categories, namely:

i. Assets beyond means [refer Section 9(a)(v) of the NAB Ordinance];

ii. Misuse of authority [refer Section 9(a)(vi) of the NAB Ordinance]; and

iii. Cheating [refer Section 9 (a) (ix) of the NAB Ordinance].

Additionally, Section 9(a)(vii) which criminalised the issuance of any directive, policy, SRO or any other order which granted undue concession or benefit to the holder of public office, his relative, associate, benamidar or any other person has been omitted by the First Amendment. This judgment, however, shall only deal with Section 9(a)(v) as that is the category of the offence of corruption and corrupt practices which prima facie appears to have the widest implications of an adverse nature on the Fundamental Rights of the people.

Arguments of Counsel

12. Both the learned counsel for the petitioner and the learned counsel for the respondent Federation made extensive submissions on the maintainability and merits of the petition. Their main contentions were:

A. Submissions by the Petitioner

i. The titled petition is maintainable under Article 184(3) of the Constitution as the 2022 Amendments directly and adversely affect the Fundamental Rights of the people of Pakistan i.e., Articles 9, 14, 19A, 24 and 25 and violate a salient feature of the Constitution, namely, Parliamentary form of Government blended with Islamic provisions;

ii. The provisions of the 2022 Amendments have effectively decriminalised the offence of 'corruption and corrupt practices' thereby allowing the holders of public office to retain their ill-gotten wealth whilst being exempted from prosecution under the NAB Ordinance. The specific sections of the 2022 Amendments that decriminalise the offence of 'corruption and corrupt practices' and exclude holders of public office from the province of the NAB will be discussed later in the judgment; and

iii. The Court is empowered under Article 184(3) of the Constitution to either strike down the 2022 Amendments or to direct the Federation to bring the 2022 Amendments in line with the requirements of the Constitution and Fundamental Rights.

B. Submissions by the Respondent Federation

i. The instant Constitution Petition is not maintainable because it does not satisfy the twin criteria laid down in Article 184(3) of the Constitution, the petitioner lacks bona fide and locus standi to challenge the 2022 Amendments and the petition at the present stage is premature and based on speculations and conjectures;

ii. No cogent reason has been given by the petitioner for not challenging the 2022 Amendments before the High Courts;

iii. The 2022 Amendments have been enacted after taking into consideration the criticisms levelled against the NAB Ordinance, including by the Superior Judiciary in its judgments/ orders; and

iv. An incorrect perception is being created that the 2022 Amendments have decriminalised the offence of corruption and corrupt practices because there exist other accountability foras in the country which can

investigate, prosecute and try accused persons for the offences which no longer fall within the ambit of the NAB.

13. Apart from the above submissions, information was also sought from the Additional Prosecutor General, NAB (produced above in para 7) regarding the particulars of the references that have been returned to the NAB pursuant to the 2022 Amendments and their fate since. Written submissions were also provided by the learned Attorney General for Pakistan who predominantly attacked the maintainability of the present petition and endorsed the submissions of the learned counsel for the respondent Federation in toto.

14. Having heard the learned counsel for all the parties and having examined the available record the Court reserved its judgment on 05.09.2023. Our decision on the present petition and the reasons for the same are set out hereinbelow.

Maintainability

15. The learned counsel for the respondent Federation strongly objected to the maintainability of the titled petition for failing to satisfy the jurisdictional requirements of Article 184(3) of the Constitution. It was his case that the petitioner had failed to identify the precise Fundamental Right that had been violated by the 2022 Amendments. Additionally, he submitted that the petitioner lacked locus standi and bona fides to challenge the 2022 Amendments because firstly, when he was Prime Minister his government introduced many of the amendments that have been consolidated by the 2022 Amendments and secondly, he had committed a dereliction of duty by refusing to sit in the National Assembly and raise concerns regarding the 2022 Amendments therein. Learned counsel also stated that the dispute raised by the petition in respect of the 2022 Amendments is hypothetical as there are no
facts before the Court as a result of which the Court will be considering and deciding the question of vires of the 2022 Amendments in the abstract.

16. In response, learned counsel for the petitioner consistently maintained his stance that the cumulative effect of the 2022 Amendments is that the offence of corruption and corrupt practices committed by the holders of public office has been decriminalised thereby violating the following Fundamental Rights of the people of Pakistan:

> "9. Security of person. No person shall be deprived of life or liberty save in accordance with law.
>
> 14. Inviolability of dignity of man, etc. (1) The dignity of man and, subject to law, the privacy of home, shall be inviolable.
>
> 24. Protection of property rights. (1) No person shall be compulsorily deprived of his property save in accordance with law.
>
> 25. Equality of citizens. (1) All citizens are equal before law and are entitled to equal protection of law."

Learned counsel for the petitioner further submitted that since the 2022 Amendments directly and adversely affect the Fundamental Rights of the public not only are the conditions of Article 184(3) satisfied but also the objections of learned counsel for the respondent Federation regarding bona fides and locus standi of the petitioner lose force.

17. As the learned counsel for the respondent Federation
has primarily attacked the maintainability of the instant Constitution Petition, we shall examine that question first. The Court has been conferred original jurisdiction by Article 184(3) of the Constitution which reads:

> "184. Original jurisdiction of Supreme Court.
>
> ...
>
> (3) Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved, have the power to make an order of the nature mentioned in the said Article."

By virtue of the afore-noted provision the Court can pass appropriate orders in cases where the enforcement of a Fundamental Right(s) affecting the public at large is involved. It is by now well-established in our jurisprudence that acts of corruption and corrupt practices do infringe the Fundamental Rights of the public and thus meet the test of Article 184(3). Reliance in this regard is placed on the decisions of the Court in Suo

Motu Case No.19 of 2016 (2017 SCMR 683); Corruption in Hajj Arrangements in 2010 (PLD 2011 SC 963); Bank of Punjab v. Haris Steel Industries (Pvt.) Ltd. (PLD 2010 SC 1109). For reference relevant passages from the cases of Corruption in Hajj Arrangements (supra) and Bank of Punjab are produced below:

"Corruption in Hajj Arrangements

28. ...However, when the cases of massive corruption, not only one, but so many came for hearing, therefore, this Court in the exercise of its constitutional jurisdiction had enforced fundamental rights of the citizens under Articles 4, 9, 14 and 25 of the Constitution... Undoubtedly, whenever the Court will notice that there is corruption or corrupt practices, it would be very difficult to compromise or digest it because the public money of the country cannot be allowed to be looted by any one whatsoever status he may have.

Bank of Punjab

25. A perusal of the above quoted provision [Art. 184(3)] would demonstrate that this Court was possessed of powers to make any order of the nature mentioned in Article-199 of the Constitution, if, in the opinion of this Court, a question of public importance relating to the enforcement of any of the Fundamental Rights was involved in the matter[.] As has been mentioned in the preceding parts of this order, what was at stake was not only a colossal amount of money/property belonging to at least one million depositors i.e. a large section of the public but what was reportedly at stake was also the very existence of the Bank of Punjab which could have sunk on account of the mega fraud in question and with which would have drowned not only the said one million depositors but even others dealing with the said Bank. And what had been sought from this Court was the protection and defence of the said public property. It was thus not only the right of this Court but in fact its onerous obligation to intervene to defend the said assault on the said fundamental right to life and to property of the said public."

(emphasis supplied)

18. Although learned counsel for the respondent Federation had no cavil with the proposition that the Court can undertake proceedings in the original jurisdiction to check corruption and corrupt practices committed by the holders of public office, he stressed that unlike the cases previously decided by the Court the instant matter pinpoints no specific act of corruption and/or corrupt practice. In fact, the entire controversy raised by the petitioner is conjectural and academic. However, we are not persuaded with this argument of learned counsel because as noted above in paras 7 and 9-10, the 2022 Amendments have limited the NAB's jurisdiction thus excluding hundreds of pending references from trial before any forum and have also made the proof of the offence of corruption and corrupt practices significantly harder for references that satisfy the jurisdictional requirements of Section 4 and Section 5(o) of the NAB Ordinance. We think it would be a legal absurdity to hold that whilst the Court can take cognizance of individual acts of corruption and corrupt practices under Article 184(3) it cannot do so when amendments have been introduced in the accountability law i.e., the NAB Ordinance which exclude the jurisdiction of the NAB to investigate and prosecute holders of public office in two significant respects thereby ex-facie violating Articles 9, 14, 23 and 24 of the Constitution by exonerating the holders of public office from their alleged acts of corruption and corrupt practices by failing to provide a forum for their trial. The 2022 Amendments have therefore rendered the NAB toothless in accomplishing its objective of 'eradicat[ing] corruption and corrupt practices and hold[ing] accountable all those persons accused of such practices' and have left public property belonging to the people of Pakistan vulnerable to waste and malfeasance by the holders of public office. Such interference in the NAB's jurisdiction and powers most certainly affects the Fundamental Rights of the people at large as noted by the Court in Progress Report of NAB in OGRA Case (2015 SCMR 1813):

"3. ...We may emphasize that NAB has been created as a principal watchdog against corruption in Pakistan. Corruption is itself rightly perceived as eating into the very foundation and vitals of society. A corruption watchdog which, therefore, does not function efficiently adversely affects inter alia, the fundamental rights in Articles 14, 18, 19A, 23 and 24 of the Constitution."

(emphasis supplied)

Although the above observation was made by the Court in the context of the NAB's poor handling of the Oil and Gas Regulatory Authority Scam, we see no reason why the same rationale cannot apply to the present

matter where the legislature through the 2022 Amendments has left the NAB ineffective in pursuing cases of corruption and corrupt practices exposing the public property of the people to misappropriation. We accordingly hold that the present Constitution Petition fulfils the requirements of Article 184(3) of the Constitution and so is maintainable.

19. Be that as it may, the learned counsel for the respondent Federation raised other preliminary objections to the petition as well. One of them being that the petitioner does not possess either locus standi or bona fides to challenge the 2022 Amendments because he never questioned the 2022 Amendments in Parliament. However, it is settled law that when the Court exercises jurisdiction under Article 184(3) of the Constitution it is not concerned with the antecedents or standing of the person who has filed the petition because that person is merely acting as an informant. Instead, the Court favours a substantive approach focusing more on the content of the petition and whether the same crosses the threshold set out in Article 184(3). In this respect, we are fortified by the dicta of the Court in Muhammad Yasin v. Federation of Pakistan (PLD 2012 SC 132):

"24. Before concluding our discussion on the issue of maintainability of this petition we need to address the respondent's submission that the petition has been filed mala fide. We have found no lawful basis for this submission... we have already held in the case titled Moulvi Iqbal Haider v. Capital Development Authority and others (PLD 2006 SC 394 at 413) that the contents of a petition under Article 184 (3) ibid will override concerns arising on account of the conduct or antecedents of a petitioner..."

(emphasis supplied)

Likewise, the Court in Muhammad Ashraf Tiwana v. Pakistan (2013 SCMR 1159) observed that:

"16. ...The questions which the contents of this petition have brought to light are, without doubt, matters of public importance and, as discussed above relate directly to the enforcement of fundamental rights. Therefore, concerns about the conduct or antecedents of the petitioner, if any, would stand overridden by the contents of the petition. We may also emphasize that exercise of jurisdiction under Article 184(3) ibid is not dependent on the existence of a petitioner..."

(emphasis supplied)

20. We have already noted above that the instant petition satisfies the conditions of Article 184(3), therefore, any apprehensions about the locus standi and bona fides of the petitioner stand overridden. Insofar as the prior amendments passed during the petitioner's term as Prime Minister are concerned, the same were promulgated through different Ordinances all of which have lapsed and are no longer in the field. On the other hand, the 2022 Amendments have come into being through Acts of Parliament and will remain on the statute book unless these are repealed by Parliament in the future. Further, the amendments brought about in the petitioner's tenure did not contain analogous retrospectivity clauses, as exist in the 2022 Amendments, as a result of which the impact of the Ordinances on pending references and past and closed transactions was limited.

21. The learned counsel for the respondent Federation also submitted that the petitioner could have voiced his grievances against the 2022 Amendments in the National Assembly as a member of the Opposition. Indeed, in the Court's recent judgment reported as Pakistan Peoples Party Parliamentarians v. Federation of Pakistan (PLD 2022 SC 574) the necessity of a robust Opposition for a healthy democracy was emphasised. However, the choice to remain in or walk out of Parliament is a political decision made consciously by parliamentarians and their political parties. The decision being political in nature the Court cannot and does not sit in judgment over such matters. In any event, we have already held above that locus standi is not an impediment when the Court is exercising original jurisdiction. Therefore, to dismiss the instant petition solely on the ground that the petitioner did not object to the 2022 Amendments in the National Assembly would result in the Court deciding the question of maintainability on the basis of an irrelevant consideration. More so when we have already held above that the 2022 Amendments do raise questions of public importance having a bearing on the Fundamental Rights of the people of Pakistan.

22. Learned counsel for the respondent Federation lastly took exception with the Court exercising its original jurisdiction in this matter instead of first letting the High Courts decide the vires of the 2022 Amendments. He relied on Manzoor Elahi v. Federation of Pakistan (PLD 1975 SC 66) and Benazir Bhutto v. Federation of

Pakistan (PLD 1988 SC 416) to reiterate that the Court's original jurisdiction is to be exercised sparingly and in deference to the High Courts jurisdiction under Article 199 of the Constitution. We are of the view that the Court's judgment in Suo Motu No.1 of 2023 dated 01.03.2023 has already dealt with this point. For reference, the relevant passage is produced below:

"45. ...Secondly, it appears that the petition under Article 184(3) [Manzoor Elahi v. Federation of Pakistan] was the first of its kind before the Court under the present Constitution... The jurisprudence as regards Article 184(3) was thus quite literally in its infancy. In the half-century that has since passed, things have of course changed enormously. The jurisprudence has matured, developed and deepened and the Court has developed an altogether more muscular approach in its understanding and application of Article 184(3). There has been a sea change in how the Court views this constitutional power. Thus, e.g., the observation of the learned Chief Justice, that "[t]his is an extraordinary power which should be used with circumspection" (pg. 79) is, with respect, hardly reflective of present times. Time does not stand still and nor does the jurisprudence of the Court. In the common law tradition, the law is connected to the past but not shackled by it."

(emphasis supplied)

We find ourselves in agreement with the dicta cited above and endorse it. Indeed, on an examination of the jurisprudence of the Court that has developed under Article 184(3) of the Constitution it becomes clear that since the decisions in Manzoor Elahi (supra) and Benazir Bhutto (supra) there have been numerous instances where the Court has considered and decided the vires of legislation in its original jurisdiction. Some of these cases are Mehram Ali v. Federation of Pakistan (PLD 1998 SC 1445) which decided the vires of the Anti-Terrorism Act, 1997; Liaquat Hussain v. Federation of Pakistan (PLD 1999 SC 504) which decided the vires of the Pakistan Armed Forces (Acting in Aid of the Civil Power) Ordinance, 1998; Asfandyar Wali (supra) which decided the vires of the NAB Ordinance; Mobashir Hassan v. Federation of Pakistan (PLD 2010 SC 265) which decided the vires of the National Reconciliation Ordinance, 2007; Baz Muhammad Kakar v. Federation of Pakistan (PLD 2012 SC 923) which decided the vires of the Contempt of Court Act, 2012; Zulfiqar Ahmed Bhutta v. Federation of Pakistan (PLD 2018 SC 370) which decided the vires of Sections 203 and 232 of the Elections Act, 2017.

23. In light of the above discussion, we find there to be no merit in the objections raised by the learned counsel for the respondent Federation in respect of the maintainability of the present Constitution Petition. As a result, his objections are rejected and the titled petition is declared to be maintainable under Article 184(3) of the Constitution.

Impugned Provisions of the 2022 Amendments

24. In his Constitution Petition the petitioner has sought the nullification of virtually the entire 2022 Amendments. However, on a careful examination of these we are not convinced that the Fundamental Rights of the people of Pakistan are violated by each and every section of the 2022 Amendments. Our considered view at the outset about the provisions of the 2022 Amendments is that prima facie judicial scrutiny of only Sections 2, 8, 10 and 14 of the First Amendment and Sections 2, 3 and 14 of the Second Amendment is required. These provisions have brought about the following modifications in the NAB Ordinance:

i. Section 3 of the Second Amendment has changed the definition of 'offence' in Section 5(o) of the NAB Ordinance by inserting a minimum pecuniary jurisdiction of Rs. 500 million below which value the NAB cannot take cognizance of the offence of corruption and corrupt practices;

ii. Section 2 of the First Amendment by inserting subsections (a)-(f) into Section 4 of the NAB Ordinance and Section 2 of the Second Amendment by adding subsection (g) in Section 4 of the NAB Ordinance has excluded certain holders of public office from application of the NAB Ordinance and thereby limited its effect;

iii. Section 8 of the First Amendment has inserted new ingredients in the offence under Section 9 (a) (v) of the NAB Ordinance and added explanations thereto. Section 9(a)(v) criminalizes the act of holding assets beyond means;

iv. Section 10 of the First Amendment has deleted Section 14 of the NAB Ordinance which provides evidentiary presumptions that may be drawn against the accused;

v. Section 14 of the First Amendment has deleted Section 21(g) of the NAB Ordinance which permitted foreign evidence to be admissible in legal proceedings under the mutual legal assistance regime; and

vi. Section 14 of the Second Amendment has added a second proviso to Section 25(b) of the NAB Ordinance whereby an accused who enters into a plea bargain duly approved by the Accountability Court under Section 25(b) can renege from the same if he has not paid the full amount of the bargain settlement as approved by the Accountability Court.

The remaining provisions of the 2022 Amendments may be considered later in an appropriate case.

Section 3 of the Second Amendment

25. As already noted above in para 6, Section 3 of the Second Amendment has amended Section 5(o) of the NAB Ordinance to set the minimum pecuniary jurisdiction of the NAB at Rs.500 million for inquiring into and investigating cases involving the commission of the offence of corruption and corrupt practices. As a result, offences that cause loss valued at less than Rs.500 million no longer come within the ambit of the NAB. The apparent rationale for enhancing the pecuniary jurisdiction is noted in the Statement of Objects and Reasons attached to the Second Amendment. It reads:

"...Through the insertion of proposed amendments, the pecuniary jurisdiction of the NAB has been fixed to take only action against mega scandals..."

(emphasis supplied)

The necessity to streamline the jurisdiction of the NAB and focus its efforts on mega scandals i.e., those involving an amount of Rs.500 million or more was explained by learned counsel for the respondent Federation by reference to the jurisprudence of the Superior Courts. Reliance was placed on State v. Hanif Hyder (2016 SCMR 2031) wherein the Court observed:

"2. During the hearing of these proceedings, we have noticed that the NAB in exercise of powers under section 9 of the NAB Ordinance has started taking cognizance of the petty matters and therefore, notice was issued to the D.G. NAB to submit report in regard to the enquiries and or investigations, which the NAB has undertaken in respect of the amounts involv[ing] less than 100 Million and References, if any, filed which involved amount less than 100 million. A list has been provided. It is evident from this list that prima facie the enquiries and investigations undertaken by the NAB are not of mega scandals and apparently petty matters have been enquired into on the complaints. This is not the wisdom behind legislation of NAB Ordinance. The NAB Ordinance was primarily legislated to counter mega scandals and book the persons who are involved in mega scandals of corruption and corrupt practices."

(emphasis supplied)

A decision by the Division Bench of the Sindh High Court reported as Amjad Hussain v. National Accountability Bureau (2017 YLR 1) was also referred:

"11. Learned PGA NAB on instructions from the Chairman NAB made written as well as oral submissions in order to assist the Court. He submitted that NAB was aware of this issue of pecuniary jurisdiction and in this respect had passed an SOP in respect of the monetary value of cases which NAB would pursue which is set out below for ease of reference.

"Priority for Cognizance of Cases:

...

iii. Cases of former/sitting legislators of National Assembly, Senate and Provincial Assemblies (including ministers/advisers etc.) and elected representatives of local bodies, where amount involved is more than Rs. 100 million.

iv. Cases involving interest of members of public at large where the numbers of defrauded person are more than 50 persons and amount involved is not less than Rs. 100 million.

v. Cases against public servants, whether serving or retired, Bankers, Businessmen and Contractors where amount involved is more than Rs. 100 million.

...

40. ...taking into account the above discussion on the pecuniary jurisdiction of NAB including NAB making the best use of its human resources, equipment, office space etc., and budget limitations we hereby endorse by way of judicial order the NAB's SOP for dealing with pecuniary jurisdiction which is set out at para 11 of this order... as we consider the figure of Rs. 100 M to be significantly large to justify the intervention of the NAB being the premier anti corruption body in the Country..."

(emphasis supplied)

The above dictum of the Sindh High Court was endorsed by the Islamabad High Court in Iftikhar Ali Haideri v. National Accountability Bureau (2019 YLR 255).

26. It becomes clear from the pronouncements of the Superior Courts quoted above that the principal focus of the NAB is to mainly prosecute mega scandals. But whilst the judgments of the Superior Courts indicate that the minimum pecuniary threshold of NAB should be Rs. 100 million (except in limited circumstances where offences less than Rs. 100 million cannot be prosecuted by any other accountability agency), Section 3 of the Second Amendment has increased this minimum threshold to Rs.500 million. No cogent argument was put forward by learned counsel for the respondent Federation as to why Parliament has fixed a higher amount of Rs.500 million for the NAB to entertain complaints and file corresponding references in the Accountability Courts when the Superior Courts have termed acts of corruption and corrupt practices causing loss to the tune of Rs. 100 million as mega scandals.

27. It is accepted that Parliament is empowered to legislate freely within its legislative competence laid down by the Constitution. However, it is also a settled principle of our constitutional dispensation that the three organs of the State i.e., the Legislature, the Executive and the Judiciary perform distinct functions and that one organ of the State cannot encroach into the jurisdiction of another organ. Reliance is placed on the case of Mobashir Hassan (supra):

"34. ... It is also to be borne in mind that Constitution envisages the trichotomy of powers amongst three organs of the State, namely the legislature, executive and the judiciary. The legislature is assigned the task of law making, the executive to execute such law and the judiciary to interpret the laws. None of the organs of the State can encroach upon the field of the others..."

(emphasis supplied)

Nonetheless, by enacting Section 3 of the Second Amendment we are afraid that Parliament has in fact assumed the powers of the Judiciary because by excluding from the ambit of the NAB Ordinance the holders of public office who have allegedly committed the offence of corruption and corrupt practices involving an amount of less than Rs.500 million Parliament has effectively absolved them from any liability for their acts. This is a function which under the Constitution only the Judiciary can perform (with the exception of the President who has been conferred the power to grant a pardon under Article 45 of the Constitution). A similar view was also taken by the Court in Mobashir Hassan (supra) when it was examining the vires of Section 7 of the National Reconciliation Ordinance, 2007 under which pending investigations and proceedings initiated by the NAB against holders of public office were withdrawn and terminated with immediate effect:

"119. So far as withdrawal from the cases inside or outside the country, as per Section 33[A] of the NAO, 1999, inserted through Section 7 of the NRO, 2007, is concerned, it would mean that the 'holders of public office' have been absolved from the charge of corruption and corrupt practices, therefore, by adopting such procedure, the legislative authority had transgressed its jurisdiction, because such powers are only available to the judiciary and the Constitution provides guarantee to secure the independence of the judiciary..."

(emphasis supplied)

28. Learned counsel for the respondent Federation attempted to justify this encroachment into the jurisdiction of the Judiciary by submitting that merely because the minimum pecuniary threshold of the NAB has been increased does not mean that holders of public office stand absolved. That other accountability fora exist in the country where the trials of the accused holders of public office who have been removed from the jurisdiction of the NAB can be held. The Court having regard to the fact, as noted above in para 2, that holders of public office under the NAB Ordinance fall into two categories i.e., elected holders of public office and persons in the service of Pakistan, posed the following query to learned counsel for the respondent

Federation 'if the Accountability Court were to send/transfer a Reference against a parliamentarian [elected holders of public office] for lack of its jurisdiction, then which would be the competent transferee court to adjudicate the Reference and under which law?' In his written response, the learned counsel referred to the provisions of Prevention of Corruption Act, 1947 ("1947 Act"); Pakistan Penal Code, 1860 ("P.P.C."); Income Tax Ordinance, 2001; and Anti-Money Laundering Act, 2010. For present purposes the two relevant laws are the 1947 Act and the P.P.C.. However, on a careful examination of these legislations it becomes clear that the two are applicable only to public servants. Public servant is defined in the P.P.C. in Section 21 as follows:

"21. "Public servant".---The words "public servant" denote a person falling under any of the descriptions hereinafter following, namely:-

Second.- Every Commissioned Officer in the Military, Naval or Air Forces of Pakistan while serving under the Federal Government or any Provincial Government;

Third.- Every Judge;

Fourth.- Every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court; and every person specially authorized by a Court of Justice to perform any of such duties;

Fifth.- Every juryman, assessor, or member of a panchayat assisting a Court of Justice or public servant;

Sixth.- Every arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice, or by any other competent public authority;

Seventh.- Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;

Eighth.- Every officer of the Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience;

Ninth.- Every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the Government, or to make any survey, assessment or contract on behalf of the Government, or to execute any revenue-process, or to investigate, or to report, on any matter affecting the pecuniary interests of the Government, or to make, authenticate or keep any document relating to the pecuniary interests of the Government, or to prevent the infraction of any law for the protection of the pecuniary interests of the Government, and every officer in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty;

Tenth.- Every officer whose duty it is, as such officer, to take, receive, keep or expend any property, to make any survey or assessment or to levy any rate or tax for any secular common purpose of any village, town or district, or to make, authenticate or keep any document for the ascertaining of the rights of the people of any village, town or district;

Eleventh.- Every person who holds any office in virtue of which he is empowered to prepare, publish, maintain or revise an electoral roll or to conduct an election or part of an election."

(emphasis supplied)

Section 2 of the 1947 Act also relies on Section 21 of the P.P.C. to define public servant. Therefore, in both laws the term 'public servant' has an identical meaning.

29. One example of public servants is given in Article 260 of the Constitution:

"260. Definitions. (1) In the Constitution, unless the context otherwise requires, the following expressions have the meaning hereby respectively assigned to them, that is to say,-

...

"service of Pakistan" means any service, post or office in connection with the affairs of the Federation or of a Province, and includes an All-Pakistan Service, service in the Armed Forces and any other service declared to be a service of Pakistan by or under Act of [Majlis-e-Shoora (Parliament)] or of a Provincial Assembly, but does not include service as... member of a House or a Provincial Assembly;"

(emphasis supplied)

It may be noticed that under the Constitution persons in the service of Pakistan are those who are holding posts in connection with the affairs of the Federation or Province. As a result, such persons are either dealing with the property of the Federal/ Provincial Government or with the pecuniary interests of the Federal/ Provincial Government. They, therefore, come within the definition of public servant set out in the P.P.C. and adopted by the 1947 Act and so can be prosecuted under these laws for the offence of corruption and corrupt practices. However, elected holders of public office do not qualify as public servants under the guise of being in the service of Pakistan because Article 260 of the Constitution specifically excludes them from such service. Further, although no authoritative pronouncement has been delivered in this respect by the Superior Courts of Pakistan, the Indian Supreme Court in R.S. Nayak v. A.R. Antulay (AIR 1984 SC 684) has categorically held that members of the Legislative Assembly (equivalent to our elected holders of public office) are not public servants within the meaning of Section 21 of the Indian Penal Code, 1860 (which is similar to Section 21 of the P.P.C.).[1] Further the Bangladesh Supreme Court in Zakir Hossain Sarkar v. State [70 DLR (2018) 203] has noted that a Member of Parliament (equivalent to our elected holders of public office) is not a public servant because he is neither appointed by
the Government nor paid by it and he does not discharge his constitutional duties of law-making in accordance with the rules and regulations made by the Executive (para 23 of that judgment). The result is that contrary to what learned counsel for the respondent Federation has submitted elected holders of public office are not triable either under the 1947 Act or the P.P.C. for the offence of corruption and corrupt practices.

30. This legal situation also explains why the Holders of Representative Offices (Prevention of Misconduct) Act, 1976 ("1976 Act") was enacted and Holders of Representative Offices (Punishment for Misconduct) Order, 1977 ("1977 Order") was promulgated. Both these laws applied only to holders of representative office i.e., elected holders of public office and subjected them to prosecution for offences similar to those prescribed in the NAB Ordinance. If the submission of learned counsel for the respondent Federation is correct that elected holders of public office can be tried under the 1947 Act and the P.P.C. then there would have been no need to pass the 1976 Act or the 1977 Order since both the 1947 Act and the P.P.C. precede these laws. Ultimately, the 1976 Act was repealed by the Parliament and Provincial Assemblies (Disqualification for Membership) (Amendment) Ordinance, 1990 whereas the 1977 Order was repealed by the Ehtesab Act, 1997. As noted above in para 2, the Ehtesab Act, 1997 was the predecessor of the NAB Ordinance and the latter repealed the former. This chain of legislative events shows that in 1976 Parliament became aware of the vacuum in the law whereby persons in the service of Pakistan could be held to account for their corruption and corrupt practices but elected holders of public office could not. Therefore, Parliament passed the 1976 Act. The said Act was then succeeded by multiple legislations which had the same object i.e., accountability of elected holders of public office with the NAB Ordinance being the latest and the most comprehensive effort so far to accomplish this objective.

31. By amending Section 5(o) of the NAB Ordinance to raise the minimum pecuniary threshold of the NAB to Rs.500 million, Section 3 of the Second Amendment has undone the legislative efforts beginning in 1976 to bring elected holders of public office within the ambit of accountability laws because by virtue of Section 3 elected holders of public office have been granted both retrospective and prospective exemption from accountability laws. Once excluded from the jurisdiction of the NAB no other accountability fora can take cognizance of their alleged acts of corruption and corrupt practices as noted above. Such blanket immunity offends Articles 9, 14, 23 and 24 of the Constitution because it permits and encourages the squandering of public assets and wealth by elected holders of public office as there is no forum for their accountability. This in turn affects the economic well-being of the State and ultimately the quality and dignity of the peoples lives because as more resources are diverted towards illegal activities less resources remain for the provision of essential services to the people such as health facilities, education institutes and basic infrastructure etc. The immunity also negates Article 62(1)(f) of the Constitution which mandates that only 'sagacious, righteous, non -profligate, honest and ameen' persons enter Parliament. It also offends the equal treatment command of Article 25 of the Constitution as differential treatment is being meted out to persons in the service of Pakistan than to elected holders of public office. This is because persons in the service of Pakistan can still be

prosecuted for the offence of corruption and corrupt practices under the 1947 Act as they fall within the definition of public servants (refer para 29 above). The 1947 Act shares some of the essential features of the NAB Ordinance, namely, it provides for the prosecution of public servants who have accumulated assets beyond means [refer Section 5(1)(e) of the 1947 Act] and it permits the drawing of an evidentiary presumption against public servants who cannot account for their disproportionate pecuniary resources or property [refer Section 5(3) of the 1947 Act]. Consequently, if Section 3 of the Second Amendment is allowed to remain on the statute book there will be an anomalous situation in that elected holders of public office will be exempted from accountability under the amended and much relaxed requirements of the NAB Ordinance even though

they 'while acting as trustees and the chosen representatives of the people, take decisions which are often of grave consequence for the protection of the economic, political and over-all national interests of the people of Pakistan. In other words, theirs is a fiduciary duty of the highest order' [ref: Mehmood Akhtar Naqvi v. Federation of Pakistan (PLD 2012 SC 1089) at para 6 of Justice Jawwad S. Khawaja's concurring note] whilst the persons in the service of Pakistan will

have to undergo the rigours of accountability laws without exception. Such a situation cannot be countenanced by either the Constitution or the law.

32. In this regard, we must also note that the learned counsel for the respondent Federation filed his concise statement on 12.09.2023 wherein he has attached the decision/ guideline of the Chairman NAB dated 08.08.2023 in respect of returned references. The decision/ guideline reads:

"Therefore, a policy/decision has been made by the competent authority that all References which have been returned to NAB shall now be placed before the Accountability Courts by filing an application pleading this amendment as per case law laid down in the judgment Adam Amin Chaudhry v. NAB in W.P. No.3787/2022 and requesting that the Reference be revived and re-examined, the viewpoint of the NAB be solicited and thereafter it be forwarded in terms of section 4(4)(d) of the National Accountability (Amendment) Act, 2023 to the appropriate forum."

(emphasis supplied)

We have already noted above in para 6 that the 2023 Act has provided a mechanism for transferring pending inquiries, investigations and references to the relevant agency, authority, department, court, tribunal or forum if the NAB or Accountability Courts are seized of these matters. But returned references can by no stretch of the imagination be considered as pending before the Accountability Courts. Therefore, the above decision/ guideline issued by Chairman NAB a year after the

First Amendment to seek the revival of the 544 references returned to the NAB that are lying in storage to have them forwarded to the appropriate forum cannot vest jurisdiction in the Accountability Courts to reopen cases of which it is not seized. In any event, the decision/ guideline still does not resolve the pivotal issue i.e., that there is neither an accountability law other than the NAB Ordinance and

an investigating authority other than the NAB nor any accountability forum other than the Accountability Court where the acts of corruption and corrupt practices committed by elected holders of public office can be investigated and prosecuted. The decision/ guideline may therefore prove effective only in cases of corruption and corrupt practices where the accused are persons in the service of Pakistan. Consequently, the decision/ guideline issued by Chairman NAB has no bearing on the vires of Section 3 of the Second Amendment which is unconstitutional on account of absolving persons accused of the offence of corruption and corrupt practices without a judicial verdict which amounts to legislative judgment [refer Province of Punjab v. National Industrial Cooperative Credit Corporation (2000 SCMR 567) at para 8].

Declaration on Section 3 of the Second Amendment

A. Elected Holders of Public Office

i. On account of our analysis noted above in paras 27- 32, Section 3 of the Second Amendment is declared to be ultra vires the Constitution and of no legal effect from the date of commencement of the Second Amendment.

B. Persons in the Service of Pakistan

ii. The cases of persons in the service of Pakistan can be categorised under two headings, namely, offences which are common to both the 1947 Act and the NAB Ordinance and offences which are unique to the NAB Ordinance.

iii. The offences which are common to the 1947 Act and the NAB Ordinance are those listed in Section 9(a)(i)-(v) of the NAB Ordinance whereas the offences in 9 (a) (vi)- (xii) are distinct to the NAB Ordinance.

iv. Since persons in the service of Pakistan can be tried for offences contained in Section 9(a)(i)-(v) of the NAB Ordinance under the 1947 Act the bar of Rs.500 million shall continue for such offences. To this extent Section 3 of the Second Amendment is declared to be intra vires the Constitution.

v. However, on account of the fact that persons in the service of Pakistan cannot be tried for the offences noted in Section 9(a)(vi)-(xii) under the 1947 Act or any other accountability law the bar of Rs.500 million will not apply to them for such offences. Section 3 of the Second Amendment is therefore declared to be void and without legal effect for these offences for discharging the accused without trial which is tantamount to legislative judgment and is held to be so from the date of commencement of the Second Amendment.

Section 2 of the 2022 Amendments

33. Section 2 of the 2022 Amendments has altered Section 4 of the NAB Ordinance. For reference Section 4, as amended by the 2022 Amendments, is produced below:

"4. Application: (1) This Ordinance extends to the whole of Pakistan and shall apply to all persons, including those persons who are or have been in the service of Pakistan, except persons and transactions specified in subsection (2).

(2) The provisions of this Ordinance shall not be applicable to the following persons or transactions, namely:-

(a) all matters pertaining to Federal, Provincial or Local taxation, other levies or imposts, including refunds, or loss of exchequer pertaining to taxation, transactions or amounts duly covered by amnesty schemes of Government of Pakistan;

(b) decisions of Federal or Provincial Cabinet, their Committees or Sub-Committees, Council of Common Interests (CCI), National Economic Council (NEC), National Finance Commission (NFC), Executive Committee of the National Economic Council (ECNEC), Central Development Working Party (CDWP), Provincial Development Working Party (PDWP), Departmental Development Working Party (DDWP), Board of Directors of State Owned Enterprises (SOEs), Board of Trustees/Directors of all Statutory Bodies, the State Bank of Pakistan and such other bodies except where the holder of the public office has received a monetary gain as a result of such decision;

(c) any person or entity who, or transaction in relation thereto, which are not directly or indirectly connected with the holder of a public office except offences falling under clauses (ix), (x) and (xi) of subsection (a) of section 9;

(d) procedural lapses in performance of any public or governmental work or function, project or scheme, unless there is evidence to prove that a holder of public office or any other person acting on his behalf has been conferred or has received any monetary or other material benefit from that particular public or governmental work or function, whether directly or indirectly on account of such procedural lapses, which the said recipient was otherwise not entitled to receive;

(e) a decision taken, an advice, report or opinion rendered or given by a public office holder or any other person in the course of his duty, unless there is sufficient evidence to show that the holder of public office or any other person acting on his behalf received or gained any monetary or other material benefit, from that decision, advice, report or opinion, whether directly or indirectly, which the said recipient was otherwise not entitled to receive;

(f) all matters, which have been decided by, or fall within the jurisdiction of a regulatory body established under a Federal or Provincial law; and

(g) all matters where the funds, property or interest not involving or belonging to the appropriate government, except for the offences under clause (ix), (x) or (xi) of subsection (a) of section 9."

Prior to the 2022 Amendments Section 4 of the NAB Ordinance read:

"4. Application: It extends to the whole of Pakistan and shall apply to all persons in Pakistan, all citizens of Pakistan and persons who are or have been in the service of Pakistan wherever they may be, including areas which are part of Federally and Provincially Administered Tribal Areas."

34. From the comparison of the unamended and amended versions of Section 4 it becomes plain that exceptions have been created for the decisions, advice, reports, opinions of and works, functions, projects, schemes undertaken by holders of public office and public/ governmental bodies unless there is evidence of the holder of public officer or a person acting on his behalf having received monetary or other material benefit. Such exceptions are novel not only to the NAB Ordinance
but also other accountability laws such as the 1947 Act. The rationale behind introducing these exceptions in the NAB Ordinance is explained in the Statement of Objects and Reasons attached to the First Amendment:

"Currently National Accountability Bureau (NAB) is dealing with a large number of inquiries and investigation in addition to handling mega corruption cases. Under the existing regime a number of inquiries have been initiated against the holders of Public Office and government servants on account of procedural lapses where no actual corruption is involved. This has enhanced NAB's burden and had an adverse impact on the workings of the Federal Government. Additionally, NAB has also assumed parallel jurisdiction and is inquiring into matters pertaining to taxation, imposition of levies etc., and therefore interfering in the domain of tax regulatory bodies. As such, a number of amendments have been proposed to redefine the operational domain of NAB."

The Court appreciates the efforts of Parliament to address and rectify what has long been regarded unguided discretion of the NAB authorities. The Court as far back in Asfandyar Wali (supra) observed in relation to the NAB Ordinance that:

"228. ...To protect decision making level officers and the officers conducting inquiry/ investigation from any threats, appropriate measures must be taken to relieve them of the anxiety from the likelihood of harassment for taking honest decisions.

229. Viewed in the above context, although shifting of burden of proof on an accused in terms of Section 9 (a) (vi) (vii) read with Section 14(d) may not be bad in law in its present form, but would certainly be counter productive in relation to the principle of good governance. If decision making level officials responsible for issuing orders, SROs etc. are not protected for performing their official acts in good faith, the public servants and all such officers at the level of decision making would be reluctant to take decisions and/or avoid or prolong the same on one pretext or another which would ultimately lead to paralysis of State-machinery. Such a course cannot be countenanced by this Court."

(emphasis supplied)

35. Clearly then Section 2 of the 2022 Amendments is an attempt by Parliament to rein in the unguided powers of the NAB and to protect the bureaucracy from unnecessary harassment. However, the exceptions granted by Section 2 operate as an en-masse exemption for holders of public office from facing accountability. The freshly inserted condition that the NAB shall provide evidence of monetary or other material benefit received by the holder of public office or a person acting on his behalf to overcome the exceptions listed in Section 2 of the 2022 Amendments cannot be satisfied in the references already pending before the Accountability Courts. Therefore, where such condition will not be met by the NAB the result will be (and in fact has been) that references will be returned. In this regard, our analysis set out above in paras 27-32 being highly relevant is adopted because Section 2 of the 2022 Amendments affects the same Fundamental Rights i.e., Articles 9, 14, 23, 24 and raises the same problems in terms of the accountability of elected holders of public office as Section 3 of the Second Amendment, namely, that whilst persons in the service of Pakistan may still be investigated and prosecuted under the 1947 Act for the offences listed in Section 9(a)(i)-(v) of the NAB Ordinance, elected holders of public office will not be amenable to the jurisdiction of any other accountability fora for the offence of corruption and corrupt practices.

Declaration on Section 2 of the 2022 Amendments

A. Elected Holders of Public Office

i. For suffering from the same defects as noted above in paras 27-32, Section 2 of the 2022 Amendments is also declared to be void from the date of commencement of the 2022 Amendments.

B. Persons in the Service of Pakistan

ii. Section 2 of the 2022 Amendments insofar as these pertain to the offences set out in Section 9(a)(i)-(v) of the NAB Ordinance are declared to be intra vires the Constitution because persons in the service of Pakistan can be prosecuted for these offences under the 1947 Act.

iii. However, Section 2 is ultra vires the Constitution from the date of commencement of the 2022 Amendments for the offences listed in Section 9(a)(vi)-(xii) because persons in the service of Pakistan cannot be tried for such offences under the 1947 Act or any other accountability law.

Sections 8 and 10 of the First Amendment

36. Section 8 of the First Amendment has significantly altered Section 9 of the NAB Ordinance which lays down various categories of the offence of corruption and corrupt practices. For present purposes, the changes brought about in Section 9(a)(v) of the NAB Ordinance are relevant. The Section as it existed prior to and after the First Amendment is produced below:

"Prior to the First Amendment

9. Corruption and Corrupt Practices: (a) A holder of a public office, or any other person, is said to commit or to have committed the offence of corruption and corrupt practices-

...

(v) if he or any of his dependents or benamidars owns, possesses, or has acquired right or title in any assets or holds irrevocable power of attorney in respect of any assets or pecuniary resources disproportionate to his known sources of income, which he cannot reasonably account for or maintains a standard of living beyond that which is commensurate with his sources of income;

After the First Amendment

9. Corruption and Corrupt Practices: (a) A holder of a public office, or any other person, is said to commit or to have committed the offence of corruption and corrupt practices-

...

(v) if he or any of his dependents or other benamidars, through corrupt and dishonest means, owns, possesses or acquires rights or title in assets substantially disproportionate to his known sources of income which he cannot reasonably account for.

Explanation I.--The valuation of immovable property shall be reckoned on the date of purchase either according to the actual price shown in the relevant title documents or the applicable rates prescribed by District Collector or the Federal Board of Revenue whichever is higher. No evidence contrary to the later shall be admissible.

Explanation II.--For the purpose of calculation of movable assets, the sum total of credit entries of bank account shall not be treated as an asset. Bank balance of an account on the date of initiation of inquiry may be treated as a movable asset. A banking transaction shall not be treated as an asset unless there is evidence of creation of corresponding asset through that transaction."

(emphasis supplied)

37. It may be noticed from the above that apart from reducing the circumstances in which the offence of assets beyond means can be made out against the holder of a public office, the First Amendment has made another material change in Section 9(a)(v), namely, the obligation on the NAB to prove that an accused has accumulated substantially disproportionate assets 'through corrupt and dishonest means.' This element was previously not a part of Section 9(a)(v). This is evident from the ingredients of Section 9(a)(v) which were well-established in the jurisprudence of the Court and required that the NAB prove that:

i. The accused is a holder of public office;

ii. The nature and extent of the pecuniary resources of the property found in the accused's possession;

iii. The known sources of income of the accused; and

iv. The resources or property found in the possession of the accused are objectively disproportionate to his known sources of income [ref: Muhammad Hashim Babar v. State (2010 SCMR 1697) at para 4].

Once the NAB had established the above-mentioned four elements the accused was presumed to be guilty of the offence of corruption and corrupt practices unless he could account for the resources or property so recovered from him. The NAB was not required to demonstrate that the accused had obtained the resources or property 'through corrupt and dishonest means' because the mere presence of disproportionate assets led to the presumption that the accused had engaged in corrupt and dishonest conduct. Such a presumption is provided in Section 14(c) of the NAB Ordinance. The fact of the matter is that the proof of acquisition of assets 'through corrupt and dishonest means' itself constitutes a complete offence. Therefore, by changing Section 9(a)(v) the First Amendment has amalgamated two separate offences into one. As a result, the original offence contained in Section 9(a)(v) has now been rendered redundant. To further ensure the futility of the said offence all of the evidentiary presumptions contained in Section 14 of the NAB Ordinance sustaining the erstwhile offence under Section 9(a)(v) and the remaining offences in the NAB Ordinance have been omitted by Section 10 of the First Amendment. The presumption relevant to Section 9(a)(v) of the Ordinance existed in Section 14(c). This latter provision read:

"14. Presumption against accused accepting illegal gratification: ...

c. In any trial, of an offence punishable under clause (v) of sub-section (a) of section 9 of this Ordinance, the fact that the accused person or any other person on his behalf, is in possession, for which the accused person cannot satisfactorily account, of assets or pecuniary resources disproportionate to his known source of income, or that such person has, at or about the time of the commission of the, offence with which he is charged, obtained an accretion to his pecuniary resources or property for which he cannot satisfactorily account, the Court shall presume, unless the contrary is proved, that the accused person is guilty of the offence of corruption and corrupt practices and his conviction therefor shall not be invalid by reason only that it is based solely on such a presumption."

(emphasis supplied)

38. Further, by the insertion of Explanation II to Section 9(a)(v) entries in bank statements have been removed from the scope of assets whereas banking transactions can only be regarded as assets if there is evidence of the creation of a corresponding asset through specific transactions. The source, object and quantum of credits/ receipts in the bank accounts can now no longer be shown for proving the creation of assets. Nor can debit transfers from one account to another be used to show accumulation of money for the creation of an asset. It goes without saying that bank records are usually the most pivotal evidence in financial crimes. However, by virtue of Explanation II limited resort can be made to them. On a first reading, the changes to Section 9(a)(v), the addition of Explanation II and the omission of Section 14(c) might appear innocuous in nature but their effect both individually and collectively has actually rendered the offence of corruption and corrupt practices in the category of assets beyond means pointless. If accused persons cannot be held to account for owning or possessing assets beyond their means, the natural corollary will be that public assets and wealth will become irrecoverable which would encourage further corruption. This will have a direct adverse effect on the peoples' right to life and to public property because the economic well-being of the State will be prejudiced.

39. Additionally, when other accountability laws are examined in this context such as the 1947 Act, it become obvious that no similar or corresponding changes have been made in that Act in relation to the offence of assets beyond means. The relevant provisions from the 1947 Act are produced below for reference:

"5. Criminal Misconduct.-- (1) A public servant is said to commit the offence of criminal misconduct:

...

(e) If he, or any of his dependents, is in possession, for which the public servant cannot reasonably account of pecuniary resources or of property disproportionate to his known sources of income.

...

(3) In any trial of an offence punishable under subsection (2) the fact that the accused person or any other person on his behalf is in possession, for which the accused person cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income may be proved, and on such proof the

Court shall presume unless the contrary is proved, that the accused person is guilty of criminal misconduct and his conviction therefore shall not be invalid by reason only that it is based solely on such presumption."

(emphasis supplied)

We have already held above in paras 29 and 31 that persons who are in the service of Pakistan can still be tried under the 1947 Act for the offence of corruption and corrupt practices even if they stand excluded from the jurisdiction of the NAB pursuant to the amendments made in Section 4 of the NAB Ordinance. However, the same cannot be said of elected holders of public office because they only fall within the purview of the NAB Ordinance. The amended Section 9(a)(v) and the omission of Section 14(c) would treat similarly placed persons differently because while elected holders of public office are relieved from prosecution for the offence under Section 9(a)(v), persons in the service of Pakistan will still have to go through the rigors of trial under the 1947 Act for the same offence. This would offend the equal treatment command of Article 25 of the Constitution. Insofar as the other presumptions contained in Section 14 of the NAB Ordinance for the other categories listed in Section 9(a) ibid are concerned, the same too stand revived as their omission will prevent the recovery of public assets and wealth from the holders of public office thereby defeating the peoples Fundamental Rights of accessing justice and protecting their public property. Moreso, when presumptions comparable to those in Section 14(a) [presumption as to motive] and (d) [presumption as to guilt] for the categories of 'illegal gratification,' 'obtaining a valuable thing without consideration,' 'fraudulent misappropriation,' 'obtaining property/valuable thing/ pecuniary advantage through illegal means' and 'misuse of authority' do not exist in any other accountability law, including the 1947 Act.

Declaration on Sections 8 and 10 of the First Amendment

A. Elected Holders of Public Office

i. For the foregoing reasons the phrase 'through corrupt and dishonest means' used in Section 9(a)(v) along with its Explanation II is struck down from the NAB Ordinance from the date of commencement of the First Amendment for being unworkable. Additionally, Section 14 in its entirety is restored to the NAB Ordinance from the date of commencement of the First Amendment. Sections 8 and 10 of the First Amendment are declared invalid to this extent.

B. Persons in the Service of Pakistan

ii. The amendments made in Section 9 (a) (v) of the NAB Ordinance by Section 8 of the First Amendment are upheld in their entirety as persons in the service of Pakistan can be tried for the same offence under the 1947 Act.

iii. However, Section 10 of the First Amendment is struck down from the date of commencement of the First Amendment and Section 14(a), (b) and (d) stand restored to the NAB Ordinance because such presumptions do not exist in any other accountability law.

Section 14 of the First Amendment

40. Section 14 of the First Amendment has omitted Section 21(g) of the NAB Ordinance. This provision provided that:

"21. International Cooperation Request for mutual legal assistance: The Chairman NAB or any officer authorized by the Federal Government may request a Foreign State to do any or all of the following acts in accordance with the law of such State:--

...

(g) Notwithstanding anything contained in the Qanun-e-Shahadat Order, 1984 (P.O. 10 of 1984) or any other law for the time being in force all evidence, documents or any other material transferred to Pakistan by a Foreign Government shall be receivable as evidence in legal proceedings under this Ordinance;"

The primary objective of Section 21(g) in particular and Section 21 in general was explained by the Court in Mobashir Hassan (supra):

"99. ...A perusal of above Section [21] indicates that on account of international cooperation, request for mutual legal assistance means, the NAB or any officer, authorized by the Federal Government, has been empowered to make a request to a Foreign State to do any or all things mentioned therein... for achieving the

object to save the assets outside the country, allegedly belonging to the nation, a mechanism has been provided on the basis of international cooperation.

...

104. The Government of Pakistan is also signatory to the above UN Convention [against Corruption] as it has been ratified by Pakistan on 31st August, 2007, regarding international cooperation in criminal matters in accordance with Articles 44 to 50 of the above noted UN Convention, according to which, where appropriate and consistent with their domestic legal system, the State Parties shall consider assisting each other in investigation or proceedings in civil and administrative matters, relating to corruption.

...

129. Section 21 of the NAO, 1999 is a comprehensive provision of law, which spells out the nature of the request to a Foreign State for mutual legal assistance... We believe that to curb the culture of corruption and corrupt practices globally it has become necessary to enact such law on the basis of which the objects noted hereinabove could be achieved.

130. ...A perusal of UN Convention Against Corruption indicates that... State parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption; as well as affording to one another the widest measure of mutual legal assistance in investigations, prosecutions, and judicial proceedings in relation to the offences covered by the Convention; prevention and detection of transfers of proceeds of crime. On the other hand, the promulgation of the NRO, 2007, instead of preventing corruption and corrupt practices, has encouraged the same..."

(emphasis supplied)

41. It is a common fact that many accused persons being tried under the NAB Ordinance have stashed their wealth and assets abroad in tax havens under fiduciary instruments. However, after the omission of the said provision the admissibility of foreign public documents shall be governed by Article 89(5) of the Qanun-e-Shahadat Order, 1984 ("1984 Order") which reads:

"89. Proof of other public documents. The following public documents may be proved as follows:

...

(5) Public documents of any other class in a foreign country, by the original, or by a copy certified by the legal keeper thereof with a certificate under the seal of a notary public, or of a Pakistan Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of foreign country."

It may be observed that the process of admitting foreign public documents under the 1984 Order is protracted and cumbersome because it requires either the production of the original document or a copy which is certified not only by the legal keeper of the document but also by the Embassy of Pakistan. Further, the character of the document needs to be established in accordance with the law of the foreign country. Additionally, foreign private documents would need to be established through the procedure set out in Articles 17 and 79 of the 1984 Order which would require that two attesting witnesses from the foreign country enter personal appearance for proving the execution of the foreign private document. Such a process naturally entails time as the foreign evidence needs to pass through red tape. It therefore defeats the purpose for which Section 21(g) was inserted into the NAB Ordinance i.e., that after State cooperation led to the receipt of relevant foreign evidence the same would be directly admissible in legal proceedings initiated under the NAB Ordinance without fulfilling the onerous conditions of Article 89(5) of the 1984 Order. By deleting Section 21(g) from the NAB Ordinance Section 14 of the First Amendment has made it near impossible for relevant and necessary foreign evidence to be used in the trials of accused persons. It therefore offends the Fundamental Rights of the people to access justice and protect public property from waste and malfeasance.

Declaration on Section 14 of the First Amendment

42. Section 21(g) is hereby restored in the NAB Ordinance for both elected holders of public office and persons in the service of Pakistan with effect from the date of commencement of the First Amendment for facilitating peoples right to access justice and for protecting their public property from squander. Accordingly, Section 14 of the First Amendment is struck down for being illegal.

Section 14 of the Second Amendment

43. Section 14 of the Second Amendment has inserted two new provisos to Section 25(b) of the NAB Ordinance. The said provision pertains to plea bargains entered into by accused persons:

"25. Voluntary return and plea bargain: ...

(b) Where at any time after the authorization of investigation, before or after the commencement of the trial or during the pendency of an appeal, the accused offers to return to the NAB the assets or gains acquired or made by him in the course, or as a consequence, of any offence under this Ordinance, the Chairman, NAB, may, in his discretion, after taking into consideration the facts and circumstances of the case, accept the offer on such terms and conditions as he may consider necessary, and if the accused agrees to return to the NAB the amount determined by the Chairman, NAB, the Chairman, NAB, shall refer the case for the approval of the Court, or as the case may be, the Appellate Court and for the release of the accused:

Provided that statement of an accused entering into plea bargain or voluntary return shall not prejudice case of any other accused:

Provided further that in case of failure of accused to make payment in accordance with the plea bargain agreement approved by the Court, the agreement of plea bargain shall become inoperative to the rights of the parties immediately."

(emphasis supplied)

44. For present purposes we are concerned only with the second proviso to Section 25(b) of the NAB Ordinance which renders a plea bargain entered into by an accused person inoperative if the accused fails to make the complete payment as approved by the Accountability Court. Read on its own this proviso appears to protect the interests of the State by ensuring prompt recovery of looted public money and this intention is also reflected in the Statement of Objects and Reasons attached to the Second Amendment:

" ...Section 25 is related to protect the interest of the Government that in case persons entering into plea bargain fail to make payment pursuant to the payment approved by the court, the plea bargain agreement will become infructuous."

45. However, despite the benign purposes behind introducing the second proviso to Section 25(b), the actual effect of it is that it nullifies Section 25(b) itself which was inserted in the NAB Ordinance 'to facilitate early recovery of the ill-gotten wealth through settlement where practicable' [ref: Asfandyar Wali case (supra) at para 267] because it places no restrictions on the accused from revoking the plea bargain entered into by him. It is established law that whilst a proviso can qualify or create an exception to the main section it cannot nullify the same [ref: Muhammad Anwar Kurd v. State (2011 SCMR 1560) at para 22]. Further, the second proviso gives the accused an uninhibited right to withdraw from a plea bargain without obtaining the approval of the Accountability Court which in the first place approved the plea bargain. The Court in the case of Asfandyar Wali (supra) recognised that plea bargain is in the nature of compounding an offence and therefore it should be subject to the sanction of the Accountability Court. We see no reason and none was advanced by learned counsel for the respondent Federation as to why the Accountability Court should be excluded from the revocation of an agreement which compounded the offence committed by the accused. The exclusion of the Accountability Court by the second proviso to Section 25(b) of the NAB Ordinance therefore undermines the independence of the Judiciary and is violative of Article 175(3) of the Constitution.

46. Moreover, it is an admitted fact that under the proviso to Section 15(a) of the NAB Ordinance (disqualification to contest elections or to hold public office) an accused person who enters into a plea bargain suffers the same consequences as an accused person who is convicted of the offence of corruption and corrupt practices under Section 9(a). Such consequences are that the accused person either forthwith ceases to hold public office, if any, held by him or further stands disqualified for a period of ten years for seeking or from being elected, chosen, appointed or nominated as a member or representative of any public body etc. Therefore, allowing an accused person to renege from his plea bargain would be tantamount to conferring an unlawful benefit on him i.e., he would escape the consequences stipulated in Section 15(a) of the NAB Ordinance.

Declaration on Section 14 of the Second Amendment

47. The second proviso to Section 25(b) is struck down from the NAB Ordinance from the date of commencement of the Second Amendment for exceeding its purpose by nullifying Section 25(b), for violating the independence of the Judiciary and for enabling accused persons to avoid the consequences of Section 15(a). As a result, Section 14 of the Second Amendment is declared to be void and of no legal effect to this extent.

Conclusion

48. On the basis of the above discussion the Court holds:

i. The titled Constitution Petition is maintainable on account of violating Articles 9 (security of person), 14 (inviolability of dignity of man), 24 (protection of property rights) and 25 (equality of citizens) of the Constitution and for affecting the public at large because unlawful diversion of State resources from public development projects to private use leads to poverty, declining quality of life and injustice.

ii. Section 3 of the Second Amendment pertaining to Section 5(o) of the NAB Ordinance that sets the minimum pecuniary threshold of the NAB at Rs.500 million and Section 2 of the 2022 Amendments pertaining to Section 4 of the NAB Ordinance which limits the application of the NAB Ordinance by creating exceptions for holders of public office are declared void ab initio insofar as these concern the references filed against elected holders of public office and references filed against persons in the service of Pakistan for the offences noted in Section 9(a)(vi)-(xii) of the NAB Ordinance;

iii. Section 3 of the Second Amendment and Section 2 of the 2022 Amendments pertaining to Sections 5(o) and 4 of the NAB Ordinance are declared to be valid for references filed against persons in the Service of Pakistan for the offences listed in Section 9(a)(i)-(v) of the NAB Ordinance;

iv. The phrase 'through corrupt and dishonest means' inserted in Section 9 (a) (v) of the NAB Ordinance along with its Explanation II is struck down from the date of commencement of the First Amendment for references filed against elected holders of public office. To this extent Section 8 of the First Amendment is declared void;

v. Section 9(a)(v) of the NAB Ordinance, as amended by Section 8 of the First Amendment, shall be retained for references filed against persons in the service of Pakistan;

vi. Section 14 and Section 21(g) of the NAB Ordinance are restored from the date of commencement of the First Amendment. Consequently, Sections 10 and 14 of the First Amendment are declared void; and

vii. The second proviso to Section 25(b) of the NAB Ordinance is declared to be invalid from the date of commencement of the Second Amendment. Therefore, Section 14 of the Second Amendment is void to this extent.

49. On account of our above findings, all orders passed by the NAB and/or the Accountability Courts placing reliance on the above Sections are declared null and void and of no legal effect. Therefore, all inquiries, investigations and references which have been disposed of on the basis of the struck down Sections are restored to their positions prior to the enactment of the 2022 Amendments and shall be deemed to be pending before the relevant fora. The NAB and all Accountability Courts are directed to proceed with the restored proceedings in accordance with law. The NAB and/or all other fora shall forthwith return the record of all such matters to the relevant fora and in any event not later than seven days from today which shall be proceeded with in accordance with law from the same stage these were at when the same were disposed of/closed/returned.

50. The titled Constitution Petition is allowed in these terms.

Sd/-

Umar Ata Bandial, H.C.J.

Sd/-

Ijaz ul Ahsan, J.

Sd/-

**Syed Mansoor Ali Shah, J.**

**I dissent and have attached**

**my separate note.**

**SYED MANSOOR ALI SHAH J*.---**I have read the judgment authored by the Hon'ble Chief Justice of Pakistan to which my learned brother Justice Ijaz ul Ahsan has concurred ("majority judgment") provided to me last night. With great respect, I could not make myself agree to it. Due to the paucity of time, I cannot fully record reasons for my dissent and leave it for my detailed opinion to be recorded later. However, in view of the respect that I have for my learned colleagues and for their opinion, I want to explain, though briefly, why I am unable to agree with them.

2. In my humble opinion, the primary question in this case is not about the alleged lopsided amendments introduced in the NAB law by the Parliament but about the paramountcy of the Parliament, a house of the chosen representatives of about 240 million people of Pakistan. It is about the constitutional importance of parliamentary democracy and separation of powers between three organs of the State. It is about the limits of the jurisdiction of the Court comprising unelected judges, second judging the purpose and policy of an enactment passed by the Parliament, without any clear violation beyond reasonable doubt, of any of the fundamental rights guaranteed under the Constitution or of any other constitutional provision.

3. The majority judgment has fallen short, in my humble opinion, to recognize the constitutional command that 'the State shall exercise its power and authority through the chosen representatives of the people' and to recognize the principle of trichotomy of powers, which is the foundation of parliamentary democracy. The majority has fallen prey to the unconstitutional objective of a parliamentarian, of transferring a political debate on the purpose and policy of an enactment from the Houses of the Parliament to the courthouse of the Supreme Court. Without setting out a clear and objective test for determining how the claimed right to have accountability of the parliamentarians is an integral part of any of the fundamental rights guaranteed under the Constitution, the majority judgment through a long winding conjectural path of far-fetched "in turn" effects has tried hard to "ultimately" reach an apprehended violation of the fundamental rights. The majority judgment has also fallen short to appreciate that what Parliament has done, Parliament can undo; the legislative power of the Parliament is never exhausted. If the Parliament can enact the NAB law, it can also repeal the entire law or amend the same.

4. For these and further reasons to be recorded in my detailed opinion later, with great respect, I disagree with my learned brothers and dismiss this petition.

Sd/-

Judge

Order of the Bench

By majority of 2:1 (Justice Syed Mansoor Ali Shah dissenting) Constitution Petition No.21 of 2022 is allowed.

Sd/-

Umar Ata Bandial, H.C.J.

Sd/-

Ijaz ul Ahsan, J.

Sd/-

Syed Mansoor Ali Shah, J.

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**SYED MANSOOR ALI SHAH, J.---**Benjamin Cardozo said: 'The voice of the majority may be that of force triumphant, content with the plaudits of the hour and recking little of the morrow. The dissenter speaks to the future, and his voice is pitched to a key that will carry through the years ... the [dissenters] do not see the hooting throng. Their eyes are fixed on eternities.'[1] Antonin Scalia was right when he said that '[d]issents augment rather than diminish the prestige of the Court'[2]. Courts must rise above the 'hooting throng' and keep their eyes set on the future of democracy, undeterred by the changing politics of today. Courts unlike political parties don't have to win popular support. Courts are to decide according to the Constitution and the law even if the public sentiment is against them.

Prologue

2. One of the foundations of democracy is a legislature elected freely and periodically by the people. Without a majority rule, as reflected in the power of the legislature, there is no democracy[3]. Justice McLachlin rightly said that in democracies, "the elected legislators, the executive and the courts all have their role to play. Each must play that role in a spirit of profound respect for the other. We are not adversaries. We are all in the justice business, together"[4].

3. Courts must realize that legislation is an elaborate undertaking which is an outcome of debate and deliberations of public, social and economic policy considerations. Role of a judge in a democracy recognizes this central role of the Legislature. The courts can judicially review the acts of the legislators if they offend the Constitution, in particular the fundamental rights guaranteed by the Constitution. While examining this conflict of rights and the legislation, the courts must consider that they are dealing with a legislative document that represents multiple voices, myriad policy issues and reflective of public ethos and interests, voiced through the chosen representatives of the people. And remembering that undermining the legislature undermines democracy. With this background, only if such a legislation is in conflict and in violation of the fundamental rights or the express provisions of the Constitution, can the courts interfere and overturn such a legislation. At the foundation of this approach is the basic view that the Court does not fight for its own power. The efforts of the Court should be directed towards protecting the Constitution and its values[5].

4. The delicate institutional balance between various institutions in the constitutional scheme is largely maintained through mutuality of respect which each institution bestows on the other.[6] In a parliamentary form of government, the executive (Government) is usually constituted from amongst the representatives of the majority party in the legislature (Parliament) and is thus, in a sense, a part of the latter. It is, therefore, very rare that the executive and the legislature come in a head-on collision against each other in the performance of their assigned functions under the Constitution. In this system of government, the judiciary is seen more often than not as an opponent of the executive or the legislature. This impression can only be removed, or at least moderated, by "mutuality of respect"[7] between the judiciary and other organs of the State, particularly between the judiciary and the legislature. The courts have formulated the doctrine of judicial restraint which

'urges Judges considering constitutional questions to give deference to the views of the elected branches and invalidate their actions only when constitutional limits have clearly been violated'[8]. As the legislative acts of a legislature are the manifestation of the will of the people exercised through their chosen representatives, the courts tread carefully to judicially review them and strike them down only when their constitutional invalidity is clearly established beyond any reasonable doubt.[9] A reasonable doubt is resolved in favour of the constitutional validity of the law enacted by a competent legislature by giving a constitution-compliant interpretation to the words that create such doubt.[10]

5. Steven Levitsky and Daniel Ziblatt in their recent book "How Democracies Die" have argued that two norms stand out as fundamental to a functioning democracy: "mutual toleration" and "institutional forbearance." These norms become more nuanced in the present context as we later on discuss the nature of the amendments to our accountability law in the country. "Mutual toleration" refers to the idea that as long as our rivals play by constitutional rules, we accept that they have an equal right to exist, compete for power, and govern. We may disagree with, and even strongly dislike, our rivals, but we nevertheless accept them as legitimate. This means recognizing that our political rivals are decent, patriotic, law-abiding citizens - that they love our country and respect the constitution just as we do. It means that even if we believe our opponents' ideas to be foolish or wrong-headed, we do not view them as an existential threat. Nor do we treat them as treasonous, subversive, or otherwise beyond the pale. We may shed tears on election night when the other side wins, but we do not consider such an event apocalyptic. Put another way, mutual toleration is politicians' collective willingness to agree to disagree.... [Political] parties can be rivals rather than enemies, circulating power rather than destroying each other. This recognition was a critical foundation for American democracy.... when norms of mutual toleration are weak, democracy is hard to sustain."[11]

6. "The second norm critical to democracy's survival is what we call institutional forbearance. Forbearance means patient self-control; restraint and tolerance... Where norms of forbearance are strong, politicians do not use their institutional prerogatives to the hilt, even of it is technically legal to do so, for such action could imperil the existing system.... Think of democracy as a game that we want to keep playing indefinitely. To ensure future rounds of the game, players must refrain from either incapacitating the other team or antagonizing them to such a degree, that they refuse to play again tomorrow. If one's rival quits, there can be no future games .... the opposite of forbearance is to exploit one's institutional prerogatives in an unrestrained way. Legal scholar Mark Tushnet call this "constitutional hardball"; ..it is a form of institutional combat aimed at permanently defeating one's partisan rivals - and not caring whether the democratic game continues."[12] With this understanding of democracy, "mutuality of respect" and "institutional forbearance", we are to deal with the present case.

Summation of the matter

7. In the exercise of its legislative power conferred on it by Article 142(b) of the Constitution of the Islamic Republic of Pakistan ("Constitution") to make laws with respect to criminal law, criminal procedure and evidence, the Parliament comprising the chosen representatives of the people of Pakistan has made certain amendments in the National Accountability Ordinance 1999 ("NAB Ordinance"). The petitioner, a parliamentarian who chose not to participate in the process of enactment of those amendments, either by supporting or opposing them in the Parliament, has instead, challenged those amendments in this Court invoking its original jurisdiction under Article 184(3) of the Constitution. It is the petitioner's assertion that the amendments made in the NAB Ordinance infringe the fundamental rights of the people of Pakistan in general and not of the persons who are to be dealt with in respect of their life, liberty and property under the NAB Ordinance. My learned colleagues, the Hon'ble Chief Justice and Hon'ble Justice Ijaz ul Ahsan ("majority"), have been convinced by the said assertion and have therefore declared most of the challenged amendments ultra vires the Constitution. With great respect, I have not been able to persuade myself to agree with them.

6(sic). The Parliament has, through the challenged amendment, merely changed the forums for investigation and trial of the offences of corruption involving the amount or property less than Rs.500 million. After the amendment, the cases of alleged corruption against the holders of public offices that involve the amount or

property of value less than Rs.500 million are to be investigated by the anti-corruption investigating agencies and tried by the anti-corruption courts of the Federation and Provinces respectively, under the Prevention of Corruption Act 1947 and the Pakistan Criminal Law Amendment Act 1958, instead of the NAB Ordinance. This matter undoubtedly falls within the exclusive policy domain of the legislature, not justiciable by the courts. In my opinion, this and other challenged amendments, which relate to certain procedural matters, in no way take away or abridge any of the fundamental rights guaranteed by the Constitution to the people of Pakistan. Hence, my dissent.

Main premise of the majority judgment

7(sic). The majority has found that the 'elected holders of public office are not triable either under the 1947 Act [Prevention of Corruption Act] or the P.P.C. [Pakistan Penal Code] for the offence of corruption and corrupt practices'[13], and that by 'amending Section 5(o) of the NAB Ordinance to raise the minimum pecuniary threshold of the NAB to Rs.500 million, Section 3 of the Second Amendment has undone the legislative efforts beginning in 1976 to bring elected holders of public office within the ambit of accountability laws ... Once excluded from the jurisdiction of the NAB no other accountability fora can take cognizance of their alleged acts of corruption and corrupt practices'[14]. On these findings, the majority has concluded that such 'blanket immunity offends Articles 9, 14, 23 and 24 of the Constitution because it permits and encourages the squandering of public assets and wealth by elected holders of public office as there is no forum for their accountability. This in turn affects the economic well-being of the State and ultimately the quality and dignity of the people's lives because as more resources are diverted towards illegal activities, less resources remain for the provision of essential services to the people such as health facilities, education institutes and basic infrastructure etc.'[15]

Reasons for dissent

8. With utmost respect, the majority view, in my humble opinion, is not correct as even after the challenged amendments:

(i) the elected holders of public offices (members of Parliament, Provincial Assemblies and Local Government Bodies, etc.) are still triable under the Prevention of Corruption Act 1947 (PCA) and the Pakistan Penal Code 1860 (P.P.C.) for the alleged offences of corruption and corrupt practices and no one goes home scot-free. They are still triable under other laws. This aspect has been, with respect, seriously misunderstood by the majority;

(ii) the challenged amendment of adding the threshold value of Rs.500 million for an offence to be investigated and tried under the NAB Ordinance, simply changes the forums for investigation and trial of the alleged offences of corruption and corrupt practices involving the amount or property less than Rs.500 million. This matter falls within the exclusive policy domain of the legislature (Parliament); and

(iii) the said and other challenged amendments (law made by the Parliament) do not take away or abridge any of the fundamental rights guaranteed under Articles 9, 14, 23, 24 and 25 of the Constitution of the Islamic Republic of Pakistan (Constitution).

I would elucidate the above three statements seriatim.

(i) Elected holders of public offices are triable under P.C.A. and P.P.C.

9. The answer to the question, whether the elected holders of public offices (i.e., members of Parliament and Provincial Assemblies, etc.) are triable for the alleged offences of corruption and corrupt practices under the P.C.A. and the P.P.C., hinges upon the definition of the expression "public servant" provided in the latter part of clause ninth of Section 21 of the P.P.C. The majority has found that the elected holders of public offices do not fall within the definition of "public servant" and are therefore not triable for the alleged offence of corruption and corrupt practices either under the P.C.A. or under the P.P.C. With respect I submit that before arriving at this finding, the majority has failed to fully examine the definition of the expression "public servant" provided in the latter part of clause ninth of Section 21, P.P.C., and have erroneously relied upon the two judgments from the foreign jurisdictions (R. S. Nayak v. A.R. Antulay AIR 1984 SC 684 and Zakir Hossain v. State 70 DLR [2018] 203), without noticing the difference of the provisions of Section 21, P.P.C.,

from the relevant provisions of the penal codes of those countries. The said difference is highlighted in the following comparative table:

| Latter part of clause ninth of Section 21 of the Pakistan Penal Code | Clause twelfth (a) of Section 21 of the Indian Penal Code | Clause twelfth (a) of Section 21 of the Penal Code of Bangladesh |
|---|---|---|
| every officer in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty; | Every person in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty by the Government; | Every person in the service or pay of the Government or remunerated by the Government by fees or commissions for the performance of any public duty; |

A bare reading of the above definitions shows that the notable difference between the definition in the Pakistan Penal Code (P.P.C.) and the definitions in the Indian Penal Code (I.P.C.) as well as in the Bangladesh Penal Code (B.P.C.) is that the word "Government" has been used once in the P.P.C. while in the I.P.C. and the B.P.C., it has been used twice. It is the absence of the word "Government" in the second limb of the definition provided in the P.P.C. that makes the real difference, which I will explain later, in the meaning and scope of these definition clauses of "public servant" in three penal codes. The word "or" used after the word "Government" in the P.P.C. and after the first word "Government" in the I.P.C. and the B.P.C. signifies that there are actually two types of officers (word "officer" used in the P.P.C.) or persons (word "person" used in the I.P.C. and B.P.C.) that fall within the scope of "public servant" as defined therein. When the two limbs of the above three definitions are split, they take the following forms:

| Splitting of second part of clause ninth of Section 21 of Pakistan Penal Code | Splitting of clause twelfth (a) of Section 21 of the Indian Penal Code | Splitting of clause twelfth (a) of Section 21 of the Penal Code of Bangladesh |
|---|---|---|
| i. Every officer in the service or pay of the Government ii. Every officer remunerated by fees or commission for the performance of any public duty | i. Every person in the service or pay of the Government ii. Every person remunerated by fees or commission for the performance of any public duty by the Government | i. Every person in the service or pay of the Government Every person remunerated by the Government by fees or commissions for the performance of any public duty |

Having set out the relevant provisions of the penal codes of the three countries and the difference between them, we can now better appreciate the ratio of the cases relied upon by the majority.

Analysis of Antulay relied upon by the majority

10. Since in Zakir Hossain[16] the High Court Division of the Supreme Court of Bangladesh has mainly relied upon Antulay, it is this latter case decided by the Indian Supreme Court that requires a minute examination. The word "Government" has also been used in the IPC, as aforenoted, in relation to a person 'remunerated by fees or commission for the performance of any public duty'. In Antulay, the Indian Supreme Court therefore observed that a person would be a public servant under Clause (12) (a) of Section 21, IPC, if:

(i) he is in the service of the Government; or

(ii) he is in the pay of the Government; or

(iii) he is remunerated by fees or commission for the performance of any public duty by the Government.[17]

The Indian Supreme Court formulated the question thus:

[W]hether M.L.A. [Member of Legislative Assembly of a State] is in the pay of the Government of a State or is remunerated by fees for the performance of any public duty by the Government of a State?[18]

In the course of its discussion on the question, the Indian Supreme Court observed that '[t]he Legislature lays down the broad policy and has the power of purse. The executive executes the policy and spends from the Consolidated Fund of the State what Legislature has sanctioned. The Legislative Assembly enacted the Act enabling to pay to its members salary and allowances. And the members vote on the grant and pay themselves. Therefore, even though M.L.A. receives pay and allowances, he is not in the pay of the State Government because Legislature of a State cannot be included in the expression "State Government".[19]

10.1. Responding to the contention that an M.L.A. does not perform any public duty, the Indian Supreme Court observed that 'it would be rather difficult to accept an unduly wide submission that M.L.A. is not performing any public duty....He no doubt performs public duties cast on him by the Constitution and his electorate. He thus discharges constitutional functions for which he is remunerated by fees under the Constitution and not by the Executive.'[20]

10.2. After a thorough discussion on the pro and contra arguments, the Indian Supreme Court answered the question in the negative by concluding that '[t]he expression "Government and Legislature",...are distinct and separate entities. ... [T]he expression "Government" in Section 21(12) (a) [of the IPC] clearly denotes the executive and not the Legislature. M.L.A. is certainly not in the pay of the executive. Therefore, the conclusion is inescapable that even though M.L.A. receives pay and allowances, he can not be said to be in the pay of the Government i.e. the executive'[21] nor is he 'remunerated by fees paid by the Government i.e. the executive.'[22] On this conclusion, the Indian Supreme Court held that an M.L.A. 'is thus not a public servant within the meaning of the expression in Clause (12) (a) [of Section 21 of the IPC]'[23].

10.3. The close examination of the Antulay thus reveals that it was decided on the ratio that even though an M.L.A. receives pay and also performs public duties, he does not receive that pay from the Government nor is he remunerated by fees by the Government but rather he is remunerated by fees under the Constitution. Therefore, he does not fall within the definition of "public servant" under clause (12) (a) of Section 21 of the IPC. The deciding factor in that case was the requirement of being in the pay of the Government or being remunerated by fees by the Government. At the cost of repetition but for clarity and emphasis, it is restated that the Indian Supreme Court held:

> [An M.L.A.] no doubt performs public duties cast on him by the Constitution ... for which he is remunerated by fees under the Constitution and not by the Executive [Government].[24]

It is, therefore, the absence of the word "Government" in the second limb of the latter part of clause ninth of Section 21, P.P.C., that makes the real difference in the meaning and scope of the relevant definition clauses of "public servant" in the penal codes of three countries.

11. As per the second limb of the latter part of clause ninth of Section 21, P.P.C., every officer remunerated by fees or commission for the performance of any public duty is a public servant. Thus, to fall within the scope of this definition of "public servant":

(a) a person should be an officer,
(b) he should perform any public duty, and
(c) he should be remunerated by fees or commission for the performance of that public duty.

There is no condition that for the performance of public duty, the fees or commission is to be paid by the Government. Therefore, every officer remunerated by the fees or commission for the performance of any public duty is a public servant under Section 21, P.P.C., irrespective of the fact whether the fee is paid by the Government or by any other public body or by an Act of Parliament under the Constitution.

12. This statutory definition of a "public servant" in the P.P.C. fully corresponds to the common law definition formulated by Chief Justice Best in Henly[25] in the terms that 'every one who is appointed to discharge a public duty and receives a compensation in whatever shape, whether from the crown or otherwise, is constituted a public officer'. In a similar vein, Justice Lawrence held in Whittaker[26] that a 'public officer is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public. If taxes go to supply his payment and the public have an interest in the duties he discharges, he is a public officer'. In these common law definitions articulated by the two

distinguished judges, like the definition provided in Section 21, P.P.C., there is no emphasis on who makes the payment from a public fund for the performance of public duty.

13. What, therefore, needs determination is whether a member of Parliament fulfills all the above three conditions to fall within the scope of the definition of "public servant" provided in the ninth clause of Section 21, P.P.C. Applicability of each of the three conditions to a member of Parliament is examined next.

(a) A member of Parliament is an officer, i.e., a holder of an office

13.1. As for the first condition of being an officer, the word "officer" has not been defined in the P.P.C. While it is obvious that it refers to a person who holds an office, the matter does not end here as then arises a further question, what the word "office" means. Though the word "office" is of indefinite content, it is ordinarily understood to mean a position to which certain duties of a more or less public character are attached,[27] especially a position of trust, authority or service.[28.] It is a subsisting, permanent and substantive position, which has an existence independent of the person who fills it, which goes on and is filled in succession by successive holders.[29] The position is an office whether the incumbent is selected by appointment or by election and whether he is appointed during the pleasure of the appointing authority or is elected for a fixed term.[30] The position of a member of Parliament squarely falls within the scope of this definition of "office"; as it is subsisting, permanent and substantive, which exists independent of the person who for the time being fills it and which goes on and is filled in succession by others after him.[31] A member of Parliament is therefore the "holder of an office" and is thus an "officer" within the meaning and scope of this term used in clause ninth of Section 21, P.P.C. The invaluable observations of Justices Isaacs and Rich made in Boston[32], also support the finding that the position of a member of Parliament is an office and the holder of this position is an officer. They observed:

> A Member of Parliament is, ... in the highest sense, a servant of the State; his duties are those appertaining to the position he fills, a position of no transient or temporary existence, a position forming a recongnized place in the constitutional machinery of government…… Clearly a member of Parliament is a "public officer" in a very real sense, for he has..."duties to perform which would constitute in law an office".

(b) A member of Parliament performs a public duty

13.2. As a duty in the discharge of which the public is interested, is a "public duty", anyone can hardly dispute that a person in his position as a member of Parliament does perform a "public duty". 'He no doubt performs public duties cast on him by the Constitution',[33] which include enacting laws, regulating public funds and sanctioning expenditures therefrom, and overseeing the functioning of the Government (Cabinet of Ministers), etc. These duties are such in which the public has an interest; they are, therefore, public duties.[34]

(c) A member of Parliament is remunerated by fees, i.e., salary and allowances

13.3. So far as the remuneration for the performance of these public duties is concerned, a member of Parliament is remunerated by salary and allowances under an Act of Parliament.[35] In Antulay, such salaries and allowances were treated as "fees" by holding that a member of the Legislative Assembly 'no doubt performs public duties cast on him by the Constitution ... for which he is remunerated by fees under the Constitution'.[36] The words "remuneration" and "fees" are of wide amplitude; they include "compensation in whatever shape". In R v. Postmaster-General,[37] Justice Blackburn observed:

> I think the word 'remuneration' ... means a quid pro quo. If a man gives his services, whatever consideration he gets for giving his services seems to be a remuneration for them.

This definition of the word "remuneration" was adopted by this Court in National Embroidery Mills[38] for holding that 'the word "remuneration" has a wider significance than salary and wages' and that it 'includes payments made, besides the salary and wages.' Justice Blackburn's statement was also relied upon by the Indian Supreme Court in Bakshi[39] in support of the observation that the expression "remuneration", in its ordinary connotation, means reward, recompense, pay, wages or salary for service rendered. A "fee", like remuneration, also means a quid pro quo,[40] and in this regard is synonymous with "remuneration". Article 260 of our Constitution defines the word "remuneration" to include salary. The word "fees" used in the definition of "public servant" under consideration, being synonymous with the word "remuneration", also includes

salary and allowances. A member of Parliament is, therefore, remunerated by fees (salary and allowances) for the performance of public duties.

14. A member of Parliament, thus, fulfills all the three conditions to fall within the scope of the definition of "public servant" provided in the second limb of the latter part of clause ninth of Section 21, P.P.C., and is, therefore, triable as a "public servant" for the alleged commission of an offence of corruption and corrupt practices (criminal misconduct) under the P.P.C. and the P.C.A.

Reference to cases holding members of Parliament and Ministers as public servants

15. In this conclusion, I am fortified by the judgment of the Indian Supreme Court delivered in the case of Narsimha Rao[41]. In that case, while interpreting the provisions of Section 2(c)(viii) of the Indian Prevention of Corruption Act 1988 it was held that a member of Parliament is a public servant within the meaning and scope of those provisions and is therefore triable under the said Act. To see the relevancy of that case to this case, it would be expedient to cite here the provisions of the Indian law on the basis of which the Indian Supreme Court so held. They are as follows:

(viii) any person who holds an office by virtue of which he is authorised or required to perform any public duty;

(Emphasis added)

A bare reading of the above provisions shows that they contain two conditions that are common to the definition of "public servant" considered in this case: (a) a person should hold an office, i.e., he should be an officer, and (b) he should perform any public duty. The only missing condition which is present in the definition considered in this case but is not there in the above provisions is that of being "remunerated by fees". This third condition, the Indian Supreme Court had already held in Antulay, is also fulfilled by a member of Parliament as he receives salary and allowance.

16. It would also be pertinent to mention here that on the basis of the definition of "public servant" provided in the latter part of clause ninth of Section 21, P.P.C., the Dacca High Court, an erstwhile Pakistani High Court, held in the cases of Abul Monsur[42] and Mujibur Rahman[43] that a Minister is a public servant and is triable for the offences under the PCA. These cases referred to and relied upon the cases of Sibnath Banerji[44] and Shiv Bahadur[45] decided by the Privy Council and the Indian Supreme Court respectively, which had also held that a Minister is a public servant. The observations and reasoning of Justice Baquer in Abul Monsur for holding that a Minister is a public servant are quite instructive and worth quoting here:

The last lines "and every officer in the service or pay of the Crown or remunerated by fees or commission for the performance of any public duty" are very comprehensive. The Clause begins with "Every officer" and then again adds "and every officer" before closing. There is no disjunctive 'or'. Under those circumstances the inclusion of Minister in the category does not seem to be hit by the ejusdem generis rule ... The popular notion that a Minister is a public servant of the first order, does not seem to be absolutely erroneous. At any rate no person could be a more public person than a Minister in the sense that his duties are with the public and he is the people's man in the Government of the country ... The language of a statute is not unoften extended to new things which were not known and could not have been contemplated by the Legislature when it was passed. Of course subject to this that the thing coming afterwards is a species of the genus that the Legislature dealt with...It cannot be denied that the Minister is a species of the genus although the Minister may combine in himself other features that do not wholly apply in the case of ordinary officers and public servants ... The categories of public servants are never closed particularly in the background of the total change in the conception of 'public servant' in modern times. In a society imbued with a sense of wider and wider public service and duties, there can be no justification for confining the connotation of public servant literally to the concept of public servants as prevailing in 1850. Nor has it been so confined. The Minister in aiding and advising the Governor represents the public and in doing so, he performs a duty owed to the public in the most literal sense of the term. Criminal misconduct on the part of a Minister is the more reprehensible and there can be no valid reason for keeping his position sacrosanct and above the law on purely technical

grounds. Law being not very far from the ethical sense of the community it is not to be given a meaning that is revolting to society.

Unfortunately, all these cases escaped the notice of the majority. It may also be pertinent to mention that elected officer holders or members of Parliament may commit corruption or corrupt practices, inter alia, through the following means: (i) Bribery: by accepting bribes from individuals or businesses in exchange for political favors, contracts, or regulatory decisions; (ii) Embezzlement: by misappropriating public funds for personal use, often by diverting money meant for public projects or services; (iii) Kickbacks: by receiving a portion of money from contracts or projects awarded to specific companies in return for steering those contracts their way; (iv) Nepotism and cronyism: by appointing family members or close associates to government positions or awarding them contracts without fair competition; (v) Extortion: by forcing individuals or businesses to pay money through threats or coercion; (vi) Money laundering: by concealing the origins of illegally obtained funds by making them appear legitimate through a series of transactions; (vii) Shell companies: by creating fake companies to funnel money illicitly, making it difficult to trace the funds back to the corrupt politician; (viii) Fraudulent land deals: by illegally acquiring public or private land and then selling it for personal gain; (ix) Insider trading: by using non-public information gained through political office to make profitable investments in the stock market; (x) Tax evasion: by underreporting income or using offshore accounts to hide money and avoid paying taxes. All these acts are triable for the offences of corruption and corrupt practices not only under the P.C.A. and the P.P.C. but they are also triable for different offences under the Income Tax Ordinance 2001, the Anti-Money Laundering Act 2010 and the Elections Act 2017, etc.

(ii) Change of forum for investigation and trial of certain offences falls within the policy domain of legislature (Parliament)

17. Since the members of Parliament (elected holders of public office) being "public servants" are triable under the P.P.C. and the P.C.A. for the alleged commission of the offences of corruption and corrupt practice (criminal misconduct), the observation of the majority that once excluded from the jurisdiction of the NAB no other accountability fora can take cognizance of their alleged acts of corruption and corrupt practices, respectfully submitted, does not stand. Similar is the position with the observation of the majority that by excluding from the ambit of the NAB Ordinance the holders of public office who have allegedly committed the offence of corruption and corrupt practices involving an amount of less than Rs.500 million, Parliament has effectively absolved them from any liability for their acts. Reliance on Mobashir Hassan[46] is, therefore, also not well placed.

18. The effect of adding the said threshold of value by the challenged amendments in the NAB Ordinance is simply that the cases of alleged corruption and corrupt practices (criminal misconduct) against the members of Parliament and Provincial Assemblies that involve the amount or property of value less than Rs.500 million shall now be investigated and tried under the PCA by the respective anti-corruption investigating agencies and anti-corruption courts of the Federation and Provinces. The matter of defining a threshold of value for the investigation and trial of offences under the NAB Ordinance is undoubtedly a policy matter that falls within the domain of the legislature, not of the courts. If a legislature has the constitutional authority to pass a law with regard to a particular subject, it is not for the courts to delve into and scrutinize the wisdom and policy which led the legislature to pass that law.

19. The majority has observed that 'No cogent argument was put forward by learned counsel for the respondent Federation as to why Parliament has fixed a higher amount of Rs.500 million for the NAB to entertain complaints and file corresponding references in the Accountability Courts when the Superior Courts have termed acts of corruption and corrupt practices causing loss to the tune of Rs.100 million as mega scandals.'[47] With great respect, it is not the domain of the courts to determine what value of the amount or property involved in an offence of corruption and corrupt practice makes it one of "mega scandals" to be investigated and tried under the NAB Ordinance. Any observation by a court that the NAB should investigate the offences involving "mega scandals", indicating any threshold in this regard can at most be a recommendation to be considered by the legislature, which is not binding on the latter. The legislature may, in

its wisdom, after considering the recommendation either enhance or reduce the proposed threshold or may simply decide not to act upon that. The courts cannot force the legislature to act upon their recommendations nor can they strike down any law competently enacted by the legislature which does not commensurate with their recommendations.

Principle of trichotomy of power

20. Our Constitution is based on the principle of trichotomy of power in which legislature, executive and judiciary have their separately delineated functions. The legislature is assigned the function to legislate laws, the executive to execute laws and the judiciary to interpret laws. None of these three organs are dependent upon the other in the performance of its functions nor can one claim superiority over the others.[48] Each 'enjoys complete independence in their own sphere'[49] and is 'the master in its own assigned field'[50] under the Constitution. Any one of these three organs cannot usurp or interfere in the exercise of each other's functions,[51] nor can one encroach upon the field of the others[52]. This trichotomy of power is so important that it is said to be a 'basic feature of the Constitution',[53] a 'cornerstone of the Constitution,'[54] a 'fundamental principle of the constitutional construct',[55] and 'one of the foundational principles of the Constitution'[56]. In view of this constitutional arrangement of separation of powers between three organs of the State, this Court strongly repelled in Mamukanjan[57] an argument challenging the vires of a law enacted by the legislature on the ground that the law was enacted to undo the effect of a judgment passed by a High Court, thus:

The argument...is without substance and which if accepted would indeed lead to startling results. It would strike at the very root of the power of Legislature, otherwise competent to legislate on a particular subject, to undertake any remedial or curative legislation after discovery of defect in an existing law as a result of the judgment of a superior Court in exercise of its constitutional jurisdiction. The argument overlooks the fact, that the remedial or curative legislation is also "the end product" of constitutional jurisdiction in the cognate field. The argument if accepted, would also seek to throw into serious disarray the pivotal arrangement in the Constitution regarding the division of sovereign power of the State among its principal organs; namely, the executive, the Legislature and the judiciary each being the master in its own assigned field under the Constitution.

(Emphasis added)

With great respect, I would submit that the above observations of the majority, in the words used in Mamukanjan, 'throw into serious disarray the pivotal arrangement in the Constitution regarding the division of sovereign power of the State among its principal organs'.

21. Although after explaining that the main premise of the majority judgment that the elected holders of public offices are not triable either under the P.C.A. or under the P.P.C. for the offence of corruption and corrupt practices is, in my humble opinion, not correct, it is not necessary to discuss the other related NAB amendments that have also been declared ultra vires the Constitution by the majority. Yet, I find it appropriate to briefly discuss such amendments.

(ii)-A No substantial effect of omission of Section 14 of the NAB Ordinance

22. The omission of Section 14 of the NAB Ordinance has made no substantial effect in view of the provisions of Article 122 of the Qanun-e-Shahadat 1984. The omitted Section 14 of the NAB Ordinance provides inter alia that in a trial of an offence punishable under Section 9(a)(v) of the NAB Ordinance, if the fact is proved that the accused is in possession of assets or pecuniary resources disproportionate to his known source of income, the Court shall presume, unless the contrary is proved, that the accused person is guilty of the offence of corruption and corrupt practices. The majority judgment has held that the omission of Section 14(c), along with the change made in Section 9(a)(v), might appear innocuous in nature but their effect both individually and collectively has actually rendered the offence of corruption and corrupt practices pointless in the category of assets beyond means, and if accused persons cannot be held to account for owning or possessing assets beyond their means, the natural corollary will be that public assets and wealth will become irrecoverable which would encourage further corruption.[58] With respect, I would say that no such effect has occurred by the omission of Section 14 from the NAB Ordinance.

23. The different clauses of the omitted Section 14 of the NAB Ordinance are actually the descriptive instances of the applicability of the principle of "evidential burden"[59] enshrined in Article 122 of the Qanun-e-Shahadat 1984 (formerly Section 106 of the Evidence Act 1872), which provides:

When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

The illustrations of Article 122 of the Qanun-e-Shahadat are also quite instructive to understand the scope thereof, which are as follows:

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

Clauses (a), (b) and (d) of the omitted Section 14 of the NAB Ordinance relate to the intention of the accused other than that which the character and circumstances of the act proved against him by the prosecution suggest. These clauses are, therefore, merely descriptive instances of the applicability of Article 122 read with its illustration (a) of the Qanun-e-Shahadat. And clause (c) of the omitted Section 14 of the NAB Ordinance that relates to possessing assets disproportionate to known sources of income is the descriptive instance of the applicability of Article 122 read with its illustration (b) of the Qanun-e-Shahadat. That being the legal position, this Court in Mazharul Haq[60] by referring to Rehmat[61] (wherein the scope of Section 106 of the Evidence Act, now Article 122 of the Qanun-e-Shahadat, had been explained) held:

[T]he ordinary rule that applies to criminal trials, viz., that the onus lies on the prosecution to prove the guilt of the accused, is not in any way modified by the rule of evidence contained in this section [14 of the NAB Ordinance] which cannot be used to make up for the inability of the prosecution to produce evidence of circumstances necessary to prove the guilt of the accused. It is only in cases where the facts proved by the evidence give rise to a reasonable inference of guilt unless the same is rebutted, that such inference can be negative[d] by proof of some fact which, in its nature, can only be within the special knowledge of the accused.

(Emphasis added)

Also in Hashim Babar[62] referred to in the majority judgment, this legal position was reiterated, thus:

It is also settled principle of law that the initial burden of proof [legal burden] is on the prosecution to establish the possession of properties by an accused disproportionate to his known sources of income to prove the charge of corruption and corrupt practices under NAB Ordinance, 1999 and once this burden is satisfactorily discharged, onus [evidential burden] is shifted to the accused to prove the contrary and give satisfactory account of holding the properties...

Therefore, in view of the provisions of Article 122 of the Qanun-e-Shahadat, the omission of Section 14 from the NAB Ordinance by the challenged amendments does not have any substantial effect. Notwithstanding such an innocuous effect, the change in the rules of evidence squarely falls within the scope of the legislative competence of the Parliament under Article 142(b) of the Constitution and unless such change offends any of the fundamental rights, it is not justiciable in courts.

(ii)-B No substantial effect of addition of words "through corrupt and dishonest means" in section 9(a)(v) of the NAB Ordinance

24. Similar is the position with the addition of words "through corrupt and dishonest means" by the challenged amendments in Section 9(a)(v) of the NAB Ordinance: It also has no substantial effect on the mode of proving the offence of unaccounted assets possessed by a holder of public office beyond his known sources of income; as when the prosecution succeeds in proving that the particular assets of the accused are disproportionate to his known sources of income (legal means) and are thus acquired through some corrupt and dishonest means, the burden of proving the "fair and honest means" whereby the accused claims to have acquired the same, being within his knowledge, are to be proved by him as per provisions of Article 122, read with its illustration (b), of the Qanun-e-Shahadat.

(ii)-C Constitutionality of other amendments

25. The majority has declared ultra vires the Constitution the following amendments also: (i) the addition of Explanation II to Section 9(v), which provides that for the purpose of calculation of movable assets, the sum total of credit entries of bank account shall not be treated as an asset but rather the bank balance of an account on the date of initiation of inquiry may be treated as a movable asset and that a banking transaction shall not be treated as an asset unless there is evidence of creation of corresponding asset through that transaction; (ii) the omission of clause (g) of Section 21, which omission has made applicable the provisions of the Qanun-e-Shahadat to documents or any other material transferred to Pakistan by a Foreign Government in legal proceedings under the NAB Ordinance; and (iii) and the addition of second proviso to Section 25(b), which provides that in case of failure of accused to make payment in accordance with the plea bargain agreement approved by the Court, the agreement of plea bargain shall become inoperative to the rights of the parties immediately. With great respect, I would say that in declaring these amendments as ultra vires the Constitution, the majority has not explained how they infringe any of the fundamental rights or any other provision of the Constitution, nor could the learned counsel for the petitioner point out in his arguments any such infringement. These amendments being related to "criminal law, criminal procedure and evidence" fall within the legislative competence of the Parliament as per Article 142(b) of the Constitution and in no way take away or abridge any of the fundamental rights in terms of Article 8(2) of the Constitution.

(iii) Challenged amendments (law made by the Parliament) do not take away or abridge any of the fundamental rights

26. Despite my repeated questions during the prolonged hearings of the present case, the learned counsel for the petitioner could not pinpoint which of the fundamental rights guaranteed by the Constitution has either been "taken away" or "abridged" by the Parliament by making the challenged NAB Amendment Acts. Needless to mention that as per Article 8(2) of the Constitution, the Parliament cannot make any law which "takes away or abridges" the fundamental rights conferred by Chapter 1 of Part II of the Constitution (Articles 9-28) and if it does so a High Court under Article 199 and this Court under Article 184(3) of the Constitution can declare it to have been made without lawful authority (ultra vires) and of no legal effect (void).

27. The learned counsel for the petitioner attempted to establish that the challenged amendments have abridged the fundamental rights of the people of Pakistan to life (Art. 9), dignity (Art. 14), property (Art. 24) and equality (Art. 25). His argument was quite circuitous: that the challenged amendments have deprived the people of Pakistan form holding accountable through criminal prosecution their elected representatives for committing breach of trust with regard to public money and property; that the challenged amendments operate to bring to halt or abort the criminal prosecution of the holders of public offices for offences involving embezzlement of public money and property; that the challenged amendments have excluded certain acts of holders of public offices from the definition of the offences of corruption and corrupt practices and have made the proof of others impossible; that in absence of a strong accountability law, the holders of public offices would continue to indulge in loot and plunder of public money and property which were to be used for the welfare of the people of Pakistan in providing the basic necessities of life, such as, health and education facilities, etc.; that the challenged amendments have thus deprived the people of Pakistan from their fundamental rights to life, dignity, property and equality.

28. This argument of the learned counsel for the petitioner have prevailed with the majority in holding that the blanket immunity granted to the elected holders of public offices offends Articles 9, 14, 23 and 24 of the Constitution because it permits and encourages the squandering of public assets and wealth by elected holders of public office as there is no forum for their accountability. And this in turn, according to the majority, affects the economic well-being of the State and ultimately the quality and dignity of the people's lives because as more resources are diverted towards illegal activities, less resources remain for the provision of essential services to the people such as health facilities, education institutes and basic infrastructure, etc.[63]

29. With respect, I am completely at a loss to understand the correlation of the claimed right to the accountability of the elected representatives through criminal prosecution with fundamental rights to life (Art. 9), dignity (Art. 14), property (Art. 24) and equality (Art. 25). The Constitution by itself provides only one mode to hold the elected representatives accountable, that is, by exercising the right of vote in the election.

The mode of holding the elected representatives accountable for the offences of corruption and corrupt practices through criminal prosecution has not been provided by the Constitution but by the sub-constitutional laws - the P.P.C., the P.C.A. and the NAB Ordinance. If Parliament can enact these laws in the exercise of its ordinary legislative power, it can surely amend them in the exercise of the same legislative power. The argument cannot be acceded to that Parliament after enacting these laws has no power to amend, modify or repeal them.

Doctrines of exhaustion and functus officio, not applicable to legislative powers

30. 'What Parliament has done, Parliament can undo.'[64] The legislative power of Parliament does not exhaust by enactment of any law nor does Parliament become functus officio by making a law, on a particular subject. The doctrines of exhaustion and functus officio are not applicable to legislative powers.[65] A legislature that has made any law is competent, as enunciated in Asfandyar,[66] to change, annul, re-frame or add to that law. Even the legislature of today cannot enact a law, as held in Imran Tiwana,[67] whereby the powers of a future legislature or of its own to amend a law are curtailed. Therefore, if Parliament can enact the NAB Ordinance, it can also repeal the entire law or amend the same.

31. Further, holding a right to be included in or to be an integral part of a fundamental right guaranteed in the Constitution, is a very serious matter that has the effect of curtailing the legislative powers of Parliament in terms of Article 8(2) of the Constitution. This matter, therefore, demands a thorough and in-depth analysis of the relation of the claimed right with the fundamental right guaranteed in the Constitution, on the basis of an objective criterion. With great respect, I would say that the majority has assumed the right to accountability of the elected holders of public offices through criminal prosecution as included in the fundamental rights to life, dignity and property guaranteed by Articles 9, 14 and 24 of the Constitution, without making any discussion for establishing its close relationship of such an extent with those fundamental rights that makes this right to be an integral part of them.

32. No doubt, the fundamental rights guaranteed in the Constitution, an organic instrument, are not capable of precise or permanent definition delineating their meaning and scope for all times to come. With the passage of time, changes occur in the political, social and economic conditions of the society, which requires re-evaluation of their meaning and scope in consonance with the changed conditions. Therefore, keeping in view the prevailing socio-economic and politico-cultural values and ideals of the society, the courts are to construe the fundamental rights guaranteed in the Constitution with a progressive, liberal and dynamic approach.[68] But this does not mean that the judges are at liberty to give any artificial meaning to the words and expressions used in the provisions of the fundamental rights, on the basis of their subjective ideological considerations. The progressive, liberal and dynamic approach in construing fundamental rights guaranteed in the Constitution must be guided by an objective criterion, not by subjective inclination.

Objective criterion for recognizing new rights as fundamental rights

33. In this regard, the objective criterion, as articulated by Justice Bhagwati,[69] is to see whether the claimed right is an integral part of a named fundamental right or partakes of the same basic nature and character as the named fundamental right so that the exercise of such right is in reality and substance nothing but an instance of the exercise of the named fundamental right. A right is an integral part of a named fundamental right which gives, in the words of Justice Douglas,[70] "life and substance" to the named fundamental right. Further, the question whether a State action (legislative or executive) constitutes an infringement of a fundamental right is determined by examining its "direct and inevitable effect" on the fundamental right.[71]

34. The learned counsel for the petitioner could not explain how the right to accountability of the elected holders of public offices through criminal prosecution under the NAB Ordinance is an integral part of the fundamental rights to life, dignity, property and equality or how it partakes of the same basic nature and character as the said fundamental rights so that the exercise of such right is in reality and substance nothing but an instance of the exercise of these fundamental rights. Nor could he establish that the "direct and inevitable effect" of the challenged amendments constitutes an infringement of these fundamental rights. The "effect" of the challenged amendments on these fundamental rights portrayed by him is so "remote and

uncertain" that if such effect is accepted as an infringement of the fundamental rights then there would hardly be left any space and scope for Parliament to make laws on any subject; as all laws enacted by Parliament would "ultimately" reach any of the fundamental rights, particularly rights to life or property, in one way or the other through such a long winding conjectural path of farfetched "in turn" effects. The acceptance of "remote and uncertain effect" on a fundamental right as an infringement of that right, I am afraid, would thus reduce to naught the principle of trichotomy of power which is, as aforesaid, a 'basic feature of the Constitution', a 'cornerstone of the Constitution,' a 'fundamental principle of the constitutional construct', and 'one of the foundational principles of the Constitution'. Reference by the learned counsel for the petitioner and reliance of the majority on the cases of Corruption in Hajj Arrangements[72] and Haris Steel Industries,[73] submitted with respect, is misplaced as the executive actions impugned therein had a "direct and inevitable effect", not "remote and uncertain effect", on the fundamental rights of the people of Pakistan.

Conclusion: Petition is meritless

35. As discussed above, the learned counsel for the petitioner has utterly failed to clearly establish beyond any reasonable doubt that the challenged amendments in the NAB Ordinance are constitutionally invalid on the touchstone of "taking away" or "abridging" any of the fundamental rights, in terms of Article 8(2) of the Constitution. I find the petition meritless and therefore dismiss it.

Locus standi of the petitioner

36. Before parting with this opinion, I want to bring on record my reservations on the locus standi of a parliamentarian to challenge the constitutional validity of an Act of Parliament. Parliament is a constitutional body, but being comprised of the chosen representatives of the people of Pakistan it attains the status of a prime constitutional body. Any action made or decision taken by the majority of a constitutional body is taken to be and treated as an action or decision of that body as a whole comprising of all its members, not only of those who voted for that action or decision, such as a decision made by the majority of a Cabinet of Ministers, the majority of a Bench of this Court or of all Judges in an administrative matter, the majority of the Judicial Commission of Pakistan or the majority of the Supreme Judicial Council, etc. Can any member of these constitutional bodies who was in the minority in making that decision challenge the validity of that decision in court? Not, in my opinion. The principle that decisions taken by a majority of members in a constitutional body (like a parliament or legislature) usually cannot be directly challenged in court by those in the minority is rooted in the doctrine of parliamentary sovereignty and the separation of powers. There is a clear division between the legislative, executive and judiciary branches. This division ensures that each branch can function independently without undue interference from the others. If the judiciary could easily overturn majority decisions within a legislative body based solely on the objections of the minority, it would disrupt this balance and infringe on the independence of the legislative process. The principle of parliamentary sovereignty holds that the decisions of the Parliament, when made according to its rules and procedures, are supreme. This means that courts cannot typically interfere with the internal workings or decisions of the Parliament. Democratic systems are often built on the principle of majority rule. This ensures that decisions reflect the will of the majority while still respecting the rights of the minority. Allowing minority members to easily challenge majority decisions would undermine this fundamental democratic principle.

37. The majority has referred to and relied upon the case of Ashraf Tiwana[74] to repel the objection as to the locus standi of the petitioner, wherein this Court held that the exercise of jurisdiction under Article 184(3) of the Constitution is not dependent on the existence of a petitioner. But in doing so, the majority has missed the point that Ashraf Tiwana was decided before the decision of a five-member Bench of this Court in S.M.C. No.4/2021,[75] holding inter alia that the Chief Justice of Pakistan is the sole authority by and through whom the jurisdiction of this Court under Article 184(3) of the Constitution can be invoked suo motu, i.e., without the "existence of a petitioner". After this decision in S.M.C. No.4/2021, the question of locus standi of a petitioner cannot so easily be brushed aside. However, as I have found this petition even otherwise meritless, I leave these questions for full consideration and authoritative decision in any other appropriate case.

Judges of the constitutional courts and Members of the Armed Forces are accountable under the NAB Ordinance and the PCA

38. This case was heard on over 50 dates of hearing and during these prolonged hearings a question was also raised as to whether the judges of the constitutional court and the members of the Armed Forces enjoy exemption from the NAB Ordinance. I find that the generally professed opinion that members of the Armed Forces and the judges of the constitutional courts are not triable under the anti-corruption criminal laws of the land, requires some clarification. To maintain the said opinion, the reference is usually made to the case of Asfandyar[76]. This Court in Asfandyar observed that the non-applicability of the NAB Ordinance to the members of the Armed Forces and the judges of the Superior Courts is not discriminatory as they are held accountable under the Army Act 1952 and under Article 209 of the Constitution respectively. It appears that to secure the independence of these important national institutions, the Court made this observation in the context that if a member of the Armed Forces or a judge of a Superior Court is alleged to` have committed an offence of corruption and corrupt practices, he is at first to be proceeded against by his departmental authority; once he is found guilty of such offence by his departmental authority and is removed from his official position, only then can he be investigated and tried under the anti-corruption criminal laws of the land, i.e., the NAB Ordinance or the PCA as the case may be. If we do not read and understand the observations made by the Court in Asfandyar in this way, the legal position would be clearly hit by the basic constitutional value and the non-negotiable fundamental right of equality before law. The other holders of public offices, in addition to facing the civil consequences of their corruption and corrupt practices, are to suffer criminal punishment of undergoing the sentence of imprisonment and the forfeiture of the unaccounted-for assets, while the members of the Armed Forces and the judges of the constitutional courts would go scot-free in this regard. After removal from the official position, they would be set free to enjoy the assets accumulated by them through corrupt means. Such reading and understanding of the observation of the Court would allow the members of the Armed Forces and the judges of the constitutional courts to be unjustly enriched and then allowed to retain this unlawful enrichment without any accountability, this would make the members of the Armed forces and the judges of the constitutional courts untouchable and above the law; any such reading would be reprehensible and revolting to the conscience of the people of Pakistan and bring the Court into serious disrepute. We must, therefore, strongly shun the above generally professed opinion and be clear that members of Armed Forces and the judges of the constitutional courts are fully liable under the NAB Ordinance, like any other public servant of Pakistan.

Sd/-

Judge

MWA/I-11/SC Petition allowed.

**P L D 2024 Supreme Court 207**

**Present: Sardar Tariq Masood, A.C.J. Syed Mansoor Ali Shah and Athar Minallah, JJ**

**GUL KHAN and others---Petitioners**

**Versus**

**SAEED UR REHMAN and others---Respondents**

Civil Petition No. 4305 of 2023, decided on 18th December, 2023.

(Against the order of the Balochistan High Court, Quetta, dated 12.12.2023, passed in C.P. No. 2010 of 2023).

**Elections Act (XXXIII of 2017)---**

----Ss. 57(2), 17 & 19---Constitution of Pakistan, Art. 17---General Elections, 2024---Delimitation of constituencies, dispute over---Proportionality, principle of---High Court interfering with the delimitation order of the Election Commission of Pakistan about three days before notification of the Election Programme of the General Elections, 2024---Propriety---Principle of proportionality and the concept of the larger good demand that general elections be given primacy, and issues concerning the delimitation of constituencies, while important, should be addressed subsequent to the elections---Such an approach ensures the continuity of democratic governance and upholds the fundamental rights of the electorate, while still acknowledging the need for eventual and necessary adjustments in constituency boundaries.

In democratic systems general elections are the cornerstone of representative governance, ensuring the people's right to choose their leaders and influence policy decisions. The periodic conduct of these elections is not merely a procedural necessity but a fundamental principle upholding the democratic ethos. On the other hand, the delimitation of a constituency, although significant for ensuring fair and effective representation, does not hold the same immediacy or overriding importance as the conduct of general elections. Delimitation, by its nature, is a detailed and often prolonged exercise, aimed at creating constituencies that reflect current demographic realities. While this is undoubtedly important for the health of a democratic system, it is not so critical that it should impede the timely conduct of general elections. In applying the principle of proportionality, it becomes evident that the larger good - the uninterrupted continuation of democratic processes and the assurance of the people's right to government formation - takes precedence. Postponing general elections to address constituency delimitation could lead to a vacuum in governance and a potential crisis of legitimacy. Such a situation would be antithetical to the principles of democracy and the larger good of the populace. Therefore, the principle of proportionality and the concept of the larger good demand that general elections be given primacy. Issues concerning the delimitation of constituencies, while important, should be addressed subsequent to the elections. This approach ensures the continuity of democratic governance and upholds the fundamental rights of the electorate, while still acknowledging the need for eventual and necessary adjustments in constituency boundaries. Therefore, if the Supreme Court proceeds to adjudicate upon the present issue of delimitation of two constituencies thereby re-examining or altering the notified constituencies by the Election Commission of Pakistan ("ECP") under challenge, the Court will invariably upset the timeline of the Election Programme and derail the electoral process already set afoot by the Election Programme announced on 15 December, 2023.

Supreme Court Bar Association v. Federation of Pakistan PLD 2024 SC 1 ref.

Applying the scale of proportionality, the constitutional importance of holding of General Elections in a constitutional democracy as per the Election Programme far outweighs the need for re-examining the delimitation of a constituency at this critical electoral juncture. Any intervention by the Supreme Court in revisiting the contours of delimitation of a constituency done by the ECP at this stage will open floodgates of similar litigation, resulting in choking the election process. Therefore, proceeding with the present case at this stage when the electoral clock has started ticking, would undermine democracy and adversely affect the fundamental right to vote and form a political government of millions of voters and political workers countrywide. The importance of elections in a democracy and the fulfillment of the larger objective of holding a timely election should be given due consideration to ensure that the Court remains within its democratic remit, which in the present case necessitates organizing and conducting of free, fair and timely elections by the ECP.

In the present case, the holding of timely elections in the two constituencies is more important than insisting upon otherwise proper delimitation thereof. Therefore, it is best that the court lays its hands off this matter for the time being till the General Elections are successfully completed. Supreme Court suspended the operation of the impugned order and granted leave to appeal to consider inter alia the question: whether in the circumstances of the case, the judicial intervention by the High Court with the delimitation order of the ECP, in its discretionary jurisdiction under Article 199 of the Constitution, was justified. Supreme Court directed that the ECP shall organize and conduct the election in the two constituencies as per the final delimitation notified on 30 November 2023 and in accordance with the Election Programme notified on 15 December 2023; that the controversy as to the delimitation of the two constituencies shall be decided after the elections, only for the purpose of future general elections if conducted on the basis of the population census of 2023; and that Office shall fix this case for hearing after the General Elections, 2024 are over.

Afnan Karim Kundi, Advocate Supreme Court, Syed Rifaqat Hussain Shah, Advocate-on-Record and Adeel Aftab, Advocate for Petitioners.

Kamran Murtaza, Sr. Advocate Supreme Court for Respondent No. 1.

Taimoor Aslam Khan, Advocate Supreme Court, Masoom Khan Kakar, Advocate Supreme Court and M. Amir Malik, Advocate-on-Record for Respondent No.3.

Muhammad Arshad, DG (Law), ECP., Khurram Shahzad, ADG (Law), ECP and Falak Sher, Legal Consultant, ECP for Respondents Nos. 5-8.

Date of hearing: 18th December, 2023.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The role of a judge in a constitutional democracy is of a guardian who protects both the Constitution and the democracy. Democracy rests on the sovereignty of the people which is exercised through free and fair elections held on a regular basis. Elections are therefore of central importance without which the government is not democratic. Constitutional democracy is nurtured by free and fair elections, and timely elections are the hallmark of a functioning democracy. Elections are thus essential to maintain the democratic process and public trust in the system. Elections play a crucial role in upholding the principles of democracy; they ensure that the will of the people is respected and that leadership is accountable to the public. When election programme is announced, it is important for any litigation or legal challenges related to elections to be resolved promptly. Delaying elections or prolonging legal disputes can undermine public confidence in the electoral process and the democratic system as a whole. It can also create uncertainty and potentially destabilize the political environment.

2. It is in the background of this significance of the elections in a constitutional democracy that we attend to the question before us: whether we should now proceed with and adjudicate upon the controversy of delimitation of constituencies or be mindful and lay our hands off this matter at present and take it up for adjudication after the general elections so that the electoral process set in motion is successfully completed without any hindrance.

3. Briefly, the facts that have given rise to the said question are that vide short order[1] dated 12.12.2023 the Balochistan High Court allowed the constitution petition of respondents Nos. 1 to 4 and declared the delimitation order dated 26.11.2023 of the Election Commission of Pakistan ("ECP") to be void and of no legal effect. The High Court further directed the ECP to notify the final delimitation (Form-7) for both constituencies, in the following terms:

PB-I (Sherani-cum-Zhob):

District Sherani plus Patwar Circles Babar and Murgha Kibzai of District Zhob

PB-II (Zhob):

District Zhob minus Patwar Circles Babar and Murgha Kibzai.

However, no such notification has yet been issued as per the statement of the counsel for the ECP.

4. Without touching the merits of the case, we note with concern that while the impugned order was passed on 12 December 2023, the ECP has on 15 December 2023 notified the Election Programme of the General Elections-2024, under Section 57(2) of the Elections Act 2017, for the National Assembly and the Provincial Assemblies with the elections to be held on 8 February 2024. As per the said programme, the Returning Officers

of the notified constituencies are to give public notice tomorrow, i.e., on 19 December 2023, of the dates specified by the ECP for different actions required to be done for holding the elections. In the Election Programme, the dates fixed for filing the nomination papers with the Returning Officers by the candidates are 20 December to 22 December 2023. Earlier on 3 November 2023, this Court in the case of Supreme Court Bar Association v. Federation of Pakistan[2] held:

18. The President of Pakistan and the ECP have announced the date for holding of general election to the National Assembly and to the provincial assemblies. The Federal Government, the Provincial Governments and the Islamabad Capital Territory have concurred. The matter of the holding of general election on 8 February 2024 stands resolved. No one should now put forward any pretext to derail democracy.

21 ... Pakistan was established democratically, is a democracy and must remain one. When general elections are due they have to be held. ...

5. It is well-established in democratic systems that general elections are the cornerstone of representative governance, ensuring the people's right to choose their leaders and influence policy decisions. The periodic conduct of these elections is not merely a procedural necessity but a fundamental principle upholding the democratic ethos. On the other hand, the delimitation of a constituency, although significant for ensuring fair and effective representation, does not hold the same immediacy or overriding importance as the conduct of general elections. Delimitation, by its nature, is a detailed and often prolonged exercise, aimed at creating constituencies that reflect current demographic realities. While this is undoubtedly important for the health of a democratic system, it is not so critical that it should impede the timely conduct of general elections. In applying the principle of proportionality, it becomes evident that the larger good - the uninterrupted continuation of democratic processes and the assurance of the people's right to government formation - takes precedence. Postponing general elections to address constituency delimitation could lead to a vacuum in governance and a potential crisis of legitimacy. Such a situation would be antithetical to the principles of democracy and the larger good of the populace. Therefore, the principle of proportionality and the concept of the larger good demand that general elections be given primacy. Issues concerning the delimitation of constituencies, while important, should be addressed subsequent to the elections. This approach ensures the continuity of democratic governance and upholds the fundamental rights of the electorate, while still acknowledging the need for eventual and necessary adjustments in constituency boundaries. Therefore, if we proceed to adjudicate upon the issue of delimitation of the constitutuencies before us thereby re-examining or altering the notified constituencies by the ECP under challenge, we will invariably upset the timeline of the Election Programme and derail the electrol process already set afoot by the Election Programme announced on 15 December, 2023.

6. Applying the scale of proportionality, to us the constitutional importance of holding of General Elections in a constitutional democracy as per the Election Programme far outweighs the need for re-examining the delimitation of a constituency at this critical electoral juncture. Any intervention by us in revisiting the contours of delimitation of a constituency done by the ECP at this stage will open floodgates of similar litigation, resulting in choking the election process. Therefore, proceeding with this case at this stage when the electoral clock has started ticking, would undermine democracy and adversely affect the fundamental right to vote and form a political government of millions of voters and political workers countrywide. The importance of elections in a democracy and the fulfillment of the larger objective of holding a timely election should be given due consideration to ensure that the Court remains within its democratic remit, which in the present case necessitates organizing and conducting of free, fair and timely elections by the ECP.

7. In the present case, because of the crucial stage of the election process, we are of the considered view that holding of general elections is far more imperative and should be prioritized over the delimitation of constituencies. The holding of timely elections in the two constituencies is more important than insisting upon otherwise proper delimitation thereof. Therefore, it is best that the court lays its hands off this matter for the time being till the General Elections are successfully completed. We, therefore, suspend the operation of the impugned order and grant leave to appeal to consider inter alia the question: whether in the circumstances of the case, the judicial intervention by the High Court with the delimitation order of the ECP, in its discretionary jurisdiction under Article 199 of the Constitution, was justified. The ECP shall organize and conduct the election

in the two constituencies as per the final delimitation notified on 30 November 2023 and in accordance with the Election Programme notified on 15 December 2023. The controversy as to the delimitation of the two constituencies shall be decided after the elections, only for the purpose of future general elections if conducted on the basis of the population census of 2023. Office shall fix this case for hearing after the General Elections, 2024 are over.

MWA/G-16/SC Order accordingly.

**PLD 2024 Supreme Court 230**

**Present: Syed Mansoor Ali Shah, Jamal Khan Mandokhail and Ayesha A. Malik, JJ**

**Messrs FUN INFOTAINMENT (PVT.) LIMITED/ NEO T.V., LAHORE ---Petitioner**

**Versus**

**PAKISTAN ELECTRONIC MEDIA REGULATORY AUTHORITY through its Chairman, Islamabad and others---Respondents**

Civil Petition No.5438 of 2021, decided on 15th June, 2023.

(Against judgment dated 30.06.2021 passed by the Lahore High Court, Lahore in FAO No.32274 of 2021).

**Pakistan Electronic Media Regulatory Authority Ordinance (XIII of 2002)---**

----Ss. 13, 26 & 29(6)---Delegation of powers of Pakistan Electronic Media Regulatory Authority (PEMRA) to Chairman PEMRA---Scope and principles---Council of Complaints ("COC")---Whether the Chairman PEMRA had the authority to approve the recommendations of the COC---Held, that as the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 ('the Ordinance') gives discretion to PEMRA to delegate its powers, responsibilities or functions subject to conditions imposed by rules and the power to make rules is conferred on PEMRA, the validity of the exercise of discretion will be judged by the same principles as the exercise of any other administrative discretion---Any rules delegating PEMRA's powers, responsibilities or functions must meet the test of reasonableness and non-arbitrariness -- Act of delegation must align with the statutory purpose---PEMRA while delegating a power, responsibility or function shall not exercise the discretion of delegation in a manner that distorts the purpose of the statutory scheme---Conditions accompanying such delegation should possess rationality---Furthermore, the determination of the suitable recipient for delegation primarily rests within the purview of PEMRA---Nevertheless, it is imperative that the selection be not characterized by irrationality, as any instance of improper delegation shall be a matter for the courts to decide---Power to impose fine, which was the recommended action in the present case, resides in Section 29(6) of the Ordinance and belongs to PEMRA---It follows that the COC is to place its recommendation before PEMRA and the power to impose fine vests in PEMRA---In the instant case, PEMRA has placed reliance on a decision taken in a meeting held on 31.07.2007 wherein the powers to approve the minutes of meeting of the COC in terms of Section 26 of the Ordinance was delegated to the Chairman PEMRA [Notification No. PEMRA-1(2)/Secy.2007-44 dated 01.09.2007]---Delegation could only be in terms of, and subject to, legally relevant and sustainable conditions imposed by rules---No rules have been framed whereby the authority to approve the recommendation of the COC has been delegated to the Chairman PEMRA---What PEMRA has done in its meeting dated 31.07.2007 has been to delegate the power in the very terms in which it was given to PEMRA to the Chairman PEMRA specifying no standards and leaving everything in the Chairman PEMRA's discretion---Public bodies in whom discretion is vested are under an obligation to confine and structure it by the promulgation of decisional criteria so as to strike the best balance in the context between rules and discretion---In the present case the Chairman PEMRA did not have any validly delegated authority to approve the recommendation of the COC---Petition for leave to appeal was converted into appeal and allowed.

PEMRA v. Pakistan Broadcasters Association 2023 SCMR 1043; Harry Woolf and others (eds), De Smith's Judicial Review (8th Edn., Sweet and Maxwell 2018) 331; Fazal Karim, Judicial Review of Public Actions (2nd edn, Pakistan Law House 2018) Vol 3, 1824 and Harry Woolf and others (eds), De Smith's Judicial Review (8th Edn., Sweet and Maxwell 2018) 335 ref.

Barrister Afzal Hussain, Advocate Supreme Court and Muhammad Talha, Advocate High Court for Petitioner(s).

Barrister Haris Azmat, Advocate Supreme Court, Barrister Syed Ali Asghar, Law Officer, Mohsin Hameed Dogar, Director Regulations and Tahir Farooq Tarrar, Head Legal for Respondent(s).

Hassan Riaz, Research Officer, SCRC, Research Assistance.

Date of hearing: 15th June, 2023.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**The matter originated with a complaint filed before the Council of Complaints ("COC") of the Pakistan Electronic Media Regulatory Authority ("PEMRA") alleging that the

petitioner violated the Electronic Media (Programmes and Advertisements) Code of Conduct 2015 ("Code of Conduct") in a programme aired on its channel on 08.03.2021. After considering the reply of the petitioner, the COC in its meeting on 01.04.2021 found the contents of the programme to be violative of the Code of Conduct and recommended that a fine of Rs. 5,00,000/- be imposed on the petitioner. The said recommendation was approved by the Chairman PEMRA on 29.04.2021. The High Court dismissed the appeal filed against the order of the Chairman PEMRA. The petitioner now seeks leave of this Court to appeal against the order of the High Court.

2. We have heard the learned counsel for the parties and perused the record. The question posed before us is whether the Chairman PEMRA had the authority to approve the recommendations of the COC.

3. PEMRA is envisaged, in the Pakistan Electronic Media Regulatory Authority Ordinance 2002 ("Ordinance"), as an independent statutory body consisting of the Chairman and twelve members that would regulate electronic media in Pakistan.[1] The Ordinance hands out a distinct legal personality and operational autonomy to PEMRA. One of the objects identified in the preamble is to "improve the standards of information, education and entertainment". Thus, the Ordinance also establishes COCs under Section 26 with an adjudicatory-cum-recommen-datory role to address public complaints against any aspects of programmes broadcast or distributed by electronic media. The COC has powers to summon a licensee against whom a complaint has been made and call for explanation regarding any matter relating to their operation. The COC is supposed to render opinions on such complaints. Finally, in case of violation of the codes of programme content and advertisements, the COC may recommend appropriate action of censure or fine to PEMRA. However, the power to impose fine, which was the recommended action in this case, resides in Section 29(6) of the Ordinance and belongs to PEMRA. It follows that the COC is to place its recommendation before PEMRA and the power to impose fine vests in PEMRA.

4. The Ordinance expressly vests PEMRA with the power of delegation: Section 13 authorizes PEMRA to delegate, by general or special order, any of its powers, responsibilities or functions other than the power to grant, revoke or cancel a broadcast media or distribution service licence except Cable TV to the Chairman or a member or any member of its staff, or an expert, consultant, adviser, or other officer or employee of PEMRA subject to such conditions as it may by rules prescribe. It thus appears that there is an express authority to delegate, however, the power has to be duly delegated.

5. In the instant case, PEMRA has placed reliance on a decision taken in a meeting held on 31.07.2007 wherein the powers to approve the minutes of meeting of the COC in terms of Section 26 of the Ordinance was delegated to the Chairman PEMRA.[2] However, we note that this Court in PEMRA v. Pakistan Broadcasters Association[3] has already held that "the delegation could only be in terms of, and subject to, legally relevant and sustainable conditions imposed by rules." We are told that no rules have been framed whereby the authority to approve the recommendation of the COC has been delegated to the Chairman PEMRA. The word "delegate" must take its meaning from the context in which it appears and, when found in a statute, it ordinarily connotes a degree of formality especially when the provision requires that the delegation shall be in a particular form. A look at Section 26 of the Ordinance suggests that PEMRA has been given the power to delegate any of its powers, responsibilities or functions to the Chairman or a member or any member of its staff, or an expert, consultant, adviser, or other officer or employee of PEMRA, and in order to control the delegate in the exercise of delegated powers, responsibilities or functions the delegation has been subjected to such conditions as may be prescribed by the rules. The legislature has intended that the exercise of delegation envisaged under Section 13 of the Ordinance shall be structured with conditions prescribed under the rules framed with the approval of the Federal Government.

6. It is not for this Court to decide whether PEMRA should have exercised its power of delegation though it is certainly a question for this Court to decide if PEMRA has exercised it within permissible limits. What PEMRA has done in its meeting dated 31.07.2007 has been to delegate the power in the very terms in which it was given to PEMRA to the Chairman PEMRA specifying no standards and leaving everything in the Chairman PEMRA's discretion. Public bodies in whom discretion is vested are under an obligation to confine and structure it by the promulgation of decisional criteria so as to strike the best balance in the context between rules and

discretion.[4] This is the reason that the legislature aimed to limit the delegation to the conditions prescribed by the rules.

7. The power to make rules is conferred to carry the enabling statute into effect, and that is an executive function. It is a function to administer the statute, which gives the power to make subordinate legislation. Thus, as the Ordinance gives discretion to PEMRA to delegate its powers, responsibilities or functions subject to conditions imposed by rules and the power to make rules is conferred on PEMRA, the validity of the exercise of discretion will be judged by the same principles as the exercise of any other administrative discretion.[5] Any rules delegating PEMRA's powers, responsibilities or functions must meet the test of reasonableness and non-arbitrariness. The act of delegation must align with the statutory purpose. PEMRA while delegating a power, responsibility or function shall not exercise the discretion of delegation in a manner that distorts the purpose of the statutory scheme. Furthermore, the conditions accompanying such delegation should possess rationality. As already held in Pakistan Broadcasters Association[6], the more important the power, responsibility or function being considered for delegation, the higher must be the "threshold" for PEMRA in deciding not to impose any conditions. Such threshold is to be gauged according to the importance of the power, responsibility or function that is being delegated, and as and when PEMRA decides to delegate more important powers, responsibilities or functions, the threshold, and in effect, the discretion to not impose conditions starts to dissipate. Furthermore, the determination of the suitable recipient for delegation primarily rests within the purview of PEMRA. Nevertheless, it is imperative that the selection be not characterized by irrationality, as any instance of improper delegation shall be a matter for the courts to decide.[7]

8. In view of the above, we come to the conclusion that the Chairman PEMRA did not have any validly delegated authority to approve the recommendation of the COC. Therefore, we convert this petition into appeal and allow the same.

MWA/F-20/SC Appeal allowed.

**P L D 2024 Supreme Court 288**

**Present: Sardar Tariq Masood, HACJ, Syed Mansoor Ali Shah and Athar Minallah, JJ**

**GOHAR ALI KHAN---Petitioner**

**Versus**

**FEDERATION OF PAKISTAN and others---Respondents**

Constitutional Petition No.47 of 2023, decided on 22nd December, 2023.

**Constitution of Pakistan---**

----Art. 218(3)---Election Commission of Pakistan ('ECP'), duties of---Level playing field for all political parties, importance of---ECP plays a crucial role in the democratic process, especially in conducting elections----Under Article 218(3) of the Constitution, ECP enjoys the constitutional responsibility to conduct elections honestly, justly, fairly and in accordance with law and to guard against corrupt practices---While under Article 220 of the Constitution all the executive authorities in the country shall assist the ECP in the discharge of its functions----ECP is to ensure that elections are conducted in accordance with the democratic principles and that elections are free from undue influence, coercion, and corruption---ECP is also to ensure that all political parties and candidates have an equal opportunity to participate in the election process---Importance of free and fair elections, and maintaining a level playing field during elections, cannot be overstated---Free and fair elections provide legitimacy to the elected government and maintain the trust of the public in the democratic process---Level playing field is essential for the healthy competition, ensuring that elections are a true reflection of the people's choice, rather than the result of manipulation or coercion---Organizing free and fair elections is more important than the results itself.

M. Shoaib Shaheen, Advocate Supreme Court, Niaz Ullah Khan Niazi, Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Petitioner.

Mansoor Usman Awan, Attorney General, Zafar Iqbal Hussain, Spl. Secy. ECP/D.R., M. Arshad, D.G. (Law) ECP and Falak Sher, Legal Consultant, ECP on Court's call.

Date of hearing: 22nd December, 2023.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**Through this petition under Article 184 (3) of the Constitution of the Islamic Republic of Pakistan, Gohar Ali Khan, the Chairman of Pakistan Tehreek-e-Insaaf ("PTI"), has approached this Court praying that the Election Commission of Pakistan ("ECP") has to ensure free and fair elections in the country by providing a level playing field for the leaders and workers of the PTI. It is alleged that members of PTI, upon filing their nomination papers under the announced Election Programme, are being arrested, harassed and their nomination papers are being snatched from them which is blatant abuse of a fair and free electoral process. Learned counsel for the petitioner submits that in this regard they have approached the Election Commission of Pakistan under the Elections Act, 2017 ("Act") by filing complaints, however, there has been no response on behalf of the ECP.

2. On Court's call, the learned Attorney General for Pakistan and the Representatives of ECP are present before the Court. The said Representatives at the very outset submit that certain complaints have been received by the ECP this morning, which will be immediately attended to. Both the Attorney General for Pakistan and the Representative of the ECP have assured the Court that elections will be held freely and fairly as mandated under the Constitution. They further assured the Court that the grievance of the members of the PTI or any other political party received by the ECP will be decided and resolved on urgent basis and in accordance with law and where any action is required to be taken such an action will be taken so that every political party in the country enjoys a level playing field and that the elections are conducted freely and fairly.

3. The ECP plays a crucial role in the democratic process, especially in conducting elections. Under Article 218(3) of the Constitution, ECP enjoys the constitutional responsibility to conduct elections honestly, justly, fairly and in accordance with law and to guard against corrupt practices. While under Article 220 of the Constitution all the executive authorities in the country shall assist the ECP in the discharge of its functions. ECP is to ensure that elections are conducted in accordance with the democratic principles and that elections are free from undue influence, coercion, and corruption. ECP is also to ensure that all political parties and

candidates have an equal opportunity to participate in the election process. The importance of free and fair elections, and maintaining a level playing field during elections, cannot be overstated. Free and fair elections provide legitimacy to the elected government and maintain the trust of the public in the democratic process. A level playing field is essential for the healthy competition, ensuring that elections are a true reflection of the people's choice, rather than the result of manipulation or coercion. It is important to remember that "organizing free and fair elections is more important than the results itself"[1].

4. The petitioner or for that matter any person representing any other political party in the electoral process may approach the ECP today at 03:00 p.m. for the redressal for their grievance relating to the elections. ECP shall attended to these grievances on urgent basis and resolve them expeditiously in order to ensure that the electoral process remains smooth, open, transparent, free and fair. Let this exercise be completed by ECP promptly without disturbing the timelines given in the Election Programme because voters must have faith in the electoral process for our democracy to succeed.

5. This petition is disposed of in the above terms.

MWA/G-1/SC Order accordingly.

**P L D 2024 Supreme Court 492**

**Present: Syed Mansoor Ali Shah, Jamal Khan Mandokhail and Athar Minallah, JJ**

**ROHAN AHMAD---Petitioner**

**Versus**

**The STATE and others---Respondents**

Crl. P. No. 894-L of 2023, decided on 15th January, 2024.

(Against the order of Lahore High Court, Lahore dated 22.08.2023, passed in Crl. Misc.No.12650-B of 2023).

**(a) Criminal Procedure Code (V of 1898)---**

----S. 497(1), third proviso---Constitution of Pakistan, Arts. 4, 9, 10A & 185(3)---Bail---Delay in conclusion of trial---Grant of statutory bail where the delay in the conclusion of the trial is due to the act of the Court---Principles stated.

According to the third proviso to Section 497(1), Cr.P.C. a court shall release the accused on bail in an offence punishable with death if he has been detained for a continuous period exceeding two years, unless the delay in the trial has been occasioned by an act or omission of the accused or any other person on his behalf or the conditions mentioned in the fourth proviso are attracted. The statutory right to be released on bail under the third proviso to Section 497, Cr.P.C. is not merely a statutory right but also stands firmly on constitutional guarantees under Articles 4, 9 and 10A of the Constitution. Under the said Articles the accused, like any other citizen enjoys the protection of law and to be treated in accordance with law; the accused cannot be deprived of liberty, except in accordance with law; and in determination of any criminal charge against him the accused shall be entitled to a fair trial and due process. These basket of rights are available to an accused who enjoys a presumption of innocence in his favour and understandably cannot be subjected to an indefinite pre-trial detention and therefore cannot be denied bail under the third proviso to section 497(1), Cr.P.C unless there is convincing material that the delay has been occasioned by the act or omission of the accused himself or if his case falls under any of the exceptions under the fourth proviso to section 497, Cr.P.C.

For an accused to be denied statutory bail, it must be demonstrated that his act or omission, was intentionally aimed at prolonging the trial. It must show a deliberate pattern of seeking adjournments without valid reasons during key hearings such as the examination or cross-examination of prosecution witnesses. Mere counting the number of adjournment requests alone is not enough to justify withholding bail. The application of the third proviso to Section 497(1) of the Cr.P.C when interpreted in the light of Articles 9 and 10A of the Constitution, broadens and enhances the rights of an accused who is presumed innocent during trial. The prosecution must present clear evidence that the accused or his counsel was actively trying to delay the trial through unnecessary adjournments or irrelevant applications, in order to justify denying bail. The act or omission on the part of the accused to delay of the timely conclusion of the trial must be an outcome of a concerted and consistent effort of the accused orchestrated to delay the trial.

Shakeel Shah v. The State 2022 SCMR 1 and Nadeem Samson v. State PLD 2022 SC 112 ref.

In the present case the record showed that the delay has been due to the act of the court. The trial has been suspended by the High Court on the filing of the Criminal Revision by the petitioner and during the continuum of the said suspension, the statutory period of delay i.e., continuous period exceeding two years under clause (b) of the third proviso to Section 497(1), Cr.P.C. has lapsed. The Criminal Revision is still pending before the High Court and it has been over three years since the petitioner (accused) was arrested. The Criminal Revision has not progressed for no fault of the petitioner, there is nothing on the record that the delay has been occasioned by the act or omission of the petitioner. The delay has been mainly due to the act of the High Court as the case was repeatedly relisted and not taken up on several hearings for no fault of the accused and thus the indefinite delay in the trial has been due to the act of theHigh Court which cannot be attributed to the accused in any circumstance. Petition was converted into appeal and allowed; and petitioner was admitted to bail.

Fida Hussain v. State PLD 2002 SC 46; Sher Ahmed v. State 1995 SCMR 1944 and Zahir Hussain Shah v. State PLD 1995 SC 49 ref.

**(b) Administration of justice---**

----Criminal trial---High Court staying or suspending proceedings of Trial Court---Expeditious disposal by the High Court---While the High Court enjoys the authority to order stay or suspend the proceedings in a criminal trial, in a deserving case, it is equally important that such an exercise of authority must be carried out with caution and circumspection, ensuring expeditious disposal of the case after the grant of injunctive relief---High Court should not lose sight of the case where it has exercised its extraordinary power of staying or suspending the proceeding of a criminal trial but should make it a point of finally disposing of such proceedings as early as possible.

Imtiyaz Ahmad v. State of Uttar Pradesh AIR 2012 SC 642 ref.

Sh. Usman Karim-ud-Din, Advocate Supreme Court for Petitioner.

Shahid Tasawar Rao, Advocate Supreme Court for the Complainant along with Complainant.

Raja M. Shafqat Khan Abbasi, D.A.G. along with Naveed, I.O. for the State.

Date of hearing: 15th January, 2024.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The Petitioner seeks leave to appeal against the order dated 22.08.2023, whereby his second post-arrest bail in case FIR No.C-29/2020 dated 26.05.2020, under Section 11, PECA, 2016 read with sections 295-B, 298-C, 120-B, 34 and 109 P.P.C. at the FIA Cybercrime Reporting Centre, Police Station FIA Cybercrime Wing, Lahore was declined.

2. Briefly, according to the crime report, the petitioner disseminated blasphemous content to the complainant through whats app/SMS using the mobile network and later on upon raid conducted at the residence of the petitioner blasphemous material was recovered.

3. We have heard the arguments of learned counsel for the parties and gone through the record of the case.

4. The first post arrest bail petition of the petitioner was dismissed on merits on 26.08.2021. The second bail petition was preferred by the petitioner on statutory ground, as well as, on fresh grounds, which too was dismissed by the High Court vide impugned order dated 22.08.2023. Hence this petition for leave to appeal.

5. Taking up the ground of statutory bail, the record reveals that the petitioner was arrested on 26.05.2020. During the proceedings before the trial court, the petitioner moved an application under Section 265-C, Cr.P.C. for providing him documents mentioned in the police report. The said application of the petitioner was dismissed by the trial court on 28.05.2021. The petitioner challenged the said order before the High Court through Criminal Revision[1] and the High Court was pleased to suspend the proceedings before the trial court vide order dated 07.09.2021. The said Criminal Revision is still pending and the injunctive relief granted continues.

6. According to the third proviso to Section 497, Cr.P.C. a court shall release the accused on bail in an offence punishable with death if he has been detained for a continuous period exceeding two years, unless the delay in the trial has been occasioned by an act or omission of the accused or any other person on his behalf or the conditions mentioned in the fourth proviso are attracted, which is not so in the present case. In our view the statutory right to be released on bail under the third proviso to Section 497, Cr.P.C. is not merely a statutory right but also stands firmly on constitutional guarantees under Articles 4, 9 and 10A of the Constitution. Under the said Articles the accused, like any other citizen enjoys the protection of law and to be treated in accordance with law; the accused cannot be deprived of liberty, except in accordance with law; and in determination of any criminal charge against him the accused shall be entitled to a fair trial and due process. These basket of rights are available to an accused who enjoys a presumption of innocence in his favour and understandably cannot be subjected to an indefinite pre-trial detention and therefore cannot be denied bail under the third proviso to section 497(1), Cr.P.C. unless there is convincing material that the delay has been occasioned by the act or omission of the accused himself or if his case falls under any of the exceptions under the fourth proviso to section 497, Cr.P.C.

7. For an accused to be denied statutory bail, it must be demonstrated that his act or omission, was intentionally aimed at prolonging the trial. It must show a deliberate pattern of seeking adjournments without valid reasons during key hearings such as the examination or cross-examination of prosecution witnesses.

Mere counting the number of adjournment requests alone is not enough to justify withholding bail. The application of the third proviso to Section 497(1) of the Cr.P.C when interpreted in the light of Articles 9 and 10A of the Constitution, broadens and enhances the rights of an accused who is presumed innocent during trial. The prosecution must present clear evidence that the accused or his counsel was actively trying to delay the trial through unnecessary adjournments or irrelevant applications, in order to justify denying bail. As already held by this Court, the act or omission on the part of the accused to delay of the timely conclusion of the trial must be an outcome of a concerted and consistent effort of the accused orchestrated to delay the trial. See Shakeel Shah and Nadeem Samson.[2] Learned counsel for the complainant, as well as, learned DAG have failed to establish that the delay in the trial was due to the act or omission of the accused whereas, as discussed hereunder, the record reveals that the delay has been due to the act of the court.

8. In this case the trial has been suspended by the High Court on the filing of the Criminal Revision by the petitioner and during the continuum of the said suspension, the statutory period of delay i.e., continuous period exceeding two years under clause (b) of the third proviso to Section 497(1), Cr.P.C. has lapsed. We have gone through the order sheet of the proceedings in the Criminal Revision which is still pending before the High Court and it has been over three years since the petitioner was arrested. The Criminal Revision has not progressed for no fault of the petitioner, there is nothing on the record that the delay has been occasioned by the act or omission of the petitioner. The delay has been mainly due to the act of the High Court as the case was repeatedly relisted and not taken up on several hearings for no fault of the accused and thus the indefinite delay in the trial has been due to the act of the High Court which cannot be attributed to the accused in any circumstance.[3]

9. While the High Court enjoys the authority to order stay or suspend the proceedings in a criminal trial, in a deserving case, it is equally important that such an exercise of authority must be carried out with caution and circumspection, ensuring expeditious disposal of the case after the grant of injunctive relief. High Court should not lose sight of the case where it has exercised its extraordinary power of staying or suspending the proceeding of a criminal trial but should make it a point of finally disposing of such proceedings as early as possible.[4] Public interest necessitates that the administration of justice is improved for sustaining the faith of a common man in rule of law and justice delivery system, which are closely and inextricably linked.

10. For the above reasons, this petition is converted into appeal and allowed. The impugned order of the High Court dated 22.08.2023 is set aside. The petitioner is admitted to bail subject to furnishing bail bonds in the sum of Rs.100,000/- with two sureties in the like amount to the satisfaction of the trial Court.

11. A copy of this Order be dispatched to the Registrar of the Lahore High Court to be placed before the Chief Justice for improving the administration of criminal justice in such like matters.

MWA/R-2/SC Bail granted.

**P L D 2024 Supreme Court 595**

**Present: Syed Mansoor Ali Shah, Jamal Khan Mandokhail and Athar Minallah, JJ**

**Malik ARSHAD HUSSAIN AWAN---Petitioner**

**Versus**

**Messrs UNITED BANK LIMITED---Respondent**

Civil Petition No. 1393-L of 2020, decided on 22nd February, 2024.

(Against the judgment of Lahore High Court, Lahore, dated 18.06.2020 passed in F.A.O No. 512 of 2013).

**(a) Civil Procedure Code (V of 1908)---**

----O.XXXII, R. 15---Mental Health Ordinance (VIII of 2001), Ss. 29 & 32---Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001), S. 7(2)---Suit for recovery of finance---Defendant of unsound mind---Guardian in the suit, appointment of---Banking Court, powers of---Banking Court has the power to determine the unsoundness of mind or mental infirmity of a person on an inquiry under Order XXXII of the C.P.C. based on the evidence and appoint a guardian for the suit for the limited purpose of representation before the court of law, without first seeking an appointment of a guardian under the Mental Health Ordinance, 2001.

Rule 15 of Order XXXII of C.P.C. provides that Rules 1 to 14 of Order XXXII shall apply to (i) persons adjudged to be of unsound mind and (ii) persons who though not so adjudged are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued. The said Rule, therefore, acknowledges two categories of persons of unsound mind: one who is already adjudged by a court of competent authority as a person of unsound mind; and the other, who is not so adjudged but the court itself on inquiry finds that the person is of unsound mind. In both cases, the court is to appoint a guardian for the suit for such a person. In the first category, in view of the provisions of Rule 4(2) of Order XXXII of C.P.C. the court is to ordinarily appoint the same person as guardian for the suit who has been appointed the guardian under the Mental Health Ordinance, 2001 ("MHO"); while in the second, the court may appoint any suitable person who has no interest against the person of unsound mind. In the second category, the court cannot decline to appoint the guardian for the suit merely for the reason that the defendant has not been so adjudged under the MHO by the competent authority.

Where no guardian has been appointed under the MHO, it does not preclude the Civil Court, or the Banking Court, to proceed and appoint a guardian for the suit under Order XXXII of C.P.C. so that the interest of a mentally disordered person is protected before the court of law and also ensures the continuation and efficient conclusion of the trial. The Banking Court, therefore, has the power to determine the unsoundness of mind or mental infirmity of a person on an inquiry under Order XXXII of the C.P.C. based on the evidence and appoint a guardian for the suit for the limited purpose of representation before the court of law, without first seeking an appointment of a guardian under the MHO.

**(b) Civil Procedure Code (V of 1908)---**

----O.XXXII, Rr. 1, 3, 4(2) & 15---Mental Health Ordinance (VIII of 2001), S. 32---Minor---Defendant of unsound mind---'Guardian for the suit' and 'Guardian of the person or property'---Distinction---Concept of next friend or guardian for the suit is to provide proper representation to a minor or a person with unsound mind during litigation, in order to protect his interests; therefore, their role is limited to the particular litigation or legal action for which they are appointed---Guardian for the suit is also called as "Guardian ad Litem"; the Latin term "ad litem" means "for the lawsuit"---Thus, guardian for the suit is appointed by a court specifically for the duration of legal proceedings and his role is temporary and limited to the particular lawsuit or legal matter---This might involve making decisions about litigation, settlement or other legal strategies---A guardian of the person or property of a minor or a person of unsound mind, on the other hand, is a person legally appointed to manage all the affairs of another person---Such a guardian has the authority to make decisions on behalf of the said person in various aspects of life, including financial, medical, and personal matters.

Ms. Saba Saeed Sheikh, Advocate Supreme Court and Syed Fayyaz Ahmad Sherazi, Advocate-on-Record for Petitioner.

Jam Khurshid Ahmed, Advocate Supreme Court for Respondent.

Date of hearing: 22nd February, 2024.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**Brief facts of the case are that the respondent Bank filed a recovery suit under the Financial Institutions (Recovery of Finances) Ordinance, 2001 ("FIO") against the brother and father of the petitioner on 03.01.2011. While the father of the petitioner contested the suit by filing his application for leave to defend, the brother of the petitioner was proceeded against ex-parte vide order dated 10.02.2011. Subsequently, the petitioner filed an application under Rules 3 and 15 of Order XXXII of the Code of Civil Procedure, 1908 ("C.P.C.") before the Banking Court seeking his appointment as guardian for the suit of his brother who he asserted was suffering from mental infirmity and was of unsound mind. The said application was dismissed by the Banking Court on merits vide order dated 16.09.2013 on the ground that there was no valid document on the record to establish that the brother of the petitioner was of unsound mind or suffering from any mental infirmity. Aggrieved of the said order, the petitioner filed an appeal before the High Court under Section 22 of the FIO, which was dismissed through judgment dated 18.06.2020 ("impugned judgment"). The High Court maintained that the petitioner's brother had to be first adjudged as mentally disordered by the Court of Protection under the provisions of the (Punjab) Mental Health Ordinance, 2001[1] ("MHO") before the petitioner could be entitled to file an application under Order XXXII, C.P.C., before the Banking Court. Hence, the instant petition for leave to appeal.

2. We have heard the learned counsel for the parties and have examined the laws and the record of the case.

3. The question involved in the instant petition is whether a Banking Court can appoint a guardian for the suit, under Rules 3 and 15 of Order XXXII of the C.P.C., for a defendant who by reason of "unsoundness of mind" or "mental infirmity" is incapable of protecting his interests, or whether the defendant has to be first adjudged to be a person of unsound mind and get a guardian appointed under Sections 29 and 32 of the MHO by the Court of Protection and only then can an application for the appointment of his guardian for the suit under Order XXXII of the C.P.C. be entertained by a Banking Court?

4. The instant petition emanates from a suit for recovery filed under the FIO which prescribes a special mechanism for dealing with recovery of finance by the financial institutions from the customers and also establishes special courts, i.e., the Banking Courts for this purpose. Section 4 of the FIO gives its provisions overriding effect over any other law for the time being in force. Section 7 stipulates the powers of Banking Courts and grants them all powers vested in a Civil Court under the C.P.C. in the exercise of its civil jurisdiction. Furthermore, Section 7(2) of the FIO prescribes the Banking Court to follow the procedure laid out in the CPC in all matters with respect to which the procedure has not been provided for in the FIO. Therefore, for the procedure as to how a person of unsound mind or mental infirmity can file or defend a suit filed under the FIO, recourse has to be made to Rule 15 of Order XXXII of the CPC, which is reproduced hereunder for ready reference:

Order XXXII

Rule 15. Application of rules to persons of unsound mind. The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind and to persons who though not so adjudged are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.

(Underlining is ours)

The above cited Rule 15 of Order XXXII extends the applicability of the procedure given in Rules 1 to 14 to suits by or against persons of unsound mind. Rules 1 of Order XXXII provides that every suit by a minor shall be filed through a next friend and where a minor is the defendant in a suit, Rule 3 mandates the court to appoint his guardian for the suit. Rule 4(2) states that where a minor has a guardian appointed by a competent authority, such a guardian shall act as his next friend or be appointed his guardian for the suit, unless the court for the reasons to be recorded decides otherwise.

5. Rule 15 provides that Rules 1 to 14 of Order XXXII shall apply to (i) persons adjudged to be of unsound mind and (ii) persons who though not so adjudged are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued. The said Rule, therefore, acknowledges two categories of persons of unsound mind: one who is already adjudged by a court of competent authority as a person of unsound mind; and the other, who is not so adjudged but the court itself on inquiry finds that the person is of unsound mind. In both cases, the court is to appoint a guardian for the suit for such a person. In the first category, in view of the provisions of Rule 4(2) the court is to ordinarily appoint the same person as guardian for the suit who has
been appointed the guardian under the MHO; while in the second, the court may appoint any suitable person who has no interest against the person of unsound mind. In the second category, the court cannot decline to appoint the guardian for the suit merely for the reason that the defendant has not been so adjudged under the MHO by the competent authority.

6. The mandate and wisdom of Order XXXII of the C.P.C. is to ensure smooth continuation of proceedings and expeditious trial of suits wherein a minor or a person of unsound mind sues or is sued. The concept of next friend or guardian for the suit is to provide proper representation to a minor or a person with unsound mind during litigation, in order to protect his interests; therefore, their role is limited to the particular litigation or legal action for which they are appointed. Guardian for the suit is also called as "Guardian ad Litem"; the Latin term "ad litem" means "for the lawsuit". Thus, guardian for the suit is appointed by a court specifically for the duration of legal proceedings and his role is temporary and limited to the particular lawsuit or legal matter. This might involve making decisions about litigation, settlement or other legal strategies. A guardian of the person or property of a minor or a person of unsound mind, on the other hand, is a person legally appointed to manage all the affairs of another person. Such a guardian has the authority to make decisions on behalf of the said person in various aspects of life, including financial, medical, and personal matters.

7. Now let us examine the scope and extent of MHO. This law deals with the care and treatment of mentally disordered persons, management of their property and other related matters. Under Section 29 of the MHO, whenever a person is possessed of property and is alleged to be mentally disordered, the Court of Protection may, upon an application by any of his relatives filed after having obtained consent in writing of the Advocate-General, direct an inquiry for the purposes of ascertaining whether such person is mentally disordered and incapable of managing himself, his property and his affairs. In case any person is found to be mentally disordered and incapable of taking care of himself, the Court of Protection appoints a guardian under Section 32 of the MHO. A guardian so appointed under MHO is someone who is legally appointed to take care of and manage the personal and property interests of a mentally disorered person.

8. The scope of the MHO is thus different and broader when compared to that of Order XXXII of the C.P.C. It provides for care and treatment of mentally disordered persons, for the management of their properties and their affairs and to encoruage community care of such persons. It is not limited only to representation before court in a suit. While the MHO does not specifically provide for representation before court while suing or being sued but it goes without saying that once a guardian is appointed by the Court of Protection he is to ordinarily act as the next friend and the guardian for the suit for the purposes of Order XXXII of the C.P.C. (see Rule 4(2) of the said Order). The important thing is that where no such guardian has been appointed under the MHO, it does not preclude the Civil Court, or the Banking Court in the present case, to proceed and appoint a guardian for the suit under Order XXXII, so that the interest of a mentally disordered person is protected before the court of law and also ensures the continuation and efficient conclusion of the trial. The Banking Court, therefore, has the power to determine the unsoundness of mind or mental infirmity of a person on an inquiry under Order XXXII of the C.P.C. based on the evidence and appoint a guardian for the suit for the limited purpose of representation before the court of law, without first seeking an appointment of a guardian under the MHO. The High Court has, therefore, committed a legal error by dismissing the appeal filed by the petitioner holding that the petitioner's brother had to first adjudged as a person of unsound mind under the MHO before an application could be moved under Order XXXII before the Banking Court.

9. For the above reasons, the instant petition is converted into appeal and allowed by setting aside the impugned judgment. The matter is remanded to the High Court to decide the appeal of the petitioner on merits and in accordance with the provisions of Rule 15 of Order XXXII of the CPC, as expounded above. We are sanguine that the said appeal will be decided expeditiously.

MWA/A-9/SC Appeal allowed.

**P L D 2024 Supreme Court 610**

**Present: Qazi Faez Isa, CJ, Syed Mansoor Ali Shah, Amin-ud-Din Khan and Athar Minallah, JJ**

**TAUFIQ ASIF and others---Petitioners**

**Versus**

**General (Retd.) PERVEZ MUSHARRAF and others---Respondents**

Civil Petitions Nos. 3797 to 3800 of 2020, decided on 10th January, 2024.

(Against the judgment of the Lahore High Court, Lahore, dated 13.01.2020, passed in Writ Petition No. 71713 of 2019).

**(a) High Treason (Punishment) Act (LXVIII of 1973)---**

----Ss. 2 &3---Criminal Law Amendment (Special Court) Act (XVII of 1976), S. 4---Constitution of Pakistan, Arts. 6 & 199---Trial for high treason---Judgment of Special Court---Territorial jurisdiction of Lahore High Court---Scope---Special Court convicted the respondent (former Chief of Army Staff) and sentenced him to death---However, the High Court ignored the judgment of the Special Court and decided the writ petition filed before it by allowing it through the impugned judgment ("impugned judgment")---High Court, amongst other reliefs granted therein, held that the very basis of initiation of proceedings against the respondent for the offence of high treason was beyond the constitutional mandate, ultra vires, coram non judice and unlawful---Legality---In the present case, the main grievance agitated and the ultimate relief sought by the respondent in his writ petition were about the acts done and the proceedings taken by the Special Court at Islamabad---Over such acts and proceedings, only the Islamabad High Court enjoyed territorial jurisdiction, and only the Islamabad High Court could judicially review the legality thereof under Article 199(1)(a)(ii) of the Constitution---Lahore High Court had no such jurisdiction; it wrongly assumed and exercised the jurisdiction that was not vested in it by the Constitution

The matter relating to the trial of the respondent (former Chief of Army Staff) for the offence of high treason had earlier come before the Supreme Court on at least three occasions. On two of these occasions, the Supreme Court had specifically directed the Special Court to continue with the trial of the respondent. However, the Lahore High Court, in purported exercise of its writ jurisdiction under Article 199 of the Constitution, set aside the entire proceedings of the trial, which was conducted by the Special Court against the respondent at Islamabad. The impugned judgment was passed by the Lahore High Court after the final judgment convicting the respondent had been announced by the Special Court.

Lahore High Court Bar Association v. General (Retd.) Pervez Musharraf 2019 SCMR 1029 ref.

Lahore High Court lacked territorial jurisdiction to entertain the writ petition of the respondent filed against the acts done and proceedings taken by the Special Court at Islamabad. Any act done or proceeding taken by the Special Court at Islamabad could only be challenged, as per Article 199(1)(a)(ii), before the High Court within whose territorial jurisdiction such act was done or proceeding taken, that is, the Islamabad High Court. The respondent, instead of agitating his grievance in the Islamabad High Court against the act done and proceeding taken by the Special Court at Islamabad, chose the forum of the Lahore High Court, and the latter court wrongly entertained the same.

Government of Pakistan v. Special Court PLD 2020 Isl. 82 ref.

In the present case, the main grievance agitated and the ultimate relief sought by the respondent in his writ petition were about the acts done and the proceedings taken by the Special Court at Islamabad. Over such acts and proceedings, only the Islamabad High Court enjoyed territorial jurisdiction, and only the Islamabad High Court could judicially review the legality thereof under Article 199(1)(a)(ii) of the Constitution. The Lahore High Court had no such jurisdiction; it wrongly assumed and exercised the jurisdiction that was not vested in it by the Constitution with regard to the acts done and proceedings taken outside its territorial jurisdiction. Though the Federal Government is deemed to function all over Pakistan, the actions of the Federal Government in constituting the Special Court and filing a complaint

for high treason against the respondent in Islamabad, and the trial

being conducted by the Special Court in Islamabad, can in no manner be said to have affected the respondent within the territorial jurisdiction of the Lahore High Court. Petitions were converted into appeals and allowed, and impugned judgment of the High Court was set-aside.

**(b) Constitution of Pakistan---**

----Art. 199---Civil Procedure Code (V of 1908), O. II, R. 2---Territorial jurisdiction of a High Court---Scope---It is the dominant object of the petition, i.e., the main grievance agitated and the ultimate relief sought in the petition, which determines the territorial jurisdiction of the High Courts---If the ultimate relief sought relates to an act done or proceeding taken within the territorial jurisdiction of a particular High Court, no other High Court in the country can assume and exercise writ jurisdiction on the pretext that one of the reliefs sought relates to an act of a federal body---Splitting of claims and reliefs in several actions (suits or petitions) regarding one cause of action is also not legally permissible under Order II, Rule 2, C.P.C.---No person can, therefore, seek relief regarding an act of a federal body from one High Court and relief regarding an act done in furtherance of or pursuance to that act from another High Court---Both reliefs must be sought in one petition and adjudicated by the High Court which has territorial jurisdiction over both acts.

Sandalbar Enterprises v. Central Board of Revenue PLD 1997 SC 334; Amin Textile Mills v. Federation of Pakistan 1998 SCMR 2389; Sethi and Sethi v. Federation of Pakistan 2012 PTD 1869 and Province of Punjab v. Shehzad Anjum 2024 SCMR 766 ref.

**(c) High Treason (Punishment) Act (LXVIII of 1973)---**

----S. 2---Criminal Law Amendment (Special Court) Act (XVII of 1976), S. 12(3)---Constitution of Pakistan, Arts. 6 & 199---Trial for high treason---Judgment of Special Court---Writ petition filed before the Lahore High Court to set aside the entire proceedings of the trial conducted by the Special Court---Maintainability---Availability of an alternate adequate remedy---Writ jurisdiction of the High Court cannot be exploited while having an alternate equally efficacious and adequate remedy provided under the law; such remedy cannot be bypassed to attract the writ jurisdiction---Doctrine of exhaustion of remedies accentuates that a litigant must not circumvent or bypass the provisions of the relevant law that provide for an adequate remedy---If a party does not choose the remedy available under the law, the writ jurisdiction of the High Court cannot be invoked and exercised in his favour---Where a matter arises under a statute and is adjudicated by a forum provided therein, and the said statute also provides a remedy of appeal or revision either in the High Court itself or directly before the Supreme Court, the High Court should not in its writ jurisdiction interfere with such matter---In the present case the remedy of appeal provided before the Supreme Court by Section 12(3) of the Criminal Law Amendment (Special Court) Act, 1976 against the judgment of the Special Court was an alternate, adequate and efficacious remedy---In view of the availability of an adequate remedy of appeal before the Supreme Court, the High Court could not have exercised its writ jurisdiction under Article 199 of the Constitution, arrogating to itself the appellate jurisdiction vested in the Supreme Court under Section 12(3) of the Criminal Law Amendment (Special Court) Act, 1976---Petitions were converted into appeals and allowed, and impugned judgment of the High Court was set-aside.

Imran Khattak v. Sofia Waqar Khattak 2014 SCMR 122; Tariq Transport Company v. Sarghodha-Bhera Bus Service PLD 1958 SC (Pak.) 437; Deputy Commissioner of Income Tax/Wealth Tax v. Punjab Beverage Company 2008 SCMR 308; Amin Textile Mills v. Commissioner of Income Tax 2000 SCMR 201; Sher Afgan Khan Niazi v. Ali S. Habib 2011 SCMR 1813; Muhammad Abbasi v. SHO Bhara Kahu PLD 2010 SC 969; Special Secretary-II v. Fayyaz Dawar 2023 SCMR 1442; Mian Azam Waheed v. Collector of Customs 2023 SCMR 1247; Sana Jamali v. Mujeeb Qamar 2023 SCMR 316; Mehboob Ali Malik v. Province of West Pakistan PLD 1963 (W.P.) Lahore 575; Chief Settlement Commissioner v. Ashfaque Ali PLD 2003 SC 132 and Khalid Mehmood v. Collector of Customs 1999 SCMR 1881 ref.

**(d) High Treason (Punishment) Act (LXVIII of 1973)---**

----S. 2---Criminal Law Amendment (Special Court) Act (XVII of 1976), S. 12(3)---Constitution of Pakistan, Arts. 6 & 199---Trial for high treason---Judgment of Special Court---Lahore High Court in its writ jurisdiction set aside the entire proceedings of the trial conducted by the Special Court---Legality---Not only did the High Court assume jurisdiction not vested in it but it also dilated upon the merits of the matter, which

it could not do as the High Court was not the appellate forum---High Court, without enjoying any jurisdiction whatsoever, gave its own findings on the core subject matter of the trial, i.e., whether the respondent (former Chief of Army Staff) had committed the offence of high treason under Article 6 of the Constitution read with Section 2 of the High Treason (Punishment) Act, 1973---By doing this the High Court unlawfully assumed the appellate jurisdiction exclusively vested in the Supreme Court under Section 12(3) of the Criminal Law Amendment (Special Court) Act, 1976---High Court had also granted relief which was not even sought in the writ petition---Relief sought in the prayer clause of the writ petition mainly challenged the order of the Special Court, whereby it had reserved its judgment---No prayer was made to seek a determination as to whether the respondent had committed the offence of high treason---However, the High Court overstretched its jurisdiction by proceeding to determine the core question of whether the respondent had committed the offence of high treason, and then held that the actions of the respondent were not part of Article 6 at the time of the commission of the said actions---High Court not only assumed the exclusive jurisdiction of the Special Court which was to determine whether the respondent had committed the offence of high treason but also usurped the appellate jurisdiction of the Supreme Court----Matter of the trial of the respondent for the offence of high treason had come before the Supreme Court a number of times and despite authoritative judgments and orders of the Supreme Court dealing specifically with the trial of the respondent by the Special Court, the High Court in derogation of the same set aside the entire proceedings of the trial of the respondent through the impugned judgment---Disregard of the judgments of the Supreme Court amounted to judicial effrontery and impropriety---Impugned judgment passed by the High Court in sheer violation of the judgments and orders of the Supreme Court was, therefore, not only without jurisdiction but also unconstitutional---Petitions were converted into appeals and allowed, and impugned judgment of the High Court was set-aside.

Irfan Bashir v. DC, Lahore PLD 2021 SC 571 ref.

**(e) Criminal Law Amendment (Special Court) Act (XVII of 1976)---**

----S. 9---High Treason (Punishment) Act (LXVIII of 1973), S. 2---Constitution of Pakistan, Arts. 6 & 199(1)(a), (c)---Trial for high treason---Judgment of Special Court---Lahore High Court in its writ jurisdiction set aside the entire proceedings of the trial conducted by the Special Court and also declared the entire Section 9 of the Criminal Law Amendment (Special Court) Act, 1976 ('Special Court Act') as ultra vires the Constitution---Legality---Plain reading of Section 9 shows that it deals with the absence of the accused person not only due to his illness but also where the absence of the accused person or his counsel has been brought about by the accused person himself, or where the behaviour of the accused person prior to such absence has been such as to impede the course of justice---In such cases, the Special Court is mandated to proceed with the trial after taking the necessary steps to appoint an advocate to defend such an accused person---Respondent/convict (former Chief of Army Staff) was neither "aggrieved", as required by Article 199(1)(a) or (c) of the Constitution, nor had assailed the entire provision of Section 9---However, the High Court proceeded to declare the entire provision as ultra vires the Constitution without providing any reasoning except that trial in absentia cannot take place---Petitions were converted into appeals and allowed, and impugned judgment of the High Court was set-aside.

Lahore High Court Bar Association v. General (Retd.) Pervez Musharraf 2019 SCMR 1029 ref.

**(f) High Treason (Punishment) Act (LXVIII of 1973)---**

----S. 3---Criminal Law Amendment (Special Court) Act (XVII of 1976), S. 3---Trial for high treason---Judgment of Special Court---Lahore High Court in its writ jurisdiction set aside the entire proceedings of the trial conducted by the Special Court and observed that the Secretary Interior, in his capacity as the officer authorized by the Federal Government vide SRO 1234(I)/94 dated 29.12.1994 under Section 3 of the High Treason (Punishment) Act, 1973 ('High Treason Act'), can only file a complaint for high treason on the recommendations of the Federal Government, and under Section 3 of the Criminal Law Amendment (Special Court) Act, 1976 ('Special Court Act') it is the Federal Government that constitutes the Special Court; that the whole exercise was illegal, unconstitutional and void ab initio as said actions were taken by the Prime Minister, not by the Federal Government, and therefore, were not conducted in accordance with the principle laid down in the judgment reported as Mustafa Impex v. Government of Pakistan PLD 2016 SC 808

("Mustafa Impex")---Held, that High Court, did not consider the decision of the Supreme Court rendered in the case reported as PMDC v. Muhammad Fahad Malik, 2018 SCMR 1956 ("PMDC"), which had held that the principle settled in Mustafa Impex did not have retrospective application, and applies only from the date of its pronouncement, i.e., 18.06.2016---In the present case the Special Court was constituted vide notification dated 20.11.2013 and the complaint was filed on 12.12.2013---Both these actions were taken before Mustafa Impex; therefore, the law declared therein did not apply to them---Any reconstitution of the Special Court before Mustafa Impex could also not be challenged for the same reason---As to the reconstitution of the Special Court after Mustafa Impex, the relevant summaries moved, approvals granted and notifications issued showed that the process of reconstituting the Special Court was, in fact, in compliance with the law declared in Mustafa Impex---Particularly, the three Judges of the Special Court, who announced the final judgment on 17.12.2019, were appointed with the approval of the Federal Government, i.e., the Federal Cabinet---Therefore, the High Court could not have set aside the acts of filing the complaint and the constitution or reconstitution of the Special Court on the ground that Mustafa Impex was not complied with---Petitions were converted into appeals and allowed, and impugned judgment of the High Court was set-aside.

Mustafa Impex v. Government of Pakistan PLD 2016 SC 808 and PMDC v. Muhammad Fahad Malik 2018 SCMR 1956 ref.

Hamid Khan, Senior Advocate Supreme Court, Taufiq Asif, Advocate Supreme Court and Ajmal Ghaffar Toor, Advocate Supreme Court for Petitioner (in C.P. No. 3797 of 2020).

Hassan Raza Pasha, Advocate Supreme Court, (Chairman, Executive Committee, PBC), Haroon-ur-Rasheed, Advocate Supreme Court. (Vice-Chairman, Executive Committee, PBC) assisted by Wajih Hassan Pasha, Advocate for Petitioner (in C.P. No. 3798 of 2020).

Syed Rifaqat Hussain Shah, Advocate-on-Record for Petitioner (in C.P. No. 3799 of 2020).

Nemo for Petitioner (in C.P. No. 3800 of 2020).

Ch. Aamir Rehman, Additional Attorney-General for Pakistan for the Federation.

Assisted by Muhammad Hassan Ali, Law Clerk Supreme Court of Pakistan for the Federation.

Date of hearing: 10th January 2024.

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**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**

Preface

Judging is a cornerstone of the legal system, embodying the application of law to resolve disputes. Unlike monarchs who historically wielded absolute power, a judge operates within a framework of laws and principles that guide decision-making. Judges are not sovereigns with unfettered discretion but are guardians of the law, tasked with ensuring that justice is done according to established legal norms and principles. Their decisions must be guided by the law, precedents and the facts before them, not by personal desires or objectives. A Judge, in the pursuit of justice, cannot embark on a self-imposed crusade of right and wrong. He 'is not to innovate at pleasure. He is not a knight errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic

sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by the system, and subordinated to the primordial necessity of order in the social life.'[1] This ensures that justice is administered fairly, consistently and predictably, thereby upholding the rule of law.

2. In the matter at hand, serious questions have been raised as to the discretionary and equitable exercise of writ jurisdiction by the High Court under Article 199 of the Constitution. These questions pertain not only to the lack of territorial jurisdiction vested in the High Court in the instant matter, but also to a purported exercise of this jurisdiction when none was available or warranted under the Constitution or the law and that too, in violation of the judgments and orders of the Supreme Court.

Facts

3. The background facts of the case are that the respondent, General Pervez Musharraf ("respondent"), while acting as the Chief of Army Staff issued a Proclamation of Emergency Order, 2007 ("PEO") on 3 November 2007, imposing an emergency in the country and holding the Constitution in abeyance. He simultaneously issued a Provisional Constitutional Order, 2007 ("PCO") providing a governance mechanism during the said emergency, and the Oath of Office (Judges) Order, 2007 ("Oath Order") thereby removing and then replacing Judges of the superior courts. A 14-member Bench of this Court declared in Sindh High Court Bar Association,[2] the PEO, PCO and the Oath Order, and all actions taken pursuant thereto, to be unconstitutional and void ab initio. Review petitions filed against this judgment were also dismissed in Nadeem Ahmed.[3]

4. After this Court's decision in Sindh High Court Bar Association, certain constitutional petitions were filed before this Court with the prayer that the Federal Government be directed to lodge a complaint under Article 6 of the Constitution against the respondent and others for the offence of high treason. These petitions were disposed of vide order dated 03.07.2013 in Moulvi Iqbal Haider[4] on the statement/undertaking of the learned Attorney-General to the effect that the Prime Minister had directed for the commencement of an inquiry and investigation in relation to the actions of the respondent taken on 03.11.2007, whereafter, if required, a complaint might be filed under Section 5 of the Criminal Law Amendment (Special Court) Act, 1976 ("Special Court Act") for the trial of the offence of high treason.

5. Pursuant to the result of that inquiry and investigation, a Special Court was constituted by the Federal Government vide notification dated 20.11.2013 for the trial of the offence of high treason under the High Treason (Punishment) Act, 1973 ("High Treason Act"). A complaint was filed by the Federal Government on 12.12.2013 against the respondent for the offence of high treason under Article 6 of the Constitution read with Section 3 of the High Treason Act and Section 5 of the Special Court Act. The trial of the respondent then commenced. During the trial, the Special Court passed an order for associating other persons as suspects with the respondent and ordered a fresh investigation during the ongoing trial. This order of the Special Court was then challenged up till this Court. Vide order dated 26.02.2016 passed in Abdul Hameed Dogar,[5] this Court set aside the said order of the Special Court on the ground that the Special Court had no power to associate any other person for investigation into the offence of high treason as the same was the prerogative of the Federal Government, and directed it to proceed with the trial of the respondent "with all convenient dispatch and without any unnecessary delay".

6. Meanwhile, a review petition was filed against the decision of this Court, dated 03.07.2013, in Moulvi Iqbal Haider. While deciding this review petition vide order dated 01.04.2019 in Lahore High Court Bar Association,[6] this Court noted that the complaint was filed on 12.12.2013 before the Special Court, the charge was framed on 31.03.2014, the prosecution evidence was closed on 18.09.2014, and the trial was being delayed only because of the absence of the accused respondent who had been declared a proclaimed offender on 12.07.2016. Placing reliance on Section 9 of the Special Court Act, it was held that within the scope of the Special Court Act, if the accused voluntarily chooses not to exercise his right to appear and be present at trial, his trial in absentia does not infringe the fairness of the trial or violate the right to fair trial under Article 10A of the Constitution. It was held that by electing to be a fugitive of the law, the accused loses his right to audience. However, if he surrenders before the Court, his right to put up a defence stands restored. The Special Court was then directed to proceed with the trial provided that if the accused appeared, he would be

entitled to record his statement under Section 342 of the Cr.P.C. and also lead any other defence under the law. However, if the accused failed to appear before the court and remained a proclaimed offender, the Special Court could proceed against him in his absence, under Section 9 of the Special Court Act.

7. The Special Court then proceeded with the trial and reserved its judgment vide order dated 19.11.2019. This order, whereby the Special Court reserved its judgment, was challenged by the respondent before the Lahore High Court, Lahore through a writ petition under Article 199 of the Constitution. While the matter was being heard by the High Court, the Special Court announced its judgment on 17.12.2019 convicting the respondent and sentencing him to death. However, the High Court ignored the judgment of the Special Court and decided the writ petition by allowing it through the impugned judgment dated 13.01.2020 ("impugned judgment"). The High Court, amongst other reliefs granted therein, held that the very basis of initiation of proceedings against the respondent for the offence of high treason was beyond the constitutional mandate, ultra vires, coram non judice and unlawful. Hence, the instant petitions for leave to appeal.

Contentions of the Parties

8. The learned counsel for the petitioners, with the main thrust of the arguments presented by Mr. Hamid Khan, Senior ASC, contended that the Lahore High Court acted in derogation of the directions and judgments of this Court; the High Court had no territorial jurisdiction; the impugned judgment is in derogation of Section 12 of the Special Court Act, which provides for the jurisdiction of the Special Court and ousts the jurisdiction of any other Court with regards to matters seized by the Special Court; the writ petition was not maintainable as there was an adequate remedy available through an appeal before this Court under Section 12(3) of the Special Court Act, which was also availed of by the respondent; even otherwise, the impugned judgment was passed after the Special Court had announced its judgment convicting the respondent and therefore, the cause of action (if any) had ceased to exist; the reliance on Mustafa Impex[7] is misplaced as the principle settled therein has no retrospective applicability as held in PMDC[8]; and therefore, the impugned judgment is void ab initio, illegal, unconstitutional and coram non judice. It was also contended that since the Lahore High Court had acted in complete derogation of the Constitution and the law, it was the duty of Bar Associations, Bar Councils and lawyers to ensure that the Constitution and the law are not violated and if such illegalities are committed, to bring the same to the notice of this Court so that the same can be rectified.

9. The learned Additional Attorney-General ("AAG"), representing the Federation and other official respondents, was asked about the stance of the said respondents regarding the impugned judgment. He stated that none of them supported the impugned judgment and contended that the impugned judgment was not legally sustainable. As to the respondent, this Court noted that he had passed away and, vide order dated 10.11.2023, allowed his legal heirs to come forward and join these cases if desired. However, none of the legal heirs appeared or appointed any counsel to represent them before this Court in these cases.

Opinion of the Court

10. We have heard the learned counsel for the petitioners and the learned AAG, and have perused the record with their able assistance.

11. At the very outset, we may note that the matter relating to the trial of the respondent for the offence of high treason had earlier come before this Court on at least three occasions. On two of these occasions, this Court had specifically directed the Special Court to continue with the trial of the respondent. It had also been observed by this Court that there cannot be a graver offence than that of high treason and no proceeding is more solemn than a trial for the offence of high treason.[9] However, the Lahore High Court, in purported exercise of its writ jurisdiction under Article 199 of the Constitution, set aside the entire proceedings of the trial, which was conducted by the Special Court against the respondent at Islamabad. The impugned judgment was passed after the final judgment convicting the respondent had been announced by the Special Court. Serious issues have been raised before us about the jurisdiction exercised by the High Court and the grounds for exercising such jurisdiction.

Territorial jurisdiction of the Lahore High Court

12. The primary contention of the learned counsel for the petitioners and the learned AAG is that the Lahore High Court lacked territorial jurisdiction to entertain the writ petition of the respondent filed against the acts

done and proceedings taken by the Special Court at Islamabad. This contention, we find, is well-founded. Any act done or proceeding taken by the Special Court at Islamabad could only be challenged, as per Article 199(1)(a)(ii), before the High Court within whose territorial jurisdiction such act was done or proceeding taken, that is, the Islamabad High Court. Because of this legal position, the persons, including the respondent's counsel Barrister Salman Safdar, who were aggrieved of some acts and proceedings of the Special Court had challenged the same in the Islamabad High Court.[10] But the respondent, instead of agitating his grievance in the Islamabad High Court against the act done and proceeding taken by the Special Court at Islamabad, chose the forum of the Lahore High Court, and the latter court wrongly entertained the same.

13. The Lahore High Court assumed territorial jurisdiction in the matter, stating the reason that since the respondent also challenged, along with the acts and proceedings of the Special Court, the Federal Government's acts, i.e., the acts of filing the complaint and constituting the Special Court, it had the jurisdiction to adjudicate upon the matter. The reason is flawed and is also against the law declared by this Court in Sandalbar[11] and Amin Textile[12] as well as by the Lahore High Court in Sethi and Sethi.[13] The ratio of these cases is that it is the dominant object of the petition, i.e., the main grievance agitated and the ultimate relief sought in the petition, which determines the territorial jurisdiction of the High Courts. If the ultimate relief sought relates to an act done or proceeding taken within the territorial jurisdiction of a particular High Court, no other High Court in the country can assume and exercise writ jurisdiction on the pretext that one of the reliefs sought relates to an act of a federal body. The splitting of claims and reliefs in several actions (suits or petitions) regarding one cause of action is also not legally permissible under Order II, Rule 2, C.P.C.[14] No person can, therefore, seek relief regarding an act of a federal body from one High Court and relief regarding an act done in furtherance of or pursuance to that act from another High Court. Both reliefs must be sought in one petition and adjudicated by the High Court which has territorial jurisdiction over both acts.

14. In the present case, the main grievance agitated and the ultimate relief sought by the respondent in his writ petition were about the acts done and the proceedings taken by the Special Court at Islamabad. Over such acts and proceedings, only the Islamabad High Court enjoyed territorial jurisdiction, and only the Islamabad High Court could judicially review the legality thereof under Article 199(1)(a)(ii) of the Constitution. The Lahore High Court had no such jurisdiction; it wrongly assumed and exercised the jurisdiction that was not vested in it by the Constitution with regard to the acts done and proceedings taken outside its territorial jurisdiction.

15. We have also noted that probably, to grant itself territorial jurisdiction, the Lahore High Court observed in the impugned judgment that the PCO was issued by the respondent as Chief of Army Staff, at the General Headquarters, Rawalpindi, therefore, it had territorial jurisdiction to entertain the writ petition at Lahore. The grievances agitated in the writ petition and the reliefs sought therein had no connection with the legality of the PCO. It appears that the High Court either contrived or misunderstood the subject matter of the writ petition by considering it to be related to the legality of the PCO. In any event, this Court had already held, in Sindh High Court Bar Association,[15] the PCO to be unconstitutional. Therefore, the assumption of jurisdiction by the Lahore High Court on this ground was unabashedly misplaced. Though the Federal Government is deemed to function all over Pakistan, the actions of the Federal Government in constituting the Special Court and filing a complaint for high treason against the respondent in Islamabad, and the trial being conducted by the Special Court in Islamabad, can in no manner be said to have affected the respondent within the territorial jurisdiction of the Lahore High Court.

16. Although the lack of territorial jurisdiction of the Lahore High Court is sufficient to set aside the impugned judgment, however, in view of the seriousness of the matter, we are inclined to dilate upon the other legal grounds also, but without discussing the merits of the case. Since the appeal filed by the respondent under Section 12(3) of the Special Court Act against the final judgment of the Special Court has been dismissed by this Court by an order of even date, we shall confine ourselves to the jurisdictional and legal challenges made against the impugned judgment.

Availability of an alternate adequate remedy

17. The next challenge, made before us, on the exercise of jurisdiction by the High Court is that the respondent had an alternate adequate remedy under the law; therefore, the High Court should have kept its hands off the matter and should not have proceeded to exercise the writ jurisdiction under Article 199 of the Constitution. In this regard, we have noted that the Special Court conducting the trial of the respondent for the offence of high treason was constituted under a special law i.e., the Special Court Act. Section 3 of the Special Court Act confers exclusive jurisdiction on the Special Court to try certain offences, including any offence punishable under the High Treason Act. Section 3 of the Special Court Act is reproduced below, for ease of reference:

3. Certain offences triable by Special Court.

(1) Any offence punishable under sections 121, 121A, 122, 123 and 123A of the Pakistan Penal Code (Act XLV of 1860), and any offence punishable under the High Treason (Punishment) Act, 1973 (LXVIII of 1973), including an offence of conspiracy to commit any such offence, whether committed before or after the commencement of this Act, shall be tried by a Special Court in accordance with the provisions of this Act.

(2) No court other than the Special Court shall try an offence which is triable by the Special Court under subsection (1).

(3) If, in the course of a trial before the Special Court, the Court is of opinion that an accused before it has committed or appears to have committed any offence other than an offence referred to in subsection (1), the Special Court shall record such opinion and refer such accused for the trial of such other offence to a court having jurisdiction to try the offence.

Section 12 of the Special Court Act, reproduced below, states that the jurisdiction of the Special Court is not to be questioned; it also provides a right of appeal against the final judgment of the Special Court to the Supreme Court.

12. Jurisdiction, etc., of Special Court not to be questioned.

(1) No Court shall entertain any plea as to the jurisdiction of the Special Court or as to the legality or propriety of anything done or purported to be done by the Special Court or order the release under section 491 or section 498 of the Code[16] or any other law of any accused person in a case triable by the Special Court for so long as the Court is seized of the case.

(2) Save as provided in sub-section (3), no order, judgment or sentence of the Special Court shall be called in question in any manner whatsoever in or before any court or other authority.

(3) Any party aggrieved by the final judgment of the Special Court may prefer an appeal to the Supreme Court within thirty days of the passing of the judgment.

It is evident from the above provisions that through Section 3 of the Special Court Act, exclusive jurisdiction to try the offence of high treason is conferred on a Special Court constituted for this purpose. Further, under Section 12(1), no Court can entertain any plea as to the jurisdiction of the Special Court, or as to the legality or propriety of anything done or purported to be done by the Special Court in a case triable by the Special Court for so long as the Special Court is seized of the case. Section 12(2) further stipulates that, save as provided in subsection (3), i.e., except through an appeal filed before this Court, no order, judgment or sentence of the Special Court shall be called in question in any manner whatsoever in or before any Court or other authority. Through Section 12(3), a right of appeal before this Court has been provided against the final judgment of the Special Court, being the only right of appeal. Therefore, it was argued, the constitutional bar contained in Article 199(1) of the Constitution on exercising the writ jurisdiction in case of availability of an "other adequate remedy" was fully attracted.

18. Where an adequate remedy is available under the relevant law, this Court has strictly deprecated circumventing that remedy and invoking the writ jurisdiction of the High Court under Article 199 of the Constitution.[17] The writ jurisdiction of the High Court cannot be exploited while having an alternate equally efficacious and adequate remedy provided under the law; such remedy cannot be bypassed to attract the writ jurisdiction.[18] The doctrine of exhaustion of remedies accentuates that a litigant must not circumvent or bypass the provisions of the relevant law that provide for an adequate remedy.[19] If a party does not choose the remedy available under the law, the writ jurisdiction of the High Court cannot be invoked and exercised in his

favour.[20] Where a matter arises under a statute and is adjudicated by a forum provided therein, and the said statute also provides a remedy of appeal or revision either in the High Court itself or directly before this Court, the High Court should not in its writ jurisdiction interfere with such matter.[21]

19. We therefore hold that the remedy of appeal provided before this Court by Section 12(3) of the Special Court Act against the judgment of the Special Court was an alternate, adequate and efficacious remedy. And, as we have already noted above, the main grievance agitated and the ultimate relief sought in the writ petition was about the acts and proceedings of the Special Court, which could only be agitated before this Court in appeal. Instead of waiting for the Special Court to announce its judgment (which was announced on 17.12.2019, i.e., within less than a month) and availing the remedy of appeal before this Court, the respondent filed the writ petition assailing the order of the Special Court whereby it reserved its judgment. Later on, the respondent himself acknowledged the availability of alternate adequate remedy by filing an appeal before this Court under Section 12(3) of the Special Court Act. Therefore, in view of the availability of an adequate remedy of appeal before this Court, the High Court could not have exercised its writ jurisdiction under Article 199 of the Constitution, arrogating to itself the appellate jurisdiction vested in this Court under Section 12(3) of the Special Court Act. Consequently, the impugned judgment fails on this ground as well.

Decision by High Court on merits of the case

20. Not only did the High Court assume jurisdiction not vested in it but it also dilated upon the merits of the matter, which it could not do as the High Court was not the appellate forum. The High Court, without enjoying any jurisdiction whatsoever, gave its own findings on the core subject matter of the trial, i.e., whether the respondent had committed the offence of high treason under Article 6 of the Constitution read with Section 2 of the High Treason Act. By doing this the High Court unlawfully assumed the appellate jurisdiction exclusively vested in the Supreme Court under Section 12(3) of the Special Court Act.

High Court granted the relief not sought

21. We have noted that the High Court had also granted relief which was not even sought in the writ petition. The relief sought in the prayer clause of the writ petition, as noted above, mainly challenged the order of the Special Court, dated 19.11.2019, whereby it had reserved its judgment. No prayer was made to seek a determination as to whether the respondent had committed the offence of high treason. However, the High Court overstretched its jurisdiction by proceeding to determine the core question of whether the respondent had committed the offence of high treason, and then held that the actions of the respondent were not part of Article 6 at the time of the commission of the said actions. The High Court not only assumed the exclusive jurisdiction of the Special Court which was to determine whether the respondent had committed the offence of high treason but also usurped the appellate jurisdiction of the Supreme Court. The High Court should have remained within the confines of the dispute brought before it and decided the same in accordance with the law and the Constitution.[22]

Constitutionality of Section 9 of the Special Court Act

22. The High Court also declared the entire Section 9 of the Special Court Act as ultra vires the Constitution, even though the respondent had only challenged its 'offending portion' to the extent it provides that "no trial shall be adjourned by reason of the absence of any accused person due to illness". Section 9 of the Special Court Act expressly restricts granting adjournments during the proceedings of such trial, undoubtedly because of the seriousness of the offence of high treason. Section 9 of the Special Court Act is reproduced here, for ready reference:

> 9. Restriction of adjournments.
>
> No trial before the Special Court shall be adjourned for any purpose unless the Special Court is of opinion that the adjournment is necessary in the interests of justice and, in particular, no trial shall be adjourned by reason of the absence of any accused person due to illness, or if the absence of the accused or his counsel has been brought about by the accused person himself, or if the behavior of the accused person prior to such absence has been, in the opinion of the Special Court, such as to impede the course of justice but, in any such case, the Special Court shall proceed with the trial after taking necessary steps to appoint an advocate to defend any such accused person.

A plain reading of Section 9 shows that it deals with the absence of the accused person not only due to his illness but also where the absence of the accused person or his counsel has been brought about by the accused person himself, or where the behaviour of the accused person prior to such absence has been such as to impede the course of justice. In such cases, the Special Court is mandated to proceed with the trial after taking the necessary steps to appoint an advocate to defend such an accused person. The respondent was neither "aggrieved", as required by Article 199(1)(a) or (c) of the Constitution, nor had assailed the entire provision of Section 9. However, the High Court proceeded to declare the entire provision as ultra vires the Constitution without providing any reasoning except that trial in absentia cannot take place. In any event, the matter of trial in absentia had been dealt with by this Court in Lahore High Court Bar Association.[23]

Misapplying Mustafa Impex

23. It was observed in the impugned judgment that the Secretary Interior, in his capacity as the officer authorized by the Federal Government vide SRO 1234(I)/94 dated 29.12.1994 under Section 3 of the High Treason Act, can only file a complaint for high treason on the recommendations of the Federal Government, and under Section 3 of the Special Court Act it is the Federal Government that constitutes the Special Court. The whole exercise was then set aside by declaring it as illegal, unconstitutional and void ab initio on the ground that the said actions were taken by the Prime Minister, not by the Federal government, and therefore, were not conducted in accordance with the principle laid down in Mustafa Impex.[24] The High Court, however, did not consider the decision of this Court rendered in PMDC,[25] which had held that the principle settled in Mustafa Impex did not have retrospective application, and applies only from the date of its pronouncement, i.e., 18.06.2016. The Special Court was constituted vide notification dated 20.11.2013 and the complaint was filed on 12.12.2013. Both these actions were taken before Mustafa Impex; therefore, the law declared therein did not apply to them. Any reconstitution of the Special Court before Mustafa Impex could also not be challenged for the same reason.

24. As to the reconstitution of the Special Court after Mustafa Impex, the relevant summaries moved, approvals granted and notifications issued have been placed on the record by the learned AAG. On perusing the same, we have noted that the process of reconstituting the Special Court was, in fact, in compliance with the law declared in Mustafa Impex. Particularly, we have noted that the Judges of the Special Court, who announced the final judgment on 17.12.2019, namely, Justices Waqar Ahmed Seth,[26] Nazar Akbar[27] and Shahid Karim,[28] were appointed with the approval of the Federal Government, i.e., the Federal Cabinet. Therefore, the High Court could not have set aside the acts of filing the complaint and the constitution or reconstitution of the Special Court on the ground that Mustafa Impex was not complied with.

Violation of the directions and judgments of this Court

25. Another disconcerting dimension of the case is that the High Court acted in outright violation of the express directions and judgments of this Court. The matter of the trial of the respondent for the offence of high treason had come before this Court a number of times and was dealt with in Moulvi Iqbal Haider,[29] Abdul Hameed Dogar[30] and Lahore High Court Bar Association,[31] and the respondent was duly represented by counsel in all these cases.

26. Despite the said authoritative judgments and orders of this Court dealing specifically with the trial of the respondent by the Special Court, the High Court in derogation of the same set aside the entire proceedings of the trial of the respondent through the impugned judgment. It ignored particularly the judgment of this Court rendered in Lahore High Court Bar Association[32] and declared Section 9 of the Special Court Act ultra vires in its entirety, which was not even prayed for by the respondent.

27. Failing to adhere to the judgments and orders of the Supreme Court undermines the credibility and effectiveness of the entire judicial system established by the Constitution. Judgments of this Court being binding on all judicial and executive authorities of the country is a constitutional obligation under Articles 189 and 190 of the Constitution. This obligation reflects a fundamental commitment to preserving the integrity and sanctity of the Supreme Court. Disregard of the abovementioned judgments and orders by the Lahore High Court amounts to judicial effrontery and impropriety. The impugned judgment passed by the

Lahore High Court in sheer violation of the judgments and orders of this Court is, therefore, not only without jurisdiction but also unconstitutional.

28. The foregoing are the reasons for our short order dated 10.01.2024 whereby these petitions were dismissed in the following terms:

The impugned judgment dated 13 January 2020 passed by the Lahore High Court, Lahore in Writ Petition No. 71713 of 2019 is not sustainable and is accordingly set aside by converting these petitions into appeals and allowing them. Detailed reasons shall be given later.

MWA/T-3/SC Appeals allowed.

**P L D 2024 Supreme Court 642**

**Present: Syed Mansoor Ali Shah, Muhammad Ali Mazhar and Athar Minallah, JJ**

**SUNNI ITTEHAD COUNCIL, FAISALABAD and others---Petitioners**

**Versus**

**ELECTION COMMISSION OF PAKISTAN through its Secretary, Islamabad, and others---Respondents**

C.P.L.As. Nos. 1328, 1329 and C.M.A. No. 3554 of 2024, decided on 6th May, 2024.

(Against the judgment of Peshawar High Court dated 25.03.2024, passed in Writ Petition No. 1272-P/2024, etc.)

**Constitution of Pakistan---**

----Arts. 51(6)(d), 51(6)(e) & 106(2)(c)---Reserved seats for women and non-Muslims in the National and Provincial Assemblies, allocation of---Plea of petitioner (political party) was that it was a parliamentary party having 82 general seats in the National Assembly, therefore, it was entitled to reserved seats as per the proportional representation system in terms of Articles 51(6)(d) & (e) and 106(2)(c) of the Constitution---Counsel for the Election Commission of Pakistan ("ECP"), contended that according to Articles 51 and 106 of the Constitution the reserved seats have to be allocated on the proportional representation system only to those political parties who have contested the general elections and won atleast one seat in the said elections; that since the petitioner-party did not contest the elections and did not win even a single seat in the general elections, it cannot be considered as a political party in terms of Articles 51(6)(d) & (e) and 106(2)(c) of the Constitution, for the purpose of allocating the reserved seats---Supreme Court observed that questions of allocation of reserved seats in the National and Provincial Assemblies touch upon the foundational constitutional concept of a parliamentary democracy that the voice of the electorate is truly reflected in the composition of the assemblies; that democratic mandate necessitates that the allocation of reserved seats enhances the representativeness of the electorate in the assemblies and upholds the principles of fairness and transparency in the electoral process, and that it is paramount to prioritize the integrity of the elections so that the Parliament remains a true reflection of the will of the people---Supreme Court granted leave to appeal to consider the contentions of all parties to the case on the meaning and scope of proportional representation system for allocating the reserved seats for women and non-Muslims under Articles 51(6)(d) & (e) and 106(2)(c) of the Constitution---Supreme Court directed that in the meantime operation of the impugned judgment of the (Peshawar) High Court, as well as, the order of the Election Commission of Pakistan is suspended; that such interim order relates to the disputed seats only, i.e., the reserved seats allocated over and above the initially allocated reserved seats to the political parties; that present order is to operate prospectively, w.e.f., from today, and that since the questions under consideration require constitutional interpretation, the matter be placed before the Committee under Section 4 of the Supreme Court (Practice and Procedure) Act, 2023 for constitution of a larger bench to hear the appeals.

For the Petitioner(s):

Faisal Siddiqui, Advocate Supreme Court, Barrister Gohar Ali Khan, Advocate Supreme Court and Salman Akram Raja, Advocate Supreme Court.

Through V.L. Lahore:

Sameer Khosa, Advocate Supreme Court, Syed Rifaqat Hussain Shah, Advocate-on-Record and Muhammad Usman Mirza, Advocate-on-Record.

For the Respondent(s):

Mansoor Usman Awan, AGP., Ch. Aamir Rehman, Addl. AGP., Sikandar Bashir Mohmand, Advocate Supreme Court, Zafar Iqbal, Sp. Secy. (ECP), M. Arshad, D.G. (L) (ECP), Khurram Shahzad, ADG(L), Falak Shair, L.C. (ECP) and Amir Javed, Advocate Supreme Court.

Date of hearing: 6th May, 2024.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**Learned counsel for the petitioners submits that allocation of the reserved seats for women and non-Muslims to the political parties other than the petitioner, Sunni Ittehad Council

("SIC"), is in violation of Article 51(6)(d) and (e) of the Constitution of the Islamic Republic of Pakistan ("Constitution") which provides for proportional representation system on the basis of total number of general seats secured by each political party from the Province concerned in the National Assembly. Once a political party has been allocated the reserved seats on the basis of proportional representation system, the remaining seats cannot be re-allocated to the same political party. As per Letter issued by the Election Commission of Pakistan dated 25.04.2024, he submits, it has been acknowledged that SIC is a parliamentary party having 82 general seats in the National Assembly. Therefore, SIC is entitled to reserved seats as per the proportional representation system in terms of Articles 51(6) (d) & (e) and 106(2)(c) of the Constitution.

2. On the other hand, Mr. Sikandar Bashir Mohmand, learned counsel for the Election Commission of Pakistan ("ECP"), submits that according to Articles 51 and 106 of the Constitution the reserved seats have to be allocated on the proportional representation system only to those political parties who have contested the general elections and won atleast one seat in the said elections. Since SIC did not contest the elections and did not win even a single seat in the general elections, it cannot be considered as a political party in terms of Articles 51(6) (d) & (e) and 106(2) (c) of the Constitution, for the purpose of allocating the reserved seats. Learned Attorney-General for Pakistan ("AGP") supports the contentions of the learned counsel for the ECP. Both the learned counsel for ECP and the learned AGP frankly concede that this is a case of first impression involving questions of constitutional law that have not been addressed by the Court earlier.

3. The above questions of allocation of reserved seats in the National and Provincial Assemblies touch upon the foundational constitutional concept of a parliamentary democracy that the voice of the electorate is truly reflected in the composition of the assemblies. Democratic mandate necessitates that the allocation of reserved seats enhances the representativeness of the electorate in the assemblies and upholds the principles of fairness and transparency in the electoral process. It is paramount to prioritize the integrity of the elections so that the Parliament remains a true reflection of the will of the people.

4. Therefore, leave to appeal is granted to consider, amongst others, the said questions. The appeals are to be posted for hearing on 03.06.2024. The appeal arising out of these petitions will be heard on the basis of available record; however, both sides are at liberty to file any additional documents, which were part of the record before the fora below but have not been filed with instant petitions.

5. Notices under Order XXVII-A, C.P.C. be issued to the learned AGP as well as the Advocates-General of the Provinces.

C.M.A. No. 2920 of 2024:

6. Notice for the same date. In the meanwhile, operation of the impugned judgment of the Peshawar High Court dated 25.03.2024, as well as, the order of the Election Commission of Pakistan dated 01.03.2024 is suspended. It is, however, clarified that this interim order relates to the disputed seats only, i.e., the reserved seats allocated over and above the initially allocated reserved seats to the political parties. It is also clarified that this order is to operate prospectively, w.e.f., from today.

C.M.A. No. 3554 of 2024:

7. Notice. To be heard along with C.P.L.A. No.1328/2024 on 03.06.2024.

8. Since the questions under consideration require constitutional interpretation, the matter be placed before the Committee under Section 4 of the Supreme Court (Practice and Procedure) Act, 2023 for constitution of a larger bench to hear the appeals.

MWA/S-17/SC Order accordingly.

**P L D 2023 Supreme Court 648**

**Present: Syed Mansoor Ali Shah and Ayesha A. Malik, JJ**

**Syeda AYESHA SUBHANI---Petitioner**

**Versus**

**The STATE and others---Respondents**

Crl. P. 588-L of 2023, decided on 28th August, 2023.

(Against the order of Lahore High Court, Lahore dated 17.04.2023, passed in Crl. Misc. No.77194-B of 2022)

**(a) Criminal Procedure Code (V of 1898)---**

----S. 497(1), third proviso---Constitution of Pakistan, Arts. 9, 10A & 14---Second bail application/petition---Maintainability---Fresh grounds---Scope---Delay in trial that occurs after rejection of first bail application on statutory ground of delay in conclusion of trial---Delay in the conclusion of the trial that occurs for no fault of the accused in the year following the rejection of his bail application on the statutory ground of delay, is to be considered a "fresh ground", not earlier available to him, for entertaining his second bail application, within the meaning and scope of that term.

As the statutory right to be released on bail on the ground of delay in the conclusion of the trial flows from the constitutional rights to liberty, fair trial and dignity guaranteed under Articles 9, 10A and 14 of the Constitution, the provisions of the 3rd proviso to section 497(1), Cr.P.C. must be fashioned in a manner that is progressive and expansive of these rights of the accused, who is still under trial, and his guilt being not yet proven, has in his favour the presumption of innocence.

The entitlement of an accused to post-arrest bail on the statutory ground of delay in the conclusion of the trial is time-based. If the delay exceeds a year for no fault of the accused, in offences punishable other than death, the right of the accused to post-arrest bail ripens. This right continues to ripen for each period of one year starting from the arrest of the accused if he satisfies the court that he is not at fault for the delay in a particular period of one year unless his case falls within the 4th proviso to Section 497(1), Cr.P.C. Denying this recurring right to post-arrest bail to the accused would amount to giving the prosecution a license to delay the conclusion of the trial for an unlimited period of time after the dismissal of the first bail application of the accused on the statutory ground of delay. The accused would, in such an eventuality, be left confined as an under trial prisoner for an unlimited period of time at the mercy of the prosecution to conclude the trial as and when it pleases to do so. The accused shall have no incentive to attend the trial regularly and cooperate in the early conclusion thereof, after the dismissal of his first bail application, if his subsequent orderly conduct cannot entitle him to post-arrest bail despite non-conclusion of the trial for no fault of his in the next one year. Such a situation would be absolutely antithetical to the constitutional scheme of fundamental rights and make a mockery of the rights to liberty, fair trial and dignity of the accused guaranteed under the Constitution.

The purpose and objective of the 3rd proviso to section 497(1), is to ensure that the trial of an accused is conducted expeditiously and that the pre-conviction detention of a person accused of an offence not punishable with death does not extend beyond the period of one year. If the trial in such an offence is not concluded within a period of one year for no fault of the accused, the statutory right to be released on bail ripens in his favour unless his case falls within any of the clauses of the 4th proviso. This right of the accused creates a corresponding duty upon the prosecution to conclude the trial within the specified period of one year. If any act or omission of the accused hinders the conclusion of the trial within a period of one year, no such right will accrue to him and he would not be entitled to be released on bail on the statutory ground of delay in conclusion of the trial. But if after the rejection of his plea for bail on this ground, the accused corrects himself and abstains from doing any such act or omission in the year following such rejection but the prosecution fails to perform its duty in concluding the trial within the specified period of one year, a fresh right, that is to say, a fresh ground, would accrue in his favour. The 3rd proviso to Section 497, Cr.P.C., thus, becomes operative as and when a period of one year passes but the trial is not concluded for no fault of the accused. Therefore,the delay in the conclusion of the trial that occurs for no fault of the accused in the year following the rejection of his bail application on the statutory ground of delay, is to be considered a "fresh

ground", not earlier available to him, for entertaining his second bail application, within the meaning and scope of that term as elaborated in the case reported as Nazir Ahmed v. State PLD 2014 SC 241

Shakeel Shah v. State 2022 SCMR 1 ref.

**(b) Interpretation of statutes---**

----Criminal statute---If two interpretations of a provision of a criminal statute are reasonably possible, the one that is favourable to the accused, not the prosecution, should be preferred.

Bashir v. State 1998 SCMR 1794; Shahista Bibi v. Superintendent Jail PLD 2015 SC 15; Waris Ali v. State 2017 SCMR 1572; Province of Punjab v. Muhammad Rafique PLD 2018 SC 178 and Sahib Ulah v. State 2022 SCMR 1806 ref.

Jawad Zafar, Advocate Supreme Court for Petitioner/ Complainant.

Raja Shafqat Khan Abbasi, DAG, Saqib Hafeez, A.D. FIA, Cyber Crimes, Lahore for the State.

Munir Ahmed Bhatti, Advocate Supreme Court for Respondent along with Syed Junaid Arshad, the respondent/accused, in person.

Date of hearing: 28th August 2023.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**Through this petition, the petitioner/complainant seeks leave to appeal against an order of the Lahore High Court, dated 17.04.2023, whereby the High Court has allowed the post-arrest bail application of the respondent/ accused and granted him bail on the statutory ground of delay in the conclusion of the trial. The petitioner prays for setting aside the order of the High Court and cancellation of the bail granted to the respondent.

2. Briefly, the factual background of the case is that in the earlier round, the post-arrest bail application of the respondent was dismissed by the Lahore High Court by its order dated 11.01.2021, on merits as well as on the statutory ground of delay. The High Court, however, also directed the trial court to conclude the trial within a period of 30 days from the date of receipt of that order. The respondent, through a petition for leave to appeal, challenged the said order of the High Court before this Court, but on perusing the report of the trial court as to who caused the delay in the conclusion of the trial, learned counsel for the respondent did not press the petition, and the same was disposed of by this Court on 24 February 2021 with the observation that the trial court would decide the case expeditiously.

3. The trial of the respondent, however, could not be concluded till 15 September, 2022, when the respondent filed a fresh post-arrest bail application in the trial court, on the statutory ground of delay in the conclusion of the trial. The trial court dismissed the application of the respondent on 11 November 2022, with the observation that the earlier post-arrest bail application on the statutory ground of delay stood dismissed by the High Court as well as by the Supreme Court; therefore, the fresh application on the same ground was not maintainable. The respondent then went up to the High Court, and by the impugned order of 17 April 2023, the High Court allowed the second post-arrest bail application of the respondent on the statutory ground of delay in the conclusion of the trial; hence, the present petition.

4. We have heard the arguments of the learned counsel for the parties and examined the cases cited by them, as well as, the record of the case.

5. The report of the trial court submitted to the High Court shows that from April 2022 to April 2023 when the High Court granted the respondent bail, for a period of one year, the conclusion of the trial was mainly hindered by a defect in the functioning of the video-link system in the jail through which the respondent had to appear before the trial court. Other than this, on a few hearings during this year, the respondent could not appear because he was seriously ill and was hospitalized while on some other hearings when the respondent appeared the witnesses of the prosecution were not present. Thus, the respondent was not at fault for the delay in the conclusion of the trial at least in the year preceding the date on which he was granted bail by the High Court. The only question of law that requires determination, therefore, is whether the delay in the conclusion of the trial that occurs for no fault of the accused in the year following the rejection of his first bail application on the statutory ground of delay, can be considered a "fresh ground", not earlier available to him, for

entertaining his second bail application, within the meaning and scope of that term as elaborated in Nazir Ahmed[1].

6. The present case does not involve any offence punishable with death.[2] And as per the 3rd proviso to Section 497(1), Cr.P.C., which provides the statutory ground of delay in the conclusion of the trial for granting post-arrest bail, a person accused of any offence not punishable with death is to be released on bail as of right if he has been detained for such offence for a continuous period exceeding one year and the delay in the conclusion of the trial has not been occasioned by his any act or omission or any other person acting on his behalf nor does his case fall within the 4th proviso to Section 497(1), Cr.P.C.

7. The argument of the learned counsel for the petitioner is that once a bail application of the accused on the statutory ground of delay is dismissed, holding the accused responsible for causing the delay in the conclusion of the trial, his second bail application on the same ground for any subsequent period cannot be entertained. The argument does not appeal to us. Firstly, the entitlement of an accused to post-arrest bail on the statutory ground of delay in the conclusion of the trial is time-based. If the delay exceeds a year for no fault of the accused, in offences punishable other than death, the right of the accused to post-arrest bail ripens. This right continues to ripen for each period of one year starting from the arrest of the accused if he satisfies the court that he is not at fault for the delay in a particular period of one year unless his case falls within the 4th proviso to Section 497(1), Cr.P.C. Secondly, denying this recurring right to post-arrest bail to the accused would, in our opinion, amount to giving the prosecution a license to delay the conclusion of the trial for an unlimited period of time after the dismissal of the first bail application of the accused on the statutory ground of delay. The accused would, in such an eventuality, be left confined as an undertrial prisoner for an unlimited period of time at the mercy of the prosecution to conclude the trial as and when it pleases to do so. Thirdly, the accused shall have no incentive to attend the trial regularly and cooperate in the early conclusion thereof, after the dismissal of his first bail application, if his subsequent orderly conduct cannot entitle him to post-arrest bail despite non-conclusion of the trial for no fault of his in the next one year. Such a situation would be absolutely antithetical to the constitutional scheme of fundamental rights and make a mockery of the rights to liberty, fair trial and dignity of the accused guaranteed under the Constitution.

8. It is a well-settled principle of interpretation in our jurisdiction that if two interpretations of a provision of a criminal statute are reasonably possible, the one that is favourable to the accused, not the prosecution, should be preferred.[3] As the statutory right to be released on bail on the ground of delay in the conclusion of the trial flows from the constitutional rights to liberty, fair trial and dignity guaranteed under Articles 9, 10A and 14 of the Constitution of Pakistan, the provisions of the 3rd proviso must be fashioned in a manner that is progressive and expansive of these rights of the accused, who is still under trial, and his guilt being not yet proven, has in his favour the presumption of innocence.

9. The purpose and objective of the 3rd proviso, as observed by this Court in Shakeel Shah[4], is to ensure that the trial of an accused is conducted expeditiously and that the pre-conviction detention of a person accused of an offence not punishable with death does not extend beyond the period of one year. If the trial in such an offence is not concluded within a period of one year for no fault of the accused, the statutory right to be released on bail ripens in his favour unless his case falls within any of the clauses of the 4th proviso. This right of the accused creates a corresponding duty upon the prosecution to conclude the trial within the specified period of one year. If any act or omission of the accused hinders the conclusion of the trial within a period of one year, no such right will accrue to him and he would not be entitled to be released on bail on the statutory ground of delay in conclusion of the trial. But if after the rejection of his plea for bail on this ground, the accused corrects himself and abstains from doing any such act or omission in the year following such rejection but the prosecution fails to perform its duty in concluding the trial within the specified period of one year, a fresh right, that is to say, a fresh ground, would accrue in his favour. The 3rd proviso to Section 497, Cr.P.C., thus, becomes operative as and when a period of one year passes but the trial is not concluded for no fault of the accused. We are, therefore, of the opinion that the delay in the conclusion of the trial that occurs for no fault of the accused in the year following the rejection of his bail application on the statutory ground of

delay, is to be considered a "fresh ground", not earlier available to him, for entertaining his second bail application, within the meaning and scope of that term as elaborated in Nazir Ahmed.

10. The High Court has arrived at the right decision but has been rather remiss in elaborating the entitlement of the respondent to maintain a second post-arrest bail on the fresh statutory ground of delay that had arisen due to the delay in the conclusion of the trial for his no fault in a subsequent period of one year, which was earlier found not available to him for a previous period of one year. However, for the above reason, we find that the High Court has acted correctly in entertaining the second bail application of the respondent on the fresh ground of delay in the conclusion of the trial for a period of one year after the dismissal of his earlier bail application. There is no legal justification for interference by this Court in the impugned order. The petition is found meritless; it is therefore dismissed and the leave to appeal is declined. However, as the trial in the case has been pending for long, we direct the trial court to conclude the trial within a period of three months from the date of receipt of this order.

MWA/A-35/SC Petition dismissed.

**P L D 2024 Supreme Court 830**

**Present: Syed Mansoor Ali Shah, Muhammad Ali Mazhar and Athar Minallah, JJ**

**Messrs TANVEER COTTON MILLS (PVT.) LTD. and another---Petitioners**

**Versus**

**SUMMIT BANK LIMITED and others---Respondents**

C.Ps.L.As. Nos. 1422-L and 1423-L of 2021 and C.M.As Nos. 1636-L, 1758-L and 1759-L of 2021 and C.M.As Nos.2160, 2161, 2216 and 2217 of 2024, decided on 28th June, 2024.

(Against the consolidated judgment of the Lahore High Court, Lahore, dated 17.06.2021, passed in C.O. Nos. 28 and 29 of 2013).

**(a) Companies Act (XIX of 2017)---**

----Ss. 6(1) & 387, proviso---Constitution of Pakistan, Art. 10A---Company ordered to be wound up by the Court---Appointment of liquidator to manage the affairs of the company---Winding-up order challenge to---Maintainability---Directors, powers of---Company that has been ordered to be wound up can challenge the winding-up order in its name, provided the institution of appeal and the person acting on behalf of the company are authorized by a resolution of its board of directors---Section 6(1) of the Companies Act, 2017 provides that "[a]ny person aggrieved by any judgment or final order of the Court passed in its original jurisdiction under this Act may, within sixty days, file a petition for leave to appeal in the Supreme Court of Pakistan."---It uses the general expression "any person aggrieved" and does not mention the specific persons competent to file a petition for leave to appeal---Company against which a winding-up order has been passed falls within the scope of the expression "any person aggrieved" and thus can file a petition for leave to appeal in the Supreme Court under Section 6(1) of the 2017 Act---Company can exercise such right of appeal through its directors---Upon the commencement of the winding-up proceedings, despite the appointment of the liquidator, certain powers still remain with the directors of the company who, before the winding-up order, had the ultimate responsibility for managing the company and acting in its best interests in their fiduciary capacity---Such powers are usually referred to as 'residuary powers', and are not affected by the provisions of company law like the proviso to Section 387 of the Companies Act, 2017---Therefore, a company against which the winding up order has been passed is to exercise its right of appeal through the board of directors---Board of directors can, by its resolution, authorise any person, including the former chief executive of the company, to act on behalf of the company in filing an appeal or a petition for leave to appeal against the winding-up order---When the directors can defend the original winding-up proceeding, they surely can also file and pursue an appeal arising from that original proceeding, as it is an integral part of defending the company from being wound up until it stands wound up or dissolved---This continuity ensures that the company retains its right of defense throughout the legal process---It is a necessary corollary of the company's right to appeal that its directors control the conduct of the appeal, just as they had control over the defence to the winding-up petition in the first instance---Denying the directors the capacity to exercise the company's right to appeal would effectively deprive the company of its locus standi to challenge the winding-up order, which would be contrary to the fundamental right of every person, including a juristic person like a company, to a fair trial and due process in the determination of civil rights and obligations, guaranteed by Article 10A of the Constitution---Regarding the expenses/costs for filing the appeal or petition for leave to appeal, the liquidator upon his appointment takes over the charge of all the assets and funds of the company, and the directors no longer have any control or authority to make or authorize any expenditure therefrom---Given this position, the directors inevitably have to arrange the funds for payment of fees to the counsel, etc., from their personal sources other than the funds and assets of the company and also bear the costs of appeal or petition for leave to appeal, if any, in case of dismissal---However, if the company's appeal succeeds and the winding-up order is set aside, they may get reimbursement of those expenses from the company's funds under a resolution of the board of directors made after the success of the appeal.

Re Diamond Fuel Company (1879) 13 Ch. D. 400; Ripon Press and Sugar Mill Company v. Gopal Chetti (1931) 58 Ind App 416; U.K. Jurisdiction: Re Union Accident Insurance Co. Ltd. (1972) 1 All ER 1105; Closegate Hotel Development (Durham) Ltd. v. McLean (2013) EWHC 3237 (Ch). Indian Jurisdiction; Anil

Kumar Sachdeva v. Four 'A' Asbestos [1980] 50 Comp Cas 122 (Del); Sinha Watches v. Gujarat S.F.C. (1985) 58 Com Cas 489 (Guj); Tata Finance Ltd. v. Chemox Chemical Industries, [2000] 100 Com Cas 338 (Bom); Rishabh Agro Industries v. P.N.B. Capital Services AIR 2000 SC 1583; Modi Rubber Ltd. v. Madura Coats Ltd. MANU/UP/1521/2004=2004 SCC Online All 1400 Australian Jurisdiction: Re Laverton Nickel (1979) 3 ACLR 945; Re Rick Wilson (1982) 7 ACLR 354. South African Jurisdiction: O'Connell Manthe and Partners v. Vryheid Minerale 1979 (1) SA 553 (T); Storti v. Nugent (2001) 3 SA 783 (W); Praetor v. Aqua Earth Consulting CC (162/2016) [2017] ZAWCHC 8 Malaysian Jurisdiction; Sri Hartamas Development v. MBF Finance (1991) LRC (Comm) 595; KTL v. Azrahi Hotels (2003) 3 CLJ 49. Singapore Jurisdiction; Sun Electric Power v. RCMA Asia (2021) 2 SLR 478; Hin Leong Trading v. Rajah and Tann, (2022) SGCA 28; Closegate Hotel Development (Durham) Ltd. v. McLean (2013) EWHC 3237 (Ch) and Re Rick Wilson (1982) 7 ACLR 354 ref.

**(b) Appeal---**

----Person adversely affected---Appeal, right of---Where a right of appeal is provided from a judgment, decree or order without specifying the persons who can avail it, every person who is adversely affected and thus aggrieved by such judgment, decree or order can avail that right of appeal.

Shahid Ikram Siddiqui, Advocate Supreme Court, Muhammad Imran Malik, Advocate Supreme Court, Tariq Aziz, Advocate-on-Record and Mian Liaqat Ali, Advocate-on-Record for Petitioners.

Salman Aslam Butt, Sr. Advocate Supreme Court, Shehzada Mazhar, Advocate Supreme Court, Muhammad Shoaib Rashid, Advocate Supreme Court, Anis M. Shahzad, Advocate-on-Record and Mobin Ahmad Siddiqui, Advocate-on-Record for Respondents.

Barrister Haris Azmat, Advocate Supreme Court, assisted by Ms. Faiza Asad, Advocate and Ch. Akhtar Ali, Advocate-on-Record for Applicants (in C.M.As. Nos. 2216, 2217 of 2024)

Uzair Karamat Bhandari, Advocate Supreme Court, Khwaja Ahmad Hosain, Advocate Supreme Court and Faisal Siddiqi, Advocate Supreme Court, Amicus Curiae.

Akif Saeed, Chairman, SECP, Muzaffar Ahmed Mirza, CP, SECP, Shamshad A. Rana, SPP, SECP. Barrister Omer Malik, SPP, SECP and Hussain Raza, SPP, SECP for the SECP.

Date of hearing: 7th May 2024.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**Two companies, Messrs Tanveer Cotton Mills (Pvt.) Ltd. and Messrs Tanveer Spinning and Weaving Mills (Pvt.) Ltd., ("petitioner-companies") have filed these petitions for leave to appeal under Section 6(14) of the Companies Act 2017 against a consolidated judgment of a Company Bench of the Lahore High Court, dated 17 June 2021 ("impugned judgment"). By the impugned judgment, the Company Bench allowed the petitions of the creditors, Summit Bank Ltd. and MCB Bank Ltd. ("respondent-banks"), for winding up the petitioner-companies and appointed official liquidators to manage the affairs of the petitioner-companies until the conclusion of the winding-up proceedings.

Further, the Company Bench ordered that since the industrial units owned by the petitioner-companies were operational, the official liquidators would ensure their continued operation through the existing employees.

2. The petitioner-companies have filed these petitions through their former chief executive, Mian Azhar Saleem, who is duly authorized by the resolutions of the board of directors of the petitioner-companies. However, before the Court could proceed to hear these petitions on their merits, the learned counsel for the respondent-banks raised a preliminary objection. He argued that since the petitioner-companies had been ordered to be wound up and the official liquidator appointed by the impugned judgment, they could not maintain these petitions in their names, especially through their former chief executive, who no longer has any authority in managing the affairs of the petitioner-companies after the appointment of the official liquidators. In support of his argument, he cited two judgments of the High Courts: (i) Hala Spinning Ltd. v. Industrial Development Bank (2002 CLD 978), and (ii) Muhammad Akbar v. Masood Baghpati (2019 CLD 1). This objection of the learned counsel for the respondent-banks thus gave rise to an important question of law, that is:

Whether a company that has been ordered to be wound up can challenge the winding-up order in its name through its board of directors or the chief executive officer.

The cases referred to by the learned counsel for the respondent-banks, however, were found not relevant, as they do not deal with the said question. The learned counsel for the petitioner-companies also could not cite any case of this Court or of any of the High Courts of the country that has dealt with the said question.

3. In this view of the matter and considering the importance of the question, we appointed Messrs Uzair Karamat Bhandari, Khawaja Ahmad Hosain and Faisal Siddiqi, distinguished practitioners in corporate law, as amici curiae to assist the Court in the matter. The learned amici curiae submitted comprehensive written briefs and presented detailed oral arguments on the said question of law. We appreciate their invaluable assistance and express our gratitude for their contribution. Additionally, Mr. Shahzada Mazhar, learned counsel for one of the respondent-banks, Barrister Haris Azmat, learned counsel for the applicants in the connected C.M.As. 2216-17 of 2024, and Mr. Akif Saeed, the Chairman, SECP, filed written submissions on the question.

4. We have read the cases referred to and considered the arguments on the aforementioned question of law.

5. While the question before us appears new in our jurisdiction, it has many precedents in other jurisdictions. The cases referred to us from other jurisdictions have answered the question in the affirmative, holding that a company that has been ordered to be wound up can challenge the winding-up order in its name, provided the institution of appeal and the person acting on behalf of the company are authorized by a resolution of its board of directors. No judgment from any jurisdiction has been cited by the learned amici curiae that takes a divergent view. Having reviewed the cases referred to, we concur with the view taken therein and the reasons stated. An in-depth discussion of these cases, we think, is unnecessary; instead, we find it appropriate to briefly state the main reasons that persuaded us to agree with the said view.

6. A well-settled principle of law, which hardly needs any references, is that where a right of appeal is provided from a judgment, decree or order without specifying the persons who can avail it, every person who is adversely affected and thus aggrieved by such judgment, decree or order can avail that right of appeal. A company is a separate juristic person, distinct from its directors and shareholders. When every person has a right to appeal a judgment, decree or order made against him, a company, which is also a person, cannot be treated differently. Just as any other person against whom an order is made can do, a company also has the right to argue before the appellate court that an order made against it is wrong. A winding-up petition is filed against a company. The winding-up order is made against the company. The company is thus a person aggrieved by such an order. Therefore, a company against which a winding-up order is passed does have the right to appeal it.[1]

7. Section 6(1) of the Companies Act 2017 provides that "[a]ny person aggrieved by any judgment or final order of the Court passed in its original jurisdiction under this Act may, within sixty days, file a petition for leave to appeal in the Supreme Court of Pakistan." It uses the general expression "any person aggrieved" and does not mention the specific persons competent to file a petition for leave to appeal. However, given the above legal position, a company against which a winding-up order has been passed falls within the scope of the expression "any person aggrieved" and thus can file a petition for leave to appeal in this Court under that Section.

8. However, the matter does not end here. The next question arises: how is the company to exercise its right of appeal? Being a juristic person, it needs to act through natural persons. Who are those natural persons: directors, chief executive officer or liquidator? The cases referred to by the learned amici curiae answer this question in favor of the directors, with which we agree. The reasons for our agreement with and adoption of the same view on this point are as follows.

9. Under company law, as stated in the proviso to Section 387 of the Companies Act 2017, upon the commencement of the winding-up of a company, the liquidator takes the place of the board of directors and the chief executive of the company. They become functus officio, and their powers are assumed by the liquidator. Before the winding-up order, the power to institute or defend litigation in the name of the company regarding its affairs usually vests in the board of directors under its articles. Upon the commencement of the

winding-up proceedings, all powers and functions that were previously vested in the board of directors devolve upon the liquidator, who then acts on behalf of the company for its affairs. The winding-up order, however, is the very order under which the liquidator derives his authority to act on behalf of the company. It would be absurd and self-contradictory to suggest that the liquidator should act under the winding-up order to wind up the company and also challenge the same order in an appeal to save the company from being wound up. The very object of the appeal is to revoke the winding-up order and discharge the liquidator, causing the liquidator to lose his position and remuneration if the appeal succeeds. One is not expected or required to saw off the tree's branch he is sitting on. Further, it is the duty of the liquidator to act with complete impartiality between the parties contesting for and against the winding-up of the company. He is not to be a party in this contest. Consequently, the legal position emerges that despite the appointment of the liquidator, certain powers still remain with the directors of the company who, before the winding-up order, had the ultimate responsibility for managing the company and acting in its best interests in their fiduciary capacity. Such powers are usually referred to as 'residuary powers', and are not affected by the provisions of company law like the proviso to Section 387 of the Companies Act 2017.[2]

10. The criterion to determine the 'residuary powers' of the board of directors is to see whether or not the power in question has been passed on to the liquidator. If the answer is that it has not, that is a valid reason to conclude that the board of directors still retains the same.[3] Since the liquidator cannot act on behalf of the company in filing an appeal against the winding-up order, the board of directors retains this power. Therefore, a company against which the winding-up order has been passed is to exercise its right of appeal through the board of directors. The board of directors can, by its resolution, authorise any person, including the former chief executive of the company, to act on behalf of the company in filing an appeal or a petition for leave to appeal against the winding-up order, as has been done in the present case.

11. Another well-established principle of law also supports the above conclusion: an appeal is a continuation of the original proceeding. No one disputes, or can dispute, that the directors of a company can, and usually do, contest the original proceeding initiated for winding up the company, i.e., the petition filed for winding up the company. A company that is ordered to be wound up does not stand wound up or dissolved upon the making of a winding-up order. The winding-up order does not mark the culmination of the winding-up proceedings but rather, in fact, initiates such proceedings.[4] When the directors can defend the original winding-up proceeding, they surely can also file and pursue an appeal arising from that original proceeding, as it is an integral part of defending the company from being wound up until it stands wound up or dissolved. This continuity ensures that the company retains its right of defense throughout the legal process. It is a necessary corollary of the company's right to appeal that its directors control the conduct of the appeal, just as they had control over the defence to the winding-up petition in the first instance.[5] Denying the directors the capacity to exercise the company's right to appeal would effectively deprive the company of its locus standi to challenge the winding-up order, which would be contrary to the fundamental right of every person, including a juristic person like a company, to a fair trial and due process in the determination of civil rights and obligations, guaranteed by Article 10A of our Constitution.

12. A minor point remains to be addressed: who would pay the counsel for the company in filing the appeal or petition for leave to appeal against the winding-up order, as well as the costs to the respondents if the Court awards the same while dismissing the appeal or petition. Upon his appointment, the liquidator takes over the charge of all the assets and funds of the company, and the directors no longer have any control or authority to make or authorize any expenditure therefrom. Given this position, the directors inevitably have to arrange the funds for payment of fees to the counsel, etc., from their personal sources other than the funds and assets of the company and also bear the costs of appeal or petition for leave to appeal, if any, in case of dismissal.[6] However, if the company's appeal succeeds and the winding-up order is set aside, they may get reimbursement of those expenses from the company's funds under a resolution of the board of directors made after the success of the appeal.

13. Having thus answered the question of law raised and the ancillary points involved therein, we find the preliminary objection of the learned counsel for the respondent-banks to be not maintainable and therefore reject the same.

14. The office shall fix the case for hearing arguments on its merits after the summer vacation.

MWA/T-7/SC Order accordingly.

**P L D 2024 Supreme Court 843**

**Present: Syed Mansoor Ali Shah, Muhammad Ali Mazhar and Athar Minallah, JJ**

**MEHRAN---Petitioner**

**Versus**

**UBAID ULLAH and others---Respondents**

Crl.P.L.A. No. 80-P of 2024, decided on 29th May, 2024.

(Against the judgment of the Peshawar High Court, Peshawar, dated 25.03.2024, passed in Cr. M.B.A. No.551-P of 2024).

**(a) Juvenile Justice System Act (XXII of 2018)---**

----Preamble---Constitution of Pakistan, Art. 35---United Nations Convention on the Rights of the Child (UNCRC), Art. 3---Juvenile justice system---Child justice---Therapeutic jurisprudence---Purpose and objective of the juvenile justice system explained.

The juvenile justice system specifically addresses the situation of children alleged to have infringed criminal law and operates under the premise that juveniles are different from adults and require special attention and treatment. Since juveniles are more amenable to rehabilitation than adults, the juvenile justice system is designed not just to punish but to rehabilitate, emphasizing correction and guidance to help children develop into responsible adults. A range of factors underscore the need for a special justice system for juveniles. These include juveniles' lack of maturity, propensity to take risks, susceptibility to peer influence, as well as intellectual disabilities, mental illness, and victimization. This system is distinct from the ordinary criminal justice system and is based on a rehabilitative and restorative model rather than a retributive one. It emphasizes reducing crime by rehabilitating and reclaiming juvenile offenders, focusing on treating rather than punishing them. Central to this system is the principle of the 'best interest of the child', which ensures the fulfillment of a juvenile's basic rights, needs, identity, social well-being, and physical, emotional and psychological development. The rationale behind this non-punitive approach is that public safety is best served by emphasizing rehabilitation rather than the incapacitation and punishment of juveniles.

Kathleen Daly, 'Restorative v. Retributive Justice' (2002) 4(1) Punishment and Society Sage Publications 55; Anees Jillani, Cries Unheard: Juvenile Justice in Pakistan, Society for the Protection of the Rights of the Child (1999) and Cox, S.M., Conrad, J. J., and Allen, J. M., Juvenile Justice: A guide to theory and practice, McGraw-Hill Humanities, Social Sciences and World Languages (2003) ref.

The main objective of the Juvenile Justice System Act, 2018 ('the 2018 Act') is to modify and amend the law relating to the criminal justice system for juveniles, with a special focus on disposing of their cases through diversion and socially reintegrating with the 'best interest of the child' principle as a primary consideration. This approach, rooted in therapeutic jurisprudence, forms the foundation of the juvenile justice system. Therapeutic jurisprudence involves the use of social science to study the extent to which a legal rule or practice promotes the psychological or physical well-being of the people it affects. It offers an interdisciplinary perspective with a problem-solving approach that views the law itself as a potential therapeutic agent. Therapeutic jurisprudence forms the bedrock of the juvenile justice system, integrating the societal responsibilities of sanction and rehabilitation in line with the principles of rehabilitative and restorative justice. This holistic framework ensures that the juvenile justice system not only addresses legal accountability but also prioritizes the well-being and developmental needs of juvenile offenders. Juvenile justice also falls under the rubric of child justice. While juvenile justice is more narrowly focused on dealing with crimes, including aspects of both punishment and rehabilitation, child justice is more encompassing, aiming to protect and uphold the rights and best interests of all children involved in the legal system. Child justice is also centered around the idea that children, due to their age and maturity, should not be dealt with in the same manner as adults within the legal system. It emphasizes rehabilitation and education, rather than punishment, recognizing the potential for growth and change in young individuals. Both child and juvenile justice systems are shaped by international conventions like the United Nations Convention on the Rights of

the Child (UNCRC), which provides a broad framework and standards for the treatment of children within judicial systems worldwide.

David B. Wexler, Reflections on the Scope of Therapeutic Jurisprudence, 1(1) Psychology, Public Policy, and Law, 220-236 and Patrick H. Tolan and Jennifer A. Titus, 'Therapeutic jurisprudence in juvenile justice' in G.S. Goodman, Children as victims, witnesses, and offenders: Psychological science and the law, New York: Guilford Press, p. 313-333 ref.

**(b) Juvenile Justice System Act (XXII of 2018)---**

----Ss. 2(g), 2(m), 2(o), 6(4) & 6(5)---Juvenile accused---Heinous offence---Bail---Statutory delay in conclusion of trial---Principles---Since both 'minor offence' and 'major offence' are treated as bailable under Section 6(3) of the Juvenile Justice System Act, 2018 ('the 2018 Act'), the ground of delay in the conclusion of the trial provided by Section 6(5) for grant of bail applies solely to juveniles detained for a 'heinous offence'---Therefore, post-arrest bail is to be granted as a matter of right to a juvenile detained for a heinous offence, regardless ofhis age, whether above or below sixteen years, provided the prerequisites of Section 6(5) are fulfilled---Nature of the offence is not a valid ground to withhold bail under Section 6(5) of the 2018 Act.

Khawar Kayani v. State PLD 2022 SC 551 ref.

**(c) Criminal Procedure Code (V of 1898)---**

----S. 497---Juvenile Justice System Act (XXII of 2018), Ss. 6(5) & 8---Penal Code (XLV of 1860),Ss. 302, 324, 392, 427, 201 & 34---Khyber Pakhtunkhwa Arms Act (XXIII of 2013), S. 15---Constitution of Pakistan, Art. 185(3)---Qatl-i-amd committed during robbery---Bail, grant of---Juvenile accused---Statutory delay in conclusion of trial---Main reasons given by the High Court for the denial of bail to the petitioner (juvenile accused) on the statutory ground of delay in the conclusion of the trial were (i) that the petitioner committed a 'heinous offence'; (ii) that the delay in the conclusion of the trial was attributable to the petitioner, as he had moved an application for the determination of his age under Section 8 of the Juvenile Justice System Act, 2018 ("2018 Act"), which took time; and (iii) the frequent absence of the co-accused during the trial also contributed to the delay---Validity---High Court erred in law by attributing the delay in concluding the trial to the petitioner, who had filed an application for determination of his age under Section 8 of the 2018 Act, which took time---Initial duty to determine the age of an accused who appeared or claimed to be a juvenile laid with the police---When the police fails in this duty, it passes on to the court---Therefore, the time spent by the court in making this determination constitutes an act of the court, which cannot be construed as delay caused by the petitioner in the trial, thereby depriving him of his right to bail on the statutory ground of delay---So far as the delay caused by the frequent absence of the co-accused during trial was concerned, the same could not be attributed to the petitioner as one was responsible for his own acts or omissions, not of others---Petitioner was arrested in the present case on 23 February 2023 and had been detained continuously for more than six months since then, with his trial not yet concluded---There was no evidence on record indicating that the delay in concluding the trial was caused by any act or omission of the petitioner---Therefore, the prerequisites of Section 6(5) of the 2018 Act were fulfilled, which entitled the petitioner to the grant of post-arrest bail as a matter of right on the statutory ground of delay in the conclusion of the trial---Petition was converted into an appeal and the same was allowed, the impugned judgment was set aside, and the petitioner was admitted to bail.

Saleem Khan v. State PLD 2020 SC 356; Himesh Khan v. NAB 2015 SCMR 1092 and Khursheed Shah v. State PLD 2022 SC 261 ref.

**(d) Criminal Procedure Code (V of 1898)---**

----S. 497---Juvenile Justice System Act (XXII of 2018), S. 6(5)---Constitution of Pakistan, Art. 185(3)---Bail---Juvenile accused---Statutory delay in conclusion of trial---Period of delay in concluding the trial is calculated from the date of the arrest of the accused.

Saleem Khan v. State PLD 2020 SC 356 ref.

Shabbir Hussain Gigyani, Advocate Supreme Court (Through V.L. Peshawar Registry) for Petitioner.

Noroz Khan, Addl. A.G. KPK along with Complainant in person, Fazal Akbar, DSP and Safdar Iqbal, S.I./I.O for Respondents.

Assisted by: Umer A. Ranjha, Judicial Law Clerk.

Date of hearing: 29th May, 2024.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The petitioner, a juvenile, seeks leave to appeal against the judgment of the Peshawar High Court, Peshawar, dated 25 March 2024 ("impugned judgment"). By the impugned judgment, the High Court dismissed the petitioner's post-arrest bail petition, which was filed on the statutory ground of delay in the conclusion of his trial, in case FIR No. 417/2021, dated 16 August 2021, registered at Police Station Prang, District Charsadda, for offences punishable under Sections 302, 324, 392, 427, 201 and 34 of the Pakistan Penal Code, 1860 ("P.P.C."), and Section 15 of the Khyber Pakhtunkhwa Arms Act, 2013.

2. Briefly, according to the crime report (FIR), the allegations against the petitioner are that during the night hours of 16 August 2021, Ubaid Ullah ("complainant") and Shafiq Ur Rehman ("deceased") were travelling on the motorway when the petitioner, along with the other co-accused, signaled them to stop. The deceased, who was driving the car, did not stop. As a result, the petitioner and the other co-accused fired upon them, causing the deceased to sustain injuries to which he subsequently succumbed, while the complainant remained unhurt.

3. In this case, the petitioner was arrested on 23 February 2023. He filed a bail petition, which was dismissed on merits by both the trial court and the High Court. Thereafter, on 18 September 2023, the petitioner moved an application seeking a determination of his juvenility. Relying on the secondary school certificate of the petitioner and the report of the medical board, the trial court declared the petitioner a juvenile, aged 14 years and 5 months, at the time of the commission of the offence. Therefore, the petitioner was under the age of 16 years at the time of his arrest and detention. The petitioner then moved a second bail petition on the statutory ground of delay in the conclusion of the trial, which was dismissed by both the trial court and the High Court, vide judgments dated 22 January 2024 and 25 March 2024, respectively.

4. The two reasons given by the High Court for the denial of bail to the petitioner on the statutory ground of delay in the conclusion of the trial were (i) that the petitioner committed a 'heinous offence', and (ii) that the delay in the conclusion of the trial was attributable to the petitioner, as he had moved an application for the determination of his age under Section 8 of the Juvenile Justice System Act, 2018 ("2018 Act"), which took time. Additionally, the High Court observed that the frequent absence of the co-accused during the trial also contributed to the delay.

5. We have heard the learned counsel for the parties and have perused the record of the case with their able assistance.

6. We may observe at the outset that the juvenile justice system specifically addresses the situation of children alleged to have infringed criminal law and operates under the premise that juveniles are different from adults and require special attention and treatment. Since juveniles are more amenable to rehabilitation than adults, the juvenile justice system is designed not just to punish but to rehabilitate, emphasizing correction and guidance to help children develop into responsible adults. A range of factors underscore the need for a special justice system for juveniles. These include juveniles' lack of maturity, propensity to take risks, susceptibility to peer influence, as well as intellectual disabilities, mental illness, and victimization. This system is distinct from the ordinary criminal justice system and is based on a rehabilitative and restorative model rather than a retributive one.[1] It emphasizes reducing crime by rehabilitating and reclaiming juvenile offenders, focusing on treating rather than punishing them.[2] Central to this system is the principle of the 'best interest of the child',[3] which ensures the fulfillment of a juvenile's basic rights, needs, identity, social well-being, and physical, emotional and psychological development. The rationale behind this non-punitive approach is that public safety is best served by emphasizing rehabilitation rather than the incapacitation and punishment of juveniles.[4]

7. In Pakistan, the juvenile justice system finds its ideological roots in the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution"). Article 25(3) of the Constitution empowers the State to make special provisions for the protection of children, even if such protection discriminates against adults.

Furthermore, Article 35 of the Constitution mandates that the State shall protect children. As a signatory to the United Nations Convention on the Rights of the Child ("UNCRC"), Pakistan is also under international obligation to take special measures for the protection and rehabilitation of juveniles who come into conflict with the law. It is this international obligation, coupled with Pakistan's compliance with its constitutional mandate
that formed the impetus behind the enactment of the juvenile justice system.[5]

8. The main objective of the 2018 Act is to modify and amend the law relating to the criminal justice system for juveniles, with a special focus on disposing of their cases through diversion and socially reintegrating with the 'best interest of the child' principle as a primary consideration.[6] This approach, rooted in therapeutic jurisprudence, forms the foundation of the juvenile justice system. Therapeutic jurisprudence, as defined by David B. Wexler,[7] involves 'the use of social science to study the extent to which a legal rule or practice promotes the psychological or physical well-being of the people it affects.'[8] It offers an interdisciplinary perspective with a problem-solving approach that views the law itself as a potential therapeutic agent. Therapeutic jurisprudence forms the bedrock of the juvenile justice system, integrating the societal responsibilities of sanction and rehabilitation in line with the principles of rehabilitative and restorative justice.[9] This holistic framework ensures that the juvenile justice system not only addresses legal accountability but also prioritizes the well-being and developmental needs of juvenile offenders. Juvenile justice also falls under the rubric of child justice. While juvenile justice is more narrowly focused on dealing with crimes, including aspects of both punishment and rehabilitation, child justice is more encompassing, aiming to protect and uphold the rights and best interests of all children involved in the legal system. Child justice is also centered around the idea that children, due to their age and maturity, should not be dealt with in the same manner as adults within the legal system. It emphasizes rehabilitation and education, rather than punishment, recognizing the potential for growth and change in young individuals. Both child and juvenile justice systems are shaped by international conventions like the UNCRC, which provides a broad framework and standards for the treatment of children within judicial systems worldwide.

9. With this understanding of the juvenile justice system, we approach and address the bail matter of a juvenile in the instant case. Since the bail matter of the petitioner, a juvenile accused of committing a 'heinous offence', is to be dealt with under subsections (4) and (5) of Section 6 of the 2018 Act, the provisions thereof are cited here for ready reference:

6. Release of a juvenile on bail.-

(1)...

(2)...

(3)...

(4) Where a juvenile of more than sixteen years of age is arrested or detained for a heinous offence, he may not be released on bail if the Juvenile Court is of the opinion that there are reasonable grounds to believe that such juvenile is involved in commission of a heinous offence.

(5) Where the Juvenile Court is of the opinion that the delay in the trial of a juvenile has not been occasioned by an act or omission of such juvenile or any other person acting on his behalf or in exercise of any right or privilege under any law for the time being in force, such juvenile shall be released on bail if he has been detained for a continuous period exceeding six months and whose trial has not been completed.

A bare reading of the above provisions shows that Section 6(4) of the 2018 Act provides that where a juvenile of more than sixteen years of age is arrested or detained for a heinous offence, he may not be released on bail if the Juvenile Court is of the opinion that there are reasonable grounds to believe that such juvenile is involved in the commission of a heinous offence. While, Section 6(5) of the 2018 Act provides that any juvenile who has been detained for a continuous period exceeding six months and whose trial has not been completed shall be released on bail, provided that the delay in the conclusion of the trial has not been occasioned by an act or omission of such juvenile.

10. It is thus evident that while Section 6(4) deals with the matter of bail on merits, while Section 6(5) provides for a distinct and separate ground of bail, namely, the delay in the conclusion of the trial of

the juvenile. It is also important to underline that since both 'minor offence'[10] and 'major offence'[11] are treated as bailable under Section 6(3),[12] the ground of delay in the conclusion of the trial provided by Section 6(5) for grant of bail applies solely to juveniles detained for a 'heinous offence'.[13] Therefore, post-arrest bail is to be granted as a matter of right to a juvenile detained for a heinous offence, regardless of his age, whether above or below sixteen years, provided the prerequisites of Section 6(5) are fulfilled.[14]

11. The 2018 Act is a beneficial legislation that favors juvenile offenders. It not only reduces the period for granting bail on the statutory ground of trial delay for juveniles detained pending trial under the previous law, i.e., the Juvenile Justice System Ordinance, 2000 ("2000 Ordinance"), from one year to six months but also removes the disqualification of having a previous criminal record for bail on this ground. Unlike the 2000 Ordinance or Section 497 of the Criminal Procedure Code, 1898, the 2018 Act does not impose any other statutory disqualifications for granting bail to juveniles on the ground of delay in the conclusion of the trial. The subsequent ameliorative and benevolent legislation, i.e., the 2018 Act, reflects the legislature's intent to ensure that the trial of a juvenile is concluded within six months of his detention, and any delay beyond this period entitles the juvenile to be released on bail. Furthermore, since the denial of bail and detention of an accused pending trial curtail his fundamental rights to liberty, fair trial and dignity guaranteed by Articles 9, 10-A and 14 of the Constitution, statutory provisions on bail matters, such as Section 6(5) of the 2018 Act, must be interpreted in a manner that is progressive and expansive of these rights.

12. Now, turning to the instant case, the approach of the High Court to deny the petitioner the benefit of Section 6(5) of the 2018 Act by observing that the offence is 'heinous' is not legally correct but rather misconceived. The nature of the offence is not a valid ground to withhold bail under Section 6(5) of the 2018 Act; in fact, this provision only applies to heinous offences, as other offences are bailable under Section 6(3) of the 2018 Act.

13. The High Court has also erred in law by attributing the delay in concluding the trial to the petitioner, who had filed an application for determination of his age under Section 8 of the 2018 Act, which took time. It is crucial to emphasize that the initial duty to determine the age of an accused who appears or claims to be a juvenile lies with the police. When the police fail in this duty, it passes on to the court.[15] Therefore, the time spent by the court in making this determination constitutes an act of the court, which cannot be construed as delay caused by the petitioner in the trial, thereby depriving him of his right to bail on the statutory ground of delay.[16] So far as the delay caused by the frequent absence of the co-accused during trial is concerned, the same cannot be attributed to the petitioner as one is responsible for his own acts or omissions, not of others.[17]

14. The petitioner was arrested in this case on 23 February 2023 and has been detained continuously for more than six months since then, with his trial not yet concluded. It is crucial to note that the period of delay in concluding the trial is calculated from the date of the arrest.[18] There is no evidence on record indicating that the delay in concluding the trial was caused by any act or omission of the petitioner. Therefore, the prerequisites of Section 6(5) of the 2018 Act are fulfilled, which entitles the petitioner to the grant of post-arrest bail as a matter of right on the statutory ground of delay in the conclusion of the trial.

15. For the above reasons, the courts below are found to have made a legal error in declining bail to the petitioner under Section 6(5) of the 2018 Act, warranting interference by this Court in the interest of justice. The present petition is, therefore, converted into an appeal and the same is allowed. The impugned judgment is set aside, and the petitioner is admitted to bail, subject to furnishing bail bond in the sum of Rs. 50,000/- with two sureties in the like amount to the satisfaction of the trial court.

MWA/M-29/SC Bail granted.

**P L D 2024 Supreme Court 862**

**Present: Syed Mansoor Ali Shah and Muhammad Ali Mazhar, JJ**

**MUHAMMAD ASHRAF---Petitioner**

**Versus**

**The CHIEF ENGINEER (ADMINISTRATION), WAPDA and others---Respondents**

Civil Review Petition No. 1077 of 2023, decided on 31st May, 2024.

(Against the order dated 08.011.2023 passed in C.M. Appeal No. 157 of 2022).

**(a) Constitution of Pakistan---**

----Art. 188---Supreme Court Rules, 1980, O.XXVI, R. 1---Review jurisdiction of the Supreme Court---Scope---Registrar's original order returning a petition (for leave to appeal) and the Judge-in-Chambers's appellate order maintaining it are both administrative in nature---Review petition against these orders is not entertainable, as Article 188 of the Constitution and Order XXVI of the Supreme Court Rules, 1980 pertain to the review of judicial orders, not administrative orders.

Fazal Muhammad v. State PLD 1987 SC 273; Qausain Faisal v. Federation of Pakistan PLD 2022 SC 675 and Ahsan Abid v. Khusru Bakhtiar PLD 2022 SC 712 ref.

**(b) Supreme Court Rules, 1980---**

----O.XVII, R. 5---Petition filed before the Supreme Court---Frivolous petition---Registrar, duty of---Scope---Petition that does not fall within the scope of any provision of the Constitution, the law or the Supreme Court Rules, 1980 ('the Rules') is "frivolous" and should not be received/entertained by the Registrar, as per Rule 5 of Order XVII of the Rules---Office must be vigilant about this legal position and perform its administrative duty in this regard with due diligence.

Fazal Muhammad v. State PLD 1987 SC 273 and Ahsan Abid v. Khusru Bakhtiar PLD 2022 SC 712 ref.

Petitioner in person.

Nemo for Respondents.

Date of hearing: 31st May, 2024.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**Through the present review petition, the petitioner seeks a review of the order dated 8 November 2023 passed by one of us (Syed Mansoor Ali Shah, J.) whereby his appeal filed against an order of the Registrar, dated 27 May 2022, was dismissed and the said order was maintained. By order dated 27 May 2022, the Registrar had returned being not entertainable a CMA of the petitioner filed for restoration of his C.M.A. No.2384/2022.

2. Briefly, the background facts that have given rise to the present review petition are as follows: By its order dated 3 May 2019, the Federal Service Tribunal dismissed the petitioner's service appeal regarding his annual increments, pensionary benefits, etc., for the period he remained dismissed from service. He filed a petition for leave to appeal (C.P.L.A. 3020/2019) against that order in this Court and also filed a review petition before the Tribunal. The Tribunal dismissed his review petition by its order dated 17 July 2019. Against this order, the petitioner filed another petition for leave to appeal (C.P.L.A. 3774/ 2019).

3. The present review petition pertains to the second CPLA, i.e., C.P.L.A. 3774/2019. This CPLA was dismissed by a two-member Bench on 5 October 2021, for non-prosecution and for being time-barred. Instead of filing a review petition, since the CPLA had been dismissed on the ground of being time-barred also, the petitioner filed an application (C.M.A. 12715/2021) for restoration of the said CPLA. Although this application was not entertainable in view of the law declared in Fazal Muhammad,[1] the office wrongly received and registered it. Anyhow, C.M.A. 12715/2021 was also dismissed by a two-member Bench for non-prosecution on 1 February 2022.

4. The petitioner then filed an application (C.M.A. 2384/2022) for the restoration of C.M.A. 12715/2021. This second application was dismissed by a two-member Bench on 10 May 2022, for non-prosecution and for being non-maintainable. Again, instead of filing a review petition, since C.M.A. 2384/2022 had been dismissed on the ground of being non-maintainable also, the petitioner filed an application (C.M.A.) for the restoration of C.M.A. 2384/2022. The Registrar returned this application for being not entertainable by order dated 27 May

2022, and the petitioner's appeal against this order of the Registrar was dismissed by one of us (Syed Mansoor Ali Shah, J.) vide order dated 8 November 2023. Hence, the petitioner has filed this review petition.

5. We have heard the petitioner who appeared in person and examined the record of the case.

6. Both the Registrar's original order returning the petitioner's CMA and the appellate order maintaining that order were administrative in nature.[2] Therefore, we asked the petitioner to specify under which provision of the Constitution[3] or the Rules[4] he has filed the present review petition. He, however, could not cite any such provision. It hardly needs clarification that Article 188 of the Constitution and Order 26 of the Rules pertain to the review of judicial orders, not administrative orders. The misunderstanding of the petitioner, who has filed the present review petition in person without obtaining any legal advice, is understandable. But, it is surprising that the office has entertained the present review petition despite there being no provision for such a review petition in either the Constitution or the Rules.

7. As held by this Court in Fazal Muhammad[5] on the judicial side and reiterated in Ahsan Abid[6] on the administrative side, a petition that does not fall within the scope of any provision of the Constitution, the law or the Rules is "frivolous" and should not be received/ entertained by the Registrar, as per Rule 5 of Order 17 of the Rules. The office must be vigilant about this legal position and perform its administrative duty in this regard with due diligence.

8. The present review petition is neither entertainable nor maintainable under any provision of the Constitution or the Rules. It is, therefore, dismissed.

MWA/M-24/SC Review dismissed.

**P L D 2024 Supreme Court 873**

**Present: Syed Mansoor Ali Shah, Jamal Khan Mandokhail, Muhammad Ali Mazhar and Athar Minallah, JJ**

**Mst. SAMRANA NAWAZ and others---Appellants/Petitioners**

**Versus**

**MCB BANK LTD. and others---Respondents**

C.P. No. 2646-L of 2018, C.A. No. 17-L of 2019 and C.A. No. 364-L of 2020, decided on 10th May, 2024.

(Against (i) judgment dated 20.11.2018 passed in E.F.A. No.620/2011, (ii) judgment dated 20.11.2018 passed in E.F.A. No.17/2012, and (iii) judgment dated 03.02.2020 passed in E.F.A No.231782/2018 respectively by the Lahore High Court, Lahore).

**(a) Civil Procedure Code (V of 1908)---**

----O. XXI, R. 90, second proviso---Execution of decree---Auction sale---Application to set aside sale on ground of irregularity or fraud---Deposit of amount or furnishing of security in court---Meaning and scope of the second proviso to Rule 90 of Order XXI, C.P.C.---Deposit of the amount, which is required under the second proviso, is not to be made by the applicant along with the application but rather it is to be made on the direction of the court.

Alhamdi Begum v. NBP PLD 1976 Kar. 723; Shafique Shah v. Irshad Begum 1981 CLC 369; Rukhsana v. Muhammad Ilyas 1993 CLC 1949; Ali Match Industries v. IDB 1999 MLD 2127; Niamat Ali v. Muhammad Imran PLD 2003 Lah. 42; Sultan Mahmood v. HBFC 2006 YLR 2776 and Khursheed v. Inam-Ur-Rehman PLD 2009 Lah. 552 approved.

Habib and Company v. MCB PLD 2020 SC 227 overruled.

**(b) Civil Procedure Code (V of 1908)---**

----O.XXI, R. 90, second proviso---Execution of decree---Auction sale---Application to set aside sale on ground of irregularity or fraud---Deposit of amount or furnishing of security in court---Purpose of the second proviso to Rule 90 of Order XXI, C.P.C.---Evidently, the purpose of the second proviso is to discourage frivolous objections---Condition stipulated in the second proviso for entertaining the application ensures that the rule is not misused to delay the completion of the sale and expeditious conclusion of the execution proceedings, and that the objections are made only by bona fide persons on valid grounds---If upon adjudication the application is found frivolous, the amount deposited or the security furnished, as the case may be, by the applicant is to be appropriated for awarding costs to the person(s) who suffer from the delay in completing the sale due to the filing of the application---Therefore, in determining the amount required to be deposited, the executing court should consider various factors such as the decretal amount, the time elapsed since filing the execution petition, the sale amount and the applicant's previous conduct, etc., and fix an amount reflective of the costs likely to be awarded to the affected party in case of dismissal of the application.

**(c) Financial Institutions (Recovery of Finances) Ordinance (XLVI of 2001)---**

----S. 19(7)(a) & (b)---Civil Procedure Code (V of 1908), O.XXI, R.90, second proviso---Execution of decree---Auction sale---Application to set aside sale on ground of irregularity or fraud---Deposit of amount or furnishing of security in court---Effect of clauses (a) and (b) of Section 19(7) of the Financial Institutions (Recovery of Finances) Ordinance 2001 ("Ordinance") on the provisions of Rule 90 of Order XXI, C.P.C., particularly the second proviso thereof---Clauses (a) and (b) of Section 19(7) of the Ordinance are not comprehensive provisions regarding objections to the sale of property in the execution of a decree; they do not specify who can make objections or the grounds on which objections can be made---Therefore, these clauses cannot function independently of Rule 90 of Order XXI, C.P.C., regarding objections to the sale of property in the execution of a decree---It is worth noting that since Section 141, C.P.C., does not apply to applications under Rule 90 of Order XXI, C.P.C., 11 the procedure for investigating objections made under this rule is also summary, as provided in clause (a) of Section 19(7) of the Ordinance---Latter provision merely further prescribes a period of 30 days to complete the investigation of objections through a summary procedure---Clause (b) of Section 19(7) of the Ordinance provides for imposing a penalty of up to twenty percent of the sale price of the property if objections are found by the Banking Court to be malafide or aimed at delaying the sale

of the property---This penalty amount, is to be deposited by the applicant, or its security furnished, as per the second proviso to Rule 90 of Order XXI, C.P.C., before the court entertains the application to set aside the sale---Thus, there is no conflict between the two provisions; clauses (a) and (b) of Section 19(7) of the Ordinance are only complementary to the provisions of Rule 90 of Order XXI, C.P.C., for the execution of decrees under the Ordinance---Banking Court is therefore bound to follow both the provisions in the matter of objections made to the sale of property in the execution of a decree.

Messrs Majid & Sons v. N.B.P 2002 CLD 1742 disapproved

Pakistan Industrial Credit and Investment Corporation v. Government of Pakistan 2002 CLD 1 overruled.

Muhammad Imran Malik, Advocate Supreme Court and Shahid Ikram Siddiqui, Advocate Supreme Court for the Appellants/petitioners (Through video link from Lahore).

Umar Farooq, Advocate Supreme Court, Ashar Elahi, Advocate Supreme Court, Hafeez Saeed Akhtar, Advocate Supreme Court, Muhammad Akram Gondal, Advocate Supreme Court, Muhammad Ilyas Sheikh, Advocate Supreme Court, Mrs. Kausar Iqbal Bhatti, Advocate-on-Record and Muhammad Dawood Khan, OG-II, SME Bank for Respondents (Through video link from Lahore).

Date of hearing: 7th March, 2024.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**While hearing these cases, a three-member Bench of this Court disagreed with the view earlier taken by another three-member Bench in Habib and Company v. MCB (PLD 2020 SC 227) regarding the meaning and scope of the second proviso to Rule 90 of Order XXI of the Code of Civil Procedure, 1908 ("C.P.C."). Consequently, the matter of interpretation of the said proviso was referred for reconsideration by a larger Bench through an order dated 16 March 2021, reported as Samrana Nawaz v. MCB (PLD 2021 SC 581). These cases have, therefore, been posted before this larger Bench for an authoritative pronouncement of the law on the meaning and scope of the second proviso to Rule 90 of Order XXI, C.P.C.

Divergent opinions on the meaning and scope of the second proviso to Rule 90 of Order XXI, C.P.C.

2. Since the essential question involved in the present cases is that of interpretation of the second proviso to Rule 90 of Order XXI, C.P.C., the provisions of the said Rule including the proviso under consideration ("second proviso") are cited at the outset for the convenience of reading and reference:

90. Application to set aside on ground of irregularity or fraud.---Where any immovable property has been sold in execution of a decree the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it:

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud;

Provided further that no such application shall be entertained unless the applicant deposits such amount not exceeding twenty per cent of the sum realised at the sale, or furnishes such security, as the Court may direct.

(Emphasis added)

The two competing opinions on the meaning and scope of the second proviso are: first, that the deposit of the amount, which is required under the proviso, is not to be made by the applicant along with the application but rather it is to be made on the direction of the court; and second, that such deposit of the amount is to be made by the applicant along with the application without waiting for any direction of the court in this regard, i.e., the application at the time of its filing in the court is to be accompanied by deposit of such amount.

3. We may mention here that prior to the decision of this Court in Habib, the first opinion was a considered and consistent opinion of the High Courts in the country.[1] There was not even a single dissent. However, by enunciating the second opinion, Habib impliedly overruled all those decisions of the High Courts without referring to them and without discussing and weighing the reasons stated therein.

Some fundamental principles of statutory interpretation

4. Before we delve into interpreting the second proviso, it would be advantageous to outline some fundamental principles of statutory interpretation that will guide our analysis. We all know that the ultimate objective of interpretation is to ascertain and give effect to the legislative intent, which constitutes the major step in the

process of interpreting statutes and lies at the heart of the interpretative process. The first source from which the legislative intent is to be sought is the words of the statute; then an examination is to be made of the context and purpose of the enactment.[2] Therefore, in the process of interpreting a provision of law, the staring point is to read and understand the words used therein in their ordinary linguistic and grammatical meaning. Generally, such meaning is to be ascribed to them, more so when it is consistent with the context and purpose of the provision in which they are used. However, where there is a potential conflict between the ordinary meaning of words and the purpose of the provision, courts may depart from the literal meaning to advance the purpose and give effect to the legislative intent. Similarly, if the words are ambiguous and can reasonably bear more than one meaning, courts are to ascribe such meaning to them which will be consistent with the purpose of the provision. Or, if the words in their ordinary meaning lead to absurdity, courts may give them such meaning that will make the provision reasonable and consistent with the context and purpose thereof. The interpretative process, thus, combines both literal and purposive approaches to ensure that the legislative intent is ascertained and given effect.[3]

A literal interpretation of the second proviso to Rule 90 of Order XXI, C.P.C.

5. Guided by the above principles, we start our analysis of the second proviso by reading and understanding the words used therein in their ordinary linguistic and grammatical meaning. The provisions of the second proviso are again cited here for ease of reference:

Provided further that no such application shall be entertained unless the applicant deposits such amount not exceeding twenty per cent of the sum realised at the sale, or furnishes such security, as the Court may direct. (Emphasis added)

The keywords that need to be understood for determining the meaning and scope of the second proviso, as underlined, are 'entertained', 'not exceeding twenty per cent' and 'as the Court may direct'.

5.1. The word 'entertain', according to its ordinary dictionary meaning, inter alia means 'to give attention or consideration',[4] 'to take into consideration',[5] 'to receive and take into consideration'[6] or 'to give judicial consideration'.[7] In legal parlance, as observed by this Court in Abdul Khaliq,[8] the word 'entertain' ordinarily means to 'adjudicate upon' or 'proceed to consider on merits'.[9] In the context of its use in the second proviso, we find that the word 'entertain' has been used in the same ordinary legal meaning, i.e., to proceed to consider and adjudicate upon merits. It implies that the application to set aside the sale on the ground of a material irregularity or fraud shall not be adjudicated upon on its merits unless the applicant deposits such amount not exceeding twenty per cent of the sum realised at the sale, or furnishes such security, as the court may direct. It does not imply merely filing of the application by the applicant or receiving of the application by the court.

5.2. The next important words in understanding the meaning and scope of the second provision are 'not exceeding twenty per cent' and 'as the Court may direct'. Their significance is pivotal in discerning the implications of the second proviso. These words being plain expressions of English language do not require further assistance from English language dictionaries. They clearly convey their intended meanings and are self-explanatory. The words 'not exceeding twenty per cent' prescribe the upper limit of the amount that the court may direct to be deposited for entertaining the application, and the words 'as the Court may direct' signify the court's discretion to fix any amount that does not exceed the upper limit.

6. With this understanding of the keywords used therein, we find that the second proviso stipulates that upon filing the application to set aside the sale, the court will direct the applicant to deposit an amount not exceeding twenty per cent of the sum realised at the sale or furnish security for that amount, and provide the applicant with an opportunity to fulfill this requirement. Until the applicant deposits the amount or furnishes the security, the court cannot proceed to consider and adjudicate upon the merits of the application. Only when the applicant complies with this requirement within the allowed time, can the court proceed to consider the application on its merits. If the applicant fails to do so, the court is to dismiss the application without proceeding to consider and adjudicate upon its merits.

7. The bar on entertaining the application thus arises from the failure of the applicant to "deposit such amount not exceeding twenty per cent of the sum realized at the sale, or furnish such security, as the Court may direct". It becomes operative and effective only when the court first determines the amount to be deposited or the nature

of security to be furnished against that amount by the applicant. No applicant can anticipate what amount or security the court would direct him to deposit or furnish, as the case may be; nor can he be allowed to deposit the amount or furnish the security as per his own choice at the time of filing the application. The prior direction of the court to deposit a certain amount or furnish a specified security is a condition precedent (sine qua non) for declining to entertain and dismissing the application under the second proviso.

8. We, therefore, approve the afore-referred opinion of the High Courts[10] that the deposit of the amount, which is required under the proviso, is not to be made by the applicant along with the application but rather it is to be made on the direction of the court, and agree with the same view expressed by the three-member Bench that earlier heard these cases in its order dated 16 March 2021 (Samrana Nawaz v. MCB PLD 2021 SC 581), thus:

The expression "as the Court may direct" leaves little room to speculate whether the applicant is to deposit the 20% of the sale amount at the time of filing the objection petition or at a subsequent stage under direction of the court. The expression "such amount not exceeding twenty percent" further strengthens the position that the amount required to be deposited by the applicant is to be determined by the court which must not exceed twenty percent of the sale amount but can be less than that. An applicant cannot anticipate what the direction of the court would be in this regard and, therefore, he cannot deposit the requisite amount at the time of filing the objection petition. The mandatory requirement of the second proviso appears to become operative only once the court determines the "amount not exceeding twenty percent of the sum realised at the sale" and directs the applicant to deposit the same.

With respect, we find that the view taken in Habib that the second proviso "mandates every application under the provision to be accompanied by 20% of the auction price in order to be entertained" is manifestly wrong; hence, it is overruled.

Purpose of the second proviso to Rule 90 of Order XXI, C.P.C.

9. Next, we briefly discuss the purpose of the second proviso and the considerations that may guide the executing court in exercising its discretion under the second proviso to determine an appropriate amount. Evidently, the purpose of the second proviso is to discourage frivolous objections. The condition stipulated in the second proviso for entertaining the application ensures that the rule is not misused to delay the completion of the sale and expeditious conclusion of the execution proceedings, and that the objections are made only by bona fide persons on valid grounds. If upon adjudication the application is found frivolous, the amount deposited or the security furnished, as the case may be, by the applicant is to be appropriated for awarding costs to the person(s) who suffer from the delay in completing the sale due to the filing of the application. Therefore, in determining the amount required to be deposited, the executing court should consider various factors such as the decretal amount, the time elapsed since filing the execution petition, the sale amount and the applicant's previous conduct, etc., and fix an amount reflective of the costs likely to be awarded to the affected party in case of dismissal of the application. The literal meaning of the second proviso as ascertained above, which signifies the discretion of the court to determine an appropriate amount not exceeding twenty per cent of the sum realised at the sale, thus aligns with its purpose as well.

Effect of Section 19(7) of the Financial Institutions (Recovery of Finances) Ordinance 2001 on Rule 90 of Order XXI, C.P.C.

10. There remains another legal point that needs to be discussed before going on to the facts of the present cases. It is: what is the effect of clauses (a) and (b) of Section 19(7) of the Financial Institutions (Recovery of Finances) Ordinance 2001 ("Ordinance") on the provisions of Rule 90 of Order XXI, C.P.C., particularly of the second proviso thereof discussed above. The provisions of the said clauses are reproduced here for ready reference:

(7) Notwithstanding anything contained in the Code of Civil Procedure 1908 (Act V of 1908), or any other law for the time being in force-

(a) the Banking Court shall follow the summary procedure for purposes of investigation of claims and objections in respect of attachment or sale of any property, whether or not mortgaged, pledged or hypothecated, and shall complete such investigation within 30 days of filing of the claims or objections;

(b) if the claims or objections are found by the Banking Court to be mala fide or filed merely to delay the sale of the property, it shall impose a penalty upto twenty percent of the sale price of the property;

It is evident from reading the above provisions that they have been given an overriding effect over the provisions contained in the C.P.C. Similarly as per Section 7(2) of the Ordinance, in the exercise of its civil jurisdiction under the Ordinance, a Banking Court is to follow the procedure provided in the C.P.C. in all matters but only with respect to which the procedure has not been provided for in the Ordinance. Thus, there remains no doubt that where a particular procedure has been provided in the Ordinance to deal with a certain matter, a Banking Court cannot apply the procedure provided in the C.P.C. In other words, a Banking Court is to follow the procedure provided in the C.P.C. in so far as it is not inconsistent with the procedure provided in the Ordinance. In case of conflict between the two, the procedure provided in the Ordinance is to be preferred and followed.

11. That being so, we are to examine the substance of the provisions of Rule 90 of Order XXI, C.P.C. and Section 19(7) of the Ordinance; to see whether there is any conflict between them or the latter is only complementary to the former.

12. Rule 90 of Order XXI, C.P.C., specifies the persons eligible to make the application to set aside the sale, namely, (i) any person entitled to share in a rateable distribution of assets, and (ii) any person whose interests are affected by the sale. It also outlines the grounds for challenging the sale, which are (i) material irregularity in publishing or conducting the sale, and (ii) fraud in publishing or conducting the sale. The first proviso of the Rule restricts the vitiating effect of these grounds only to situations where the applicant has sustained substantial injury due to such irregularity or fraud. And its second proviso mandates that the entertainability of the application is conditional upon the deposit of an amount not exceeding twenty per cent of the sum realised at the sale, or the furnishing of such security, as directed by the court. On the other hand, clauses (a) and (b) of Section 19(7) of the Ordinance address two aspects: (i) the requirement for Banking Courts to follow a summary procedure for investigating objections regarding the sale of any property and completing such investigation within 30 days of filing of the objections; and (ii) the provision for imposing a penalty of upto twenty percent of the sale price of the property if objections are found mala fide or aimed at delaying the sale.

13. As evident from the above analysis, clauses (a) and (b) of Section 19(7) of the Ordinance are not comprehensive provisions regarding objections to the sale of property in the execution of a decree. They do not specify who can make objections or the grounds on which objections can be made. Therefore, these clauses cannot function independently of Rule 90 of Order XXI, C.P.C., regarding objections to the sale of property in the execution of a decree. It is worth noting that since Section 141, C.P.C., does not apply to applications under Rule 90 of Order XXI, C.P.C.,[11] the procedure for investigating objections made under this rule is also summary, as provided in clause (a) of Section 19(7) of the Ordinance. The latter provision merely further prescribes a period of 30 days to complete the investigation of objections through a summary procedure. Clause (b) of Section 19(7) of the Ordinance provides for imposing a penalty of up to twenty percent of the sale price of the property if objections are found by the Banking Court to be mala fide or aimed at delaying the sale of the property. This penalty amount, as discussed earlier, is to be deposited by the applicant, or its security furnished, as per the second proviso to Rule 90 of Order XXI, C.P.C., before the court entertains the application to set aside the sale. Thus, there is no conflict between the two provisions; clauses (a) and (b) of Section 19(7) of the Ordinance are only complementary to the provisions of Rule 90 of Order XXI, C.P.C., for the execution of decrees under the Ordinance. A Banking Court is therefore bound to follow both the provisions in the matter of objections made to the sale of property in the execution of a decree.

14. Our attention has been drawn to a Lahore High Court Division Bench judgment in Messrs Majid & Sons[12] wherein, while relying upon a judgment of this Court in PICIC,[13] it has been held that due to the non-obstante clause of Section 18(6) of the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act 1997 (the predecessor provision of Section 19(7) of the Ordinance), the provisions of Rule 90 of Order XXI, C.P.C., are excluded. In PICIC, a three-member Bench of this Court had held that objections in respect of the sale of a property could be filed under the provisions of Section 18(6) of the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act 1997, and not under the C.P.C., because of the non-obstante clause of this subsection. With respect, we note that in PICIC, a three-member Bench of this Court

failed to appreciate that the detailed provisions on the matter of objections in respect of sale of a property in execution of a decree are contained in Rule 90 of Order XXI, C.P.C., whereas the provisions of Section 18(6) of the 1997 Act (now Section 19(7) of the Ordinance) only covers two things and are thus merely complementary to them, as discussed above. Therefore, the decision on this point in PICIC suffers from patent illegality and is hereby overruled. Consequently, the Division Bench judgment of the Lahore High Court in Messrs Majid and Sons is also disapproved.

15. Having decided the questions of law, we now proceed to examine the facts of the present cases and decide them in light of the legal position stated above.

Facts of and decision on C.P. 2646-L/2018

16. On 21 July 2009, the respondent, MCB, instituted a suit against the petitioner, Samrana Nawaz, seeking recovery of a sum of Rs.69,34,793.00. The Banking Court decreed the suit on 6 April 2010 and converted it into execution proceedings for further action. In the execution proceedings, the property of the petitioner was sold through a public auction. The appellant filed objections to this sale under Rule 90 of Order XXI, C.P.C. The Banking Court dismissed the appellant's objection petition, on 14 June 2011, on merits. The petitioner appealed this decision, but the Lahore High Court dismissed the appeal by a judgment dated 20 November 2018 ("impugned judgment"). The sole ground on which the High Court dismissed the petitioner's appeal and upheld the Banking Court's order was that since the petitioner had not deposited twenty percent of the sum realized at the sale at the time of filing the objection petition, her objection petition was not entertainable. Hence, this petition for leave to appeal is filed by the petitioner.

17. The deposit of the amount required under the second proviso, as held above, is not mandated to be made by the applicant along with the application; rather, it is to be made upon the direction of the court. In the present case, the Banking Court neither determined the specific amount to be deposited by the petitioner under the second proviso nor did it direct the petitioner to make any deposit. Therefore, the High Court could not legally dismiss the petitioner's appeal and uphold the Banking Court's order on the ground of non-deposit of twenty percent of the sum realized at the sale by the petitioner at the time of filing her objection petition. Instead, the proper course for the High Court was to ensure compliance with the requirement of the second proviso before considering her appeal on its merits by determining an appropriate amount to be deposited by the petitioner under the second proviso and allowing the petitioner an opportunity to deposit the same with the executing court, i.e., the Banking Court.

18. Therefore, the present petition is converted into an appeal, and the same is allowed. The impugned judgment is set aside. The petitioner's appeal before the High Court shall be deemed pending. The High Court shall, before considering the appeal on its merits, determine an appropriate amount to be deposited by the petitioner under the second proviso and allow the petitioner an opportunity to deposit the same with the executing court. If the petitioner deposits the amount determined by the High Court, her appeal shall be decided on its merits; otherwise, the same may be dismissed by upholding the order of the Banking Court on this ground alone.

Facts of and decision on C.A. 17-L/2019

19. On 21 July 2009, the respondent, MCB, instituted a suit against the appellant, Samrana Nawaz, seeking recovery of a sum of Rs.67,48,254.54. The Banking Court decreed the suit on 6 April 2010 and converted it into execution proceedings for further action. In the execution proceedings, four properties of the appellant were sold through public auction. The appellant filed objections to this sale under Rule 90 of Order XXI, C.P.C. The Banking Court allowed the appellant's objection petition on 9 January 2012 and set aside the sale. The respondent appealed this decision, and the Lahore High Court accepted the appeal by a judgment dated 20 November 2018 ("impugned judgment"). The sole ground on which the High Court accepted the respondent's appeal was that since the appellant had not deposited twenty percent of the sum realized at the sale at the time of filing the objection petition, her objection petition was not entertainable. Hence, this appeal is filed by the appellant.

20. As stated above, the deposit of the amount, which is required under the second proviso, is not to be made by the applicant along with the application but rather it is to be made on the direction of the court. In the present case, the Banking Court neither determined the specific amount to be deposited by the appellant under the

second proviso nor did it direct the appellant to make any deposit. Additionally, the respondent failed to raise this crucial point before the Banking Court when it proceeded to entertain the appellant's objection petition. It was imperative for the Banking Court to adhere to the requirement of the second proviso before proceeding to consider and adjudicate upon the merits of the appellant's objection petition. However, it failed in its duty in this regard.

21. The purpose behind requiring the deposit of a certain amount under the second proviso, as mentioned earlier, is to deter frivolous objections and to appropriate the deposited amount for awarding costs to those affected by the delay caused by such objections. In the present case, the appellant's objections were found valid, not frivolous, upon adjudication by the Banking Court. Since the appellant's objection petition was granted by the court, there was no occasion to compensate the respondent for filing a frivolous application by the appellant to delay the sale. Had the appellant's objection petition been dismissed by the Banking Court and the appellant appealed to the High Court, we would have asked the High Court to comply with the requirement of the second proviso before considering her appeal on its merits. However, in the scenario where the executing court had accepted the appellant's objection petition and it was the respondent who appealed, we find that the impugned judgment passed by the High Court is not legally sustainable.

22. Therefore, the present appeal is allowed, and the impugned judgment is set aside. The respondent's appeal before the High Court shall be deemed pending, and the High Court shall decide it on its merits, excluding the ground of non-deposit of the amount by the appellant under the second proviso.

Facts of and decision on C.A. 364-L/2020

23. The respondent, Bank of Punjab, instituted a suit against the appellants, Khalid Mujeeb Pervaiz and others, seeking recovery of a sum of Rs.144,802,140. A Single Bench of the Lahore High Court, exercising its jurisdiction as a Banking Court under the Ordinance, decreed the suit on 27 October 2014 to the extent of Rs.114,792,163.97 and converted it into execution proceedings for further action. In the execution proceedings, several properties of the appellants were sold through public auction. The appellants filed objections to this sale under Rule 90 of Order XXI, C.P.C. However, by its order dated 9 May 2018, the Banking Court, i.e., the Single Bench of the High Court, dismissed the objection petition on the sole ground that the appellants had not deposited twenty percent of the sum realized at the sale along with their objection petition. The appellants appealed before the Division Bench of the High Court, but it was dismissed and the order of the Banking Court was upheld by a judgment dated 3 February 2020 ("impugned judgment") on the same ground. Hence, this appeal is filed by the appellant, with leave of the Court, which was granted to consider the question: "whether a 20% deposit of the auction price is obligatory for an objector without an order requiring the same being passed by the Banking Court in terms of the second proviso to Rule 90 of Order XXI, C.P.C."

24. Since we have held above that the deposit of the amount required under the second proviso to Rule 90 of Order XXI, C.P.C., is not obligatory for the applicant to make along with the application but rather it is to be made on the direction of the court, the Banking Court committed a legal error in dismissing the appellants' objection petition on the ground of non-deposit of twenty percent of the sum realized at the sale along with their objection petition. Further, the Division Bench, by dismissing the appellants. appeal, failed to correct that legal error in its appellate jurisdiction.

25. Therefore, the present appeal is allowed. The impugned judgment is set aside, and the appellants' appeal made before the Division Bench is accepted. Consequently, the order of the Banking Court, i.e., the Single Bench of the High Court, is also set aside. The appellants. objection petition shall be deemed pending. The Banking Court shall, before considering the objection petition on its merits, determine an appropriate amount to be deposited by the appellants under the second proviso to Rule 90 of Order XXI, C.P.C., and allow the appellants an opportunity to deposit the same. If the appellants deposit the amount determined by the Banking Court, their objection petition shall be decided on its merits; otherwise, the same shall not be entertained and shall be dismissed on this ground alone.

MWA/S-18/SC Order accordingly.

**P L D 2024 Supreme Court 896**

**Present: Syed Mansoor Ali Shah, Athar Minallah and Malik Shahzad Ahmad Khan, JJ**

**IFTIKHAR AHMED CHAUDHRY---Petitioner**

**Versus**

**SAEED AHMED KHAN and others---Respondents**

Crl. O.P. No. 233 of 2017 in C.A. No. 633 of 2017, Crl. O.P. No. 242 of 2017 in C.A. No. 353 of 2015, Crl. O.P. No. 243 of 2017 in C.A. No. 632 of 2017 and Crl. O.P. No. 12 of 2024 in C.R.P. No. 368 of 2017 in C.A. No. 632 of 2017, decided on 8th August, 2024.

**(a) Constitution of Pakistan---**

----Arts. 184, 185, 187 & 188---Implementation of orders and decisions of the Supreme Court by individuals, institutions and entities---Constitutional significance of implementing such orders and decisions stated.

It is imperative to underline that in a constitutional democracy, the rule of law is not just a principle but the bedrock upon which the legitimacy of governance rests. The Supreme Court of Pakistan, as the apex judicial body, is entrusted with the profound responsibility of interpreting the law, ensuring justice, and upholding the Constitution. Its orders are not merely recommendations or advisories; they are legal mandates that must be followed. These decisions are the culmination of rigorous legal scrutiny and deliberation intended to reflect the values and laws of the land. When the Supreme Court renders a verdict, it does so as the ultimate interpreter of the Constitution. To disregard or delay the implementation of such verdicts is to challenge the very framework of our legal system. The compliance with judicial decisions is not a matter of courtesy but a constitutional requirement that safeguards this balance. Non-compliance not only disrupts this delicate equilibrium but also sets a dangerous precedent that could lead to executive overreach.

Additionally, the implementation of these orders is crucial for maintaining public confidence in the judicial system. Courts are seen as the defenders of rights, the arbiters of disputes, and the interpreters of laws. If their decisions can be easily ignored or sidestepped by the individuals or entities, it undermines public trust in the efficacy of the judiciary and, by extension, the entire government. This erosion of trust can lead to a lack of faith in the processes that govern citizens' lives and, ultimately, in the democratic system itself. The importance of implementing these orders cannot be overstated, and it is imperative that the institutions recognize that it has no other choice but to comply.

**(b) Contempt of Court Ordinance (V of 2003)---**

----S. 3---Constitution of Pakistan, Arts. 184, 185, 187, 188 & 204---Non-implementation of orders and decisions of the Supreme Court by individuals, institutions and entities---Purpose of law of contempt of court in context of implementing Court judgments stated.

The law of contempt is a critical tool to enforce court orders, ensuring that the judiciary is respected and that its decisions are not taken lightly. The power to hold individuals or entities in contempt for failing to comply with a Court order is fundamental to the judiciary's ability to function effectively. Without this power, the judiciary would be rendered toothless, unable to enforce its decisions, thereby jeopardizing the administration of justice. The individuals or entities have no other choice but to implement the judgment of the Court, for in doing so, it upholds the Constitution, strengthens democracy, and preserves the public's trust in justice and the rule of law.

Salman Akram Raja, Advocate Supreme Court, Abdul Rahim Bhatti, Advocate Supreme Court, Dr. G.M. Ch. Advocate Supreme Court, Ch. Akhtar Ali, Advocate-on-Record and Sh. Mahmood Ahmed, Advocate-on-Record for Petitioner.

Rashid Anwar, Advocate Supreme Court, Adnan Shuja Butt, Advocate Supreme Court, Rana Asad Ullah Khan, Addl. AGP, Syed Rifaqat Hussain Shah, Advocate-on-Record, Rehmat Ali Hasnie, President NBP, Mehnaz Salar, Head of Legal, NBP, Riaz Hussain, Wing Head Lit. North NBP for Respondents and Rana Muhammad Khial (In person).

Date of hearing: 8th August, 2024.

**ORDER**

Our Order dated 01.07.2024 records that the President, National Bank of Pakistan (NBP), who appeared before this Court, acknowledged that 11,000 pensioners or more have to be paid pension in pursuance to the judgment of this Court dated 25.09.2017. It is submitted by the learned counsel for NBP that 764 pensioners have been paid and the payment to the rest of the pensioners is underway.

2. Today, we have noticed that while processing cases of the pensioners for payment of their pension as per the judgment of this Court certain factual verification of some of the pensioners is required. We don't want this Court to be burdened with this exercise, which is primarily the function of NBP. In order to streamline the process, let the President, National Bank of Pakistan depute a Senior Officer of NBP as a focal person to ensure the implementation of the judgment of this Court dated 25.09.2017 in letter and spirit and where required, grant a hearing to the concerned pensioner.

3. It is imperative to underline that in a constitutional democracy, the rule of law is not just a principle but the bedrock upon which the legitimacy of governance rests. The Supreme Court of Pakistan, as the apex judicial body, is entrusted with the profound responsibility of interpreting the law, ensuring justice, and upholding the Constitution. Its orders are not merely recommendations or advisories; they are legal mandates that must be followed. These decisions are the culmination of rigorous legal scrutiny and deliberation intended to reflect the values and laws of the land. When this Court renders a verdict, it does so as the ultimate interpreter of the Constitution. To disregard or delay the implementation of such verdicts is to challenge the very framework of our legal system. The compliance with judicial decisions is not a matter of courtesy but a constitutional requirement that safeguards this balance. Non-compliance not only disrupts this delicate equilibrium but also sets a dangerous precedent that could lead to executive overreach.

4. Additionally, the implementation of these orders is crucial for maintaining public confidence in the judicial system. Courts are seen as the defenders of rights, the arbiters of disputes, and the interpreters of laws. If their decisions can be easily ignored or sidestepped by the individuals or entities, it undermines public trust in the efficacy of the judiciary and, by extension, the entire government. This erosion of trust can lead to a lack of faith in the processes that govern citizens' lives and, ultimately, in the democratic system itself. The importance of implementing these orders cannot be overstated, and it is imperative that the institutions recognize that it has no other choice but to comply.

5. The law of contempt is a critical tool in this context. It serves to enforce court orders, ensuring that the judiciary is respected and that its decisions are not taken lightly. The power to hold individuals or entities in contempt for failing to comply with a Court order is fundamental to the judiciary's ability to function effectively. Without this power, the judiciary would be rendered toothless, unable to enforce its decisions, thereby jeopardizing the administration of justice. The individuals or entities have no other choice but to implement the judgment of the Court, for in doing so, it upholds the Constitution, strengthens democracy, and preserves the public's trust in justice and the rule of law.

6. Let the said nominee, keep this constitutional understanding in mind and expeditiously implement the judgment of this Court by ensuring that the pensioners are fully paid at the earliest and submit a compliance report before the next date of hearing. To come up on 15.10.2024.

MWA/I-13/SC Order accordingly.

**P L D 2024 Supreme Court 978**

**Present: Syed Mansoor Ali Shah, Muhammad Ali Mazhar and Shahid Bilal Hassan, JJ**

**PUBLIC INTEREST LAW ASSOCIATION OF PAKISTAN MEHERBANO AHSANUDDIN and others---Petitioners**

**Versus**

**FEDERATION OF PAKISTAN and others---Respondents**

C. Ps. Nos. 42 of 2022 and 25 of 2024, decided on 1st July, 2023.

**Pakistan Climate Change Act (X of 2017)---**

----Ss. 5 & 8---National Disaster Management Act (XXIV of 2010), Ss. 9 & 16---Constitution of Pakistan, Art. 184(3)---Climate change---Lack of a clear policy/strategy and action plan to deal with climate change---Special budget for climate change---Observations and directions recorded by the Supreme Court regarding importance of implementing a climate change policy and allocating a special budget for climate change stated.

Climate change was a serious existential threat to the people of Pakistan and directly affected the fundamental rights, still the recent provincial budgets had not allocated any Climate Fund for climate change or come up with any effective strategies. This became doubly worrying as Monsoon rains were round the corner and the country had still not recovered from the devastating floods of the year 2022.

Nothing concrete was placed before the Supreme Court to show if the Ministry of Climate Change had any climate change policy in place and if any effective steps had been taken in order to address the challenges of climate change. It was mentioned thatNational Disaster Management Authority (NDMA) and Provincial Disaster Management Authority (PDMA)were looking into the matter, however NDMA and PDMA were disaster management institutions, while the Ministry of Climate Change had to come up with preventive policies addressing the challenges of climate change head-on. It appeared that no such policy was in place and no action on the ground had been taken. Supreme Court provided opportunity to the Secretary Climate Change to place the relevant policy on the record and apprise the Supreme Court on the next date as to what were the key challenges of climate change and what strategies and plans had been put in place by the Ministry and what action had so far been taken.

Submissions made by the Chief Secretaries of Punjab, Sindh, KPK and Balochistan were not satisfactory. No material steps had been taken by the said Provinces to deal with the challenges of climate change as there was no clear strategy(ies), action plans or any adequate steps taken on the ground. The Chief Secretaries undertook that they would submit relevant strategy/action plans to deal with the issue of climate change in their respective Provinces before the next date. Supreme Court directed that the said strategies shall clearly identify the threats/challenges of climate change in their respective Provinces and steps taken to address the said challenges.

All the Chief Secretaries were asked whether a special budget had been allocated for climate change in the recent provincial budgets, their reply to said question was in the negative, however, as far as, Punjab was concerned, it had been pointed out that a loan of $ 50 million through Asian Development Bank had been obtained and parked as Climate Change Fund, however, no document in this regard had been placed on the record.

Supreme Court directed that all the Chief Secretaries, as well as Coordinator to the Prime Minister on Climate Change, Ministry of Climate Change and Secretary Climate Change, and, all the concerned officers shall appear before the Court on the next date of hearing and apprise the Court of their strategies and steps taken.

In attendance:

Mian Sami-ud-Din, Advocate Supreme Court, Riaz Hussain Azam, Advocate-on-Record, Malik Javed Iqbal Wains, Addl. AGP, Ms. Roomina Khursheed Alam, Coordinator, Eazaz A. Dar, Secretary Climate Change, Khalid Ishaq, Adv. Genl. Punjab, Baleegh-uz-Zaman, Addl. A.G. Pb. Zahid Akhtar Zaman, Chief Secy. Pb., Hassan Akbar, A.G. Sindh, Muhammad Asif, A.G. Balochistan, M. Ayaz Khan Swati, Addl. A.G.,

Balochistan, Shah Faisal, A.G. Khyber Pakhtunkhwa, Syed Kausar Ali Shah, Addl. A.G. KPK, Haji Muhammad Nazir, A.G. (G.B.), Yasir Gul Khan, A.C. (MOPDS), Mutahir Ahmad, D.S. (F) (G.B.), Nadeem-ur-Rehman, Secretary Env. Bal., Jahangir Anwar, Sect. Env. Lahore, Imran Hamid, D.G. Env. Lahore, M. Nawaz Manik, Addl. D.G. Env. Lahore, Ms Amina, A.D. Legal Env. Lahore, Asmatullah A.D. Legal Env. Lahore, Kashif Sajjan, Asstt. Legal. Env. Lahore, Nadeem Aslam Ch. C.S. Khyber Pakhtunkhwa, M. Masood (Spl. Sec. Forest), Sami Ullah (D.G. Env.), M. Bashar Naveed, Addl. A.G., Dr. Habib ur Rehman Solangi, D.D. Law, Hassan Akber A.G. Sindh, Asif Hyder Shah, C.S. Sindh, Syed Mohsin Hussain Shah, A.A.G. and Focal person to Chief Secretary and Nabeela Umer, Sec. Env. Sindh.

Date of hearing: 1st July, 2024.

**ORDER**

**Ms. Roomina Khursheed Alam,** Coordinator to the Prime Minister on Climate Change, Ministry of Climate Change and Secretary Climate Change have tendered appearance along with Additional Attorney General and submit that five posts for Members of the Authority established under Section 5 of the Pakistan Climate Change Act, 2017 ("Act") have been advertised and as a result 752 applications have been received, which are under process and soon the said five posts will be filled. Let the said exercise be completed within a fortnight from today without fail. The Notification of a duly constituted Authority be placed on the record on or before the next date of hearing.

2. When inquired, if the Ministry of Climate Change has any climate change policy in place and the effective steps taken in order to address the challenges of climate change, nothing concrete was placed before us. It was mentioned that NDMA and PDMA are looking into the matter. Our understanding is that NDMA and PDMA are disaster management institutions, while the Ministry of Climate Change has to come up with preventive policies addressing the challenges of climate change head-on. It appears that no such policy is in place and no action on the ground has been taken. Still we provide opportunity to the Secretary Climate Change to place the relevant policy on the record and apprise the Court on the next date as to what are the key challenges of climate change and what strategies and plans have been put in place by the Ministry and what action has so far been taken.

3. We have also heard the Chief Secretaries of Punjab, Sindh, KPK and Balochistan. We are not satisfied with their submissions and notice with concern that no material steps have been taken by the said Provinces to deal with the challenges of climate change as there is no clear strategy(ies), action plans or any adequate steps taken on the ground. The Chief Secretaries undertake that they will submit relevant strategy/action plans to deal with the issue of climate change in their respective Provinces before the next date. Let the said strategies clearly identifying the threats/ challenges of climate change in their respective Provinces and steps taken to address the said challenges.

4. All the Chief Secretaries were asked whether the special budget has been allocated for the climate change in the recent provincial budgets, their reply to this question was in the negative, however, as far as, Punjab is concerned, it has been pointed out that a loan of $ 50 million through Asian Development Bank has been obtained and parked as Climate Change Fund, however, no document in this regard has been placed on the record.

5. It is observed that climate change is a serious existential threat to the people of Pakistan and directly affects the fundamental rights, still the recent provincial budgets have not allocated any Climate Fund for climate change or come up with any effective strategies. This becomes doubly worrying as Monsoon rains are round the corner and the country has still not recovered from the devastating floods of the year 2022.

6. All the Chief Secretaries, as well as, Ms. Roomina Khursheed Alam, Coordinator to the Prime Minister on Climate Change, Ministry of Climate Change and Secretary Climate Change, and, all the concerned officers will appear before the Court on the next date of hearing and apprise the Court of their strategies and steps taken. To come up on 15.07.2024. Ms Ayesha Khan, Regional Managing Director Acumen, 609, 6th Floor, ISE Tower, F-7/1 Blue Area, Islamabad is also appointed as amicus curiae to assist the Court on the aforesaid date. Office will inform amici curiae to be present on the next date of hearing.

7. Considering the critical importance of the issue, let a copy of this order be dispatched to the Prime Minister Secretariat so that the same be placed before the Prime Minister for his perusal.

MWA/P-14/SC Order accordingly.

**P L D 2024 Supreme Court 1134**

**Present: Syed Mansoor Ali Shah, Muhammad Ali Mazhar and Shahid Bilal Hassan, JJ**

**AMER ISHAQ and others---Petitioners**

**Versus**

**PROVINCE OF KHYBER PAKHTUNKHWA and others---Respondents**

Constitution Petitions Nos. 4 and 14 of 2021

(Regarding declaration of Rule 2 (c) and Schedule-IV of the Khyber Pakhtunkhwa Power Crushers (Installation, Operation and Regulation) Rules, 2020 as ultra vires the Constitution).

and

Crl.M.Appeal No.8 of 2021 in Crl.O.P No.NIL of 2021.

and

C.M.A No.4707/2020 in C.A No.844/2020.

(Report of Hagler Bailly Pakistan)

Constitution Petitions Nos.4 and 14 of 2021, Crl. M. Appeal No.8 of 2021 in Crl. O.P No.NIL of 2021 and C.M.A No.4707 of 2020 in C.A No.844 of 2020, decided on 11th July, 2024.

**(a) Constitution of Pakistan---**

----Arts. 9, 23, 24 & 25---Right to life and property---Protection against discrimination---Environmental crisis---Islamic environmentalism---Human-induced climate change---Scope---Environmental crisis pervades our lives---Overwhelming scientific consensus warns that human-induced climate change is leading to rising sea levels, extreme weather events and public health disasters---Supreme Court pointed out that despite over thirty years of international agreements, global carbon dioxide emissions rose 70% between 1990 and 2020---Biodiversity was collapsing at an unprecedented rate---One million animal and plant species faced complete destruction within decades because of human activities---Notwithstanding extensive domestic regulation, global standards of air, land and water pollution remained stubbornly high---It is in this perspective of environmental constitutionalism that current issue and Islamic environmentalism that current issue was approached by the Supreme Court.

**(b) Khyber Pakhtunkhwa Power Crushers (Installation, Operation and Regulations) Act (I of 2020)---**

----Ss. 7 & 19---Khyber Pakhtunkhwa Power Crushers (Installation, Operation and Regulations) Rules, 2020,R. 2(c) & Schedule-IV---Constitution of Pakistan, Art. 184 (3)------Environmental crisis---Question of public importance---Rule 2 of Khyber Pakhtunkhwa Power Crushers (Installation, Operation and Regulations) Rules, 2020, vires of---Petitioners were aggrieved of air pollution caused by crushing of stones by power crushers operating in violation of National Environmental Quality Standards (NEQS)---Provincial Government supported Report of Power Crushers Commission and also urged the Court to shut down such plants unless they complied with NEQS---Validity---Supreme Court directed Environmental Protection Agency, Khyber Pakhtunkhwa (EPA), in order to protect human life and health of residents of the area who had been subjected to plants in question for a number of years, to shut down and seal operations of stone crushing plants in question immediately---Respondent owners of plants in question could be allowed to re-operationalize their plants provided they made an appropriate application to Supreme Court satisfying the Court that they complied with the requirements of NEQS---Supreme Court after verifying such fact through a technical expert might allow the same---Supreme Court directed local police to render full assistance to EPA to carry out order of Supreme Court in shutting down stone crushing plants immediately---NEQS were passed in the year 1993 and were last updated in the year 2010---Federal and Provincial Governments made no efforts to update the standards of NEQS---By limiting both the quality

and quantity of anthropogenic pollutants in environment, NEQS served as crucial frameworks which facilitated transition towards a sustainable future---Such standards did not only ensure preservation of ecosystems and protection of public health through preventive measures but also played a significant role in fostering climate resilient development mechanisms by encouraging sustainable production processes in industries---Supreme Court directed Federal Government as well as Provincial Governments to update NEQS within a period of three months and submit their updated/revised NEQS before the Supreme Court---Matter was adjourned accordingly.

Shehla Zia v. WAPDA PLD 1994 SC 693; Imrana Tiwana v. Province of Punjab PLD 2015 Lah. 522 and Asghar Leghari v. Federation of Pakistan PLD 2018 Lah. 364 rel.

In attendance:

Dr. Pervez Hassan, Chairman, Power Crusher Commission (PCC) Waqar Zakariya, Member PCC and Asad A. Ghani, Advocate.

Ch. Aitzaz Ahsan, Sr. Advocate Supreme Court assisted by Barrister Zunaira Fayyaz, Advocate, Khawaja Haris Ahmed, Senior Advocate Supreme Court, Ch. Imran Hassan Ali, Advocate Supreme Court, Haider Mehmood Mirza, Advocate Supreme Court, Syed M. Iqbal Hashmi, Advocate Supreme Court and Syed Qamar Hussain Sabzwari, Advocate Supreme Court.

Chief Abdul Rehman, in person.

Qasim Jamal, Director Mineral, Hazara, Mohsin Ali Khan, Director Mineral.

Riaz, Dy. Director Mineral, Abbottabad, Zulfiqar Ahmed, Asst. Director (Mineral) and Mumtaz Ali, DD(L), EPA.

Date of hearing: 11th July, 2024.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The instant Constitution Petition No.4/2021 was filed under Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution"), challenging the vires of Rule 2(c) and Schedule-IV of the Khyber Pakhtunkhwa Power Crushers (Installation, Operation and Regulations) Rules, 2020 ("Rules") to the extent they are ultra vires Sections 7 and 19 of the Khyber Pakhtunkhwa Power Crushers (Installation, Operation and Regulations) Act, 2020 ("Act") as well as the fundamental rights i.e., Articles 9, 23, 24, and 25 of the Constitution. During the course of hearing of this case in 2021, it was discovered that the core issue behind the challenge to the vires of the Rules is the air pollution in the area due to the unlawful operations of stone power crushers[1] in the village Suraj Galli, Tehsil Khanpur, District Haripur. Therefore, the environmental degradation through air pollution is at the heart of this case and forms the context for challenging the vires of the said Rules. It is for this reason that

vide Order dated 15.06.2021, the Report prepared by Hagler Baily Pakistan ("HBP") as a local commission (in C.A. 844-846/2020, a connected matter) was directed to be put up in this case which is before us today as C.M.A. 4707/2020. It is pointed out that the power crushers installed in the said village are causing air pollution in the area which raises serious threat to human life and health. The Report of the HBP after inspecting the area formulated the following conclusions: "Regulatory Compliance: High PM concentrations resulting from mining and crushing activities were measured at all the monitoring locations. The measured PM concentrations were not in compliance with the NEQS (24-hour) limits. Long term exposure to such high concentrations of $PM_{10}$ can cause several health effects ranging from coughing, asthma to high blood pressure, cardiac diseases among the residents as well as the staff of the stone crushing plants. $PM_{10}$ is also known to affect animals by causing various respiratory problems and creating additional stress." (See Schedule A to this Order for details).

2. Vide Order dated 15.12.2021, the Court again called for a fresh Report on the compliance

of the National Environmental Quality Standards ("NEQS") by the power crushers from HBP as technical counsel with the mandate to carry out site inspection of the stone crushing plants set up in village Suraj Galli and prepare a fresh Report specifically on the presence of particulate matter ($PM_{10}$) in the air. HBP submitted the Draft Report on 04.4.2022 (C.M.A No.2323/2022). The conclusions drawn by in the Draft Report read as follows:- "The measured PM concentrations were above the 24-hours limit prescribed in the NEQS at all six monitoring locations. Long-term exposure to such high concentrations of PM can cause several health effects ranging from mild coughing to asthma to high blood pressure to cardiac diseases among the residents and the workers of the stone-crushing plants." (See Schedule B of the Order for details).

3. Thereafter, not satisfied with the performance of the power crushers and in order to delve deeper into the issue of environmental degradation in the area, this Court vide Order dated 25.4.2022, was pleased to form a Power Crushers Commission ("Commission") under the chairmanship of Dr. Pervez Hassan. (See Schedule C of this Order for details). The Commission submitted its Final Report (C.M.A 6741/ 2024) on 06.07.2024, when the Chair of the Commission highlighted its final recommendations and conclusions as follows: "The Plants have not met, among others, the NEQS set out in Section 14. The Plants do not comply with the "existing" 300 metre safe distance applicable in the KPK which is borne out in the Report dated 10 August 2020 of Hagler Bailly Pakistan (Annexure A-1) and recorded in the Supreme Court Order dated 15 December 2021. The Plants do not comply with the "existing" NEQS, however unsatisfactory they may be. For the interim, as the Crush Plants at Suraj Gali are non-compliant with the legal and regulatory framework as on 28 May 2024 (the cut-off date of the Commission), the Supreme Court may consider closing them in the public interest and, subject to the other recommendations of the Commission such as the establishment of Crushing Zones, allow their opening on any of them establishing compliance with a neutral third party appointed by the Supreme Court."(See Schedule D of this Order for details).

4. The Final Report concludes that the three power crushers operating in the area in question are alarmingly violating the NEQS, as well as, the requirement of distance from the local community under the Rules. According to the Report, the $PM_{2.5}$ and $PM_{10}$ levels are much higher than the standards given in the NEQS which result in serious chronic and lifelong diseases for the local inhabitants. The air pollution generated by the power crushers carries calcium carbonate which has adverse effects for human health such as damaging the respiratory tract.[2] It is now well accepted and acknowledged that air pollution affects not just humans but a wide array of environmental and ecological components; (i) Wildlife: Air pollutants can directly harm animals by causing health problems such as respiratory issues, heart disease, and even cancer. Animals can also be affected indirectly through
changes in their habitat and the availability of food and water. (ii) Plants and Forests: Toxic pollutants in the air can damage the leaves of plants and trees, hinder their growth, and reduce their ability to photosynthesize, which is vital for their survival and growth. This not only affects the plants themselves but also the entire ecosystem
that depends on them. (iii) Water Bodies: Air pollution contributes to acid rain, which forms when pollutants from the air are deposited in water bodies, and on vegetation and soils. This can lead to drastic changes in the pH level of waterways, adversely affecting aquatic life and water quality. (iv) Soil Quality: Deposits of pollutants like heavy metals in the soil can alter its composition and health, affecting plant growth and the organisms that depend on the soil, potentially disrupting entire terrestrial ecosystems. (v) Climate Change: Some air pollutants, particularly greenhouse gases like carbon dioxide and methane, contribute to global warming. Others, like sulfur dioxide, can create aerosols that reflect sunlight, affecting atmospheric temperatures and weather patterns. (vi) Visibility and Aesthetic Damage: Pollution can cause

smog and haze, which reduce visibility. This not only affects the aesthetic enjoyment of natural landscapes but can also have economic implications for industries like tourism and real estate. (vii) Biodiversity: The cumulative impact of these effects can lead to reduced biodiversity as species that cannot adapt to the altered conditions die out or move to other areas. The interplay between air pollution and the environment is complex, influencing various natural cycles and life forms, and can lead to long-term ecological imbalances.[3]

5. Air pollution causes an estimated one in every nine deaths worldwide, making it the greatest environmental threat to human health. According to the World Health Organization ("WHO"), air pollution is responsible for an estimated seven million premature deaths worldwide every year.[4] Almost all air breathed by humans exceeds the WHO Guidelines limits. It is pertinent to mention here that no other location on the planet illustrates the stubborn nature of air pollution challenge more than South Asia, where pollution continued its upward trend in 2021. Bangladesh, India, Nepal and Pakistan - where 22.9 percent of the global population lives - are the top four most polluted countries in the world.[5] As per the World Air Quality Report (2023), Pakistan is the second most polluted country in the world with an annual average $PM_{2.5}$ concentration 14 times above the WHO guidelines, leading to a loss in life expectancy of 4.4 years.[6] The most serious issue of air quality in Pakistan is the presence of excessive suspended PM present in the air. The PM is not a single pollutant, but rather is a complex mixture of solids and aerosols composed of small droplets of liquid, dry solid fragments, and solid cores with liquid coatings.[7] These particles vary widely in size, shape and chemical composition and are defined by their diameter for air quality regulatory purposes. Those with a diameter of 10 microns or less $PM_{10}$ are inhalable into the lungs and can induce adverse health effects.[8] Fine PM is defined as particles that are 2.5 microns or less in diameter $PM_{2.5}$. A number of adverse health effects have been associated with both $PM_{2.5}$ and $PM_{10}$ including the worsening of respiratory diseases such as asthma, lung cancer and premature deaths in extreme circumstances. It is noted that the triple-planetary crisis, which comprises of interrelated urgent crisis of climate change, biodiversity loss, and widespread pollution must entrench environmental concerns as supreme constitutional norms.[9] This strand of demand often coined as "environmental constitutionalism" is a relatively recent phenomenon at the confluence of constitutional law, international law, human rights and environmental law and embodies the recognition that the environment is a proper subject for protection in constitutional texts and for vindication by constitutional courts worldwide.[10] By acting as a method of constitutionally entrenching environmental law and protection at a more enduring or "higher" consti-tutional level, environmental constitutionalism entails a transformative approach that relies on constitutions to provide for the architecture of environmental governance, whereupon it then acts to improve environmental protection through various constitutional features such as fundamental rights, recognized principles of environmental governance and the rule of law.[11]

6. Over the years, Pakistan's superior courts have expanded the scope of fundamental rights and judicially interpreted the text of the constitutional fundamental right to life (Article 9) which has been popularly dubbed as right to a clean and healthy environment.[12] Subsequently, the courts have also recognized the right to dignity (Article 14) in Imrana Tiwana[13] and Asghar Leghari[14] that the protection of environment also emerges from the right to dignity which is inviolable and such protection is an inalienable right and perhaps more fundamental than the other rights. It is in this context that right to life and dignity when read with constitutional principles of democracy, equality, social, economic and political justice include within their ambit and commitment, the international environmental principles of sustainable development, precautionary principle, environmental impact assessment, inter and intra-generational equity and public trust doctrine. This protection to environment is also accorded in other international legal instruments[15], which Pakistan has ratified, including the most recent United Nations

General Assembly Resolution[16] which recognized that everyone, everywhere, has the right to a clean and healthy environment.

7. Environmental constitutionalism as a concept also finds its ideological roots within Islamic environmentalism as environment and climate change have a strong linkage with our religion.[17] Approaching environmental constitutionalism through the lens of religion and spirituality can indeed be a powerful tool. Seyyed Hossein Nasr[18] criticizes the modern secular worldview for what he perceives as a harmful attitude towards nature. He believes that the current ecological crisis is a spiritual problem rooted in the forgetfulness of the sacred nature of the world. He argues that modernity has led to an exploitative and instrumentalist view of nature, contributing to environmental degradation.[19] Islam can provide a comprehensive and integrated approach to environmental issues, encompassing ethical, social, economic and political dimensions. This foundation, inter alia, includes; (i) Tawhid (Unity of God): The Quranic concept of Tawhid underscores the idea that all things come from one creator. This perspective encourages a holistic approach to the environment, viewing the Earth and all its inhabitants as interconnected and interdependent, (ii) Stewardship (Khalifa): The Holy Quran emphasizes that humans are stewards (khalifas) of the Earth. This concept promotes responsible management of the Earth's resources, (iii) Balance (Meezan): The Holy Quran speaks about balance (Meezan) in creation and warns against upsetting this balance. Climate change, which is driven by human activities, is disrupting the Earth's natural balance, (iv) Avoiding Waste (Israaf): Islam discourages wastefulness (Israaf). The current patterns of consumption and waste, especially in more developed countries, are contributing significantly to greenhouse gas emissions and climate change, (v) Justice (Adl); climate change is also a matter of justice, as it disproportionately affects the poor and vulnerable - people who often have contributed least to the problem and (vi) Hima (Protected Areas): The Islamic principle of Hima refers to a system of community-based management of resources, where certain areas are set aside for the conservation of natural resources, wildlife, and biodiversity.

8. At this juncture, it is important to underscore that environmental crisis pervades our lives. An overwhelming scientific consensus warns us that human-induced climate change is leading to rising sea levels, extreme weather events, and public health disasters.[20] Despite over thirty years of international agreements, global carbon dioxide emissions rose 70% between 1990 and 2020.[21] Biodiversity is collapsing at an unprecedented rate; one million animal and plant species face complete destruction within decades, because of human activities. Notwithstanding extensive domestic regulation, global standards of air, land and water pollution remain stubbornly high. It is in this perspective of environmental constitutionalism and Islamic environmentalism that we approach the current issue.

9. After hearing the chair of the Commission, the case was fixed today to provide an opportunity of hearing to the power crushers to explain whether they raise any objection on the said Report of the Commission or actual compliance as far as the environmental threats are concerned. We have heard Ch. Aitzaz Ahsan, learned

Sr. ASC and Ms. Zunaira Fayyaz, Advocate. At the very outset, they do not allege any mala fide to the Commission. However, they submitted that the respondents are fully complying with the NEQS, yet they could not refer to even a single document showing their compliance with the same. Learned counsel submits that one of the respondents has invested Rs. 150 Million and purchased equipment

that curtail environmental pollution, however, no evidence has been placed on the record to substantiate this submission. He stated that the local villagers are adding to the pollution by burning various substances, to which Waqar Zakariya (HBP), member of the Commission pointed out that the readings of $PM_{10}$ and $PM_{2.5}$ were taken round the clock, therefore, this intermittent burning does not affect the overall reading.

10. The submissions of the learned counsel for the respondent power crushers are not satisfactory and the findings of the Report have gone unrebutted, in particular, the violation of the NEQS. Learned Advocate General, KPK supported the Report of the Commission and also urged the Court to shut down these plants unless they comply with the NEQS. In order to protect the human life and health of the residents of the area, who have been subjected to these plants for a number of years, we direct the Environmental Protection Agency, KPK ("EPA") to shut down and seal the operations of these stone crushing plants immediately. The respondent owners of the said plants can be allowed to re-operationalize their plants provided they make an appropriate application to this Court satisfying the Court that they now comply with the requirements of the NEQS, which the Court, after verifying this fact through a technical expert may allow. The local Police shall render full assistance to EPA to carry out the Order of this Court in shutting down the stone crushing plants immediately. A copy of this Order shall also be dispatched to the Inspector General Police, KPK for immediate compliance. The Advocate General, KPK shall submit a compliance report to this Court within a week thereof.

11. We also note that the NEQS were passed in 1993 and last updated in the year 2010 and the Federal and Provincial Governments have made no efforts to update the said standards. It is crucial to highlight that by limiting both the quality and quantity of anthropogenic pollutants in the environment, the NEQS serve as crucial frame-works which facilitate the transition towards a sustainable future. These standards do not only ensure the preservation of ecosystems and protection of public health through preventive measures but also play a significant role in fostering climate resilient development mechanisms by encouraging sustainable production processes in industries. Therefore, the Federal Government as well as the Provincial Governments are directed to update the NEQS within a period of three months from today and submit their updated/revised NEQS before this Court.

12. It is also pointed out that there are 900 other stone crushing plants operating in the province of Khyber Pakhtunkhwa. Let the Provincial EPA carry out detailed report regarding their environmental compliance and safe distance and submit their detailed report in this regard to this Court before the next date of hearing. In case the EPA finds that the said plants do not meet the NEQS or the safe distance requirement under the Rules, the EPA is free to take action against the said plants in accordance with the law.

&&13. Let these matters be relisted in the first week of November for the report of the Provincial Governments regarding the updating/ revision of the NEQS as well as the report on the environmental status of the 900 stone crushing plants. Copy of this Order be dispatched to all the Chief Secretaries of the four provinces and the Chief Commissioner, ICT for compliance regarding updating/ revision of the NEQS.

Schedule-A Excerpts from the Study on Environmental and Social Assessment of Mining and Crushing Activities in District Haripur, KP 6.1 Regulatory Compliance HKG and Niazi Crush Plants are operating without an Environmental Approval for operations from the KP EPA. Extensive deposition of dust was observed on trees, crops, the floor and furniture in houses in the Study Area. This indicates that the mitigation measures adopted by Plant owners until the time when monitoring was carried out as a part of this study are insufficient to control the dust emissions in the area and are therefore, non-compliant to conditions of the Environmental Approval for construction from KP EPA. High PM concentrations resulting from mining and crushing activities were measured at all the monitoring locations. The measured PM concentrations were not in compliance with the NEQS (24-hour) limits. Long term exposure to such high concentrations of $PM_{10}$ can cause several health effects ranging from

coughing, asthma to high blood pressure, cardiac diseases among the residents as well as the staff of the stone crushing plants. PM10 is also known to affect animals by causing various respiratory problems and creating additional stress. The settling of limestone dust over a long period results in changes to soil composition and pH, which may affect agricultural output. High noise levels exceeding the NEQS especially the nighttime limits were measured. Although most of the measured noise levels were under 60 dBA, however, long term exposures to such noise levels may cause headaches, sleeplessness, high blood pressure, and multiple other health issues among the nearby residents and especially among the staff of the stone crushing plants. High noise levels are also associated with hearing loss and increased stress in animals which results in altered mating behaviors. 6.2 Distance to Safeguard Health, Safety and Life of Residents Blasting vibrations are not expected to result in long-term damage to structures at 300 m or beyond (see Section 5.1 for detailed assessment). A safe distance of 378 m should be considered (keeping in mind the potential impact of flyrocks) to ensure the safety of the local community residents and residential structures (see Section 5.2) for the assessment and Section 5.3 for the justification used to obtain this number). Increasing the safe distance should not be considered the only solution to ensure safety of the nearby residents and appropriate mitigation measures to reduce flyrock distance and mitigate flyrock generation should be undertaken (see Section 5.2 for possible mitigation measures.

Schedule B Excerpts from the Draft Report on Particulate Matter Sampling: Stone Crushing Plants, Khanpur The key conclusions that have been made under this Study include the following: • $PM_{10}$ concentrations at all the sampling locations substantially exceeded the limits prescribed in the NEQS. • Extensive deposition of dust was observed on trees, and crops in the Study Area (Exhibit 2.8). This indicates that the mitigation measures adopted by Plant owners until the time when sampling was carried out as a part of this Study are insufficient to control the dust emissions in the area. • The measured PM concentrations were above the 24-hours limit prescribed in the NEQS at all six monitoring locations. Long-term exposure to such high concentrations of PM can cause several health effects ranging from mild coughing to asthma to high blood pressure to cardiac diseases among the residents and the workers of the stone-crushing plants. $PM_{10}$ is also known to affect animals by causing various respiratory problems and creating additional stress. The implementation of appropriate dust control measures is essential to keep the emissions of particulate matter within the limit.

Schedule C CONSTITUTION OF POWER CRUSHERS COMMISSION 1. Dr. Pervez Hassan Chairman 2. Representative of Hagler Bailly Pakistan Member 3. Representative of WWF Member 4. Director, Mineral and Mines, Government of KP Member 5. Director, EPA, Government of KPK Member 6. Representatives of Stone Crushers Member 7. Ahmad Rafay Alam, Environmental Lawyer, Lahore Member 8. Zofeen T Ibrahim, Freelance Journalist. Member Terms of Reference: a) What is the safe distance for installation and operation of power crushers from human dwellings? b) What safety measures must be taken/installed by power crushers for blasting and stone crushing at site at all times? c) What National Environmental Quality Standards

(NEQS) must be maintained by stone crushers to safeguard public health? d) What short term and long-term measures to be adopted by crushers in order to be EPA compliant? e) What measures or steps ought to be taken to continuously or regularly monitor the crushing and mining activities of power crushers to be EPA compliant? f) What measures to be taken by power crushers so as to convert from conventional quarrying to safe and smart quarrying which avoids flying rock and dust? g) What time frame to be fixed for to make their units EPA complaint? h) Recommend specification for cost-effective monitoring equipment with real-time monitoring of wind speed, wind direction, and dust emissions (specifically PM10) generated from operations of stone crushers and blasting activities. i) Draft guidelines to assist the power crushers to achieve effective management and operation of monitoring equipment with due consideration to existing technical capacity and costs. j) Develop a framework that can be used by the regulators to assess the environmental and social performance of stone crushers throughout the province and to share the information with the communities that may be at risk. k) Assess performance of stone crushing plants that have installed and operated equipment to control dust emissions and where applicable provide recommendations that the owners of crush plants may consider to further improve their environmental performance. l) Develop an action plan that considers a phased approach including appropriate safe distance (buffer zone) that will allow stone crushers to transition towards compliance with applicable legal laws in an appropriate time frame and eventually achieve internationally established benchmarks through continual improvement. m) Has the Government of KPK recently established a dedicated crushing zone in Khanpur, a few kilometers away from Suraj Gali; whether it is viable solution to shift/transfer the stone crushers to that zone. n) Any other issue as may be deemed appropriate or relevant to the above TORs or subject matter of crushing and environment.

Schedule D Excerpts from the Report of the Power Crushers Commission Conclusions of the Commission The Commission concludes that, as at 28 May 2024, the cut-off date determined by the Commission, the Suraj Gali Plants were not fully compliant with the existing applicable legal and regulatory regimes. This conclusion emerges from the following considerations: (1) The TOR of the Supreme Court required an assessment of the EPA compliance of the Plants; this meant the entire regulatory framework including "safe distance" and the "NEQS" (applicable to KPK) (2) importantly, the reference to compliance is to the "existing" regulatory framework, irrespective of its inadequacies. The Plants have not met, among others, the NEQS set out in Section 14. (3) it is acknowledged and recorded that the Plants do not comply with the "existing" 300 metre safe distance applicable in the KPK. That the Plants do not meet the applicable safe distance of 300 metres is borne out in the Report dated 10 August 2020 of Hagler Bailly Pakistan (Annexure A-1) and recorded in the Supreme Court Order dated 15 December 2021. (4) the Plants do not comply with the "existing" NEQS, however unsatisfactory they may be. There is a good case for a rationalization of the NEOS; the Commission can include that in its recommendations, which it has done, but it cannot base its recommendations on the NEOS as "they should be". The Commission commends the efforts and investments by the Plant Owners toward compliance with the support and guidance of the Commission but they could not

accomplish satisfactory and full compliance leaving the villagers defenseless against pollution, noise, health hazards, environmental and eco-system degradation and with a continuing risk to the qualities of their lives protected particularly by Articles 9 and 14 of the Constitution. Recommendations of the Commission (1) Adopt, at the national level, a safe distance of 500 metres (Discussion in Section 13(2)(a)). (2) KPK to develop a plan for Crushing Zones and to shift all crushing plants including the Suraj Gali Plants to such zones within a maximum transition period of 3 years. The Commission recommends that the KP Government develop a holistic policy and plan for establishing zone(s) for mining and stone crushing plants. To support the development of policy and plan, the stone crushing plants should develop and submit a comprehensive report to the Industries Department that details: • Project information including maps that identify nearby communities, quantity of equipment in place, operating capacity and schedules, and transportation routes. • The daily production volumes and output, revenue numbers and operating costs. • In the event of relocation, a minimum cost of relocation, number of closure days and the number of employees that will be retained. • The mitigation and monitoring measures in place by the crush plant in-line with the requirements of their respective IEEs/EIAs and conditions included in the NOC issued by the KP EPA. The report will be submitted by the industries to the KP Industries Department and the KP EPA. The information will allow the KP Industries Department to make an informed decision on which crush plants can be relocated to dedicated crushing zones based on their environmental performance and opportunity costs involved in relocation to ensure that a sustainable approach that considers both the environment and industrial needs of the province is adopted. In the Balochistan Environmental Protection Act, there is space for District Environmental Protection Agency, there is no such provision in KP Environmental Protection Agency. It is suggested that the KP Environmental Protection Agency may be enabled legally to work closely with the Mining Authority under KP Mines and Mineral Act. The Local Government is empowered to notify land zoning where it would be important that land zoning for purposes of mining and crushing of stones should be in consultation with the Mining Authority and Environmental Protection Agency. (3) to amend and rationalize NEOS to incorporate recent technology and best practices. (4) KPK to resource and develop the capacity of its regulatory agencies to better enforce and implement the laws and regulations. (5) KPK to require crush plants to install effective monitoring equipment for ensuring compliance. (6) KPK to enforce a closure period for all crush plants during winter months notwithstanding compliance to NEOS and safe distance. (7) KPK to establish grievance redressal mechanisms including local governments to assist the affected workers, villagers and the adjoining areas, as per Annexure F-2. (8) KPK to ban the use of old and obsolete equipment for crush plants and require equipment and processes that are environment and people-friendly. (9) A Phased-Out Action Plan that sets out phased approach for compliance with law. (10) Short and long-term Measures for Legal Compliance: The Industries Department have defined the criteria and classified integrated mining and crushing operations respectively as Large, Medium, or Small. In some cases, the mining activity is separate from the crushing. These classifications and guidelines apply to both independent mining and integrated mining and crushing operations. The Commission recommends a phased approach segregated in three

phases as provided below: Period Time Span Measures to be Followed by Crush Plants Short Within 1 year All crush plants designated as 'Large' will: Observe safe distances. Report daily production quantities to the KP Industries Department monthly. Carry out air quality monitoring against NEQS parameters as recommended and report to KP EPA on monthly basis. Adopt all mitigation measures adopted or planned to be adopted by the HKG facility inclusive of mining and crushing. Develop a Grievance Redress Mechanism (GRM) and implement it with involvement of all stakeholders. A framework is provided in Annexure F-2. Upgrade the EMP as included in the approved IEE or EIA of the facility in view of the recommendations of the Commission and submit it to the KP-EPA for review and approval. Where an EMP is not available, conduct an audit of the facility by engaging an independent consultant and prepare an EMP as advised by KP EPA. Cease operations between November and mid-February unless based on monitoring data the KP EPA determines that the facility has sufficient mitigations in place to safeguard the health and safety of communities. Medium Within 2 years All recommendations of the Commission for units designated as Large will also be applied on crush plants designated as Medium. Long Within 3 years All recommendations of the Commission for crush plants designated as Large will also be applied on crush plants designated as Small. In the meantime, no new licenses will be issued to any category of mining and crushing operations that do not obtain an environmental approval from KP EPA and do not comply with the recommendations of the Commission. (11) Specific Measures for Prevention of fly rock, noise, wastewater, and air emissions. Noise and wastewater are included in these mitigations in consideration of the grievances reported by the local community on these aspects. (a) Air Emissions • Dust collection systems: Use of dust collection systems such as baghouse filters as implemented by HKG. • Water Sprays: Use of water sprays to moisten materials and roadways to settle dust particles. • Enclosures and Sealing: Enclosure of conveyor systems and other equipment prevent dust from escaping. • Dust Suppressants: Addition of chemicals such as magnesium chloride or calcium chloride during the crushing can bind dust particles and reduce their airborne movement. • Vegetative Barriers: Strategic planting of trees and shrubs can act as natural barriers to dust. Measures employed by the HKG crush plant such as dust collection systems, closures around jaw crushers and water sprinkling systems can significantly reduce PM and dust related emissions. Section Error! Reference source not found. identifies the measures implemented by HKG. (b) Flyrock • Blasting Techniques: Precise drilling, accurate timing, and sequencing of blasts can reduce flyrock travel distance. Techniques such as pre-splitting can also help control the direction and limit the extent of flyrock. • Blast Mats or Covering Material: Use of blast mats or other durable covering materials over the blast area can significantly reduce the risk of flyrock by absorbing and containing the energy of the blast. • Protective Barriers: Constructing earthen berms or other types of barriers around the blasting site can physically block and contain flyrock, directing it back to the ground. • Charge and Firing Pattern Adjustment: Modifying the amount of explosive charge and changing the firing pattern can help control the force and direction of the blast, thereby reducing the risk of flyrock. (c) Noise • Acoustic Barriers: Erecting barriers or walls to block sound waves from machinery can mitigate noise impacts. • Equipment Modification: Using quieter machinery or retrofitting existing

equipment with noise-dampening materials. • Operational Timing: Limiting the hours of operation, especially during early morning or late evening, to minimize noise impact on surrounding communities. • Distance: Placing noisy equipment as far as possible from community areas. (d) Wastewater Primary treatment: Suspended solids can be removed from effluent via simple gravity settling before discharge into drainage systems. The addition of inexpensive flocculants such as lime and alum facilitate effective settling and removal of suspended solids in addition to also allowing for the settling and removal of dissolved solids. • Reuse and recycling: The silt-containing runoff can be collected in stormwater collection system and reused for vehicle washing and in sanitary facilities. The KP EPA as part of its review and prior issuance of a No-ObjectionCertification will ensure that the crush plant owners submitting an EIA or IEE have included the above-mentioned mitigation measures in the documents and have included the relevant mechanisms to ensure implementation within the environmental monitoring and mitigation plans. Recommendations for Interim Orders of the Supreme Court The Court in its order of 25 April 2022 directs that: It is also underlined that only three power crushers are before us, and we have been informed that there are 950 power crushers operating in KPK. Any sustainable solution proposed by the Commission and eventually approved by this Court can go a long way in resolving this issue for the entire Province (paragraph 5). (1) The Commission recommends that the concerned government departments that have a mandate to regulate the power crusher industry should be directed to formulate policies, plans, and procedures to extend the implementation to the entire Province. Both the actions should be time bound as suggested by the Commission in this Report. For the interim, as the Crush Plants at Suraj Gali are non-compliant with the legal and regulatory framework as at 28 May 2024 (the cut-off date of the Commission), the Supreme Court may consider closing them in the public interest and, subject to the other recommendations of the Commission such as the establishment of Crushing Zones, allow their opening on any of them establishing compliance with a neutral third party appointed by the Supreme Court It is added that the Plant Owners particularly the Niazi Plant kept sending the Commission its progress reports after the cut-off date of 28 May 2024 which the Commission could not assess and leaves for the evaluation of the neutral third party requested to be appointed by the Supreme Court in case the Niazi Plant or any other Plant petitions the Supreme Court for the opening of the Plant. (Emphasis supplied)

MH/A-26/SC Order accordingly.

**P L D 2024 Supreme Court 1168**

**Present: Syed Mansoor Ali Shah, Muhammad Ali Mazhar and Shahid Bilal Hassan, JJ**

**The COMMISSIONER INLAND REVENUE and others---Appellants**

**Versus**

**MEKOTEX (PVT.) LIMITED and others---Respondents**

C.P.L.As Nos. 824-K to 872-K, 545-K to 554-K, 582-K to 679-K, 699-K to 708-K, 1020-K to 1023-K, 1066-K of 2023 and C.M.As. Nos. 4002, 4003, 4384, 4004, 4005, 4006, 4007 and 7911 of 2023, decided on 18th September, 2024.

(Against the judgment of High Court of Sindh, Karachi dated 07-02-2023, passed in C.Ps. Nos. D-8385, D-8373, D-665, D-2208, D-2273, D-2661, D-8396, D-8277, D-8376, D-8372, D-8394, D-8370, D-8371, D-8164, D-8369, D-8278, D-8345, D-8390, D-8434, D-8375, D-8417, D-8539, D-8452, D-8470, D-1351, D-359, D-2209, D-8389, D-8343, D-8344, D-8416, D-8428, D-8534, D-8540, D-8552, D-2429, D-8561, D-8447, D-8507, D-8528, D-8446, D-8242, D-8449, D-6727, D-8275, D-8247, D-8271, D-8397, D-8546, D-8235, D-8276, D-8272, D-8559, D-8547, D-8560, D-8281, D-8282, D-8506, D-8274, D-8431, D-8432, D-8525, D-8543, D-8500, D-8544, D-8530, D-8526, D-8244, D-8508, D-8527, D-8517, D-8242, D-8241, D-8450, D-8246, D-8518, D-8243, D-8240, D-8238, D-8403, D-8433, D-8245, D-8545, D-8531, D-8529, D-8503, D-8237, D-8236, D-8448, D-8443 of 2019, D-2456, D-2210, D-659, D-6792, D-6729, D-6823, D-6822, D-6729, D-8368, D-8367, D-8374, D-357, D-358, D-6807, D-6728, D-355, 6771, D-6583, D-93, D-6682, D-60, D-3615, D-2652, D-356, D-6582, D-94, D-648, D-6498, D-6497 of 2020, D-04, D-05, D-444, D-09, D-08, D-1828 of 2021, D-140, D-993, D-139, D-141, D-1613, D-1614, D-1517, D-1518, D-36, D-1829, D-1830, D-955, D-8453, D-6815, D-63, D-52, D-114, D-115, D-61, D-3049, D-1718, D-54, D-464, D-357, D-6814, D-55, D-65, D-112, D-53, D-111, D-62, D-06, D-335 and D-3494 of 2022).

**(a) Constitution of Pakistan---**

----Arts. 12 & 142---Legislative powers of Parliament and Provincial Assemblies---Laws with retrospective effect---Apart from the specified exception under Article 12 of the Constitution, Parliament and Provincial Assemblies cannot enact criminal laws with retrospective effect; however, there is no restriction on their legislative powers to enact civil laws with retrospective effect---Nonetheless, neither prospective nor retrospective laws can be enacted to take away or abridge any of the fundamental rights guaranteed by Articles 9 to 28 of the Constitution or in contravention of any other provision of the Constitution---Constitution's prohibitions and requirements apply equally to both prospective and retrospective laws.

State of Gujarat v. Raman Lal (1983) 2 SCC 33 ref.

**(b) Constitution of Pakistan---**

----Art. 142---Legislative power to enact civil laws with retrospective effect---Principles---Legislature's power to legislate includes the power to legislate with retrospective effect---Legislature that is competent to make a law on a particular subject also has the power to legislate such a law with retrospective effect and can, by legislative fiat, even take away vested rights or affect past and closed transactions---Therefore, when a legislature gives retrospective effect to a law, either by express provision or by necessary implication, no protection can be afforded to vested rights contrary to that law---Similarly, when a legislature enacts a law with retrospective effect, the person affected cannot plead the imposition of a previously non-existent civil obligation as a ground for declaring the law invalid---Constitution only bars retrospective legislation concerning criminal liabilities, not civil rights and obligations---There is no such rule that even if a legislature has sought to take away a vested right, the courts must hold that such legislation is ineffective or strike down the legislation on the ground that it has retrospectively taken away a vested right---Law cannot be declared ineffective or struck down on the ground that it has taken away a vested right, nor can any protection be offered to vested rights contrary to it.

Amin Ullah v. Pannu Ram PLD 1967 SC 289; Haider Automobile v. Pakistan PLD 1969 SC 623; Molasses Trading v. Federation of Pakistan 1993 SCMR 1905; Muhammad Hussain v. Muhammad 2000 SCMR 367; Taisei Corporation v. A. M. Construction Company 2024 SCMR 640; Raja Amer v. Federation

of Pakistan 2024 SCP 91; Jamshaid Gulzar v. Federation of Pakistan 2014 SCMR 1504; Irshad Sheikh v. NAB 2015 SCMR 588; Annoor Textile v. Federation of Pakistan PLD 1994 SC 568; Taisei Corporation v. A. M. Construction Company 2024 SCMR 640; Haider Automobile v. Pakistan PLD 1969 SC 623; Molasses Trading v. Federation of Pakistan 1993 SCMR 1905 and Nabi Ahmed v. Government of West Pakistan PLD 1969 SC 599 ref.

**(c) Interpretation of statutes---**

----Laws having retrospective effect---Principles for interpreting laws that have or appear to have retrospective effect stated.

When a law regulating certain affairs is introduced for the first time, it is presumed to apply to future affairs, not to alter the character of past transactions made under the law as it then existed. This principle is encapsulated in the maxim lex prospicit non respicit-the law looks forward, not backward. A retrospective law is an exception to this general principle; therefore, courts approach the interpretation of laws with a presumption in favour of the general principle that laws are intended to regulate future affairs, not to affect past transactions. Exceptions of retrospective effect are interpreted strictly, as are other exceptions to general principles. This presumption is rooted in the rule of fairness, as altering accrued rights and obligations retrospectively is often considered unfair. Since the legislature is not expected to act in an unfair manner, it becomes essential to closely scrutinize a law that appears to have such an effect, ensuring that this was indeed the legislature's intent. Thus, the legislature is presumed not to have intended to alter the law applicable to accrued rights and obligations or past events and transactions unless a clear contrary intention is expressed. The strength of this presumption varies with the degree of potential unfairness-the greater the unfairness, the more explicit the legislature's intent must be.

C.I.T. v. Vatika Township (2015) 1 SCC 1 (5MB); L'Office Cherifien v. Yamashita-Shinnihon Steamship Co (1994) 1 AC 486 and Secretary of State v. Tunnicliffe (1991) 2 All ER 712 ref.

Therefore, in our jurisdiction, the established principles for interpreting laws that have or appear to have retrospective effect are as follows. Every statute that relates to substantive rights and obligations should be deemed prospective unless, by express provision or necessary implication, it has been given retrospective effect. Courts must lean against giving a statute retrospective effect that affects vested rights and/or past and closed transactions by adhering to two rules: first, if two interpretations are reasonably possible, the one that saves vested rights and/or past and closed transactions should be adopted; and second, no statute should be construed to have retrospective effect to a greater extent than its language necessarily requires. Although vested rights may be affected and taken away by express provision or necessary implication, past and closed transactions can be disturbed and reopened only by express provision. This is because the greater the unfairness, the more explicit the legislature's intent must be.

Nagina Silk Mill v. Income-Tax Officer PLD 1963 SC 322; Province of East Pakistan v. Sharafatullah PLD 1970 SC 514; C.I.T. v. EFU Insurance Co. PLD 1982 SC 247; Ghulam Hyder Shah v. Chief Land Commissioner 1983 CLC 1585; Chief Land Commissioner v. Ghulam Hyder Shah 1988 SCMR 715; Molasses Trading v. Federation of Pakistan 1993 SCMR 1905; Muhammad Hussain v. Muhammad 2000 SCMR 367; Molasses Trading v. Federation of Pakistan 1993 SCMR 1905 and Zila Council Jehlum v. Pakistan Tobacco Company PLD 2016 SC 398 and Shahnawaz (Pvt.) Ltd. v. Pakistan 2011 PTD 1558 ref.

**(d) General Clauses Act (X of 1897)---**

----S. 6---Effect of repeal of a law---'Repeal' and 'amendment'---Synonymity---There is no difference in principle between repeal and amendment, as every amendment inherently involves a repeal, where the law in its previous form disappears and a new law takes its place---Whether the legislature states that a particular section will be amended in a certain way or declares that the section is repealed and replaced by a new one, the outcome is fundamentally the same---In its broader scope, the word 'repeal' as used in Section 6 of the General Clauses Act, 1897 includes amendment, as both processes ultimately achieve the same legislative result---While 'repeal' generally refers to the abrogation of an entire law and 'amendment' to changes within a statute, both carry the same effect, making it necessary to treat them similarly---Therefore, Section 6 of the General Clauses Act, 1897 also applies to the amendment of a law.

Saeed Ahmad v. State PLD 1964 SC 266; Dad Muhammad v. ADJ 1996 SCMR 1688; Mukhtar Hamid v. Government of Punjab PLD 2002 SC 757 and Anwar Yahya v. Federation of Pakistan 2017 PTD 1069 ref.

**(e) Interpretation of statutes---**

----Vested right under a law---Scope---Past and closed transaction---Scope---A right vests when all the facts required by law to establish that right have occurred---In other words, when all the facts necessary to create a right have occurred, the right is said to be "vested"---A right remains inchoate and contingent when some, but not all, of the investitive facts have occurred---A "vested right" is, therefore, one that is absolute, complete and unconditional, with no obstacles to its exercise---It is immediate and perfect in itself, not dependent upon any contingency---Vested right are thus free from contingencies, but ordinarily there are always specific occasions and circumstances under which such vested rights may be exercised---A vested right becomes a past and closed transaction when such right is exercised, or deemed to have been exercised by operation of law, at a specific occasion and under specific circumstances---Since such specific occasions and circumstances may vary under different laws, it is determined on the basis of the peculiar facts and legal position of each case whether a vested right has turned into a past and closed transaction.

Government of Punjab v. Kamran Bashir 2022 PLC (C.S.) 6; Nabi Ahmed v. Government of West Pakistan PLD 1969 SC 599; Zaman Cement Co. v. CBR 2002 SCMR 312; Asdullah Mangi v. PIA Corporation 2005 SCMR 445; Amer v. Federation of Pakistan 2024 SCP 91; CIT v. EFU Insurance Co. PLD 1982 SC 247; Nagina Silk Mill v. Income-Tax Officer PLD 1963 SC 322; Ghulam Hyder Shah v. Chief Land Commissioner 1983 CLC 1585; Chief Land Commissioner v. Ghulam Hyder Shah 1988 SCMR 715; Molasses Trading v. Federation of Pakistan 1993 SCMR 1905; Muhammad Hussain v. Muhammad 2000 SCMR 367; Zila Council Jehlum v. Pakistan Tobacco Company PLD 2016 SC 398 and Shahnawaz (Pvt.) Ltd. v. Pakistan 2011 PTD 1558 ref.

**(f) Income Tax Ordinance (XLIX of 2001)---**

----S. 65B (as amended by the Finance Act, 2019)---Constitution of Pakistan, Art. 25---Amendments made to Section 65B of the Income Tax Ordinance, 2001 by the Finance Act, 2019 ("2019 amendments"), vires of---Tax credit---Purchase of plant and machinery for an industrial undertaking set up in Pakistan---Competency of legislature to modify or withdraw the benefit of tax credit through retrospective amendments---Past and closed transaction---Vested right---Scope---For purposes of present case there were two categories of taxpayer companies; the "first category" consisted of those companies who had both purchased and installed the plant and machinery by 30 June 2019, while the "second category" included those who had purchased the plant and machinery by 30 June 2019 but installed it after that date but before 30 June 2021---Provisions of subsection (1) of Section 65B of the Income Tax Ordinance, 2001 are to be read in conjunction with subsection (2)---When so read together, it becomes clear that to avail the benefit of the tax credit under Section 65B, taxpayer companies must fulfill two conditions: first, they have to purchase the plant and machinery; and second, they have to install the purchased plant and machinery in an industrial undertaking set up in Pakistan---Only when both of these conditions are fulfilled does a taxpayer company acquire a vested right to avail the benefit of the tax credit conferred by Section 65B---In the present case the second category of taxpayer companies had purchased the plant and machinery before 1 July 2019, when the 2019 amendments came into force, but had not yet installed it---Therefore, they had fulfilled only one of the two required conditions---As a result, they had not yet acquired any vested right to avail the benefit of the tax credit conferred by Section 65B, thus no question arose as to them being affected by the 2019 amendments---As for the first category of taxpayer companies, they had undoubtedly acquired a vested right to avail the benefit of the tax credit conferred by Section 65B---This was because they had fulfilled both of the required conditions by 1 July 2019, when the 2019 amendments came into force; they had both purchased and installed the plant and machinery by that date---Vested right of a taxpayer company to avail the benefit of the tax credit conferred by Section 65B matured into a past and closed transaction upon the filing of the claim by the taxpayer company, either separately as per the instructions of the Federal Board of Revenue (FBR), if such or similar instructions existed, or along with the income tax returns, as the case may be---In the present case, the second category of taxpayer companies had neither filed the claim separately, as per the FBR instructions, nor

filed their income tax returns along with the claim by 1 July 2019, when the 2019 amendments came into force---Therefore, their vested right did not "crystallize" into a past and closed transaction---By way of the 2019 amendments the proviso added to subsection (1) of Section 65B of the Income Tax Ordinance, 2001, was in violation of the prohibition against discrimination and the guarantee of equal treatment provided by the fundamental right enshrined in Article 25 of the Constitution---This proviso reduced the rate of the tax credit for the tax year 2019 from 10% to 5% of the amount invested, whereas for all other tax years from 2010 to 2018, taxpayer companies were granted a tax credit at the rate of 10% of the amount invested---As a result, the first category of taxpayer companies had been discriminated against and had not been afforded the equal treatment that was given to other taxpayer companies for the tax years 2010 to 2018---As for the second category of taxpayer companies, their case was distinguishable from the first category, therefore, the amendment made to subsection (2) of Section 65B, which reversed the expiry date of availing the benefit of the tax credit from 30 June 2021 to 30 June 2019, did not fall within the scope of the constitutional prohibition contained in Article 8 read with Article 25 of the Constitution---Supreme Court declared that the proviso added to subsection (1) of Section 65B through the 2019 amendments infringed the fundamental right of the first category of taxpayer companies to protection against discrimination and the guarantee of equal treatment under Article 25 of the Constitution, and was therefore liable to be struck down; that the change made to subsection (2) of Section 65B through the 2019 amendments did not infringe any of the fundamental rights of the second category of taxpayer companies guaranteed by Articles 18, 23, 24 and 25 of the Constitution---Petitions were converted into appeals, which were partly allowed.

**(g) Promissory estoppel, doctrine of---**

----Doctrine of promissory estoppel does not operate against the legislature.

Army Welfare Sugar Mills v. Federation of Pakistan 1992 SCMR 1652 ref.

**(h) Precedent---**

----Earlier decision of a Bench of equal numeric strength---Precedential value---Earlier decision of a bench of a High Court, or of the Supreme Court, on a question of law is binding on another bench of equal numeric strength when dealing with the same question, in the sense that the latter bench cannot decide the same question contrary to the first decision---However, the latter bench is not precluded from examining the correctness of the earlier decision or forming a different view---In such a case, the proper course of action is to refer the matter to the Chief Justice of the High Court, or in the case of the Supreme Court to the Bench-Constitution Committee, with a request for the constitution of a larger bench to examine the correctness of the earlier decision and, if necessary, to reconsider and redecide the question.

Multiline Associates v. Ardeshir Cowasjee 1995 SCMR 362 ref.

**(i) Judicial review---**

----Economic matters and policies---In complex economic matters, the best solutions are often not easily discernible; the wisdom of any choice may be debated or criticized, but mere errors of policy judgment are not subject to judicial review---Only clear and definite violations of fundamental rights or other constitutional provisions warrant judicial intervention---Legislative and executive branches of the State are entitled to make pragmatic adjustments which may be called for by particular circumstances---Courts cannot strike down an economic policy decision taken by them merely because they feel that another policy decision would have been fairer, wiser, or more scientific or logical---It is for the legislature, not the courts, to balance the advantages and disadvantages of various economic concerns---Therefore, while examining the constitutionality of fiscal laws on the touchstone of fundamental rights, particularly the fundamental right to equality before the law, courts should exercise greater restraint and extend more deference to legislative judgment than they do with laws concerning civil and political rights---Legislature must be afforded some "play in its joints" because it is tasked with addressing complex economic problems that do not admit solutions through doctrinaire or rigid formulas.

Metropolis Theatre Co. v. Chicago (1913) 228 U.S. 61; Morey v. Doud (1957) 354 US 457; R.K. Garg v. UOI (1981) 4 SCC 675 and Bain Peanut Co. v. Pinson (1931) 282 U.S. 499 ref.

In attendance:

Dr. Shah Nawaz, Advocate Supreme Court.

M. Tariq Arbab, Member (L) FBR.

Mir Badshah Khan, Member (Operation) FBR and Fahad Faizan, CIR, FBR.

Dr. Sohail Ahmed Fazlani, Addl. Comm. FBR. Abdul Wahid, Addl. Commissioner, LTO. and Malik Waqas Nawaz, ADC/DR CTO, FBR.

Rashid Anwar, Advocate Supreme Court.

Irfan Mir Halipota, Advocate Supreme Court.

Abid Hussain Shaban, Advocate Supreme Court.

Hussain Ali Almani, Advocate Supreme Court.

Hyder Ali Khan, Advocate Supreme Court.

Imtiaz Rashid Siddiqui, Advocate Supreme Court.

Ms. Lubna Pervez, Advocate Supreme Court.

Muhammad Nadeem Qureshi, Advocate Supreme Court.

Arshad Hussain Shahzad, Advocate Supreme Court.

Naeem Suleman, Advocate Supreme Court.

Taimur Mirza, Advocate Supreme Court.

Mst. Abida Parveen Channar, Advocate-on-Record.

Syed Rafaqat Hussain Shah, Advocate-on-Record.

Rashideen Nawaz Kasuri, Addl. AGP.

M. Ibrahim Khan, L.O. (AGP office).

Date of hearing: 3rd July, 2024.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**The constitutionality of the amendments made to Section 65B of the Income Tax Ordinance, 2001 ("ITO") by the Finance Act, 2019 is under challenge in the present case. Section 65B was introduced into the ITO by the Finance Act, 2010 as a tax incentive provision for local industry. It allowed taxpayer companies a tax credit at the rate of 10% of the amount invested in the purchase of plant and machinery for an industrial under- taking set up in Pakistan, provided that the plant and machinery were purchased and installed between 1 July 2010 and 30 June 2015. Subsections (1) and (2) of Section 65B are relevant to the questions involved in the present case. Some minor changes were made to subsection (1) by the Finance Act, 2012,[1] which are not important for the purposes of the present case. Therefore, the provisions of subsections (1) and (2), as amended in 2012, are reproduced here for ease of reference:

65B. Tax credit for investment.---(1) Where a taxpayer being a company invests any amount in the purchase of plant and machinery, for the purposes of extension, expansion, balancing, modernization and replacement of the plant and machinery, already installed therein, in an industrial undertaking set up in Pakistan and owned by it, credit equal to ten per cent of the amount so invested shall be allowed against the tax payable, including on account of minimum tax and final taxes payable under any of the provisions of this Ordinance, by it in the manner hereinafter provided.

(2) The provisions of subsection (1) shall apply if the plant and machinery is purchased and installed at any time between the first day of July, 2010, and the 30th day of June, 2015.

(Emphasis added)

The ending year, 2015, mentioned in subsection (2) was changed to 2016 by the Finance Act, 2015; to 2019 by the Finance Act, 2016; and to 2021 by the Finance Act, 2018. However, the Finance Act, 2019 brought the ending year back from 2021 to 2019 and, by adding a proviso to subsection (1), reduced the rate of tax credit from 10% to 5% of the amount invested for the tax year 2019.[2] The said proviso is also reproduced here for ready reference:

Provided that for the tax year 2019 the rate of credit shall be equal to five percent of the amount so invested:

2. Aggrieved by the amendments made to Section 65B of the ITO by the Finance Act, 2019 ("2019 amendments"), some taxpayer companies ("respondents") challenged the constitutionality thereof by invoking the writ jurisdiction of the High Court of Sindh. By its order dated 7 February 2023 ("impugned order"), detailed reasons of which were released on 27 February 2023 ("impugned judgment"), the High Court concluded that two categories of taxpayer companies-firstly, those respondents which had both purchased and installed the plant and machinery by 30 June 2019, and secondly, those respondents which had purchased the plant and machinery by 30 June 2019 and installed the same after that date but by 30 June 2021-had protected vested rights that could not be vitiated by the 2019 amendments. Consequently, the High Court allowed the writ petitions, declaring that for these two categories of taxpayer companies, the amended provisions of subsection (2) of Section 65B should be "read to reflect that the provisions of subsection (1) shall apply if the plant and machinery was purchased before 30 June 2019 and installed before 30 June 2021". Furthermore, the High Court struck down the proviso added to subsection (1), which had reduced the rate of tax credit from 10% to 5% for the tax year 2019. Hence, the Commissioner Inland Revenue ("petitioner") has filed the present petitions for leave to appeal against the impugned order passed by the High Court.

3. The learned counsel for the petitioner challenged the validity of the impugned order, primarily arguing that the legislature is competent to modify or withdraw the benefit of tax credit through retrospective amendments to Section 65B of the ITO and can thereby take away the vested rights, if any, of the respondents. He contended that the High Court legally erred in holding that the vested rights of the respondents could not be vitiated by the 2019 amendments. On the other hand, the learned counsel for the respondents stated that, in the case of the first category of taxpayer companies which purchased and installed plant and machinery by 30 June 2019 ("first category of taxpayer companies"), the transaction of the tax credit benefit has become past and closed. As for the second category of taxpayer companies which purchased plant and machinery before 30 June 2019 ("second category of taxpayer companies"), such taxpayer companies have acquired a vested right to avail the benefit of the tax credit by installing the purchased plant and machinery by 30 June 2021.

They contended that retrospective legislation does not reopen past and closed transactions unless the legislature uses express and clear language to that effect, which, according to them, is not present in the 2019 amendments (the proviso). Thus, they argued, the first category of taxpayer companies is not affected by the said amendments. Regarding the second category of taxpayer companies, they argued that the amendment made to subsection (2), reverting the ending year of the tax credit benefit from 2021 to 2019, applies only to investments made after, not before, 30 June 2019. They further contended that the 2019 amendments infringe upon the respondents' fundamental rights to conduct lawful business, to acquire and hold property, and to equality before the law, as guaranteed by Articles 18, 23, 24 and 25 of the Constitution.

4. We have considered the arguments of the learned counsel for the parties, read their written submissions as well as the cases cited therein, and examined the record of the case.

5. The contentions of the learned counsel for the parties give rise to the following questions:

(i) Whether the High Court legally erred in holding that the vested rights of the respondents could not be vitiated by the 2019 amendments.

(ii) Whether the second category of taxpayer companies has acquired a vested right to avail the benefit of the tax credit and such right is not affected by the 2019 amendments.

(iii) Whether in the case of the first category of taxpayer companies, the transaction of the tax credit benefit has become past and closed and the same is not affected by the 2019 amendments.

(iv) Whether the 2019 amendments infringe upon the respondents' fundamental rights to conduct lawful business, to acquire and hold property and to equality before the law, as guaranteed by Articles 18, 23, 24 and 25 of the Constitution.

However, before addressing these questions, we find it appropriate to briefly outline the constitutional position regarding the legislative powers of Parliament and Provincial Assemblies, as well as the settled principles of law concerning the legislature's power to enact laws with retrospective effect and the established

principles for interpreting laws that have or appear to have retrospective effect. This will facilitate the decision on the questions.

Constitutional position regarding the legislative powers of Parliament and Provincial Assemblies

6. In our country, Article 142 of the Constitution of the Islamic Republic of Pakistan ("Constitution") is the fountainhead of legislative powers. In addition to other specific provisions in the Constitution, the legislative powers of the Federal Legislature (Parliament) and the Provincial Legislatures (Provincial Assemblies) stem from the general provisions of this Article. It confers on Parliament the power to make laws with respect to any matter in the Federal Legislative List and on Provincial Assemblies the power to make laws with respect to any matter not enumerated in the Federal Legislative List, while also conferring on both the concurrent power to make laws with respect to criminal law, criminal procedure and evidence. There is no restriction on the legislative powers conferred by this Article on Parliament and Provincial Assemblies regarding the enactment of laws with retrospective effect, except that it makes this conferment of legislative powers "subject to the Constitution".

7. The phrase "Subject to the Constitution" used in Article 142 indicates that where the Constitution itself imposes a restriction on the exercise of legislative power in a particular manner or prescribes a specific manner for the exercise of legislative power, then the legislative power conferred by this Article cannot be exercised in the prohibited manner or can only be exercised in accordance with the manner specifically prescribed by the Constitution, as the case may be.[3] Since Article 8 of the Constitution imposes a restriction on the legislative powers of Parliament and Provincial Assemblies with respect to making any law that takes away or abridges the rights conferred by Articles 9 to 28, neither Parliament nor Provincial Assemblies can exercise their legislative powers in a manner prohibited by this Article.[4] Article 12 bars the enactment of retrospective laws concerning criminal liabilities, except for acts of abrogation or subversion of the Constitution. Therefore, apart from the specified exception, Parliament and Provincial Assemblies cannot enact criminal laws with retrospective effect; however, there is no restriction on their legislative powers to enact civil laws with retrospective effect. Nonetheless, neither prospective nor retrospective laws can be enacted to take away or abridge any of the fundamental rights guaranteed by Articles 9 to 28 of the Constitution or in contravention of any other provision of the Constitution. The Constitution's prohibitions and requirements apply equally to both prospective and retrospective laws.[5]

Principles of law concerning the legislature's power to enact laws with retrospective effect

8. Given the above constitutional position, which imposes no restriction on enacting civil laws either prospectively or retrospectively within constitutional limits, the settled principles of law regarding the legislature's power to enact civil laws with retrospective effect are as follows. The legislature's power to legislate includes the power to legislate with retrospective effect.[6] A legislature that is competent to make a law on a particular subject also has the power to legislate such a law with retrospective effect and can, by legislative fiat, even take away vested rights or affect past and closed transactions.[7] Therefore, when a legislature gives retrospective effect to a law, either by express provision or by necessary implication, no protection can be afforded to vested rights contrary to that law.[8] Similarly, when a legislature enacts a law with retrospective effect, the person affected cannot plead the imposition of a previously non-existent civil obligation as a ground for declaring the law invalid.[9] The Constitution only bars retrospective legislation concerning criminal liabilities, not civil rights and obligations.[10] There is no such rule that even if a legislature has sought to take away a vested right, the courts must hold that such legislation is ineffective or strike down the legislation on the ground that it has retrospectively taken away a vested right.[11]

Principles for interpreting laws that have or appear to have retrospective effect

9. As for the principles for interpreting laws that have or appear to have retrospective effect, it is axiomatic that every person is presumed to know the law currently in force and is expected to arrange their affairs accordingly-current law governs current affairs. If a person acts today, he does so with the knowledge of today's law, not with knowledge of future laws. Therefore, when a law regulating certain affairs is introduced for the first time, it is presumed to apply to future affairs, not to alter the character of past transactions made under the law as it then existed. This principle is encapsulated in the maxim lex prospicit non respicit-the law

looks forward, not backward. A retrospective law is an exception to this general principle; therefore, courts approach the interpretation of laws with a presumption in favour of the general principle that laws are intended to regulate future affairs, not to affect past transactions. Exceptions of retrospective effect are interpreted strictly, as are other exceptions to general principles. This presumption is rooted in the rule of fairness, as altering accrued rights and obligations retrospectively is often considered unfair. Since the legislature is not expected to act in an unfair manner, it becomes essential to closely scrutinize a law that appears to have such an effect, ensuring that this was indeed the legislature's intent. Thus, the legislature is presumed not to have intended to alter the law applicable to accrued rights and obligations or past events and transactions unless a clear contrary intention is expressed. The strength of this presumption varies with the degree of potential unfairness-the greater the unfairness, the more explicit the legislature's intent must be.[12]

10. Therefore, in our jurisdiction, the established principles for interpreting laws that have or appear to have retrospective effect are as follows. Every statute that relates to substantive rights and obligations should be deemed prospective unless, by express provision or necessary implication, it has been given retrospective effect. Courts must lean against giving a statute retrospective effect that affects vested rights and/or past and closed transactions by adhering to two rules: first, if two interpretations are reasonably possible, the one that saves vested rights and/or past and closed transactions should be adopted; and second, no statute should be construed to have retrospective effect to a greater extent than its language necessarily requires.[13] Although vested rights may be affected and taken away by express provision or necessary implication, past and closed transactions can be disturbed and reopened only by express provision.[14] This is because, as noted above, the greater the unfairness, the more explicit the legislature's intent must be.

11. It is pertinent to mention that the above principles are also statutorily underpinned by the provisions of Section 6 of the General Clauses Act, 1897, which inter alia provides that where any Act repeals an enactment, then, unless a different intention appears, the repeal shall not affect the previous operation of the repealed enactment or anything duly done or suffered thereunder (past and closed transactions), nor shall it affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed enactment (vested rights). We may also underscore, as held by this Court in Saeed Ahmad,[15] that there is no difference in principle between repeal and amendment, as every amendment inherently involves a repeal, where the law in its previous form disappears and a new law takes its place. Whether the legislature states that a particular section will be amended in a certain way or declares that the section is repealed and replaced by a new one, the outcome is fundamentally the same. In its broader scope, the word 'repeal' as used in Section 6 of the General Clauses Act, 1897 includes amendment, as both processes ultimately achieve the same legislative result. While 'repeal' generally refers to the abrogation of an entire law and 'amendment' to changes within a statute, both carry the same effect, making it necessary to treat them similarly. Therefore, Section 6 of the General Clauses Act, 1897 also applies to the amendment of a law.

Legal position as to retrospective law, vested right, and past and closed transaction

12. To have a clear and complete understanding of the questions at hand, it is also necessary to briefly state the legal position as to which statute is considered a retrospective law, how a right becomes vested and when a vested right turns into a past and closed transaction.

13. A statute is considered retrospective if it takes away or impairs any vested right already acquired under the then existing law or creates a new obligation or disability in respect of a transaction that is already past and closed.[16] In other words, a statute that does not affect vested rights or create new obligations regarding past and closed transactions cannot be said to be retrospective.[17] Similarly, a statute that extinguishes, by repeal of an existing law, a bare, abstract, inchoate or contingent right is not deemed to be retrospective, and such rights do not survive the repeal of the law under which they existed.[18]

14. As for vested rights, the legal position is also well settled. A right vests when all the facts required by law to establish that right have occurred. In other words, when all the facts necessary to create a right have occurred, the right is said to be "vested". A right remains inchoate and contingent when some, but not all, of the investitive facts have occurred. A "vested right" is, therefore, one that is absolute, complete and unconditional, with no obstacles to its exercise. It is immediate and perfect in itself, not dependent upon any

contingency.[19] Vested right are thus free from contingencies, but ordinarily there are always specific occasions and circumstances under which such vested rights may be exercised.[20]

15. The last sentence of the above paragraph indicates how a vested right becomes a past and closed transaction: this occurs when such right is exercised, or deemed to have been exercised by operation of law, at a specific occasion and under specific circumstances. Since such specific occasions and circumstances may vary under different laws, it is determined on the basis of the peculiar facts and legal position of each case whether a vested right has turned into a past and closed transaction[21]. Accordingly, this question has been addressed differently in several cases, each with its own peculiar facts and legal context. For example, In EFU Insurance Co.,[22] it was held that once the four-year period prescribed under the then-existing law for the assessment or reassessment of tax on profits that had either escaped assessment or were under-assessed had expired, the assessment for the year concerned became a past and closed transaction; in Ghulam Hyder Shah,[23] it was held that since the Land Commissioner had exercised his power to scrutinize the disputed gifts and affirmed them under the provisions of the then-existing law, the transaction of gifts had become past and closed. In Molasses Trading,[24] it was held that when the petitioners
had presented the bills of entry for the quantification of customs duty payable on the imported goods and thereby exercised their vested right to avail exemption under the then-existing law, the transaction had become past and closed. In Muhammad Hussain,[25] the suits filed within the limitation period prescribed under the then-existing law were treated as past and closed transactions with respect to the right to file suits within the prescribed limitation period. In Zila Council Jehlum,[26] it was held that since the respondents' goods had passed through the terminal of the appellant without payment of the 'goods exit tax' in accordance with the then-existing law, the transaction of exiting the goods had become past and closed; and, in Shahnawaz,[27] it was determined that the deemed assessment order under Section 120 of the ITO becomes a past and closed transaction for the purpose of audit once it is selected for audit and the audit is conducted or abandoned in accordance with Section 177 of the ITO as applicable to the tax year concerned.

16. Having thus laid down the constitutional and legal position on the key points concerning the questions raised, we can now conveniently address those questions.

(i) Whether the High Court legally erred in holding that the vested rights of the respondents could not be vitiated by the 2019 amendments.

17. In the impugned judgment, the High Court observed that 'the curtailing of the benefit extended in section 65B of the Ordinance [ITO], consequent upon the amendment made via [the] Finance Act 2019, amounted to impermissible vitiation of vested rights/past and closed transactions'[28] (para 14); that 'the amendment to section 65B of the Ordinance [ITO] via the Finance Act 2019 amounted to impermissible vitiation of vested rights' (para 22); that 'notwithstanding the curtailment of the expiration date, protected vested rights had been created in favor of the persons having purchased the pertinent plant and machinery prior to 30th June 2019' (para 24); that 'the Proviso is determined to be an unjustified attempt to vitiate protected vested rights' (para 26). With the said observations, the High Court concluded that the 'two category identified were found to have protected vested rights and it was our much deliberated view that such rights could not be vitiated in the manner intended by the amendment to section 65B of the Ordinance [ITO] by the Finance Act 2019' (para 35).[29]

18. We are completely at a loss to understand the constitutional and legal basis of the above observations and conclusion of the High Court. As afore noted, a legislature that is competent to make a law on a particular subject also has the power to legislate such a law with retrospective effect and can, by legislative fiat, even take away vested rights. Therefore, when a legislature gives retrospective effect to a law, either by express provision or by necessary implication, no protection can be afforded to vested rights contrary to that law.

19. It is evident from the above-cited observations and conclusion of the High Court that it recognized the legislature's intent through the 2019 amendments was to vitiate the vested rights, if any, of the taxpayer companies. However, the High Court found this to be "impermissible" and "unjustified", and regarded the rights of the taxpayer companies vested in them under Section 65B, before the amendments, as "protected vested rights". Therefore, in essence, it declined to give effect to the 2019 amendments through the impugned

judgment. This approach of the High Court in determining the constitutionality of a law that has or appears to have a retrospective effect clearly contradicts the statements and principles of law enunciated by this Court in several cases, which are binding on all courts of the country, including the High Courts, under Article 189 of the Constitution. Some of these statements and principles, most relevant to the question under discussion, are cited here for ready reference:

Haider Automobile v. Pakistan PLD 1969 SC 623 (5MB)

There is no such rule that even if the Legislature has, by the use of clear and unambiguous language, sought to take away a vested right yet the Courts, must hold that such a legislation is ineffective or strike down the legislation on the ground that it has retrospectively taken away a vested right.

Molasses Trading v. Federation of Pakistan 1993 SCMR 1905 (5MB)

It also cannot be disputed that the legislature, which is competent to make a law, has full plenary powers within its sphere of operation to legislate retrospectively or retroactively. Therefore vested rights can be taken away by such a legislation and it cannot be struck down on that ground.

Jamshaid Gulzar v. Federation of Pakistan 2014 SCMR 1504

[W]hen the legislature has given the amending enactment retrospective effect with clear intendment spelt out from its language, than no protection to the alleged vested rights of appellants can be offered contrary to it.

It is more than evident from the above pronouncements that a law cannot be declared ineffective or struck down on the ground that it has taken away a vested right, nor can any protection be offered to vested rights contrary to it. Therefore, the High Court legally erred in holding that the vested rights of the respondents could not be vitiated by the 2019 amendments. Vested rights, if any, of the respondents can be vitiated by the 2019 amendments if such legislative intent appears either from the express provisions or by necessary implication of the amendments. Question (i) is answered accordingly.

20. However, whether the respondents have any vested rights and whether the 2019 amendments indeed affect such rights will be addressed in the following questions.

(ii) Whether the second category of taxpayer companies has acquired a vested right to avail the benefit of the tax credit and such right is not affected by the 2019 amendments.

21. As above noted, the first category of taxpayer companies consists of those respondents who had both purchased and installed the plant and machinery by 30 June 2019, while the second category includes those who had purchased the plant and machinery by 30 June 2019 but installed it after that date but before 30 June 2021. Although the High Court classified the respondents into these categories for discussion, it granted both categories the same relief that was available to them before the 2019 amendments, i.e., a tax credit at the rate of 10% of the amount invested in the purchase of plant and machinery.

22. It is not clear from the impugned judgment which category's claimed right was treated as a past and closed transaction and which was considered only a vested right. This lack of clarity in the impugned judgment suggests that, despite citing extensive extracts from Shahnawaz[30] that elaborate on the distinction between vested rights and past and closed transactions, as earlier expounded in Ghulam Hyder Shah[31] and Molasses Trading,[32] the High Court did not fully comprehend this distinction. The conclusion recorded in paragraph 35 of the impugned judgment suggests that the High Court perhaps treated the claimed rights of both categories as vested rights. Nonetheless, since the learned counsel for the respondents have argued before us that the vested rights of the first category of respondents have become past and closed transactions while those of the second category remain vested rights, we have opted to discuss and decide the matter on that basis for the sake of clarity.

23. It was argued on behalf of the petitioner before the High Court, and also before us, that to avail the benefit of the tax credit under Section 65B, the taxpayer companies must fulfill two conditions: first, they must purchase the plant and machinery; and second, they must install the purchased plant and machinery in an industrial undertaking set up in Pakistan. Only once both of these conditions
are fulfilled by a taxpayer company does it acquire a vested right to avail the benefit of the tax credit. On the other hand, the stance of the respondents before the High Court, as well as before us, was that the only

condition to avail the benefit of the tax credit is the purchase of the plant and machinery for an industrial undertaking set up in Pakistan, as prescribed in subsection (1) of Section 65B, which grants such a benefit.

24. Relying on its earlier decision in Gulshan Spinning,[33] the High Court accepted the stance of the respondent and held that the right to claim the tax credit comes into existence with the purchase of the plant and machinery, while the installation is material only in respect of the tax year when the credit is to be claimed.[34]

25. We find that the High Court's reliance on Gulshan Spinning is misplaced, and it erred in accepting the respondents' stance that the sole condition to avail the benefit of the tax credit under subsection (1) of Section 65B is the purchase of plant and machinery. The provisions of subsection (2) of Section 65B make it clear that subsection (1) is not to be read in isolation, but rather in conjunction with subsection (2). To clarify this point, the provisions of subsection (2), as they were before the 2019 amendments, are reproduced here:

(2) The provisions of subsection (1) shall apply if the plant and machinery is purchased and installed at any time between the first day of July, 2010, and the 30th day of June, 2021.

(Emphasis added)

The language of the above-cited provisions of subsection (2) could not be clearer and more explicit in expressing the legislative intent. It is hard to understand how these provisions could be interpreted differently from what they plainly state: "The provisions of subsection (1) shall apply if the plant and machinery is purchased and installed at any time between the first day of July, 2010, and the 30th day of June, 2021." The expression "purchased and installed" used in subsection (2) leaves little room for doubt that to avail the benefit of the tax credit provided in subsection (1), both the conditions of purchase and installation of the plant and machinery must be fulfilled. In fact and effect, subsection (2) operates like a proviso to subsection (1). As is well known, a proviso, in its classic sense, limits or qualifies what precedes it. Subsection (2) performs this very function by qualifying the application of the provisions of subsection (1), making them subject to the conditions of purchase and installation made between the first day of July 2010 and the 30th day of June 2021. The High Court itself read the provisions of subsection (2) as a proviso in the very first sentence of paragraph 2 of the impugned judgment, stating that "section 65B was inserted into the Ordinance [ITO] via the Finance Act 2010 and it conferred a tax credit of ten percent upon qualifying companies for investment, provided that the requisite investment and installation of the pertinent plant and machinery took place within a specified time."[35] However, in the latter part of the impugned judgment, the High Court overlooked this crucial aspect of subsection (2) and misplaced its reliance on Gulshan Spinning, where no provision similar to subsection (2) was under consideration.

26. As the High Court placed much reliance in the impugned judgment on Gulshan Spinning, we feel constrained to observe that in that case also, the High Court failed to appreciate the necessary implication of subsection (2) of Section 107 of the Income Tax Ordinance, 1979, which was similar to subsection (3) of Section 65B of the Income Tax Ordinance, 2001. To clarify this point, the provisions of both subsections are reproduced:

Section 107 of the Income Tax Ordinance, 1979

(2) The amount of credit admissible under this section shall be deducted from the tax payable by the assessee in respect of the income year in which the machinery or plant in the purchase of which the amount referred to in subsection (1) is invested is installed.

Section 65B of the Income Tax Ordinance, 2001

(3) The amount of credit admissible under this section shall be deducted from the tax payable by the taxpayer in respect of the tax year in which the plant or machinery in the purchase of which the amount referred to in subsection (1) is invested and [sic-is][36] installed.

A plain reading of the above-cited provisions of subsection (2) of Section 107 of the Income Tax Ordinance, 1979, makes it evident that the amount of credit admissible under that section was to be deducted from the tax payable by the assessee (taxpayer) in the income year (tax year) in which the purchased machinery or plant was installed. The necessary implication of these provisions was that the amount of credit could neither be claimed nor deducted from the tax payable unless the purchased machinery or plant was installed. Only once

the assesse (taxpayer) had installed the machinery or plant, could the amount of credit be claimed by it and deducted by the assessing officer (income tax officer) from the tax payable in respect of the income year (tax year) in which the installment took place. If the purchased machinery or plant was not installed, the question of claiming and deducting the amount of credit from the tax payable did not arise. Therefore, the installation of the purchased machinery or plant was a necessary condition, along with the purchase, to avail the benefit of the credit allowed by subsection (1) of Section 107 of the Income Tax Ordinance, 1979. The same is the effect of the similar provisions of subsection (3) of Section 65B of the Income Tax Ordinance, 2001.

27. However, since Gulshan Spinning had held otherwise in 2005, the legislature---presumed to be aware of the interpretation of the law made by constitutional courts---provided this time the clear and explicit provisions of subsection (2) of Section 65B while inserting it into the Income Tax Ordinance, 2001, in 2010. This was done by the legislature to express its intent unequivocally, leaving no room for further interpretation. Unfortunately, in the impugned judgment, the High Court failed to appreciate this legislative move and did not give due effect to it, but rather stuck to the interpretation made in Gulshan Spinning.

28. The correct legal position, as held above, is that the provisions of subsection (1) of Section 65B are to be read in conjunction with subsection (2). When so read together, it becomes clear that to avail the benefit of the tax credit under Section 65B, taxpayer companies must fulfill two conditions: first, they have to purchase the plant and machinery; and second, they have to install the purchased plant and machinery in an industrial undertaking set up in Pakistan. Only when both of these conditions are fulfilled does a taxpayer company acquire a vested right to avail the benefit of the tax credit conferred by Section 65B.

29. The second category of taxpayer companies had purchased the plant and machinery before 1 July 2019, when the 2019 amendments came into force, but had not yet installed it. Therefore, they had fulfilled only one of the two required conditions. As a result, they had not yet acquired any vested right to avail the benefit of the tax credit conferred by Section 65B. Their right was inchoate and contingent upon fulfilling the second condition, i.e., installing the purchased plant and machinery in an industrial undertaking set up in Pakistan. As above expounded, a right vests when all the facts required by law to establish that right have occurred. In other words, when all the investitive facts necessary to create a right have occurred, the right is said to be "vested". A right remains inchoate and contingent when some, but not all, of the investitive facts have occurred. Therefore, we conclude and answer question (ii) accordingly: the second category of taxpayer companies has not acquired a vested right to avail the benefit of the tax credit conferred by Section 65B; thus, no question arises as to its being affected by the 2019 amendments.

30. We may observe in passing that the alteration of their position by the taxpayer companies through the fulfillment of one of the two conditions might have attracted the doctrine of promissory estoppel if the benefit of the tax credit had been extended and amended by an executive action.[37] However, in the present case, the benefit of the tax credit was conferred by legislative action, and the amendment thereto has also been made by legislative action. Therefore, the doctrine of promissory estoppel is of no avail to the taxpayer companies, as like the doctrine of vested rights it also does not operate against the legislature.[38]

(iii) Whether in the case of the first category of taxpayer companies, the transaction of the tax credit benefit has become past and closed and the same is not affected by the 2019 amendments.

31. As for the first category of taxpayer companies, they have undoubtedly acquired a vested right to avail the benefit of the tax credit conferred by Section 65B. This is because they had fulfilled both of the required conditions by 1 July 2019, when the 2019 amendments came into force; they had both purchased and installed the plant and machinery by that date. The question, therefore, arises as to whether such right has become a past and closed transaction and the same is not affected by the 2019 amendments. If it is found that the right has not become a past and closed transaction but remains a vested right, then it will require determination whether such vested right is affected by the 2019 amendments.

32. In the impugned judgment, although the High Court did not explicitly hold that the right of the first category of taxpayer companies had become a past and closed transaction, it did mention, by referring to Gulshan Spinning, that "the tax credit crystallized upon making the relevant investment".[39] The word "crystallized" was perhaps first used by this Court in Molasses Trading[40] in the context of a retrospective law

that affected vested rights, to distinguish vested rights from past and closed transactions. In that case, the Court held that the retrospective amendment made to the Customs Act, 1869, by inserting Section 31A therein, though took away vested rights, it did not have the effect of reopening past and closed transactions where the liability of customs duty had "crystallized" upon the presentation of bills of entry, as there was no express provision to that effect in Section 31A. This term was later also used, in the same sense, in Gulshan Spinning and Shahnawaz[41] to refer to those vested rights that move forward and become past and closed transactions. Therefore, as we understand, the High Court, by relying on Gulshan Spinning, treated the vested rights of the first category of taxpayer companies as having become past and closed transactions.

33. As the High Court decided this point in the impugned judgment by simply relying on Gulshan Spinning, we are constrained to examine the correctness of the decision made in Gulshan Spinning on this point as well.

34. In Gulshan Spinning, the High Court accepted the contention of the taxpayer companies and held that the right to claim a tax credit under Section 107 of the Income Tax Ordinance, 1979---which was similar to Section 65B of the ITO---accrued with the investment made in the purchase of plant and machinery and, at the same time, became a past and closed transaction. The High Court reasoned that the right to claim any allowance, deduction or exemption is crystallized and matured with finalization of assessment proceedings culminating into an assessment order, because anything in the nature of exemption, allowance or deduction forms part of the assessment order and thus, is an integral part of the assessment process. However, the tax credit, the High Court held, is not in the nature of an exemption, allowance or deduction for the purpose of computing income under the head of business or profession, and therefore, it is not part of the assessment process/ assessment order. To support its view that the tax credit is not part of the assessment process/assessment order, the High Court also cited the following extract from the instructions issued by the C.B.R. (now F.B.R.) via Circular No.13(ii)/IT-1/80, dated 27 March 1984:

(i) a separate claim can be filed by a tax payer within the specified period of two years.

(ii) a separate order under section 107 should be passed on the claim made by the assessee.

In light of the distinction between an exemption and a tax credit as explained by this Court in H.M. Extraction,[42] we have no cavil with the statement made in Gulshan Spinning that an exemption forms part of the assessment process, whereas a tax credit does not. However, this does not imply that a taxpayer company need do nothing to exercise its vested right to avail the benefit of a tax credit, nor that such vested right automatically matures (crystalizes) into a past and closed transaction. As is evident from the instructions of the FBR cited by the High Court in Gulshan Spinning, a taxpayer company having a vested right to avail the benefit of the tax credit must file a claim separate from its filing of income tax returns, and a separate order is to be passed on this claim. We understand that the vested right of a taxpayer company cannot remain in a state of uncertainty or be jeopardized by delays in passing an appropriate order on the claim by the public functionary-the income tax officer. Therefore, such vested right must be considered to have "crystallized" into a past and closed transaction upon filing of the claim by the taxpayer company, as held by this Court in Molasses Trading regarding the presentation of a bill of entry for exercising the vested right to avail an exemption in customs duty. However, the statement that the right to claim a tax credit accrues with the investment made in the purchase of plant and machinery and simultaneously matures into a past and closed transaction is not legally correct.

35. As above noted, a vested right becomes a past and closed transaction when such right is exercised at a specific occasion and under specific circumstances. It has also been clarified that since such specific occasions and circumstances may vary under different laws, it is determined on the basis of the peculiar facts and legal position of each case whether a vested right has turned into a past and closed transaction. In the peculiar facts and legal position of the present case, we hold that the vested right of a taxpayer company to avail the benefit of the tax credit conferred by Section 65B matures into a past and closed transaction upon the filing of the claim by the taxpayer company, either separately as per the above-cited instructions of the FBR, if such or similar instructions exist, or along with the income tax returns, as the case may be. In the present case, the second category of taxpayer companies had neither filed the claim separately, as per the above-cited FBR instructions, nor filed their income tax returns along with the claim by 1 July 2019, when the 2019

amendments came into force. Therefore, their vested right did not "crystallize" into a past and closed transaction. The High Court erred in the impugned judgment by treating their vested right as having "crystallized" into a past and closed transaction. Since the vested right of the second category of taxpayer companies did not become a past and closed transaction, the question of it being unaffected by the 2019 amendments does not arise. Question (iii) is answered accordingly.

36. However, that answer to question (iii) does not conclude the discussion on the status of the vested right of the first category of taxpayer companies. Rather, it necessitates determining of an ancillary point: whether such vested right is affected by the 2019 amendments. For ease of reference, the proviso added to subsection (1) of Section 65B by the 2019 amendments, which pertains to this point, is cited again here:

Provided that for the tax year 2019 the rate of credit shall be equal to five percent of the amount so invested:

Although it was argued before us that this proviso could be interpreted in a manner that would preserve the vested rights of the first category of taxpayer companies, we find it impossible to do so without distorting the language of the proviso. The language of the proviso clearly expresses the legislative intent to reduce the rate of the tax credit for the tax year 2019 from 10% to 5% of the amount invested. It is incomprehensible how anyone could reasonably interpret it to mean anything else. The proviso, by its explicit terms, affects the vested right of the first category of taxpayer companies to avail the benefit of the tax credit at the rate of 10% for the tax year 2019 on the amount invested in the purchase of plant and machinery. The point ancillary to the answer to question (iii) is decided accordingly.

37. Before parting with this portion of the judgment, we feel constrained to address another incidental point. A reading of the impugned judgment shows that the Division Bench of the High Court, which decided the present case, considered itself to be "absolutely" bound by the decision of an earlier bench of equal strength in Gulshan Spinning and referred to the case of Multiline Associates[43] to support this understanding. No doubt, the earlier decision of a bench of a High Court, or of this Court, on a question of law is binding on another bench of equal numeric strength when dealing with the same question, in the sense that the latter bench cannot decide the same question contrary to the first decision. However, the latter bench is not precluded from examining the correctness of the earlier decision or forming a different view. In such a case, the proper course of action is to

refer the matter to the Chief Justice of the High Court, or in the

case of this Court to the Bench-Constitution Committee, with a request for the constitution of a larger bench to examine the correctness of the earlier decision and, if necessary, to reconsider and redecide the question.[44] The Division Bench of the High Court that decided this case should, therefore, have appreciated the respective contentions of the parties with an open and objective judicial mind, without considering itself to be "absolutely" bound by the decision in Gulshan Spinning, which, on the two points discussed above,[45] has been found to have

been incorrectly decided. For the sake of removing any ambiguity in future cases, we expressly disapprove of Gulshan Spinning on those two points.

(iv) Whether the 2019 amendments infringe upon the respondents' fundamental rights to conduct lawful business, to acquire and hold property and to equality before the law, as guaranteed by Articles 18, 23, 24 and 25 of the Constitution.

38. This is the last question involved in the case, and before embarking on its discussion, we find it appropriate to make some preliminary remarks pertaining to this question. In economic matters, most legislative and executive decisions are essentially empirical, based on experimentation or what might be called the "trial and error method".[46] "The problems of government"[47] are practical and may sometimes justify rough accommodations based on unscientific formulas. In complex economic matters, the best solutions are often not easily discernible; the wisdom of any choice may be debated or criticized, but mere errors of policy judgment are not subject to judicial review. Only clear and definite violations of fundamental rights or other constitutional provisions warrant judicial intervention. The legislative and executive branches of the State are entitled to make pragmatic adjustments

which may be called for by particular circumstances. Courts cannot strike down an economic policy decision taken by them merely because they feel that another policy decision would have been fairer, wiser, or more scientific or logical. It is for the legislature, not the courts, to balance the advantages and disadvantages of various economic concerns. Therefore, while examining the constitutionality of fiscal laws on the touchstone of fundamental rights, particularly the fundamental right to equality before the law, courts should exercise greater restraint and extend more deference to legislative judgment than they do with laws concerning civil and political rights.[48] The legislature must be afforded some "play in its joints"[49] because it is tasked with addressing complex economic problems that do not admit solutions through doctrinaire or rigid formulas.

39. While describing the constitutional position regarding the legislative powers of Parliament and Provincial Assemblies, we have observed above that since Article 8 of the Constitution imposes a restriction on the legislative powers of Parliament and Provincial Assemblies with respect to making any law that takes away or abridges the rights conferred by Articles 9 to 28, neither Parliament nor Provincial Assemblies can exercise their legislative powers in a manner prohibited by this Article. Neither prospective nor retrospective laws can be enacted to take away or abridge any of the fundamental rights guaranteed by Articles 9 to 28 of the Constitution or in contravention of any other provision of the Constitution. The Constitution's prohibitions and requirements apply equally to both prospective and retrospective laws.

40. In light of the above constitutional position, when we examine the proviso added to subsection (1) of Section 65B, we find it to be in violation of the prohibition against discrimination and the guarantee of equal treatment provided by the fundamental right enshrined in Article 25 of the Constitution. This proviso reduces the rate of the tax credit for the tax year 2019 from 10% to 5% of the amount invested, whereas for all other tax years from 2010 to 2018, taxpayer companies were granted a tax credit at the rate of 10% of the amount invested. As a result, the first category of taxpayer companies has been discriminated against and has not been afforded the equal treatment that was given to other taxpayer companies for the tax years 2010 to 2018.

41. We are fully cognizant of the constitutional position that Article 25 does not bar reasonable classification, provided it is based on intelligible differentia with a rational nexus to the object sought to be achieved. In the context of Article 25, courts generally afford relatively greater latitude to the State in matters of fiscal legislation. However, as held by this Court in Tariq Mehmood,[50] this latitude is not infinitely elastic and the fiscal legislation is not entirely beyond the scope of Article 25. Therefore, having carefully considered the impact of the proviso on the first category of taxpayer companies, we find that there are no intelligible differentiae distinguishing these taxpayer companies in respect of tax credit for the tax year 2019 from the other taxpayer companies that were granted a tax credit at the rate of 10% of the amount invested for the tax years 2010 to 2018. The differentiation created by the proviso lacks any rational nexus with the object sought to be achieved. Consequently, the proviso is clearly in violation of the constitutional prohibition contained in Article 8, read with Article 25 of the Constitution.

42. We clarify that we have examined Section 65B in its entirety as it stood on 1 July 2019, when the 2019 amendments came into force, treating it as a unified provision applicable to all taxpayer companies and all tax years from 2010 to 2019. We have not dissected Section 65B into before and after the 2019 amendments, as any amendment made to a law becomes an integral part of it. A law that, if enacted today, would be invalid due to the infringement of a fundamental right or any other constitutional provision cannot gain validity simply because its different parts were enacted at different times.

43. Moreover, we clarify that we are not inclined to examine the constitutionality of the proviso against the fundamental rights guaranteed by Articles 18, 23 and 24, because of the principle that "if it is not necessary to decide more, it is necessary not to decide more."[51] Even otherwise, we have serious reservations about the relevance of the cases[52] cited regarding the point of alleged infringement of the fundamental rights guaranteed by Articles 18, 23 and 24 to the present case involving the matter of an income tax credit, as those cases dealt with retrospective amendments in sales tax laws where the tax could not be recovered by the taxpayer (seller) from the purchasers of goods sold in the past, we leave this point to be addressed in some other appropriate case.

44. As for the second category of taxpayer companies, their case is distinguishable from those taxpayer companies that have both purchased and installed plant and machinery between 1 July 2010 and 30 June 2019. Their situation is not at par with that of the latter category of taxpayer companies, which forms a separate class for the purpose of availing the benefit of the tax credit granted by Section 65B. Therefore, the amendment made to subsection (2) of Section 65B, which reversed the expiry date of availing the benefit of the tax credit from 30 June 2021 to 30 June 2019, does not fall within the scope of the constitutional prohibition contained in Article 8 read with Article 25 of the Constitution. As for the issue of the alleged infringement of the fundamental rights of this category of taxpayer companies guaranteed by Articles 18, 23, and 24, the same does not even arise for consideration, as they did not acquire any vested right regarding the benefit of the tax credit that might have become their property.

45. In view of the above findings, we hold and answer question (iv) as follows: (i) the proviso added to subsection (1) of Section 65B through the 2019 amendments infringes the fundamental right of the first category of taxpayer companies to protection against discrimination and the guarantee of equal treatment under Article 25 of the Constitution, and is therefore liable to be struck down; and (ii) the change made to subsection (2) of Section 65B through the 2019 amendments does not infringe any of the fundamental rights of the second category of taxpayer companies guaranteed by Articles 18, 23, 24 and 25 of the Constitution.

Relief

46. Given the above answers to the four questions, the present petitions are converted into appeals, which are partly allowed: the impugned order and judgment of the High Court are set aside to the extent of the interpretation of the amendment made to subsection (2) of Section 65B and are upheld to the extent of striking down the proviso added to subsection (1) of Section 65B of the ITO by the 2019 amendments, but for the reasons recorded in this judgment and the answer to question (iv). As the appeals have been partly allowed, the parties shall bear their own costs.

MWA/C-19/SC Order accordingly.

**2025 SCMR 257**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, Athar Minallah and Aqeel Ahmed Abbasi, JJ**

**Messrs INTER QUEST INFORMATICS SERVICES ---Petitioner**

**Versus**

**The COMMISSIONER OF INCOME TAX and others ---Respondents**

Civil Review Petitions Nos. 988 to 1001 of 2023 in Civil Appeals Nos. 94 to 106 of 2008 and 550 of 2011, decided on 28th November, 2024.

(For review of the judgment of this Court dated 08.09.2023).

**(a) Constitution of Pakistan---**

----Art. 188---Supreme Court Rules, 1980, O.XXVI, R. 1---Review petition before the Supreme Court---Principles upon which a judgment may be reviewed stated.

A petition for review is neither an appeal nor a revision petition to a superior court but rather a request made to the same court to reconsider its decision on the limited grounds prescribed for review. It does not entail a rehearing or re-argument of the case adjudicated in the judgment under review.

For purposes of a review petition the settled principles governing the ground of "error apparent on the face of the record" are that the error, whether of fact or law, must be self-evident and readily discernible on the face of the record. It should not require meticulous examination or detailed analysis to uncover, nor should it need to be demonstrated through extensive or intricate arguments, or established through a lengthy process of reasoning on points where reasonable divergence of opinion may exist. Established instances falling within the scope of "error apparent on the face of the record" include judgments passed on an erroneous assumption of material facts or by overlooking a material question of fact or law or an important aspect of the matter, which, if noticed and considered earlier, would have direct bearing on the conclusions reached by the Court.

Abdul Ghaffar v. Asghar Ali PLD 1998 SC 363; Pakistan v. Fecto Belarus Tractors Ltd PLD 2002 SC 208; Muhammad Boota v. Member, BOR 2010 SCMR 1049; Government of Punjab v. Aamir Zahoor-ul-Haq PLD 2016 SC 421 and Justice Qazi Faez Isa v. President of Pakistan PLD 2022 SC 119 ref.

**(b) Income Tax Ordinance (XLIX of 2001) ---**

----Ss. 107 & 133(1)---Income Tax Ordinance (XXXI of 1979) (since repealed), Ss. 163 & 136(1)---Convention Between the Kingdom of the Netherlands and the Islamic Republic of Pakistan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, 1982, Arts. 7, 12, paras. 3(a), 3(b), 22, 23 & 24---Concept of "Royalties"---Scope---Business profits---Non-resident foreign company---Exemption from income tax---Income/royalties earned by the non-resident company in Pakistan for the lease of certain software---Whether such income was business profits and thus exempt from payment of income tax in Pakistan under Article 7 of the Convention Between the Kingdom of the Netherlands and the Islamic Republic of Pakistan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income ('the Convention'), or the same constituted "royalties" as defined in paragraph 3 of Article 12 of the Convention and was liable to tax.

Petitioner (foreign incorporated company), in its tax returns, declared the receipts under the software lease agreements ('Agreements') as "business profits" and sought exemption from income tax in Pakistan under Article 7 of the Convention Between the Kingdom of the Netherlands and the Islamic Republic of Pakistan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, 1982 ("the Convention"). However, the tax department treated these receipts as "royalties" under Article 12 of the Convention and subjected them to income tax at the rate of fifteen percent. The Income Tax Officer, Commissioner of Income Tax (Appeals) and the Tribunal concluded that the payments received by the petitioner fell within the definition of "royalties" under paragraph 3(a) and (b) of Article 12 of the Convention and were therefore liable to income tax in Pakistan. The petitioner challenged the assessment orders, appellate orders and Tribunal judgments before the High Court through references. The High Court ruled in favour of the petitioner, holding that the amounts received by the petitioner for leasing FLIC tapes (software programs) under

the Agreements did not qualify as "royalties" under the Convention and were not subject to income tax in Pakistan. The respondent appealed to the Supreme Court and the majority judgment under review allowed the appeals, setting aside the High Court's judgments and restoring the Tribunal's judgments as well as the original and appellate orders of the Income Tax Officers.

By the majority judgment under review the Court decided the matter against the petitioner mainly for the following reasons: (i) it would not really matter to the petitioner if, under Article 12 of the Convention, it had to pay income tax in Pakistan, because the petitioner could, with the tax authority of the Netherlands, claim an adjustment of the tax amount paid in Pakistan; (ii) the High Court did not note that the petitioner had an alternative remedy under Article 24 of the Convention to present its case to the competent authority of its own country, the Netherlands, which, if agreed with the respondent's stance, could take up the matter with the competent authority of Pakistan; (iii) the petitioner did not explain and prove the nature of the receipts for which it claims tax exemption before the Income Tax Officer, the Commissioner (Appeals) and the Tribunal- the fact-finding forums-and it was unwarranted for the High Court to have delved into the nature of the receipts; (iv) the High Court incorrectly assumed the applicability of the Organization for Economic Co-operation and Development Model Convention' ('OECD MC'), as Article 12 of the Convention adheres to Article 12 of the 'United Nations Model Double Taxation Convention between Developed and Developing Countries' ('UN MC') and not to Article 12 of the OECD MC; and (v) the full definition of "royalties" in paragraph 3(a) of Article 12 of the Convention included payments for "information concerning industrial, commercial, or scientific experience".

As to grounds (i) and (ii), in the majority judgment under review there is an error which is apparent on the face of the record. The possibility of adjustment of tax paid by the petitioner in Pakistan by the competent authority in the Netherlands or the availability of an alternate remedy before the competent authority in the Netherlands, was no ground for the High Court to decline to answer the questions of law referred to it in the reference application filed by the petitioner. In this regard, the Supreme Court mistakenly regarded the two different jurisdictions of the High Court to be interchangeable: one under Article 199 of the Constitution and the other exercised in the present case, the reference jurisdiction under the Income Tax Ordinance. Under Article 199, the High Court may decline to exercise its jurisdiction if it finds that the petitioner has an alternate adequate remedy. However, it escaped notice of the Supreme Court that a reference application is akin to an appeal and the reference jurisdiction is similar to appellate jurisdiction. Therefore, neither a reference application can be dismissed, nor can the exercise of reference jurisdiction be declined, on the ground of availability of some alternate remedy.

Messrs Squibb Pakistan v. CIT 2017 SCMR 1006 and CIR v. Rafeh Limited PLD 2020 SC 518 ref.

So far as ground (iii) is concerned, the petitioner contended that this is the result of an erroneous assumption of a material fact. There was substance in this contention, as the error in this regard is also apparent on the face of the record. The nature of the receipts was explained by the petitioner in its tax returns, and there was no dispute regarding this fact before the Income Tax Officer, the Commissioner (Appeals) or the Tribunal. It was, and remains, an admitted fact that the receipts were rentals received by the petitioner for the lease of FLIC tapes containing computer software programs. The nature of the receipts was an admitted fact, and the questions referred were questions of law. Therefore, the observations made by the Supreme Court in the majority judgment, that it was unwarranted for the High Court to have delved into the nature of the receipts, appear to have overlooked the said orders of the Tribunal. The High Court only dealt with and answered the questions of law and did not determine the nature of the receipts, which was an admitted fact.

As for ground (iv), it has been contended on behalf of the petitioner that, in the majority judgment, it escaped the notice of the Supreme Court that there is no significant difference in the definition of "royalties" provided in Article 12 of the UN MC and Article 12 of the OECD MC; therefore, the reference to Article 12 of the OECD MC, instead of Article 12 of the UN MC, by the High Court was inconsequential. This contention is supported by a plain reading of the two definitions. The only material difference between the definitions of "royalties" in the UN MC and the OECD MC is that the former includes payments received as consideration "for the use of, or the right to use, industrial, commercial or scientific equipment" in its definition. However, since neither the

Income Tax Officer, the Commissioner (Appeals), the Tribunal, nor the respondent before the Supreme Court relied upon this clause of the definition of "royalties" as FLIC tapes containing computer software programs are admittedly not "equipment", this difference was immaterial to the decision of the case.

As to ground (v), it has been contended on behalf of the petitioner that, in the majority judgment, the Supreme Court totally overlooked the question of law that was referred by the Tribunal to the High Court and decided in favour of the petitioner; that, instead, the majority judgment only cursorily observed that the full definition of "royalties" in paragraph 3(a) of Article 12 of the Convention included payments for "information concerning industrial, commercial or scientific experience", but did not clearly and decisively hold that the receipts received by the petitioner for the lease of FLIC tapes containing computer software programs involved in the present case are covered by that clause of the definition of "royalties". The majority judgment cursorily observed that the full definition of "royalties" in paragraph 3(a) of Article 12 of the Convention includes payments for "information concerning industrial, commercial or scientific experience". However, it did not clearly or decisively hold that the receipts received by the petitioner for the lease of FLIC tapes containing computer software programs, as involved in the present case, are covered by that clause of the definition of "royalties".

If a payment is in respect of rights to use the copyrights in a program, (e.g. by reproducing it and distributing it) then such a payment would be considered as a royalty. Other payments, however, only give a user the right to operate the program, where a consumer pays for a copy of computer program to use, this is not royalty payment. The Tribunal was not correct, and the High Court was correct, in determining that the receipts received by the petitioner for the lease of FLIC tapes containing computer software programs were not income from "royalties" but were "business profits", as claimed by the petitioner in its tax returns.

Lynne Oats and Emer Mulligaan-Principles of International Taxation, 7th edition. Bloomsbury Professional Tax. P.141 ref.

The majority judgment under review suffers from errors apparent on the face of the record. It proceeded on an erroneous assumption of a material fact and overlooked the material question of law and important aspects of the matter involved. The majority judgment under review was recalled and the appeals of the respondent were dismissed, upholding the judgments of the High Court. Review petitions were accepted accordingly with the observations that Double Taxation Treaties (DTTs) provide a crucial framework for fostering international economic cooperation, facilitating cross-border investments, and avoiding the dual taxation of income that can impede global commerce; that these treaties serve as "bridges between nations," designed to encourage economic collaboration while preventing conflicts over taxing rights; that they achieve this by allocating taxing authority between the source and resident states, promoting predictability for businesses and individuals engaged in international activities; that Courts in developing countries must interpret these treaties as dynamic instruments that balance the need for economic growth with the protection of their tax base, and that treaties should not be interpreted rigidly but should reflect their "object and purpose," ensuring they serve the broader goal of equitable economic development globally.

Klaus Vogel on Double Taxation Conventions -5th edition. Wolters Kluwer ref.

Makhdoom Ali Khan, Senior Advocate Supreme Court and Saad Mumtaz Hashmi, Advocate Supreme Court for Petitioners (through video link).

Mrs. Misbah Gulnar Sharif, Advocate Supreme Court, Fayyaz Hussain Abro, Addl.Comm.FBR (through video link from Karachi) and Dr. Ishtiaq Ahmed Khan, DG Law, FBR for the Respondents.

Date of hearing: 28th November, 2024.

**ORDER**

**SYED MANSOOR ALI SHAH, J. ---**Through the present petitions, the petitioner seeks a review of the majority judgment (authored by Mr. Justice Qazi Faez Isa and concurred by the Hon'ble Chief Justice Mr. Justice Umar Ata Bandial) dated 8 September 2023 ("majority judgment"). By the majority judgment, the civil appeals filed by the respondent with leave of the Court against the judgments of the Sindh High Court, dated 12 October 2007 and 11 November 2010, were allowed. Consequently, the said judgments were set aside and the decision of the Income Tax Appellate Tribunal ("Tribunal") was restored. In disagreement, the minority judgment authored by one of us (Syed Mansoor Ali Shah, J.) dismissed the appeals of the respondent and upheld

the judgments of the Sindh High Court. Both the majority and minority judgments have been reported as CIT v. Inter Quest Informatics Services (2023 SCMR 1803).

2. As two members of the Bench that delivered the majority judgment under review have since retired, two of us (Athar Minallah and Aqeel Ahmed Abbasi, JJ.) now form part of the Bench. We are fully cognizant that we sit in review jurisdiction and that majority of us on this Bench were not part of the majority judgment under review. We are therefore not approaching this case influenced by our own perspective, which may not necessarily align with those who originally decided the case. But we have endeavoured to approach these review petitions with the utmost objectivity by adopting the perspective of the Judges who delivered the judgment under review, treating it as our own, and then carefully considering the grounds raised for its review. In our view, one of the most effective ways to ensure an objective approach in this regard is to first identify the settled principles upon which a judgment may be reviewed and then evaluate the grounds raised for review of the majority judgment in light of those principles.

3. A petition for review is neither an appeal nor a revision petition to a superior court but rather a request made to the same court to reconsider its decision on the limited grounds prescribed for review. It does not entail a rehearing or re-argument of the case adjudicated in the judgment under review. Since in the present review petitions the petitioner has invoked the ground of "error apparent on the face of the record" for the review of the majority judgment, it is essential to outline the settled principles governing this ground. The error, whether of fact or law, must be self-evident and readily discernible on the face of the record. it should not require meticulous examination or detailed analysis to uncover, nor should it need to be demonstrated through extensive or intricate arguments, or established through a lengthy process of reasoning on points where reasonable divergence of opinion may exist. Established instances falling within the scope of "error apparent on the face of the record" include judgments passed on an erroneous assumption of material facts or by overlooking a material question of fact or law or an important aspect of the matter, which, if noticed and considered earlier, would have direct bearing on the conclusions reached by the Court.

4. Since the judgment under review, encompassing the facts of the case, the arguments advanced by learned counsel for the parties and the questions of law involved, has already been reported, their reiteration is unnecessary. We shall, however, briefly state them to the extent required for the decision of the present review petitions.

5. The petitioner, a company incorporated in the Netherlands and thus a non-resident for income tax purposes in Pakistan, entered into two agreements with Schlumberger Seaco, Inc., a company operating in Pakistan. These agreements were titled the "Agreement for Lease of FLIC Tapes", dated 1 February 1986, and the "Software Rental Agreement" dated 1 January 1995 ("the Agreements"). The petitioner, in its tax returns, declared the receipts under the Agreements as "business profits" and sought exemption from income tax in Pakistan under Article 7 of the Convention Between the Kingdom of the Netherlands and the Islamic Republic of Pakistan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income ("the Convention"). However, the tax department treated these receipts "royalties" under Article 12 of the Convention and subjected them to income tax at the rate of fifteen percent. The Income Tax Officer, Commissioner of Income Tax (Appeals) and the Tribunal concluded that the payments received by the petitioner fell within the definition of "royalties" under paragraph 3(a) and (b) of Article 12 of the Convention and were therefore liable to income tax in Pakistan. The petitioner challenged the assessment orders, appellate orders and Tribunal judgments before the High Court through references. The High Court ruled in favour of the petitioner, holding that the amounts received by the petitioner for leasing FLIC tapes (software programs) under the Agreements did not qualify as "royalties" under the Convention and were not subject to income tax in Pakistan. The respondent appealed to this Court and the majority judgment under review allowed the appeals, setting aside the High Court's judgments and restoring the Tribunal's judgments as well as the original and appellate orders of the Income Tax Officers. The minority judgment, however, dismissed the respondent's appeals and upheld the High Court's judgments. Hence, these review petitions.

6. Having heard the arguments of the learned counsel for the parties and examining the available record of the case, we find that by the majority judgment under review the Court decided the matter against the petitioner

mainly for the following reasons: (i) it would not really matter to the petitioner if, under Article 12 of the Convention, it had to pay income tax in Pakistan, because the petitioner could, with the tax authority of the Netherlands, claim an adjustment of the tax amount paid in Pakistan; (ii) the High Court did not note that the petitioner had an alternative remedy under Article 24 of the Convention to present its case to the competent authority of its own country, the Netherlands, which, if agreed with the respondent's stance, could take up the matter with the competent authority of Pakistan; (iii) the petitioner did not explain and prove the nature of the receipts for which it claims tax exemption before the Income Tax Officer, the Commissioner (Appeals) and the Tribunal-the fact-finding forums-and it was unwarranted for the High Court to have delved into the nature of the receipts; (iv) the High Court incorrectly assumed the applicability of the OECD MC, as Article 12 of the Convention adheres to Article 12 of the UN MC and not to Article 12 of the OECD MC; and (v) the full definition of "royalties" in paragraph 3(a) of Article 12 of the Convention included payments for "information concerning industrial, commercial, or scientific experience".

7. As to grounds (i) and (ii), we find an error which is apparent on the face of the record. The possibility of adjustment of tax paid by the petitioner in Pakistan by the competent authority in the Netherlands or the availability of an alternate remedy before the competent authority in -the Netherlands, was no ground for the High Court to decline to answer the questions of law referred to it in the reference application filed by the petitioner. In this regard, this Court mistakenly regarded the two different jurisdictions of the High Court to be interchangeable: one under Article 199 of the Constitution and the other exercised in the present case, the reference jurisdiction under the Income Tax Ordinance. Under Article 199, the High Court may decline to exercise its jurisdiction if it finds that the petitioner has an alternate adequate remedy. However, it escaped notice of this Court that a reference application is akin to an appeal and the reference jurisdiction is similar to appellate jurisdiction, as held by this Court in M/s Squibb Pakistan v. CIT (2017 SCMR 1006). Therefore, neither a reference application can be dismissed, nor can the exercise of reference jurisdiction be declined, on the ground of availability of some alternate remedy.

8. So far as ground (iii) is concerned, it has been contended on behalf of the petitioner that this is the result of an erroneous assumption of a material fact. We find substance in this contention, as the error in this regard is also apparent on the face of the record. The nature of the receipts was explained by the petitioner in its tax returns, and there was no dispute regarding this fact before the Income Tax Officer, the Commissioner (Appeals) or the Tribunal. It was, and remains, an admitted fact that the receipts were rentals received by the petitioner for the lease of FLIC tapes containing computer software programs. The Tribunal, in its well-reasoned and considered orders, referred the following questions of law to the High Court:

i. Whether the Tribunal was right in holding that receipts of the applicant [petitioner] from the leasing FLIC Tapes were not "business profits".

ii. Whether the learned Appellate Tribunal was right in holding that receipts of the Applicant [petitioner] from leasing FLIC Tapes were income from "Royalty" and were not business profits.

It is self-evident from reading the above questions referred to the High Court by the Tribunal that the nature of the receipts was an admitted fact, and the questions referred were questions of law. Therefore the observations made by this Court in the majority judgment, that it was unwarranted for the High Court to have delved into the nature of the receipts, appear to have overlooked the said orders of the Tribunal. The High Court only dealt with and answered the aforementioned questions of law and did not determine the nature of the receipts, which was an admitted fact.

9. As for ground (iv), it has been contended on behalf of the petitioner that, in the majority judgment, it escaped the notice of this Court that there is no significant difference in the definition of "royalties" provided in Article 12 of the UN MC and Article 12 of the OECD MC; therefore, the reference to Article 12 of the OECD MC, instead of Article 12 of the UN MC, by the High Court was inconsequential. This contention, we find, is supported by a plain reading of the two definitions. The only material difference between the definitions of "royalties" in the UN MC and the OECD MC is that the former includes payments received as consideration "for the use of, or the right to use, industrial, commercial or scientific equipment" in its definition. However, since neither the Income Tax Officer, the Commissioner (Appeals), the Tribunal, nor the respondent before this

Court relied upon this clause of the definition of "royalties" as FLIC tapes containing computer software programs are admittedly not "equipment", this difference was immaterial to the decision of the case.

10. As to ground (v), it has been contended on behalf of the petitioner that, in the majority judgment, this Court totally overlooked the question of law that was referred by the Tribunal to the High Court and decided in favour of the petitioner. Instead, the majority judgment only cursorily observed that the full definition of "royalties" in paragraph 3(a) of Article 12 of the Convention included payments for "information concerning industrial, commercial or scientific experience", but did not clearly and decisively hold that the receipts received by the petitioner for the lease of FLIC tapes containing computer software programs involved in the present case are covered by that clause of the definition of "royalties". In contrast, it has been contended that the minority judgment, after a detailed discussion, rightly held that the receipts involved in the present case do not fall within the scope of the said clause of the definition of "royalties".

11. Since this was, to our understanding, the most significant ground for review, we carefully read the majority judgment to evaluate its substance. We find that in the majority judgment this Court failed to determine whether the questions of law referred to and decided by the High Court were correctly resolved and whether the receipts received by the petitioner fall within the definition of "royalties", and if so, under which clause of the definition. We find the contention to be correct that the majority judgment cursorily observed that the full definition of "royalties" in paragraph 3(a) of Article 12 of the Convention includes payments for "information concerning industrial, commercial or scientific experience". However, it did not clearly or decisively hold that the receipts received by the petitioner for the lease of FLIC tapes containing computer software programs, as involved in the present case, are covered by that clause of the definition of "royalties".

12. The minority judgment, after a detailed examination of all clauses of the definition of "royalties" that could possibly bring the receipts received by the petitioner within the scope of "royalties" and thereby taxable in Pakistan, concluded that the receipts received by the petitioner for the lease of FLIC tapes containing computer software programs fall neither within the clause "information concerning industrial, commercial or scientific experience" nor within any other clause of the definition of "royalties". It is reiterated that if a payment is in respect of rights to use the copyrights in a program, (e.g. by reproducing it and distributing it) en such a payment would be considered as a royalty. Other payments, however, only give a user the right to operate the program, where a consumer pays for a copy of computer program to use, this is not royalty payment. Since both the majority and minority judgments have already been reported as CIT v. Inter Quest Informatics Services (2023 SCMR 1803), we find it unnecessary to reiterate all the discussions made in the minority judgment, especially when we fully agree with it and endorse the same. We are sure that had this Court considered the aspects of the definition of "royalties" as discussed in the minority judgment, it would not have rendered the majority judgment under review. For the same reasons as recorded in the minority judgment, we hold that the Tribunal was not correct, and the High Court was correct, in determining that the receipts received by the petitioner for the lease of FLIC tapes containing computer software programs were not income from "royalties" but were "business profits", as claimed by the petitioner in its tax returns.

13. For the above reasons, we find that the majority judgment under review suffers from errors apparent on the face of the record. It proceeded on an erroneous assumption of a material fact and overlooked the material question of law and important aspects of the matter involved. Had this Court noticed and considered them earlier, it would not have passed the majority judgment under review. Therefore, we accept the present review petitions, recall the majority judgment under review and dismiss the appeals of the respondent, upholding the judgments of the High Court.

14. Before parting with the judgement, we wish to reiterate that Double Taxation Treaties (DTTs) provide a crucial framework for fostering international economic cooperation, facilitating cross-border investments, and avoiding the dual taxation of income that can impede global commerce. Klaus Vogel emphasizes that these treaties serve as "bridges between nations," designed to encourage economic collaboration while preventing conflicts over taxing rights. They achieve this by allocating taxing authority between the source and resident states, promoting predictability for businesses and individuals engaged in international activities. Courts in developing countries must interpret these treaties as dynamic instruments that balance the need for economic

growth with the protection of their tax base. Vogel argues that treaties should not be interpreted rigidly but should reflect their "object and purpose," ensuring they serve the broader goal of equitable economic development globally.

MWA/I-16/SC Review allowed.

**2025 SCMR 341**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Ayesha A. Malik, JJ**

**COMMISSIONER INLAND REVENUE, ZONE-III RTO, RAWALPINDI and others ---Petitioners**

**Versus**

**Messrs SARWAQ TRADERS, RAWALPINDI and others ---Respondents**

Civil Review Petition No. 275 of 2022 in Civil Petition No. 4599 of 2021, decided on 6th November, 2024.

Per Syed Mansoor Ali Shah, J; Syed Hasan Azhar Rizvi, J. (as Referee Judge) agreeing; Ayesha A. Malik, J. dissenting.

**(a) Interpretation of statutes---**

----'Directory' and 'mandatory' provisions---Ascertainment of---Legislative intent can be drawn by consideration of the entire statute, its nature, its object and the consequences whether it will cause serious inconvenience or injustice to persons as a result of construing the provision in one way or the other---If by holding a provision mandatory serious general inconvenience will be created for innocent persons of the general public without furthering the object of the enactment, the same should be construed as directory.

N.S Bindra's Interpretation of Statutes. 12th Edition. P.437 and 438 ref.

**(b) Sales Tax Act (VII of 1990)---**

----S. 45B(2), first and second provisos---Constitution of Pakistan, Art. 188---Review petition---Appeal to the Commissioner Inland Revenue (Appeals)---Timeframe provided under first and second provisos to section 45B(2) of the Sales Tax Act, 1990 ("Act")---Whether the first and second provisos were mandatory or directory provisions?---By way of judgment under review the Supreme Court held that the provisos were mandatory provisions and any order passed by the Commissioner (Appeals) under section 45B(2) beyond the maximum period of 180 days was an "invalid decision."---[Per Syed Mansoor Ali Shah, J. (Majority view): First and second provisos to section 45(B)(2) of the Sales Tax Act, 1990 ("Act") are directory provisions and lapse of the statutory timeframe will not affect the proceedings before the Commissioner (Appeals) who shall conclude the appeal in accordance with law by deciding the appeal on its merits---First and second provisos to section 45B(2) of the Act are directory provisions and do not deprive the taxpayer of his right to appeal or deny the tax department the right to adjudicate the matter on merits by virtue of lapse of the maximum statutory timeframe---Inspite of the first and second provisos to section 45(B)(2) being directory provisions, the Commissioner (Appeals) must make reasonable effort to decide the appeal of the taxpayer within the maximum statutory timeframe, subject to the third proviso to section 45B(2)---In case the taxpayer unduly delays the prosecution of the appeal without sufficient cause, the Commissioner (Appeals) is well within its power to proceed ex-parte against the taxpayer---Commissioner (Appeals) must also give reasons if the appeal is not decided within the statutory timeframe under the proviso to section 45(B)(2), so that the legislative aspiration to achieve effective and efficient tax governance is also realized even though such a timeframe is only directory in nature]---[Per Ayesha A. Malik, J. (Minority view): Primary ground for filing the present review was the argument that the adjournments taken by respondent/taxpayer during the proceedings before the Commissioner (Appeals) should have been considered in terms of Section 45-B(2), third proviso of the Sales Tax Act, 1990 (Act)---Record showed that the dates of adjournment were not considered while calculating the time period under Section 45B of the Act by the Appellate Tribunal Inland Revenue, Islamabad Bench (Tribunal) or the High Court---Given that present matter was a factual matter, it was necessary for the Tribunal to consider the dates of adjournments for the purposes of calculating the delay in terms of Section 45-B of the Act---Under the circumstances, review was allowed, the judgment under review was recalled; and accordingly, the orders of the High Court and the Tribunal were set aside; and the case was remanded to the Tribunal with the directions that the appeal of the taxpayer shall be deemed to be pending and the Tribunal shall decide afresh the issue of the timeframe as prescribed in Section 45-B of the Act with reference to the adjournments sought---[Per Syed Hasan Azhar Rizvi, J. (as Referee Judge) (Majority view): First and second provisos to section 45(B)(2) of the Act should be treated as directory provisions---This interpretation effectively safeguards the tax-payer's constitutional rights while promoting efficient and fair tax governance---It serves the public interest by preventing procedural timelines

from being used against tax-payers in a way that would compromise fairness and justice in the appellate system---Provisions must not be interpreted in a way that limits or undermines fundamental rights---Strict enforcement of statutory timelines for tax-payer appeals could jeopardize these rights and potentially deny tax-payers a fair opportunity to seek redressal---Therefore, declaring first and second provisos to section 45(B)(2) of the Act as directory is crucial to maintain due process and uphold the constitutional principles of justice.

2019 SCMR 1735 ref.

Malik Itaat Hussain Awan, Advocate Supreme Court; Ms. Asma Idrees, Additional Commissioner and Yousaf Khan, Law Officer for Petitioners.

Respondent No.1, in person.

Date of hearing: 25th October, 2022.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The judgment under review dated 12.5.2022 addresses the solitary question whether the first and second provisos to section 45B(2) of the Sales Tax Act, 1990 ("Act") are mandatory or directory provisions. The Court held that they were mandatory provisions and any order passed by the Commissioner (Appeals) under section 45B(2) beyond the maximum period of 180 days is an "invalid decision."

2. The department seeks review of the said judgment. It has been argued that the first and second provisos to section 45B(2) when considered as mandatory provisions, not only deprive the taxpayer of his right to appeal for no fault of the taxpayer, but are also adverse to the interest of the department because the consequence of the delay results in the acceptance of the appeal of the taxpayer, as held by the Appellate Tribunal Inland Revenue ("Tribunal"). It is argued that mandatory reading of the two provisos to section 45B(2) deprives both the parties to get their claims adjudicated on merits. He, therefore, argues that the statutory timeframe provided in the first and second provisos to section 45B(2) must be read as directory provisions. It is also pointed out that the impugned judgement proceeds on an erroneous and a mistaken assumption that there is no difference between the appellate and the original adjudication under the Act. Original adjudication is on the basis of the show cause notice initiated by the tax department against a taxpayer, while the appellate adjudication is when the taxpayer challenges the order-in-original passed against him in an appeal. The scheme of appellate adjudication cannot be treated at par with the original adjudication under section 36(3) of the Act or with a similar provision under section 179 of the Customs Act, 1969. He adds that reliance by this Court in the judgment under review on Mujahid Soap and Super Asia in holding first and second provisos to section 45B(2) to be mandatory provisions is an error apparent on the record as these cases deal with the scheme of original adjudication under the respective laws and not with the concept of appellate adjudication. Learned counsel also relied on a recent judgment of a three member bench of this Court in A.J. Traders, which has disagreed with the view expressed in the judgment under review considering similar provisions, as the first and second provisos to section 45B(2), under the Customs Act, 1969 to be a directory provision. It is noted for completion of record that the interest of the respondent taxpayer is no different than that of the petitioner as both stand equally aggrieved of the interpretation rendered by the judgment under review to section 45B(2) of the Act. Hence the arguments of the learned counsel for the petitioner have been considered to be on behalf of both the parties.

3. The background giving rise to the instant petition is that the taxpayer was issued a show cause notice for violation of section 25 of the Act on 18.1.2011 and thereafter an order-in-original was passed against the taxpayer on 22.2.2011. The taxpayer filed an appeal before the Commissioner (Appeals), which was dismissed on merits. Thereafter the taxpayer approached the Appellate Tribunal Inland Revenue, Islamabad and vide order dated 05.9.2012 the appeal of the respondent taxpayer was accepted on the ground that the Commissioner (Appeals) had to decide the matter within the statutory timeframe of a maximum of 180 days under section 45B(2) of the Act and as the same was decided beyond the said period, hence the order passed by the Commissioner (Appeals) was declared to be "void ab initio nullity in the eyes of law." It further held that "it will be deemed that no order has been passed by the appellate authority and resultantly the appeal filed before that forum will stand accepted." The said order was challenged in a tax reference by the tax department before the Lahore High Court and vide order dated 0 1. 6.2021, the matter was decided against the tax department by

holding that the first and second provisos to section 45B(2) of the Act were mandatory provisions, hence the order passed by the Commissioner (Appeals) was void. This Court upheld the view of the High Court in the impugned judgment under review and declared the first and second provisos to section 45B(2) of the Act to be mandatory provisions and thus the decision of the Commissioner (Appeals) to be "invalid."

4. We have heard the learned counsel for the petitioner, examined the law and the afore-cited case law relied upon in the judgment under review. Following provisions of law under the Act and the Customs Act, 1969 are relevant for the purpose of understanding the distinction between original and appellate adjudication.

Original Adjudication:

Section 36 of the Act.

36. Recovery of tax not levied or short-levied or erroneously refunded.-(1)...

(2) ...

(3) The officer of Inland Revenue empowered in this behalf shall, after considering the objections of the person served with a notice to show cause under subsection (1) or subsection (2), determine the amount of tax or charge payable by him and such person shall pay the amount so determined. Provided that order under this section shall be made within one and twenty hundred days of issuance of show cause notice or within such extended period as the Commissioner may, for reasons to be recorded in writing, fix, provided that such extended period shall in no case exceed sixty days:

Provided further that any period during which the proceedings are adjourned on account of a stay order or Alternative Dispute Resolution proceedings or the time taken through adjournment by the petitioner not exceeding thirty days shall be excluded from the computation of the periods specified in the first proviso.

Section 179, Customs Act, 1969.

179. Power of adjudication.- (1) ...

(2) ...

(3) The cases shall be decided within one hundred and twenty days of the issuance of show cause notice or within such period extended by the Collector for which reasons shall be recorded in writing, but such extended period shall in no case exceed sixty days:

Provided that any period during which the proceedings are adjourned on account of a stay order or alternative dispute resolution proceedings or the time taken through adjournment by the petitioner not exceeding thirty days, shall be excluded for the computation of aforesaid periods.

Appellate Adjudication:

Section 45B(2) of the Act.

45B. Appeals.- (1) ...

(2) The Commissioner Inland Revenue (Appeals) may, after giving both parties to the appeal an opportunity of being heard, pass such order as he thinks fit, confirming, varying, altering, setting aside or annulling the decision or order appealed against:

Provided that such order shall be passed not later than one hundred and twenty days from the date of filing of appeal or within such extended period as the Commissioner (Appeals) may, for reasons to be recorded in writing fix:

Provided further that such extended period shall, in no case, exceed sixty days:

Provided further that any period during which the proceedings are adjourned on account of a stay order or Alternative Dispute Resolution proceedings or the time taken through adjournment by the petitioner not exceeding thirty days shall be excluded from the computation of aforesaid periods.

Section 194-B, Customs Act, 1969

194-B. Orders of Appellate Tribunal.- (1) ...

Provided that the appeal shall be decided within sixty days of filing the appeal or within such extended period as the Tribunal may, for reasons to be recorded in writing, fix:

Review of the above provisions show that section 179 of the Customs Act, 1969 deals with original adjudication and is in pari materia with the erstwhile section 36(3) of the Sales Tax Act, 1990 and not with section 45B(2)

as held by the judgement under review while discussing the importance of Mujahid Soap to the instant case in the following manner:

A similar view has already been taken in the case of Messers Mujahid Soap and Chemical Industries (Pvt) Limited v. Customs Appellate Tribunal, Bench-I, Islamabad and others (2019 SCMR 1735) where the provision under consideration was Section 179 of the Customs Act, 1969, which is pari materia to the provisions under consideration under the Act, which reads as follows:

"S. 179(3) The cases shall be decided within one hundred and twenty days of the issuance of show cause notice or within such period extended by the Collector for which reasons shall be recorded in writing, but such extended period shall in no case exceed sixty days."

Second, the reliance placed by the judgment under review on Mujahid Soap and Super Asia is misplaced as both these case deal with original adjudication which has a different object, purpose and scheme as discussed later in the judgment.

5. Recently, a three member bench of this Court in A.J.Traders has held that the timeframe in section 194-B of the Customs Act, 1969 (which deals with appellate adjudication under Customs Act, 1969) is directory and disagreed with the view taken in the impugned judgement under review in the following manner:

8. If a taxpayer's appeal is not decided within the stipulated period his appeal cannot be negated and the taxpayer non-suited on this score. To hold otherwise would be eminently unfair and give the State a premium for its own functionary's non-compliance with the law. Article 4 of the Constitution of the Islamic Republic of Pakistan ('the Constitution') accords the protection of law and to be treated in accordance with law to be the inalienable right of every citizen and also of every other person for the time being in Pakistan. The right to be dealt with in accordance with the law is further fortified by Article 10A of the Constitution which stipulates a fair trial and due process as a Fundamental Right. These rights cannot be negated or diluted by statute, and if any law purports to do so it shall to such extent be void, as stipulated in Article 8(1) and (2) of the Constitution. Therefore, it cannot be stated that an order belatedly passed on a taxpayer's appeal is a void order and/or a nullity.

9. In the case of Mujahid Soap and Chemical Industries (Pvt.) Ltd v Customs Appellate Tribunal section 179 of the Customs Act, 1969, which attends to initial adjudication, and not an appeal, was considered and this Court concluded that since adjudication 'was beyond time as prescribed in section 179(3) of the Act. Therefore, the said decision is invalid.' The material distinguishing point in this case was that the initial adjudication with regard to the show cause notice was delayed. In other words the State's functionary, that is, the Deputy Collector (Adjudication), had delayed in deciding the show cause notice. Belatedly adjudicating a show cause notice is not the same as belatedly deciding an appeal preferred against a purported liability, because then the appellate authority's tardiness, whether intentional or otherwise, will frustrate the taxpayer's appeal, which is not the intention of the law, nor could it be as it would violate Articles 4 and 10A of the Constitution.

10. That as regards the view expressed in the Sarwaq Traders case by a two-member Bench we, with the greatest of respect, cannot bring ourselves to agree therewith to the extent that the said decision contradicts with what has been held in the cited precedents and by us. We also cannot, with profound respect, accept the stated rationale for prescribing a time frame which, to use the words of the learned judges is, 'that the taxpayer satisfies its liability and the Department is able to collect revenue'. This rationale effectively presupposes that the taxpayer is liable which, in our humble opinion, is not what the statute says nor what can be implied therefrom. The Legislature in prescribing a period within which an appeal should, or must, be decided obligates the appellate authority. Therefore, if there are any consequences in deciding an appeal beyond the prescribed period the same may only be visited upon the State functionaries, and not on an appellant taxpayer.

6. It is important to underline that the test to ascertain whether a provision of a statute is directory or mandatory, the principle as laid down in Super Asia provides that "perhaps the clearest indicator is the object and purpose of the statute and the provision in question. It is the duty of the court to garner the real intent of the legislature as expressed in the law itself." The legislative intent can be drawn by consideration of the entire statute, its nature, its object and the consequences whether it will cause serious inconvenience or injustice to persons as a result of construing the provision in one way or the other. If by holding a provision mandatory serious general inconvenience will be created for innocent persons of the general public without furthering the object of the

enactment, the same should be construed as directory.Purposive interpretation of a statute further helps assess and understand the real intent of the legislation. Under this interpretative tool, every statute has a purpose, without which it is meaningless. This purpose, or ratio legis, is made up of the objectives, the goals, the interests, the values, the policy, and the function that the statute is designed to actualize. The Court must give the statute's language a meaning that best realizes its purpose. With this understanding when we examine the relevant provisions of the Act. The object, policy and purpose of original adjudication under the erstwhile section 36(3) of the Act which requires that the order shall be made within a maximum statutory period of 180 days is to ensure that the show cause notice issued by the tax department is decided expeditiously so that tax recovery can be effected at the earliest and also the sword of alleged tax liability must not hang on the head of a taxpayer indefinitely. Therefore, if the tax department fails to decide the show cause notice within the maximum period provided under the law, the proceedings so initiated against a taxpayer come to an end. It is for this reason that section 36(3) of the Act has already be declared to be a mandatory provision by this Court in Super Asia.

7. The object, policy and purpose of the first and second provisos to section 45(B)(2) of the Act is totally different as it deals with the appellate adjudication. The said provision is invoked by a taxpayer by filing an appeal against the order-in-original. Appellate adjudication, as opposed to original adjudication, takes a different focus, as it deals with the right to appeal of a taxpayer. Right to appeal of a taxpayer is a right that flows from the constitutional rights of access to justice and fair trial guaranteed to a taxpayer under Articles 9 and 10-A of the Constitution of the Islamic Republic of Pakistan, 1973. It is axiomatic that no statute can muffle fundamental rights and must at all times advance public interest and remain Constitution compliant. While the action of the tax department against a citizen can be regulated through a timeframe, it is not permissible to do so when the citizen has approached the tax department in an appeal. The fundamental rights of the citizen stand invoked and come to his rescue which is not so in the case of a tax department. With these considerations in mind the statutory timeframe provided for the appellate adjudication under section 45(B)(2) can only be directory, and to conceive it otherwise, would cause injustice and irreparable harm to a taxpayer who is deprived of the right to appeal. We, therefore hold that the first and second provisos to section 45(B)(2) are directory provisions and lapse of the statutory timeframe will not affect the proceedings before the Commissioner (Appeals) who shall conclude the appeal in accordance with law by deciding the appeal on its merits. We also hold that inspite of the first and second provisos to section 45(B)(2) being directory provisions, the Commissioner (Appeals) must make reasonable effort to decide the appeal of the taxpayer within the maximum statutory timeframe, subject to the third proviso to section 45B(2). In case the taxpayer unduly delays the prosecution of the appeal without sufficient cause, the Commissioner (Appeals) is well within its power to proceed ex-parte against the taxpayer. Commissioner (Appeals) must also give reasons if the appeal is not decided within the statutory timeframe under the proviso to section 45(B)(2), so that the legislative aspiration to achieve effective and efficient tax governance is also realized even though such a timeframe is only directory in nature.

8. We also note that the argument that similar matters be marked to a larger bench in the light of WAK Limited has rightly been turned down by the judgment under review as the issue in the cited case is relating to original adjudication and therefore different and totally unrelated to the instant matter of appellate adjudication under the provision of law discussed in this case. Similar view has also been expressed in A.J.Traders.

9. Having considered the recent view of the Court in A.J. Traders and for the above reasons, the judgment under review, subject to para 7 above, is recalled and this review petition is partly allowed. It is declared that first and second provisos to section 45B(2) of the Act are directory provisions and do not deprive the taxpayer of his right to appeal or deny the tax department the right to adjudicate the matter on merits by virtue of lapse of the maximum statutory timeframe. The case is, therefore, remanded to the Tribunal, where the appeal of the taxpayer shall be deemed to be pending, with the direction to the Tribunal to expeditiously decide the appeal on merits.

Sd/-

Judge

I have read the judgment but do not agree with

it and have appended my opinion.

Sd/-

**Judge**

**AYESHA A. MALIK, J.---**I have read the opinion of Syed Mansoor Ali Shah, J., however, I do not concur with the same.

2. The primary ground for filing the review is the argument that the adjournments taken by Respondent No. 1, taxpayer during the proceedings before the Commissioner (Appeals) should have been considered in terms of Section 45-B(2), third proviso of the Sales Tax Act, 1990 (Act). The Petitioners' case is that the appeal was filed on 22.03.2011 by the Taxpayer. They sought adjournments on 19.07.2011, 16.08.2011, 13.09.2011 and 20.09.2011 and the case was finally decided on 21.09.2011. That if the time taken over adjournments is excluded as per the third proviso of Section 45-B(2) of the Act then the appeal was decided within the prescribed time, as the delay is of three days.

3. The record shows that the given dates of adjournment were not considered while calculating the time period under Section 45-B of the Act by the Appellate Tribunal Inland Revenue, Islamabad Bench (Tribunal) or the High Court. Given that this is a factual matter, it is necessary for the Tribunal to consider the dates of adjournments for the purposes of calculating the delay in terms of Section 45-B of the Act. Under the circumstances, this review is allowed, the judgment dated 12.05.2022 is recalled and accordingly, the orders of the Lahore High Court, Rawalpindi Bench and the Tribunal are set aside. The case is remanded to the Tribunal where the appeal of the Taxpayer shall be deemed to be pending with the direction that the Tribunal decides afresh the issue of the timeframe as prescribed in Section 45-B of the Act with reference to the adjournments sought. Order accordingly.

**JUDGE**

**OPINION OF THE REFEREE JUDGE**

**SYED HASAN AZHAR RIZVI, J.---**The then Honorable Acting Chief Justice of Pakistan, vide order dated 21.05.2024, was pleased to direct that this matter be placed before me as a Referee Judge due to difference of opinion between a two-member bench of this Court. I have had the privilege of going through the scholarly opinions authored by my learned colleagues and have also heard the arguments of the learned counsel for the parties on 29.10.2024.

2. This review petition was heard by a two-member bench of this Court, comprising Justice Syed Mansoor Ali Shah and Justice Ayesha A. Malik. Justice Syed Mansoor Ali Shah partly allowed the petition and remanded the case to the Tribunal. However, Justice Ayesha A. Malik allowed the petition in its entirety and remanded the matter on the ground that the period of adjournments sought by the tax-payer was not considered by the Tribunal.

3. While partly accepting the review petition, the reasoning that prevailed with Justice Syed Mansoor Ali Shah was that the first and second provisos to Section 45-B(2) of the Sales Tax Act, 1990 ("the Act") are directory provisions. These provisos do not deprive the tax-payer of the right to appeal, nor do they prevent the tax department from adjudicating the matter on its merits due to the lapse of the maximum statutory timeframe. Whereas, Justice Ayesha A. Malik allowed the review petition and remanded the matter to the Tribunal on the ground that the adjournments sought by Respondent No. 1, the tax-payer, during the proceedings before the Commissioner (Appeals) should have been considered in accordance with Section 45-B(2) third proviso of the Act. These adjournments were not taken into account when calculating the time period under Section 45-B of the Act by the Tribunal.

4. I agree with understanding of Justice Mansoor Ali Shah qua the A.J. Traders case (2019 SCMR 1735), in which it was held that the timeframe specified in Section 194-B of the Customs Act, 1969, regarding appellate adjudication, is directory in nature. The rationale is that if a tax-payer's appeal is not resolved within the stipulated period, such a delay does not negate the appeal, nor can the tax-payer be non-suited on that basis. Thus, it cannot be asserted that an order passed belatedly on a tax-payer's appeal is void or a nullity.

5. I subscribe to the view taken by Justice Syed Mansoor Ali Shah that the first and second provisos to section 45(B)(2) of the Act should be treated as directory provisions. This interpretation effectively safeguards the tax-

payer's constitutional rights while promoting efficient and fair tax governance. It serves the public interest by preventing procedural timelines from being used against tax-payers in a way that would compromise fairness and justice in the appellate system.

6. It is a settled legal principle that provisions should not be interpreted in a manner that imposes undue hardship on innocent members of the public or undermines the legislative intent. If holding a provision as mandatory would create significant inconvenience without furthering the objectives of the enactment, it should be construed as directory. Thus, provisions must not be interpreted in a way that limits or undermines fundamental rights. Strict enforcement of statutory timelines for tax-payer appeals could jeopardize these rights and potentially deny tax-payers a fair opportunity to seek redressal. Therefore, declaring these provisions as directory is crucial to maintain due process and uphold the constitutional principles of justice.

7. In view of the above legal position, I concur with the conclusion arrived at by my learned brother Justice Syed Mansoor Ali Shah and partly allow the Review petition.

**JUDGE**

**ORDER OF THE BENCH:**

By majority of two-to-one (Ayesha A. Malik, J. dissenting), this Civil Review Petition is partly allowed in terms of para-9 of the order authored by Syed Mansoor Ali Shah, J.

MWA/C-21/SC Order accordingly.

**2025 SCMR 517**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, Irfan Saadat Khan and Aqeel Ahmed Abbasi, JJ**

**KAUSAR RANA RESOURCES (PRIVATE) LIMITED and others ---Petitioners**

**Versus**

**QATAR LUBRICANTS COMPANY W.L.L. (QALCO) and others ---Respondents**

C.P.L.A. No. 4468 of 2024, decided on 2nd December, 2024.

(Against the judgment of the Lahore High Court, Lahore, dated 24.06.2024, passed in C.M. No. 3 of 2023 in C.O. No. 48681 of 2023).

**(a) Companies Act (XIX of 2017)---**

----Ss. 126, 127 & 278---Arbitration Act (X of 1940), Ss. 18 & 34---Pro-arbitration approach of Courts---Arbitration---Filing of award---Dispute pertaining to transfer of shares was initiated before High Court where proceedings were neither stayed under Arbitration Act, 1940 nor the matter was referred to Arbitrator---Validity---In addition to Supreme Court adopting a pro-arbitration approach, stance of referring for arbitration was also bolstered by the framework of Companies Act, 2017, which, through its Preamble, affirmatively advocated for alternative mechanisms to ensure expeditious resolution of corporate disputes---Companies were explicitly encouraged under section 278 of Companies Act, 2017 to refer any existing or future disputes, whether between companies or involving any other persons, to arbitration---Supreme Court with pro-arbitration approach and with the consensus of parties referred the matter to Arbitrator---Supreme Court set aside order passed by High Court and accepted application under section 34 of Arbitration Act, 1940---Supreme Court stayed proceedings under sections 126 and 127 of Companies Act, 2017 concerning alleged fraudulent transfer of shares and rectification of register of members (shareholders)---Supreme Court directed that award made by Arbitrator would be filed in High Court in accordance with the proceedings under Arbitration Act, 1940, as the matter fell exclusively within the jurisdiction of Court established under the Companies Act, 2017---Appeal was allowed.

Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd [1993] AC 334; Brother Steel Mills v. Ilyas Miraj PLD 1996 SC 543; and Nilmoni Singh v. Taranath ILR 9 Cal 295 rel.

**(b) Arbitration Act (X of 1940)---**

----S. 2(c)---Companies Act (XIX of 2017), S. 5(4)---Term "Civil Court"---Civil Courts of special jurisdiction---Scope---Courts exercising civil jurisdiction in relation to specific matters, such as the Court established under Companies Act, 2017 cannot be read into the exception clause of section 2(c) of Arbitration Act, 1940---Term "Civil Court" mentioned in section 2(c) of Arbitration Act, 1940 does not refer exclusively to Civil Courts of general jurisdiction but also encompasses Civil Courts of special jurisdiction.

**(c) Arbitration---**

----Economic benefits---Scope---Significant economic benefits of arbitration are cost-effective, efficient and confidential means of resolving disputes---Arbitration alleviates burden on national Courts, enhances business productivity and provides faster resolution process, thereby minimizing disruptions to businesses---Ability to enforce international arbitration awards strengthens trade and commerce, while arbitration's stable and predictable dispute resolution mechanism promotes investor confidence, making the country an attractive destination for foreign investment---Such factors collectively foster a favourable business environment, drive economic growth and enhance country's competitiveness on the global stage.

Barrister Iftikhar-ud-Din Riaz, Advocate Supreme Court and Muhammad Haroon Mumtaz, Advocate Supreme Court for Petitioners.

Arshad Mohsin Tayebaly, Advocate Supreme Court and Tariq Aziz, Advocate-on-Record for Respondents.

Date of hearing: 2nd December, 2024.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**In enforcing an arbitration agreement, 'the courts' role is not to pre-empt the jurisdiction of the arbitrators but to support the arbitral process and ensure that the parties adhere to their agreement'. By prioritizing arbitration, courts uphold the principle of party autonomy and reinforce the parties'

choice to resolve their disputes outside traditional litigation. This approach not only respects their agreement but also addresses the inefficiencies inherent in conventional judicial proceedings. Courts should adopt a resolute stance of non-interference, encouraging arbitration and other forms of alternative dispute resolution (ADR), such as mediation, as the preferred modes of resolving disputes. This judicial mindset is particularly vital for our country, where an overburdened judicial system and burgeoning case backlogs impose immense economic costs on both the judiciary and society. By respecting arbitration agreements and fostering an environment conducive to swift dispute resolution, courts can play a pivotal role in alleviating this crisis. Courts in Pakistan must therefore embrace this ethos, recognizing that promoting arbitration is not merely a legal necessity but also an economic and commercial imperative for ensuring the country's progress and prosperity. It is with this pro-arbitration approach that we proceed to address and decide the questions raised in the instant case.

2. Briefly, the relevant facts are that Qatar Lubricants Company W.L.L. (QALCO) and Fawad Naeem Rana ("respondents") filed a petition before the Lahore High Court, invoking its jurisdiction as a Company Bench under the Companies Act, 2017 ("Companies Act"). Through the said petition, they sought, inter alia, rectification of the register of sharers under Section 126 of the Companies Act and action against Atif Naeem Rana and Sameen Naeem Rana ("petitioners") under Section 127 of the Companies Act. The respondents alleged that the petitioners had fraudulently secured the transfer of the respondents' shares in Kausar Rana Resources (Pvt.) Ltd. (KRR) in the register of sharers, relying on an illegal and void agreement dated 12.04.2020 ("agreement"). The petitioners appeared before the Company Bench in the said petition and filed an application under Section 34 of the Arbitration Act, 1940 ("Arbitration Act"), seeking a stay of the proceedings on the respondents' petition and for referring the matter to arbitration by any retired Judge of a High Court or the Supreme Court, in accordance with clause (13) of the agreement. The respondents opposed the application by filing a written reply. Through a judgment dated 24.06.2024 ("impugned judgment"), the Company Bench dismissed the petitioners' application. Consequently, the petitioners have filed the present petition for leave to appeal.

3. A perusal of the impugned judgment reveals that the Company Bench dismissed the petitioners' application primarily on the ground that the petitioner Sameen Naeem Rana - one of the beneficiaries of the alleged fraudulent transfer of shares - was not a party to the agreement containing the arbitration clause. The Company Bench concluded that the right to arbitrate could not be enforced by a person who is not a party to the agreement. However, we find this reasoning unsustainable. Clause (1) of the agreement explicitly provides that "QALCO shall relinquish all its rights in KRR and transfer all of its existing shares in Kausar Rana Resources (Pvt.) Ltd. [KRR], including shares of nominee director, to Mr. Atif Naeem Rana - CEO or a nominee of the same". Pursuant to this clause, the shares were transferred to the petitioner Sameen Naeem Rana, who acted as the nominee of the petitioner Atif Naeem Rana - a party and signatory to the agreement containing the arbitration clause. Thus, Sameen Naeem Rana derives his rights and title in the transferred shares under and through Atif Naeem Rana. Accordingly, he is subject to all rights and obligations arising from the agreement signed by Atif Naeem Rana, including the right to enforce the arbitration clause contained therein.

4. In addition to our above finding, both learned counsel for the parties reached a consensus during arguments that the matter of the alleged fraudulent transfer of shares may be referred to an Arbitrator, to be appointed by this Court, with a direction to conclude the arbitral proceedings within a specified timeframe. Furthermore, they requested an order from this Court directing that the Award made by the Arbitrator be filed before the Company Bench, rather than the Civil Court, to ensure the matter is resolved more effectively and expeditiously.

5. In addition to the Court adopting a pro-arbitration approach, this stance is also bolstered by the framework of the Companies Act, which, through its preamble, affirmatively advocates for alternative mechanisms to ensure the expeditious resolution of corporate disputes. Furthermore, under Section 278, the Act explicitly encourages companies to refer any existing or future disputes, whether between companies or involving any other persons, to arbitration. Therefore, on the basis of the above finding, our pro-arbitration approach and the consensus of the learned counsel for the parties, we convert this petition into an appeal and allow the same. The impugned judgment is set aside, and the petitioners' application under Section 34 of the Arbitration Act is

accepted. The dispute concerning the alleged fraudulent transfer of shares is referred to arbitration and meanwhile, the proceedings on the respondents' petition under Sections 126 and 127, etc., of the Companies Act before the Company Bench shall remain stayed.

6. Since the parties themselves could not arrive at a consensus on the name of an Arbitrator, we proposed the name of Mr. Justice (R) Maqbool Baqar as the Arbitrator, to which neither party raised any objection. Therefore, with the consent of the parties, the matter is referred to the said Arbitrator. We expect that the Arbitrator will conduct the arbitral proceedings as expeditiously as possible and endeavour to decide the matter preferably within a period of four months from the date of the submission of claims by the parties before him. In case the said learned Arbitrator declines to accept the assignment, the parties are free to approach the Company Bench through a proper application for the appointment of a new Arbitrator. So far as the seat and venue of the arbitration are concerned, it was suggested by the learned counsel for the petitioners that the seat and venue ought to be Lahore or Islamabad, whereas learned counsel for the respondents suggested that it could be Karachi or Dubai. We leave this question to the discretion and decision of the Arbitrator.

7. As for the request to make an order to file the Award before the Company Bench, rather than the Civil Court, it cannot be answered in the affirmative simply based on the consent of the parties; as it relates to the jurisdiction of the Company Bench, which cannot be conferred by consent of the parties or by an order of this Court. Therefore, we examine the legality of the same considering the relevant provisions of the Arbitration Act and the Companies Act.

8. As per Section 14(2) of the Arbitration Act, the award made by an arbitrator is to be filed in Court and the "Court", as defined in Section 2(c) of the Arbitration Act, means a Civil Court having jurisdiction to decide the question forming the subject-matter of the reference [to arbitration] if the same had been the subject-matter of a suit. The question of law before us, therefore, is: Whether the Court, i.e., a Company Bench of the High Court, established by the Companies Act qualifies as a Civil Court having jurisdiction to decide the question forming the subject matter of the reference to arbitration if the same had been the subject matter of a suit.

9. Generally, a civil court is a court that has jurisdiction to adjudicate disputes between individuals or entities concerning their civil rights and obligations, while a criminal court is a court that has jurisdiction to hear cases involving the commission of offences in order to determine the guilt or innocence of the accused. Although Article 175 of the Constitution, which authorises the establishment of courts and the conferment jurisdiction on them by law, does not explicitly name or label the courts established by law as general or special courts, it is common in legal parlance to distinguish between the two. Courts with general jurisdiction over a broad range of matters are referred to as courts of general jurisdiction or general courts, while courts with jurisdiction limited to specific matters are referred to as courts of special jurisdiction or special courts.

10. Accordingly, the Civil Courts established under the Civil Courts Ordinance, 1962 are referred to as general courts of civil jurisdiction or general civil courts, as they have been conferred jurisdiction under Section 9 of the Code of Civil Procedure 1908 to try all suits of a civil nature except those whose cognizance is expressly or impliedly barred. Similarly, the Criminal Courts established under the Code of Criminal Procedure, 1898 are referred to as general courts of criminal jurisdiction or general criminal courts, as they have been conferred general jurisdiction under Sections 28 and 29 of the said Code to try all offences under the Pakistan Penal Code, 1860 or other criminal laws. Conversely, courts such as Banking Courts, Consumer Courts and Labour Courts, etc., established under different statutes and conferred jurisdiction by those statutes to deal with specific matters, are referred to as civil courts of special jurisdiction or special civil courts. Likewise, Anti-Terrorism Courts, Anti-Corruption Courts and Accountability Courts, etc., established under various criminal laws and conferred jurisdiction limited to specific offences, are referred to as criminal courts of special jurisdiction or special criminal courts.

11. The Court, i.e., a Company Bench of the High Court, established under Section 5 of the Companies Act, has been conferred specific jurisdiction to adjudicate disputes between individuals or entities concerning their civil rights and obligations relating to companies and matters connected therewith. Section 4 gives Companies Act an overriding effect over any other law. The jurisdiction conferred on the Court by the Companies Act is,

therefore, civil in nature. Consequently, the Court established under the Companies Act qualifies as a civil court of special jurisdiction and may appropriately be referred to as a special civil court.

12. Since Section 2(c) of the Arbitration Act itself does not specify, it requires determination whether the term "Civil Court" mentioned therein refers exclusively to civil courts of general jurisdiction or also encompasses civil courts of special jurisdiction. If we hold that the term "Civil Court" refers exclusively to civil courts of general jurisdiction, it will amount to reading into the provisions of Section 2(c) of the Arbitration Act additional words that are not used by the legislature. We are cognizant of the lawful use of the interpretational tool of "reading into" the provisions of a law to give effect to the manifest legislative intent and purpose or to save the provisions from unconstitutionality by giving it a constitutionally compliant meaning, scope and effect. However, in this case, we find no justifiable reason to read anything additional into the provisions of Section 2(c) of the Arbitration Act. In fact, we find the position to be the converse: if we were to adopt such a restrictive interpretation, it would limit the scope of the Arbitration Act and frustrate the legislative intent and purpose, which is to provide an alternative dispute resolution mechanism for civil disputes. Such an interpretation would unnecessarily restrict its application to only those civil disputes that are adjudicable in civil courts of general jurisdiction. However, if it is held that the term "Civil Court" mentioned in Section 2(c) of the Arbitration Act also includes civil courts of special jurisdiction, it would give full effect to the legislative intent and purpose.

13. The latter view also aligns with the provisions of Section 20 of the Arbitration Act, which permits an application to file an arbitration agreement in a court having jurisdiction over the matter to which the arbitration agreement relates. Such a court may either be a civil court of general jurisdiction or a civil court with special jurisdiction over the relevant matter. It is quite common that the legislature, from time to time, carves out specific matters from the general jurisdiction of Civil Courts established under the Civil Courts Ordinance, 1962, either to ensure their expeditious resolution or to address the need for specialised expertise. Jurisdiction over such matters is conferred upon Special Courts established for this purpose. However, the fact that these matter are adjudicated by special civil courts established under special laws, rather than by general civil courts established under the general law, does not alter their classification as civil matters nor does it change the nature of the civil rights or obligations involved.

14. Similarly, the word "suit" used in Section 2(c) of the Arbitration Act cannot be given a narrow and restrictive meaning, as it refers to the usual mode of instituting a civil proceeding to enforce a civil right or obligation, and thus encompasses all such modes provided by law. It means the original proceeding in the court of first instance. While some laws provide for the initiation of proceedings through a suit, others allow for initiation through application, petition, reference or complaint. The name given to the document initiating the proceedings cannot be the determining factor in ascertaining either the nature of the jurisdiction exercised by the court or the classification of the court exercising such jurisdiction.

15. If the term "Civil Court" in Section 2(c) of the Arbitration Act were interpreted to refer exclusively to civil courts of general jurisdiction, all civil matters adjudicable by special courts under specific laws would fall outside the scope of the Arbitration Act. Such an interpretation would preclude applications for filing award or arbitration agreements in courts having special jurisdiction over the relevant matters, thereby frustrating the legislative intent and purpose of the Arbitration Act, which is to provide an alternative dispute resolution mechanism in civil matters. Section 2(c) of the Arbitration Act excludes from the definition of "Court" only one civil court of special jurisdiction, namely, the Small Cause Court, and no other civil court. Courts exercising civil jurisdiction in relation to specific matters, such as the Court established under the Companies Act, cannot be read into the exception clause of Section 2(c) of the Arbitration Act. Therefore, it is our considered view that the term "Civil Court" mentioned in Section 2(c) of the Arbitration Act does not refer exclusively to civil courts of general jurisdiction but also encompasses civil courts of special jurisdiction.

16. This conclusion aligns with the pro-arbitration bias firmly established in the enforcement of international arbitral awards, which, in our considered view, is equally applicable to domestic disputes. Where parties agree to take their disputes to arbitration, they expect the court to hold them to their bargain. It is underlined that the word "bias" used in the work "pro-arbitration bias" is not used in the negative or prejudicial sense. Instead, it reflects a judicial and a policy inclination towards supporting arbitration as a preferred method for resolving

disputes. This tendency arises from recognizing arbitration's benefits, such as efficiency, flexibility and the ability to deliver tailored outcomes. Applying this pro-arbitration bias to domestic arbitration advances the overarching objectives of arbitration law, including efficiency, party autonomy and minimising judicial interference. Requiring a party to an arbitration agreement to first approach a civil court of general jurisdiction for enforcement of the arbitration agreement and then, if the arbitral proceedings fail, to revert to a civil court of special jurisdiction, introduces unnecessary delay, inconvenience and expense. Such a convoluted process undermines the purpose of arbitration as an expeditious and cost-effective mechanism for dispute resolution. Adopting a pro-arbitration bias in domestic disputes is also essential to addressing the challenges posed by the overwhelming backlog of cases in our judicial system, particularly at the level of courts of original jurisdiction (trial courts).

17. The dispute in the present case, as well as the subject matter of the reference to arbitration, pertains to the alleged fraudulent transfer of shares and the rectification of the register of members (shareholders), which falls exclusively within the jurisdiction of the Court established under the Companies Act. Accordingly, we accept the request of learned counsel for the parties and direct that the Award made by the Arbitrator be filed before the Company Bench for further proceedings in accordance with the Arbitration Act.

18. Before parting with this judgment, we wish to underscore the significant economic benefits of arbitration as a cost-effective, efficient and confidential means of resolving disputes. Arbitration alleviates the burden on national courts, enhances business productivity and provides a faster resolution process, thereby minimising disruptions to businesses. Furthermore, the ability to enforce international arbitration awards strengthens trade and commerce, while arbitration's stable and predictable dispute resolution mechanism promotes investor confidence, making the country an attractive destination for foreign investment. These factors collectively foster a favourable business environment, drive economic growth and enhance the country's competitiveness on the global stage. In this context, we are informed that a draft bill for a new Arbitration Act, prepared by the Law and Justice Commission of Pakistan, was submitted to the Federal Government through the Ministry of Law and Justice on 2 May 2024. This draft bill aims to modernise the out dated arbitral dispute resolution framework, which has remained largely unchanged since 1940. We are optimistic that the Federal Government will prioritise the larger economic interest of the nation and ensure the swift enactment of fresh arbitral legislation to provide an effective and contemporary dispute resolution mechanism for the people. The office is directed to dispatch a copy of this judgment to the Attorney-General of Pakistan for onward correspondence and as a reminder to the concerned Ministry.

MH/K-1/SC Order accordingly.

**2025 SCMR 538**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, Ayesha A. Malik and Irfan Saadat Khan, JJ**

**FEDERATION OF PAKISTAN through Revenue Division and others ---Petitioners**

**Versus**

**DEWAN MOTORS (PVT) LTD. and others ---Respondents**

C.P.L.As Nos. 836-K to 887-K, 951-K, 1056-K, 1296-K of 2020, 741-K to 743-K of 2021 and 165-K of 2022, decided on 13th January, 2025.

**Constitution of Pakistan---**

----Arts. 185(3) & 191A [as inserted by 26th Constitutional Amendment]---Customs Act (IV of 1969), S. 221A (2)---Regular Bench of Supreme Court---Jurisdiction---Interpretation of Constitutional provision---Authorities contended that regular bench of Supreme Court could not hear the matter in question as it involved a challenge to Constitutionality of law namely section 221A (2) of Customs Act, 1989---Authorities referred to provisions of Article 191A of the Constitution, which was added to the Constitution through the 26th Constitutional Amendment---Respondents contended that Article 191A of the Constitution, was constitutionally invalid as it had infringed upon the salient features of the Constitution, including independence of judiciary and separation of powers among three organs of the State---Validity---Supreme Court found that it would be necessary to first decide upon the objection raised and reply thereto before proceeding further in the matter at hand---Supreme Court granted time to parties to prepare their arguments and assist Supreme Court on such points---Petition was adjourned.

Sabir Shah v. Shad Muhammad Khan PLD 1995 SC 66; Fazlul Quader Chowdhry v. Abdul Haque PLD 1963 SC 486 and Marbury v. Madison 5 US 137 [1803] ref.

Mirza Nasar Ahmad, Advocate Supreme Court (through video-link), M. Nadeem Qureshi, Advocate Supreme Court, Raja M. Iqbal, Advocate Supreme Court for Petitioners.

Salah-ud-Din, Advocate Supreme Court, Haider Waheed, Advocate Supreme Court, Imran Iqbal, Advocate Supreme Court, Ghulam Haider Sh, Advocate Supreme Court, Hussain Ali Amani, Advocate Supreme Court (through video-link), Afzal Awan, Advocate Supreme Court and Pervaiz Akhtar Tahir, Advocate Supreme Court for Respondents.

Date of hearing: 13th January, 2025.

**ORDER**

At the very outset, the learned counsel for the petitioners submitted that the present regular bench of the Court cannot hear these cases, as they involve a challenge to the constitutionality of a law, namely, subsection (2) of Section 221-A of the Customs Act, 1969. When asked why this bench cannot hear these cases, the learned counsel referred to the provisions of Article 191A, which was added to the Constitution of the Islamic Republic of Pakistan through the 26th Constitutional Amendment. In response to the petitioners' objection regarding the lack of jurisdiction of the present bench of the Court, the learned counsel for the respondents contended that Article 191A, the basis of the objection regarding jurisdiction, is constitutionally invalid as it infringes upon the salient features of the Constitution, including the independence of the judiciary and the separation of powers among the three organs of the State. He further submitted that a constitutionally invalid amendment cannot oust the constitutionally valid conferment of jurisdiction on the regular benches of the Court.

2. When asked how the present bench of the Court can decide upon the constitutional validity of the newly added Article 191A, the learned counsel for the respondents took the position that since the objection raised and the basis thereof pertain to the jurisdiction of the present bench, it must be decided by it. In support of his stance, he referred to Sabir Shah v. Shad Muhammad Khan (PLD 1995 SC 66), Fazlul Quader Chowdhry v. Abdul Haque (PLD 1963 SC 486) and Marbury v. Madison (5 US 137 [ 1803]) and sought time to further assist the Court on this point.

3. Given the objection raised and the reply thereto, we find that it would be necessary to first decide upon the same before proceeding further in the matter at hand. Therefore, the learned counsel for the parties are

granted time to prepare their arguments and assist the Court on the said points. The hearing for arguments on those points is adjourned to 16.01.2025.

MH/F-
2/SC

Order accordingly.

**2025 S C M R 606**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, and Aqeel Ahmed Abbasi, JJ**

**Syed ALI HUSSAIN and others ---Petitioners**

**Versus**

**SENIOR MEMBER/MEMBER (REVENUE) BOARD OF REVENUE PUNJAB, LAHORE and others ---Respondents**

Civil Petitions Nos. 2918-L and 3039-L of 2015, decided on 31st January, 2025.

**Punjab Land Acquisition Rules, 1983---**

----R.14---Acquired land---Restoration to original land owners---Non-utilization of land---Land was acquired from respondents/landowners with the promise to set up Waste Water Treatment Plant (WWTP) but that had not materialized for over three decades---Effect---Water And Sanitary Agency's (WASA) inaction over such years had represented a serious failure in upholding its commitment to both public welfare and private rights---If there was no success reported in September 2025, the question would be open before Supreme Court as to whether land acquired three decades ago for a public purpose, which had not been fulfilled, could result in the land being restored to its original owners as per Rule 14 of Punjab Land Acquisition Rules, 1983---Supreme Court considering the importance of WWTP and its bearing on fundamental rights of the people, expected from WASA to reconsider its financial and technological options while pursuing its negotiations with French Development Agency (AFD)---Supreme Court extended time to the authorities to conclude the matter latest by end of August 2025---Supreme Court directed ECNEC to submit its final report to the Court before the next date of hearing---Supreme Court directed the office to fix the case in last week of September 2025 to assess whether the relevant authorities had successfully concluded the matter after exploring all possible financial and technological alternatives---Petition was adjourned.

Muhammad Umer Riaz, Advocate Supreme Court for Petitioners (in both cases) (via video link from Lahore).

Mohsin Mumtaz, Advocate Supreme Court along with Asad Ullah Khan, Secretary Housing and Urban Development, Punjab, Ghufran Ahmad, M.D. WASA, Lahore, Zeeshan Bilal, Director (P&D) WASA, Lahore and Muhammad Usman Asif, Advocate Supreme Court for Respondents (via video link from Lahore).

Date of hearing: 31st January, 2025.

**ORDER**

Background

Land measuring 6,937 kanals was acquired by the Water and Sanitation Authority ("WASA"), an agency of the Lahore Development Authority ("LDA"), in three mauzajat of Tehsil and District Lahore - Babu Sabu, Jhuggian Nagra, and Niaz Beg - in 1991- 1992 through two awards dated 24.12.1991 and 23.02.1992. The land was acquired for the public purpose of setting up a Wastewater Treatment Plant ("WWTP") to treat the contaminated wastewater flowing into the River Ravi.

Funding Challenges and Revised Plans

2. Initially, the WWTP was to be funded by the World Bank, but negotiations did not materialize, and nearly three decades have passed without any progress on the ground. The Managing Director, WASA, and the Secretary, Housing and Urban Development, Punjab, submit that fresh loan negotiations are now being pursued with the French Development Agency ("AFD"). In this regard, it is submitted by MD, WASA, that Form PC-1[1] is being put up for approval before the Provincial Development Working Party ("PDWP"), Central Development Working Party ("CDWP"), and the Executive Committee of the National Economic Council ("ECNEC") - key bodies responsible for economic planning, infrastructure development, and public sector investments. It is further submitted that the ECNEC approval is expected by late August 2025, and, if granted, loan negotiations with AFD will commence in February 2026.

Environmental Significance of WWTP

3. It is important to underline that a WWTP is crucial for preventing contaminated water from entering River Ravi, ensuring environmental sustainability and public health. If left untreated, contaminated water introduces harmful pollutants, degrading water quality, harming aquatic life, and disrupting ecosystems. These effects, in turn, threaten biodiversity and essential river services, including drinking water, irrigation, and recreation. The WWTP will safeguard the river's ecological integrity and protect the livelihoods of communities dependent on it.

The Importance of River Ravi

4. The River Ravi, which flows through Lahore, Pakistan, holds immense ecological, cultural, and historical significance. As one of the five major rivers of the Punjab region, it has been a lifeline for agriculture, providing water for irrigation and supporting millions of livelihoods. However, urbanization, industrial pollution, and untreated wastewater have severely degraded its health, endangering both ecosystems and human communities. Protecting and restoring the River Ravi is not only essential for environmental sustainability but also for preserving Lahore's heritage, ensuring water security, and improving the overall quality of life for its residents.

Pakistan's Climate Vulnerability and WWTP's Role

5. According to the Global Climate Risk Index, Pakistan is the 8th most vulnerable country in the world. It's geographical location, socio-economic challenges, and heavy reliance on climate-sensitive sectors like agriculture and water make it highly susceptible to climate-related risks as it ranks 23rd out of 194 countries as per the 2024 Inform Risk Index.[2] Climate change exacerbates water pollution by increasing the frequency and intensity of rainfall, which can overwhelm wastewater treatment systems, leading to the discharge of untreated or partially treated wastewater into rivers. Investing in climate-resilient wastewater treatment infrastructure ensures that water flowing into the river is clean and safe, thereby protecting aquatic life, preserving biodiversity, and maintaining ecological balance. This aligns with several Sustainable Development Goals[3] ("SDGs"), including SDG 6 (Clean Water and Sanitation), which aims to improve water quality and reduce pollution; SDG 13 (Climate Action), which calls for taking urgent measures to combat climate change; and SDG 14 (Life Below Water), which focuses on conserving marine and freshwater ecosystems.

Delay and the Need for Alternative Funding

6. For three decades, the construction of a much-needed WWTP has been delayed due to WASA's inability to secure international financing, highlighting the limitations of relying solely on international financing. Given the urgency of ensuring River Ravi's sustainability, securing clean water access, and addressing the WWTP's links to climate adaptation, its timely construction is tied to the fundamental rights to life and dignity under Articles 9 and 14 of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution"). In light of this grave and pressing background, it is imperative that WASA urgently explores alternative financing mechanisms and cost-effective, homegrown waste water treatment solutions in public interest.

Judicial Guidance without Encroachment on Policy-Making

7. While it is well established that policy-making falls within the domain of the executive, this Court, in exercising its constitutional duty to safeguard fundamental rights under Article 9 of the Constitution, has over the years developed a substantial knowledge base regarding environmental challenges. Therefore, without encroaching upon the policy-making prerogative of the executive, this Court deems it appropriate to suggest certain options that the executive authorities may consider while formulating its response to the challenge in hand, that is, the delay of three decades in setting up the WWTP. These recommendations, while not binding, are intended to assist the executive in discharging its obligations towards environmental protection and sustainable development.

Recommendations:

Islamic Climate Finance: A Sustainable Alternative

8. We find it important to underline that access to climate finance is essential for ensuring climate adaptation and resilience, particularly in vulnerable regions like Pakistan, where environmental degradation directly affects fundamental rights such as life, health and dignity. In this context, climate finance emerges as a viable, self-sustaining alternative that not only aligns with environmental responsibility and financial sustainability but also upholds fundamental rights under the Constitution. Islamic finance principles, particularly those emphasizing

risk-sharing and ethical investment, offer a non-debt-based approach to financing critical infrastructure. WASA may consider leveraging Waqf (Endowments), Sukuk (Islamic bonds), and Public-private Partnerships rooted in Islamic finance. For instance, a Green Sukuk-a Shariah-compliant financial instrument-can be issued to raise funds specifically for the water treatment plant, attracting investors who seek both financial returns and environmental impact. Islamic finance has been a game changer in climate action, offering ethical and sustainable financial solutions for the Global South. Indonesia successfully launched a Green Sukuk in 2018, raising $1.25 billion to finance renewable energy and climate-resilient projects, demonstrating that Islamic financial instruments can effectively mobilize resources for environmental sustainability. Malaysia's Sustainable and Responsible Investment ("SRI") Sukuk, has funded water conservation, waste management, and solar energy initiatives. By integrating Islamic finance into climate strategies, particularly in Muslim-majority and climate-vulnerable countries like Pakistan, there is significant potential to mobilize resources and enhance the impact of global climate initiatives.

Wastewater Treatment Technologies: Exploring Cost-Effective Options and Homegrown Solutions

9. WASA may explore a range of WWTP technologies, including cost-effective and homegrown technological solutions to urgently provide sustainable water management for the people of Pakistan. The spectrum of technologies available can be broadly categorized into low-cost, intermediate, and advanced solutions. Low-cost, homegrown solutions, include: (a) Septic Tanks; which provides basic on-site sewage treatment by separating solids from liquids and enabling anaerobic digestion, (b) Constructed Wetlands; these use natural wetland processes to filter and treat wastewater, (c) Anaerobic Ponds and Lagoons; these rely on anaerobic processes for treatment, making them suitable or agricultural or low-resource settings, and (d) Sand and Gravel Filters; these offer a simple yet effective way to remove impurities through layered filtration. Intermediate or conventional technologies provide more efficient treatment. These include: (a) Activated Sludge Process; this uses aeration and biological floc to treat sewage, (b) Trickling Filters; this involves microorganisms breaking down contaminants as wastewater flows over filtration media, (c) Upflow Anaerobic Sludge Blanket Reactor; it facilitates anaerobic wastewater treatment by allowing the wastewater through a blanket of granular sludge, and (d) Membrane Bioreactors; these combine membrane filtration with biological treatment, resulting in high-quality effluent. Advanced wastewater treatment technologies offer cutting-edge solutions for complex contamination issues. These include: (a) Reverse Osmosis and Nanofiltration; these provide high-level purification, making them suitable for desalination and water treatment, (b) Advanced Oxidation Processes; these use hydroxyl radicals to break down pollutants, (c) Electrocoagulation; this removes contaminants like heavy metals through electrical currents, (d) Zero Liquid Discharge Systems; these ensure complete wastewater purification and recycling, eliminating discharge entirely, and (e) AI and IoT-based Smart Treatment; these technologies enhance real-time monitoring and efficiency in wastewater management.[4]

10. Additionally, the restriction on using 6,937 kanals of acquired land exclusively for the WWTP may also be reconsidered. Given that the project footprint does not require acres of land, WASA may repurpose the remaining land for other climate adaptation initiatives such as afforestation, renewable energy projects (solar or wind farms), or sustainable agriculture to combat soil degradation and improve food security. By diversifying adaptation projects in the same area, WASA not only maximizes land use but also strengthens resilience against climate change. This aligns with the Pakistan's National Adapation Plan (2023-2030) which prioritizes adaptation efforts and identifies several key sectors, e.g., (i) Water Security (ii) Agriculture and Food Security (iii) Disaster Risk Reduction (iv) Health (v) Urban Planning and Infrastructure (vi) Ecosystems and Biodiversity and (vii) Energy.[5] Our institutions must promote national adaptation strategies through indigenous financial tools and home grown solutions that align with sustainability, community well-being, and long-term economic stability.

11. Learned counsel for the respondent land owners, vehemently agitates, that the land was acquired from private landowners with the promise to set up WWTP that has not materialized over three decades. WASA's inaction over these years represents a serious failure in upholding its commitment to both public welfare and private rights. He submits that if there is no success reported in September 2025, the question would be open before this Court as to whether land acquired three decades ago for a public purpose, which has not been

fulfilled, can result in the land being restored to its original owners as per Rule 14 of the Punjab Land Acquisition Rules, 1983.

12. Considering the importance of WWTP and its bearing on fundamental rights of the people, WASA may want to reconsider its financial and technological options while pursuing its negotiations with AFD. Let the PDWP through its Chair, Chairman Planning and Development Punjab, Civil Secretariat Lahore, CDWP through its Chair, Deputy Chairman Planning Commission, Pakistan Secretariat, Constitution Avenue Islamabad and ECNEC, Cabinet Block, Cabinet Secretariat, Red Zone Islamabad conclude the matter latest by end of August 2025. ECNEC is directed to submit its final report to the Court before the next date of hearing. A copy of this Order be dispatched to PDWP, CDWP and ECNEC for information and further action.

13. Let this case now come up in the last week of September 2025 to assess whether the relevant authorities have successfully concluded the matter after exploring all possible financial and technological alternatives.

MH/A-8/SC Order accordingly.

**2025 S C M R 690**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Aqeel Ahmed Abbasi, JJ**

**ZAFAR IQBAL and another ---Petitioners**

**Versus**

**Syed RIAZ HUSSAIN SHAH and others ---Respondents**

C.P.L.A. No. 3854 of 2024, decided on 25th February, 2025.

(Against the judgment of the Lahore High Court, Lahore, dated 14.05.2024, passed in Writ Petition No. 17731 of 2024).

**(a) Punjab Rented Premises Act (VII of 2009)---**

----S. 15---Constitution of Pakistan, Art. 10A---Rent proceedings---Due process and fair trial---Scope---Rent Tribunal adjudicates upon civil rights and obligations in eviction proceedings, and parties thereto are entitled to a fair trial and due process under Article 10A of the Constitution.

Khadim Mohy-Ud-Din v. Rehmat Ali Nagra PLD 1965 SC 459 and Shahid Raza v. Fauzia Shaheen 2003 MLD 1215 rel.

**(b) Punjab Rented Premises Act (VII of 2009)---**

----Ss. 15 & 17---Qanun-e-Shahadat (10 of 1984), Arts. 17 & 79---Ejectment of tenant---Document---Proof---Provisions of Qanun-e-Shahadat, 1984---Applicability---Rent Tribunal dismissed ejectment application for failure of landlord to prove rent deed according to the provisions of Articles 17 and 79 of Qanun-e-Shahadat, 1984---Lower Appellate Court allowed appeal filed by landlord and passed eviction order but High Court maintained the order of Rent Tribunal---Validity---Distinction must be drawn between invoking and applying general principles of law of evidence codified in Qanun-e-Shahadat, 1984 and any special provisions enacted therein---While adjudicating upon civil rights and obligations in eviction proceedings, Rent Tribunal should invoke and apply only those general principles of law of evidence codified in Qanun-e-Shahadat, 1984 that are necessary to give effect to fundamental rights of parties under Article 10A of the Constitution---Rent Tribunal need not apply all principles or any special provisions enacted in Qanun-e-Shahadat, 1984---Such distinction is rooted in summary nature of rent proceedings, which are designed to resolve disputes expeditiously and without procedural formalities of regular civil trials---General principles of evidence, such as burden of proof, relevance of evidence, and right to cross-examine, must nevertheless apply to safeguard Constitutional right to a fair trial---Lower Appellate Court rightly accepted eviction petition filed by landlord---Rent Tribunal legally erred in law by dismissing the petition, and High Court similarly erred in restoring its decision---Supreme Court set aside judgment passed by High Court and upheld that of Lower Appellate Court, whereby respondent/tenant was evicted from the premises---Appeal was allowed.

Khadim Mohy-Ud-Din v. Rehmat Ali Nagra PLD 1965 SC 459 and Shahid Raza v. Fauzia Shaheen 2003 MLD 1215; Shajar Islam v. Muhammad Siddique PLD 2007 SC 45; Ahmad Ali v. Nasar-Ud-Din PLD 2009 SC 453; Jehangir Rustom v. State Bank of Pakistan 1992 SCMR 1296 and F.K. Irani and Co. v. Begum Feroze 1996 SCMR 1178 rel.

**(c) Punjab Rented Premises Act (VII of 2009)---**

----S. 15---Landlord and tenant---Proof---In absence of any evidence to the contrary, owner of a property, by virtue of his title, is presumed to be landlord---Person in possession is presumed to be tenant of that property.

Ch. Muhammad Masood Jahangir, Advocate Supreme Court for Petitioners.

Malik Ijaz Hussain Gorcha, Advocate Supreme Court for Respondent No. 1 (through video link, Lahore Registry).

Respondents Nos. 2 and 3 (Special Judge (Rent) and Additional District Judge) Pro forma Respondents.

Date of hearing: 25th February, 2025.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The present case raises a short but important question of law: Is a disputed tenancy agreement required to be proved in a proceeding before the Rent Tribunal under the Punjab Rented Premises Act 2009, in accordance with the provisions of Articles 17(2)(a)[1] and 79[2] of the Qanun-e-Shahadat, 1984? This question arises from the following facts of the case.

2. The Petitioners, Zafar Iqbal and Abdul Aziz, filed a petition under Section 15 of the Punjab Rented Premises Act, 2009 ("the Act"), seeking the eviction of the Respondent, Syed Riaz Hussain Shah, from a shop - the alleged rented premises. In their eviction petition, the Petitioners asserted that they had rented out the shop to the Respondent through a tenancy agreement dated 21.03.2006 ("the tenancy agreement"). They required the shop for their personal use and, in accordance with the terms of the tenancy agreement, served a one-month notice upon the Respondent to vacate the premises. However, the Respondent refused to comply with the same. On the other hand, in his application for leave to defend, the Respondent contended that he is not a tenant of the Petitioners in the shop and that the tenancy agreement is false and fraudulent. Based on the pleadings of the parties, the Rent Tribunal framed the following issues:

(1) Whether the relationship of landlord and tenant exists between the parties? OPA

(2) Whether the petitioner is entitled qua eviction of the respondent, if the above-mentioned issue affirms in positive? OPA

(3) Whether the petition is not maintainable? OPR

(4) Relief.

After recording the evidence of both parties on the above issues, the Rent Tribunal answered Issue No. 1 in the negative, primarily on the ground that the Petitioners had failed to prove the execution of the tenancy agreement due to their failure to produce both attesting witnesses. Consequently, the Rent Tribunal dismissed the Petitioners' eviction petition. However, the Additional District Judge accepted the Petitioners' appeal, holding that the provisions of the Qanun-e-Shahadat do not apply to proceedings before the Rent Tribunal and, therefore, the mere non-production of both attesting witnesses could not be fatal to the Petitioners' case. Accordingly, he reversed the findings of the Rent Tribunal on Issue No. 1 and allowed the eviction petition. The Respondent then challenged the order of the Additional District Judge before the High Court in its writ jurisdiction. The High Court accepted the challenge and, in doing so, held as follows:

Petitioner [the Respondent before this Court] categorically denied the existence of relationship of landlord and tenant between the parties and also denied the execution of rent agreement. It was the duty of respondents [the Petitioners before this Court] Nos. 3 and 4 to produce both marginal witnesses to prove the rent agreement but they failed to produce the same, as such rent agreement is not proved by Respondents Nos. 3 and 4. As per Article 17 read with Article 79 of the Qanun-e-Shahadat Order, 1984, it is duty of Respondents Nos. 3 and 4/ejectment petitioner[s], to prove the alleged rent agreement by producing both the witnesses but here in this case admittedly both witnesses of the alleged rent agreement were not produced in evidence and even no convincing reasons have been expounded in this regard, which is a blatant non-compliance of the above mentioned mandatory provision of law and same leads to conveniently hold that Respondents Nos. 3 and 4 have failed to prove the valid execution of the alleged rent agreement as per law. The non-production of the required number of witnesses in evidence is blatant non-compliance of the aforesaid mandatory provisions of law which impress fatal impact on the case of Respondents Nos. 3 and 4. Reliance is placed on the cases cited as Hafiz Tassaduq Hussain v. Muhammad Din through legal heirs and others (PLD 2011 SC 241), Farzand Ali and another v. Khuda Bakhsh and others (PLD 2015 SC 187) and Farid Bakhsh v. Jind Wadda and others (2015 SCMR 1044).

Based on the above findings, the High Court allowed the writ petition, set aside the order of the Additional District Judge and restored the decision of the Rent Tribunal. Hence, the Petitioners have filed the present petition for leave to appeal, giving rise to the question of law set out in paragraph 1 above.

3. We have heard and considered the arguments of the learned counsel for the parties and, with their able assistance, have also examined the record of the case.

4. It may be noted at the outset that a Rent Tribunal under the Act, like the Rent Controller under the West Pakistan Urban Rent Restriction Ordinance, 1959, acts in a quasi-judicial capacity and does not function as a

court of law in the strict sense of the term.[3] Similarly, although Article 1(2) of the Qanun-e-Shahadat provides that it applies to all judicial proceedings in or before any Court, including a court-martial, tribunal, or other authority exercising judicial or quasi-judicial powers or jurisdiction, its applicability to proceedings before a Rent Tribunal under the Act is expressly excluded by Section 34 of the Act.[4] Consequently, the provisions of the Qanun-e-Shahadat do not stricto sensu apply to proceedings before a Rent Tribunal under the Act, as the special law (the Act) prevails over the general law (the Qanun-e-Shahadat).[5]

5. We have deliberately used the adverbial phrase stricto sensu in the last sentence of the previous paragraph, for despite the non-applicability of the provisions of the Qanun-e-Shahadat to proceedings under the Act, a Rent Tribunal may, rather should, invoke the general principles of the law of evidence codified in the Qanun-e-Shahadat concerning relevancy, admissibility or weight of evidence when admitting and appraising evidence to decide disputed facts. Since a Rent Tribunal adjudicates upon civil rights and obligations in eviction proceedings, the parties thereto are entitled to a fair trial and due process under Article 10A of the Constitution of the Islamic Republic of Pakistan.

6. A fair trial and due process require that no material that does not constitute evidence should be relied upon. No fact in dispute may be established through material that is not testified by a competent witness. Likewise, where a document is produced in evidence, the fundamental question that arises is whether it is genuine. Therefore, even though the provisions of the Qanun-e-Shahadat may not strictly apply to proceedings under the Act, it will be unfair if a Rent Tribunal could rely on inadmissible material, such as hearsay, or base its decision on copies of documents without producing and satisfactorily proving the originals when they exist.[6] This underscores the necessity for a Rent Tribunal to invoke and apply the general principles of the law of evidence codified in the Qanun-e-Shahadat to ensure fairness and due process in determining the civil rights and obligations of the parties in eviction proceedings.[7]

7. However, applying the general principles of the law of evidence does not mean that a Rent Tribunal must enforce all the provisions of the Qanun-e-Shahadat, as doing so would render Section 34 of the Act redundant and frustrate the legislative objective[8] behind the very enactment of the Act-namely, the expeditious disposal of rent matters.[9] Therefore, a Rent Tribunal cannot be required to adhere strictly to all the principles of the law of evidence codified in the Qanun-e-Shahadat or to any special provisions introduced therein that amend general principles of the law of evidence. A distinction must be drawn between invoking and applying the general principles of the law of evidence codified in the Qanun-e-Shahadat and any special provisions enacted therein. Thus, while adjudicating upon civil rights and obligations in eviction proceedings, a Rent Tribunal should invoke and apply only those general principles of the law of evidence codified in the Qanun-e-Shahadat that are necessary to give effect to the fundamental right of the parties under Article 10A of the Constitution; it need not apply all the principles or any special provisions enacted in the Qanun-e-Shahadat. This distinction is rooted in the summary nature of rent proceedings, which are designed to resolve disputes expeditiously and without the procedural formalities of regular civil trials. The general principles of evidence-such as the burden of proof, relevance of evidence, and the right to cross-examine-must nevertheless apply to safeguard the constitutional right to a fair trial. However, the relaxation of detailed evidentiary rules, such as strict compliance with the formal proof of documents or the exclusion of hearsay evidence, is justified by the need to maintain the efficiency and accessibility of rent proceedings. This approach strikes a balance between upholding due process and preserving the summary character of rent proceedings.

8. From an economic and social perspective, relaxed evidentiary procedure serve critical public policy objectives. They reduce litigation costs, making the process more accessible to individuals who may lack the resources to comply with stringent evidentiary requirements. This, in turn, encourages investment in rental housing by providing landlords with a reliable mechanism to address disputes swiftly. At the same time, these rules protect tenants from unjust eviction and homelessness, thereby maintaining housing stability and social harmony. By addressing the inherent power imbalances between landlords and tenants, relaxed evidentiary rules promote equity and fairness, ensuring that the legal process does not become a tool for oppression or undue advantage. In sum, the relaxation of evidentiary procedure in rent proceedings is not merely a procedural

convenience but a necessary measure to uphold the principles of justice, economic efficiency, and social welfare.

9. In light of the above principles of law, when we examine Articles 17(2)(a) and 79 of the Qanun-e-Shahadat, it becomes evident that they do not embody general principles of the law of evidence but rather enact special provisions therein. A Rent Tribunal was, therefore, in no way bound to invoke and apply these provisions for the purpose of determining the genuineness of the tenancy agreement. Accordingly, we answer the question in the terms that a disputed tenancy agreement is not required to be proved in a proceeding before the Rent Tribunal under the Act, in accordance with the provisions of Articles 17(2)(a) and 79 of the Qanun-e-Shahadat. The reliance of the High Court on three judgments of this Court is misplaced, as they pertain to civil suits, not eviction proceedings.

10. Having thus answered the question of law, we now proceed to examine whether the Petitioners have produced sufficient evidence to establish the genuineness of the tenancy agreement on the standard of preponderance of probability, which ordinarily applies to all civil cases, including rent matters.

11. To establish the genuineness of the tenancy agreement, the Petitioners tendered the original deed (Exh-P4) in evidence. One of the Petitioners, Zafar Iqbal, appeared as AW-1 and deposed regarding the due execution of the agreement. Two other witnesses, Abdul Aziz (AW-2) and Muhammad Sibtain (AW-3), corroborated the Petitioners' stance. Additionally, the Petitioners tendered the certified copy of the revenue record (Exh-A5) to prove their ownership of the shop. Conversely, the Respondent, Syed Riaz Hussain Shah (RW-1), merely made bald assertions denying both the genuineness of the tenancy agreement and the Petitioners' ownership of the shop. He did not file any application before the Rent Tribunal seeking a comparison of his purported signatures on the tenancy agreement with his admitted signatures by an expert to establish forgery, nor did he initiate any proceedings against the stamp vendor who recorded a note on the stamp paper of the tenancy agreement-bearing both his and the Respondent's signatures-stating that the Respondent had obtained the stamp paper for executing the tenancy agreement in favour of the Petitioners. Further, the Respondent's own witness, Muhammad Iqbal (RW-2), expressed in cross-examination his ignorance about the tenancy agreement between the parties. Such evidence of the parties on the crucial issue clearly tilts in favour of the Petitioners' stance and establishes the genuineness of the tenancy agreement on the standard of preponderance of probability.

12. As this Court has held in several cases,[10] in the absence of any evidence to the contrary, the owner of a property, by virtue of his title, is presumed to be the landlord, and the person in possession is presumed to be the tenant of that property. In the present case, this presumption is further strengthened by a written tenancy agreement, the genuineness of which, as stated above, is proven on the standard of preponderance of probability. Therefore, we find that the Rent Tribunal and the High Court legally erred in answering Issue No. 1 in the negative, whereas the Additional District Judge was correct in deciding the same in the affirmative and holding that the relationship of landlord and tenant exists between the parties.

13. As for Issue No. 2, we find that the tenancy agreement does not specify a fixed term. In such a situation, under Section 106 of the Transfer of Property Act 1882, the tenancy is deemed to be from month to month, terminable, on the part of either landlord (lessor) or the tenant (lessee), by fifteen days notice expiring with the end of a month of tenancy. Moreover, the tenancy agreement expressly provides that if the Respondent wishes to close the business in the shop, he may terminate the tenancy with one month's notice. Similarly, if the Petitioners require the shop for their personal use, they may also terminate the tenancy by serving one month's notice.

14. The Petitioners asserted in paragraph 4 of the eviction petition that they required the shop for their personal use and, accordingly, served a one-month notice upon the Respondent to vacate the premises. However, the Respondent refused to comply. In his application for leave to defend the eviction petition, the Respondent did not specifically dispute the Petitioners' assertion regarding the notice. The Petitioner, Zafar Iqbal (AW-1), reaffirmed this fact in his affidavit (Exh-A 1), and this statement remained unchallenged during his cross-examination. Furthermore, the Respondent did not contest the Petitioners' claim that they required the shop for their personal use.

15. As held by this Court in Jehangir Rustom,[11] the statement of a landlord on oath-if consistent with the averments made in the eviction petition and neither shaken in cross-examination nor disproved in rebuttal-is sufficient to establish that the landlord's requirement for personal use is bona fide. The Petitioners are, therefore, entitled to seek the Respondent's eviction from the shop not only under Section 106 of the Transfer of Property Act, 1882, but also pursuant to the express terms of the tenancy agreement, which provides for termination on the ground of personal use with one month's notice.

16. For the above reasons, we find that the Additional District Judge rightly accepted the Petitioners' eviction petition. In contrast, the Rent Tribunal legally erred in law by dismissing the petition, and the High Court similarly erred in restoring its decision through the impugned judgment. Accordingly, we convert this petition into an appeal and allow the same: the impugned judgment of the High Court is set aside, and the decision of the Additional District Judge is upheld.

MH/Z-1/SC Appeal allowed.

**2025 S C M R 708**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Aqeel Ahmed Abbasi, JJ**

**MUHAMMAD NASIR ISMAIL ---Petitioner**

**Versus**

**GOVERNMENT OF PUNJAB through Secretary Law and Parliamentary Affairs Division, Lahore and others ---Respondents**

C.P.L.A. No. 3062 of 2022, decided on 25th February, 2025.

(Against the judgment dated 30.05.2022 passed by the Lahore High Court, Rawalpindi Bench, Rawalpindi in W.P. No. 1806 of 2013).

**(a) Constitution of Pakistan---**

----Art. 10A---Civil service---Disciplinary proceedings---Due process---Affected civil servants must be granted a fair hearing, and disciplinary proceedings must adhere to legal requirements---Due process ensures that no officer is unjustly penalized without being given an opportunity to present their defense---Courts must exercise judicial restraint and avoid undue interference with executive discretion---Judicial review is necessary to prevent abuse of power---Courts must respect autonomy of Executive branch in managing its employees---Judicial intervention should be limited to cases involving clear illegality, arbitrariness, or mala fide intent---Courts must balance individual rights with the larger public interest.

**(b) Punjab Employees Efficiency, Discipline and Accountability Act (XII of 2006)---**

----Ss. 5 & 13(5)(ii), second proviso---Disciplinary proceedings---Major penalty, imposing of---Absence without leave---Principle of proportionality---Applicability---Punishment of compulsory retirement was imposed upon civil servant who remained absent from service for 48 days, without leave---Validity---Authority of competent authority in imposing any of the three major penalties is not restricted under second proviso to section 13(5)(ii) of Punjab Employees Efficiency, Discipline and Accountability Act, 2006, even where period of absence from duty is less than one year---Where competent authority elects to impose a major penalty in cases of absence from duty for less than a year, it must do so in accordance with the principle of proportionality---Civil servant remained absent from duty for a total of 48 days and imposition of major penalty of compulsory retirement failed to meet test of proportionality---Neither the punishment established rational nexus between misconduct and severity of penalty nor it considered less restrictive alternatives---Supreme Court set aside judgment passed by High Court to the extent of the penalty imposed---Supreme Court directed that reinstatement of civil servant would be subject to a fresh determination by competent authority---Supreme Court directed competent authority to revisit case of civil servant and impose a penalty commensurate with the gravity of misconduct---Appeal was allowed.

Sunni Ittehad Council v. Election Commission of Pakistan PLD 2025 SC 67; East and West Steamship v. Pakistan PLD 1958 SC 41; Pramath Nath v. Kamir Mondal PLD 1965 SC 434; Hamdard Dawakhana v. C.I.T PLD 1980 SC 84; Kadir Bux v. Province of Sindh 1982 SCMR 582; K.E.S.C. Progressive Workers' Union v. K.E.S.C Labour Union 1991 SCMR 888; Nawaz Bibi v. Allah Ditta 1998 SCMR 2381; N S Bindra, Interpretation of Statutes Lexis Nexis, 13th Edition, 2022; De Smith's Judicial Review Sweet and Maxwell, 8th Edition, 2018; Sabir Iqbal v. Cantonment Board PLD 2019 SC 189; Muhammad Iqbal Khan Noori v. NAB PLD 2021 SC 916 and Divisional Superintendent, Postal Services v. Nadeem Raza 2023 SCMR 803 rel.

Haseeb Shakoor Paracha, Advocate Supreme Court for Petitioner.

Haroon Irshad, Advocate Supreme Court for Respondents.

Date of hearing: 25th February, 2025.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**Disciplinary proceedings were initiated against Muhammad Nasir Ismail ("petitioner"), employed as an Assistant at the Board of Intermediate and Secondary Education, Rawalpindi ("Respondent No. 3"), under Section 5 of the Punjab Employees Efficiency, Discipline and Accountability Act, 2006 ("PEEDA Act") vide order dated 27.02.2013. The charges framed against the petitioner pertained to wilful absence from duty, inefficiency, and misconduct. Pursuant to a regular inquiry, a recommendation was made

for his removal from service; however, he was instead awarded the major penalty of compulsory retirement by the competent authority vide order dated 29.04.2013. Aggrieved, the petitioner preferred an appeal before the appellate authority[1], which was dismissed vide order dated 19.06.2013 ("impugned order"). Thereafter, the petitioner assailed the impugned order by invoking the constitutional jurisdiction of the Lahore High Court, Lahore, through a writ petition, which was dismissed vide judgment dated 30.05.2022 ("impugned judgment"). Hence, the instant petition for leave to appeal.

2. Learned counsel for the petitioner pressed into service a singular ground, contending that the interpretation of the second proviso to Section 13(5)(ii) of the PEEDA Act was misapplied. He argued that the said provision mandates the imposition of a major penalty-compulsory retirement, removal, or dismissal from service-only when the charge of absence from duty extends beyond one year. He submitted that, in the present case, the petitioner's absence from duty was for a period significantly shorter than one year (48 days in particular); therefore, the imposition of any of the aforementioned major penalties was legally untenable. Conversely, learned counsel for the respondent supported the impugned judgment, asserting that the second proviso to Section 13(5)(ii) of the PEEDA Act does not curtail the discretion of the competent authority to award one of the prescribed major penalties, even in cases where the absence from duty is less than one year.

3. We have heard the learned counsel for the parties at some length and gone through the impugned judgment of the High Court and the record of the case.

4. The civil service is the backbone of any government, ensuring continuity, stability, and efficiency in governance. It plays a crucial role in the implementation of policies, service delivery, and maintaining the institutional framework of the state. Unlike political leadership, which changes periodically, the civil service ensures uninterrupted functioning of government, providing institutional memory and stability. Civil servants are responsible for executing policies and programs formulated by elected representatives, ensuring that governance reaches the grassroots level. They also play a central role in public service delivery, providing essential services such as law enforcement, healthcare, and infrastructure development--all of which are critical to societal well-being. Moreover, the civil service contributes to institutional stability by preserving knowledge and expertise within the government, preventing abrupt policy reversals, and maintaining continuity in governance despite shifts in political leadership. A fundamental characteristic of an effective civil service is impartiality and meritocracy. A professional bureaucracy operates independently of political influence, ensuring that decisions are made based on merit rather than favoritism. This independence fosters efficiency, fairness, and public trust in government institutions.

5. Given these crucial functions, maintaining discipline, integrity, and accountability within the civil service is essential. This is where service laws and penalties play a significant role in upholding professional standards and deterring misconduct. Penalties under service laws serve multiple purposes in ensuring that civil servants adhere to ethical and professional standards. One of their primary functions is maintaining discipline and accountability. Civil servants hold positions of public trust, and disciplinary measures deter misconduct while reinforcing the importance of ethical conduct. Without accountability, the credibility and efficiency of the civil service could be severely compromised. Another key objective of enforcing penalties is to prevent the abuse of power. In the absence of strict disciplinary mechanisms, bureaucrats may misuse their authority, leading to corruption, inefficiency, and injustice. Such misconduct not only erodes public trust in institutions but also disrupts governance and service delivery.

6. Penalties also play a key role in ensuring efficiency and performance. The knowledge that disciplinary action may be taken in cases of negligence or misconduct incentivizes civil servants to fulfill their responsibilities diligently. Additionally, when the public sees that civil servants are held accountable for their actions, it helps in protecting public confidence in government institutions. A transparent and fair disciplinary system assures citizens that government officials are working in their best interest.

7. Courts play a critical role in ensuring that penalties imposed on civil servants are just, proportionate, and lawful. Judicial review of disciplinary actions is essential in preventing arbitrary or excessive punishments while maintaining the integrity of the civil service. A key principle in judicial review is proportionality--the penalty must not be excessively harsh in relation to the offense. Courts frequently set aside penalties that are

disproportionately severe, ensuring fairness in disciplinary actions. Similarly, courts apply the principle of rationality and reasonableness, which requires that disciplinary decisions be based on objective evidence and not be arbitrary or politically motivated. Another essential principle is procedural fairness (due process). Affected civil servants must be granted a fair hearing, and disciplinary proceedings must adhere to legal requirements. Due process ensures that no officer is unjustly penalized without being given an opportunity to present their defense. At the same time, courts must exercise judicial restraint and avoid undue interference with executive discretion. While judicial review is necessary to prevent abuse of power, courts must respect the autonomy of the executive branch in managing its employees. Judicial intervention should be limited to cases involving clear illegality, arbitrariness, or mala fide intent. Finally, courts must balance individual rights with the larger public interest. While it is imperative to protect employees from unfair treatment, judicial decisions should not undermine the broader objectives of maintaining an efficient and disciplined civil service. A well-functioning disciplinary system is essential for governance, and courts must ensure that their rulings do not compromise the effectiveness of administrative oversight. With this background we approach the present case.

8. The petitioner was proceeded against under the PEEDA Act, which aims to regulate the efficiency, discipline, and accountability of employees serving in government and semi-governmental institutions. It provides mechanisms for initiating disciplinary proceedings, conducting inquiries, and imposing penalties on employees for misconduct, inefficiency, or corruption. The relevant provision for our purposes is Section 13 of the PEEDA Act, which is reproduced below for ready reference:

Section $13^{2}$. Order to be passed by the competent authority on receipt of report from the inquiry officer or inquiry committee. -

(1) ...

(2) ...

(3) ...

(4) ...

(5) After affording personal hearing to the accused or on receipt of the report of the hearing officer, the competent authority shall, keeping in view the findings and recommendations of the inquiry officer or inquiry committee, as the case may be, facts of the case and defence offered by the accused during personal hearing, by an order in writing-

(i)

(ii) Impose any one or more of the penalties specified in Section 4:

Provided that-

(i)

(ii) Where charge of absence from duty for a period of more than one year is proved against the accused, the penalty of compulsory retirement or removal or dismissal from service shall be imposed upon the accused. (emphasis supplied)

A plain reading of the aforementioned provisions establishes that the competent authority, under Section 13(5)(ii) of the PEEDA Act, has the discretion to choose from a specturm of penalites and impose any one or more of the penalties enumerated in Section 4. The said provision prescribes both major and minor penalites in the manner, as outlined below:

4. Penalties.- (1) The competent authority may, notwithstanding anything contained in any law or the terms and conditions of service of the accused, by an order in writing, impose one or more of the following penalties, namely:-

a) Minor penalties-

(i) censure;

(ii) withholding of increment or increments, for a specific period, subject to a maximum of five years;

(iii) fine not exceeding basic pay of one month;

(iv) reduction to a lower stage or stages in pay scale, subject to a maximum of five stages; and

(v) withholding of promotion for a specific period, subject to a maximum of five years; provided that this period shall be counted from the date when a person junior to the accused is considered for promotion and is promoted on regular basis for the first time;

(b) Major penalties-

(i) recovery from pay, pension or any other amount payable to the accused, the whole or a part of any pecuniary loss caused to the Government or the organization in which he was employed, and if the amount due from any such person cannot be wholly recovered from the pay, pension or any other amount payable to him, such amount shall be recovered under the law for the time being in force;

(ii) reduction to a lower post and pay scale from the substantive or regular post for a specific period subject to a maximum of five years;

(iii) forfeiture of past service for a specific period subject to a maximum of five years;

(iv) compulsory retirement;

(v) removal from service; and

(vi) dismissal from service; and

(c) ...

(2) ...

(3) ...

(emphasis supplied)

While the competent authority is generally free to impose any one or more of the penalties enumerated in Section 4, the second proviso to Section 13(5)(ii) provides that, where the charge of absence from a duty for a period exceeding one year is proved against the officer, the competent authority shall impose either of the three major penalties: compulsory retirement or removal or dismissal from service. This establishes that unauthorized absence from duty is a serious lapse in civil service, as it disrupts public service delivery, weakens institutional discipline, and undermines government efficiency. Civil servants hold positions of responsibility, and prolonged absence without authorization delays decision-making, burdens administrative resources, and erodes public confidence in governance. Hence the proviso classifies absence of more than one year as a major penalty, often leading to dismissal or compulsory retirement, as it is considered akin to abandonment of service.

9. What is therefore the effect of the "proviso" on the general discretion of the competent authority to impose any one or more of penalties under Section 4, including in cases of absence from duty for less than a year? A "proviso" serves to qualify, restrict, or except a particular case from the generality of the main provision.[3] Ordinarily, a proviso limits the scope of the principal provision.[4] The second proviso to Section 13(5)(ii) restricts discretion of the competent authority when imposing a penalty in cases of prolonged absence (exceeding one year). In such cases, the competent authority must impose one of the three major penalties i.e., compulsory retirement or removal or dismal from service--whichever it deems fit--if the charge stands proved against the officer. The proviso restricts and limits the general discretion of the competent authority under Section 13(5)(ii) only in case where there is a charge of absence from duty for a period of more than one year. The proviso has no application in other cases including cases of absence from duty for a period of less than one year, where the competent authority continues to enjoy its general discretion under Section 13(5)(ii) to impose any one or more of the penalties under Section 4 of PEEDA Act. Nonetheless, the exercise of such discretion must be structured, reasoned, and supported by cogent justification in accordance with the principles of proportionality and administrative fairness.

10. We, therefore, concur with the interpretation rendered by the High Court that the second proviso to Section 13(5)(ii) does not restrict the authority of the competent authority in imposing any of the three major penalties, even where the period of absence from duty is less than one year. However, where the competent authority elects to impose a major penalty in cases of absence from duty for less than a year, it must do so in accordance with the principle of proportionality.

11. The principle of proportionality, in the context of structured discretion, mandates that the exercise of discretionary power must be reasonable, balanced, and commensurate with the objectives sought to be achieved. It serves as a check against arbitrariness and excess, ensuring that disciplinary action remains fair, just, and

legally sustainable. Proportionality is assessed through a structured three-pronged test[5]: First, whether the measure in question is suitable and bears a rational connection to the legitimate objective it seeks to achieve. Second, whether the measure is necessary, meaning no less restrictive or less onerous alternative exists to accomplish the same purpose. Third, whether the measure maintains a fair balance between the public interest and the rights of the individual, ensuring that the burden imposed is neither excessive nor oppressive in relation to the intended benefit.[6] Also see: Sabir Iqbal v. Cantonment Board PLD 2019 SC 189; Muhammad Iqbal Khan Noori v. NAB PLD 2021 SC 916 and Divisional Superintendent, Postal Services v. Nadeem Raza 2023 SCMR 803.

12. Applying the principle of proportionality to the present case, we note that the petitioner remained absent from duty for a total of 48 days. The imposition of a major penalty of compulsory retirement, in our considered view, fails to meet the test of proportionality, as it neither establishes a rational nexus between the misconduct and the severity of the penalty nor considers less restrictive alternatives. Accordingly, we set aside the impugned judgment to the extent of the penalty imposed. However, the petitioner's reinstatement shall be subject to a fresh determination by the competent authority. We, therefore, direct the competent authority i.e., Chairman BISE, Rawalpindi, to revisit the petitioner's case in light of the principles outlined above and impose a penalty commensurate with the gravity of the misconduct. To facilitate the expeditious disposal of this matter, let the petitioner appear before the competent authority at 11 am on 19.03.2025, who, after affording the petitioner an opportunity of hearing, shall decide the matter through a speaking order within a period of 07 days. A compliance report shall be submitted for the information of this Court. Office shall dispatch a copy of this order to the Competent Authority.

13. This petition is converted into appeal and allowed in the above terms.

MH/M-18/SC Case remanded.

**2025 S C M R 1515**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Aqeel Ahmed Abbasi, JJ**

**ASAD HUSSAIN ---Petitioner**

**Versus**

**The CONTROLLER GENERAL OF ACCOUNTS FEDERAL CO-OPERATIVE BUILDING, SECTOR G-5/2, ISLAMABAD and another ---Respondents**

C.P.L.A. No. 2258 of 2023, decided on 19th May, 2025.

(Against the judgment dated 31.03.2002 passed by the Federal Service Tribunal, Islamabad in Appeal No. 1250(P)CS of 2018).

**(a) Khyber Pakhtunkhwa Service Tribunals Act (I of 1974)---**

----S.4---Promotion---Vacant post---Current charge---Administrative neglects---Civil servant was aggrieved of being assigned the post on current charge basis instead of being promoted n the said post being a vacant post---Validity---When the post in question fell vacant, the civil servant was the senior-most eligible officer at that time, who was entitled to be considered for promotion with effect from that date---Delay caused by authorities in convening DPC or in processing petitioner's case due to procedural irregularities such as issues with the author of his PERs could not be used to defeat his rightful claim---Competent authority was under a duty to act with a fine sense of judgment, which it had failed to do---The moment the post became vacant and civil servant met required qualifications, legitimate expectation arose in his favour that he would be considered for promotion in a fair and timely manner---Failure to fulfil such expectation, without lawful justification, amounted to arbitrariness and procedural unfairness---Such delay in promotion of civil servant stemmed not from personal shortcoming but from systemic inefficiencies and administrative neglect---Civil servant must not bear the consequences of internal procedural lapses---Supreme Court directed the authorities to promote the civil servant to post in question with effect from the date on which vacancy in his quota first became available---Supreme Court also directed the authorities that all consequential benefits, including seniority, arrears of pay and service entitlements would follow from backdated promotion---Supreme Court set aside judgment passed by Service Tribunal---Appeal was allowed.

Secretary, Government of Punjab v. Khalid Hussain Hamdani 2013 SCMR 817; Brean v. Amalgamated Engineering Union (1971) 2 QB 175; Messrs Gadoon Textil Mills v. WAPDA 1997 SCMR 641; Province of Sindh v. Ghulam Shabbir 2023 SCMR 686; Government of Khyber Pakhtunkhwa v. Fazli Ghufran 2022 SCMR 1765; Dr. Yasmeen Zafar v. Dr. Shehla Sami 2019 SCMR 993; Khalid Mehmood v. Chief Secretary, Punjab 2013 SCMR 544; WAPDA v. Haji Abdul Aziz 2012 SCMR 965; Muhammad Siddique v. Director, Special Education 1998 SCMR 88; Narender Chadha v. Union of India AIR 1986 SC 638; A. Janardhana v. Union of India AIR 1983 SC 769; B.S Yadav v. State of Haryana AIR 1981 SC 561; Dr. Muhammad Amjad v. Dr. Israr Ahmed 2010 SCMR 1466; WAPDA v. Muhammad Nawaz Khan 1998 SCMR 640; S. Abu Saeed v. Government of N.W.F.P. 1990 SCMR 1623; Government of N.W.F.P. v. Buner Khan 1985 SCMR 1158; Federation of Pakistan v. Jahanzeb 2023 PLC (C.S.) 336; NADRA v. Jawad Khan 2023 SCMR 1381 and Bashir Ahmed Badini v. Hon'ble Chairman and Member of Administration Committee 2022 SCMR 448 rel.

**(b) Civil service---**

----Vacant post, filling of---Principle---Every sanctioned post within a government department or public institution exists to serve a defined functional need and must be filled promptly upon falling vacant---So long as the post continues to exist and has not been formally abolished or frozen pursuant to a lawful policy decision, such as due to budgetary constraints or other demonstrable administrative exigencies, it must be filled within a reasonable time---Unjustified delays in such regard not only disrupt efficient functioning of the institution but also weaken its service delivery capacity---Vacancies, when left unattended, often lead to informal arrangements and ad hoc delegations of authority that foster opacity, enable nepotism and corrode principles of merit and transparency.

Ms. Shireen Imran, Advocate Supreme Court for Petitioner.

Raja Muhammad Shafqat Abbasi, DAG, Riaz Hussain Azam, Advocate-on-Record along with Javed Iqbal, Additional Secretary, Finance and Fiaz Afridi, DAG, CGA Office and Abdullah A.A.O. for Respondents.

Assisted by: Umer A. Ranjha, Judicial Law Clerk, Supreme Court of Pakistan.

Date of hearing: 19th May, 2025.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**The brief facts of the case are that the petitioner was serving as an Assistant Private Secretary (BS-16) in the office of the Accountant General, Khyber Pakhtunkhwa. During his service, he was assigned the current charge of the post of Private Secretary (BS-17). Despite being eligible, the petitioner was not promoted in the Departmental Promotion Committee ("DPC") meetings held on 27.09.2016, 03.08.2017, and 10.04.2018. He was finally promoted in the DPC meeting held on 03.10.2018 via notification dated 04.05.2018. Subsequently, he filed a departmental appeal challenging this notification contending that he ought to have been promoted with effect from 06.08.2015 when the post of Private Secretary (BS-17) initially fell vacant. The said departmental appeal was dismissed vide order dated 10.07.2018. Thereafter, he preferred a service appeal before the Federal Service Tribunal, Islamabad which was dismissed vide judgment dated 31.03.2023 ("impugned judgment"). Hence, the present appeal by leave of this Court.

2. Learned counsel for the petitioner submits that the petitioner fulfilled all the requisite criteria for promotion to BS-17 and was at the top of the seniority list following the promotion of Mr. Muhammad Yousaf. He argues that the petitioner was entitled to promotion with effect from 06.08.2015, and the denial thereof was based on arbitrary justifications and administrative inaction beyond the petitioner's control. Conversely, the learned Deputy Attorney General contends that promotion is not automatic upon the occurrence of a vacancy and must follow the recommendation of the DPC. He asserts that the petitioner's case was deferred due to deficiencies in his Performance Evaluation Reports ("PERs"). After rectification, his case was considered, and he was promoted in accordance with the rules.

3. We have heard the learned counsel for the parties at length and examined the impugned judgment of the Tribunal along with the record of the case.

4. It is an admitted position that the petitioner was the senior-most eligible officer in the relevant cadre and was performing the duties of the higher post in a current charge capacity. The justification for withholding his promotion appears to be based on alleged deficiencies in his PERs for the years 2014 to 2016, which, upon scrutiny, do not support the respondents' position. A review of the PER for the year 2014 reveals no adverse remarks. The 2015 and 2016 reports similarly describe his performance as "Good," and in the sections relating to suitability for promotion, the remarks are clearly favourable. Notably, the pen-picture in 2016 reads:

"The officer carries a lot of potential. He needs to improve his discipline and manners. He has a good command of rules and procedures."

This statement cannot, by any reasonable standard, be treated as adverse or disqualifying for promotion. The comments, if anything, reflect a routine suggestion for personal development, not professional incompetence.

5. Moreover, the record shows that the Accountant General i.e., the relevant authority did not write the PERs himself; instead, they were written by the Additional Accountant General, leading to questions about their procedural validity. These internal inconsistencies in the recording and assessment of the PERs ought not to have been held against the petitioner. It is also relevant that the petitioner's case was deferred multiple times without affording him an opportunity to respond or rectify any alleged shortcomings. This violates the principles of natural justice and procedural fairness, as required under the law governing civil servants and the broader principles of administrative justice.

6. When we examined the entire PER for the year 2016, we found nothing adverse that could lawfully justify withholding the petitioner's promotion. The report, on the whole, indicates a competent officer with a good command over rules and procedures, and no material deficiency that would disqualify him from advancement. The remarks concerning improvement in discipline and manners are suggestive at best and cannot be construed as adverse entries under the law. Most significantly, there appears to be no statutory rule, regulation, or promotion policy that authorized the DPC to withhold promotion of an eligible and senior officer solely on the basis of generalized or non-adverse remarks in PERs. In the absence of a clearly defined policy or objective

criteria to guide such discretion, the DPC's action amounted to an arbitrary exercise of authority. It is a settled principle that where discretion is granted, it must be exercised fairly, reasonably, and in accordance with law.[1] To make exercise of discretionary power valid, it is necessary that apart from being legal it is also reasonable.[2] Discretion unguided by policy opens the door to discrimination, favouritism, and administrative injustice. In such cases, the Court is empowered to step in and correct the arbitrary denial of a lawful right.

7. It is also a well-established principle, both in local and foreign jurisprudence, that a civil servant's promotion must be considered from the date a vacancy in their quota becomes available, provided they are otherwise eligible at that time.[3] The competent authorities must apply their mind judiciously and cannot delay promotion on administrative pretexts once a substantive vacancy arises.[4] In the instant case, the post of Private Secretary (BS-17) fell vacant on 06.08.2015. The petitioner, being the senior-most eligible officer at that time, was entitled to be considered for promotion with effect from that date. The delay caused by the department in convening the DPC or in processing the petitioner's case due to procedural irregularities such as issues with the author of his PERs cannot be used to defeat his rightful claim. The competent authority was under a duty to act with a fine sense of judgment, which it failed to do. The moment the post became vacant and the petitioner met the required qualifications, a legitimate expectation arose in his favour that he would be considered for promotion in a fair and timely manner.[5] The failure to fulfil this expectation, without lawful justification, amounted to arbitrariness and procedural unfairness.

8. The delay in the petitioner's promotion, therefore, stems not from personal shortcoming but from systemic inefficiencies and administrative neglect. It is a firmly entrenched principle that a civil servant must not bear the consequences of internal procedural lapses.[6] Accountability lies with the department, not the employee, for ensuring timely and lawful processing of promotion cases. The arbitrary delay in the petitioner's promotion also raises concerns under Articles 4 and 25 of the Constitution of the Islamic Republic of Pakistan, 1973, which guarantee the right to be treated in accordance with law and equality before the law. Denying the petitioner timely promotion while others with comparable or lesser credentials advanced through the same system reflects unequal treatment. Administrative discretion, if exercised unequally or irrationally, becomes discriminatory in effect.

9. It is a settled principle of public administration that every sanctioned post within a government department or public institution exists to serve a defined functional need and must be filled promptly upon falling vacant. So long as the post continues to exist and has not been formally abolished or frozen pursuant to a lawful policy decision such as due to budgetary constraints or other demonstrable administrative exigencies, it must be filled within a reasonable time. Unjustified delays in this regard not only disrupt the efficient functioning of the institution but also weaken its service delivery capacity. Vacancies, when left unattended, often lead to informal arrangements and ad hoc delegations of authority that foster opacity, enable nepotism, and corrode the principles of merit and transparency.

10. Public institutions must operate at their optimal level, with all sanctioned posts filled in a timely and lawful manner. The performance and credibility of any department is directly correlated with the adequacy of its human resources. Timely recruitment is thus not merely an administrative formality but a requirement grounded in the larger public interest. Public sector institutions are not private domains to be governed by the whims of a few; they are public trusts, created and maintained to serve the people in accordance with constitutional principles, statutory rules, and the highest standards of transparency. Government officers, as trustees of the public good, must discharge their duties in a manner that upholds this trust. The failure to fill vacancies without a cogent and lawful justification constitutes an abdication of this responsibility and undermines both institutional efficiency and public confidence.

11. Accordingly, we hold that the petitioner's promotion to the post of Private Secretary (BS-17) was unjustifiably withheld in 2016 due to reasons entirely attributable to internal administrative mismanagement. The original promotion order issued vide notification dated 04.05.2018 is, therefore, liable to be modified.

12. In this background, the promotion order is modified, and the petitioner is directed to be promoted to the post of Private Secretary (BS-17) with effect from 06.08.2015 the date on which the vacancy in his quota first

became available. All consequential benefits, including seniority, arrears of pay, and service entitlements, shall follow from the backdated promotion. Resultantly, the impugned judgment is set aside.

13. The titled petition is converted into an appeal and allowed in the above terms. The respondents are directed to issue a fresh promotion notification and revise the petitioner's seniority and pay fixation within thirty (30) days from the date of this judgment. A compliance report shall be submitted to the Registrar within the stipulated period.

MH/A-34/SC Appeal allowed.

**2025 S C M R 1076**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Aqeel Ahmed Abbasi, JJ**

**The CHIEF COMMISSIONER REGIONAL TAX OFFICE, BAHAWALPUR and others ---Petitioners**

**Versus**

**SHAHEEN YOUSAF ---Respondent**

C.P.L.A. No. 808 of 2023, decided on 16th April, 2025.

(Against the order dated 21.12.2022 passed by the Lahore High Court, Bahawalpur in W.P. No. 5193/2017).

**Constitution of Pakistan---**

----Art. 25---Employment---Prime Minister's Assistance Package for the Families of Deceased Government Employees---Re-marriage of widow of deceased civil servant---Reinstatement in service---Respondent was appointed as a Lower Division Clerk, under Prime Minister's Assistance Package for the Families of Deceased Government Employees but later on her services were terminated on the ground of her remarriage---High Court reinstated the respondent in service---Validity---Constitution secures fundamental rights for individuals as equal citizens not as appendages of patriarchal roles or marital identities---Women are not defined by the men in their lives; they are autonomous and rights-bearing individuals---Denying a woman right to employment on the basis of her remarriage is a blatant reinforcement of patriarchal control, seeking to subordinate her legal identity to societal expectations---Financial independence is not a concession to women, it is the foundation of their Constitutional agency, dignity, and full participation in public life---Law must dismantle, not perpetuate, the structures that reduce women to secondary citizens in the eyes of society---Impugned office order was discriminatory as it singled out widows, the female spouses of deceased government employees for disqualification from compassionate employment upon remarriage, without imposing a corresponding restriction on widowers, notwithstanding the Prime Minister's Assistance Package which offered compassionate employment to both a widow and a widower---Gender-specific disqualification amounts to direct discrimination based on sex, contravening Articles 25(1) and 25(2) of the Constitution, which guarantee equality before law and prohibit discrimination on the basis of sex---Supreme Court declined to interfere in judgment passed by High Court, whereby respondent was reinstated in service---Petition for leave to appeal was dismissed and leave to appeal was refused.

Zahida Parveen v. Government of Khyber Pakhtunkhwa C.P.L.A No. 566/2024 2025 SCP 107; Government of Khyber Pakhtunkhwa v. Syed Sadiq Shah 2021 SCMR 747; Federation of Pakistan v. Shuja Sharif 2023 SCMR 129; Hadayat Ullah v. Federation of Pakistan 2022 SCMR 1691; Syed Azam Shah v. Federation of Pakistan 2022 SCMR 201; Dr. Mobashir Hassan v. Federation of Pakistan PLD 2010 SC 265; Margaret Owen, 'The Human Rights of Widows in Developing Countries' in Kelly D Askin and Dorean M Koenig (eds) Women and International Human Rights Law (Brill 2023) and Kate Young, 'Widows without rights: challenging marginalization and dispossession' (2016) 14(2) Gender and Development. Paragraph 25 of the judgment provides that "it is clarified that the instant judgment shall not affect the appointments already made of the widow/widower, wife/husband or child of deceased or retired civil servants." Zarai Taraqiati Bank v. Sarfraz Khan Jadoon 2021 SCMR 1305; Pakistan Medical and Dental Council v. Muhammad Fahad Malik 2018 SCMR 1956 and General Post Office, Islamabad and others v. Muhammad Jalal PLD 2024 SC 1276 rel.

General Post Office, Islamabad and others v. Muhammad Jalal PLD 2024 SC 1276 ref.

Hafiz S. A. Rehman, Senior Advocate Supreme Court for Petitioners.

Nemo for Respondent.

Assisted by: Umer A. Ranjha, Judicial Law Clerk.

Date of hearing: 16th April, 2025.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**Respondent's husband, an employee of the Income Tax Department, passed away while in service on 14.02.2006. Under the Prime Minister's Assistance Package for the Families of Deceased Government Employees[1] ("Prime Minister's Assistance Package") respondent was appointed as a Lower Division Clerk ("LDC") on a two-year contract on 26.05.2010. The said contract was extended on

multiple occasions, however, vide order dated 04.01.2016 issued by the Secretary (MGT) IR-V, Federal Board of Revenue, (HRM), Islamabad, her services were terminated. Notably, this action was based on an Office Memorandum ("O.M.") dated 15.12.2015[2], which stipulated that upon remarriage, a widow becomes ineligible for any compassionate employment granted under the Prime Minister's Assistance Package and the same shall stand terminated from the date of such remarriage. The respondent filed a writ petition challenging the said order before the Lahore High Court. The petition was disposed of with a direction to the Member (Admin), Federal Board of Revenue to treat the same as a representation and to redress her grievance through a speaking order. In compliance, the Second Secretary, Board of Revenue, considered the matter and rejected her representation vide order dated 11.05.2017. The respondent filed a second writ petition before the Lahore High Court, challenging the above departmental orders, which was allowed vide judgment dated 21.12.2022 ("impugned judgment"), and the respondent was reinstated in service. Hence, the instant petition seeking leave to appeal against the impugned judgment.

2. We have heard the learned counsel for the petitioner at length and examined the impugned judgment of the High Court and the record of the case.

3. At the outset, it is pointed out for record that the O.M. dated 15.12.2015, which formed the basis of the respondent's termination from service has since been withdrawn vide O.M. dated 07.11.2024.[3] While the withdrawal of the earlier O.M. is a welcome corrective step, it has no bearing on the present case, which was decided when the O.M. was in existence. Hence, this Court finds it necessary to examine the broader constitutional and legal implications of the said O.M., particularly, in the context of the rights and entitlements of widows under public welfare frameworks.

4. The question before us is whether the right to compassionate employment extended to a widow (respondent) under the Prime Minister's Assistance Package can be withdrawn on the pretext that she has subsequently remarried?

5. This Court addressed a comparable issue in Zahida Parveen[4], where it struck down an executive clarification that excluded daughters, whether already married or married subsequent to the grant of the compasssionate employment as unconstitutional. We reaffirm that the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution"), secures fundamental rights for individuals as equal citizens, not as appendages of patriarchal roles or marital identities. Women are not defined by the men in their lives; they are autonomous and rights-bearing individuals. Denying a woman the right to employment on the basis of her remarriage is a blatant reinforcement of patriarchal control, seeking to subordinate her legal identity to societal expectations. Financial independence is not a concession to women, it is the foundation of their constitutional agency, dignity, and full participation in public life. The law must dismantle, not perpetuate, the structures that reduce women to secondary citizens in the eyes of society.

6. Turning to the O.M. dated 15.12.2015, it is manifestly discriminatory as it singles out widows, the female spouses of deceased government employees for disqualification from compassionate employment upon remarriage, without imposing a corresponding restriction on widowers, notwithstanding the Prime Minister's Assistance Package which offers compassionate employment to both a widow and a widower.[5] This gender-specific disqualification amounts to direct discrimination based on sex, contravening Articles 25(1) and 25(2) of the Constitution, which guarantee equality before the law and prohibit discrimination on the basis of sex.[6] The O.M.'s discriminatory nature is further underscored by its inapplicability to widowers in identical circumstances, rendering it inherently unequal, arbitrary, and devoid of constitutional justification. It therefore fails the test of reasonable classification and cannot be sustained in law.[7] It also offends the guarantees of non-discrimination in public service (Article 27)[8]. By conditioning continued employment on a widow's remarriage status, the O.M. reinforces outdated patriarchal assumptions, treating widows as passive dependents entitled to benefits only while they remain unmarried. This violates the fundamental rights to livelihood and dignity under Article 14 of the Constitution.[9] It penalizes a woman for choosing to remarry, a constitutionally protected liberty by extinguishing her employment rights.

7. The rights of widows should not be viewed as acts of state generosity, but as legal entitlements rooted in constitutional guarantees, statutory protections, and developing judicial principles. Furthermore, international

human rights instruments[10] to which Pakistan is a party, including the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") impose obligations on the State to dismantle legal and social barriers to women's full economic participation.[11] Any policy that makes public employment contingent upon a woman's marital status not only entrenches dependency but effectively penalizes her for exercising a fundamental liberty. Widows, like all citizens, are entitled to employment, dignity, equality, and autonomy without discrimination or reprisal.[12] The law must serve as a shield against exclusion, not a tool for reinforcing outdated social hierarchies.

8. It is also critical to consider the social context in which such executive decisions operate. Widowhood, in its simplest sense, refers to the status of a woman whose spouse has died.[13] However, in many societies, including ours, it carries a layered social identity often accompanied by stigma, isolation, and a diminished sense of social worth.[14] Widows are too often viewed through the prism of loss and dependence, rather than as individuals with agency and resilience. This perception restricts their choices, particularly when it comes to remarriage or economic independence. The law must reject these harmful cultural narratives and affirm that widowhood is not a diminution of identity but a life circumstance deserving of dignity, protection, and equal opportunity. It is incumbent upon courts to ensure that public policy reflects this understanding and shields widows from both overt and covert forms of systemic discrimination.

9. For completeness of record, it is clarified that the judgment of this Court reported as General Post Office, Islamabad and others v. Muhammad Jalal (PLD 2024 SC 1276) has struck down the Prime Minister's Assistance Package as unconstitutional but has no application on appointments that have been already made.[15] It is well settled that the judgments of this Court operate prospectively, unless declared otherwise.[16] Therefore, the present case remains unaffected by the said judgment.

10. In this view of the matter, we see no reason to interfere in the impugned judgment. This petition is, therefore, dismissed. Leave is refused.

MH/C-9/SC Petition dismissed.

**2025 S C M R 1221**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah, ACJ and Shahid Bilal Hassan, J**

**AATIKA HINA MUSHTAQ ---Petitioner**

**Versus**

**SECRETARY SPECIAL EDUCATION GOVERNMENT OF THE PUNJAB, SPECIAL EDUCATION DEPARTMENT LAHORE and others ---Respondents**

C.P.L.A. No. 3116 of 2022, decided on 21st April, 2025.

(Against the order dated 10.01.2022 passed by the Punjab Service Tribunal, Lahore in Appeal No. 5689 of 2019).

**(a) Constitution of Pakistan---**

----Art. 9---Right to life---Civil service---Promotion---Fair, transparent and merit-based consideration for promotion forms an essential facet of the right to livelihood, and thus, of right to life itself---Where civil servant meets prescribed qualifications and conditions for promotion, lawful and transparent consideration of their case creates a legitimate expectation that such progression has to materialize unless cogent reasons to the contrary exist---Denial or indefinite deferral of such consideration, particularly when based on arbitrary, opaque, or shifting grounds violates such expectation and reduces Constitutional guarantees to mere rhetoric.

Federal Service Public Commission v. Shiraz Manzoor 2023 SCMR 2087; Federation of Pakistan v. Misri Ladhani 2023 SCMR 915; Fazali Rehmani v. Chief Minister, N.W.F.P PLD 2008 SC 769; M.A. Rafique v. Managing Director (Power), WAPDA 1990 SCMR 927; Union of India v. Sangram Keshari Nayak (2007) 6 SCC 704; Islamabad Wildlife Management Board v. Metropolitan Corporation PLD 2021 Islamabad 6; Shehla Zia v. WAPDA PLD 1994 SC 693; Divisional Superintendent v. Umar Daraz 2023 SCMR 761; Province of Punjab v. Kanwal Rashid 2021 SCMR 730; Pir Imran Sajid v. Managing Director 2015 SCMR 1257; Abdul Wahab v. HBL 2013 SCMR 1383; Olga Tellis v. Bombay Municipal Corporation AIR 1986 SC 180; Novita Wahyu Setyawati, Dewi Sri Woelandri PG and Muhammad Richo Rianto, 'Career Development, Motivation and Promotion on Employee Performance' (2022) 1 East Asian Journal of Multidisciplinary Research 1957; Federation of Pakistan v. Jahanzeb 2022 SCMR 2020; Contempt Proceedings Against Chief Secretary, Sindh 2013 SCMR 1752; Mrs. Farkhanda Talat v. Federation of Pakistan 2007 SCMR 886 and Muhammad Nasir Ismail v. Government of Punjab 2005 SCMR 708 rel.

**(b) Civil service---**

----Effective role---Principles---Fundamental characteristic of an effective civil service is impartiality and meritocracy---In order to perform such role effectively, civil service must remain free from political interference---Independence, integrity and intellectual honesty of civil service are essential to sustaining rule of law and the Constitution---Allegiance of civil service lies with the Constitution and the law, not with shifting political winds.

**(c) Punjab Service Tribunals Act (IX of 1974)---**

----S. 4---Punjab Special Education Department (Directorate of Special Education) Service Rules, 2006 [since repealed]---Departmental promotion---Civil bureaucracy---Political influence---Withholding of promotion till amending of service rules---Legality---Civil servant was aggrieved of deferring her promotion till the amendment of Punjab Special Education Department (Directorate of Special Education) Service Rules, 2006---Validity---Arbitrary obstruction, unwarranted delay, capricious interference, unjustified hindrance, manipulation or undue delay in career progression of a civil servant erodes independence and morale of civil bureaucracy, transforming it into an instrument of political patronage, a phenomenon that is antithetical to the ethos of Constitutional democracy and democratic governance---Such interference fosters networks of favoritism and erodes impartiality and credibility of civil service---It is therefore imperative that service laws must be transparent, predictable, and uniformly applied, to ensure equal treatment---Purity of service can be obtained only if promotions are made on merit without favouritism or nepotism---Decision of Departmental Promotion Committee of withholding promotion till such time that Punjab Special Education Department (Directorate of Special Education) Service Rules, 2006 were suitably amended was not sustainable---Supreme

Court directed Departmental Promotion Committee to consider the case of civil servant for promotion to the post of Lecturer Physical Education on merits and decide the same within one month from the receipt of this judgment---Appeal was allowed

Secretary, Ministry of Finance v. Muhammad Anwar 2025 SCMR 153; Naseem Khan v. Government of Khyber Pakhtunkhwa 2024 SCMR 1341; Federal Service Public Commission v. Shiraz Manzoor 2023 SCMR 2087; Muhammad Amjad v. D.G. Quetta Development Authority 2022 SCMR 797; Abdul Hameed v. Ministry of Housing and Works PLD 2008 SC 395; Zafar Iqbal v. Director, Secondary Education 2006 SCMR 1427; Muhammad Ishaque v. Government of Punjab 2005 SCMR 980 and Tariq Aziz-ud-Din's case 2010 SCMR 1301 rel.

Mahmood Ahmad Qazi Advocate Supreme Court for Petitioner.

Khalid Masood Ghani, Additional Advocate General, Punjab along with Abu Bakar, L.O. Special Education Department Punjab for Respondents.

Date of hearing: 21st April, 2025.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, ACJ.---**Briefly, the petitioner while working as a Physical Education Teacher ("PET") (BS-09) in the Punjab Special Education Department ("Department") was considered for promotion for the post of Lecturer Physical Education (BS-17) under the Special Education Department (Directorate of Special Education) Service Rules, 2006[1] ("Rules"). Her case was recommended for promotion through a working paper submitted by the Department. However, on 07.03.2019, the Departmental Promotion Committee ("DPC") deferred the promotion of the petitioner on the pretext that the Rules required amendment, and promotions would be considered thereafter. The petitioner's representation against the decision of the DPC was rejected on 19.08.2019, while her departmental appeal was dismissed on 29.11.2019. Consequently, the petitioner challenged both these orders by filing a service appeal before the Punjab Service Tribunal, Lahore ("Tribunal"), which too was dismissed vide order dated 10.01.2022 ("impugned order"). Hence, the instant petition for leave to appeal.

2. We have heard the learned counsel for the parties, examined the impugned order, relevant laws and the record of the case.

3. As per the Rules, the promotion to the post of Lecturer Physical Education (BS-17) has the following requirement:

| Name of the post | Appointing Authority | Minimum Qualification for appointment for | | Method of Recruitment |
|---|---|---|---|---|
| | | By Initial Recruitment | Promotion | |
| 3 | 4 | 5 | 6 | 7 |
| 143. Lecturer Physical Education/Lecturer (DPE)/Instructor Physical Education (BS-17) | Admn Secretary | M.A. (Physical Education) in 1st Division or Grade B from any recognized university. Preference will be given to those having additional qualification | | (i) 50% by initial recruitment. (ii) 25% by promotion on seniority cum fitness basis from amongst the D.P.E. (BS-16). (iii) 25% by promotion from amongst PTI / PET / DPE having qualification prescribed for initial recruitment. Note:- Seniority of PTI / PET / DPE will be |

| | | | | |
|---|---|---|---|---|
| | | relating to Special Education | | maintained from the date of acquiring requisite qualification or from the date of joining in case of a person who hold the requisite qualification prior to appointment as such. If none is available for promotion then by initial recruitment. |

The working paper put up by the Department recommended the promotion of the petitioner in the following terms:

"She has more than 14 year's service to her credit. Her service record is satisfactory. No inquiry is pending against her and no penalty was ever awarded to her. Her character roll and synopsis are complete in all aspects. She is M.A. Physical Education in 1st Division so, she fulfills required criteria for promotion She is recommended for promotion as Physical Education /Lecturer (DPE)/Instructor Physical Education (BPS-17) on regular basis."

However, the DPC considered the case of the petitioner and deferred her promotion after recording the following in its Minutes dated 07.03.2019:

During the course of discussion, Deputy Secretary (Regulations), S&GAD pointed out that each post is to be filled as per provisions of the service rules and there were the following discrepancies in the Service Rules:

| Sr. | Services Rules for the post of | Deficiency |
|---|---|---|
| 3. | Lecturer Physical Education /Lecturer (DPE)/Instructor Physical Education (BS-17) | It was pointed out that 25% of the posts were to be filled by promotion from amongst PTI/PET/DPE having qualification prescribed for initial recruitment which was M.A Physical Education (1st Div), hence the persons having 2nd Div were not eligible. Moreover, The Note given at the end of the service rules provide that seniority of PTI / PET / DPE will be maintained from the date of acquiring requisite qualification or from the date of joining in case of person who holds the requisite qualification prior to appointment and in presence of this note all PTI / PET / DPE will be excluded from the seniority list who have not gained such qualification and no one could be excluded from the seniority once he or she stood appointed. |

7. Keeping in view the above observations, raised by the Deputy Secretary/ Representative of Regulations Wing, S&GAD, the Departmental Promotion Committee unanimously decided that the service rules of above-mentioned posts may be amended in first instance and meeting of the Departmental Promotion Committee for consideration of the above-mentioned agenda items may be held thereafter."

(emphasis supplied)

The above decision was challenged by the petitioner, however, the Department as well as the Tribunal maintained the view of the Department.

4. We have examined the Note appended to the Rules (reproduced above), which clearly stipulates that the seniority of PTIs, PETs, and DPEs is to be determined either from the date they acquire the requisite qualification, namely, an M.A. in Physical Education or, where the qualification was already held at the time of the appointment, from the date of joining service. Notably, the only requirement for promotion under the 25% quota from among PETs and others to the post of Lecturer Physical Education is possession of an M.A. in Physical Qualification (1st Division), as provided in the Rules. In this case, the petitioner had already acquired the requisite qualification at the time of the DPC meeting on 07.03.2019; thus, the exclusion under the Note (Rules) did not apply to her. There has also been no dispute between the parties regarding the accuracy of the revised seniority list. However, in the petitioner's case, the DPC, under serial No. 3 and paragraph No. 7 of its Minutes dated 07.03.2019 (reproduced above), recorded that seniority cannot be revised once an individual has been appointed to a post. This reasoning is misconceived and untenable. The DPC does not possess the mandate or the authority to question the Rules or refuse their enforcement. The Rules, including the Note, provide a clear mechanism for determining seniority from the date of acquiring the requisite qualification which had to be given effect by the DPC. The decision of the DPC that the Rules governing the posts of PTI, PET, and DPE needed to be amended first before considering promotions, leading to the deferment of the petitioner's case, is without any lawful authority. Parties aggrieved of the Note/Rules can challenge the Rules, if they are so advised, but the DPC cannot sit in judgment over the legality and enforceability of the Rules, which are duly framed under the law. The DPC is to examine the candidature of the officers under the law and process their cases for promotion, it lacks the authority to question the legality of the law or the Rules, which it is bound to enforce. Therefore, any proposed future amendments of the Rules proposed by a Deputy Secretary/ Representative of Regulations Wing, S&GAD, cannot bind the DPC to lay their hands off and defer promotions on this pretext. The DPC is bound to follow the law as it exists. It is axiomatic that the promotion of a civil servant cannot be withheld merely because amendments to the Rules are being contemplated.

5. Members of the DPC in this case ought to be reminded that while a civil servant does not have a vested right to promotion[2], he or she certainly has an enforceable right to be considered for promotion in accordance with law[3]. This right also finds its ideological roots in the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution"). Article 9 of the Constitution guarantees the right to life, which, through consistent judicial interpretation, has evolved beyond mere animal existence[4] to encompass the right to live with dignity and purpose.[5] Integral to this dignified existence is the right to livelihood[6], a concept that extends mere employment to include the genuine opportunity for growth, progress, and advancement in one's career in accordance with law. The right to a dignified livelihood transcends the mere possession of a job; it includes the essential opportunity for professional advancement and rise in one's career on basis of merit, experience, and adherence to established criteria.[7] A livelihood stripped of progression, stagnated by arbitrary or opaque service practices, renders the constitutional guarantee hollow and illusory. It is thus axiomatic that fair, transparent, and merit-based consideration for promotion forms an essential facet of the right to livelihood, and thus, of the right to life itself. Further, where a civil servant meets the prescribed qualifications and conditions for promotion, the lawful and transparent consideration of their case creates a legitimate expectation that such progression will materialize, unless cogent reasons to the contrary exist.[8] Denial or indefinite deferral of such consideration, particularly when based on arbitrary, opaque, or shifting grounds violates this expectation and reduces constitutional guarantees to mere rhetoric.

6. It is not out of place to reietrate and underscore that the civil bureaucracy is meant to be the steel frame of the State, not the rubber stamp of the political party in power. The civil bureaucracy serves as the backbone of the State, entrusted with ensuring continuity, stability, and efficiency in governance.[9] Unlike political leadership, which changes with electoral cycles, the civil service provides the institutional memory and administrative steadiness required for uninterrupted government functioning. It plays a vital role in implementing policies, delivering services, and upholding the institutional framework of the State. A fundamental characteristic of an effective civil service is impartiality and meritocracy.[10] In order to perform

this role effectively, the civil service must remain free from political interference. It's independence, integrity, and intellectual honesty are essential to sustaining the rule of law and the constitution. Its allegiance lies with the Constitution and the law, not with shifting political winds. According to Professor Lorne Sossin, civil servants are the guardians of public trust and their duty of loyalty to the public interest must in some circumstances be a higher obligation than the duty of loyalty owed to the government of the day.[11] They should not be penalized for opposing government policies, especially in cases of illegal acts or threats to public safety.

7. Max Weber's classic theory[12] of bureaucracy reminds us that only a professional, merit-based, and politically neutral[13] civil service can sustain the rational-legal authority of a modern constitutional State. E.N. Gladden consistently stresses that the civil servant's loyalty is to the state and its institutions, not to transient political leaders or parties.[14] In the end we draw strength from the words of our founding father, Quaid-e-Azam Muhammad Ali Jinnah, who said: "Civil officers should have no hand in supporting this political party or that political party, this political leader or that political leader-this is not [their] business. Whichever government is formed according to the constitution, and whoever happens to be the Prime Minister or Minister coming into power in the ordinary constitutional course, [their] duty is not only to serve that government loyally and faithfully, but at the same time, fearlessly, maintaining [their] high reputation."[15]

8. We underline that arbitrary obstruction, unwarranted delay, capricious interference, unjustified hindrance, manipulation or undue delay in the career progression of a civil servant erode the independence and morale of the civil bureaucracy, transforming it into an instrument of political patronage, a phenomenon that is antithetical to the ethos of constitutional democracy and democratic governance. Such interference fosters networks of favoritism and erodes the impartiality and credibility of the civil service. It is therefore imperative that service laws must, therefore, be transparent, predictable, and uniformly applied, to ensure equal treatment. Purity of service can be obtained only if promotions are made on merit without favouritism or nepotism.[16]

9. For the above reasons we are of the view that decision of the DPC of withholding the promotion till such time that the Rules are suitably amended is not sustainable. We therefore direct the DPC to consider the case of the petitioner for promotion to the post of Lecturer Physical Education on merits and decide the same within one month from the receipt of this judgment.

10. In this background of the matter, we set aside the impugned order. Resultantly, this petition is converted into an appeal and allowed in the above terms.

MH/A-25/SC Appeal allowed.

**2025 S C M R 1357**

**[Supreme Court of Pakistan]**

**Present: Syed Mansoor Ali Shah and Ayesha A. Malik, JJ**

**RAB NAWAZ ---Petitioner**

**Versus**

**SHEHZAD HASSAN and others ---Respondents**

Crl. P. No. 253-L of 2025, decided on 26th March, 2025.

(Against the order of Lahore High Court, Lahore dated 18.02.2025 passed in Crl. Misc.No. 5460-B of 2025).

**Criminal Procedure Code (V of 1898)---**

----S. 497(5)---Penal Code (XLV of 1860), Ss. 302, 427, 109 & 34---Constitution of Pakistan, Art. 185 (3)---Qatl-i-amd, mischief, abetment, common intention---Application for cancellation of bail, dismissal of---Petitioner/complainant was aggrieved of grant of post-arrest bail to respondent/accused by High Court---Held: Accused was charged for committing murder of the brother of complainant---Bail, though a concession granted to ensure the liberty of an accused pending trial, is not an unqualified right and can be withdrawn, if misused---Bail may be cancelled if the accused, after securing release, engaged in conduct that undermined the administration of justice---Such grounds included attempt to influence or intimidate witnesses, tampering with evidence, committing another offence while on bail, or violating conditions imposed by the Court---Furthermore, if the accused fails to appear before the Court without just cause, or if new facts come to light that materially altered the basis on which bail was granted, the Court may justifiably revoke the concession---However, the liberty of an individual must be balanced against the need to ensure a fair trial and uphold public confidence in the justice system---Other than the above, the principles evolved for examining a bail granting order for the purpose of cancellation, the Court usually interferes on two grounds: (i) when the impugned order is perverse on the face of it, or (ii) when the impugned order has been made in clear disregard of some principles of the law of bail---Perverse order is one that has been passed against the weight of the material on the record or by ignoring such material or without giving reasons; such order is also termed as arbitrary, whimsical and capricious---Courts are not to indulge in the exercise of a deeper appreciation of material available on record at the bail stage and are only to determine tentatively, by looking at such material, whether or not there exist any "reasonable grounds" for believing that the accused person is guilty of the alleged offence---None of the said grounds for cancellation of bail were attracted in the present case---Accordingly, leave to appeal was declined and the petition was dismissed, in circumstances.

Zaro v. State 1974 SCMR 11; Sidra Abbas v. State 2020 SCMR 2089; Farid v. Ghulam Hussan 1968 SCMR 924 and Khalid Saigol v. State PLD 1962 SC 495 rel.

Aqib Javed Malik, Advocate High Court for Petitioner (With permission of the Court).

Rana Abdul Majid, Additional Prosecutor General, Punjab for the State.

Respondents-in-person.

Date of hearing: 26th March, 2025.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**The petitioner seeks leave to appeal against the order dated 18.02.2025 whereby post-arrest bail was granted to respondent No.1 in case FIR No. 203/2023 dated 22.02.2023 registered at Police Station Bhalwal City, District Sargodha in respect of offences under Sections 302/427/109/34-P.P.C. The petitioner seeks cancellation of the same through the instant petition.

2. Briefly stated, the contents of the crime report reveal that the petitioner is alleged to have, on 22.02.2023 at approximately 11:00 a.m., acted in concert with a co-accused, both armed with weapons, and fired five shots, resulting in the murder of Asad Ahmad, the brother of the complainant.

3. The precise facts that formed the basis for grant of post-arrest bail to Respondent No. 1 are that the test identification parade was held on 25.09.2023 after a period of seven months of occurrence, therefore, the value of such a test identification parade can best be determined during trial and the recovery of Kalashnikov is at best a corroborative piece of evidence which cannot be singularly used to decline bail.

4. We have heard the learned counsel for the parties and gone through the record with their able assistance. The scope of the interference to be made by this Court in its appellate jurisdiction, in matters of cancellation of bail are well settled and hardly need reiteration. Bail, though a concession granted to ensure the liberty of an accused pending trial, is not an unqualified right and can be withdrawn, if misused. The law recognizes that bail may be cancelled if the accused, after securing release, engages in conduct that undermines the administration of justice. Such grounds include attempts to influence or intimidate witnesses, tampering with evidence, committing another offence while on bail, or violating conditions imposed by the court. Furthermore, if the accused fails to appear before the court without just cause, or if new facts come to light that materially alter the basis on which bail was granted, the court may justifiably revoke the concession. The guiding principle remains that the liberty of an individual must be balanced against the need to ensure a fair trial and uphold public confidence in the justice system.

5. Other than the above, the principles evolved for examining a bail granting order for the purpose of cancellation, the court usually interferes on two grounds: (i) when the impugned order is perverse on the face of it, or (ii) when the impugned order has been made in clear disregard of some principle of the law of bail.[1] A perverse order is the one that has been passed against the weight of the material on the record or by ignoring such material or without giving reasons;[2] such order is also termed as arbitrary, whimsical and capricious. While it is one of the elementary principles of the law of bail that courts are not to indulge in the exercise of a deeper appreciation of material available on record at the bail stage and are only to determine tentatively, by looking at such material, whether or not there exist any reasonable grounds for believing that the accused person is guilty of the alleged offence.[3] None of these grounds for cancellation of bail are attracted in the present case. Consequently, we are not inclined to interfere in the impugned order of the High Court. Accordingly, leave to appeal is declined and this petition is dismissed.

MH/R-2/SC Petition dismissed.

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[1] *Zaro v. State 1974 SCMR 11.*

[2] *Sidra Abbas v. State 2020 SCMR 2089.*

[3] *Farid v. Ghulam Hussan 1968 SCMR 924 and Khalid Saigol v. State PLD 1962 SC 495.*

**P L D 2025 Supreme Court 1**

**Present: Syed Mansoor Ali Shah, Ayesha A. Malik and Aqeel Ahmed Abbasi, JJ**

**Messrs MUGHALS PAKISTAN (PVT.) LIMITED---Appellant**

**versus**

**EMPLOYEES OLD AGE BENEFITS INSTITUTION through Director Law, Lahore and others---Respondents**

Civil Appeals Nos. 256 and 257 of 2024 and C.M.As. Nos. 3039 and 3042 of 2024, decided on 6th November, 2024.

(On appeal against the judgment dated 06.01.2024 passed by the Lahore High Court, Lahore in R.F.As. Nos. 43092 and 37623 of 2022).

(a) Alternate Dispute Resolution Act (XX of 2017)---

----S. 2(i)---Punjab Alternate Dispute Resolution Act (XVII of 2019), S. 2(b)---Balochistan Alternate Dispute Resolution Act (XXXI of 2022), S. 2(i)---Khyber Pakhtunkhwa Alternate Dispute Resolution Act (XLVIII of 2020), S. 2(a)---Civil Procedure Code (V of 1908) [as amended by the Code of Civil Procedure (Sindh Amendment) Act, 2018], S. 89-A(1)---Alternative Dispute Resolution ("ADR")---Mediation---Mediation is not merely an alternative to litigation but a complementary and necessary component of the justice system---Significance of mediation stated.

Mediation is evolving as a powerful mechanism for conflict resolution, bridging divides with creativity and fostering harmonious solutions. It is a testament to the potential of dialogue over confrontation. Mediation (and other mechanisms of Alternative Dispute Resolution (ADR)) can be philosophically framed as essential tools to ensure access to justice in a country where millions of cases are pending. This approach aligns with a broader understanding of justice as being not only about achieving outcomes but also about the process itself being fair, efficient, and accessible. Traditional court system is adversarial and often resource-intensive, leading to delays and alienation of marginalized groups. Mediation embodies a collaborative model of justice that prioritizes dialogue and empowerment, ensuring parties are active participants in resolving their disputes. The sheer volume of pending cases often renders justice delayed, and as the saying goes, "Justice delayed is justice denied." Mediation offers a timely and context-sensitive resolution that addresses the substance of disputes without being bogged down by procedural complexities. Philosophically, mediation reflects the relational nature of human beings. It prioritizes restoring relationships, preserving dignity, and finding mutually beneficial solutions over the zero-sum outcomes of litigation. Mediation accommodates the cultural, social, and economic diversity of disputing parties. It aligns with justice as capability enhancing, allowing parties to exercise their agency and reach solutions that reflect their lived realities. Mediation bridges modern legal systems with indigenous practices, thereby strengthening communal harmony while maintaining legal validity.

Mediation must be increasingly seen as a right of the parties within the litigation process. Access to justice includes the right to have disputes resolved in a timely and efficient manner. Mediation, as a faster and cost-effective alternative, satisfies this fundamental aspect of justice. Mediation respects the autonomy of the parties by giving them control over the process and outcome, unlike litigation, where outcomes are imposed by judges. Litigants have the right to avoid the adversarial consequences of litigation, such as financial strain, emotional distress, and reputational harm. Mediation provides a non-confrontational environment that mitigates these risks. Procedural justice emphasizes the fairness of the process, and mediation upholds this by ensuring participation, neutrality, and respect - core elements of a fair process. In contexts where economic inequalities limit access to legal representation, mediation ensures that the justice system remains accessible to the underprivileged. Many societies have strong traditions of community-led dispute resolution. Mediation builds on these traditions, ensuring justice remains culturally relevant. Mediation is at the heart of access to justice. Courts must embrace it as an essential tool for efficient and humane dispute resolution. In conclusion, mediation is not merely an alternative to litigation but a complementary and necessary component of the justice system.

Chief Justice Sundaresh Menon's speech titled "International Mediation and the Role of Courts" at the Supreme Court of Indonesia, November 2023 ref.

The reasons which make mediation a compelling choice for an appropriate avenue to resolve disputes efficiently and effectively, inter alia, include: (i) Cost-effectiveness; mediation incurs lower legal fees and expenses due to shorter and less formal processes; (ii) Time efficiency; resolutions can often be reached much faster through mediation than through court proceedings, which can take years to conclude, (iii) Flexibility; the procedures in mediation are flexible, allowing parties to tailor the specific processes to their specific needs, including choosing their mediator and deciding the rules for the proceedings, (iv) Confidentiality; unlike trials in courts which are generally public, mediation processes are private. This confidentiality can be crucial for preserving personal relationships, protecting trade secrets or avoiding negative publicity, (v) Preservation of relationships; mediation encourages cooperation and communication, which can help maintain or even improve relationships between parties, a key consideration in business context or family disputes, (vi) Control over the outcome; parties have more control over the resolution as they are directly involved in negotiating the settlement, (vii) Expertise; parties can choose an expert in the field relevant to their dispute to act as the mediator, which can lead to more informed decisions and (viii) Reduced hostility; mediation tends to be less adversarial than court litigation, which can reduce tensions and hostility between parties.

The courts should not only encourage mediating more and litigating less but also exhibit a promediation bias which connotes a pre-disposition within the legal system for resolution of disputes through mediation rather than through litigation or other forms of dispute resolution. Such bias does not favor one party over another but rather prioritizes mediation as the preferred method of dispute resolution. It is grounded in the belief that settlements are generally more efficient and satisfactory for all parties involved compared to outcomes determined by a court. Mediation offers the best chance of a solution where both parties leave with dignity and satisfaction, as opposed to the all-or-nothing results of litigation.

Taisei Corporation v. A.M. Construction 2024 SCMR 640; Commissioner Inland Revenue v. RYK Mills 2023 SCMR 1856; National Highway Authority v. Sambu Construction 2023 SCMR 1103; Orient Power Company v. Sui Northern Gas 2021 SCMR 1728; Federation of Pakistan v. Attock Petroleum 2007 SCMR 1095; Waqas Yaqub v. Adeel Yaqub 2024 CLD 990; Faisal Zafar v. Siraj-ud-Din, 2024 CLD 1; Fiaz Hussain Minhas v. SECP, C.O. No. 75025/2022 (unreported); Netherlands Financierings v. Morgah Valley 2024 CLD 685; Strategic Plans v. Punjab Revenue Authority PLD 2024 Lah. 545; Sohail Nisar v. Nadeem Nisar 2024 LHC 1435; Messrs Alstom Power v. Pakistan Water PLD 2007 Lah. 581; Shehzad Arshad v. Pervez Arshad 2024 CLD 1121; Focus Entertainment v. Television Media 2021 CLD 885; Asif S. Sajan v. Rehan Associates PLD 2012 Sindh 388; Messrs U.I.G v. Muhammad Imran Qureshi 2011 CLC 758; Miss Memoona Zainab Kazmi v. Additional District Judge 2023 CLC 207; Imperial Electric Company v. Zhongzing Telecom Pakistan 2019 CLD 609; Cowl v. Plymouth City Council [2001] EWCA Civ 1935 (per Lord Woolf LCJ) and Province of Punjab v. Haroon Construction Company 2024 SCMR 947 ref.

Encouraging mediation aligns with the broader goals of justice systems worldwide: to resolve disputes in a manner that is fair, efficient, and conducive to the longterm well-being of all parties involved.

From a global perspective, the value of mediation as a method of amicably resolving disputes has been recognized in various international legal instruments including the United Nations Convention on International Settlement Agreements Resulting from Mediation, known as, the "Singapore Convention on Mediation", ("Singapore Convention"). The Convention provides a uniform and efficient framework for the recognition and enforcement of mediated settlement agreements that resolve international, commercial disputes - akin to the framework that the 1958 New York Convention provides for arbitral awards. To date, the Convention has 57

signatories, while only 12 states have ratified the same. To promote efficiency and align with the principle that 'in the future, it is likely that the traditional trial will be the exception rather than the rule' it is recommended that Pakistan becomes a signatory to the Convention. This will not only reduce the alarming backlog statistics through enhancing faster access to justice but will also serve as a turning point towards a comprehensive and profound transformation of the legal and judicial system.

(b) Arbitration Act (X of 1940)---

----Ss. 17 & 20---Construction project---Disputes over extension of time and the encashment of Mobilization Advance Guarantees---Alternative Dispute Resolution ("ADR")---Mediation---In the present case the arbitral award passed by a two-member arbitral tribunal was made the Rule of Court by the Civil Court---Appeal was filed against the said judgment by the respondents before the High Court, which was allowed and the unanimous arbitral award was rendered a nullity---Respondents after initially expressing their unease with out of court settlement or "ADR" finally agreed to resolve their dispute through mediation in both the appeals---Respondents, however, reserved their right to expand the scope of their dispute before the mediator, provided both the parties mutually agreed to such a change---Supreme Court disposed of present appeals as being sent out for mediation, and observed that in case mediation or any other mode of ADR was unsuccessful, the parties may approach the Supreme Court and apply for the refixation of present appeals---Appeals were, therefore consigned to the record.

Ahmer Bilal Soofi, Advocate Supreme Court, Syed Ali Imran, Advocate Supreme Court and Sh. Mehmood Ahmed, Advocate-on-Record for Appellants.

Salman Mansoor, Advocate Supreme Court, Mian Shafqat Jan, Advocate Supreme Court, Barrister Khurram Raza, Advocate Supreme Court, Syed Rifaqat Hussain Shah, Advocate-on-Record, Sukhan Ilyas Malik, Dy. Dir. Law (EOBI) and Imran Shanwari, CEO PRIMACO for Respondents.

Assisted by Umer A. Ranjha, Judicial Law Clerk.

Date of hearing: 6th November, 2024.

ORDER

SYED MANSOOR ALI SHAH, J.---The brief facts giving rise to the instant appeals are that Messrs Mughals Pakistan (Pvt.) Limited ("appellant"), a private limited construction company was engaged by Employees Old Age Benefits Institution and its wholly owned subsidiary, Messrs Pakistan Real Estate Investment and Management Company (Pvt.) Ltd., (collectively referred to as the "respondents") for a construction project. Following the initiation of the project, disputes arose between the appellant and the respondents regarding the extension of time and the encashment of Mobilization Advance Guarantees. Subsequently, the appellant filed petitions under Section 20 of the Arbitration Act, 1940 ("Act") along with an application under Section 41 read along with Second Schedule to the Act, seeking injunctive relief as well as invoking the remedy of arbitration before the learned Civil Court, Lahore. Thereafter, a two-member arbitral tribunal was constituted which, after hearing both the parties unanimously passed the arbitral award which was made the Rule of Court by the learned Civil Court vide its judgment and decree dated 18.05.2022, as provided under Sections 14 and 17 of the Act. An appeal was filed against the said judgment by the respondents before the Lahore High Court, Lahore which was allowed vide judgment dated 06.01.2024 and the unanimous arbitral award was rendered a nullity. Hence, the instant appeal.

2. During the last hearing1, it was deemed appropriate by the Court to suggest mediation of the dispute between the parties given the nature of the dispute. The parties were given appropriate time to seek instructions and explore the possibility of an out of court settlement. Today, the respondents after initially expressing their unease with out of court settlement or alternative dispute resolution ("ADR") finally agreed to resolve their dispute through mediation in both the appeals. The respondents, however, reserved their right to expand the scope of their dispute before the mediator, provided both the parties mutually agree to such a change.

3. "The courts of this country should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried."2 It is significant to underline that there are around 2.22 million (2,221,512) cases pending before all the courts in Pakistan.3 Out of these, 0.35 million (347,173) cases are pending in the Constitutional Courts (Supreme Court of Pakistan and the High Courts) while the bulk of the pendency is in the District Courts which constitutes 82% of these cases, translating into a backlog of 1.82 million (1,815,783) cases. This voluminous and chronic pendency necessitates exploration of new and out-of-box dispute resolution solutions. ADR is therefore the way head.

4. Mediation is evolving as a powerful mechanism for conflict resolution, bridging divides with creativity and fostering harmonious solutions. It is a testament to the potential of dialogue over confrontation. Mediation (and other mechanisms of ADR) can be philosophically framed as essential tools to ensure access to justice in a country where millions of cases are pending. This approach aligns with a broader understanding of justice as being not only about achieving outcomes but also about the process itself being fair, efficient, and accessible. Traditional court system is adversarial and often resource-intensive, leading to delays and alienation of marginalized groups. Mediation embodies a collaborative model of justice that prioritizes dialogue and empowerment, ensuring parties are active participants in resolving their disputes. The sheer volume of pending cases often renders justice delayed, and as the saying goes, "Justice delayed is justice denied." Mediation offers a timely and context-sensitive resolution that addresses the substance of disputes without being bogged down by procedural complexities. Philosophically, mediation reflects the relational nature of human beings. It prioritizes restoring relationships, preserving dignity, and finding mutually beneficial solutions over the zero-sum outcomes of litigation. Mediation accommodates the cultural, social, and economic diversity of disputing parties. It aligns with justice as capability-enhancing, allowing parties to exercise their agency and reach solutions that reflect their lived realities. Mediation bridges modern legal systems with indigenous practices, thereby strengthening communal harmony while maintaining legal validity.

5. Mediation must be increasingly seen as a right of the parties within the litigation process. Access to justice includes the right to have disputes resolved in a timely and efficient manner. Mediation, as a faster and cost-effective alternative, satisfies this fundamental aspect of justice. Mediation respects the autonomy of the parties by giving them control over the process and outcome, unlike litigation, where outcomes are imposed by judges. Litigants have the right to avoid the adversarial consequences of litigation, such as financial strain, emotional distress, and reputational harm. Mediation provides a non-confrontational environment that mitigates these risks. Procedural justice emphasizes the fairness of the process, and mediation upholds this by ensuring participation, neutrality, and respect - core elements of a fair process. In contexts where economic inequalities limit access to legal representation, mediation ensures that the justice system remains accessible to the underprivileged. Many societies have strong traditions of community-led dispute resolution. Mediation builds on these traditions, ensuring justice remains culturally relevant. "Mediation is at the heart of access to justice. Courts must embrace it as an essential tool for efficient and humane dispute resolution."4 In conclusion, mediation is not merely an alternative to litigation but a complementary and necessary component of the justice system.

6. The reasons which make mediation a compelling choice for an appropriate avenue to resolve disputes efficiently and effectively, inter alia, include: (i) Cost-effectiveness; mediation incurs lower legal fees and expenses due to shorter and less formal processes; (ii) Time efficiency; resolutions can often be reached much faster through mediation than through court proceedings, which can take years to conclude, (iii) Flexibility; the procedures in mediation are flexible, allowing parties to tailor the specific processes to their specific needs, including choosing their mediator and deciding the rules for the proceedings, (iv) Confidentiality; unlike trials in courts which are generally public, mediation processes are private. This confidentiality can be crucial for preserving personal relationships, protecting trade secrets or avoiding negative publicity, (v) Preservation of relationships; mediation encourages cooperation and communication, which can help maintain or even improve relationships between parties, a key consideration in business context or family disputes, (vi) Control over the outcome; parties have more control over the resolution as they are directly involved in negotiating the settlement, (vii) Expertise; parties have (sic) choose an expert in the field relevant to their dispute to act as the mediator, which can lead to more informed decisions and (viii) Reduced hostility; mediation tends to be less adversarial than court litigation, which can reduce tensions and hostility between parties.

7. It needs to be reiterated that "an ounce of mediation is worth a pound of arbitration and a ton of litigation."5 Our courts, more recently, have encouraged ADR.6 The courts should not only encourage "mediating more and litigating less7" but also exhibit a pro-mediation bias which connotes a pre-disposition within the legal system for resolution of disputes through mediation rather than through litigation or other forms of dispute resolution. Such bias does not favor one party over another but rather prioritizes mediation as the preferred method of dispute resolution. It is grounded in the belief that settlements are generally more efficient and satisfactory for all parties involved compared to outcomes determined by a court.8 Mediation offers the best chance of a solution where both parties leave with dignity and satisfaction, as opposed to the all-or-nothing results of litigation.

8. The introduction of a robust legal landscape i.e., The Alternate Dispute Resolution Act, 2017 ("2017 Act") and the provincial legislations9 in each respective province allows courts to exercise this pro-mediation bias. These laws accord the courts the power to refer a case to ADR with the consent of the parties. Similarly, ADR has been defined very broadly 'as a process in which parties' resort to resolving a dispute other than by adjudication by courts and includes, but is not limited to, arbitration, mediation, conciliation and neutral evaluation.' The 2017 Act along with the Balochistan Alternate Dispute Resolution Act, 2022 separately define mediation 'as a process in which a mediator facilitates dispute resolution by encouraging communication and negotiation between the parties, in order for them to arrive at a mutually satisfactory agreement.'10 Similarly, the Code of Civil Procedure (Sindh Amendment) Act, 2018 offers the most holistic definition of mediation by defining it as 'a process which is conducted confidentially in which a neutral person (mediator) actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle the terms of the resolution, the mediator having no decision-making power or authority to impose solutions on the parties or force settlement between the parties.'11 To ensure inexpensive and expeditious justice by means of an alternate dispute resolution system, these legislations also provide for referral of cases to ADR centers. Further, various other laws12 also encourage the use of out of court settlement, in particular mediation. More recently, the ADR Mediation Accreditation (Eligibility) Rules, 202313 which provide for the eligibility requirements for any such center providing mediation services and Mediation Practice Direction (Civil) Rules, 202314 which provide for the practice to be followed by the courts in cases involving mediation, have been notified. Therefore, by using this legal framework as a means to foster a pro-mediation bias, courts, in particular the District Courts can contribute to a more harmonious and efficient dispute resolution landscape, where parties are empowered to resolve conflicts collaboratively and constructively. Encouraging mediation aligns with the broader goals of justice systems worldwide: to resolve disputes in a manner that is fair, efficient, and conducive to the longterm well-being of all parties involved.

9. In actualizing the true spirit of these legislations, various mediation centers15 including the Islamabad High Court-Annexed Mediation Center have been introduced, marking a significant initiative to reduce case backlog and prioritize mediation for dispute resolution. This idea of a court-annexed mediation through judges is highly encouraged and should extend to all Provinces as it will increase the likelihood of a settlement because litigating parties respect both the bench and the mantle of the judge. At the same time, private centers are also encouraged to adopt mediation as an efficient means to foster timely access to justice to all.

10. From a global perspective, the value of mediation as a method of amicably resolving disputes has been recognized in various international legal instruments including the United Nations Convention on International Settlement Agreements Resulting from Mediation, known as, the "Singapore Convention on Mediation", ("Singapore Convention").16 The Convention provides a uniform and efficient framework for the recognition and enforcement of mediated settlement agreements that resolve international, commercial disputes - akin to the framework that the 1958 New York Convention provides for arbitral awards. To date, the Convention has 57 signatories, while only 12 states have ratified the same. To promote efficiency and align with the principle that 'in the future, it is likely that the traditional trial will be the exception rather than the rule'17 it is recommended that Pakistan becomes a signatory to the Convention. This will not only reduce the alarming backlog statistics through enhancing faster access to justice but will also serve as a turning point towards a comprehensive and profound transformation of the legal and judicial system.

11. In view of the aforesaid, these appeals are disposed of as being sent out for mediation. In case mediation or any other mode of ADR is unsuccessful, the parties may approach this Court and apply for the refixation of these appeals. These appeals are, therefore consigned to the record.

12. Copy of this Order be dispatched to the Attorney-General for Pakistan for considering the recommendation in paragraph 7 of this Order regarding the ratification of the Singapore Convention with the relevant quarters.

MWA/M-57/SC Appeals disposed of

**P L D 2025 Supreme Court 67**

**Present: Qazi Faez Isa, CJ, Syed Mansoor Ali Shah, Munib Akhtar, Yahya Afridi, Amin-ud-Din Khan, Jamal Khan Mandokhail, Muhammad Ali Mazhar Ayesha A. Malik, Athar Minallah, Syed Hasan Azhar Rizvi, Shahid Waheed, Irfan Saadat Khan and Naeem Akhtar Afghan, JJ**

**Civil Appeals Nos. 333 and 334 of 2024**

**AND**

**Civil Misc. Application No.2920 of 2024**

**[Stay application]**

**AND**

**Civil Misc. Application No. 5913 of 2024**

[Application of PTI for impleadment]

**SUNNI ITTEHAD COUNCIL and another---Appellants**

**Versus**

**ELECTION COMMISSION OF PAKISTAN and others---Respondents**

**Civil Petitions No. 1612 to 1617 of 2024**

**AND**

**C.M.A. No.3554 of 2024 in C.P. NIL/2024**

[For permission to file and argue]

**The SPEAKER, PROVINCIAL ASSEMBLY OF KHYBER PAKHTUNKHWA, PESHAWAR and others---Petitioners/Applicants**

**Versus**

**SHAZIA TEHMAS KHAN and others---Respondents**

Civil Appeals Nos. 333 and 334 of 2024 and Civil Miscellaneous Applications Nos. 2920, 5913 of 2024 and Civil Petitions Nos. 1612 to 1617 of 2024 and C.M.A. No. 3554 of 2024 in C.P. No. Nil of 2024, decided on 12th July, 2024.

**Per Amin-ud-Din Khan and Naeem Akhtar Afghan, JJ. [Minority view]:**

**(a) Constitution of Pakistan---**

----Arts. 51(6)(d), 51(6)(e), 106(3)(c) & 63---Elections Act (XXXIII of 2017), Ss. 66, 104 & 215(5)---Seats reserved for women and non-Muslims in the National Assembly and the Provincial Assemblies, allocation of---Eligible political parties---Pakistan Tehreek-e-Insaf ("PTI") [a political party] denied its election symbol by the Election Commission of Pakistan for failing to conduct its intra-party election---Whether Sunni Ittehad Council ("SIC") [a political party] which was joined by 80 independent returned candidates, who were backed by PTI, was eligible for the allocation of reserved seats---Whether Pakistan Tehreek-e-Insaf ("PTI") was eligible for the allocation of reserved seats---Reasons for disagreeing with the majority decision in the present case listed.

i. Pakistan Tehreek-e-Insaf ("PTI") was not before the Supreme Court nor before the High Court nor even before the ECP;

ii. The joining of 80 independent returned candidates with Sunni Ittehad Council ("SIC") was never disputed by anyone;

iii. The said 39 plus 41 persons as mentioned in the majority's short order did not come before the Supreme Court nor were they heard. The majority short order decided about their rights or lack thereof without their consent or even hearing them. Their joining of SIC has been undone without such prayer raised by anyone before the Supreme Court, or before the High Court;

iv. Not only the appeals filed by the SIC have been dismissed by the majority order, as no relief has been granted to SIC but independent members who joined the SIC have also been snatched from the SIC and that too without hearing the above said 39 plus 41 persons;

v. Unless Articles 51, 106 and 63 of Constitution are suspended and in their place new articles in consonance with the relief granted through the majority order are inserted in the Constitution, the relief which has been granted to the PTI cannot be granted;

vi. Article 175 of the Constitution has been ignored;
vii. The constitutional limits of jurisdiction under Article 185 of the Constitution have been ignored;
viii. All substantive as well as procedural law with regard to parties to lis have been ignored;
ix. The relief granted to PTI is self-created and has been carved out by the majority, without anyone claiming this relief in these proceedings;
x. Not only SIC has been denied relief claimed by it but all those who have joined it have been taken off and for the rest of the tenure of the National as well as Provincial assemblies. Thus, SIC has been kicked out from the assemblies;
xi. For a specific date i.e. 06.05.2024 the notification of returned candidates for special seats has been quashed, however before that date their notification and acts are held to be valid. It is incomprehensible how can this be done, as it is without any backing of Constitution;
xii. The majority short judgment virtually declares that said 80 persons are not honest and ameen in accordance with Article 62(1)(f) of the Constitution;
xiii. All the returned candidates for the reserved seats of other parties who have been notified were not issued notices and provided an opportunity of hearing;
xiv. Forty-one (41) candidates mentioned in Annexure-B (of the majority short judgment) have been given the choice of joining any other Political Party;
xv. The issue was simply the matter of post general elections directly related to the reserved seats for both women and non-Muslims on the basis of proportional representation system of political parties' lists of candidates under Articles 51 and 106 of the Constitution. The majority's short order in effect created a new parliamentary party in the National Assembly and three Provincial Assemblies and since this related to the pre-election process, it is clearly and unequivocally not an issue before the Supreme Court. In the process of the general elections all events are scheduled and timebound and the same cannot be reversed;
xvi. The judgment of the full Bench of the Peshawar High Court has been set aside by the majority's short order to the extent, that it is or may be inconsistent with the majority's short order. This is incomprehensible as none of the rights which have now been created in favour of PTI by the majority's short order were in issue before the High Court,
nor had been adjudicated upon. The High Court had simply dismissed SIC's claim to the reserved seats, which was the lis before the High Court.

If an independent candidate joins a party, though it may be listed as a political party with ECP, it does not make that party entitled for the reserved seats. The joining of independent candidates only enhances the proportion of right in the reserved seats of that party if that party has won seats. Joining of independent candidates with any political party does not create a right in favour of that political party to become eligible for reserved seats only on the basis of the joining of independent candidates.

The majority judgment ignores all rules of procedure, substantive provisions of law and the Constitution. Relief cannot be granted to the PTI as PTI was not before the Court nor tried to become a party before the ECP, High Court and before the Supreme Court nor was claiming the reserved seats, which were in issue in the instant litigation. If the said 39 plus 41 persons take any step on the basis of majority's short judgment, which is not in accordance with the Constitution, they may lose their seats as returned candidates on the basis of violation of the Constitution. Any other constitutional body cannot be asked to take any steps or decisions which are not permissible under the Constitution. If the said 80 persons change their stance on the basis of the majority short judgment, they will be guilty of violating their oath for the members of the National Assembly.

For creating and carving out relief in these proceedings for PTI, the Court would have to travel beyond the jurisdiction conferred by Articles 175 and 185 of the Constitution and would also have to suspend Articles 51, 106 and 63 of the Constitution and section 104 of the Elections Act, 2017 along with the relevant rules. All the rules of procedures of proceedings before the Supreme Court and the Supreme Court Rules, 1980 would also have to be ignored as no party before the Court asked in writing or orally for the relief which has been granted to PTI. Therefore, any affidavit contrary to the provisions of the affidavits already filed will entail the penal consequences of non-seating such members of National Assembly and Provincial Assemblies if he/she files a

fresh affidavit in contradiction to his/her previous affidavit and joins any other party. Any order of the Court which is not in consonance with the constitutional provisions is not binding upon any other constitutional organ of the State.

In conclusion, it is clear that the superstructure created by
the majority's short order, does not in any way come within the ambit of the jurisdiction vested in the Supreme Court or in the Constitution.

Per Syed Mansoor Ali Shah, J; Munib Akhtar, Muhammad Ali Mazhar, Ayesha A. Malik, Athar Minallah, Syed Hasan Azhar Rizvi, Shahid Waheed and Irfan Saadat Khan, JJ. agreeing; Qazi Faez Isa, CJ., Yahya Afridi, Amin-ud-Din Khan, Jamal Khan Mandokhail and Naeem Akhtar Afghan, JJ. dissenting. [Majority view]

**(b) Constitution of Pakistan---**

----Arts. 218 & 187(1)---Election Commission of Pakistan, duty of---Scope---Electoral justice and integrity---Power of the Supreme Court to do complete justice for protection of democracy---Election authorities, as "electoral management bodies", are the "guarantor institutions" of democratic processes and are critical to democratic governance, akin to a "fourth branch of government"---Their constitutional role is to ensure the conduct of elections by providing an equal and fair competitive field for all political entities and protect citizens' rights to vote---As an impartial steward of the electoral process, the Election Commission of Pakistan is not only an administrative body but also a guardian of electoral integrity and democracy's legitimacy---When election authorities engage in actions that undermine these principles, such as unlawfully denying the recognition of a major political party and treating its nominated candidates as independents, they not only compromise the rights of these candidates but also significantly infringe upon the rights of the electorate and corrode their own institutional legitimacy---When the Election Commission errs or makes significant mistakes impacting the electoral process, judicial intervention becomes necessary to rectify them and ensure electoral justice---Electoral justice is vital to protecting political and electoral rights and is intertwined with electoral integrity---Role of the Supreme Court of Pakistan in overseeing electoral integrity is crucial for sustaining public trust in the democratic process, and the Court's power to do "complete justice" is a critical tool in the constitutional arsenal of the Supreme Court, enabling it to prevent democratic backsliding, and protect democracy effectively with a focus on the electorate's rights---Denying electoral justice and compromising electoral integrity would undermine the very legitimacy of democracy.

Tom Ginsburg, 'Democracy Backsliding and the Rule of Law' 44 Ohio University Law Review 351 (2018) ref.

**(c) Constitution of Pakistan---**

----Art. 185---Appellate jurisdiction of the Supreme Court---Election dispute---Judicial inquiry not limited to pleadings of the parties---A case before the Supreme Court involving an election dispute cannot be treated as an ordinary civil case and the judicial inquiry into such a case cannot be limited to the pleadings of the parties. Elections are a crucial part of the democratic process, and the public has a major stake in ensuring that they are held free and fair, unmarred by corrupt or illegal practices. Therefore, unlike ordinary civil cases, election cases involve substantial public interest. An election dispute is fundamentally different from other civil disputes, as it is not solely a dispute between two contesting parties but a proceeding where the constituency itself is the principal interested party. These cases involve not just the rights of the contesting candidates or political parties but also the rights of the voters, constituencies and the public. Election cases aim to fill public offices by properly qualified and duly elected candidates and to maintain the purity of elections, ensuring that no one takes charge of a public office through flagrant breaches of election laws or corrupt practices. The proceedings in election cases thus have unique characteristics because they serve the interests of the entire constituency, differentiating them from ordinary civil proceedings. This distinction clearly demonstrates the flaw in treating an election case as an ordinary civil case and limiting the judicial inquiry to the pleadings of the parties as it is in adversarial proceedings.

Morton v. Galway [1875] 3 O.M. & H. 19; Aldridge v. Hurst [1876] L.R. 1 C.P. 410; Sreenivasan v. Election Tribunal [1955] 11 E.L.R. 278; Inamati Basappa v. Desai Ayyappa AIR 1958 SC 698; Mohinder Singh v. Chief Election Commissioner AIR 1978 SC 851; Dilshad Khan v. Arshad Ali 1999 MLD 2874 and Irshad Hussain v. Ashraf Nagra 2003 YLR 812 ref.

In adjudicating election controversies, courts must therefore play an active role in an inquisitorial manner, defending the rights of the constituency and the values and principles of democracy. They must act as guardians of the fundamental rights of the people against any misuse of power or illegal action in the electoral process.

**(d) Constitution of Pakistan---**

----Part II, Chap. 1---Fundamental Rights---Progressive, and dynamic interpretation---Fundamental rights guaranteed by the Constitution, an organic instrument, are not capable of precise or permanent definition delineating their meaning and scope for all times to come---With the passage of time, changes occur in the political, social and economic conditions of the society, which requires re-evaluation of their meaning and scope in consonance with the changed conditions---Therefore, keeping in view the prevailing socioeconomic and politico-cultural values and ideals of the society, the courts construe the fundamental rights guaranteed by the Constitution with a progressive, liberal and dynamic approach---This approach ensures that the fundamental rights remain a vibrant and effective guarantee of citizens' rights, liberties and freedoms, adapting to the evolving needs and aspirations of society---With this approach, the courts expound the fundamental rights to give them life and substance that are true to the reality of the changing times.

Nawaz Sharif v. President of Pakistan PLD 1993 SC 473 ref.

**(e) Interpretation of statutes---**

----Provision entailing penal consequences---Strict construction---It is a cardinal principle of the construction of statutes that any provision entailing penal consequence, whether of criminal law or of civil law, must be construed strictly---This principle of strict construction of penal statutes is also called the principle against doubtful penalisation---It stresses that a person should not be penalised except under clear law and if, in construing the relevant provisions, there appears any reasonable doubt or ambiguity, it should be resolved in favour of the person who would be liable to the penalty---No penalty or penal consequence can be added to the one specified in law by inference or assumption---Penal actions can only be taken on the basis of express and clear provisions of law.

Muhammad Ali v. State Bank of Pakistan 1973 SCMR 140; F. B. Ali v. State PLD 1975 SC 506; M.B. Abbasi v. State 2009 SCMR 808; Zahid Rehman v. State PLD 2015 SC 77; Tahir Naqash v. State PLD 2022 SC 385; PIA Corporation v. Labour Court PLD 1978 SC 239; Federal Land Commission v. Ghulam Qadir 1983 SCMR 867; Siddique Khan v. Abdul Shakur PLD 1984 SC 289; UBL v. Yousuf Dhadhi 1988 SCMR 82; Wukala Mahaz v. Federation of Pakistan PLD 1998 SC 1263; B.I.S.E. v. Rizwan Rashid 2005 SCMR 728; Tahir Hussain v. Liaqat Ali 2014 SCMR 637; State Bank of Pakistan v. S.E.C.P. PLD 2018 SC 52; Maxwell on the Interpretation of Statutes (12th ed.) pp. 238-240 and Bennion on Statutory Interpretation (7th ed.) pp. 715-717 ref.

**(f) Elections Act (XXXIII of 2017)---**

----Ss. 215(5), 209 & 210---Constitution of Pakistan, Art. 17(2)---Political party---Failure to conduct intra-party elections---Non-allocation of election symbol---No further penalty beyond the specified non-allocation of an election symbol---It is unequivocal that Section 215(5) of the Elections Act, 2017 prescribes a penal consequence for a political party's failure to comply with the provisions of Section 209 (regarding intra-party elections) or Section 210 (regarding the sources of the party's funds)---The specified penalty of non-allocation of an election symbol curtails the political party's fundamental right to function and operate as a political party-a right implicit in the right to form a political party guaranteed by Article 17(2) of the Constitution---Therefore, Section 215(5) must be construed strictly -- No further penalty or consequence beyond the specified non-allocation of an election symbol can be inferred or assumed from Section 215(5)---Additionally, no other constitutional or statutory right of the political party can be denied on the basis of the non-allocation of an election symbol under this provision.

**(g) Election Rules, 2017---**

----R. 94, Explanation---Elections Act (XXXIII of 2017), S. 215(5)---Constitution of Pakistan, Arts. 51(6)(d), 51(6)(e) & 106(3)(c)---Explanation to Rule 94 of the Election Rules, 2017, vires of---Seats reserved for women and non-Muslims in the National Assembly and the Provincial Assemblies, allocation of---Eligible political parties---Explanation to Rule 94 of the Election Rules, 2017 being beyond the scope of Section 215(5) of the

Elections Act, 2017 and inconsistent with the provisions of Articles 51(6)(d), 51(6)(e) and 106(3)(c) of the Constitution, was ultra vires the Elections Act, 2017 and the Constitution, thus void and invalid.

Rule 94 of the Election Rules, 2017 provides the procedure for the calculation, allocation and notification of the share of proportional representation of political parties in the seats reserved for women and non-Muslims. Its Explanation stipulates that '[f]or the purpose of this rule, the expression "political party" means a political party to which a symbol has been allocated by the Commission.' By defining a political party in this manner, the Explanation excludes a political party that has not been allotted a symbol by the Commission from being allocated a share of proportional representation in the reserved seats. No such exclusion of a political party, as created by the Explanation to Rule 94, is provided in Articles 51(6)(d), 51(6)(e) and 106(3)(c) of the Constitution, nor is any such consequence of non-allocation of the election symbol provided in Section 215(5) of the Elections Act, 2017 or any other provision of the said Act. In effect, it has introduced an additional penal consequence of declaring a political party ineligible to obtain an election symbol under Section 215(5) of the Elections Act, 2017 and it has also infringed the constitutional right of a political party, conferred by Articles 51(6)(d), 51(6)(e) and 106(3)(c) of the Constitution, to have its due share of proportional representation in the seats reserved for women and non-Muslims on the basis of general seats secured by such a political party. This Explanation has thus clearly gone beyond and against the provisions of the Elections Act, 2017 and the Constitution.

The Explanation to Rule 94 of the Election Rules, 2017 being beyond the scope of Section 215(5) of the Elections Act, 2017 and inconsistent with the provisions of Articles 51(6)(d), 51(6)(e) and 106(3)(c) of the Constitution, is declared ultra vires the Elections Act, 2017 and the Constitution, thus void and invalid.

**(h) Elections Act (XXXIII of 2017)---**

----Ss. 215(5), 98 & 67(3)---Constitution of Pakistan, Art. 17(2)---Whether a candidate nominated by a political party ineligible to obtain an election symbol be mentioned as an independent candidate in the list of contesting candidates (Form-33), and can such a returned candidate be notified as an independent returned candidate in the Section 98 Notification?---Right to participate in and contest elections as a political party through its nominated candidates is a fundamental right guaranteed by Article 17(2) of the Constitution---This right is not, nor can it be, extinguished by any provision of the Elections Act, 2017 including Section 215(5) thereof---Depriving a political party of participating in and contesting elections through its nominated candidates, destroys the political existence of the party and is tantamount to its political extermination and virtual dissolution, which cannot be done except by the procedure and on the grounds provided in Article 17(2) of the Constitution---Similar would be the position if the candidates nominated by a political party are denied the status of being the candidates of that political party and are mentioned as independent candidates in the list of contesting candidates (Form-33), or such returned candidates are notified as independent returned candidates in the Notification under section 98 of the Elections Act, 2017---Such actions of the Returning Officers and the Election Commission of Pakistan would also be ultra vires Article 17(2) of the Constitution, as they effectively nullify the party's right to participate in and contest elections---Notwithstanding that a political party has been declared ineligible to obtain an election symbol, its nominated candidates cannot be mentioned as independent candidates in the list of contesting candidates (Form 33), despite allotment of different election symbols to them under Section 67(3) of the Elections Act, 2017 nor can they be notified as independent returned candidates in the Section-98 Notification.

Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416; Benazir Bhutto v. Federation of Pakistan PLD 1989 SC 66 and Nawaz Sharif v. President of Pakistan PLD 1993 SC 473 ref.

**(i) Constitution of Pakistan---**

----Arts. 51(6)(d) & 51(6)(e) & 106(3)(c)---Seats reserved for women and non-Muslims in the National Assembly and the Provincial Assemblies, allocation of---Eligible political parties---Parties that contest and win general seats---Article 51(6)(d) of the Constitution refers to political parties that have contested for and won one or more general seats in the National Assembly from the Province concerned, and not to all enlisted political parties---Similarly, Article 51(6)(e) of the Constitution refers to political parties that have contested for and won one or more general seats in the National Assembly from the whole country, i.e., from any of the Provinces

or the Federal Capital---Therefore, Articles 51(6)(d) & (e) and 106(3)(c) of the Constitution refer to political parties that have contested for and won general seats and not to all enlisted political parties---Political party which does not win (any) general seats, is not entitled to allocation of the reserved seats.

**(j) Constitution of Pakistan---**

----Arts.51(6)(d), proviso, 51(6)(e) & 106(3)(c)---Seats reserved for women and non-Muslims in the National Assembly and the Provincial Assemblies, allocation of---Independent candidates---Only political parties, not independent returned candidates, are entitled to the allocation of the reserved seats---Independent returned candidates can only be counted towards the proportional representation (of political parties) if they act in accordance with the proviso to Article 51(6)(d) of the Constitution and join a political party, in which case their seats shall be counted as the seats of the political parties to which they join for the purpose of determining the proportional representation of political parties---For the purpose of allocating reserved seats under Articles 51(6)(d) & 51(6)(e) of the Constitution, the proportional representation of political parties is to be calculated on the basis of total number of general seats won by each political party, including the seats of independent returned candidates who join it, but excluding the seats of other independent returned candidates.

**(k) Constitution of Pakistan---**

----Arts. 51(6)(d), 51(6)(e) & 106(3)(c)---Election Rules, 2017, R.95(2)---Rule 95(2) of the Elections Rules, 2017, vires of---Seats reserved for women and non-Muslims in the National Assembly and the Provincial Assemblies, allocation of---No reserved seat should ordinarily be left vacant---Adopting an interpretation of paragraphs (d) and (e) of Article 51(6) of the Constitution that would result in holding certain reserved seats vacant would lead to a form of disenfranchisement, where the electorate's mandate is not fully realised in terms of gender and minority representation, and thus frustrate the constitutional objective of providing for such reserved seats---Rule 95(2) of the Elections Rules, 2017 which provides that the seats won by independent candidates, other than those who join a political party, shall be excluded for the purpose of determining the share of each political party, is thus found consistent with the constitutional provisions, as it ensures the constitutional objective that no reserved seat should ordinarily remain vacant.

**(l) Constitution of Pakistan---**

----Arts. 17(2), 19, 51(6)(d) & 51(6)(e) & 106(3)(c)---Seats reserved for women and non-Muslims in the National Assembly and the Provincial Assemblies---Right of a political party to reserved seats proportionate to the general seats won---Scope---Right to so many of the reserved seats that are proportionate to the general seats won by a political party is an integral part of the right to form a political party, as this right also gives the "life and substance" to the said fundamental right---Therefore, denial of the right to reserved seats proportionate to the general seats won by it would violate the fundamental rights of a political party guaranteed by Article 17(2) of the Constitution as well as the fundamental right to vote of the electorate that have voted for such political party guaranteed by Article 19 of the Constitution.

**(m) Administration of justice---**

----Wrongful acts/omissions of public functionaries---No person should be made to suffer or be prejudiced by an unlawful act or omission of public functionaries---If any person suffers the loss of any right or benefit because of an unlawful act or omission of a public functionary, he is entitled, by reason of an obligation of justice, to be restored to that right or benefit and put in the same position, insofar as is possible, as he would have been if such unlawful act or omission had not been made by the public functionary.

**(n) Constitution of Pakistan---**

----Art. 187(1)---Power of the Supreme Court to do complete justice---Scope---General power of the Supreme Court under Article 187(1) of the Constitution is to be invoked and exercised by the Court to do complete justice in any case when there is no specific provision of law that covers or addresses the matter or issue involved---Power under Article 187(1) of the Constitution is focused on achieving and prioritizing fairness to ensure complete justice in any case---While doing complete justice in the exercise of its general power under Article 187(1) of the Constitution, the Supreme Court is not handicapped by any technicality or rule of practice or procedure, nor is the exercise of this power by the Court dependent on an application by a party.

Dossani Travels v. Travels Shop PLD 2014 SC 1; Saddaqat Khan v. Collector Land Acquisition PLD 2010 SC 878; Martin Dow Marker Ltd. v. Asadullah Khan 2020 SCMR 2147 and State v. Alif Rehman 2021 SCMR 503 ref.

**(o) Constitution of Pakistan---**

----Arts. 17(2), 19, 51(6)(d) & 51(6)(e)---Seats reserved for women and non-Muslims in the National Assembly and the Provincial Assemblies---Case before the Supreme Court regarding dispute over allocation of reserved seats---Candidate for the seat reserved for women in the National Assembly---Not a necessary party to the case---A contesting candidate or a returned candidate to the seats reserved for women or non-Muslims is not a necessary party to a dispute where the matter to be decided is which political party and in what proportion is entitled to the reserved seats---Persons nominated by a political party for reserved seats or elected to such seats do not have a personal right to such seats---It is the right of the electorate guaranteed under Articles 17(2) and 19 of the Constitution, exercisable through political parties, to have proportional representation in the reserved seats, not of the person nominated for or elected to such seats.

**(p) Constitution of Pakistan---**

----Arts. 51(6)(d), 51(6)(e) & 106(3)(c)---Elections Act (XXXIII of 2017), Ss. 66, 98, 104 & 215(5)---Election Rules, 2017, R. 94, Explanation---Seats reserved for women and non-Muslims in the National Assembly and the Provincial Assemblies, allocation of---Eligible political parties---Pakistan Tehreek-e-Insaf ("PTI") [a political party] denied its election symbol by the Election Commission of Pakistan for failing to conduct its intra-party election---Whether Pakistan Tehreek-e-Insaf ("PTI")was eligible for the allocation of reserved seats---Held, that lack or denial of an election symbol does not in any manner affect the constitutional and legal rights of a political party to participate in an election---Pakistan Tehreek-e-Insaf ("PTI") was and is a political party, which secured or won general seats in the National and Provincial Assemblies in the General Elections of 2024---Directions issued by the Supreme Court regarding the procedure and methodology for allocation of reserved seats for women and minorities to PTI in the National and Provincial Assemblies stated.

(i) The lack or denial of an election symbol does not in any manner affect the constitutional and legal rights of a political party to participate in an election (whether general or bye) and to field candidates and the Election Commission of Pakistan ("Commission') is under a constitutional duty to act, and construe and apply all statutory provisions, accordingly.

(ii) For the purposes, and within the meaning, of paragraphs (d) and (e) of clause (6) of Article 51 ("Article 51 Provisions") and paragraph (c) of clause (3) of Article 106 ("Article 106 Provisions") of the Constitution, the Pakistan Tehreek-e-Insaf ("PTI") was and is a political party, which secured or won (the two terms being interchangeable) general seats in the National and Provincial Assemblies in the General Elections of 2024 as herein after provided.

(iii) During the course of the hearing of the instant appeals, counsel for the Commission placed before the Court a list ("the List") of 80 returned candidates for the National Assembly (now MNAs), setting out in tabular form particulars relating to their election. Counsel made a categorical statement that the Commission stood by the data so provided to the Court. In particular, the List contained three columns marked as follows: (i) "Statement (on nomination form) given in declaration and oath by the person nominated (i.e., 'I belong to')"; (ii) "Certificate of party affiliation under Section 66 of the Elections Act, 2017"; and (iii) "Statutory Declaration/affidavit accompanying section 66 certificate". In the peculiar facts and circumstances of the General Election of 2024, it is declared that out of the aforesaid 80 returned candidates (now MNAs) those (being 39 in all and whose particulars are set out in Annex A to this Order) in respect of whom the Commission has shown "PTI" in any one of the aforesaid columns in the List, were and are the returned candidates whose seats were and have been secured by the PTIwithin the meaning, and for purposes of, para (ii) above in relation to the Article 51 Provisions.

(iv) In the peculiar facts and circumstances of the General Election of 2024, it is further ordered that any of the remaining 41 returned candidates out of the aforesaid 80 (whose particulars are set out in Annex B to this Order) may, within 15 working days of this Order file a statement duly signed and notarized stating that he or she contested the General Election as a candidate of the political party specified therein. If any such statement(s)

is/are filed, the Commission shall forthwith but in any case within 7 days thereafter give notice to the political party concerned to file, within 15 working days, a confirmation that the candidate contested the General Election as its candidate. A political party may in any case, at any time after the filing of a statement asaforesaid, of its own motion file its confirmation. If such a statement is filed, and is confirmed by the political party concerned, then the seat secured by such candidate shall be forthwith deemed to be a seat secured by that political party for the purposes of para (ii) above in relation to the Article 51 Provisions. The Commission shall also forthwith issue, and post on its website, a list of the retuned candidates (now MNAs) and seats to which this para applies within 7 days after the last date on which a political party may file its confirmation and shall simultaneously file a compliance report in the Court.

(v) For the purposes of para (ii) of this Order in relation to the Article 51 Provisions, the number of general seats secured by PTI shall be the total of the seats declared in terms of para (iii) and those, if any, to which para (iv)applies. The PTI shall be entitled to reserved seats for women and minorities in the National Assembly accordingly. PTI shall, within 15working days of this Order file its lists of candidates for the said reserved seats and the provisions of the Elections Act, 2017 ("Act") (including in particular S. 104) and the Elections Rules, 2017 ("Rules") shall be applied to such lists in such manner as gives effect to this Order in full measure. The Commission shall, out of the reserved seats for women and minorities in the National Assembly to which para (vii) of this Order applies, notify as elected in terms of the Article 51 Provisions, that number of candidates from the lists filed (or, as the case may be, to be filed) by the PTI as is proportionate to the general seats secured by it in terms of paras (iii) and (iv) of this Order.

(vi) The order of the Election Commission of Pakistan ("Commission") dated 01.03.2024 ("Impugned Order") is declared to be ultra vires the Constitution, without lawful authority and of no legal effect.

(vii) The notifications (of various dates) whereby the persons respectively mentioned therein (being the persons identified in the Election Commission's notification No.F.5(1)/2024-Cord. dated 13.05.2024) have been declared to be returned candidates for reserved seats for women and minorities in the National and Provincial Assemblies are declared to be ultra vires the Constitution, without lawful authority and of no legal effect, and are quashed from 06.05.2024 onwards, being the date an interim order was made by the Court.

(viii) The foregoing paras shall apply mutatis mutandis for purposes of the Article 106 Provisions in relation to PTI (as set out in para (ii) herein above) for the reserved seats for women and minorities in the Khyber Pakhtunkhwa, Punjab and Sindh Provincial Assemblies to which para (vii) of this Order applies. In case the Commission or PTI need any clarification or order so as to give effect to this para in full measure, it shall forthwith apply to the Court by making an appropriate application, which shall be put up before the Judges constituting the majority in chambers for such orders and directions as may be deemed appropriate.

**Per Yahya Afridi, J. [Minority view]**

**(q) Constitution of Pakistan---**

----Arts. 51(6)(d), 51(6)(e) & 106(3)(c)---Elections Act (XXXIII of 2017), Ss. 66, 104 & 215(5)---Election Rules, 2017, R. 92---Seats reserved for women and non-Muslims in the National Assembly and the Provincial Assemblies, allocation of---Eligible political parties---Pakistan Tehreek-e-Insaf ("PTI") [a political party] denied its election symbol by the Election Commission of Pakistan for failing to conduct its intra-party election---Whether Sunni Ittehad Council ("SIC") [a political party] which was joined by 80 independent returned candidates, who were backed by PTI, was eligible for the allocation of reserved seats---Whether Pakistan Tehreek-e-Insaf ("PTI") was eligible for the allocation of reserved seats---Sunni Ittehad Council does not fulfil the conditions prescribed for a political party under the enabling provisions of the Constitution and the law to be allowed/allocated reserved seats for women and non-Muslims in the National Assembly or the Provincial Assemblies---However, Pakistan Tehreek-e-Insaf ("PTI") did fulfil the conditions prescribed for a political party under the enabling provisions of the Constitution and the law to be allowed/allocated reserved seats for women and non-Muslims---Procedure and methodology for allocation of reserved seats for women and minorities to PTI in the National and Provincial Assemblies stated.

A fundamental prerequisite for a political party to qualify for reserved seats is the winning of at least one general seat in the elections. Consequently, the entitlement of a political party to reserved seats is inextricably linked to

its success on at least one general seat. Similarly, a political party must win a general seat to benefit from the inclusion of independent candidates, so as to become a part of its numerical strength for the purpose of allocation of reserved seats.

Sunni Ittehad Council ("SIC") is a registered political party, but it did not field any candidate for a seat in the National Assembly or Provincial Assemblies in the General Election, 2024. Thus, having won no seat in the houses, it cannot seek to include the independent returned members of the respective houses to enhance its strength for the allocation of reserved seats within the contemplation of Articles 51 and 106 of the Constitution. Further, SIC had not submitted any list of candidates for reserved seats for women or for non-Muslims within the period fixed by Election Commission of Pakistan ('ECP'), as reflected in the Schedule of Election notified in the official gazette. SIC does not fulfil the conditions prescribed for a political party under the enabling provisions of the Constitution and the law to be allocated reserved seats for women and non- Muslims in the National Assembly and Provincial Assemblies.

Pakistan Tehreek-e-Insaf ("PTI") fulfils the conditions prescribed for a political party under the enabling provisions of the Constitution and the law to be allowed/allocated reserved seats for women and non-Muslims, in terms that:

i. A candidate for a seat in the National Assembly or the Provincial Assembly, who in his/her nomination paper has declared on oath to belong to Pakistan Tehreek-e-Insaf ("PTI") and duly submitted a certificate of the same political party confirming that he/she is the nominated candidate of PTI for the respective constituency, shall remain so, and cannot be declared independent, unless he/she submitted a written declaration to the Election Commission of Pakistan or Returning Officer to be treated as the candidate of another political party or as an independent candidate;

ii. A returned candidate to the National Assembly or the Provincial Assembly, who in his/her nomination paper has declared on oath to belong to PTI and duly submitted a certificate of the same political party confirming that he/she is the nominated candidate of PTI for the respective constituency, shall remain so, and this consistent position maintained by a returned candidate throughout the electoral process should be legally recognized by the Election Commission of Pakistan and such returned candidate cannot be treated as the returned candidate of another political party or as an independent returned candidate, and thus, the reserved seats for women and non- Muslims are to be allowed/ allocated to PTI, accordingly;

iii. A candidate nominated by PTI for a constituency of the National Assembly or the Provincial Assembly who, after being declared returned, joined another political party or sought to be treated as independent, raises serious concerns about disregarding the trust reposed in him/her by the voters, thus undermining the will of the people; and

iv. The legal implications, effects and consequences of the determinations made above in paragraphs (ii) and (iii), as well as the actions or inactions of the Election Commission of Pakistan thereon, although deeply concerning, have not been challenged in the present appeals and petitions; and the persons who would be affected or aggrieved are not parties before the Supreme Court. Therefore, issuing definitive directions to the Election Commission of Pakistan qua the allocation of specific number of reserved seats for women and non-Muslims to a political party in the National Assembly and the Provincial Assemblies would not be legally appropriate.

Accordingly, the Election Commission of Pakistan is directed to decide the allocation of reserved seats for women and non- Muslims to political parties in the National Assembly and the Provincial Assemblies in the light of the determinations made hereinabove after providing an opportunity of hearing to the parties concerned, and if required revisit its earlier decisions on the matter.

**(r) Constitution of Pakistan---**

----Art. 187(1)---Power of the Supreme Court to do complete justice---Scope---While the undeniable power of the Supreme Court to do complete justice under Article 187 of the Constitution is recognized, exercising this power in the absence of an aggrieved party directly approaching the Court could set a dangerous and far-reaching precedent---Such a course risks undermining the principles of due process and judicial restraint, potentially leading to an overreach of judicial authority---Exercise of this power must, therefore, be reserved

for exceptional circumstances, where there is a clear and compelling need to intervene to bolster the rights of the aggrieved petitioner, and prevent a miscarriage of justice.

**Per Jamal Khan Mandokhail, J; Qazi Faez Isa, CJ. agreeing [Minority view]:**

**(s) Interpretation of Constitution---**

----Supreme Court can interpret the Constitution, but it must ensure that words are not read into it nor should it ascribe artificial meaning to commonly understood words---Court must ensure that words are not read into the Constitution and no artificial meaning is to be ascribed to commonly understood words.

**(t) Constitution of Pakistan---**

----Arts. 51(6)(d), 51(6)(e) & 106(3)(c)---Elections Act (XXXIII of 2017), Ss. 66, 67, 104 & 215(5)---Seats reserved for women and non-Muslims in the National Assembly and the Provincial Assemblies, allocation of---Eligible political parties---Pakistan Tehreek-e-Insaf ("PTI") [a political party] denied its election symbol by the Election Commission of Pakistan for failing to conduct its intra-party election---Whether Sunni Ittehad Council ("SIC") [a political party] which was joined by 80 independent returned candidates, who were backed by PTI, was eligible for the allocation of reserved seats---Whether Pakistan Tehreek-e-Insaf ("PTI") was eligible for the allocation of reserved seats---Held, that Sunni Ittehad Council ("SIC") did not contest the General Elections of the year 2024, but demands allocation of reserved seats on account of inclusion of independent parliamentarians in it---SIC did not secure a single seat in the National Assembly or any of the Provincial Assemblies nor submitted a list of its candidates for seats reserved for women and non-Muslims---Thus, it is not entitled to any of the reserved seats in the National Assembly and in the Provincial Assemblies---Impugned judgment and the order dated 1 March 2024 of the Election Commission of Pakistan ("ECP") to such extent is upheld---Non-allocation of symbol to a political party, in no way prevents a candidate from filing a declaration about his affiliation with that political party, nor does it prevent such political party from nominating a candidate to contest an election---Impugned judgment of the High Court and the order of the ECP to the extent of the proportional representation distribution of seats amongst the political parties which won and secured seats is also maintained, however, since the ECPcalculated and allocated the seats to the parties by the exclusion of the Pakistan Tehreek-e-Insaf ("PTI") candidates, therefore, to such extent, the impugned judgment of the High Court and the order of the ECP are set aside---A number of candidates had submitted their nomination papers declaring on oath that they belonged to PTI supported by an affiliation certificate of the said party, though some did not submit affiliation certificates of PTI, however, since they stated on oath that they belonged to PTI, and did not contradict themselves, they should be considered to be members of PTI in the National and the Provincial Assemblies---ECP by misinterpreting a judgment of the Supreme Court dated 13 January 2024, which was regarding non-holding intra-party elections in PTI, wrongly mentioned the said candidates of the PTI as independents in Form 33 of the Election Rules---ECP had no authority to declare validly nominated candidates of a political party to be independent candidates---Similarly, a candidate who once declares himself/herself as a candidate of a political party, can not subsequently resile from his/her candidature of a particular party, after the last date of withdrawal of the nomination papers---Neither the PTI nor any candidate affiliated with PTI approached either the Supreme Court before or during the hearing of these proceedings, or the High Court to challenge the decision of the ECP, declaring them as independents---However, in view of the fact that the appeal and the petition are a continuation of election proceedings before the ECP, the Supreme Court can look into the vires of the decision of the ECP in the light of the provisions of Article 51(1)(d) and (e) of the Constitution read with sections 66, 67 and 104 of the Elections Act, 2017 to safeguard the interest of women and non-Muslims---As a consequence whereof, the candidates who had submitted their nomination papers declaring that they belonged to PTI and had not filed a document showing affiliation with another political party before the last date of withdrawal of the nomination papers, should have been treated as the Parliamentary Party of PTI, but the needful was not done by the ECP---Consequently, the PTI as a Parliamentary Party is entitled to the reserved seats---ECP should recalculate and reallocate the reserved seats amongst the political parties, including the PTI, as provided by Article 51(6)(d) and (e) of the Constitution---Candidates who had submitted their nomination papers by 24 December 2023, which was the last date of submission of nomination papers, and had declared them selves either as independent candidates or had left blank the relevant

column in the nomination papers/declaration and were elected shall be considered to be independents---All those who joined the SIC are presumed to have done so out of their own free will---None of them claimed to have joined SIC because of any misunderstanding of any judgment, the law, compulsion, coercion or undue influence and it is not for the Supreme Court to presume otherwise---They are now members of SIC---Neither the Constitution nor the Elections Act, 2017 permits the Supreme Court to issue direction or provide an opportunity or additional avenue to them to join another political party and that too, within a period of fifteen days.

**(u) Constitution of Pakistan---**

----Arts. 51(3), 51(6)(d) & (e), 106(3)(c) & 224(6)---Seats reserved for women and non-Muslims in the National Assembly and the Provincial Assemblies---Whether reserved seats could be left vacant---Held, that under Article 51(3) of the Constitution, the total number of seats in the National Assembly shall be 326, out of which 60 seats are reserved for women and 10 seats for non-Muslims---Such right of women and non-Muslims has been guaranteed by the Constitution---They shall be elected in accordance with the law through proportional representation system of political parties' list of candidates on the basis of total number of general seats secured by each political party from the Province concerned in the National Assembly and the Provincial Assemblies, as provided by Article 51(6) (d) and (e) of the Constitution---Therefore, they cannot be deprived of this right of theirs by leaving these seats vacant, and all reserved seats must be filled in, as provided by Article 224(6) of the Constitution.

**Per Qazi Faez Isa, CJ.;agreeing with Jamal Khan Mandokhail, J. [Minority view]:**

**(v) Constitution of Pakistan---**

----Arts. 51(6)(d), 51(6)(e), 106(3)(c) & 10A---Elections Act (XXXIII of 2017), Ss. 66, 104 & 215(5)---Seats reserved for women and non-Muslims in the National Assembly and the Provincial Assemblies, allocation of---Eligible political parties---Pakistan Tehreek-e-Insaf ("PTI") [a political party] denied its election symbol by the Election Commission of Pakistan for failing to conduct its intra-party election---Whether Sunni Ittehad Council ("SIC") [a political party] which was joined by 80 independent returned candidates, who were backed by PTI, was eligible for the allocation of reserved seats---Whether Pakistan Tehreek-e-Insaf ("PTI") was eligible for the allocation of reserved seats---Constitutional violations and illegalities in the majority's short order of 12 July 2024, the majority's detailed judgment of 23 September 2024, the order/clarification of 14 September 2024 and the clarification of 18 October 2024 highlighted.

Present appeals were heard by a thirteen-member Bench of the Supreme Court, comprising of all judges of the Supreme Court. The majority's short order concluded by permitting the Election Commission of Pakistan ('ECP') and Pakistan Tehreek-i-Insaf ('PTI') to, 'apply to the Court by making an appropriate application, which shall be put up before the Judges constituting the majority in chambers for such orders and directions as may be deemed appropriate'. This deviated from how courts have always functioned, was novel and unprecedented. The majority of eight judges decided to part ways with the Court, comprising of thirteen judges, which had heard the appeals. The majority set up its own virtual court, permitted the making of 'an appropriate application' by the ECP and PTI, and directed that such appropriate application would only be heard by them whilst cloistered in Chambers. In doing this the majority of the Judges effectively legislated, because neither the Constitution nor any law permits what they did. Incidentally no party or counsel during the hearing ever suggested the course of action which the majority adopted, and neither the majority's short order nor the majority's detailed judgment offers an explanation to justify it.

The majority disregarded the precedents of the Supreme Court, and they not only carved out a separate eight-member 'court' from the thirteen-member Court, but also innovated further by not finally concluding the hearing of the appeals, because they permitted appropriate application to be filed, introduced timelines and changed what the Constitution provided. The timelines that were introduced were as under:

(i) 41 returned candidates to file a statement within 15 days;

(ii) Upon receipt of the above statements the ECP to give notice to the political party concerned;

(iii) Then within 15 days the political party to submit its 'confirmation that the candidates contesting the General Elections as its candidates'; and

(iv) The ECP within 7 days to issue and post on its website 'the list of candidates now MNAs'.

Judges may decide or dispose of a case as per their understanding of the Constitution and the law but it is critical that the case must be decided or disposed of. Permitting appropriate application to be filed by the ECP or the PTI meant that the case was not decided or disposed of. This coupled with the stated timelines effectively kept the appeals pending. In civil cases after a judgment is pronounced the decree follows. In constitutional cases too a judgment can be executed, provided it is finally and conclusively decided. The majority's short order and the majority's detailed judgment did not conclude the appeals. The well trodden legal path was abandoned by the majority which created unnecessary and avoidable problems. Since the appeals were not finally decided there was no decision which could be stated to be binding, in terms of Article 189 of the Constitution. Similarly, contempt of court proceedings for any non-compliance of the 'order of the Court', under Article 204 of the Constitution, cannot be initiated. The right of review, which Article 188 of the Constitution grants, was also effectively negated.

The majority's short order was announced on 12 July 2024, following which the Judges had to issue their detailed reasons for the same. Instead something inexplicable happened. A purported order/clarification was uploaded on the Supreme Court's website on 14 September 2024, and this was done without informing the Chief Justice, the other Judges (in the minority), and bypassing the Registrar and the office of the Supreme Court. And, this was done on a Saturday, after the Registrar had left. The majority's order/clarification of 14th September was admittedly passed without first listing the cases, without issuing notices to the parties and without issuance of the requisite notice to the Attorney-General for Pakistan. The title of the 'order' stated - 'In Chambers'. However, not all of the said eight Judges (in majority) were in the Supreme Court premises and some were not even in Islamabad (principal seat of the Supreme Court). By not issuing notices, not granting an opportunity of hearing, and not conducting the hearing in open Court, the well-established rules of natural justice were transgressed, and Article 10A of the Constitution, which gives protection to procedural fairness and has elevated due process and fair trial to the status of a Fundamental Right, was contravened. The mandatory requirements of openness and transparency were also transgressed.

The majority's order/clarification of 14th September was followed by yet another; the majority's clarification of 18th October which, like the earlier one of 14 September 2024, was uploaded on the website of the Supreme Court in similar manner. This was done on Friday, 18 October 2024 at 3.59 pm. This time too the cause list was not issued, parties were not informed, and an opportunity of hearing was not provided. Where and when the Judges (in majority) had met also remains a mystery. The majority's orders/clarifications of 14th September, 2024 and 18th October, 2024 cannot be stated to have been issued by a 'Court'; the forum which issued them was coram non judice. Moreover, such forum did not comply with the rudimentary principles of natural justice, of due process and of fair trial. Therefore, the same do not constitute legal orders, and are of no legal effect. They also cannot be categorized as a 'decision' of the Supreme Court (in terms of Article 189 of the Constitution), resultantly, they need not be followed or acted upon.

In Civil Appeals

For Appellants

(In both Appeals)

Faisal Siddiqui, Advocate Supreme Court,

assisted by Ammar Rafique, Advocate along with Ajmal Ghaffar Toor, Advocate Supreme Court,

Haider Bin Masud, Advocate

and Sahibzada M. Hamid Raza

(appellant in person)

For Respondent No. 1-ECP

(in both Appeals)

Sikandar Bashir Mohmand, Advocate Supreme Court

assisted by Abdullah Noor

and Hamza Azmat, Advocates

along with M. Arshad, D.G. (Law) ECP and

Ms. Saima Tariq Janjua, D.D. Law (ECP)
For PPP
(In both Appeals)
Farooq H. Naek, Senior Advocate Supreme Court
assisted by Asad Mehmood Abbasi, Advocate Supreme Court,
Sheraz Shaukat Rajpar, Advocate and
Syed Qaim Shah, Advocate.
For PML(N)
(In C.A. No. 333/24)
Haris Azmat, Advocate Supreme Court,
assisted by Ms. Faiza Asad, Advocate and
Ch. Akhtar Ali, Advocate-on-Record.
For MQM
Nemo.
For Respondent No.5
(in C.A. No. 333/2024)
M. Siddique Awan, Advocate Supreme Court.
For Respondent No. 9
(in C.A. No. 333/24)
Syed Rifaqat Hussain Shah, Advocate Supreme Court/Advocate-on-Record.
For Respondent No. 11
(in C.A. No. 333/24)
Kamran Murtaza, Senior Advocate Supreme Court.
For Respondents Nos. 15 to 19, 21-22.
(In C.A. No. 333/24)
M. Makhdoom Ali Khan, Senior Advocate Supreme Court,
Sarmad Hani, Advocate Supreme Court,
Saad Mumtaz Hashmi, Advocate Supreme Court,
assisted by Zarar Qadir Shoro, Advocate
along with Yawar Mukhtar, Advocate.
For Respondent No. 20
(In C.A. No. 333/24)
Zulfikar Khalid Maluka, Advocate Supreme Court.
For Respondent No. 9
(In C.A. No. 333/24)
M. Shahzad Shaukat, Advocate Supreme Court.
assisted by Raza ur Rehman, Advocate.
In Civil Petitions
For the Petitioners
(In C.Ps. Nos. 1612-1514/24)
Asad Jan Durrani, Advocate Supreme Court.
along with Malik Khawas, Assistant Law Officer,
KPK Assembly
For the Petitioners
(In C.Ps. Nos. 1615-1617)
Shah Faisal Utmankhail,
Advocate-General, KP.
Kausar Ali Shah, AAG, KPK and
Zahid Yousaf, Advocate-on-Record.

For Respondent No. 1
(in C.Ps. Nos. 1612 and 1616/24)
Amir Javed, Advocate Supreme Court.
For R-6 (in C.P. 1612/24) and
For R-2 to 5 (in C.P. No. 1616/24)
Shah Khawar, Advocate Supreme Court.
For Respondents Nos. 1 to 6
(In C.Ps. Nos. 1613 and 1617/2024)
Kamran Murtaza, Senior Advocate Supreme Court and
Qari Abdul Rasheed, Advocate Supreme Court.
For Respondents Nos. 1, 2, 3 and 8
(In C.P. No. 1614/24)
Imran Khan, Advocate Supreme Court.
In C.M.As.
For the Applicants:
(In C.M.As. 3554 and 5913/24)
Salman Akram Raja, Advocate Supreme Court,
Sameer Khosa, Advocate Supreme Court,
assisted by Malik Ghulam Sabir,
Ramsa Banuri, Samreen Qureshi and
Hamad Amin, Advocates.
On Court Notice:
For the Federation:
Mansoor Usman Awan, Attorney-General for Pakistan.
(Assisted by: Ms. Maryam Ali Abbasi, Adv.)
along with Malik Javed Iqbal Wains, AAGP.
Raja M. Shafqat Abbasi, D.A.G.
Ms. Maryam Rasheed, Advocate.
For Government of Punjab:
Khalid Ishaq, Advocate-General, Punjab and
Sanaullah Zahid, Additional Advocate-General, Punjab.
For Government of Khyber Pakhtunkhwa:
Shah Faisal Utmankhail, Advocate-General, KP and
Shah Faisal Ilyas, Additional Advocate-General, KP.
For Government of Sindh:
Miran Muhammad Shah, Addl. A.G., Sindh
(through video-link from Karachi)
For Government of Balochistan:
Muhammad Asif Reki, Advocate-General, Balochistan.
(Through video-link from Quetta)
M. Ayaz Swati, Addl. A.G.
Tahir Iqbal Khattak, Additional Advocate-General, Balochistan.
(At Islamabad)
For ICT:
Muhammad Ayyaz Shaukat, A.G., Islamabad.
Research Assistance:
Umer A. Ranjha, Judicial Law Clerk.
Date of hearing: 9th July, 2024.

**ORDER**[*]

Syed Mansoor Ali Shah, Munib Akhtar, Muhammad Ali Mazhar, Ayesha A. Malik, Athar Minallah, Syed Hasan Azhar Rizvi, Shahid Waheed and Irfan Saadat Khan, JJ.: For detailed reasons to be recorded later and subject to what is set out therein by way of amplification and/or explanation or otherwise, these appeals are decided in the following terms:

1. The impugned judgment dated 25.03.2024 of the learned Full Bench of the High Court is set aside to the extent it is or may be inconsistent with this Order or the detailed reasons.

2. The order of the Election Commission of Pakistan ("Commission") dated 01.03.2024 ("Impugned Order") is declared to be ultra vires the Constitution, without lawful authority and of no legal effect.

3. The notifications (of various dates) whereby the persons respectively mentioned therein (being the persons identified in the Commission's notification No.F.5(1)/2024-Cord. dated 13.05.2024) have been declared to be returned candidates for reserved seats for women and minorities in the National and Provincial Assemblies are declared to be ultra vires the Constitution, without lawful authority and of no legal effect, and are quashed from 06.05.2024 onwards, being the date an interim order was made by the Court in CPLA Nos. 1328-9 of 2024, the leave petitions out of which the instant appeals arise.

4. It is declared that the lack or denial of an election symbol does not in any manner affect the constitutional and legal rights of a political party to participate in an election (whether general or bye) and to field candidates and the Commission is under a constitutional duty to act, and construe and apply all statutory provisions, accordingly.

5. It is declared that for the purposes, and within the meaning, of paragraphs (d) and (e) of clause (6) of Article 51 ("Article 51 Provisions") and paragraph (c) of clause (3) of Article 106 ("Article 106 Provisions") of the Constitution, the Pakistan Tehreek e Insaf ("PTI") was and is a political party, which secured or won (the two terms being interchangeable) general seats in the National and Provincial Assemblies in the General Elections of 2024 as herein after provided.

6. During the course of the hearing of the instant appeals, on 27.06.2024, learned counsel for the Commission placed before the Court a list ("the List") of 80 returned candidates for the National Assembly (now MNAs), setting out in tabular form particulars relating to their election. Learned counsel made a categorical statement that the Commission stood by the data so provided to the Court. In particular, the List contained three columns marked as follows: (i) "Statement (on nomination form) given in declaration and oath by the person nominated (i.e., 'I belong to')"; (ii) "Certificate of party affiliation under Section 66 of the Elections Act, 2017"; and (iii) "Statutory Declaration/ affidavit accompanying section 66 certificate".

7. In the peculiar facts and circumstances of the General Election of 2024, it is declared that out of the aforesaid 80 returned candidates (now MNAs) those (being 39 in all and whose particulars are set out in Annex A to this Order) in respect of whom the Commission has shown "PTI" in any one of the aforesaid columns in the List, were and are the returned candidates whose seats were and have been secured by the PTI within the meaning, and for purposes of, para 5 above in relation to the Article 51 Provisions.

8. In the peculiar facts and circumstances of the General Election of 2024, it is further ordered that any of the remaining 41 returned candidates out of the aforesaid 80 (whose particulars are set out in Annex B to this Order) may, within 15 working days of this Order file a statement duly signed and notarized stating that he or she contested the General Election as a candidate of the political party specified therein. If any such statement(s) is/are filed, the Commission shall forthwith but in any case within 7 days thereafter give notice to the political party concerned to file, within 15 working days, a confirmation that the candidate contested the General Election as its candidate. A political party may in any case, at any time after the filing of a statement as aforesaid, of its own motion file its confirmation. If such a statement is filed, and is confirmed by the political party concerned, then the seat secured by such candidate shall be forthwith deemed to be a seat secured by that political party for the purposes of para 5 above in relation to the Article 51 Provisions. The Commission shall also forthwith issue, and post on its website, a list of the retuned candidates (now MNAs) and seats to which this para applies within 7 days after the last date on which a political party may file its confirmation and shall simultaneously file a compliance report in the Court.

9. For the purposes of para 5 of this Order in relation to the Article 51 Provisions, the number of general seats secured by PTI shall be the total of the seats declared in terms of para 7 and those, if any, to which para 8 applies. The PTI shall be entitled to reserved seats for women and minorities in the National Assembly accordingly. PTI shall, within 15 working days of this Order file its lists of candidates for the said reserved seats and the provisions of the Elections Act, 2017 ("Act") (including in particular section 104) and the Elections Rules, 2017 ("Rules") shall be applied to such lists in such manner as gives effect to this Order in full measure. The Commission shall, out of the reserved seats for women and minorities in the National Assembly to which para 3 of this Order applies, notify as elected in terms of the Article 51 Provisions, that number of candidates from the lists filed (or, as the case may be, to be filed) by the PTI as is proportionate to the general seats secured by it in terms of paras 7 and 8 of this Order.

10. The foregoing paras shall apply mutatis mutandis for purposes of the Article 106 Provisions in relation to PTI (as set out in para 5 herein above) for the reserved seats for women and minorities in the Khyber Pakhtunkwa, Punjab and Sindh Provincial Assemblies to which para 3 of this Order applies. In case the Commission or PTI need any clarification or order so as to give effect to this para in full measure, it shall forthwith apply to the Court by making an appropriate application, which shall be put up before the Judges constituting the majority in chambers for such orders and directions as may be deemed appropriate.

Sd/- Sd/-

Judge Judge

Sd/- Sd/-

Judge Judge

Sd/- Sd/-

Judge Judge

Sd/- Sd/-

Judge Judge

Islamabad, the

12th of July, 2024

Annexure-A

(Names of Candidates Affiliated with the Pakistan Tehreek-e-Insaf

as per the list verified from the data provided by ECP[1])

| Sr. No. | Number and Name of the Constituency | Name of the Candidate |
|---|---|---|
| 1. | NA-2 (Swat-I) | Amjad Ali Khan |
| 2. | NA-3 (Swat-II) | Saleem Rehman |
| 3. | NA-4 (Swat-III) | Sohail Sultan |
| 4. | NA-6 (Lower Dir-I) | Muhammad Bashir Khan |
| 5. | NA-7 (Lower Dir-II) | Mehboob Shah |
| 6. | NA-9 (Malakand) | Junaid Akbar |
| 7. | NA-17 (Abbottabad-II) | Ali Khan Jadoon |
| 8. | NA-19 (Swabi-I) | Asad Qaiser |
| 9. | NA-20 (Swabi-II) | Shahram Khan |
| 10. | NA-21 (Mardan-I) | Mujahid Ali |
| 11. | NA-24 (Charsadda-I) | Anwar Taj |
| 12. | NA-25 (Charsadda-II) | Fazal Muhammad Khan |
| 13. | NA-29 (Peshawar-II) | Arbab Amir Ayub |
| 14. | NA-30 (Peshawar-III) | Shandana Gulzar Khan |
| 15. | NA-31 (Peshawar-IV) | Sher Ali Arbab |
| 16. | NA-32 (Peshawar-V) | Asif Khan |
| 17. | NA-33 (Nowshera-I) | Syed Shah Ahad Ali Shah |

| | | |
|---|---|---|
| 18. | NA-38 (Karak) | Shahid Ahmad |
| 19. | NA-39 (Bannu) | Nasim Ali Shah |
| 20. | NA-41 (Lakki Marwat) | Sher Afzal Khan |
| 21. | NA-83 (Sargodha-II) | Usama Ahmed Mela |
| 22. | NA-84 (Sargodha-III) | Shafqat Abbas |
| 23. | NA-95 (Faisalabad-I) | Ali Afzal Sahi |
| 24. | NA-96 (Faisalabad-II) | Rai Haider Ali Khan |
| 25. | NA-100 (Faisalabad-VI) | Nisar Ahmed |
| 26. | NA-101 (Faisalabad-VII) | Rana Atif |
| 27. | NA-102 (Faisalabad-VIII) | Changaze Ahmad Khan |
| 28. | NA-103 (Faisalabad-IX) | Muhammad Ali Sarfraz |
| 29. | NA-115 (Sheikhupura-III) | Khurram Shahzad Virk |
| 30. | NA-122 (Lahore-VI) | Sardar Muhammad Latif Khan Khosa |
| 31. | NA-143 (Sahiwal-III) | Rai Hassan Nawaz Khan |
| 32. | NA-149 (Multan-II) | Malik Muhammad Aamir Dogar |
| 33. | NA-150 (Multan-III) | Makhdoom Zain Hussain Qureshi |
| 34. | NA-154 (Lodhran-I) | Rana Muhammad Faraz Noon |
| 35. | NA-171 (Rahim Yar Khan-III) | Mumtaz Mustafa |
| 36. | NA-179 (Kot Addu-I) | Muhammad Shabbir Ali Qureshi |
| 37. | NA-181 (Layyah-I) | Umber Majeed |
| 38. | NA-182 (Layyah-II) | Awais Haider Jakhar |
| 39. | NA-185 (D.G. Khan-II) | Zartaj Gul |

Annexure-B

(Names of Independent Candidates)

| Sr. No. | Number and Name of the Constituency | Name of the Candidate |
|---|---|---|
| 1. | NA-1 (Chitral Upper-cum- Chitral Lower) | Abdul Latif |
| 2. | NA-5 (Upper Dir) | Sahibzada Sibghatullah |
| 3. | NA-13 (Battagram) | Muhammad Nawaz Khan |
| 4. | NA-22 (Mardan-II) | Muhammad Atif |
| 5. | NA-23 (Mardan-III) | Ali Muhammad |
| 6. | NA-26 (Mohmand) | Sajid Khan |
| 7. | NA-27 (Khyber) | Muhammad Iqbal Khan |
| 8. | NA-34 (Nowshera-II) | Zulfiqar Ali |
| 9. | NA-35 (Kohat) | Shehryar Afridi |
| 10. | NA-36 (Hangu-cum-Orakzai) | Yousaf Khan |
| 11. | NA-42 (South Waziristan Upper-cum-South Waziristan Lower) | Zubair Khan |
| 12. | NA-66 (Wazirabad) | Mohammad Ahmed Chattha |
| 13. | NA-67 (Hafizabad) | Aniqa Mehdi |
| 14. | NA-68 (Mandi Bahauddin-I) | Haji Imtiaz Ahmed Choudhry |
| 15. | NA-78 (Gujranwala-II) | Muhammad Mobeen Arif |
| 16. | NA-79 (Gujranwala-III) | Ihsan Ullah Virk |
| 17. | NA-181 (Gujranwala-V) | Ch. Bilal Ejaz |
| 18. | NA-86 (Sargodha-V) | Muhammad Miqdad Ali Khan |
| 19. | NA-89 (Mianwali-I) | Muhammad Jamal Ahsan Khan |

| | | |
|---|---|---|
| 20. | NA-90 (Mianwali-II) | Umair Khan Niazi |
| 21. | NA-91 (Bhakkar-I) | M. Sana Ullah Khan Mastikhel |
| 22. | NA-93 (Chiniot-I) | Ghulam Muhammad |
| 23. | NA-97 (Faisalabad-III) | Muhammad Saad Ullah |
| 24. | NA-99 (Faisalabad-V) | Umar Farooq |
| 25. | NA-105 (Toba Tek Singh-I) | Usama Hamza |
| 26. | NA-107 (Toba Tek Singh-III) | Mohammad Riaz Khan |
| 27. | NA-108 (Jhang-I) | Muhammad Mahbob Sultan |
| 28. | NA-109 (Jhang-II) | Waqas Akram |
| 29. | NA-110 (Jhang-III) | Muhammad Ameer Sultan |
| 30. | NA-111 (Nankana Sahib-I) | Muhammad Arshad Sahi |
| 31. | NA-116 (Sheikhupura-IV) | Khurram Munawar Manj |
| 32. | NA-129 (Lahore-XIII) | Mian Muhammad Azhar |
| 33. | NA-133 (Kasur-III) | Azim Uddin Zahid |
| 34. | NA-137 (Okara-III) | Syed Raza Ali Gillani |
| 35. | NA-156 (Vehari-I) | Ayesha Nazir |
| 36. | NA-170 (Rahim Yar Khan-II) | Mian Ghous Muhammad |
| 37. | NA-172 (Rahim Yar Khan-IV) | Javaid Iqbal |
| 38. | NA-175 (Muzaffargarh-I) | Jamshaid Ahmad |
| 39. | NA-177 (Muzaffargarh-III) | Muhammad Moazzam Ali Khan |
| 40. | NA-180 (Kot Addu-II) | Fiaz Hussain |
| 41. | NA-183 (Taunsa) | Khawaja Sheraz Mehmood |

YAHYA AFRIDI, J.[*]---For reasons to be recorded later, Civil Appeals Nos. 333 and 334 of 2024, C.M.A. No. 2920 of 2024 in Civil Appeal No. 333 of 2024, Civil Petitions Nos. 1612, 1613, 1614, 1615, 1616 and 1617 of 2024 and C.M.A. No. 3554 of 2024 in C.P. Nil of 2024 are dismissed in terms that:

1. Sunni Ittehad Council does not fulfil the conditions prescribed for a political party under the enabling provisions of the Constitution of Islamic Republic of Pakistan ("Constitution") and the law to be allowed/allocated reserved seats for women and non-Muslims in the National Assembly or the Provincial Assemblies.

2. Pakistan Tehreek-e-Insaf ("PTI") fulfils the conditions prescribed for a political party under the enabling provisions of the Constitution and the law to be allowed/allocated reserved seats for women and non-Muslims, in terms that:

i. A candidate for a seat in the National Assembly or the Provincial Assembly, who in his/her nomination paper has declared on oath to belong to PTI and duly submitted a certificate of the same political party confirming that he/she is the nominated candidate of PTI for the respective constituency, shall remain so, and cannot be declared independent, unless he/she submitted a written declaration to the Election Commission of Pakistan or Returning Officer to be treated as the candidate of another political party or as an independent candidate;

ii. A returned candidate to the National Assembly or the Provincial Assembly, who in his/her nomination paper has declared on oath to belong to PTI and duly submitted a certificate of the same political party confirming that he/she is the nominated candidate of PTI for the respective constituency, shall remain so, and this consistent position maintained by a returned candidate throughout the electoral process should be legally recognized by the Election Commission of Pakistan and such returned candidate cannot be treated as the returned candidate of another political party or as an independent returned candidate, and thus, the reserved seats for women and non-Muslims are to be allowed/ allocated to PTI, accordingly;

iii. A candidate nominated by PTI for a constituency of the National Assembly or the Provincial Assembly who, after being declared returned, joined another political party or sought to be treated as independent, raises serious

concerns about disregarding the trust reposed in him/her by the voters, thus undermining the will of the people; and

iv. The legal implications, effects and consequences of the determinations made above in paragraphs 2(ii) and 2(iii), as well as the actions or inactions of the Election Commission of Pakistan thereon, although deeply concerning, have not been challenged in the present appeals and petitions; and the persons who would be affected or aggrieved are not parties before this Court. Therefore, issuing definitive directions to the Election Commission of Pakistan qua the allocation of specific number of reserved seats for women and non-Muslims to a political party in the National Assembly and the Provincial Assemblies would not be legally appropriate.

3. Accordingly, the Election Commission of Pakistan is directed to decide the allocation of reserved seats for women and non-Muslims to political parties in the National Assembly and the Provincial Assemblies in the light of the determinations made hereinabove after providing an opportunity of hearing to the parties concerned, and if required revisit its earlier decisions on the matter. The needful be done within seven days of the receipt of this order.

Sd/-

Judge

Islamabad

Arif

12th July, 2024.

Order*

in

Civil Appeal No.333/2024, Civil Miscellaneous Application No. 2920/ 2024 in Civil Appeal No.333/2024, Civil Appeal No.334/ 2024, Civil Petitions Nos. 1612 to 1617/2024 and Civil Miscellaneous Application No.3554/2024 in Civil Petition Nil/ 2024.

Sunni Ittehad Council through its Chairman,

Faisalabad and others Appellants/Petitioners

Versus

Election Commission of Pakistan through its

Secretary, Islamabad and others Respondents

---

Justice Amin-ud-Din Khan

Justice Naeem Akhtar Afghan

For reasons to be recorded later, we dismiss the appeals, petition as well as CMAs and the judgment of the Peshawar High Court is upheld.

Sd/- Sd/-

Judge Judge

Islamabad: 12th July, 2024.

Order of the Court

By a majority of 8 (comprising Syed Mansoor Ali Shah, Munib Akhtar, Muhammad Ali Mazhar, Ayesha A. Malik, Athar Minallah, Syed Hasan Azhar Rizvi, Shahid Waheed and Irfan Saadat Khan, JJ) the instant appeals are decided in terms of the short order of the majority of even date (and the other petitions including leave petitions and C.M.As are decided accordingly).

I agree with the short order authored by Justice Jamal Khan Mandokhail.

Justice Qazi Faez Isa, CJ.

Justice Syed Mansoor Ali Shah, J.

Justice Munib Akhtar, J.

With utmost respect I differ. My short order is appended herewith.

Justice Yahya Afridi, J.

I have attached my separate short order dismissing all the appeals, petitions and applications and uphold the impugned judgment of the Peshawar H.C.

Justice Amin-ud-Din Khan, J.

I have appended my separate order.

Justice Jamal Khan Mandokhail, J.

Justice Muhammad Ali Mazhar, J.

Justice Ayesha A. Malik, J.

Justice Athar Minallah, J.

Justice Syed Hasan Azhar Rizvi, J.

Justice Shahid Waheed, J.

Justice Irfan Saadat Khan, J.

I agree with the short order passed by J. Amin-ud-Din Khan.

Justice Naeem Akhtar Afghan, J.

Announced.

Islamabad,

12 July, 2024.

Approved for reporting.

**ORDER**[*]

**JAMAL KHAN MANDOKHAIL, J.---**For reasons to be recorded later, we dispose of these appeals, petitions and miscellaneous applications through a short order as under:

1. These matters involve a controversy regarding the allocation of seats reserved for women and non-Muslims. The Sunni Itehad Council ("SIC") did not contest the General Elections of the year 2024. SIC, which demands allocation of reserved seats on account of inclusion of independent parliamentarians in it, did not secure a single seat in the National Assembly or any of the Provincial Assemblies nor submitted a list of its candidates for seats reserved for women and non-Muslims. Thus, it is not entitled to any of the reserved seats in the National Assembly and in the Provincial Assemblies. The impugned judgment and the order dated 1 March 2024 of the Election Commission of Pakistan ("ECP") to such extent is upheld.

2. Under Article 51(3) of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution"), the total number of seats in the National Assembly shall be 326, out of which 60 seats are reserved for women and 10 seats for non-Muslims. Such right of women and non-Muslims has been guaranteed by the Constitution. They shall be elected in accordance with the law through proportional representation system of political parties' list of candidates on the basis of total number of general seats secured by each political party from the Province concerned in the National Assembly and the Provincial Assemblies, as provided by Article 51(6) (d) and (e) of the Constitution. Therefore, they cannot be deprived of this right of theirs by leaving these seats vacant, and all reserved seats must be filled in, as provided by Article 224(6) of the Constitution.

3. The impugned judgment of the High Court and the said order of the ECP to the extent of the proportional representation distribution of seats amongst the political parties which won and secured seats is also maintained, however, since the ECP calculated and allocated the seats to the parties by the exclusion of the Pakistan Tehreek-e-Insaf ("PTI") candidates, therefore, to such extent, the impugned judgment of the High Court and the order of the ECP are set aside.

4. During the hearing, it transpired that a number of candidates had submitted their nomination papers declaring on Oath that they belonged to PTI supported by an affiliation certificate of the said party, though some did not submit affiliation certificates of PTI, however, since they stated on Oath that they belonged to PTI, and did not contradict themselves, they should be considered to be members of PTI in the National and the Provincial Assemblies. The ECP by misinterpreting the judgment of this Court dated 13 January 2024, which was regarding non-holding intra-party elections in PTI, wrongly mentioned the said candidates of the PTI as independents in Form 33 of the Election Rules. The ECP had no authority to declare validly nominated candidates of a political party to be independent candidates. Similarly, a candidate once declared himself/herself as a candidate of a political party, could not subsequently resile from his/her candidature of a particular party, after the last date of withdrawal of the nomination papers.

5. It is important to mention here that neither the PTI nor any candidate affiliated with PTI approached either this Court before or during the hearing of these proceedings, or the High Court to challenge the decision of the ECP, declaring them as independents. However, in view of the fact that the appeal and the petition are a continuation of election proceedings before the ECP, we can look into the vires of the decision of the ECP in the light of the provisions of Article 51(1)(d) and (e) of the Constitution read with sections 66, 67 and 104 of the Elections Act, 2017 to safeguard the interest of women and non-Muslims. As a consequence whereof, the candidates who had submitted their nomination papers declaring that they belonged to PTI and had not filed a document showing affiliation with another political party before the last date of withdrawal of the nomination papers, should have been treated as the Parliamentary Party of PTI, but the needful was not done by the ECP. Consequently, the PTI as a Parliamentary Party is entitled to the reserved seats. The ECP should recalculate and reallocate the reserved seats amongst the political parties, including the PTI, as provided by Article 51(6)(d) and (e) of the Constitution.

6. The candidates who had submitted their nomination papers by 24 December 2023, which was the last date of submission of nomi-nation papers, and had declared themselves either as independent candidates or had left blank the relevant column in the nomination papers/declaration and were elected shall be considered to be independents. SIC is a registered political party and every indepen-dent member of the National Assembly and of the Provincial Assemblies has a right to join it. All those who joined the SIC are presumed to have done so out of their own free will. None of them claimed to have joined SIC because of any misunderstanding of any judgment, the law, compulsion, coercion or undue influence and it is not for this Court to presume otherwise.

7. We must ensure that words are not read into the Constitution nor to ascribe artificial meaning to commonly understood words. We must also abide by validly enacted laws and must not do anything either to hinder or facilitate a political party by ignoring the laws mandate.

Chief Justice

Judge

Announced in open Court on 12th July, 2024.

at Islamabad Judge

**JUDGMENT**

DETAILED REASONS OF THE SHORT ORDER ANNOUNCED ON 12.7.2024 IN CIVIL APPEAL NO. 333/2024, CMA NO. 2920/2024 IN CIVIL APPEAL NO.333/ 2024, CIVIL APPEAL NO. 334/2024, CIVIL PETITIONS NOS. 1612 TO 1617 OF 2024 AND CMA NO.3554 OF 2024 IN C.P. NIL OF 2024.

AMIN-UD-DIN KHAN, J.

NAEEM AKHTAR AFGHAN, J.

The matter in issue relates to seats reserved for women and non-Muslims in the National Assembly as well as Provincial Assemblies in accordance with Articles 51 and 106 of the Constitution of Islamic Republic of Pakistan, 1973 ('the Constitution') after the general elections which were held on 08.02.2024. After the elections, Sunni Ittehad Council ('SIC')[1] wrote four letters, all dated 21.2.2024 to the Election Commission of Pakistan ('ECP') claiming that after the General Elections held on 8.2.2024, independent candidates whose notifications as returned candidates to the National Assembly/or any one of three Provincial Assemblies i.e. Punjab, KPK and Sindh were issued by the ECP on different dates, joined SIC as a Political Party, accordingly their consent forms/affidavits were filed by the SIC and received in the Commission vide receipt diary numbers mentioned in the letters. The last paragraph of the letters states as follows:

"we look forward to hearing from you at your earliest convenience so that we may submit our priority list to the Commission for notifications of our MNAs (MPAs) on these reserved seats".

These four letters are scanned here for convenience and to consider the admitted position between the parties to the lis with regard to joining of independent returned candidates to SI

2. A significant fact and an admitted position is that SIC did

not participate in the said General Elections as a political party. Not a single candidate participated as a party candidate and even the Chairman of SIC/appellant No.2 participated as an independent candidate in the general elections and was declared a returned candidate as such. For the distribution of reserved seats for women and non-Muslims claimed by various political parties on the basis of
proportional representation system of political parties, list of candidates, the matter was fixed by the ECP for hearing before the Full Election Commission comprising of the Chairman as well as four members and was heard and decided by the Commission through its order announced on 1.3.2024. They held that SIC was not entitled to claim the quota for reserved seats for women and non-Muslims. The said order was challenged by the appellants through two Writ Petitions bearing Nos. 1272-P of 2024 and 1339-P of 2024. Both the writ petitions were heard and dismissed vide the consolidated judgment announced on 14.3.2024 as well as the judgment prepared and signed on 25.3.2024. Against the said judgment, two petitions for leave to appeal i.e. C.P. No. 1328 of 2024 as well as C.P.No.1329 of 2024

were filed, which were fixed before the learned three member bench of this Court on 6.5.2024 in which leave was granted as well as it was referred to the Committee constituted under section 4 of the Supreme Court (Practice and Procedure) Act, 2023 for constitution of a larger bench to hear the appeals which were ordered to be fixed for hearing on 03.06.2024.

3. A larger bench of 13 members was constituted by the Committee and the matter was heard by the learned 13 members bench on
various dates i.e. 03.06.2024, 04.06.2024, 24.06.2024, 25.06.2024, 27.06.2024, 01.07.2024, 02.07.2024 and the last hearing was on 09.7.2024. The short order was announced on 12.07.2024, the majority's order is reproduced:

"Syed Mansoor Ali Shah, Munib Akhtar, Muhammad Ali Mazhar, Ayesha A. Malik, Athar Minallah, Syed Hasan Azhar Rizvi, Shahid Waheed and Irfan Saadat Khan, JJ.: For detailed reasons to be recorded later and subject to
what is set out therein by way of amplification and/or explanation or otherwise, these appeals are decided in the following terms:

1. The impugned judgment dated 25.03.2024 of the learned Full Bench of the High Court is set aside to the extent it is or may be inconsistent with this Order or the detailed reasons.

2. The order of the Election Commission of Pakistan ("Commission") dated 01.03.2024 ("Impugned Order") is declared to be ultra vires the Constitution, without lawful authority and of no legal effect.

3. The notifications (of various dates) whereby the persons respectively mentioned therein (being the persons identified in the Commission's notification No.F.5(1)/2024-Cord. dated 13.05.2024) have been declared to be returned candidates for reserved seats for women and minorities in the National and Provincial Assemblies are declared to be ultra vires the Constitution, without lawful authority and of no legal effect, and are quashed from 06.05.2024 onwards, being the date an
interim order was made by the Court in CPLA Nos. 1328-9
of 2024, the leave petitions out of which the instant appeals arise.

4. It is declared that the lack or denial of an election symbol does not in any manner affect the constitutional and legal rights of a political party to participate in an election (whether general or bye) and to field candidates and the Commission is under a constitutional duty to act, and construe and apply all statutory provisions, accordingly.

5. It is declared that for the purposes, and within the meaning, of paragraphs (d) and (e) of clause (6) of Article 51 ("Article 51 Provisions") and paragraph (c) of clause (3) of Article 106 ("Article 106 Provisions") of the Constitution, the Pakistan Tehreek e Insaf ("PTI") was and is a political party, which secured or won (the two terms being interchangeable) general seats in the National and Provincial Assemblies in the General Elections of 2024 as herein after provided.

6. During the course of the hearing of the instant appeals, on 27.06.2024, learned counsel for the Commission placed before the Court a list ("the List") of 80 returned candidates for the National Assembly (now MNAs),

setting out in tabular form particulars relating to their election. Learned counsel made a categorical statement that the Commission stood by the data so provided to the Court. In particular, the List contained three columns marked as follows: (i) "Statement (on nomination form) given in declaration and oath by the person nominated (i.e., 'I belong to')"; (ii) "Certificate of party affiliation under Section 66 of the Elections Act, 2017"; and (iii) "Statutory Declaration/ affidavit accompanying section 66 certificate".

7. In the peculiar facts and circumstances of the General Election of 2024, it is declared that out of the aforesaid 80 returned candidates (now MNAs) those (being 39 in all and whose particulars are set out in Annex A to this Order) in respect of whom the Commission has shown "PTI" in any one of the aforesaid columns in the List, were and are the returned candidates whose seats were and have been secured by the PTI within the meaning, and for purposes of, para 5 above in relation to the Article 51 Provisions.

8. In the peculiar facts and circumstances of the General Election of 2024, it is further ordered that any of the remaining 41 returned candidates out of the aforesaid 80 (whose particulars are set out in Annex B to this Order) may, within 15 working days of this Order file a statement duly signed and notarized stating that he or she contested the General Election as a candidate of the political party specified therein. If any such statement(s) is/are filed, the Commission shall forthwith but in any case within 7 days thereafter give notice to the political party concerned to file, within 15 working days, a confirmation that the candidate contested the General Election as its candidate. A political party may in any case, at any time after the filing of a statement as aforesaid, of its own motion file its confirmation. If such a statement is filed, and is confirmed by the political party concerned, then the seat secured by such candidate shall be forthwith deemed to be a seat secured by that political party for the purposes of para 5 above in relation to the Article 51 Provisions. The Commission shall also forthwith issue, and post on its website, a list of the retuned candidates (now MNAs) and seats to which this para applies within 7 days after the last date on which a political party may file its confirmation and shall simultaneously file a compliance report in the Court.

9. For the purposes of para 5 of this Order in relation to the Article 51 Provisions, the number of general seats secured by PTI shall be the total of the seats declared in terms of para 7 and those, if any, to which para 8 applies. The PTI shall be entitled to reserved seats for women and minorities in the National Assembly accordingly. PTI shall, within 15 working days of this Order file its lists of candidates for the said reserved seats and the provisions of the Elections Act, 2017 ("Act") (including in particular section 104) and the Elections Rules, 2017 ("Rules") shall be applied to such lists in such manner as gives effect to this Order in full measure. The Commission shall, out of the reserved seats for women and minorities in the National Assembly to which para 3 of this Order applies, notify as elected in terms of the Article 51 Provisions, that number of candidates from the lists filed (or, as the case may be, to be filed) by the PTI as is proportionate to the general seats secured by it in terms of paras 7 and 8 of this Order.

10. The foregoing paras shall apply mutatis mutandis for purposes of the Article 106 Provisions in relation to PTI (as set out in para 5 herein above) for the reserved seats for women and minorities in the Khyber Pakhtunkhwa, Punjab and Sindh Provincial Assemblies to which para 3 of this Order applies. In case the Commission or PTI need any clarification or order so as to give effect to this para in full measure, it shall forthwith apply to the Court by making an appropriate application, which shall be put up before the Judges constituting the majority in chambers for such orders and directions as may be deemed appropriate.

Annexure-A

(Names of Candidates Affiliated with the Pakistan Tehreek-e-Insaf
as per the list verified from the data provided by ECP[1])

| Sr. No. | Number and Name of the Constituency | Name of the Candidate |
|---|---|---|
| 1. | NA-2 (Swat-I) | Amjad Ali Khan |
| 2. | NA-3 (Swat-II) | Saleem Rehman |
| 3. | NA-4 (Swat-III) | Sohail Sultan |
| 4. | NA-6 (Lower Dir-I) | Muhammad Bashir Khan |

| | | |
|---|---|---|
| 5. | NA-7 (Lower Dir-II) | Mehboob Shah |
| 6. | NA-9 (Malakand) | Junaid Akbar |
| 7. | NA-17 (Abbottabad-II) | Ali Khan Jadoon |
| 8. | NA-19 (Swabi-I) | Asad Qaiser |
| 9. | NA-20 (Swabi-II) | Shahram Khan |
| 10. | NA-21 (Mardan-I) | Mujahid Ali |
| 11. | NA-24 (Charsadda-I) | Anwar Taj |
| 12. | NA-25 (Charsadda-II) | Fazal Muhammad Khan |
| 13. | NA-29 (Peshawar-II) | Arbab Amir Ayub |
| 14. | NA-30 (Peshawar-III) | Shandana Gulzar Khan |
| 15. | NA-31 (Peshawar-IV) | Sher Ali Arbab |
| 16. | NA-32 (Peshawar-V) | Asif Khan |
| 17. | NA-33 (Nowshera-I) | Syed Shah Ahad Ali Shah |
| 18. | NA-38 (Karak) | Shahid Ahmad |
| 19. | NA-39 (Bannu) | Nasim Ali Shah |
| 20. | NA-41 (Lakki Marwat) | Sher Afzal Khan |
| 21. | NA-83 (Sargodha-II) | Usama Ahmed Mela |
| 22. | NA-84 (Sargodha-III) | Shafqat Abbas |
| 23. | NA-95 (Faisalabad-I) | Ali Afzal Sahi |
| 24. | NA-96 (Faisalabad-II) | Rai Haider Ali Khan |
| 25. | NA-100 (Faisalabad-VI) | Nisar Ahmed |
| 26. | NA- 101 (Faisalabad-VII) | Rana Atif |
| 27. | NA-102 (Faisalabad-VIII) | Changaze Ahmad Khan |
| 28. | NA-103 (Faisalabad-IX) | Muhammad Ali Sarfraz |
| 29. | NA-115 (Sheikhupura-III) | Khurram Shahzad Virk |
| 30. | NA-122 (Lahore-VI) | Sardar Muhammad Latif Khan Khosa |
| 31. | NA-143 (Sahiwal-III) | Rai Hassan Nawaz Khan |
| 32. | NA-149 (Multan-II) | Malik Muhammad Aamir Dogar |
| 33. | NA-150 (Multan-III) | Makhdoom Zain Hussain Qureshi |
| 34. | NA-154 (Lodhran-I) | Rana Muhammad Faraz Noon |
| 35. | NA-171 (Rahim Yar Khan-III) | Mumtaz Mustafa |
| 36. | NA-179 (Kot Addu-I) | Muhammad Shabbir Ali Qureshi |
| 37. | NA-181 (Layyah-I) | Umber Majeed |
| 38. | NA-182 (Layyah-II) | Awais Haider Jakhar |
| 39. | NA-185 (D.G. Khan-II) | Zartaj Gul |

Annexure-B

(Names of Independent Candidates)

| Sr. No. | Number and Name of the Constituency | Name of the Candidate |
|---|---|---|
| 1. | NA-1 (Chitral Upper-cum-Chitral Lower) | Abdul Latif |
| 2. | NA-5 (Upper Dir) | Sahibzada Sibghatullah |
| 3. | NA-13 (Battagram) | Muhammad Nawaz Khan |
| 4. | NA-22 (Mardan-II) | Muhammad Atif |
| 5. | NA-23 (Mardan-III) | Ali Muhammad |

| | | |
|---|---|---|
| 6. | NA-26 (Mohmand) | Sajid Khan |
| 7. | NA-27 (Khyber) | Muhammad Iqbal Khan |
| 8. | NA-34 (Nowshera-II) | Zulfiqar Ali |
| 9. | NA-35 (Kohat) | Shehryar Afridi |
| 10. | NA-36 (Hangu-cum-Orakzai) | Yousaf Khan |
| 11. | NA-42 (South Waziristan Upper-cum-South Waziristan Lower) | Zubair Khan |
| 12. | NA-66 (Wazirabad) | Mohammad Ahmed Chattha |
| 13. | NA-67 (Hafizabad) | Aniqa Mehdi |
| 14. | NA-68 (Mandi Bahauddin-I) | Haji Imtiaz Ahmed Choudhry |
| 15. | NA-78 (Gujranwala-II) | Muhammad Mobeen Arif |
| 16. | NA-79 (Gujranwala-III) | Ihsan Ullah Virk |
| 17. | NA-181 (Gujranwala-V) | Ch. Bilal Ejaz |
| 18. | NA-86 (Sargodha-V) | Muhammad Miqdad Ali Khan |
| 19. | NA-89 (Mianwali-I) | Muhammad Jamal Ahsan Khan |
| 20. | NA-90 (Mianwali-II) | Umair Khan Niazi |
| 21. | NA-91 (Bhakkar-I) | M. Sana Ullah Khan Mastikhel |
| 22. | NA-93 (Chiniot-I) | Ghulam Muhammad |
| 23. | NA-97 (Faisalabad-III) | Muhammad Saad Ullah |
| 24. | NA-99 (Faisalabad-V) | Umar Farooq |
| 25. | NA-105 (Toba Tek Singh-I) | Usama Hamza |
| 26. | NA-107 (Toba Tek Singh-III) | Mohammad Riaz Khan |
| 27. | NA-108 (Jhang-I) | Muhammad Mahbob Sultan |
| 28. | NA-109 (Jhang-II) | Waqas Akram |
| 29. | NA-110 (Jhang-III) | Muhammad Ameer Sultan |
| 30. | NA-111 (Nankana Sahib-I) | Muhammad Arshad Sahi |
| 31. | NA-116 (Sheikhupura-IV) | Khurram Munawar Manj |
| 32. | NA-129 (Lahore-XIII) | Mian Muhammad Azhar |
| 33. | NA-133 (Kasur-III) | Azim Uddin Zahid |
| 34. | NA-137 (Okara-III) | Syed Raza Ali Gillani |
| 35. | NA-156 (Vehari-I) | Ayesha Nazir |
| 36. | NA-170 (Rahim Yar Khan-II) | Mian Ghous Muhammad |
| 37. | NA-172 (Rahim Yar Khan-IV) | Javaid Iqbal |
| 38. | NA-175 (Muzaffargarh-I) | Jamshaid Ahmad |
| 39. | NA-177 (Muzaffargarh-III) | Muhammad Moazzam Ali Khan |
| 40. | NA-180 (Kot Addu-II) | Fiaz Hussain |
| 41. | NA-183 (Taunsa) | Khawaja Sheraz Mehmood |

4. Therefore, the majority's order, which became the Order of the Court was noted as under:

Order of the Court

By a majority of 8 (comprising Syed Mansoor Ali Shah, Munib Akhtar, Muhammad Ali Mazhar, Ayesha A. Malik, Athar Minallah, Syed Hasan Azhar Rizvi, Shahid Waheed and Irfan Saadat Khan, JJ) the instant appeals are decided in terms of the short order of the majority of even date (and the other petitions including leave petitions and C.M.As are decided accordingly).

I agree with the short order authored by Justice Jamal Khan Mandokhail.

Justice Qazi Faez Isa, CJ.

Justice Syed Mansoor Ali Shah, J.

Justice Munib Akhtar, J.

With utmost respect I differ. My short order is appended herewith.

Justice Yahya Afridi, J.

I have attached my separate short order dismissing all the appeals, petitions and applications and uphold the impugned judgment of the Peshawar H.C.

Justice Amin-ud-Din Khan, J.

I have appended my separate order.

Justice Jamal Khan Mandokhail, J.

Justice Muhammad Ali Mazhar, J.

Justice Ayesha A. Malik, J.

Justice Athar Minallah, J.

Justice Syed Hasan Azhar Rizvi, J.

Justice Shahid Waheed, J.

Justice Irfan Saadat Khan, J.

I agree with the short order passed by J. Amin-ud-Din Khan.

Justice Naeem Akhtar Afghan, J.

5. The detailed majority judgment has not yet come to surface, despite the expiry of the 15 days mentioned therein. The delay may render infructuous, the review petition filed against the order of the court. Therefore, on the basis of the short order we have been compelled to record our findings, which are in two parts. The first part states why we are unable to agree with the majority decision and the second part states our decision on the appeals based on the merits of the case.

6. The admitted position is that the subject matter in the instant litigation before this Court was petitions filed under Article 185(3) of the Constitution against the judgment of the five member bench of the Peshawar High Court whereby writ petitions filed by the appellants were dismissed. Leave was granted by this Court vide order dated 6.5.2024, which is reproduced:

"Learned counsel for the petitioners submits that allocation of the reserved seats for women and non-Muslims to the political parties other than the petitioner, Sunni Ittehad Council ("SIC"), is in violation of Article 51(6) (d) & (e) of the Constitution of the Islamic Republic of Pakistan ("Constitution") which provides for proportional representation system on the basis of total number of general seats secured by each political party from the Province concerned in the National Assembly. Once a political party has been allocated the reserved seats on the basis of proportional representation system, the remaining seats cannot be re-allocated to the same political party. As per Letter issued by the Election Commission of Pakistan dated 25.04.2024, he submits, it has been acknowledged that SIC is a parliamentary party having 82 general seats in the National Assembly. Therefore, SIC is entitled to reserved seats as per the proportional representation system in terms of Articles 51(6) (d) & (e) and 106(2) (c) (sic) of the Constitution.

2. On the other hand, Mr. Sikandar Bashir Mohmand, learned counsel for the Election Commission of Pakistan ("ECP"), submits that according to Articles 51 and 106 of the Constitution the reserved seats have to be allocated on the proportional representation system only to those political parties who have contested the general elections and won atleast one seat in the said elections. Since SIC did not contest the elections and did not win even a single seat in the general elections, it cannot be considered as a political party in terms of Articles 51(6) (d) and (e) and 106(2)(c) (sic) of the Constitution, for the purpose of allocating the reserved seats. Learned Attorney-General for Pakistan ("AGP") supports the contentions of the learned counsel for the ECP. Both the learned counsel for ECP and the learned AGP frankly concede that this is a case of first impression involving questions of constitutional law that have not been addressed by the Court earlier.

3. The above questions of allocation of reserved seats in the National and Provincial Assemblies touch upon the foundational constitutional concept of a parliamentary democracy that the voice of the electorate is truly reflected in the composition of the assemblies. Democratic mandate necessitates that the allocation of reserved seats enhances the representativeness of the electorate in the assemblies and upholds the principles of fairness and transparency in the electoral process. It is paramount to prioritize the integrity of the elections so that the Parliament remains a true reflection of the will of the people.

4. Therefore, leave to appeal is granted to consider, amongst others, the said questions. The appeals are to be posted for hearing on 03.06.2024. The appeal arising out of these petitions will be heard on the basis of available record; however, both sides are at liberty to file any additional documents, which were part of the record before the fora below but have not been filed with instant petitions.

5. Notices under Order XXVII-A, C.P.C. be issued to the learned AGP as well as the Advocates-General of the Provinces.

C.M.A. 2920 of 2024:

6. Notice for the same date. In the meanwhile, operation of the impugned judgment of the Peshawar High Court dated 25.03.2024, as well as, the order of the Election Commission of Pakistan dated 01.03.2024 is suspended. It is, however, clarified that this interim order relates to the disputed seats only, i.e.,
the reserved seats allocated over and above the initially
allocated reserved seats to the political parties. It is also
clarified that this order is to operate prospectively, w.e.f., from today.

C.M.A. 3554/2024:

7. Notice. To be heard along with CPLA No.1328/2024 on 03.06.2024.

8. Since the questions under consideration require constitutional interpretation, the matter be placed before the Committee
under Section 4 of the Supreme Court (Practice and Procedure) Act, 2023 for constitution of a larger bench to hear the
appeals."

7. The independent returned candidates joined the appellant, and their joining was duly processed, accepted and notified by the ECP with regard to the National Assembly as well as the three Provincial Assemblies. None has ever disputed the joining to SIC of the 39 and 41 persons mentioned in Annexures A & B of the majority short order within three days, as prescribed by the Constitution. Notifications as the returned independent candidates in the general elections were issued and their submitting affidavit and requisite documents etc. for joining SIC. The other contesting political parties, who were parties before the ECP as well as the High Court and before this Court also did not dispute their joining SIC. SIC does not dispute their joining SIC. The said persons have also never disputed their joining the SIC. Furthermore, PTI was not a party to these proceedings starting from the ECP, then before the High Court nor before this Court. Even at the time of the announcement of the short order neither any person from PTI nor PTI joined the proceedings. Not a single one of said 80 persons, mentioned in the short order, were parties before this Court collectively or in their individual capacity. They were never heard. The claim of the SIC before the ECP was that SIC was entitled to the reserved seats on the basis of the said persons joining SIC.

8. To appreciate the arguments advanced before the Court and for giving clear picture and understanding to a person reading this judgment, it will be appropriate that most relevant portions of Articles of the Constitution i.e. Article 51(6) (d) & (e) and Article 106 and section 104 of the Elections Act, 2017 are reproduced:

"Article 51

(1). --------

(2). --------

(3). --------

(4). --------

(5). --------

(6) For the purpose of election to the National
Assembly,--

(a) --------

(b) --------

(c) --------

(d) members to the seats reserved for women which are allocated to a Province under clause (3) shall be elected in accordance with law through proportional representation system of political parties' lists of candidates on the

basis of total number of general seats secured by each political party from the Province concerned in the National Assembly:

Provided that for the purpose of this paragraph the total number of general seats won by a political party shall include the independent returned candidate or candidates who may duly join such political party within three days of the publication in the official Gazette of the names of the returned candidates; and

(e) members to the seats reserved for non-Muslims shall be elected in accordance with law through proportional representation system of political parties' lists of candidates on the basis of total number of general seats won by each political party in the National Assembly:

Provided that for the purpose of this paragraph the total number of general seats won by a political party shall include the independent returned candidate or candidates who may duly join such political party within three days of the publication in the official Gazette of the names of the returned candidates."

"Article 106

(1) -------

(2) -------

(3) For the purpose of election to a Provincial Assembly,--

(a) -------

(b) -------

(c) the members to fill seats reserved for women and non-Muslims allocated to a Province under clause (1) shall be elected in accordance with law through proportional representation system of political parties' lists of candidates on the basis of the total number of general seats secured by each political party in the Provincial Assembly:

Provided that for the purpose of this sub-clause, the total number of general seats won by a political party shall include the independent returned candidate or candidates who may duly join such political party within three days of the publication in the official Gazette of the names of the returned candidates."

and

"Section 104. Party lists for reserved seats.-(1) For the purpose of election to seats reserved for women and non-Muslims in an Assembly, the political parties contesting election for such seats shall, within the period fixed by the Commission for submission of nomination papers, file separate lists of their candidates in order to priority for seats reserved for women and non-Muslims with the Commission or, as it may direct, with the Provincial Election Commissioner or other authorized officer of the Commission, who shall forthwith cause such lists to be published for information of the public:

Provided that the list submitted by a political party shall not be subject to change or alteration either in the order of priority or through addition of new names in the list or omission of any name after expiry of the date of submission of nomination papers.

(2). The parties' lists referred to in subsection (1) may contain as many names of additional candidates as a political party may deem necessary for contesting seats reserved for women and non-Muslims, to provide for any disqualification of candidates during scrutiny of nomination papers or for filling of any vacant seats during the term of an Assembly.

(3). A candidate to a seat reserved for women or non-Muslims shall file the nomination papers on the Form on or before the last date fixed for filing of nomination papers for the election and the nomination papers shall, as nearly as possible, be scrutinized in the same manner as nomination papers of candidates on general seats are scrutinized under section 62.

(4). If, at any time, the party list is exhausted, the political party may submit a name for any vacancy which may occur thereafter and the provisions of subsections (1), (2) and (3) shall, as nearly as possible, apply to fill such vacancy.

(5). Where a seat reserved for women or non-Muslims in an Assembly falls vacant as a result of death, resignation or disqualification of a Member, it shall be filled in by the next person in order of precedence from the party's list of candidates submitted to the Commission under subsection (1).

(6). Before notifying the name of the next person in order of priority from the party list, such person shall submit a declaration on oath that since the filing of his nomination paper, he has not become subject to any disqualification contained in Article 63.

(7). A candidate contesting election on a seat reserved for women or non-Muslims shall, along with the nomination papers and its annexures, submit to the Returning Officer appointed by the Commission in this behalf ----

(a). a copy of the party list of the candidate's political party for such seats;

(b). declarations and statements in support of the nomination; and

(c). proof of deposit of the fee required for filing nomination papers.

(8). Where there is equality of share on a reserved seat between two or more political parties, the Returning Officer shall declare the returned candidate by drawing of lots."

9. During the hearing of the appeals before this Court on the above-said eight dates of hearing by the thirteen member Bench of this Court, most of the time was consumed by the queries made by various members of the Bench to the learned counsel for the appellant as well as to Mr. Salman Akram Raja, who moved C.M.A. No. 3554 of 2024 on behalf of Kanwal Shauzab for permission to file CPLA, and in paragraph No. 2 of C.P.L.A. No.NIL of 2024 it was pleaded that:

"the petitioner expected to be considered, and to be nominated as candidate of the Sunni Ittehad Council for seats reserved for women in the Khyber Pakhtunkhwa Provincial Assembly as well as the National Assembly of Pakistan."

She also sought leave against the judgment of the five member bench

of the Peshawar High Court (wrongly mentioned as Division Bench).

On query by some members of the Bench, whether the reserved seats can be given to PTI in the peculiar circumstances of this case, none of the counsels agreed to this, though the suggestion was made by some of the members of the Bench repeatedly to the learned counsel for the appellant as well as to Mr. Salman Akram Raja. I recall that Mr. Salman Akram Raja replied that he will not press that the seats be given to PTI, but the Court has the power to do so. In these circumstances, we have thoroughly considered the hurdles before us which forced us to disagree with the majority decision and these are listed hereunder:

i. PTI was not before this Court nor before the High Court nor even before the ECP;

ii. The joining of 80 independent returned candidates to SIC was never disputed by anyone;

iii. The said 39 plus 41 persons as mentioned in the majority's short order did not come before this Court nor were they heard. The majority short order decides about their rights or lack thereof without their consent or even hearing them. Their joining of SIC has been undone without such prayer of anyone before this Court, or before the High Court.

iv. Not only the appeals filed by the SIC have been dismissed by the majority order, as no relief has been granted to SIC but independent members who joined the SIC have also been snatched from the SIC and that too without hearing the above said 39 plus 41 persons.

v. Unless Articles 51, 106 and 63 of Constitution are suspended and in their place new articles in consonance with the relief granted through the majority order are inserted in the Constitution, the relief which has been granted to the PTI cannot be granted.

vi. Article 175 of the Constitution has been ignored.

vii. The constitutional limits of jurisdiction under Article 185 of the Constitution have been ignored.

viii. All substantive as well as procedural law with regard to parties to lis have been ignored.

ix. The relief granted to PTI will be self-created and has been carved out relief by the majority, as none has claimed this relief in these proceedings.

x. Not only SIC has not been granted relief claimed by it but all those who have joined it have been taken off and for the rest of the tenure of the National as well as Provincial assemblies SIC has been kicked out from the assemblies.

xi. For a specific date i.e. 6.5.2024 the notification of returned candidates for special seats has been quashed, however before that date their notification and acts are held to be valid. It is incomprehensible how can this be done, as it is without any backing of Constitution.

xii. The majority judgment virtually declares that said 80 persons are not honest and ameen in accordance with Article 62 (1) (f) of the Constitution.

xiii. All the returned candidates for the reserved seats of other parties who have been notified were not issued notices and provided an opportunity of hearing.

xiv. 41 candidates mentioned in Annexure-B have been given the choice of joining any other Political Party.

xv. The issue was simply the matter of post general elections directly related to the reserved seats for both women and non-Muslims on the basis of proportional representation system of political parties' lists of candidates under Articles 51 and 106 of the Constitution. The majority's short order in effect created a new parliamentary party in the National Assembly and three Provincial Assemblies and since this related to the pre election process, it is clearly and unequivocally not an issue before this Court. In the process of the general elections all events are scheduled and time-bound and the same cannot be reversed.

xvi. The judgment of the full Bench of the Peshawar High Court has been set aside by the majority's short order to the extent, that it is or may be inconsistent of the majority's short order. This is incomprehensible as none of the rights which have now been created in favour of PTI by the majority's short order were in issue before the High Court, nor had been adjudicated upon. The High Court had simply dismissed SIC's claim to the reserved seats, which was the lis before the High Court.

In conclusion, it is clear that the superstructure created by the majority's short order, does not in any way come within the ambit of the jurisdiction vested in this Court or in the Constitution.

10. Vires of section 104 of the Elections Act, 2017 was initially challenged before the High Court. Even in the pleadings before this Court the vires was challenged, but at the time of the hearing by the thirteen member bench, the learned counsel for the appellant categorically stated more than once before the Court and when the court inquired from him whether the appellants still press their challenge to the vires of section 104 of the Act and the learned counsel categorically stated that he does not challenge the vires of section 104 and he will instead submit his arguments with regard to the interpretation of section 104 of the Elections Act, 2017. Unless Section 104 as well as the relevant rules are also suspended and new sections/rules are substituted, the majority order cannot be passed.

11. We are always conscious of our jurisdiction before hearing a matter fixed before us whether as a Judge of the High Court or that of this Court. In the instant matter, we are conscious that we are sitting in a jurisdiction vested in this Court under Article 185 of the Constitution and can exercise jurisdiction under Article 175 of the Constitution, but cannot exercise any other jurisdiction as this is not conferred upon this Court, therefore, it cannot be exercised. In this matter only the appellate jurisdiction of the Court was invoked by filing petitions under Article 185(3) of the Constitution whereafter leave was granted. The matters alien to the jurisdiction vested in this Court cannot be considered nor decided by this Court. The majority judgment ignores all rules of procedure, substantive provisions of law and the Constitution. Relief cannot be granted to the PTI as PTI was not before the Court nor tried to become a party before the ECP, High Court and before this Court nor was claiming the reserved seats, which were in issue in the instant litigation. If the said 39 plus 41 persons take any step on the basis of this judgment which is not in accordance with the Constitution they may lose their seats as returned candidates on the basis of violation of the Constitution. We are also of the firm view that any other constitutional body cannot be asked to take any steps or decisions which are not permissible under the Constitution. If the said 80 persons change their stance on the basis of the majority judgment, they will be guilty of violating their oath, which is provided under Article 65 (Third Schedule), being the Oath for the members of the National Assembly. The first paragraph is relevant, which is reproduced and which is similar to the Provincial Assembly oath with some modification:

"That, as a member of the National Assembly (or Senate), I will perform my functions honestly, to the best of my ability, faithfully, in accordance with the Constitution of the Islamic Republic of Pakistan, and the law, and

the rules of the Assembly (or Senate), and always in the interest of the sovereignty, integrity, solidarity, well-being and prosperity of Pakistan."
(bold and underlying by us)

12. For creating and carving out relief in these proceedings for PTI, we would have to travel beyond the jurisdiction conferred by Articles 175 and 185 of the Constitution and would also have to suspend Articles 51, 106 and 63 of the Constitution and section 104 of the Elections Act, 2017 along with the relevant rules. We would also have to insert instead of Articles 51, 106 and section 104 (mentioned supra). Such articles and sections therein in substitution and in consonance with the relief granted through the majority judgment. Previously there was a term used which was "reading in to the Constitution" or "reading down the Constitution" but now a new phrase has been introduced that of "inserting new Articles in consonance with the relief to be granted in the peculiar circumstances of the case" in the Constitution. We do not have the courage to go to such an extent to give relief to a party who is not before the Court or who did not join the proceedings and pray for such relief. All the rules of procedures of proceedings before the Supreme Court and the Supreme Court Rules, 1980 would also have to be ignored as neither any party before the Court asked in writing nor orally for the relief which has been granted to PTI.

13. Regarding joining of 80 persons no one has denied that they have joined SIC, ECP does not deny this nor any other contesting party denies it. Even PTI does not deny this, who then are we to undo all these things and reverse the same and create a new process plus create a new and arbitrary time limit for joining any party of their choice by disregarding the mandate of the Constitution. In our view neither Articles 62(2), 63 and 63-A have been suspended nor can be suspended, therefore, any affidavit contrary to the provisions of the affidavits already filed will entail the penal consequences of non-seating such members of National Assembly and Provincial Assemblies if he/she files a fresh affidavit in contradiction to his/her previous affidavit and joins any other party. Any order of the Court which is not in consonance with the constitutional provisions is not binding upon any other constitutional organ of the State.

14. Now we proceed to record some more facts, arguments and our reasons for dismissing the appeals, petitions and the applications.

15. We heard thorough arguments of learned counsel for the appellants Mr. Asad Jan Durrani, ASC KPK along with Malik Khawas, Assistant Law Officer, KPK Assembly, Mr. Salman Akram Raja, ASC (who moved C.M.A. No. 3554 of 2024 in C.P. No. NIL of 2024), Mr. Makhdoom Ali Khan, ASC, who represented respondent Nos.15 to 19, 21 and 22, who were the returned candidates for the reserved seats belonging to PML(N), JUI(P), PPPP and Mr. Sikandar Bashir Mohmand, learned counsel for ECP. Learned counsel for JUI adopted the arguments of learned counsel for ECP. Learned counsel for PML(N), Mr.Shehzad Shaukat adopted the arguments of Mr. Makhdoom Ali Khan and, learned counsel for respondent No.20 adopted the arguments of ECP. Maulvi Iqbal Haider also adopted the arguments of learned counsel for ECP. We have also heard the learned Attorney- General for Pakistan Mr. Mansoor Usman Awan, who submitted the formula for entitlement of reserved seats proportionately for the Political Parties with reference to his written submissions submitted through CMA No.5911 of 2024. Learned counsel for the parties produced record through CMAs as well as their written submissions and the case law also. There were four major counsels/set of counsels who pleaded the case before this Court. On one side there was counsel for the appellants who gets support from the learned Advocate General, KPK as well as learned Mr. Salman Akram Raja. On the other side was the learned Attorney-General as well as the learned counsel for the ECP and learned Mr. Makhdoom Ali Khan, representing the returned candidates for the reserved seats of various Political Parties. The appellant side attacked the order of the ECP as well as that of the learned five member Bench of the Peshawar High Court, and argued that the reserved seats for women and non-Muslims in accordance with the proportionate representation are the right of SIC. Whereas the learned Attorney- General for Pakistan as well as the learned counsel for ECP and the learned Mr. Makhdoom Ali Khan have supported the decision of the ECP to be absolutely correct and in accordance with the Constitution and the law. Learned Mr. Makhdoom Ali Khan has argued with reference to Section 57 of the Elections Act, 2017 as well as its section 206 and Rule 94 of the Election Rules and Article 226 of the

Constitution. Rule 94 with regard to powers of the Commission to declare seats won by each Political Party and supported the judgment of the High Court and prayed for dismissal of the appeals.

16. The premise of the arguments of learned counsel for the appellants seems to be on the questions, mainly question No.3 and question No.4 as framed by the learned counsel for the appellant submitted through CMA No. 5273 of 2024, Part 2, which are reproduced:

"3. Whether any Political Party could be allocated reserved seats disproportionate to their representation based on the total number of general seats secured by them?

4. Whether there is constitutional absence or silence about a situation, in which there are left over reserved seats which cannot be allocated to any party either because of disentitlement or disproportionality? If so, how can this be resolved?"

The arguments of the learned counsel for the appellant mainly revolved upon these two questions and the stance of the learned counsel was that on the basis of interpretation, as per the understanding of the learned counsel for the appellant, when a Political Party is a listed party in the ECP even if that party has not participated in the General Elections and after the notification of the independent returned candidates the joining of independent candidates makes the political party eligible for the reserved seats for women and non-Muslims, we are afraid that this interpretation is absolutely against the wording of Article 51 and of Article 106 of the Constitution. By interpretation no one can read into nor read down the Constitution. It is clearly mentioned that the political party which won in the General Elections and the independent candidates joining such political party can enhance the proportion of such party. We are clear in our mind that if an independent candidate joins a party, though it may be listed as a political party with ECP, does not make that party entitled for the reserved seats. The joining of independent candidates only enhances the proportion of right in the reserved seats of that party if that party has won seats. By the joining of independent candidates with any political party does not create a right in favour of that political party to become eligible for reserved seats only on the basis of the joining of independent candidates. Question Nos.3 and 4 noted supra are absolutely misconceived. There is no question of disproportionate allocation of reserved seats as the seats are for the political parties entitled to the same. A political party which is not entitled for the same cannot claim proportionate allocation in the reserved seats, therefore, there is no question of disproportionate allocation of seats to political parties not entitled for the seats, in accordance with the formula of distribution of seats presented by the learned Attorney-General. The seats were given to the political parties which were entitled for the same. The formula of the distribution has not been specifically challenged by the appellants. If the appellants are not entitled to the special seats then the formula presented by the learned Attorney-General for Pakistan remains undisputed. Even the majority judgment of this Court as well as our other learned brothers are unanimous on the point that SIC is not entitled to the reserved seats.

17. Mr. Faisal Siddiqi further argued on the basis of what he stated was the doctrine of progressive interpretation of the Constitution and on the basis of said interpretation has tried to analyze Article 51(6)(d)&(e) and Article 106(3) (c) of the Constitution as well as section 104 of the Elections Act, 2017 and rules 92 and 96 of the Election Rules, 2017. We absolutely do not agree with the understanding of learned counsel for the appellants with regard to the said doctrine of progressive interpretation of the Constitution and of the provisions of Elections Act, 2017 and the Rules as his understanding is absolutely misconceived, that there is a constitutional absence or silence about the situation or with regard to disentitlement or disproportionately. There is absolutely no silence about the situation in the Constitution. The Constitution is absolutely clear and which has rightly been held so by the learned five member Bench of the Peshawar High Court through the impugned judgment.

18. As we have noted, by the majority's order virtually all the persons who joined the SIC and their joining of SIC has been undone. Further positions in the process of working of the proportional representation system of political parties is affected through the majority's order. For instance, at Sr.No.39 of Annexure-A Ms. Zartaj Gul from NA-185 (D.G.Khan-II) was appointed by the SIC as the Party Leader of SIC in the National Assembly, and her notification was

issued by the Secretary General of the Assembly bearing No.F.1(1)/ 2024-N.O, Islamabad dated 23 June 2024, which was produced by the learned counsel for the appellants in CMA No. 5944 at Page 7. By the majority judgment her position and the other positions given to the SIC also go.

19. As we have noted in the start of this order that the matter of the allocation of reserved seats for women and non-Muslims on the basis of proportional representation system of political parties arose before the ECP when the appellant informed the ECP that the independent candidates from National Assembly as well as Provincial Assemblies have joined them, and by stating that they did not participate in the General Elections as a political party, even though SIC was a registered political party in the List of Political Parties maintained by the ECP. The valid joining of the independent members was recognized by the ECP as well as by the other contesting parties who also joined the proceedings, when all the concerned matters were fixed for hearing before the ECP comprising of the entire Commission, of the Chairman and the four Members. Para-1 of the order of ECP dated 1.3.2024 is reproduced to correctly appreciate the undisputed factual position:

"Brief facts of the matter are that all the above mentioned petitioners have filed petitions before the Commission in respect of the allocation of reserved seats for women and non-Muslims in the National and Provincial Assemblies constituted as a result of General Elections 2024, held on 08.02.2024. The Commission issued notification in which the independent candidates were notified as Returned Candidates in the National and Provincial Assemblies. Subsequent to the notifications some of the independent candidates joined Political Party Sunni Ittehad Council (SIC) and their affidavits were forwarded to the Commission by the said Political Party in respect of

National Assembly, Provincial Assembly Punjab and Provincial Assembly KP and Provincial Assembly of Sindh. Sunni Ittehad Council requested for allocation of share in the seats reserved for women and non-Muslim in the National Assembly and three Provincial Assemblies mentioned above. Different applications were filed by the major Political Parties including MQM-P, PPPP and PML(N) and also some individuals for allocation of reserved seats as per their share in the Assemblies. The petitioners also agitated that Sunni Ittehad Council is not eligible to obtain the quota/share in reserved seats for women and non-Muslim. Matters were placed in the meetings of the Commission and decided to fix the same for hearing before full Commission."

20. The ECP on the basis of admitted facts and in accordance with Article 51(6) (d) and Article 106(3) allocated seats in accordance with law through the proportional representation system of political parties' lists of candidates on the basis of the total number of seats secured by each political party. Admittedly, the SIC did not participate in the elections as a political party and, therefore, it did not file any list of candidates in accordance with section 104 of the Elections Act, 2017. None of the parties before the court or anyone else disputed the election program issued by the ECP for the elections held on 8.2.2024. Learned counsel for the SIC wants to take benefit of the proviso to Clause (d) of sub-clause (6) of Article 51 that the interpretation that even when a party has not participated in the elections and has not won a single seat, if the independent candidates join it then such party is entitled to the reserved seats for women and non-Muslims, we are afraid that by no stretch of the imagination this interpretation of the proviso can be as learned counsel for the appellants wants the interpretation to be. The proviso only enables adding to the seats won by a political party in the elections as is clearly mentioned, that the total number of general seats won by a political party shall include the independent returned candidate or candidates who may duly join such political party. Such political party means a party which has won seats and is in parliament and not a party who has not participated in the elections and filed not a single nomination paper by any candidate of the said party. Even if all the independent candidates join the said party they would

not be entitled to reserved seats. In this view of the matter, the view taken by the ECP as well as by the learned five member bench of the Peshawar High Court is absolutely correct and in accordance with the Constitution. Even none of us i.e. thirteen members, has given relief to SIC who challenged the judgment of the Peshawar High Court, claim of the SIC has been discarded including the majority judgment.

21. In view of what has been discussed above, the learned High Court had rightly dismissed the writ petitions filed by the appellants, and the appeals are liable to be dismissed as there is no defect in the impugned judgment.

These are the detailed reasons for dismissing the appeals. In the connected CPs leave has been sought against the judgment passed by the Peshawar High Court, however, as the
appeals have been dismissed on merits, therefore, there is no need to further dilate upon the said CPs and the CMAs and the same are also dismissed.

22. These are the reasons of our short order dated 12.7.2024 which is also reproduced:

"For reasons to be recorded later, we dismiss the appeals, petitions as well as CMAs and the judgment of the Peshawar High Court is upheld."

Sd/-

Judge

Sd/-

Judge

3rd August, 2024

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

In Chambers:*

Justice Syed Mansoor Ali Shah

Justice Munib Akhtar

Justice Muhammad Ali Mazhar

Justice Ayesha A. Malik

Justice Athar Minallah

Justice Syed Hasan Azhar Rizvi

Justice Shahid Waheed

Justice Irfan Saadat Khan

**C.M.A. No. 7540 of 2024 in C.As. 333 and 334 of 2024 etc.**

**(Filed on behalf of ECP, seeking guidance on certain legal and factual issues)**

**AND**

**C.M.A. No. 8139 of 2024 in C.As. 333 and 334 of 2024 etc.**

**(Reply to the CMA 7540/24 on behalf of PTI)**

**Sunni Ittehad Council through its Chairman,**

**Faisalabad and another .. Appellants**

**Versus**

**Election Commission of Pakistan through its**

**Secretary, Islamabad and others ... Respondents**

**ORDER**

**Through C.M.A.** 7540/2024, and in terms of the short order dated 12.07.2024 whereby these appeals were decided by majority ("Short Order") the Election Commission of Pakistan ("Commission") purports to seek guidance on the point that "[i]n absence of a valid organizational structure of Pakistan Tehreek-i-Insaf (PTI), who will confirm the political affiliation of the returned candidates (MNAs and MPAs) on behalf of PTI, who have filed their statements in light of the Supreme Court Order [dated 12 July 2024]." We may note that other than a copy of the Short Order the application is bereft of any other documentation.

2. In reply to the above application, the PTI has filed C.M.A. 8139/2024, to which have been annexed a number of documents, including correspondence between the PTI and the Commission. We have considered the material that has been placed before us.

3. By way of brief recapitulation, in paragraphs 4 and 5 of the Short Order it has been categorically declared that the lack or denial of an election symbol does not in any manner affect the constitutional and legal rights of a political party to participate in an election (whether general or bye) and to field candidates, and that for the purposes, and within the meaning, of paragraphs (d) and (e) of clause (6) of Article 51 and paragraph (c) of clause (3) of Article 106 of the Constitution of the Islamic Republic of Pakistan, PTI was and is a political party, which secured or won (the two terms being interchangeable) general seats in the National and Provincial

Assemblies in the General Elections of 2024 as provided in that Order. These paragraphs, and the preceding paragraph 3 of the Short Order, sound on the constitutional plane, being the proper interpretation and understanding of the relevant constitutional provisions. The other paragraphs of the Short Order, including in particular paragraphs 8 and 10, are consequential upon what has been held and declared in the paragraphs just noted, and flow and emanate from, and give effect to, constitutional conclusions. All of these
points will be explicated in the detailed reasons for the decision of the majority (i.e., the Short Order), which is the binding judgment of the Court.

4. Turning now to the specific clarification purportedly sought, the PTI in its reply has annexed a number of notices issued by the Commission to the PTI through Barrister Gohar Ali Khan, in which it has itself identified the latter as the Chairman of PTI. Furthermore, the certifications required to be issued by a political party (here the PTI) and filed with the Commission in terms of paragraphs 8 and 10 of the Short Order have, as per the record placed before us in relation to the returned candidates (now respectively MNAs and MPAs) in the National and the Sindh, Punjab and Khyber Pakhtunkhwa Provincial Assemblies, been issued under the signatures of Barrister Gohar Ali Khan and Mr. Omar Ayub Khan, who are identified therein as being, respectively, the Chairman and Secretary General of the PTI. These certifications are dated 18.07.2024, 24.07.2024 and 25.07.2024 and list, in each case, the particulars of the relevant returned candidate (now MNA or MPA as the case may be) and in particular the dates on which the declaration required of the candidate (again, in terms of paragraphs 8 and 10 of the Short Order) was filed with the Commission. These dates obviously all precede the respective dates of certification.

5. Putting together the record placed before us, and considering the same in the light of the Short Order, leaves in little doubt that the clarification sought by the Commission in terms of the CMA 7540/2024 is nothing more than a contrived device and the adoption of dilatory tactics, adopted to delay, defeat and obstruct implementation of the decision of the Court. This cannot be countenanced. Even on the application of elementary principles of law, the application filed by the Commission is misconceived. Having itself recognized Barrister Gohar Ali Khan as the Chairman of PTI, the Commission cannot now turn around and purport to seek guidance from the Court with regard to how the certifications are to be dealt with. The Commission cannot approbate and reprobate, taking whatever (shifting) stance as it desires and as may seem to suit its immediate purposes for the moment. Furthermore, the Commission, even if one were to consider the application in the most sympathetic light, has apparently forgotten the well known de facto doctrine or rule, in terms of which the acts of a person who holds an office are protected even if there may be (and no such conclusion is reached here in relation to the PTI) any issue with the position de jure. It sufficed and the Commission was duty bound in terms of the Constitution to keep in mind that the admitted position (as stated before the Court during the hearing of the appeals) is that the PTI was, and is, an enlisted political party. This position was not only accepted and relied upon by us (eight Judges) but also by our three learned colleagues in minority (Hon'ble the Chief Justice, Justice Yahya Afridi and Justice Jamal Khan Mandokhail). Their lordship appear to have also accepted the validity of the party certificates (party tickets) issued by Barrister Gohar Ali Khan and thus his capacity to act for PTI as its Chairman. Furthermore, having itself issued notices to the PTI through Barrister Gohar Ali Khan as its Chairman, the Commission gave recognition to both the
party and the office holder. That sufficed absolutely for purposes of the Short Order. It would be completely illogical to assume that a political party, a juristic person, is fully functional yet there are no natural persons who are either de facto or de jure performing its functions or running its affairs. Saying (as the Commission now in effect does through C.M.A. 7540/2024) that a political party is an enlisted political party, fully functional for the purposes of its formation, yet there is no one that can perform its functions and run its affairs, amounts to blowing hot and cold in the same breath or, as noted, approbating and reprobating one and the same fact. There could have been no conceivable doubt that the certifications referred to above were correct and valid in terms of the Short Order and the continued denial and refusal of the Commission to accept the same, as and when filed, is constitutionally and legally incorrect and may expose the Commission to such further or other action as may be warranted in terms of the Constitution and the law.

6. But there is another, and more fundamental, aspect that must also be alluded to. It was categorically declared in paragraph 8 of the Short Order that on filing the requisite statement and its confirmation by the political party concerned, the seat secured by such candidate shall be forthwith deemed to be a seat secured by that political party. Therefore, upon submission of the declarations and certifications referred to above, the position of the returned candidates (now respectively MNAs and MPAs) immediately and ipso facto stood determined and fixed as a matter of law as on those dates and no subsequent act can alter what became, on the respective dates, past and closed transactions. As per the position so determined, the said returned candidates were and are the returned candidates of PTI and thus members of the parliamentary party of PTI in the National Assembly and Provincial Assemblies concerned, for all constitutional and legal purposes. The attempt by the Commission to confuse and cloud what is otherwise absolutely clear as a matter of the Constitution and the law must therefore be strongly deprecated. The list required to be issued by the Commission in terms of paragraph 8 (read with paragraph 10) of the Short Order is nothing more than a ministerial act, for the information and convenience of all concerned, and has no substantive effect. Nonetheless, the continued failure of, and refusal by, the Commission to perform this legally binding obligation may, as noted, have consequences. This obligation must be discharged forthwith.

7. With the above clarifications, the present application is disposed of. Office shall dispatch a copy of this order to the respective parties.

Sd/-

Justice Syed Mansoor Ali Shah

Sd/-

Justice Munir Akhtar

Sd/-

Justice Muhammad Ali Mazhar

Sd/-

Justice Ayesha A. Malik

Sd/-

Justice Athar Minallah

Sd/-

Justice Syed Hasan Azhar Rizvi

Sd/-

Justice Shahid Waheed

Sd/-

Justice Irfan Saadat Khan

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**JUDGMENT**

**SYED MANSOOR ALI SHAH J.---**

Preface

At the core of our democratic Constitution lies the will of the people of Pakistan, with free and fair elections being fundamental to democracy. The principle that 'the most important political office is that of the private citizen'[1] underscores the crucial role of the people, whose right to vote is the lifeblood of democratic governance. Democracy thrives on the belief that authority inherently resides in the people, a principle enshrined in the Constitution of every democratic nation, including ours. Our Constitution is not merely a governmental blueprint but a covenant affirming the supreme role of the people in shaping their destiny.

2. Under our Constitution, while the sovereignty of the entire Universe belongs to Almighty Allah alone, the authority is to be exercised by the people of Pakistan as a "sacred trust" within the limits prescribed by Him. It posits that people are entrusted with the responsibility of governance, which is to be exercised through their

chosen representatives. The notion of a "sacred trust" elevates the responsibility of both the government and the judiciary in our Islamic republic. It embeds a moral dimension into the practice of democracy, where the fidelity to this trust is seen as paramount. In the context of elections, this "sacred trust" implies that all the actors in the electoral process must adhere to a higher standard of fair and honest conduct ensuring electoral integrity.

3. Election authorities, as "electoral management bodies", are the "guarantor institutions" of democratic processes and are critical to democratic governance, akin to a "fourth branch of government". Their constitutional role is to ensure the conduct of elections by providing an equal and fair competitive field for all political entities and protect citizens' rights to vote. As an impartial steward of the electoral process, the Election Commission of Pakistan is not only an administrative body but also a guardian of electoral integrity and democracy's legitimacy. When election authorities engage in actions that undermine these principles, such as unlawfully denying the recognition of a major political party and treating its nominated candidates as independents, they not only compromise the rights of these candidates but also significantly infringe upon the rights of the electorate and corrode their own institutional legitimacy.

4. Political parties play a crucial role in representative democracies, acting as intermediaries between the state and its citizens. They are uniquely positioned to shape and structure electoral choices, organize public opinion, and integrate diverse interests into coherent platforms, thereby making electoral decisions meaningful and ensuring the proper functioning of democracy.[2] Moreover, political parties contribute to stable governance by facilitating consistent lawmaking and ensuring regular accountability. As such, they are essential to electoral competition and are key to the legitimacy, efficiency, and accountability of state institutions. This central role of political parties in the constitutional process is referred to as "constitutional particracy", meaning a system in which political parties serve as the primary foundation of governance.[3] For democracy to endure, political parties must be supported and strengthened, not eliminated. A democracy without political parties is unlikely to sustain itself for long.

5. When the Election Commission errs or makes significant mistakes impacting the electoral process, judicial intervention becomes necessary to rectify them and ensure electoral justice. The judiciary, tasked with ensuring electoral justice, must foremost preserve the will of the people. Election disputes are viewed through this lens, emphasizing electoral integrity and democracy's legitimacy to maintain public confidence in governance. Electoral justice is vital to protecting political and electoral rights and is intertwined with electoral integrity. The role of the Supreme Court of Pakistan in overseeing electoral integrity is crucial for sustaining public trust in the democratic process, and the Court's power to do "complete justice" is a critical tool in the constitutional arsenal of this Court, enabling it to prevent democratic backsliding,[4] and protect democracy effectively with a focus on the electorate's rights. Denying electoral justice and compromising electoral integrity would undermine the very legitimacy of democracy.

6. When static interpretation fails to preserve the vitality of the Constitution's text and principles, judges have typically rejected it in favor of constitutional fidelity.[5] Constitutional fidelity as a concept embodies that to be faithful to the Constitution is to interpret its words and to apply its principles in ways that preserve the Constitution's meaning and democratic legitimacy over time. Constitutional fidelity and legitimacy both are framed in a means-end relationship; legitimacy as the end and constitutional fidelity as a means to that end.[6] We must remember that Constitutions are not ephemeral enactments, designed to meet passing situations but are 'designed to approach immortality as nearly as human institutions can approach it.'[7]

7. With this understanding of the importance of the will of the people, fair conduct of elections, role of the Election Commission as a guarantor institution, centrality of political parties to the electoral process, electoral justice, electoral integrity and rights of the electorate in a democracy, we approach this case.

Nature of election disputes and responsibility of courts

8. Before proceeding to the relevant facts of the case and the issues arising therefrom, it is necessary to underscore the nature of election disputes and the responsibility of courts and other judicial and quasi-judicial bodies in adjudicating such disputes. During the hearing of these appeals, when certain facts and points of law were questioned by some members of the Bench, the learned counsel for the respondents submitted that those facts were not in the pleadings and that those points of law did not arise from the facts presented in the pleadings.

They contended that in exercising its appellate jurisdiction under Article 185 of the Constitution, this Court cannot go beyond the pleadings. We are afraid, this contention is misconceived. It results from a misunderstanding of treating election disputes as mere civil disputes between two private parties, similar to other civil disputes.

9. Such a contention based on analogizing a petition on an election dispute to a civil suit was repelled by Morris J. as far back as 1875 in the Tipperary Election Case,[8] with the observation:

I consider this is a fallacious analogy, because a petition [on an election dispute] is not a suit between two persons, but is a proceeding in which the constituency itself is the principal party interested.

This legal position was further elucidated the next year in 1876 by Grove J. in Aldridge[9] as follows:

Numerous provisions of the Act have reference not merely to the individual interests or rights of petitioners or respondents, but to rights of electors, of constituencies, and of the public, in purity of election and in having the member seated who is duly returned by a majority of proper votes. ...

This English jurisprudence on the nature of election disputes was adopted in India and Pakistan. In Sreenivasan,[10] Aiyar J. of the Madras High Court also repelled such a contention of treating an election petition similar to a civil suit. He elaborated on the difference in the nature of proceedings of a civil suit and an election petition and eloquently enunciated the legal position thus:

This view proceeds principally on the basis that an election petition is in all essential respects similar to an ordinary civil suit; but that is not quite so. An election petition is not a matter in which the only persons interested are candidates who strove against each other at the elections. The public also are substantially interested in it and this is not merely in the sense that an election has news value. An election is an essential part of the democratic process. The citizens at large have an interest in seeing and they are justified in insisting that all elections are fair and free and not vitiated by corrupt or illegal practices. ... In view of the manifest difference between a civil suit and an election petition it will not be right, it seems to me, to press the analogy founded on the basis of a civil suit very far when we have to deal with an election petition.

Similarly, speaking for the Supreme Court of India in Inamati,[11] Bhagwati J. observed:

It is this interest of the constituency as a whole which invests the proceedings before the Election Tribunals with a characteristic of their own and differentiates them from ordinary civil proceedings.

An election contest as aforesaid would result in the declaration of the properly qualified candidate as duly elected and the maintenance of the purity of the elections in which the constituency as a whole is vitally interested and no person would get elected by flagrant breaches of the election law or by corrupt practices.

Again, in Mohinder Singh,[12] Krishna Iyer J. adeptly rearticulated the legal position as follows:

[A]n election dispute is not like an ordinary lis between private parties. The entire electorate is vicariously, not inertly, before the court. ... We may, perhaps, call this species of cases collective litigation where judicial activism assures justice to the constituency, guardians the purity of the system and decides the rights of the candidates. ... Therefore, it is essential that courts, adjudicating upon election controversies, must play a verily active role, conscious all the time that every decision rendered by the Judge transcends private rights and defends the constituency and the democracy of the country.

In his inimitable style, he underscored the duty of courts to exercise "vigilant monitoring" of the election process, to call to order "lawless behaviour", and to function as "the bodyguards of the People against bumptious power, official or other" in election disputes thus:

[T]he periodical process of free and fair elections, uninfluenced by the caprice, cowardices or partisanship of hierarchical authority holding it and unintimidated by the threat, tantrum or vandalism of strong-arm tactics, exacts the embarrassing price of vigilant monitoring. Democracy digs its grave where passions, tensions and violence, on an overpowering spree, upset results of peaceful polls, and the law of elections is guilty of sharp practice if it hastens to legitimate the fruits of lawlessness. The judicial branch has a sensitive responsibility here to call to order lawless behaviour. Forensic non-action may boomerang, for the court and the law are functionally the bodyguards of the People against bumptious power, official or other.

In Pakistan, the above legal position was reiterated by Syed Jamshed Ali, J. in Dilshad Khan[13] and Irshad Hussain,[14] respectively, as follows:

An election dispute is not stricto senso a dispute inter-parties because it affects the entire constituency, who have a right to insist that they are represented by a person who commands the will of the majority of electorate. Therefore, it is in the public interest that the election disputes are expeditiously resolved and parties are not put to a protracted trial.

[A]n election dispute is not necessarily a lis inter se parties because it involves the entire constituency, therefore, all efforts are required to be made to expeditiously dispose of an election petition and an election petition is not to be treated like a civil suit.

We may respectfully say that the above cases correctly enunciate the nature of election disputes and the responsibility of courts and other judicial and quasi-judicial bodies in adjudicating such disputes. While we agree with these statements and principles of law, we think it would also be apposite to summarise our understanding as well.

10. Elections are a crucial part of the democratic process, and the public has a major stake in ensuring that they are held free and fair, unmarred by corrupt or illegal practices. Therefore, unlike ordinary civil cases, election cases involve substantial public interest. An election dispute is fundamentally different from other civil disputes, as it is not solely a dispute between two contesting parties but a proceeding where the constituency itself is the principal interested party. These cases involve not just the rights of the contesting candidates or political parties but also the rights of the voters, constituencies and the public. Election cases aim to fill public offices by properly qualified and duly elected candidates and to maintain the purity of elections, ensuring that no one takes charge of a public office through flagrant breaches of election laws or corrupt practices. The proceedings in election cases thus have unique characteristics because they serve the interests of the entire constituency, differentiating them from ordinary civil proceedings. This distinction clearly demonstrates the flaw in treating an election case as an ordinary civil case and limiting the judicial inquiry to the pleadings of the parties as it is in adversarial proceedings.

11. Since election cases are a species of collective or public interest litigation, the proceedings therein are inquisitorial in nature. In these cases, any judicial intervention is to ensure justice for the constituency and to safeguard the integrity of the electoral system. The process of free and fair elections requires vigilant judicial monitoring to check the influence of any capricious or partisan election or executive authority. In this regard, courts have a critical responsibility to address lawless behaviou`r in the electoral process, as their inaction or delay could undermine the legitimacy and credibility of the whole election. In adjudicating election controversies, courts must therefore play an active role in an inquisitorial manner, defending the rights of the constituency and the values and principles of democracy. They must act as guardians of the fundamental rights of the people against any misuse of power or illegal action in the electoral process.

12. In handling election disputes, the primary obligation of courts is to protect the electorate's right to fair representation, ensuring that only candidates who have legitimately won the support of the electorate through fair processes assume office. Courts must rise above political biases and interests, focusing solely on legal and evidential matters to safeguard the electorate's interests. Their approach to election disputes reflects the judiciary's overarching responsibility to uphold the integrity of the electoral process. As the highest court in the judicial hierarchy, this Court bears a profound duty to prioritize and protect the rights of the electorate, ensuring that their voice and representation in elected bodies are not compromised by procedural failings or errors in the electoral process. This duty underscores the Court's unique and expansive constitutional mandate to oversee the electoral cycle comprehensively. Such a judicial approach not only reinforces the legitimacy of the electoral system but also strengthens the foundations of democratic governance by ensuring that the will of the electorate is accurately and fairly represented.

13. Unfortunately, the above legal position regarding the nature of election disputes and the responsibility of courts was not brought to the notice of the Bench by the learned counsel for the parties while making their arguments. However, eleven members of the Bench, being themselves aware of the above legal position, proceeded to inquire into the facts and points of law that were not presented before the court below, that is, the Peshawar High Court. Although these eleven members of the Bench disagreed to some extent on granting the eventual relief, their awareness of the true legal position as to the nature of election disputes and the

responsibility of courts led them to a broader and more comprehensive judicial inquiry into all the relevant facts and law points concerning the election dispute involved in the present case, as set out next.

Relevant facts of the case

14. On 15 December 2023, the Election Commission of Pakistan ("Commission") announced the election programme for the General Elections-2024 to the National Assembly and Provincial Assemblies. According to this programme, the last date for candidates to file nomination papers with the Returning Officers was 22 December 2023, which was extended on that day to 24 December 2023. On 22 December 2023, the Commission also decided the then-pending matter of intraparty elections of the political party, Pakistan Tehreek-e-Insaf ("PTI"). The Commission determined that PTI had not conducted its intra-party elections in accordance with its constitution and election laws. As a result, the Commission declined to recognize PTI's intra-party elections and declared PTI ineligible to obtain its election symbol. Although this decision was initially suspended on 26 December 2023 and subsequently set aside on 10 January 2024 by the Peshawar High Court, this Court restored the Commission's decision on 13 January 2024. PTI candidates were thus not allotted the party symbol of PTI but instead were allotted various different symbols that had been prescribed by the Commission for independent candidates.

15. In the course of the election programme, when the Returning Officers published the lists of contesting candidates (Form-33)[15], they mentioned PTI candidates as independent candidates. One of the PTI candidates, Mr. Salman Akram Raja, challenged this action by the Returning Officer of his constituency before the Commission. By its order dated 2 February 2024, the Commission rejected his challenge and declared him an independent candidate. The poll for the elections was then held on 8 February 2024, and PTI candidates were notified by the Commission as independent returned candidates in the notification published in the official Gazette under Section 98 of the Elections Act 2017 ("Section-98 Notification").

16. After the publication of Section-98 Notification, a substantial number of independent returned candidates (86 for the National Assembly; 107 for the Punjab Assembly; 90 for the Khyber Pakhtunkhwa Assembly; and 9 for the Sindh Assembly) joined a political party, Sunni Ittehad Council ("SIC"), to obtain the share of proportional representation in the seats reserved for women and non-Muslims in the National Assembly and the Provincial Assemblies of Khyber Pakhtunkhwa, Punjab and Sindh. SIC then informed the Commission of the joining of these returned candidates and requested the Commission, through four separate applications (letters) dated 21 February 2024, to allocate to it its due share in the seats reserved for women and non-Muslims in the National Assembly and the said three Provincial Assemblies.

17. Certain other political parties, such as Pakistan Muslim League (Nawaz) (PML(N)) and Muttahida Qaumi Movement (Pakistan) (MQM(P)), filed applications opposing SIC's request for reserved seats and prayed for the allocation of the reserved seats to them and other eligible political parties. Some individuals also filed applications opposing the SIC's request and praying that SIC should not be treated as a parliamentary party. The political party, Pakistan People's Party Parliamentarians (PPPP), appeared before the Commission as a proforma respondent in the application filed by MQM(P), while the political parties, Jamiat Ulema-e-Islam Pakistan (JUIP) and Pakistan Muslim League (PML), appeared in response to the Commission's notice and opposed SIC's request.

18. By its order dated 1 March 2024, the Commission rejected SIC's applications and decided that the reserved seats for women and non-Muslims, which had been requested by SIC but declined, would be allocated to other political parties as per the proportional representation system of political parties. Accordingly, those reserved seats (19 for women and 3 for non-Muslims in the National Assembly; 21 for women and 4 for non-Muslims in the Khyber Pakhtunkhwa Assembly; 24 for women and 3 for non-Muslims in the Punjab Assembly; and 2 for women and 1 for non-Muslims in the Sindh Assembly - 78 in total - hereinafter referred to as the "disputed reserved seats") were allocated to other political parties. SIC challenged the Commission's order before the Peshawar High Court in writ jurisdiction. By its judgment dated 25 March 2024 ("impugned judgment"), the Peshawar High Court dismissed the SIC's challenge and upheld the Commission's order. Hence, these appeals were filed by SIC with leave of the Court.

PTI's application for impleadment (CMA No. 5913 of 2024)

19. During the pendency of these appeals, PTI filed an application seeking its impleadment in these appeals and submitting therein the facts and circumstances under which its returned candidates joined SIC. PTI submitted in its application, inter alia, that PTI issued party tickets to its candidates, which were to be filed with the respective Returning Officers by 4 pm on 13 January 2024, the day fixed for the allotment of election symbols. The Supreme Court took up the Commission's appeal against the judgment of the Peshawar High Court in the matter of PTI's intra-party elections and its election symbol on 12 January 2024 for hearing, which continued until late evening on 13 January 2024.

19.1. Faced with the possibility of an adverse decision by the Supreme Court after 4 pm that day, PTI entered into an arrangement with another political party, PTI-Nazriati, under which party tickets were issued to PTI candidates by that party to obtain a common symbol for PTI candidates to prevent the disenfranchisement of a large part of the electorate. However, the same day, the Chairman of PTI-Nazriati appeared on national television channels and disavowed the tickets issued. At about the same time, the Commission also issued an order dated 13 January 2024 directing the Returning Officers not to accept a political party's tickets for candidates who belonged to another political party. Therefore, most of PTI candidates withdrew the tickets of PTI-Nazriati and presented PTI's tickets to the Returning Officers. Some of the Returning Officers placed the same on file while others refused to receive the same pending the decision of the Supreme Court.

19.2. Awaiting the decision of the Supreme Court, the Commission extended the time for submitting the party tickets and the allotment of election symbols till 12 pm that day. The Supreme Court announced its short order at about 11 pm on 13 January 2024, whereupon the Returning Officers rejected PTI's tickets and, by treating PTI candidates as independent candidates, allotted them different election symbols. The poll was held on 8 February 2024, and PTI candidates won a large number of seats in the National and Provincial Assemblies. These candidates were notified as independent returned candidates by the Commission by relying upon Rule 94 of the Elections Rules 2017 and the judgment of the Supreme Court dated 13 January 2024.

19.3. The Commission had earlier accepted in 2018 a political party, Balochistan Awami Party, which had not contested for general seats, eligible for the allocation of reserved seats. Therefore, PTI-backed returned candidates joined SIC, with which PTI had an ongoing alliance/ relationship, within three days of being so notified, in order to become entitled to the allocation of the reserved seats. In its application, PTI also made the following contentions:

A primary purpose of [Articles 51(6)(d) & (e) and 106(3)(c) of] the Constitution is the establishment of a representative National Assembly and representative Provincial Assemblies. Denial of reserved seats to PTI would create an entirely unrepresented National Assembly as well as Provincial Assemblies that do not reflect the will of the people.

[T]he denial of reserved seats to SIC/PTI and the allocation of a disproportionate number of reserved seats to other political parties would deepen the denial of the will of the people.

As per these contentions and the arguments made during the hearing, PTI claimed the allocation of the disputed reserved seats either to SIC or to itself (PTI).

Claim for allocating reserved seats to SIC or to PTI

20. It may also be pertinent to mention here that in the course of his arguments, the learned counsel for SIC also attempted to explain the above circumstances under which the returned candidates, who according to him were PTI candidates, joined SIC. However, some honourable members of the Bench reproved him, questioning how he could make conflicting arguments as he was supposed to plead the case of SIC, not of PTI. With respect, we say that both SIC and PTI took the same stance on the peculiar circumstances that led the returned candidates to join SIC; in no way did they make any conflicting assertions. Both emphasized that it is the right of the people who had voted for the returned candidates that their mandate should be reflected in allocating the disputed reserved seats to SIC or to PTI.

Questions of law

21. On the above facts and the contentions made by learned counsel for the parties, the following questions of law fall for determination:

i. What is the consequence of declaring a political party ineligible to obtain an election symbol under Section 215(5) of the Elections Act 2017? Does such a declaration affect the political party's other constitutional and statutory rights?

ii. Can a candidate nominated by a political party ineligible to obtain an election symbol be mentioned as an independent candidate in the list of contesting candidates (Form 33), and can such a returned candidate be notified as an independent returned candidate in the Section-98 Notification?

iii. Do Articles 51(6) (d) & (e) and 106(3) (c) of the Constitution refer to political parties that have contested for and won general seats or to all enlisted political parties? and

iv. How is the proportional representation of a political party to be calculated for the allocation of reserved seats under Articles 51(6) (d) & (e) and 106(3) (c) of the Constitution?

We shall discuss and decide the above questions seriatim. However, before doing so, we want to briefly state the scope of the fundamental right guaranteed by Articles 17(2) and 19 of the Constitution, as the whole case hinges upon it and the answer of all the above questions are rooted in it.

Scope of fundamental right guaranteed by Article 17(2) of the Constitution

22. The provisions of Article 17(2) of the Constitution are cited here for ease of reference and reading:

Article 17(2) of the Constitution:

Every citizen, not being in the service of Pakistan, shall have the right to form or be a member of a political party, subject to any reasonable restrictions imposed by law in the interest of the sovereignty or integrity of Pakistan, and such law shall provide that where the Federal Government declares that any political party has been formed or is operating in a manner prejudicial to the sovereignty or integrity of Pakistan, the Federal Government shall, within fifteen days of such declaration, refer the matter to the Supreme Court, whose decision on such reference shall be final.

A bare reading of the provisions of Article 17(2) of the Constitution shows that it guarantees to every citizen of Pakistan who is not in the service of Pakistan, the right to form or be a member of a political party. As per this Article, any reasonable restrictions can be imposed on this right by law only in the interest of sovereignty or integrity of Pakistan. This right has been regarded so important by the constitution makers that the adjudication of the matter of its restriction on the specified two grounds has been entrusted to the apex court of the country-the Supreme Court of Pakistan-and not to any other court. The protection of this right is so essential for ensuring democracy and representative government that its significance cannot be overstated. Although all courts and tribunals are mandated to enforce the right guaranteed by this Article, this Court (the Supreme Court of Pakistan) is the ultimate guardian of it. Therefore, it is also because of the constitutional obligation of this Court to protect the right guaranteed by this Article, as specifically entrusted to it, that we decided to make a broader and comprehensive judicial inquiry into all the relevant facts and law points concerning enforcement of the fundamental rights of both the voters and the political parties.

23. As held by this Court in Nawaz Sharif,[16] the fundamental rights guaranteed by the Constitution, an organic instrument, are not capable of precise or permanent definition delineating their meaning and scope for all times to come. With the passage of time, changes occur in the political, social and economic conditions of the society, which requires re-evaluation of their meaning and scope in consonance with the changed conditions. Therefore, keeping in view the prevailing socio-economic and politico-cultural values and ideals of the society, the courts construe the fundamental rights guaranteed by the Constitution with a progressive, liberal and dynamic approach. This approach ensures that the fundamental rights remain a vibrant and effective guarantee of citizens' rights, liberties and freedoms, adapting to the evolving needs and aspirations of society. With this approach, the courts expound the fundamental rights to give them "life and substance"[17] that are true to the reality of the changing times.

24. In view of the above principles of interpreting fundamental rights, this Court has expounded in several cases the scope of the "right to form or be a member of a political party" guaranteed by Article 17(2) and held that it includes the right to function and operate as a political party,[18] the right to participate in and contest an election as a political party,[19] the right to form the Government and complete the prescribed tenure if the members of the political party constitute the requisite majority,[20] the right to contest an election in his individual capacity

or as a member of a political party,[21] the right to be governed by chosen representatives[22] and the right to vote.[23] This bouquet of political fundamental rights ensures a functional and a workable democracy and a representative government. It is underlined that 'representation in fact is democracy'.[24] Therefore, the right guaranteed by Article 17(2) is essential for actualizing the constitutional objective of establishing an order wherein the State exercises its powers and authority through the chosen representatives of the people.[25]

Right to vote and the freedom of expression guaranteed under Article 19

25. Furthermore, as a form of expression, the right to vote is part of the fundamental right to freedom of expression guaranteed by Article 19 of the Constitution,[26] which is cited here for ease of reference:

Article 19: Every citizen shall have the right to freedom of speech and expression... subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security, or defence of Pakistan or any part thereof, friendly relations with foreign states, public order, decency, morality, or in relation to contempt of court, commission of or incitement to an offence.

The right to freedom of speech and expression is considered "preservative of all rights".[27] The act of voting for a candidate of a political party or an independent candidate is a form of expression and an inherent concept within the Constitution, fundamental to the democratic legitimacy and validity of the legislature. When individuals cast their votes, they express their opinions on how they believe their society should be governed, who should govern it, and what policies should be prioritized. This form of expression is crucial because it encapsulates the will of the electorate, conveying messages about public preferences.

26. In a democratic context, freedom of expression extends beyond individual speech to encompass the collective expression of a community's or nation's political will through their elected representatives. In essence, freedom of expression and representativeness are deeply interlinked, each reinforcing the other. A truly representative government not only exemplifies the collective expression of its people but also ensures that this expression influences governance. The right to form political parties, the right to contest elections and the right to vote are therefore pivotal extensions of representativeness and freedom of expression, essential for cultivating a socially just environment.

27. The fundamental rights enshrined in Articles 17(2) and 19 of the Constitution thus underscore the significance of political participation and freedom of expression, both of which are essential to the functioning of a representative democracy. Article 17(2) guarantees the right to form or join political parties, highlighting the vital role of political participation in safeguarding democracy, while Article 19 upholds the freedom of expression, which is integral to the electorate's ability to influence the formation of government by expressing their choices through their votes. Together, these Articles emphasize the importance of electoral integrity and political justice, ensuring that every citizen's voice and choice are heard and represented in the political process.

28. Having so briefly stated the scope of the rights guaranteed by Articles 17(2) and 19 of the Constitution, we will next discuss the questions and examine the implications of this right further.

(i) What is the consequence of declaring a political party ineligible to obtain an election symbol under Section 215(5) of the Elections Act 2017? Does such a declaration affect the political party's other constitutional and statutory rights?

29. The fundamental right to form a political party guaranteed by Article 17(2) of the Constitution is regulated by the Elections Act 2017 ("Elections Act"). Section 2(xxviii) of the Elections Act defines a "political party" to mean an association of citizens or a combination or group of such associations formed with a view to propagating or influencing political opinion and participating in elections for any elective public office or for membership of a legislative body, including an Assembly, the Senate, or local government. Chapter XI of the Elections Act, comprising Sections 200 to 213, contains the detailed provisions, inter alia, on the subjects of formation, enlistment, membership, functioning, intra-party elections, sources of funds, and dissolution of political parties, etc.

30. Section 202 makes it obligatory for the Commission to enlist a political party if the application for its enlistment is accompanied by (i) a copy of the constitution of the political party, (ii) the certificate and the information required to be submitted under Sections 201 and 209, (iii) a copy of consolidated statement of its accounts under Section 210, (iv) a list of at least two thousand members with their signatures or thumb

impressions along with copies of their National Identity Cards, and (v) the deposit of two hundred thousand rupees in favour of the Commission in the Government Treasury as enlistment fee. A political party which has been refused enlistment by the Commission can file an appeal before the Supreme Court. This provision aligns with the constitutional mandate entrusted to the Supreme Court under Article 17(2) of the Constitution as the ultimate guardian of the right guaranteed by that Article. It is also notable that a political party once enlisted under the Elections Act cannot be delisted; the Commission's power to cancel the enlistment of a political party under subsection (5) of Section 202 relates only to the political parties enlisted before the commencement of the Elections Act, i.e., under earlier law. Whereas Section 212 contains the provisions on the matter of dissolution of political parties, which are similar to those contained in Article 17(2) of the Constitution.

31. The provisions that are more relevant to the present case are those contained in Sections 208 and 209, concerning the intra-party elections of political parties. As per Section 208, the office-bearers of a political party are to be elected periodically in accordance with the constitution of the political party, provided that a period, not exceeding five years, intervenes between any two elections. Once the intra-party elections are conducted, the political party concerned is to publish the updated list of its central office-bearers on its website and also to send such list to the Commission. Similarly, under Section 209, within seven days from completion of its intra-party elections, a political party is to submit a certificate signed by an office-bearer authorized by the Party Head, to the Commission to the effect that the elections were held in accordance with the constitution of the political party. Such certificate should contain the following information: (a) the date of the last intra-party elections; (b) the names, designations, and addresses of office-bearers elected at the Federal, Provincial, and local levels, wherever applicable; (c) the election results; and (d) a copy of the political party's notifications declaring the results of the election. Within seven days from the receipt of such certificate of a political party, the Commission is to publish the certificate on its website. It is notable that under Section 208(5), where a political party fails to conduct intra-party elections as per the given time frame in its constitution (but not exceeding the statutory period of five years) despite a notice issued by the Commission to do so, then the Commission can impose a fine which may extend to two hundred thousand rupees but not be less than one hundred thousand rupees. While the consequence of failure to comply with the provisions of Section 209, which relates to the submission of a certificate containing the specified information and signed by an office-bearer authorized by the Party Head, to the effect that the elections were held in accordance with the constitution of the political party, is provided in Section 215(5).

32. Section 215(5)[28] of the Elections Act provides that if a political party fails to comply with the provisions of Section 209 (regarding intraparty elections) or Section 210 (regarding sources of the party's funds), the Commission may, after affording it an opportunity of being heard, declare it ineligible to obtain an election symbol for election to Majlis-eShoora (Parliament), Provincial Assembly or a local government, and shall not allocate an election symbol to such political party in subsequent elections. The word "may" in Section 215(5) indicates the discretion of the Commission in making the declaration, which discretion, like all other discretionary powers vested in public functionaries, is to be exercised justly, fairly and reasonably, considering the peculiar facts and circumstances of each case. However, the consequence of making such a declaration is clearly specified and is not left to the discretion of the Commission. As stipulated in Section 215(5), the consequence of making the declaration is that the Commission is not to allocate an election symbol to such political party in subsequent elections.

Principle of strict construction of statutes providing penal consequence or curtailing fundamental rights

33. It is a cardinal principle of the construction of statutes that any provision entailing penal consequence, whether of criminal law[29] or of civil law,[30] must be construed strictly. This principle of strict construction of penal statutes is also called the principle against doubtful penalisation. It stresses that a person should not be penalised except under clear law and if, in construing the relevant provisions, there appears any reasonable doubt or ambiguity, it should be resolved in favour of the person who would be liable to the penalty. No penalty or penal consequence can be added to the one specified in law by inference or assumption. Penal actions can only be taken on the basis of express and clear provisions of law. The act attracting the penal consequence and the person responsible for it must fairly and squarely fall within the plain words of the law. Courts are not to

strain or stretch the meaning of the words to bring the act or the subject within the ambit of penal provisions; in other words, the scope of penal provisions is not to be extended through liberal construction. Furthermore, if a penal provision is susceptible to two reasonable constructions, the one that does not extend the penalty is to be adopted. Any reasonable doubt or ambiguity is to be resolved in favour of the person who would be liable to the penalty, and the construction that avoids the penalty is to be adopted.[31]

34. Another well-established principle of constitutional and statutory construction is that while the fundamental rights guaranteed in the Constitution are to be construed progressively and liberally,[32] provisions in the Constitution or in any law that curtail the fundamental rights are to be construed restrictively and narrowly.[33] This principle owes its genesis to the broader principle of strict construction of statutes encroaching on rights, which applies to all fundamental rights recognized by common law, whether or not guaranteed in the Constitution. As per this principle, statutes that encroach on such rights of the subject are also subject to strict construction. They are to be construed, if possible, to protect such rights, and if there is any ambiguity, the construction that saves the right should be adopted.[34] In a constitutional democracy, laws are solicitous of the individual rights and liberties of citizens and interfere with them as little as possible in the public interest. By adopting a liberal and expansive interpretation of such laws, individual rights and liberties cannot be curtailed more than expressly provided by the legislature in the public interest. Therefore, laws that curtail individual rights and liberties, particularly the fundamental rights guaranteed in the Constitution, are to be construed strictly.[35]

35. These principles of statutory construction guide our analysis and interpretation of the provisions of Section 215(5) of the Elections Act. It is unequivocal that Section 215(5) prescribes a penal consequence for a political party's failure to comply with the provisions of Section 209 (regarding intra-party elections) or Section 210 (regarding the sources of the party's funds). The specified penalty of non-allocation of an election symbol curtails the political party's fundamental right to function and operate as a political party a right implicit in the right to form a political party guaranteed by Article 17(2) of the Constitution.[36] Therefore, Section 215(5) must be construed strictly. No further penalty or consequence beyond the specified non-allocation of an election symbol can be inferred or assumed from Section 215(5). Additionally, no other constitutional or statutory right of the political party can be denied on the basis of the non-allocation of an election symbol under this provision. Any interpretation of Section 215(5) that would impose further penalties beyond the expressly stipulated contravenes the principle of strict construction of laws that entail penal consequences or curtail fundamental rights. Thus, the scope of the penalty provided by Section 215(5) must remain confined to its express terms, ensuring that no other constitutional or statutory right of the political party is affected.

Answer to question (i) and its applicability to PTI

36. In light of the foregoing interpretation, we determine question (i) in the terms that the sole consequence of declaring a political party ineligible to obtain an election symbol under Section 215(5) of the Elections Act for failing to comply with the provisions of Section 209 regarding intra-party elections is the non-allocation of an election symbol to that party in subsequent elections-nothing more, nothing less. Furthermore, such a declaration does not affect the political party's other constitutional and statutory rights.

37. This was the effect of the Commission's order dated 22 December 2023 (upheld by this Court vide its order dated 13 January 2024), declaring PTI ineligible to obtain its election symbol under Section 215(5) of the Elections Act; other constitutional and statutory rights of PTI to function and operate as a political party were not thereby affected. With respect, it is observed that had this Court clarified this legal position in its order dated 13 January 2024, or had the Commission clarified it in its order dated 22 December 2023 or order dated 13 January 2024, the entire confusion regarding the status of PTI candidates or PTI's right to reserved seats would not have occurred.

38. We feel constrained to observe here that we have some doubts about whether the Commission has the power to reject the certificate of intra-party elections submitted by a political party under Section 209, and whether the Commission exercised its discretion under Section 215(5) justly, fairly and reasonably in PTI's case, particularly when the election programme had already been announced and the fundamental right of citizens to vote for the political party of their choice was at stake. Similarly, we have certain reservations about how the

matter of intraparty elections-a matter of internal governance of party-can trump the fundamental rights of citizens to vote and of political parties to effectively participate in and contest elections through obtaining a common symbol for their candidates, guaranteed under Articles 17(2) and 19 of the Constitution. However, since these questions are sub judice in the review petition filed by PTI against this Court's judgment dated 13 January 2024, we abstain from examining and expressing our definitive view on them. (One of us, Justice Muhammed Ali Mazhar, does not want to make the observations made in this paragraph because review petition against this Court's judgment dated 13 January 2024 is pending. He also wishes to make clear that nothing in this paragraph is intended to or will impact upon the hearing of the review petition).

Explanation to Rule 94 of the Elections Rules 2017 is ultra vires the Elections Act and the Constitution

39. The discussion under this question would, however, be incomplete without determining the legal status of the Explanation to Rule 94 of the Election Rules 2017 ("Election Rules"). It is pertinent to mention that the Election Rules have been made by the Commission in the exercise of its rule-making power under Section 239 of the Elections Act, which authorises the Commission to make rules for carrying out the purposes of the Act.

40. Rule 94[37] provides the procedure for the calculation, allocation and notification of the share of proportional representation of political parties in the seats reserved for women and non-Muslims. Its Explanation stipulates that '[fJor the purpose of this rule, the expression "political party" means a political party to which a symbol has been allocated by the Commission.' By defining a political party in this manner, the Explanation excludes a political party that has not been allotted a symbol by the Commission from being allocated a share of proportional representation in the reserved seats. No such exclusion of a political party, as created by the Explanation to Rule 94, is provided in Articles 51(6) (d) & (e) and 106(3) (c) of the Constitution, nor is any such consequence of non-allocation of the election symbol provided in Section 215(5) or any other provision of the Elections Act. In effect, it has introduced an additional penal consequence of declaring a political party ineligible to obtain an election symbol under Section 215(5) of the Elections Act, and it has also infringed the constitutional right of a political party, conferred by Articles 51(6) (d) & (e) and 106(3) (c) of the Constitution, to have its due share of proportional representation in the seats reserved for women and non-Muslims on the basis of general seats secured by such a political party. This Explanation has thus clearly gone beyond and against the provisions of the Elections Act and the Constitution.

41. It is an established principle of law that rules made under the rule-making authority conferred by an Act ("parent statute") can neither enlarge nor go beyond the scope of the parent statute, nor can they override or conflict with its provisions. If the rules are repugnant to or inconsistent with the provisions of the parent statute, they are ultra vires and invalid. The rule-making authority is conferred to give effect to the provisions of the parent statute, not to neutralise or contradict them. The primary purpose of the rules is to provide procedural details for carrying out the purposes of the parent statute. They cannot militate against the substantive provisions of the parent statute.[38] Moreover, just as a provision in the parent statute that is inconsistent with any provision of the Constitution is ultra vires the Constitution and thus invalid,[39] so too are the rules made under its authority: the rules that are inconsistent with any provision of the Constitution are also ultra vires the Constitution and thus invalid. What cannot be done directly in the parent statute through primary legislation cannot be done indirectly in the rules through delegated legislation.

42. In view of the above, the Explanation to Rule 94 of the Election Rules, being beyond the scope of Section 215(5) of the Elections Act and inconsistent with the provisions of Articles 51(6) (d) & (e) and 106(3) (c) of the Constitution, is declared ultra vires the Elections Act and the Constitution, thus void and invalid.

(ii) Can a candidate nominated by a political party ineligible to obtain an election symbol be mentioned as an independent candidate in the list of contesting candidates (Form-33), and can such a returned candidate be notified as an independent returned candidate in the Section-98 Notification?

43. The answer to question (i) above, has made it easier to address this question. The only point that requires some discussion here is whether a political party has a constitutional and/or statutory right to nominate its candidates for an election to Majlis-e-Shoora (Parliament), Provincial Assembly or a local government. Fortunately, we need not grapple much with this point as it has already been discussed at some length and decided authoritatively by the Full Court Benches of this Court in the two cases of Benazir Bhutto decided in

1988.[40] Instead of burdening this judgment with extracts from those cases, we find it appropriate to state summarily what was decided therein on the point under consideration, with which we respectfully agree.

Right to contest elections as a political party through its nomi- nated candidates is a fundamental right under Article 17(2) of the Constitution

44. Article 17(2) of the Constitution guarantees the right to form or be a member of a political party. Because the formation of a political party necessarily implies the carrying on of all its activities, the right to form a political party extends to its functioning and operation. The functioning is implicit in the formation of a political party. Without the right to its functioning, the right to form a political party would be meaningless and of no avail. To participate in an election to Parliament or a Provincial Assembly and to nominate or put up candidates at any such election are the principal activities (functions) of a political party. Depriving a political party of these activities destroys the political existence of the party and is tantamount to its political extermination and virtual dissolution, which cannot be done otherwise than by the procedure and on the grounds provided in Article 17(2) of the Constitution. The right to participate in and contest an election as a political party is included in the right to form or be a member of a political party. Any provision of election law that fails to recognize the rights of political parties to participate in the elections is, therefore, ultra vires Article 17(2) of the Constitution.

45. The Nawaz Sharif case[41] decided in 1993 by a Full Court Bench of this Court not only endorsed the above scope of the right guaranteed by Article 17(2) of the Constitution but also advanced it further. The Court held that the right to form or be a member of a political party guaranteed by Article 17(2) includes not only the right to participate in and contest elections as a political party, as held in the Benazir Bhutto cases, but also the right to form the Government and complete the prescribed tenure if the members of the political party constitute the requisite majority.

46. Being in complete agreement with the above three decisions of the Full Court Benches of this Court on the scope of Article 17(2), we hold that the right to participate in and contest elections as a political party through its nominated candidates is a fundamental right guaranteed by Article 17(2) of the Constitution. The various sections of the Elections Act, including Sections 66 and 67, merely serve to give effect to this right as machinery provisions. This right is not, nor can it be, extinguished by any provision of the Elections Act, including Section 215(5) thereof. Depriving a political party of participating in and contesting elections through its nominated candidates, it is reiterated, destroys the political existence of the party and is tantamount to its political extermination and virtual dissolution, which cannot be done except by the procedure and on the grounds provided in Article 17(2) of the Constitution. Similar would be the position if the candidates nominated by a political party are denied the status of being the candidates of that political party and are mentioned as independent candidates in the list of contesting candidates (Form-33), or such returned candidates are notified as independent returned candidates in the Section-98 Notification. Such actions of the Returning Officers and the Commission would also be ultra vires Article 17(2) of the Constitution, as they effectively nullify the party's right to participate in and contest elections.

The order of the Commission, dated 2 February 2024, made on the application of Mr. Salman Akram Raja (a PTI candidate) was both unconstitutional and unlawful.

47. As the Commission's order dated 2 February 2024, passed on the application of Mr. Salman Akram Raja ("Mr. Raja"), a PTI candidate, pertains to question (ii) under discussion, we deem it necessary to examine the legality of that order alongside answering this question, in order to ensure a comprehensive understanding of the matter. As noted above, when the Returning Officers published the lists of contesting candidates (Form-33), PTI candidates were mentioned therein as independent candidates. Mr. Raja, one of such candidates, challenged this entry in the list of contesting candidates (Form-33) before the Commission. However, the Commission, by its order dated 2 February 2024, rejected his challenge and declared him an independent candidate. In its order, the Commission reasoned:

Notwithstanding, the affiliation of the petitioner with PTI and alleged party ticket including entries of party affiliation in the nomination papers of the petitioner, he cannot be treated as nominee of PTI nor his party (PTI) can be reflected in column 5 of Form 33 in absence of party symbol.

The petitioner has been allotted symbol from the chart available for independent candidates as the party to which he claims affiliation has not been allocated Election Symbol by the Commission. Allowing any entry in absence of party symbol in column 5 of Form 33 and entry [of] applicant's name as Candidate of PTI will contradict the symbol and identity of Party as the petitioner is declared as an independent candidate.
(Emphasis supplied)

To further support its decision, the Commission also relied upon the following observation of this Court made in its order dated 13 January 2024:

Surprisingly, no declaration was sought, nor given, that intra party elections were held in PTI, let alone that the same were held in accordance with the law. If it had been established that elections had been held then ECP would have to justify if any legal benefit to such a political party was being withheld, but if intra party elections were not held the benefits accruing pursuant to the holding of elections could not be claimed.
(Emphasis supplied)

From the cited extracts of the Commission's order, it appears that the Commission rejected Mr. Raja's claim primarily because he had been allotted a symbol from the chart of symbols prescribed for independent candidates, and the party (PTI) whose candidature he sought to be mentioned in Form-33 had not been allocated an election symbol. The Commission's reliance on the cited observation of this Court indicates that it understood a political party's capacity to nominate candidates for an election as one of "the benefits accruing pursuant to the holding of [intra-party] elections."

48. In defending the Commission's order and the Returning Officers' act of mentioning PTI candidates as independent candidates in Form-33, the learned counsel for the Commission took pains to explain the provisions of Section 67[42] of the Elections Act. According to him, Section 67 classifies candidates for symbol allocation into two categories: (i) candidates nominated by a political party that has been allocated a symbol by the Commission under Chapter XII, who are allotted the party symbol under subsection (2) of Section 67, and (ii) candidates not nominated by any political party, who are treated as independent candidates and are allotted one of the symbols not allocated to any political party. He emphasised that Section 67 does not recognise any third category of candidates, such as candidates who are nominated by a political party (like PTI) that has not been allocated a symbol by the Commission under Chapter XII of the Elections Act.

49. We have given careful consideration to his arguments. We find that his focus has been solely on the express words of subsections (2) of Section 67, while overlooking its necessary implication. This necessary implication becomes clear when we invert the statement made in subsection (2) of Section 67. This subsection states that "[a] candidate nominated by a political party at an election in any constituency shall be allotted the symbol allocated by the Commission to that political party under the provisions of Chapter XII and no other symbol." By inverting this statement, we find as a necessary implication that a candidate nominated by a political party that has not been allocated a symbol by the Commission shall not be allotted the symbol declined by the Commission to that political party under Chapter XII, but rather any other symbol. Since any other symbol is allotted to candidates under subsection (3) of Section 67, a candidate nominated by a political party (such as PTI) that has not been allocated a symbol by the Commission is to be allotted, under that subsection, one of the symbols not allocated to any political party. However, the allocation of a symbol under subsection (3) does not alter the candidate's status as a nominee of the political party, which is determined under Section 66 on the basis of his declaration and the party certificate (party ticket) issued in his favour.

50. The construction of subsections (2) and (3) of Section 67 proposed by the learned counsel for the Commission, if accepted, would extinguish the fundamental right guaranteed by Article 17(2) of the Constitution to participate in and contest elections as a political party through its nominated candidates. As held above, the various sections of the Elections Act, including Sections 66 and 67, merely serve to give effect to this fundamental right as machinery provisions, which cannot be extinguished by any provision of the Elections Act, including Section 215(5) thereof.

51. In view of the above, the Commission's order dated 2 February 2024 and the Returning Officers' act of mentioning PTI candidates as independent candidates in Form-33 were both unconstitutional and unlawful, and they are hereby declared as such. It would also be appropriate to clarify that the Commission's reliance on the

cited observation of this Court made in paragraph 11[43] of its order dated 13 January 2024 was misconceived and misplaced, as that observation pertained to Section 215(5) and not to Sections 66 and 67 of the Elections Act.

Difference between "interpretation" and "construction" of statutes

52. To explain how we have determined and declared the above legal position, despite it not being explicitly stated in subsections (2) and (3) of Section 67, as argued by the learned counsel for the Commission, we may underline a subtle difference between "interpretation" and "construction" of statutes. 'Strictly speaking, construction and interpreta-tion are not the same', as Crawford wrote and this Court approvingly cited it in Haider Zaidi,[44] 'although the two terms are often used interchangeably. Construction, however, to be technically correct, is the drawing of conclusions with respect to subjects that are beyond the direct expression of the text, from elements known and given in the text, while interpretation is the process of discovering the true meaning of the language used. ... The process to be used in any given case will depend upon the nature of the problem presented. And, as is apparent, both processes may be used in seeking the legislative intent in a given statute. If the legislative intent is not clear after the completion of interpretation, then the court will proceed to subject the statute to construction.'[45]

We have thus drawn the above conclusion by construction from

the "elements known and given in the text" of the provisions of Sections 66, 67 and 215(5) of the Elections Act as a necessary implication thereof.

53. It may however be clarified, as Crawford also did, that since for most practical purposes it is sufficient to designate the whole process of ascertaining the legislative intent as either interpretation or construction, the said distinction between the two processes has little importance so far as the courts are concerned and is usually relegated to the realm of academic discussion. But, as Crawford emphasised and so we do for our present purpose, 'by breaking the process of finding the legislative intent into these two processes whose characters depend upon whether the court, strictly speaking, interprets or constructs the legislative enactment at hand, some light is shed upon how the courts exercise the judicial function of ascertaining the legislative intention.'[46]

Answer to question (ii) and its applicability to PTI

54. In view of the above, we answer question (ii) as follows: notwithstanding that a political party has been declared ineligible to obtain an election symbol, its nominated candidates cannot be mentioned as independent candidates in the list of contesting candidates (Form 33), despite allotment of different election symbols to them under Section 67(3) of the Elections Act, nor can they be notified as independent returned candidates in the Section 98 Notification.

55. Therefore, PTI's nominated candidates were wrongly shown independent candidates in the list of contesting candidates (Form 33) by the Returning Officers and were also wrongly notified as independent returned candidates in the Section-98 Notification by the Commission.

Validity of party tickets issued by Mr. Gohar Ali Khan as Chairman PTI

56. Before parting with this part of the judgment, it is necessary to address an ancillary point stated by the Commission in its order dated 2 February 2024 in rejecting Mr. Raja's claim. The Commission maintained that since the election of Mr. Gohar Ali Khan as Chairman of PTI had not been accepted by the Commission, he could not have issued the party ticket to Mr. Raja. We find that the Commission failed to recognise that its order dated 22 December 2023 regarding the intra-party elections of PTI was not in force from 26 December 2023 (when the Peshawar High Court suspended the Commission's order) to 13 January 2024 (when this Court restored the Commission's order). During this period, Mr. Gohar Ali Khan was holding the office of Chairman of PTI and had, therefore, validly issued party tickets to PTI candidates, including Mr. Raja.

57. We may also underline here that, notwithstanding a political party's failure to comply with the provisions of Section 209 of the Elections Act relating to its intra-party elections, the political party remains an enlisted political party, fully functional for the purposes of its formation, i.e., 'propagating or influencing political opinion and participating in elections for any elective public office or for membership of a legislative body, including an Assembly, the Senate, or local government.'[47] The only consequence of not complying with the said provisions of the Elections Act, as aforementioned, is that such a political party is not to be allocated an

election symbol. It would be completely illogical to assume that a political party, a juristic person, is fully functional yet there are no natural persons who are either de facto or de jure performing its functions and running its affairs. We all know that juristic persons act through natural persons. An enlisted political party is a juristic person, and like other juristic persons, it acts through natural persons. Saying that a political party is an enlisted political party, fully functional for the purposes of its formation, yet there is no one that can perform its functions and run its affairs, amounts to blowing hot and cold in the same breath or approbating and reprobating one and the same fact. Therefore, after the intra-party elections (which were not later accepted by the Commission), Mr. Gohar Ali Khan had assumed at least de facto charge of PTI's functions and affairs as its Chairman. Consequently, the acts performed by him on behalf of PTI before 13 January 2024, when this Court restored the Commission's order dated 22 December 2023 declining to accept the intra-party elections, were fully valid and effective.

58. It is further clarified that when the office-bearers of a political party are elected under Section 208 of the Elections Act, in accordance with the party's constitution, and a certificate to that effect is submitted to the Commission under Section 209, the newly elected office-bearers de facto assume the functions of the party until the Commission accepts or rejects the elections. Upon acceptance, they also assume the functions of the party de jure. In the case of rejection of the intra-party elections, the previous office-bearers are reinstated, for no political party, as held above, can exist without either de facto or de jure office-bearers to perform its functions and manage its affairs. In this regard, the clarification dated 14 September 2024, passed by us on an application of the Commission, shall also be read as part of this judgment and is reproduced hereunder for the completion of the record:

Through C.M.A. 7540/2024, and in terms [para 10] of the short order dated 12.07.2024 whereby these appeals were decided by majority ("Short Order") the Election Commission of Pakistan ("Commission") purports to seek guidance on the point that "[i]n absence of a valid organizational structure of Pakistan Tehreek-i-Insaf (PTI), who will confirm the political affiliation of the returned candidates (MNAs and MPAs) on behalf of PTI, who have filed their statements in light of the Supreme Court Order [dated 12 July 2024]." We may note that other than a copy of the Short Order the application is bereft of any other documentation.

2. In reply to the above application, the PTI has filed C.M.A. 8139/2024, to which have been annexed a number of documents, including correspondence between the PTI and the Commission. We have considered the material that has been placed before us.

3. By way of brief recapitulation, in paragraphs 4 and 5 of the Short Order it has been categorically declared that the lack or denial of an election symbol does not in any manner affect the constitutional and legal rights of a political party to participate in an election (whether general or bye) and to field candidates, and that for the purposes, and within the meaning, of paragraphs (d) and (e) of clause (6) of Article 51 and paragraph (c) of clause (3) of Article 106 of the Constitution of the Islamic Republic of Pakistan, PTI was and is a political party, which secured or won (the two terms being interchangeable) general seats in the National and Provincial Assemblies in the General Elections of 2024 as provided in that Order. These paragraphs, and the preceding paragraph 3 of the Short Order, sound on the constitutional plane, being the proper interpretation and understanding of the relevant constitutional provisions. The other paragraphs of the Short Order, including in particular paragraphs 8 and 10, are consequential upon what has been held and declared in the paragraphs just noted, and flow and emanate from, and give effect to, constitutional conclusions. All of these points will be explicated in the detailed reasons for the decision of the majority (i.e., the Short Order), which is the binding judgment of the Court.

4. Turning now to the specific clarification purportedly sought, the PTI in its reply has annexed a number of notices issued by the Commission to the PTI through Barrister Gohar Ali Khan, in which it has itself identified the latter as the Chairman of PTI. Furthermore, the certifications required to be issued by a political party (here the PTI) and filed with the Commission in terms of paragraphs 8 and 10 of the Short Order have, as per the record placed before us in relation to the returned candidates (now respectively MNAs and MPAs) in the National and the Sindh, Punjab and Khyber Pakhtunkhwa Provincial Assemblies, been issued under the signatures of Barrister Gohar Ali Khan and Mr. Omar Ayub Khan, who are identified therein as being,

respectively, the Chairman and Secretary General of the PTI. These certifications are dated 18.07.2024, 24.07.2024 and 25.07.2024 and list, in each case, the particulars of the relevant returned candidate (now MNA or MPA as the case may be) and in particular the dates on which the declaration required of the candidate (again, in terms of paragraphs 8 and 10 of the Short Order) was filed with the Commission. These dates obviously all precede the respective dates of certification.

5. Putting together the record placed before us, and considering the same in the light of the Short Order, leaves in little doubt that the clarification sought by the Commission in terms of the C.M.A. 7540/2024 is nothing more than a contrived device and the adoption of dilatory tactics, adopted to delay, defeat and obstruct implementation of the decision of the Court. This cannot be countenanced. Even on the application of elementary principles of law, the application filed by the Commission is misconceived. Having itself recognized Barrister Gohar Ali Khan as the Chairman of PTI, the Commission cannot now turn around and purport to seek guidance from the Court with regard to how the certifications are to be dealt with. The Commission cannot approbate and reprobate, taking whatever (shifting) stance as it desires and as may seem to suit its immediate purposes for the moment. Furthermore, the Commission, even if one were to consider the application in the most sympathetic light, has apparently forgotten the well known de facto doctrine or rule, in terms of which the acts of a person who holds an office are protected even if there may be (and no such conclusion is reached here in relation to the PTI) any issue with the position de jure. It sufficed and the Commission was duty bound in terms of the Constitution to keep in mind that the admitted position (as stated before the Court during the hearing of the appeals) is that the PTI was, and is, an enlisted political party. This position was not only accepted and relied upon by us (eight Judges) but also by our three learned colleagues in minority (Hon'ble the Chief Justice, Justice Yahya Afridi and Justice Jamal Khan Mandokhail). Their lordship appear to have also accepted the validity of the party certificates (party tickets) issued by Barrister Gohar Ali Khan and thus his capacity to act for PTI as its Chairman. Furthermore, having itself issued notices to the PTI through Barrister Gohar Ali Khan as its Chairman, the Commission gave recognition to both the party and the office holder. That sufficed absolutely for purposes of the Short Order. It would be completely illogical to assume that a political party, a juristic person, is fully functional yet there are no natural persons who are either de facto or de jure performing its functions or running its affairs. Saying (as the Commission now in effect does through CMA 7540/2024) that a political party is an enlisted political party, fully functional for the purposes of its formation, yet there is no one that can perform its functions and run its affairs, amounts to blowing hot and cold in the same breath or, as noted, approbating and reprobating one and the same fact. There could have been no conceivable doubt that the certifications referred to above were correct and valid in terms of the Short Order and the continued denial and refusal of the Commission to accept the same, as and when filed, is constitutionally and legally incorrect and may expose the Commission to such further or other action as may be warranted in terms of the Constitution and the law.

6. But there is another, and more fundamental, aspect that must also be alluded to. It was categorically declared in paragraph 8 of the Short Order that on filing the requisite statement and its confirmation by the political party concerned, the seat secured by such candidate shall be forthwith deemed to be a seat secured by that political party. Therefore, upon submission of the declarations and certifications referred to above, the position of the returned candidates (now respectively MNAs and MPAs) immediately and ipso facto stood determined and fixed as a matter of law as on those dates and no subsequent act can alter what became, on the respective dates, past and closed transactions. As per the position so determined, the said returned candidates were and are the returned candidates of PTI and thus members of the parliamentary party of PTI in the National Assembly and Provincial Assemblies concerned, for all constitutional and legal purposes. The attempt by the Commission to confuse and cloud what is otherwise absolutely clear as a matter of the Constitution and the law must therefore be strongly deprecated. The list required to be issued by the Commission in terms of paragraph 8 (read with paragraph 10) of the Short Order is nothing more than a ministerial act, for the information and convenience of all concerned, and has no substantive effect. Nonetheless, the continued failure of, and refusal by, the Commission to perform this legally binding obligation may, as noted, have consequences. This obligation must be discharged forthwith.

7. With the above clarifications, the present application is disposed of. Office shall dispatch a copy of this order to the respective parties.

We may underline here that, as the Commission sought clarification of our short order dated 12 July 2024 in order to give effect to it, in terms of para 10 thereof, there was no legal requirement, nor did we find it necessary, to hear the parties before clarifying our own order on the point regarding which the Commission was unclear. Thus, we provided the above clarification without issuing notice to, or hearing, the parties on the Commission's application.

(iii) Do Articles 51(6)(d) & (e) and 106(3)(c) of the Constitution refer to political parties that have contested for and won general seats or to all enlisted political parties?

59. This question was much debated during the arguments presented by the learned counsel for the parties. It arises from their two rival contentions. The learned counsel for SIC contended that Articles 51(6) (d) & (e) and 106(3)(c) of the Constitution refer to all enlisted political parties that have "secured" general seats, either directly through their nominated candidates or through the joining of independent returned candidates. Conversely, the learned counsel for the Commission and other respondents argued that Articles 51(6) (d) & (e) and 106(3) (c) of the Constitution refer only to those political parties that have contested and won one or more general seats directly through their nominated candidates.

60. The provisions of Articles 51(6) (d) & (e) and 106(3) (c) of the Constitution are identical in their wording; the only difference is in their application. Article 51(6) (d) & (e) relates and applies to the seats reserved for women and non-Muslims in the National Assembly, while Article 106(3)(c) relates and applies to such seats in the Provincial Assemblies. Therefore, we shall discuss and determine the meaning of the provisions of Article 51(6) (d) & (e), which shall also apply mutatis mutandis to Article 106(3) (c) of the Constitution. The provisions of Articles 51(6) (d) & (e), along with other relevant clauses of the same Article, are reproduced here for reading and reference:

51. (1) There shall be three hundred and thirty-six seats for members in the National Assembly, including seats reserved for women and non-Muslims.

(2) .....

(3) The seats in the National Assembly referred to in clause (1), except the seats mentioned in clause (4), shall be allocated to each Province and the Federal Capital as under: --

| | General Seats | Women Seats | Total Seats |
|---|---|---|---|
| Balochistan | 16 | 4 | 20 |
| Khyber Pakhtunkhwa | 45 | 10 | 55 |
| Punjab | 141 | 32 | 173 |
| Sindh | 61 | 14 | 75 |
| Federal Capital | 3 | - | 3 |
| Total | 266 | 60 | 326 |

(3A) .....

(4) In addition to the number of seats referred to in clause (3), there shall be, in the National Assembly, ten seats reserved for non-Muslims.

(5) .....

(6) For the purpose of election to the National Assembly, -

(a) .....

(b) each Province shall be a single constituency for all seats reserved for women which are allocated to the respective Provinces under clause (3);

(c) the constituency for all seats reserved for non-Muslims shall be the whole country;

(d) members to the seats reserved for women which are allocated to a Province under clause (3) shall be elected in accordance with law through proportional representation system of political parties' lists of candidates on the

basis of total number of general seats secured by each political party from the Province concerned in the National Assembly:

Provided that for the purpose of this paragraph the total number of general seats won by a political party shall include the independent returned candidate or candidates who may duly join such political party within three days of the publication in the official Gazette of the names of the returned candidates; and

(e) members to the seats reserved for non-Muslims shall be elected in accordance with law through proportional representation system of political parties' lists of candidates on the basis of total number of general seats won by each political party in the National Assembly:

Provided that for the purpose of this paragraph the total number of general seats won by a political party shall include the independent returned candidate or candidates who may duly join such political party within three days of the publication in the official Gazette of the names of the returned candidates.

(Emphasis added)

A plain, literal reading of the above provisions of Article 51 of the Constitution shows that there are three hundred and thirty-six (336) seats for members in the National Assembly, including sixty (60) seats reserved for women and ten (10) for non-Muslims. Each Province is a single and separate constituency for all seats reserved for women allocated to that Province in the National Assembly, while the constituency for all seats reserved for non-Muslims is the whole country. Members for both the seats reserved for women and non-Muslims are elected in accordance with the law through a proportional representation system of political parties from the lists of their candidates. However, because of the said difference in constituencies, members to the seats reserved for women are elected on the basis of the total number of general seats secured by each political party in the National Assembly from the Province concerned, while members to the seats reserved for non-Muslims are elected on the basis of the total number of general seats won by each political party in the whole National Assembly irrespective of the Province from which it wins such general seats. The total number of general seats won by a political party, for the purpose of determining its share in the proportional representation system, includes independent returned candidate(s) who may duly join such political party within three days of the publication of the names of the returned candidates in the official Gazette.

61. In support of his contention, the learned counsel for SIC argued that the proviso to Article 51(6) (d), which allows independent returned candidates to join a political party, makes it possible for a political party that has not contested and won any general seats directly through its nominated candidates to "secure" some general seats from the Province concerned through the joining of independent returned candidates. He emphasised the use of the word "secured" in Article 51(6) (d) rather than the word "won".

62. We have observed that the main provisions of paragraph (e) of Article 51(6) and the proviso thereof, which pertains to seats reserved for non-Muslims, both use the word "won" instead of "secured". This paragraph is to be interpreted in conjunction with paragraph (d) of Article 51(6), which relates to seats reserved for women, as no argument was presented to us from any of the learned counsel for the parties suggesting that paragraph (e) should be interpreted differently from paragraph (d). Nor do we find any reason or logic to interpret them differently. The only difference between them, as noted above, is with regard to the constituencies: for the election of members to seats reserved for women, each Province is a single and separate constituency, while for the election of members to seats reserved for non-Muslims, the whole country is the constituency. Furthermore, the term "won" is used in the provisos to both paragraphs (d) and (e) of Article 51(6). Considering both these closely related provisions conjunctively and harmoniously, we find that the words "secured" and "won" have been used interchangeably. Thus, nothing turns on the use of the word "secured" in paragraph (d) of Article 51(6).

Presumption that same words used in a statute carry same meaning and different words different meanings, is not absolute.

63. Although it is reasonable to presume that the same meaning is implied by the use of the same word in every part of a statute or a section thereof and that a change of word denotes a change in meaning, the presumption is neither absolute nor determinative in all cases. The context takes precedence over this presumption in ascertaining the meaning of words used in a statute, as even the statutory definitions of the words and

expressions are subject to this consideration. Therefore, it is quite possible that the same word may be used in different meanings in a statute or in a section of the statute, or, conversely, different words may be used for the same meaning. The causes for this may be various, as pointed out by Maxwell and Bennion, including that the statute is a consolidating enactment where the words are derived from two or more earlier enactments, or the statute is compiled from different sources, or the statute is the product of many minds jointly, or the statute undergoes alterations and additions from various hands in the process of its enactment in the Legislature, etc.[48] Words "secured" and "won" carry the same meaning in paragraph (d) of Article 51(6) and have been used interchangeably in its main provisions and proviso.

64. We find that a similar circumstance might have caused the use of different words in the main provisions of Article 51(6) (d) and the proviso thereto for the same meaning-the word "secured" in the main provisions of paragraph (d) of Article 51(6) and the word "won" in the proviso thereto-either because both have been compiled from different sources or because different minds produced each of them. The legislative intention to mean "won" by both expressions is explicitly evident from the use of the word "won" both in the main provisions of the closely related paragraph (e) of Article 51(6) as well as in the proviso thereto. Even the drafter of the proviso to paragraph (d) of Article 51(6) appears to have assumed that the word "won" had been used in the main provisions, as he referred to them as such in the proviso. Therefore, it can be concluded with reasonable certainty that the words "secured" and "won" carry the same meaning in paragraph (d) of Article 51(6) and have been used interchangeably in its main provisions and proviso.

65. Once we have concluded that the words "secured" and "won" carry the same meaning in paragraph (d) of Article 51(6) and have been used interchangeably in its main provisions and proviso, the word "won" being specific and clearer than the word "secured" must be our guide in construing the provisions of the said Article. Because when a statute, or any other instrument, uses two different words for the same meaning and any ambiguity arises as to the meaning of one of those words, the word which is specific and clearer should guide the interpretation of the general and obscure word, not vice versa. So read, the main provisions of paragraph (d) of Article 51(6) clearly refer to political parties that have "won" general seats in the National Assembly from the Province concerned. The consequential point, which hardly requires extensive supporting arguments, emerges inevitably that political parties win general seats by contesting for such seats through their nominated candidates.

66. Learned counsel for SIC did not dispute that political parties win general seats by contesting for such seats through their nominated candidates. His argument was that the proviso equates a political party that secures general seats by the joining of independent returned candidates with one that wins such seats directly through its nominated candidates as mentioned in the main provisions of paragraph (d) of Article 51(d). We are not impressed by this argument as it misconceives the subject and object of the proviso.

The subject and object of the proviso to Article 51(6)(d)

67. The subject and focus of the proviso, as we understand it, is on the "general seats" i.e., "general seats won (secured) by a political party", and not on the political party winning (securing) such seats. Its object is to prescribe how the "total number of general seats won (secured) by a political party" is to be determined for the purpose of the paragraph, not to define or explain political parties for the purpose of the paragraph. Had the proviso stated that, for the purpose of this paragraph, the political party winning general seats shall include a political party securing general seats by the joining of independent returned candidates, the argument would have had some weight. But the language of the proviso is not to this effect. The proviso does not in any way extend or explain the meaning of the expression "political party" as used in the main provisions of the paragraph.

The proviso to Article 51(6)(d) is not a true proviso

68. A true proviso, as is well established, serves as an exception to the main provisions to which it is added. It excepts a particular case from the rule stated in the main provisions by limiting or qualifying the applicability of the main provisions. Its effect is generally described as being that, but for the proviso, the main provisions would have included the subject matter of the proviso.[49] However, since it is not the form but the substance that matters, the clear language of both the main provisions and the proviso may establish, as held by this Court in Hamdard Dawakhana,[50] that the proviso is not a limiting or qualifying clause of the main provisions but is, in

itself, a substantive provision. Therefore, the best principle is that irrespective of the label, the contents of the main provisions and the proviso are to be read and construed together to ascertain the intention of the Legislature.

69. For determining the true character of the proviso presently under consideration, we find the Privy Council's case of Atwill[51] very enlightening. In that case, their Lordships of the Privy Council overturned the decision of the High Court of Australia, which had treated the proviso in its classic meaning, i.e., limiting or qualifying what precedes it. Their Lordships of the Privy Council did not agree and remarked:

While in many cases that is the function of a proviso, it is the substance and content of the enactment, not its form, which has to be considered, and that which is expressed to be a proviso may itself add to and not merely limit or qualify that which precedes it.

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In a strict sense the use of the words "Provided that" in section 102(a) may also be disregarded as inapt. The meaning of that provision and the proviso would be the same if instead of the words "Provided that" there had appeared the word "and" ... and to ascertain the true effect of the provision, the second part, that is to say, the proviso, is complementary and necessary in order to ascertain the full intention of the Legislature.

To strengthen their opinion, their Lordships cited the following observation of Lord Loreburn, L.C., made in the case of Taff Vale Railway Company:[52]

But it is also true that the latter half of it, though in form a proviso, is in substance a fresh enactment, adding to and not merely qualifying that which goes before.

Their Lordships also cited extensively similar observations made by Viscount Maugham and Lord Wright in the case of Jennings,[53] on determining the true meaning of a proviso.

70. We find that the observations made by their Lordships of the Privy Council in Atwill fully apply to the proviso presently under consideration. In our opinion, the meaning of the main provisions of paragraph (d) of Article 51(6) and the proviso thereto would be the same if instead of the words "Provided that", there had appeared the word "and". In our considered opinion, to determine the true effect of the main provisions as per the intention of the Legislature, the second part, i.e., the proviso, is to be read as complementary to, not limiting or qualifying, the first part, i.e., the main provisions. This approach is also consistent with the principle stated above that irrespective of the label, the contents of the main provisions and the proviso are to be read and construed together to ascertain the intention of the Legislature.

71. We have determined above that the main provisions of para-graph (d) of Article 51(6) refer to political parties that have won general seats in the National Assembly from the Province concerned through their nominated candidates. The proviso stipulates that for the purpose of this paragraph, the total number of general seats won by a political party shall include any independent returned candidate or candidates who may duly join such political party. Without the proviso, the general seats won by independent returned candidates could not be considered as seats won by a political party. Therefore, the proviso, in the words of Lord Loreburn, 'is in substance a fresh enactment, adding to and not merely [limiting or] qualifying that which goes before' in the main provisions. Since the proviso does not except anything from the main provisions of paragraph (d) of Article 51(6) by limiting or qualifying them but rather adds to them, it is not a true proviso but a substantive provision that enacts a matter which would not otherwise have been covered by the main provisions of the paragraph.

72. However, the latter part of the proviso is, in the true sense, a proviso as it qualifies that which goes before, i.e., including the seats of independent returned candidates in the seats won by the political party to which they join, for the purpose of the paragraph. According to this part, for the joining to have the stipulated effect, it must occur within three days of the publication of the names of the returned candidates in the official Gazette. It thus excludes any joining of independent returned candidates made beyond that period from having effect for the purpose of the paragraph.

The effect of the use of the word "such" with "political party" in the latter part of the proviso

73. It is also a general rule of literal construction of statutes that 'a qualifying or relative word, phrase, or clause, such as "which", "said" and "such", is to be construed as applying to the word, phrase or clause next preceding,

or as is frequently stated, to the next preceding antecedent, and not as extending to or including others more remote, unless a contrary intention appears.'[54]

74. The latter part of the proviso uses the qualifying term "such political party", to which the independent returned candidate or candidates may duly join. When we apply the above general rule to this qualifying term, it becomes evident that it refers to the term "a political party" next preceding, where the noun "political party" has

been used to denote a political party that has won general seats. It thus inevitably follows that for the purpose of paragraph (d) of Article 51(6) and within the scope of the proviso, the independent returned candidate or candidates may duly join, or be allowed to join, only such a political party that has won one or more general seats through its nominated candidates in the National Assembly from the Province concerned.

Harmonious reading of Article 51(6(d) with Article 63A(2)

75. A constitution, as defined by Cooley, is 'the fundamental

law of a state, containing the principles upon which the government

is founded, regulating the division of the sovereign powers, and

directing to what persons each of these powers is to be confined, and the manner in which it is to be exercised.'[55] Therefore, it is a fundamental principle of constitutional construction, well entrenched in our constitutional jurisprudence, that a constitution must be construed as an organic whole, harmonising its various parts, particularly those closely interlinked, and trying to give due effect to all of them, so as to make it an effective and efficacious instrument for the smooth and good governance of the state-one of the ultimate objectives sought to be achieved by it.[56]

76. In view of this principle of constitutional construction, the learned Attorney-General for Pakistan drew our attention to the provisions of clause (2) of Article 63A, which defines a member of a Parliamentary Party and also sheds light on how a political party constitutes a Parliamentary Party. Relying upon these provisions of Article 63A, he argued that only a political party whose nominated candidates become members of a House constitutes a Parliamentary Party. Therefore, he contended, the same meaning ought to be given to the expression 'political party' in clause (d) of Article 51(6), to harmonise both provisions with each other.

77. We have given anxious consideration to his contention and found it very persuasive and harmonious with the view which we are inclined to take on the meaning of the term "political party" used in Article 51(6)(d). The provisions of clause (2) of Article 63A are reproduced here for ready reference:

(2) A member of a House shall be deemed to be a member of a Parliamentary Party if he, having been elected as a candidate or nominee of a political party which constitutes the Parliamentary Party in the House or, having been elected otherwise than as a candidate or nominee of a political party, has become a member of such Parliamentary Party after such election by means of a declaration in writing.

A bare reading of the above provisions shows that a member of a House becomes a member of a Parliamentary Party in two cases: (i) if he has been elected as a candidate or nominee of a political party which constitutes the Parliamentary Party, he automatically becomes a member of such Parliamentary Party, or (ii) if he, having been elected as an independent candidate (i.e., otherwise than as a candidate or nominee of a political party), joins such Parliamentary Party by means of a declaration in writing.

78. The qualifying term "such Parliamentary Party", as discussed above, refers to the term "Parliamentary Party" next preceding, where the noun "Parliamentary Party" has been used to denote a political party whose candidate or nominee has been elected as a member of a House. It is thus evident that in the first case, one action of becoming a member of a House as a candidate or nominee of a political party produces two results: (i) it makes a political party, whose candidate or nominee is elected as a member of a House, a Parliamentary Party, and (ii) it makes that member of a House, a member of such Parliamentary Party. A member of a House elected as an independent candidate can become a member of a Parliamentary Party by joining only such a political party that constitutes a Parliamentary Party, not a political party that does not constitute a Parliamentary Party. Notwithstanding joining a political party of latter type, a member of a House shall not become a member of a Parliamentary Party and shall remain an independent member of a House for the purpose of all parliamentary proceedings.

Answer to question (iii) and its applicability to SIC and PTI

79. Thus, both the standalone reading of the provisions of Articles 51(6) (d) and (e), as well as their conjunctive and harmonious reading with the provisions of Article 63A(2), lead to one and only irresistible conclusion in terms of which this question is answered: Article 51(6) (d) of the Constitution refers to political parties that have contested for and won one or more general seats in the National Assembly from the Province concerned, not to all enlisted political parties. Similarly, Article 51(6) (e) of the Constitution refers to political parties that have contested for and won one or more general seats in the National Assembly from the whole country, i.e., from any of the Provinces or the Federal Capital.

80. Since SIC has not contested for and won one or more general seats in the National Assembly from the Provinces concerned or from anywhere in the country, it is not such a political party to which any of the independent returned candidates can join, for the purposes of paragraphs (d) and (e) of Article 51(6) of the Constitution. Therefore, the act of joining it by some returned candidates has not produced any result, and the legal status of such returned candidates remains the same as it was before such an act. As SIC has not won general seats, it is not entitled to allocation of the disputed reserved seats. However, as shall be mentioned later in detail, it has been determined by eleven members of the Bench with varying figures that PTI has contested for and won some general seats in the National Assembly from the Provinces concerned, and it is a political party entitled to allocation of the disputed reserved seats under paragraphs (d) and (e) of Article 51(6) of the Constitution.

(iv) How is the proportional representation of a political party to be calculated for the allocation of reserved seats under Articles 51(6)(d) & (e) and 106(3)(c) of the Constitution?

81. This was perhaps the most debated and, if we may say so, the most challenging question involved in the case. Because of the illegal mentioning of contesting candidates of a political party (PTI) in the list of contesting candidates (Form-33) and its returned candidates as independent returned candidates in the Section-98 Notification, as held above, an unusual situation has arisen in a parliamentary democracy. This situation seemingly pits one of the fundamental principles of democracy-that the voice of the electorate should be truly reflected in the composition of the legislative bodies-against the constitutional objective of ensuring adequate representation of women and minorities (non-Muslims) in such bodies.[57] However, with the answers provided to questions (i), (ii) and (iii) above, it has become evident that this conflict does not actually arise.

Position of political parties and independent members of Parliament in a parliamentary democracy

82. Our Constitution, as held by this Court in Benazir Bhutto,[58] establishes a parliamentary democracy with a cabinet form of government, which is primarily composed of the representatives of the political party in majority. Therefore, the cabinet form of government is essentially a government of the political party in majority, or of political parties in the case of a coalition government. The political party or parties that form the Government are the connecting link between the Government (Executive) and the people, and between the Parliament (Legislature) and the people. They are the effective instrumentalities by which the will of the people is made vocal, and the enactment of laws and the governance of the country in accordance therewith made possible. Political parties form the bedrock of representation in a parliamentary democracy and are fundamental, constitutive components of representation, not mere accessories.[59]

83. In the usual course of a parliamentary democracy, competing political parties, advocating for different manifestos, make the parliamentary election meaningful by giving voters a choice. They convert the results of a parliamentary election into a government The party or parties in the majority form the Government, while the party or parties in the minority serve as a fervent opposition. The opposition criticises the policies and actions of the Government and thus calls the Government to justify its policies and actions, thereby making it accountable to the people. Therefore, political parties are institutions of great importance in a parliamentary democracy and a vital feature of a representative government.[60]

84. On the other hand, persons elected as members of a House of Parliament (Legislature) in their personal capacities, as independent candidates, in the words of Nasim Hassan Shah, J., 'just toss around on the political scene, rudderless and without a destination'.[61] It is only when they join a political party that they become a force capable of exercising some influence through their activities for the welfare of the constituencies and the public

they represent in Parliament. They, as members of a political party, and not as independent members of Parliament, can best achieve the objective of effectively representing their constituencies in Parliament---whether in legislative business and forming executive policies or taking executive actions if they become part of a party in government, or by holding the Government accountable for its policies and actions if they are part of a party in opposition.

85. The above position of political parties and that of the independent members of Parliament in a parliamentary democracy, such as ours, guides our understanding of the procedure prescribed for the allocation of the reserved seats.

86. As evident from the above-cited provisions of Article 51 of the Constitution, clause (3) thereof allocates the specific number of seats reserved for women to each Province and clause (6) (d) provides the procedure for electing the members to those seats. A joint reading of both clauses makes it clear that the members to all the reserved seats allocated to a Province under clause (3) are to be elected under clause (6) (d) of Article 51 as per the proportional representation system of political parties from the lists of their candidates on the basis of total number of general seats won by each political party, and no reserved seat shall ordinarily remain vacant. Although the arguments before us presented divergent contentions on the meaning of the expression "political party" used in clause (6)(d), none disputed the proposition that only political parties, not independent returned candidates, are entitled to the allocation of the reserved seats. Independent returned candidates can only be counted towards the proportional representation if they act in accordance with the proviso and join a political party, in which case their seats shall be counted as the seats of the political parties to which they join for the purpose of determining the proportional representation of political parties.

Proportional representation system of political parties is a composite expression

87. A composite expression, as Bennion writes,[62] must be construed as a whole. While a certain meaning can be collected by taking each word in turn and then combining their several meanings, but it does not follow that this is the true meaning of the whole phrase. Each word in the phrase may modify the meaning of the others, giving the whole its own meaning. It, therefore, certainly is not a satisfactory method of arriving at the meaning of a compound phrase to sever it into several parts, as observed by Lord Halsbury,[63] and to construe it by the separate meaning of each of such parts when severed. The intention of the Legislature is to be discovered by taking the words as they occur---in the combination in which they are placed---not by breaking up a compound expression and weighing the words separately.[64] If a composite expression is comprehensive, it is unnecessary to determine the dividing line between different terms used in the expression.

88. The provisions of paragraph (d) of Article 51(6), when read in light of the above principles of interpreting a composite expression, remove the confusion that dwelled in the minds of some of us regarding the meaning and scope of the "proportional representation system" envisaged by that paragraph. The complete and composite expression used in the said paragraph is "proportional representation system of political parties". The expression "lists of candidates", annexed to it with an apostrophe, only provides the mechanism for electing members to the reserved seats from the lists of candidates of the political parties. So read, the provisions of paragraph (d) of Article 51(6) become consistent with the above-stated legal position that the members to all the reserved seats allocated to a Province under clause (3) are to be elected under clause (6) (d) of Article 51 as per the proportional representation system of political parties from the lists of their candidates on the basis of total number of general seats won by each political party, ensuring that no reserved seat ordinarily remains vacant.

Constitutional objective of providing seats reserved for women and non-Muslims

89. The Principles of Policy provided in Chapter 2 of Part II of the Constitution, often referred to as the conscience of the Constitution,[65] require that steps be taken to ensure the full participation of women in all spheres of national life and to safeguard the legitimate rights and interests of minorities (non-Muslims), including their due representation in the Federal and Provincial services.[66] To actualise this constitutional objective, a certain number of seats have been reserved in the National Assembly and Provincial Assemblies for women and non-Muslims (minorities). This constitutional affirmative action aims to promote gender and minority-inclusive representation in the legislative bodies, allowing for the voices of various segments of

society to be heard and considered in the law-making process. It ensures that the legislative bodies reflect the diverse perspectives and interests of the population.

90. The principle of proportional representation of political parties, according to which the members to the reserved seats are elected, aims to reflect the electoral support for political parties in the composition of the legislative bodies. By distributing the reserved seats among political parties based on the general seats won by them, the legislative bodies remain representative of the electorate's choice. Adopting an interpretation of paragraphs (d) and (e) of Article 51(6) that would result in holding certain reserved seats vacant would lead to a form of disenfranchisement, where the electorate's mandate is not fully realised in terms of gender and minority representation, and thus frustrate the constitutional objective of providing for such reserved seats.

91. Rule 95(2) of the Elections Rules, which provides that the seats won by independent candidates, other than those who join a political party, shall be excluded for the purpose of determining the share of each political party, is thus found consistent with the constitutional provisions, as it ensures the constitutional objective that no reserved seat should ordinarily remain vacant.

Answer to question (iv), and its applicability to PTI and other political parties

92. In view of the above, question (iv) is answered as follows: for the purpose of allocating reserved seats under Articles 51(6) (d) & (e), the proportional representation of political parties is to be calculated on the basis of total number of general seats won by each political party, including the seats of independent returned candidates who join it, but excluding the seats of other independent returned candidates. The Commission is to calculate the share of proportional representation of PTI and other political parties in the reserved seats accordingly.

Denial of due share of proportional representation in the reserved seats violates the fundamental rights of the political party and the electorate guaranteed by Articles 17(2) and 19 of the Constitution.

93. Before parting with this part of the judgment, we want to underline that the aforementioned principle of holistic and harmonious reading of closely interlinked provisions of the Constitution requires that the provisions of paragraphs (d) and (e) of Article 51 are to be read not only in conjunction with Article 63A(2) but also with Article 17(2) of the Constitution, which is also closely related thereto. As aforementioned, this Court has held in the cases of Benazir Bhutto and Nawaz Sharif that the right to form a political party guaranteed by Article 17(2) includes the right to participate in and contest elections as a political party, and the right to form the Government and complete the prescribed tenure if the members of the political party constitute the requisite majority. We find that the right to so many of the reserved seats that are proportionate to the general seats won by a political party is also an integral part of the right to form a political party, as this right also gives the "life and substance" to the said named fundamental right. Therefore, denial of the right to reserved seats proportionate to the general seats won by it would violate the fundamental rights of a political party guaranteed by Article 17(2) as well as the fundamental right to vote of the electorate that have voted for such political party guaranteed by Article 19 of the Constitution.

What relief would serve the ends of justice?

94. Having thus answered the questions of law, we shall now examine what relief would serve the ends of justice in the peculiar facts and circumstances of this case. When we speak of justice, we have the intuitive sense of putting things aright and in their appropriate place, of re-establishing a lost harmony and equilibrium, of remaining true to the nature of things, of giving each his due.[67] In this regard, we are also guided by the following golden words of Kaikaus, J., written in Imtiaz Ahmad:[68]

Any [justice] system, which by giving effect to the form and not to the substance defeats substantive rights, is defective to that extent. The ideal must always be a [justice] system that gives to every person what is his.

His lordship further observed:

I am unable to place the mistakes committed by the Administration [public functionaries] on the same footing as mere accidents. The difference is that in one case the harm caused to a party being the result of a mistake committed by the Administration there is an obligation on our part to undo it as far as that is possible. ... In relation to Courts there is a well-known saying that the act of Court will not prejudice anybody. I do not see why the principle of this maxim does not apply to the whole machinery of the Administration [public functionaries] of which the Courts are only a part. No mistake committed by this machinery should prejudice

any person as far as that can be helped. If the mistake of the election authorities is like a misfortune why are elections set aside on the ground of irregularities committed by the officers who conduct the elections? Why does not the law regard these irregularities like events, which have happened and cannot be helped? It cannot be the intention of the law that rights of persons should be affected by the mistakes committed by public officers. ... We must put the parties in the same position, as they would have been if no mistake had been committed by the administration as long as we can do that.

(Emphasis added)

The above principle of law, though enunciated by his Lordship in a dissenting judgment, has appealed "to the brooding spirit of the law, to the intelligence of a future day" and has now become well established and well entrenched in our jurisprudence.[69]

95. We find that the said principle is not only premised on two maxims: (i) actus curiae neminem gravabit (an act of court [public functionary] shall prejudice no one) and (ii) ex debito justitiae (as a debt of justice), but are also rooted in the constitutional provisions of Article 4 of the Constitution. Under Article 4, it is an inalienable right of every citizen, and of every other person for the time being within Pakistan, to enjoy the protection of law and to be treated in accordance with law. This constitutional inalienable right casts a corresponding constitutional inalienable duty on all public functionaries of Pakistan to treat every citizen and every other person for the time being within Pakistan in accordance with law. From this constitutional right and the corresponding constitutional obligation, the principle emerges, in our opinion, that no person should be made to suffer or be prejudiced by an unlawful act or omission of public functionaries. If any person suffers the loss of any right or benefit because of an unlawful act or omission of a public functionary, he is entitled, by reason of an obligation of justice, to be restored to that right or benefit and put in the same position, insofar as is possible, as he would have been if such unlawful act or omission had not been made by the public functionary.

Unlawful acts and omissions of the Returning Officers and the Commission that caused prejudice to PTI

96. In the present case, as discussed and determined above, the unlawful acts and omissions of the Returning Officers and the Commission, which have caused confusion and prejudice to PTI, its candidates and the electorate who voted for PTI, are numerous and include the following:

(i) the wrong omission to clarify in its order dated 22 December 2023 by the Commission that PTI is an enlisted and functioning political party notwithstanding the rejection of its intra-party elections and non-allocation an election symbol;

(ii) the wrong omission to clarify in its order dated 13 January 2024 by the Commission that PTI is an enlisted and functioning political party notwithstanding that it has not been allocated an election symbol, and that the candidates nominated by it are to be treated and mentioned as PTI candidates, not as independent candidates in the whole election process;

(ii)(sic) the wrong mentioning of the status of PTI candidates by the Returning Officers as independent candidates in the list of contesting candidates (Form-33);

(iii) the wrong decision on the application of a PTI candidate (Mr. Raja) by the Commission in rejecting his claim to be mentioned as a PTI candidate in the list of contesting candidates (Form-33);

(iv) the wrong mentioning of PTI returned candidates by the Commission as independent returned candidates in the Section 98 Notification; and

(v) the wrong acceptance of the joining of some returned candidates to SIC by the Commission, despite that it was not such a political party to which an independent returned candidate could join under the proviso to paragraphs (d) & (e) of Article 51(6) and paragraph (c) of Article 106(3), or under clause (2) of Article 63A of the Constitution.

In addition to the above, the making of an unconstitutional rule, i.e., the Explanation to Rule 94 of the Elections Rules, by the Commission which disentitles a political party to which an election symbol is not allotted from the allocation of reserved seats despite its winning the general seats, also contributed to causing confusion and prejudice to PTI, its candidates and the electorate. Further, it is observed with respect, the decision by this Court on 13 January 2024 in the matter of intra-party elections of PTI on the very day that was fixed for submission of party certificates (party tickets) and allotment of the election symbols as per the Election Programme, and

that too without clarifying that the said decision did not affect the electoral status of PTI and its candidates, also contributed in causing confusing and prejudice to PTI, its candidates and the electorate.

The scope of powers of the Commission under Article 218(3) and of the Supreme Court under Article 187(1) of the Constitution.

97. In view of the principle stated above, PTI, its candidates and the electorate should not be made to suffer or be prejudiced by the unlawful acts or omissions of public functionaries, namely the Returning Officers and the Commission. Given that they have been deprived of their constitutional right to proportional representation in the reserved seats due to these unlawful acts and omissions, they are entitled, by virtue of an obligation of justice (ex debito justitiae), to be restored to that right and placed, insofar as possible, in the same position they would have been if such unlawful acts and omissions had not occurred. However, there is no specific provision in the Constitution or the Elections Act to address this situation and rectify the wrong.

98. Since the Legislature, while enacting a law on a subject, cannot foresee and cover all unforeseen matters or issues that may arise in the administration of such law in practice, it often enacts a provision that confers upon a specified authority the general power to address such unforeseen matters or issues. In the Elections Act, such a general

power is conferred upon the Commission by Sections 4 and 8(c).[70]

These statutory general powers are conferred upon the Commission, in addition to the similar constitutional general power vested in it

under Article 218(3)[71] of the Constitution. Both these statutory and constitutional general powers are to be invoked and exercised by the Commission, as held by this Court in Zulfiqar Bhatti,[72] when there is no specific provision of law on the matter or issue that needs to be addressed.

99. Similar is the scope of the constitutional general power of the Supreme Court under Article 187(1)[73] of the Constitution: it is to be invoked and exercised by the Court to do complete justice in any case when there is no specific provision of law that covers or addresses the matter or issue involved.[74] While exercising such general powers, the Commission or the Court must, however, make an endeavour to

adhere to the spirit and substance of the provisions of law that, although not covering the matter or issue, are closely related to it, so that the legislative intent may be given effect to the maximum extent possible.

100. In order to invoke and exercise the general power vested in this Court under Article 187(1) of the Constitution to address the matter involved in the present case, we have also been guided by the observations made by a six-member larger Bench of this Court in Saddaqat Khan.[75] After a detailed analysis of several previous cases, the larger Bench reached and announced the following conclusion:

The ultimate goal sought to be achieved by the courts was thus to do complete justice between the parties and to ensure that the rights were delivered to those to whom they belonged and no hurdles were ever considered strong enough to detract the Courts from reaching the said end. Incorporation of provisions such as section 151, C.P.C.; section 561-A in the Cr.P.C.; revisional powers of wide amplitude exercisable even suo-motu under section 115 of the C.P.C. and section 439 of the Cr.P.C.; various provisions of the like contained in Order XLI, rule 4 and Order XLI, rule 33 of the C.P.C.; the provisions of Order XXXIII, rule 5 of the Supreme Court Rules of 1980; suo motu powers exercisable under Article 184(3) of the Constitution and provisions of Article 187 of the Constitution, are some of the examples which could be quoted as having been made available to the Courts at all levels to surmount any impediments which a Court might confront in the path of doing complete justice.

The ultimate objective sought to be achieved by laws, the courts and the justice system, as observed by Kaikaus, J., and as declared by the larger Bench, is to dispense justice by ensuring that rights are delivered to those to whom they belong; let justice be done, though the heavens fall (fiat justitia, ruat caelum). Thus, the power under Article 187(1) of the Constitution is focused on achieving and prioritizing fairness to ensure complete justice in any case.

Point of divergence between eight Judges and three Judges

101. Up to this point, in invoking and exercising the general power of this Court vested in Article 187(1) of the Constitution, we (the eight Judges) and the three Judges (Hon'ble the Chief Justice, Justice Yahya Afridi, and Justice Jamal Khan Mandokhail) were largely aligned. Unfortunately, from this point onward, despite several

mutual discussions on various aspects of the matter, we could not reach a consensus on what ultimate relief would be "necessary for doing complete justice" in the present case.

102. We may underscore here what Chief Justice Dickson said about the working of the Supreme Court of Canada: "The people of Canada are not entitled to nine separate votes [of the nine Supreme Court Justices]. They are entitled to nine votes after each Justice has listened to and sincerely considered the views of the other eight."[76] Similarly, we believe, the people of Pakistan are entitled to a decision from a Bench of this Court after each Judge on the Bench has listened to and sincerely considered the views of the others. Judges need not always see eye to eye and may ultimately disagree, but the possibility of disagreement does not absolve them from engaging in a free and frank discussion before rendering their final opinion. Their professional responsibility to deliver a well-considered decision requires them to lay out both their own position and the defects they see in their colleagues' positions with utter frankness. Egos may be bruised, tempers tempted, yet all must pursue the process with respect and civility.

103. Guided by the above principle, we, in fulfilling our professional responsibility to deliver a well-considered decision on the matter involved in the present case, laid out both our own position and, with respect, the defects we saw in our colleagues' positions. We did listen to and sincerely consider their views as well. Unfortunately, neither could we convince them of our view, nor could we bring ourselves to agree with theirs.

104. We all (us eight and our three colleagues) agreed that due to unlawful acts and omissions of the Returning Officers and the Commission, PTI, its candidates and the electorate have suffered the loss of some of their constitutional and statutory rights, particularly their right to proportional representation in the reserved seats. However, we differed on how we could, by virtue of an obligation of justice (ex debito justitiae), restore them to that right and place them, insofar as possible, in the same position they would have been if such unlawful acts and omissions had not occurred.

105. Our learned colleagues (Hon'ble the Chief Justice and Justice Jamal Khan Mandokhail) have formed the opinion that "the candidates who had submitted their nomination papers declaring that they belonged to PTI and had not filed a document showing affiliation with another political party before the last date of withdrawal of the nomination papers, should have been treated[77]" as PTI returned candidates. Whereas our learned colleague (Justice Yahya Afridi) is of the view that "[a] candidate for a seat in the National Assembly or the Provincial Assembly, who in his/her nomination paper has declared on oath to belong to PTI and duly submitted a certificate of the same political party confirming that he/she is the nominated candidate of PTI for the respective constituency, shall remain so ,... unless he/she submitted a written declaration to the Election Commission of Pakistan or Returning Officer to be treated as the candidate of another political party or as an independent candidate[78]". We respect their opinions but disagree.

106. '[T]he logic of words should yield to the logic of realities'.[79] With great respect, our learned colleagues have assumed and accepted that PTI candidates filed declarations of their affiliation with another political party (PTI-Nazriati), which were not even accepted by the Returning Officers under the order of the Commission, by their own free will uninfluenced by any constraint of the circumstances. Our conscience and understanding of the realities of the case do not allow us to assume and accept this position. We are completely at a loss to understand the logic, other than the constraint of the circumstances, as to why a candidate of a national-level political party (PTI), which had once formed the Federal Government and two Provincial Governments, would supersede his candidature of that party (PTI) with a party (PTI-Nazriati) whose name had not even been heard by most of the electorate, or why he would leave the candidature of that party (PTI) and become an independent candidate, by his own free will. Had it been a case of one or two candidates, we might have imagined some plausibility of free will in their actions. However, we cannot assume by any stretch of the imagination that hundreds of candidates for the National Assembly and the Provincial Assemblies would act in such a manner by their own free will, not under the constraints of the circumstances created by the unlawful acts and omissions of the public functionaries---the Returning Officers and the Commission. Therefore, we have found that notwithstanding their subsequent filing of a declaration to be treated as candidates of PTI-Nazriati or as independent candidates, 39 returned candidates, out of the list of 80 submitted by the Commission, who had

either filed party certificates (party tickets) of PTI or declared their affiliation with PTI in their nomination forms or statutory declarations/ affidavits, are the returned candidates of PTI.

107. Similar is the position of those candidates whom our learned colleagues have treated as independent returned candidates because they had not mentioned themselves as belonging to PTI in their nomination papers. In respect of these candidates, who are 41 according to the record produced by the Commission, our learned colleagues have presumed that they were independent candidates, and that none of them has appeared before the Court to rebut that presumption.

108. We must say that we tried hard to understand how, in a parliamentary democracy based on a political parties system, as underlined by this Court in Benazir Bhutto, such a large number of candidates to the seats in the National Assembly and the Provincial Assemblies could inspire and win the confidence of the electorate as independents. No satisfactory answer to this query was presented before us on behalf of the Commission and other respondents. The assertion of SIC and PTI that they were also PTI candidates and the electorate voted for them for their being PTI candidates though appears satisfactory but is not supported by the record presently before us. Therefore, it is the most challenging matter involved in the case where the scales of the requirements of law and of justice are to be justly, fairly and reasonably balanced.

109. We do not find any force in the argument that those returned candidates have not appeared before us to rebut the presumption accepted by our learned colleagues, because we find that they are before us speaking through SIC. What SIC says on facts is the version of those returned candidates---SIC speaks for them before us. Both SIC and PTI have narrated the same facts and circumstances that led to the mentioning of their status as independent candidates in the nomination papers. Both have claimed that they were also PTI candidates and that the electorate voted for them for being PTI candidates; they, in their individual capacities, did not have such voting support of the electorate.

110. As held above, while exercising their general powers under Article 218(3) and Article 187(1) of the Constitution respectively, the Commission and this Court must endeavour to adhere to the spirit and substance of the provisions of law that, although not explicitly covering the matter or issue, are closely related to it, so that the legislative intent may be given effect to the maximum extent possible. According to Section 66 of the Elections Act, two elements make a person the candidate of a political party: (i) the candidate's own declaration that he belongs to that party, and (ii) the party's certificate (party ticket) nominating him as its candidate. It is thus a matter between the candidate and the party to which he claims affiliation. No consent or authorisation from any third person or authority is required to establish their relationship and the candidate's status. This is the substance and spirit of Section 66 of the Elections Act.

111. Therefore, we find it more just, fair and reasonable that this fact should be verified and then acted upon by adhering to the substance and spirit of Section 66 of the Elections Act so that the legislative intent may be given effect to the maximum extent possible. Instead of deciding such an important matter, which essentially relates to the right and value of the votes of millions of voters, merely on assumptions, presumptions or oral statements, this fact should be determined with certain and concrete material: (i) the written statement (declaration) by the returned candidate concerned, and (ii) its written confirmation (certificate) by PTI. Upon submission of written statements by the returned candidates and written confirmations by PTI through its de facto or de jure Chairman, the status of the 41 returned candidates shall immediately and ipso facto stand determined as a matter of law, with no subsequent act altering what, upon submission of the statements and confirmations, will become a past and closed transaction. Neither the returned candidates nor PTI can later resile from this position. It is also emphasized that this verification process is solely to determine whether the said 41 returned candidates were indeed the returned candidates of PTI, and in no way does it amount to accepting them as independent returned candidates and granting them another opportunity to join a political party under the provisos to paragraphs (d) and (e) of Article 51(6) of the Constitution. Once their status is determined upon submission of the requisite statements and confirmations, they shall be deemed returned candidates of PTI from the date of the publication of their names as returned candidates in the official Gazette. Consequently, they will be considered members of the parliamentary party of PTI in the National Assembly from the date they took the oath of office as Members of the National Assembly (MNAs), for all constitutional and legal purposes.

112. As above held, the general power of the Commission under Article 218(3) of the Constitution read with Sections 4 and 8 of the Elections Act is similar to the general power of this Court under Article 187(1) of the Constitution. Therefore, in the present case the Commission should have, by the impugned order, in the words of Section 4(1), "issue[d] such directions or orders as may be necessary for the performance of its functions and duties, including an order for doing complete justice in any matter pending before it"; or, in the words of Section 8(c), "issue[d] such instructions, exercise[d] such powers and ma[d]e such consequential orders as may in its opinion, be necessary for ensuring that an election is conducted honestly, justly, fairly"; or, in the words of Article 218(3), "ma[d]e such arrangements as are necessary to ensure that the election is conducted honestly, justly, fairly". The Commission, however, again made an unlawful omission by failing to exercise its aforementioned general powers to undo the effects of its earlier unlawful acts and omissions and to restore PTI to its constitutional right as a Parliamentary Party and its entitlement to reserved seats proportionate to the won general seats, thereby placing PTI, insofar as possible, in the same position it would have been in if the said unlawful acts and omissions had not occurred. The previous unlawful acts and omissions, as well as the said unlawful omission, render the impugned order of the Commission ultra vires the Constitution, without lawful authority and of no legal effect.

The Commission has failed to perform its role as a "guarantor institution" of democratic processes

113. We find it important to emphasize that the Commission, as a constitutional "electoral management body", is not merely an administrative entity but a fundamental "guarantor institution" of democratic processes, with a constitutional status akin to a "fourth branch of government".[80] The Commission must therefore fully recognize its constitutional position and the critical role it plays in a democracy while performing its duty to conduct free and fair elections. As a central pillar of democratic electoral processes, the Commission, in its role as a guarantor institution and impartial steward, is tasked with ensuring the transparency and fairness of elections to maintain public trust in the electoral system. This is essential for the legitimacy of elected representatives and the stability of the political system. The Commission must uphold democratic principles and the integrity of electoral processes by ensuring that elections truly reflect the will of the people, thereby preserving the democratic fabric of the nation. Unfortunately, the circumstances of the present case indicate that the Commission has failed to fulfill this role in the General Elections of 2024.

114. Another matter that has surprised us during the proceedings of these appeals is the way the Commission participated in and contested the matter before us as a primary contesting party against SIC and PTI. We are cognizant that the Commission's prime function, under Article 218(3) of the Constitution, is to 'organize and conduct the election and to make such arrangements as are necessary to ensure that the election is conducted honestly, justly, fairly, and in accordance with law, and that corrupt practices are guarded against'. This function of the Commission, 'to organize and conduct the election', as held by this Court in Aam Log Itehad,[81] is primarily executive, not judicial or quasi-judicial. However, as found in the said case, the Commission also performs some quasi-judicial functions. In the present case, several political parties made counterclaims regarding their right to the disputed reserved seats, and the Commission decided these counterclaims as an adjudicatory body. The function performed by the Commission in the present case was, therefore, quasi-judicial. And, as held by this Court in Wafaqi Mohtasib[82] and A. Rahim Foods,[83] a body performing its quasi-judicial function in a matter between two rival parties cannot be treated as an aggrieved person if its decision is set aside or modified by a higher forum or by a court of competent jurisdiction. Such a body, therefore, does not have locus standi to challenge the decision of that higher forum or court. Nor, we may add, can such a body contest an appeal filed against its quasi-judicial decision by one of the rival parties as a primary contesting party. In the present case, the Commission was a proper party to assist the Court in effectually and completely adjudicating upon and settling all the questions involved in the case. It should have acted in this manner, not as a primary contesting party.

115. As for the impugned judgment of the Peshawar High Court, we know, as held by this Court in Dossani Travels,[84] that the ambit and scope of the power of the High Courts under Article 199 of the Constitution is not as wide as of the Supreme Court under Article 187 of the Constitution to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it. Nor do the High Courts

possess such general constitutional power which the Commission has under Article 218(3) to ensure that elections are conducted honestly, justly and fairly. Therefore, without PTI's petition, the High Court could not have passed an order like the one we have, or the one that the Commission could have passed, for doing complete justice and ensuring that the election is conducted honestly, justly and fairly. However, what the Peshawar High Court could have done, but failed to do, in the present case is to remand the matter to the Commission with a direction to do what the Commission was required to do under Article 218(3) of the Constitution, read with Sections 4 and 8 of the Elections Act.

116. So far as the proceedings in the National Assembly and the Provincial Assemblies, wherein members elected on the disputed reserved seats under the impugned order of the Commission participated, are concerned, the same are protected under Articles 67 and 127 of the Constitution,[85] cannot be disputed in these collateral proceedings when no one has pointed out to us any proceedings of the National Assembly or Provincial Assemblies that could not have been successfully conducted if the members elected on the disputed reserved seats had not participated therein. Further, as held by this Court in Raja Amer,[86] acts done in accordance with the legal position prevailing at the time of their doing are generally protected under the doctrine of past and closed transactions. Therefore, to protect such acts and proceedings of the National Assembly and Provincial Assemblies concerned, which could have been successfully conducted even if the members elected on the disputed reserved seats had not participated, the notifications of the Commission declaring such members as returned candidates on the disputed reserved seats are quashed with effect from 6 May 2024, the date on which this Court suspended the impugned order of the Commission.

PTI is before the Court

117. Lastly, we want to say a few words to clarify that PTI, which has been granted relief in the present case, is before us with an application for its impleadment as a party to the case. In the normal course of procedure for civil cases, the application for impleadment is first decided and the applicant formally made a party to the case, before granting him any relief in the case. This case, as explained in the opening part of this judgment, is not an ordinary civil case but a lis of the highest order, where democracy---a salient feature of the Consti-tution---and the fundamental right of the people (the electorate) to choose their representatives for the legislative and executive organs of the State is to be preserved, protected and defended. The procedural formality of first accepting PTI's application and then granting it the relief does not carry much weight where the Court's concern is the protection

of the right of vote of the people (the electorate) guaranteed under Articles 17(2) and 19 of the Constitution, more than the right of any political party-whether it be SIC or PTI or any other party. Indeed, more particularly for this kind of cases, where the rights of people are involved, not only of the parties before the Court, the words of Kaikaus, J., resound that 'the proper place of procedure in any system of administration of justice is to help and not thwart the grant to the

people of their rights.'[87] Even otherwise, as held by this Court in

several cases,[88] while doing complete justice in the exercise of its general power under Article 187(1) of the Constitution, this Court is not handicapped by any technicality or rule of practice or procedure, nor is the exercise of this power by the Court dependent on an application by a party.

118. So far as the application (C.M.A. 3554/2024) of Ms. Kanwal Shauzab, who claims to be a PTI candidate for the seats reserved for women in the National Assembly, is concerned, it also has little significance in the perspective we have approached and dealt with the present case. We may clarify that although we heard her counsel in the interest of justice, as important questions of interpretation of constitutional provisions were involved, she is not a necessary party to the case. We are of the considered view that a contesting candidate or a returned candidate to the seats reserved for women or non-Muslims is not a necessary party to a dispute where the matter to be decided is which political party and in what proportion is entitled to the reserved seats. The persons nominated by a political party for reserved seats or elected to such seats do not have a personal right to such seats. It is the right of the electorate guaranteed under Articles 17(2) and 19 of the Constitution, exercisable through political parties, to have proportional representation in the reserved seats, not of the person nominated for or elected to such seats.

Relief granted; short order reproduced

119. These are the detailed reasons for our short order dated 12 July 2024, which is reproduced here for completion of the record:

**ORDER**

Syed Mansoor Ali Shah, Munib Akhtar, Muhammad Ali Mazhar, Ayesha A. Malik, Athar Minallah, Syed Hasan Azhar Rizvi, Shahid Waheed and Irfan Saadat Khan, JJ.: For detailed reasons to be recorded later and subject to

what is set out therein by way of amplification and/or explanation or otherwise, these appeals are decided in the following terms:

1. The impugned judgment dated 25.03.2024 of the learned Full Bench of the High Court is set aside to the extent it is or may be inconsistent with this Order or the detailed reasons.

2. The order of the Election Commission of Pakistan ("Commission") dated 01.03.2024 ("Impugned Order") is declared to be ultra vires the Constitution, without lawful authority and of no legal effect.

3. The notifications (of various dates) whereby the persons respectively mentioned therein (being the persons identified in the Commission's notification No.F.5(1)/2024-Cord. dated 13.05.2024) have been declared to be returned candidates for reserved seats for women and minorities in the National and Provincial Assemblies are declared to be ultra vires

the Constitution, without lawful authority and of no legal

effect, and are quashed from 06.05.2024 onwards, being the date an interim order was made by the Court in CPLA Nos. 1328-9 of 2024, the leave petitions out of which the instant appeals arise.

4. It is declared that the lack or denial of an election symbol does not in any manner affect the constitutional and legal rights of a political party to participate in an election (whether general or bye) and to field candidates and the Commission is under a constitutional duty to act, and construe and apply all statutory provisions, accordingly.

5. It is declared that for the purposes, and within the meaning, of paragraphs (d) and (e) of clause (6) of Article 51 ("Article 51 Provisions") and paragraph (c) of clause (3) of Article 106 ("Article 106 Provisions") of the Constitution, the Pakistan Tehreek e Insaf ("PTI") was and is a political party, which secured or won (the two terms being interchangeable) general seats in the National and Provincial Assemblies in the General Elections of 2024 as herein after provided.

6. During the course of the hearing of the instant appeals, on 27.06.2024, learned counsel for the Commission placed

before the Court a list ("the List") of 80 returned candidates

for the National Assembly (now MNAs), setting out in

tabular form particulars relating to their election. Learned counsel made a categorical statement that the Commission stood by the data so provided to the Court. In particular, the List contained three columns marked as follows: (i) "Statement (on nomination form) given in declaration and oath by the person nominated (i.e., 'I belong to')"; (ii) "Certificate of party affiliation under Section 66 of the Elections Act, 2017"; and (iii) "Statutory Declaration/affidavit accompanying section 66 certificate".

7. In the peculiar facts and circumstances of the General Election of 2024, it is declared that out of the aforesaid 80 returned candidates (now MNAs) those (being 39 in all and whose particulars are set out in Annex A to this Order) in respect of whom the Commission has shown "PTI" in any one of the aforesaid columns in the List, were and are the returned candidates whose seats were and have been secured by the PTI within the meaning, and for purposes of, para 5 above in relation to the Article 51 Provisions.

8. In the peculiar facts and circumstances of the General Election of 2024, it is further ordered that any of the remaining 41 returned candidates out of the aforesaid 80 (whose particulars are set out in Annex B to this Order) may, within 15 working days of this Order file a statement duly signed and notarized stating that he or she contested the General Election as a candidate of the political party specified therein. If any such statement(s) is/are filed, the Commission shall forthwith but in any case within 7 days thereafter give notice to the political party concerned to file, within 15 working days, a confirmation that the candidate contested the General Election

as its candidate. A political party may in any case, at any time after the filing of a statement as aforesaid, of its own motion file its confirmation. If such a statement is filed, and is confirmed by the political party concerned, then the seat secured by such candidate shall be forthwith deemed to be a seat secured by that political party for the purposes of para 5 above in relation to the Article 51 Provisions. The Commission shall also forthwith issue, and post on its website, a list of the retuned candidates (now MNAs) and seats to which this para applies within 7 days after the last date on which a political party may file its confirmation and shall simultaneously file a compliance report in the Court.

9. For the purposes of para 5 of this Order in relation to the Article 51 Provisions, the number of general seats secured by PTI shall be the total of the seats declared in terms of para 7 and those, if any, to which para 8 applies. The PTI shall be entitled to reserved seats for women and minorities in the National Assembly accordingly. PTI shall, within 15 working days of this Order file its lists of candidates for the said reserved seats and the provisions of the Elections Act, 2017 ("Act") (including in particular section 104) and the Elections Rules, 2017 ("Rules") shall be applied to such lists in such manner as gives effect to this Order in full measure. The Commission shall, out of the reserved seats for women and minorities in the National Assembly to which para 3 of this Order applies, notify as elected in terms of the Article 51 Provisions, that number of candidates from the lists filed (or, as the case may be, to be filed) by the PTI as is proportionate to the general seats secured by it in terms of paras 7 and 8 of this Order.

10. The foregoing paras shall apply mutatis mutandis for purposes of the Article 106 Provisions in relation to PTI (as set out in para 5 herein above) for the reserved seats for women and minorities in the Khyber Pakhtunkhwa, Punjab and Sindh Provincial Assemblies to which para 3 of this Order applies. In case the Commission or PTI need any clarification or order so as to give effect to this para in full measure, it shall forthwith apply to the Court by making an appropriate application, which shall be put up before the Judges constituting the majority in chambers for such orders and directions as may be deemed appropriate.

Annexure-A

(Names of Candidates Affiliated with the Pakistan Tehreek-e-Insaf

as per the list verified from the data provided by ECP[89])

| Sr. No. | Number and Name of the Constituency | Name of the Candidate |
|---|---|---|
| 1. | NA-2 (Swat-I) | Amjad Ali Khan |
| 2. | NA-3 (Swat-II) | Saleem Rehman |
| 3. | NA-4 (Swat-III) | Sohail Sultan |
| 4. | NA-6 (Lower Dir-I) | Muhammad Bashir Khan |
| 5. | NA-7 (Lower Dir-II) | Mehboob Shah |
| 6. | NA-9 (Malakand) | Junaid Akbar |
| 7. | NA-17 (Abbottabad-II) | Ali Khan Jadoon |
| 8. | NA-19 (Swabi-I) | Asad Qaiser |
| 9. | NA-20 (Swabi-II) | Shahram Khan |
| 10. | NA-21 (Mardan-I) | Mujahid Ali |
| 11. | NA-24 (Charsadda-I) | Anwar Taj |
| 12. | NA-25 (Charsadda-II) | Fazal Muhammad Khan |
| 13. | NA-29 (Peshawar-II) | Arbab Amir Ayub |
| 14. | NA-30 (Peshawar-III) | Shandana Gulzar Khan |
| 15. | NA-31 (Peshawar-IV) | Sher Ali Arbab |
| 16. | NA-32 (Peshawar-V) | Asif Khan |
| 17. | NA-33 (Nowshera-I) | Syed Shah Ahad Ali Shah |
| 18. | NA-38 (Karak) | Shahid Ahmad |
| 19. | NA-39 (Bannu) | Nasim Ali Shah |
| 20. | NA-41 (Lakki Marwat) | Sher Afzal Khan |

| | | |
|---|---|---|
| 21. | NA-83 (Sargodha-II) | Usama Ahmed Mela |
| 22. | NA-84 (Sargodha-III) | Shafqat Abbas |
| 23. | NA-95 (Faisalabad-I) | Ali Afzal Sahi |
| 24. | NA-96 (Faisalabad-II) | Rai Haider Ali Khan |
| 25. | NA-100 (Faisalabad-VI) | Nisar Ahmed |
| 26. | NA-101 (Faisalabad-VII) | Rana Atif |
| 27. | NA-102 (Faisalabad-VIII) | Changaze Ahmad Khan |
| 28. | NA-103 (Faisalabad-IX) | Muhammad Ali Sarfraz |
| 29. | NA-115 (Sheikhupura-III) | Khurram Shahzad Virk |
| 30. | NA-122 (Lahore-VI) | Sardar Muhammad Latif Khan Khosa |
| 31. | NA-143 (Sahiwal-III) | Rai Hassan Nawaz Khan |
| 32. | NA-149 (Multan-II) | Malik Muhammad Aamir Dogar |
| 33. | NA-150 (Multan-III) | Makhdoom Zain Hussain Qureshi |
| 34. | NA-154 (Lodhran-I) | Rana Muhammad Faraz Noon |
| 35. | NA-171 (Rahim Yar Khan-III) | Mumtaz Mustafa |
| 36. | NA-179 (Kot Addu-I) | Muhammad Shabbir Ali Qureshi |
| 37. | NA-181 (Layyah-I) | Umber Majeed |
| 38. | NA-182 (Layyah-II) | Awais Haider Jakhar |
| 39. | NA-185 (D.G. Khan-II) | Zartaj Gul |

Annexure-B

(Names of Independent Candidates

[whom PTI claims as its candidates])

| Sr. No. | Number and Name of the Constituency | Name of the Candidate |
|---|---|---|
| 1. | NA-1 (Chitral Upper-cum- Chitral Lower) | Abdul Latif |
| 2. | NA-5 (Upper Dir) | Sahibzada Sibghatullah |
| 3. | NA-13 (Battagram) | Muhammad Nawaz Khan |
| 4. | NA-22 (Mardan-II) | Muhammad Atif |
| 5. | NA-23 (Mardan-III) | Ali Muhammad |
| 6. | NA-26 (Mohmand) | Sajid Khan |
| 7. | NA-27 (Khyber) | Muhammad Iqbal Khan |
| 8. | NA-34 (Nowshera-II) | Zulfiqar Ali |
| 9. | NA-35 (Kohat) | Shehryar Afridi |
| 10. | NA-36 (Hangu-cum-Orakzai) | Yousaf Khan |
| 11. | NA-42 (South Waziristan Upper-cum-South Waziristan Lower) | Zubair Khan |
| 12. | NA-66 (Wazirabad) | Mohammad Ahmed Chattha |
| 13. | NA-67 (Hafizabad) | Aniqa Mehdi |
| 14. | NA-68 (Mandi Bahauddin-I) | Haji Imtiaz Ahmed Choudhry |
| 15. | NA-78 (Gujranwala-II) | Muhammad Mobeen Arif |
| 16. | NA-79 (Gujranwala-III) | Ihsan Ullah Virk |
| 17. | NA-181 (Gujranwala-V) | Ch. Bilal Ejaz |
| 18. | NA-86 (Sargodha-V) | Muhammad Miqdad Ali Khan |
| 19. | NA-89 (Mianwali-I) | Muhammad Jamal Ahsan Khan |
| 20. | NA-90 (Mianwali-II) | Umair Khan Niazi |
| 21. | NA-91 (Bhakkar-I) | M. Sana Ullah Khan Mastikhel |

| | | |
|---|---|---|
| 22. | NA-93 (Chiniot-I) | Ghulam Muhammad |
| 23. | NA-97 (Faisalabad-III) | Muhammad Saad Ullah |
| 24. | NA-99 (Faisalabad-V) | Umar Farooq |
| 25. | NA-105 (Toba Tek Singh-I) | Usama Hamza |
| 26. | NA-107 (Toba Tek Singh-III) | Mohammad Riaz Khan |
| 27. | NA-108 (Jhang-I) | Muhammad Mahbob Sultan |
| 28. | NA-109 (Jhang-II) | Waqas Akram |
| 29. | NA-110 (Jhang-III) | Muhammad Ameer Sultan |
| 30. | NA-111 (Nankana Sahib-I) | Muhammad Arshad Sahi |
| 31. | NA-116 (Sheikhupura-IV) | Khurram Munawar Manj |
| 32. | NA-129 (Lahore-XIII) | Mian Muhammad Azhar |
| 33. | NA-133 (Kasur-III) | Azim Uddin Zahid |
| 34. | NA-137 (Okara-III) | Syed Raza Ali Gillani |
| 35. | NA-156 (Vehari-I) | Ayesha Nazir |
| 36. | NA-170 (Rahim Yar Khan-II) | Mian Ghous Muhammad |
| 37. | NA-172 (Rahim Yar Khan-IV) | Javaid Iqbal |
| 38. | NA-175 (Muzaffargarh-I) | Jamshaid Ahmad |
| 39. | NA-177 (Muzaffargarh-III) | Muhammad Moazzam Ali Khan |
| 40. | NA-180 (Kot Addu-II) | Fiaz Hussain |
| 41. | NA-183 (Taunsa) | Khawaja Sheraz Mehmood |

120. Before parting with the judgment, we feel constrained to observe, with a heavy heart, that our two learned colleagues in the minority (Justice Amin-ud-Din Khan and Justice Naeem Akhtar Afghan) have made certain observations in their dissenting judgment dated 3 August 2024, which do not behove Judges of the Supreme Court of Pakistan, the highest court of the land. After expressing their view that the order we passed on 12 July 2024 is not in accordance with the Constitution and that we ignored and disregarded its mandate, they observed that "[i]f the said 39 plus 41 persons take any step on the basis of this judgment which is not in accordance with the Constitution, they may lose their seats as returned candidates on the basis of violation of the Constitution",[90] and that "[a]ny order of the Court which is not in consonance with the constitutional provisions is not binding upon any other constitutional organ of the State."[91]

121. We take no issue with their having and expressing the view that, in their understanding, our order dated 12 July 2024 is not in accordance with the Constitution, as Members of a Bench of this Court, or any court, can legitimately differ on issues of fact and law. They may strongly express divergent opinions and make comments on each other's views, highlighting reasons why they believe other Members have erred. However, the manner in which they have expressed their disagreement falls short of the courtesy and restraint required of Judges of the Superior Courts. What is more disquieting is that, through the said observations, they appear to have gone beyond the parameters of propriety by warning the 39 plus 41 (80) returned candidates and urging the Commission not to comply with the majority order, which is the decision of a thirteen-member Full Court Bench of this Court. Such observations undermine the integrity of the highest institution of justice in the country and seem to constitute an attempt to obstruct the process of the Court and the administration of justice.

122. Considering the public importance of this judgment, the office is directed to ensure translation of this judgment into Urdu in order to enhance public access to its information, in accordance with Article 19A read with Article 251 of the Constitution. The Urdu version of the judgment shall be placed on the record of the case, uploaded on the Court's website and reported in the law journals alongside this official English version of the judgment.

Sd/- Sd/-

Judge Judge

Sd/- Sd/-

Judge Judge

Sd/- Sd/-

Judge Judge

Sd/- Sd/-

Judge Judge

Delivered at Islamabad

On 23rd September, 2024

SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

In Chambers at Islamabad and Karachi*

Mr. Justice Syed Mansoor Ali Shah, Mr. Justice Munib Akhtar

Mr. Justice Muhammad Ali Mazhar, Mrs. Justice Ayesha A.Malik

Mr. Justice Athar Minallah

Mr. Justice Syed Hasan Azhar Rizvi, Mr. Justice Shahid Waheed

Mr. Justice Irfan Saadat Khan

C.M.A. No. 10247 of 2024 in Civil Appeals Nos. 333 and 334 of 2024 (Filed by ECP, seeking clarification)

AND

C.M.A. No. 10088 of 2024 in Civil Appeals Nos. 333 and 334 of 2024 (Filed by PTI, seeking clarification)

Clarification

In terms of paragraph 10 of this Court's order dated 12 July 2024 ("Short Order") passed in the Civil Appeals Nos. 333 and 334 of 2024, both the Election Commission of Pakistan ("Commission"), through CMA 10247/2024, and Pakistan Tehreek-e-Insaf ("PTI"), through CMA 10088/2024, seek clarification regarding the effect of the Elections (Second Amendment) Act, 2024 ("Amendment Act") on the Short Order.

2. The ECP in its CMA, has submitted that the Short Order was based on the law which has since been altered by the amendments made to Sections 66 and 104 of the Elections Act, 2017 ("Elections Act") and a new Section, namely 104-A, has also been inserted with retrospective effect from the date of the commencement of the Elections Act.

3. On the other hand, PTI has submitted in its CMA that the Short Order passed by this Court is based on the interpretation and enforcement of constitutional provisions, therefore the amendments cannot supplant the effect of the Short Order.

4. We had already issued clarification before releasing the detailed reasons and the first clarification issued pursuant to the Short Order was also merged in our detailed reasons. The option given by us to seek clarification in the Short Order was in fact an intermediary window till the detailed reasons were assigned, so in case there arises any misunderstanding as to the spirit or implementation of the Short Order before the release of the detailed judgment, the parties may seek clarification. The detailed reasons have already been released and all legal and constitutional issues raised and argued by the parties have been dealt with eloquently and answered, therefore, no further clarification is required to be issued. The judgment of this Court has binding effect in terms of Article 189 of the Constitution of the Islamic Republic of Pakistan, 1973, and should have been implemented.

5. Since the Commission and PTI both have asked for a second clarification, we want to simply clarify and reiterate the well- settled exposition of law that the effect of the amendment made in the Elections Act cannot undo our judgment with retrospective effect. The Court granted the relief in the Short Order to enforce the right of the electorate through political parties to have proportional representation in the reserved seats under paragraphs (d) and (e) of clause (6) of Article 51 and paragraph (c) of clause (3) of Article 106 of the Constitution, therefore, the amendments made in the Elections Act after the release of our Short Order will have no bearing and the Commission is bound to implement the judgment passed by the Supreme Court of Pakistan, in its letter and spirit, without seeking any further clarification.

6. Office is directed to send this clarification to the Commission and the representative of PTI who filed the application for clarification and also upload this clarification on the Supreme Court website. Both the Civil Misc. Applications are disposed of
accordingly.

Sd/- Sd/-
Judge Judge
Sd/- Sd/-
Judge Judge
Sd/- Sd/-
Judge Judge
Sd/- Sd/-
Judge Judge
Dated 18th October, 2024.

**YAHYA AFRIDI, J.---**Sunni Ittehad Council ("SIC"), a registered political party, along with its Chairman, Sahibzada Muhammad Hamid Raza, moved the constitutional jurisdiction of the Peshawar High Court[1] seeking, inter alia, to challenge the refusal of the Election Commission of Pakistan ("ECP") to allocate reserved seats for women and non-Muslims in the National Assembly and Provincial Assemblies to SIC, and to question the allocation of these reserved seats by ECP to other political parties in terms of Notification No. F.5(1)/2024-Cord and Notification No. F.5(4)/2024-Cord both dated 04.03.2024 ("Impugned Notifications"), and to declare Section 104 of the Elections Act, 2017 ("Act") to be ultra vires to the Constitution of Islamic Republic of Pakistan, 1973 ("Constitution").

Impugned Judgment

2. A Full Bench of five worthy Judges of the Peshawar High Court dismissed the petition in terms: that SIC did not fulfill the condition precedent provided under Article 51(6) (d) and (e) of the Constitution to be allocated reserved seats for women and non-Muslims; that Section 104 of the Act was intra vires; that there was no basis to question the status of Pakistan Tehreek-e-Insaf ("PTI") as a political party; and that PTI-backed independent candidates were returned to the Assemblies on the manifesto of PTI, however, nothing was produced before the High Court to show that ECP had declined the request of these candidates to contest elections on the ticket of PTI; and that the returned PTI-backed independent candidates were neither impleaded nor did they file any application before the High Court to be made a party to the petition pending before it.

Contentions of the Parties

3. Learned counsel for the appellants, at the very outset, submitted that he would not challenge the vires of Section 104 of the Act, since the stance taken by the appellants was supported by the constitutional provisions contained in Article 51 and Article 106 of the Constitution, and restricted the challenge to the findings recorded in the impugned judgment only to the entitlement of SIC to reserved seats for women and non-Muslims in the National Assembly and Provincial Assemblies. The main thrust of the learned counsel for SIC was that Article 51(6)(d)[2] and (e)[3] and Article 106(3)(c)[4] of the Constitution did not expressly mandate that a political party was to contest General Elections to become entitled to reserved seats. Nor was it necessary, according to the learned counsel, to submit a list for reserved seats before the General Elections or within the period fixed by ECP for submission of nomination papers for the purpose of election to reserved seats to be entitled to reserved seats as the same could be allowed to be done by a political party even later. This, the learned counsel asserted, was the spirit of Article 51(6)(d)
and (e) and Article 106(3)(c) of the Constitution. Finally, the learned counsel drew our attention to the Impugned Notifications, to show that reserved seats allocated to some of the political parties far exceeded their due share of reserved seats on the basis of their numerical strength in the respective assemblies. This, the learned counsel argued, was a blatant violation of the principle of proportional representation enshrined in Article 51(6)(d) and (e) and Article 106(3)(c) of the Constitution. Hence, the Impugned Notifications warranted annulment and SIC

was to be allowed reserved seats for women and non-Muslims in the National Assembly and Provincial Assemblies, as mandated under Article 51(6) (d) and (e) and Article 106(3)(c) of the Constitution.

4. The stance taken by the appellants before us was opposed by the Federation, ECP, women and non-Muslims elected to reserved seats in the National Assembly and Provincial Assemblies beyond the share of their parties based on numerical strength in respective houses, Pakistan Muslim League (N), Muttahida Qaumi Movement (Pakistan), Pakistan Peoples Party Parliamentarians, and Jamiat Ulem-e-Islam Pakistan.

Issue for Determination

5. The core controversy requiring resolution relates to the allocation of reserved seats for women and non-Muslims to political parties in the National Assembly and Provincial Assemblies in accordance with Article 51(6) (d) and (e) and Article 106(3)(c) of the Constitution, respectively. It will be appropriate to first review and discuss the legal provisions regarding the reserved seats for women in the National Assembly, as this will provide a foundation for understanding the allocation of other reserved seats provided under the Constitution.

Total Number of Reserved Seats for Women in the National Assembly

6. Clause 3 of Article 51 of the Constitution specifies the total number of seats in the National Assembly, including those reserved for women in each province, in terms that:

"(3) The seats in the National Assembly referred to in clause (1), except the seats mentioned in clause (4), shall be allocated to each Province and the Federal Capital as under: -

| | General Seats | Women Seats | Total Seats |
|---|---|---|---|
| Balochistan | 16 | 4 | 20 |
| Khyber Pakhtunkhwa | 45 | 10 | 55 |
| Punjab | 141 | 32 | 173 |
| Sindh | 61 | 14 | 75 |
| Federal Capital | 3 | - | 3 |
| Total | 266 | 60 | 326 |

Election for Reserved Seats for Women in the National Assembly

7. As for the election on reserved seats for women in the National Assembly, the numerical strength for each province has been set out in Article 51(3) (supra); the manner of allocation of the said reserved seats to the political parties is provided in clause (d) of sub-Article (6) of Article 51 of the Constitution. It provides in terms that:

"(d) members to the seats reserved for women which are allocated to a Province under clause (3) shall be elected in accordance with law through proportional representation system of political parties' lists of candidates on the basis of total number of general seats secured by each political party from the Province concerned in the National Assembly:

Provided that for the purpose of this paragraph the total number of general seats won by a political party shall include the independent returned candidate or candidates who may duly join such political party within three days of the publication in the official Gazette of the names of the returned candidates; and"

A careful reading of the above provision provides that for a political party to be allocated reserved seats for women, the following are the crucial issues to be considered:

i) Election in accordance with law:

The allocation of reserved seats for women has to pass through an electoral process; not only are the political parties mandated to take steps, but their nominee candidates are also to do so. And all this is to proceed in "accordance with the law"[5] - the Constitution, the Act and the Election Rules, 2017 ("Rules").

With the essentials provided in Article 51 of the Constitution, Section 104 of the Act sets out the mode and manner of allocation of the reserved seats to political parties in the National Assembly, in terms that:

104. Party lists for reserved seats. -

(1) For the purpose of election to seats reserved for women
and non-Muslims in an Assembly, the political parties contesting election for such seats shall, within the period fixed by the Commission for submission of nomination papers, file separate lists of their candidates in order of priority for seats reserved for women and non-Muslims with the Commission or, as it may direct, with the Provincial Election Commissioner or other authorized officer of the Commission, who shall forthwith cause such lists to be published for information of the public:

Provided that the list submitted by a political party shall not be subject to change or alteration either in the order of priority or through addition of new names in the list or omission of any name after expiry of the date of submission of nomination papers.

(2) The parties' lists referred to in subsection (1) may contain as many names of additional candidates as a political party may deem necessary for contesting seats reserved for women and non-Muslims, to provide for any disqualification of candidates during scrutiny of nomination papers or for filling of any vacant seats during the term of an Assembly.

(3) A candidate to a seat reserved for women or non- Muslims shall file the nomination papers on the Form on or before the last date fixed for filing of nomination papers for the election and the nomination papers shall, as nearly as possible, be scrutinized in the same manner as nomination papers of candidates on general seats are scrutinized under Section 62.

(4) If, at any time, the party list is exhausted, the political party may submit a name for any vacancy which may occur thereafter and the provisions of subsections (1), (2) and (3) shall, as nearly as possible, apply to fill such vacancy.

(5) Where a seat reserved for women or non-Muslims in an Assembly falls vacant as a result of death, resignation or disqualification of a Member, it shall be filled in by the next person in order of precedence from the party's list of candidates submitted to the Commission under subsection (1).

(6) Before notifying the name of the next person in order of priority from the party list, such person shall submit a declaration on oath that since the filing of his nomination paper, he has not become subject to any disqualification contained in Article 63.

(7) A candidate contesting election on a seat reserved for women or non-Muslims shall, along with the nomination papers and its annexures, submit to the Returning Officer appointed by the Commission in this behalf-

(a) a copy of the party list of the candidate's political party for such seats;

(b) declarations and statements in support of the nomination; and

(c) proof of deposit of the fee required for filing nomination papers.

(8) Where there is equality of share on a reserved seat between two or more political parties, the Returning Officer shall declare the returned candidate by drawing of lots.

To further clarify, and elucidate the above procedure, we have Rule 92 of the Rules, framed under Section 239 of the Act. The said Rule reads:

92. Election to seats reserved for women and non-Muslims.--- (1) Election to the seats reserved for women and non-Muslims in the National Assembly and Provincial Assemblies shall be held on the basis of proportional representation system of political parties' lists of candidates in accordance with the provisions of these Rules and the Act.

(2) The Members to fill seats reserved for women in the National Assembly allocated to a Province shall be elected through proportional representation system of political parties' lists of candidates submitted to the Commission on the basis of total number of general seats won by each political party from the Province concerned in the National Assembly.

(3) The Members to fill seats reserved for women allocated to a Province shall be elected through proportional representation system of political parties' lists of candidates on the basis of total number of general seats won by each political party in the Provincial Assembly.

(4) The Members to fill seats reserved for non-Muslims in the National Assembly and the Provincial Assemblies shall be elected through proportional representation system of political parties' lists of candidates on the basis of total number of general seats won by each political party in the National Assembly, or, as the case may be, in the Provincial Assembly.

(5) If, at any time, the party list is exhausted, the political party may submit a name for any vacancy which may occur thereafter and the provisions of subsection (1) and subsection (2) of Section 104 shall, as nearly as possible, apply to fill such vacancy.

(6) For the purpose of this Rule, the expression "total number of general seats won by political party" shall include the independent returned candidate or candidates who may duly join such political party within three days of the publication in the official Gazette of the names of the returned candidates:

Provided that if the independent candidate applies to the leader of a political party for joining his party then the leader of that political party will forthwith inform the Commission of joining of such candidate through a letter to be delivered to the Commission along with consent of that candidate duly attested by a Notary appointed under the Notaries Ordinance, 1961 (XIX of 1961) or an Oath Commissioner appointed under the Oaths Act, 1873 (X of 1873) or a Government servant in basic pay scale 17 and above:

Provided that the consent of the independent candidate so delivered to the Commission shall, in no circumstances, be open to recall or cancellation.

(7) The political parties' lists of candidates to be submitted under this Rule to the Commission in connection with election to the reserved seats for women or non-Muslims in an assembly shall be on Form-66.

A combined reading of the above provisions of the Constitution, the Act and the Rules indicates that a political party seeking reserved seats for women in the National Assembly has to take the following concerted steps in order that its nominees be eligible to be elected as members of the National Assembly on the seats reserved for women:

Step No. 1

A political party desirous of contesting election for reserved seats has to submit before ECP, the list of its candidates, and that too, in order of priority. Such list is to be published for information of the public forthwith. But once the time fixed by ECP for filing of nomination papers has expired, the political party is prohibited from making any modifications to the submitted list. This includes changes to the order of candidates, adding new names, or removing existing ones.

Step No. 2

The listed nominee candidates of a political party, in turn, have to file their nomination papers along with all the requisite documents for contesting election on the reserved seats, and that too, within the prescribed time. The nomination papers of the said candidates are filed before the Returning Officer appointed by ECP. The scrutiny thereof shall, as nearly as possible, be in the same manner, as that of nomination papers of candidates on general seats under Section 62 of the Act, including the right to challenge any findings made by the Returning Officer appointed by ECP.

What is strikingly significant in the above stated procedure for election of reserved seats is that each step required of a political party and its listed nominee candidates is time bound.

ii) Basis of Allocation of Reserved Seats

For allocation of reserved seats, there has to be election not amongst the individual nominee candidates but between the political parties, who field their candidates, as per the list they submit to ECP; and that too, through proportional representation system of political parties' lists of candidates on the basis of total number of general seats secured by each political party from the provinces concerned in the National Assembly.

Forms of Elections under the Constitution - Proportional Representation System

There are under the Constitution, three distinct forms of elections: firstly, we have single member territorial constituencies for the general seats in the National Assembly and Provincial Assemblies and the members to

fill such seats are to be elected by direct and free vote in accordance with law[6]; secondly, there is single transferable vote or proportional

ranked choice voting system for the elections to the Senate; and finally, we have proportional representation system of political parties' lists for the elections for the reserved seats for women and the non-Muslims. It follows that a first-past-the-post system is used for general seats in the National and Provincial Assemblies, while a proportional representation system based on single transferable vote is used for Senate elections, and a proportional representation system based on political parties' lists is used for reserved seats in the National and Provincial Assemblies.

As for the concept of the proportional representation system, it must be understood that it manifests in different ways across various jurisdictions globally. To better understand and appreciate the various systems, and in particular, the one applicable for reserved seats for women and non-Muslims, it would be appropriate to have an overview of some of the different systems of 'proportional representation'. Proportional representation systems are of following two basic types:

Single Transferable Vote or Proportional Ranked Choice Voting

Single Transferable Vote or Proportional Ranked Choice Voting is provided under clause (2) of Article 59 of the Constitution for elections to the Senate. It is a multi-winner electoral system, where each voter casts a single vote in the form of ranked-choice ballot. Voters have the option to rank candidates, and their votes may be transferred according to alternate preferences, if their preferred candidate is eliminated or elected with surplus votes, so that their votes are used to elect someone they prefer over others in the running.

Proportional Representation System of Political Parties' Lists

Proportional representation system of political parties' lists is a system for election for the reserved seats for women and the non-Muslims in the National Assembly and Provincial Assemblies, as provided under Articles 51 and 106 of the Constitution. This system has its unique characteristics and modalities, as it provides each political party to 'showcase' to the public their listed candidates for the voters to make their valued choice at the time of casting their votes for the other candidates of the political party in the General Elections. In essence, it is to provide individual voters valuable information, about the political party and the candidates it is to field for elections, at the time they cast their vote, helping them make a more informed decision.

There is no cavil to the proposition that, all proportional representational systems, are neither intended to nor are to be applied in a disproportionate manner. But for a political party to avail any benefit thereof, it has to first fulfill the condition precedent set for first entering the electoral system. In the case of the proportional representation system of political parties' lists, used for electing reserved seats for women and non-Muslims in the National Assembly and Provincial Assemblies, as outlined in Articles 51 and 106 of the Constitution, the political party has to cross the defined legal threshold; firstly, by filing the list of candidates within the period set by ECP, and secondly, by fielding their nominee candidates by submitting their nomination papers within the time set by ECP.

iii) Total number of General Seats secured by a Political Party

Article 51(6) (d) of the Constitution mandates that reserved

seats for women in the National Assembly are to be allocated based on the total number of general seats secured by each political party from the province concerned in the National Assembly. Thus, the constituency for reserved seats for women is each of the four provinces. On the other hand, Article 51(6) (e) of the Constitution provides for reserved seats for non-Muslims in the National Assembly are to be allocated based on the total number of general seats won by each political party in the National Assembly. Here the constituency is not restricted to the provinces but is, in fact, the whole country. Similarly, for the reserved seats for women and non-Muslims in the Provincial Assembly, the constituency is the whole province.

A fundamental prerequisite for a political party to qualify for reserved seats is the winning of at least one general seat. This is evident from the proviso allowing independent candidates to join a political party within three days of election results, a process contingent on the existence of a political party with at least one elected member. The proviso to Article 51(6) (d) and (e) and Article 106(3) (c) provides that the total number of general seats won by a political party shall include the independent returned candidate or candidates who may duly join such

political party within three days of the publication in the official Gazette of the names of the returned candidates. Notably, the proviso to the above-mentioned Articles is not a proviso in the strict sense of the term, since it neither creates an exception to the main provision nor qualifies it. Instead, it serves as an explanation that supplements the main provision by clarifying that independent returned candidates, who join a political party within three days of the publication of the names of the returned candidates are to be counted as part of the total number of general seats won by that party for the purpose of allocating reserved seats. It is but necessary that a candidate can only join a political party, if that political party already has a presence in the house - it already has secured or won a general seat. If the political party has not secured or won a general seat, it does not have any returned candidate in the house, for an independent returned candidate or candidates to join it. It shows that it is necessary that a political party at least wins one general seat to become entitled to reserved seats. Consequently, the entitlement of a political party to reserved seats is inextricably linked to its success on at least one general seat.

The word 'secured' used in Article 51(6) (d) and the word 'won' in Article 51(6) (e), have in essence, the same meaning and

can be applied interchangeably. However, one can understand that by employing two different words having the same meaning was to highlight the constituencies of the reserved seats for women and the non-Muslims: for the former, a direct reference has been made to the seats secured from each province in the National Assembly; and for the latter, there is the stipulation of the total strength of the political party based on its returned candidates, who have won the elections in the National Assembly.

Even otherwise, one must be aware that the word "secured" is employed in the main provision of the above constitutional provision, while the inclusion of the independents being provided in the proviso to the said provision, and that being an explanation to the general statement of the law in the main provision, cannot be applied to those independents being referred to in the proviso. Moreso, when the two categories of returned candidates; one who belongs to a political party referred to in the main part of the provision, while the other being the independents joining the same political party stated in the proviso; are separately referred to in Article 51(6) (d) and cannot be considered as one category. And thus, are to be legally considered separately, each in accord with the letter of the law, as stated therein.

As for the contention of the learned counsel supporting the stance taken by SIC that this Court ought to render a progressive approach and endeavor to understand the intent behind the constitutional provision and not restrict the meaning of the words implied in a statute in a manner, so as to 'make a fortress out of the dictionary', I am afraid the approach of the learned counsel is rather miscued in the circumstances of the present case. In fact, when the letter of the statute is simple in meaning and does not lead to an absurd or unreasonable situation or for that matter, contradicts or come in conflict with any other provision of the Constitution, Courts are to read the letter of the law, and need not to surgically search for another meaning by taking refuge of the intent of the law-makers.

None can dispute the fundamental right of an independent member of a house to join a political party, as is ordained under Article 17 of the Constitution, but for this inclusion of an independent returned member of the house to strengthen the political party to seek the allotment of reserved seats, I am afraid the said right is conditional on the fulfillment of the legal requirements within the contemplation of Articles 51 and 106 of the Constitution. These conditions precedent - to contest and win at least a general seat and to submit the list of candidates for the reserved seats, whose antecedents have passed through the scrutiny provided under the law - have to be fulfilled by SIC.

iv) Inclusion of Independent Candidates - joining a Political Party

The general principle laid down in the substantive part of Article 51(6) (d) of the Constitution mandates the political party to be entitled to reserved seats, based on the total number of general seats secured by it from the province concerned in the National Assembly.

The proviso contained in Article 51(6) (d) of the Constitution vests an independent returned candidate, the right to join a political party of his choice, and none can take away this right from him. To render legal effect to the act of an independent returned candidate of joining a political party, requires the leader of the said political

party[7] to intimate ECP in writing regarding joining of that political party by the independent returned candidate. This written intimation has to be accompanied by the written consent of the independent returned candidate. ECP on receipt of the said intimation accompanied by the written consent of the independent returned candidate, has no authority under the law to object to any independent returned candidate joining a political party within the stipulated period of three days. However, for independent candidates to contribute to the overall seat count of a political party for the purpose of its entitlement to reserved seats, the proviso mandates that these candidates must join such party that has already won at least one general seat. In essence, a political party must win a general seat to benefit from the inclusion of independent candidates, so as to become a part of its numerical strength for the purpose of allocation of reserved seats.

Candidates for election - National Assembly and Provincial Assemblies

What is crucial to note is that the Act read with the Rules envisages three different kinds of returned candidates, contesting elections for the National Assembly and Provincial Assemblies:

Firstly, we have the candidates, who have submitted their nomination papers declaring themselves, as candidates belonging to a political party duly accompanied by a certificate from the said party, declaring the candidates to be their official candidates for election in the respective constituencies. Such a candidate cannot be denied the right to be a candidate of a political party. And similarly, in case the said candidate has won the seat of National Assembly or a Provincial Assembly in the General Elections and has been notified as returned candidate by ECP he would remain a member of the house, representing the said political party, and ECP has no authority under the law to declare him an independent or belonging to another political party or otherwise. The only exception to this principle is when the candidate of a political party contesting election for the National Assembly or Provincial Assembly submits a written declaration to ECP or the returning officer under his signatures stating that he is withdrawing from his position, as a candidate of a political party. Politics is not for the weak or fickle. Once a declaration has been rendered by a candidate to represent a political party, withdrawing the same, and that too, in writing would be estopped to revert back to his earlier stance of representing the said political party.

Secondly, we have candidates who submitted their nomination papers as candidates on the list of the political parties for reserved seats for women and non-Muslims.

Finally, we have those, who submitted their nomination papers, as independent candidates.

Reserved seats - Non-Muslims (National Assembly) Women and Non-Muslims (Provincial Assemblies)

Given the above legal position provided under the law for allocation of reserved seats for women in the National Assembly, we note that the same principles would also apply to allocation of reserved seats for non-Muslims in the National Assembly provided under Article 51(6) (e), and that of women and non-Muslims in the Provincial Assemblies under Article 106(3)(c) of the Constitution. Though there is a marked distinction between the reserved seats for women in the National Assembly and that of other reserved seats. It is notable that the constituency for the reserved seats for the non-Muslims in the National Assembly is the whole country and the reserved seats are to be allocated on the basis of the total number of seats secured by a political party in the National Assembly. Similarly, as far as the reserved seats for women and non-Muslims in the Provincial Assemblies are concerned, the constituency for the same is each province and the reserved seats are to be allocated on the basis of the total number of returned candidates of the political party in such Provincial Assembly. The mode and manner for a political party to avail the reserved seats remains the same in all cases.

A political party has to not only file the list of candidates for the reserved seats but also ensure that its nominee candidates have filed their nomination papers for election to the reserved seats within the time set by ECP. Failure on the part of a political party to fulfill any one of the two conditions stated above, and that too, within the prescribed time fixed by ECP under the law would disentitle them to be allocated the reserved seats within the enabling provisions of Articles 51 and 106 of the Constitution.

Case of Sunni Ittehad Council

8. Given the above exposition of the mandate of law, it is necessary to carefully examine the stance of the appellants, who seek reserved seats for women and non-Muslims in the National and Provincial Assemblies for SIC.

9. SIC is a registered political party, but it did not field any candidate for a seat in the National Assembly or Provincial Assemblies in the General Election, 2024. Thus, having won no seat in the houses, it cannot seek to include the independent returned members of the respective houses to enhance its strength for the allocation of reserved seats within the contemplation of Articles 51 and 106 of the Constitution. Further, SIC had not submitted any list of candidates for reserved seats for women or for non-Muslims within the period fixed by ECP, as reflected in the Schedule of Election notified in the official gazette. In fact, the Court was informed during the hearing of the present case that SIC had till the date of decision of the present appeal not submitted the requisite list of candidates. Needless to mention, the law mandates that with the filing of the list of candidates of the political party for the reserved seats for women and non-Muslims in the National Assembly and Provincial Assemblies, the nominee candidates haveto also file their nomination papers for scrutiny,
as any other candidate contesting election for the general seat.
Given the above legal infirmities and inactions in taking the requisite steps by SIC, the joining of independent returned candidates would be of no legal avail in respect of enhancing its numerical strength for allocation of reserved seats for women and non-Muslims in the National Assembly and Provincial Assemblies under Articles 51 and 106 of the Constitution.

Sahibzada Muhammad Hamid Raza - Chairman of SIC

10. Sahibzada Muhammad Hamid Raza (appellant No.2) contested the election for a seat in the National Assembly (NA-104, Faisalabad). The nomination papers he submitted before the Retuning Officer were neither clear nor consistent with his stance taken in the present appeal before this Court. During the proceeding of the present case, the Court was provided copies of the nomination papers and the requests in writing submitted by Sahibzada Muhammad Hamid Raza to the Returning Officer and ECP, and a perusal thereof unfolded the inconsistent position he had taken, as regards his affiliation with a political party. Succinctly, his affiliation swayed from belonging to SIC (alliance with PTI) and finally to Pakistan Tehreek-e-Insaf Nazriati (PTI-N). To make the matter more complicated for the appellants, he submitted to the Returning Officer, a certificate of PTI, as its official candidate for elections to the seat of the National Assembly. With such wavering political position taken by Sahibzada Muhammad Hamid Raza, it would not be legally correct to declare him a returned candidate of SIC.

11. Since SIC does not fulfil the conditions prescribed for a political party under the enabling provisions of the Constitution and the law to be allocated reserved seats for women and non-Muslims in the National Assembly and Provincial Assemblies, therefore, the appeals filed by SIC and its Chairman are dismissed.

Mst. Kanwal Shauzab

12. Mst. Kanwal Shauzab, purporting to be the President of women wing of PTI and also a nominated candidate of PTI in the list submitted by the PTI for reserved seats for women in the National Assembly, who was not a party before the Peshawar High Court, has moved a petition challenging the impugned judgment of the Peshawar High Court, Peshawar. The said petition was not numbered; however, the Court allowed the learned counsel to make his submissions on behalf of Mst Kanwal Shauzab challenging the impugned judgment.

13. As the main appeal filed by SIC (C.A. No. 333 of 2024) has been dismissed and the findings so recorded by the Peshawar High Court, Peshawar have been maintained, it would not be appropriate to pass any findings on locus standi of Mst. Kanwal Shauzab in agitating her grievance in support of SIC, lest it may prejudice her right to be elected as a member of the National Assembly, being on the list of candidates submitted by PTI for the reserved seats for women in the National Assembly.

Pakistan Tehreek-e-Insaf (PTI)

14. PTI, a registered political party, fielded its candidates for seats in the National Assembly and Provincial Assemblies in the General Elections, 2024. But none was allowed or recognized by ECP to contest elections for the general or the reserved seats, as the candidate of PTI. And yet, for reasons not known, the matter has not been agitated by PTI before this Court. In fact, at the very end of the proceedings of the present appeals, that spanned over a month with eight long hearings commencing from the 3rd June, 2024 to the 12th July, 2024; to be precise on 26th June, 2024, an application (CMA No. 5913 of 2024) was filed by PTI and Barrister Gohar Ali Khan for their impleadment, as interveners, and that too, to assist this Court in the present appeals.

Interestingly, there was no specific prayer for a definite declaration in favour of PTI for allotment of reserved seats for women and non-Muslims. In essence, the application so made challenged the assertions of ECP with respect to PTI, seeking reserved seats for women and non-Muslims for both SIC and PTI, while contesting the allocation of these seats to other political parties.

15. Upon examining the record relating to the General Election, 2024 submitted by ECP, I found its actions and inactions deeply concerning. Regarding the issue raised in the present appeals, it is important to note that four candidates, namely; Mr. Gohar Ali Khan (NA-10), Mr. Umer Ayub (NA-12), Mr. Ali Asghar Khan (NA-16), and Shahzada Gastasab Khan (NA-15) not only declared themselves to be candidates representing PTI but also submitted certificates of PTI nominating them, as its candidates in their respective constituencies. It was also noted that they had not filed any application to ECP or their respective Returning Officers to be declared independent candidates or otherwise. Despite this, and for reasons known only to ECP, these four PTI candidates were not notified as returned candidates representing PTI. The Act and the Rules do not grant ECP the authority to declare such returned candidates, as independent candidates. Similarly, another list provided by ECP revealed returned candidates who, in their nomination papers, declared themselves to represent PTI, duly accompanied by certificates of the said party nominating them as their candidates for election of the respective constituencies. They did not file any application with ECP or the Returning Officer to be declared as independent candidates. Among these returned candidates, six were particularly notable: Mr. Sohail Sultan (NA4), Mr. Arbab Amir Ayub (NA-29), Mr. Sher Ali Arbab (NA-31), Mr. Naseem Ali Shah (NA-39), Mr. Rana Atif (NA-101) and Mr. Mumtaz Mustafa (NA-171). These returned candidates also fulfilled the condition of making declaration in their nomination forms and submitting certificates from PTI nominating them as their official candidates for election in their respective constituencies. Without there being any written declaration on their part to be declared as independent candidates, ECP had no authority under the law to declare them other than returned candidates representing PTI in the National Assembly.

16. At this stage, it is pertinent to mention, without naming them, certain candidates nominated by PTI for constituencies in the National or Provincial Assemblies who, after being declared returned, joined another political party or sought to be treated as independent. This behavior on their part, raises serious concerns about disregarding the trust reposed in such returned candidates by the voters, thus undermining the will of the people.

17. Articles 218 and 219 of the Constitution mandate ECP to conduct elections in a manner that ensures they are conducted honestly, justly, fairly, and in accordance with the law. The material which was brought to the attention of the Court during the proceedings of the present case, in particular, the manner in which retuned candidates of PTI were declared independent, clearly demonstrates that ECP was unable to perform its constitutional duty as mandated under the law. However, passing any definite finding regarding the exact number of seats won by PTI in the National Assembly and Provincial Assemblies in the General Election, 2024 would not be legally appropriate for the reasons that:

Firstly, PTI has not approached this Court for any such direction. Passing a definite finding by this Court would amount to invoking suo motu jurisdiction under Article 184(3) of the Constitution, which in the circumstances of the present case, would be contrary to the ratio of the judgment rendered by this Court in SMC No.4/2021 (PLD 2022 SC 306), as partially modified by Section 3 of the Supreme Court (Practice and Procedure) Act, 2023.

Secondly, the information and record provided to the Court did not include the particulars of returned candidates in the four Provincial Assemblies. Similarly, with regard to the election results of the National Assembly, a thorough scrutiny is required before passing any definite finding that could deprive a returned candidate of their fundamental right of being member of a political party. Furthermore, passing such a finding on the conduct of returned candidates may expose them to adverse consequences under the law. Legal propriety demands that this matter be left to the returned candidates, their respective political parties, the Speakers of the National Assembly and the Provincial Assemblies, and ECP to address in accordance with the law. Any finding at this stage would prejudice their case, especially without affording them the right to a hearing.

Finally, while the undeniable power of this Court to do complete justice under Article 187 of the Constitution is recognized, exercising this power in the absence of an aggrieved party directly approaching the Court could

set a dangerous and far-reaching precedent. Such a course risks undermining the principles of due process and judicial restraint, potentially leading to an overreach of judicial authority. The exercise of this power must, therefore, be reserved for exceptional circumstances, where there is a clear and compelling need to intervene to bolster the rights of the aggrieved petitioner, and prevent a miscarriage of justice. In the present case, however, the matters before the Court do not meet this threshold. Nevertheless, based on what has been presented before this Court, the role of ECP has fallen short of the constitutional obligations entrusted to it. However, the remedy for such shortcomings lies in the processes provided within the legal framework, not in judicial pronouncement of the apex Court, and that too, without providing hearing to all concerned parties. It is imperative to uphold the fundamental principle of due process and the sanctity of the due judicial process. This Court must, therefore, exercise caution to preserve the integrity of judicial proceedings and ensure that justice is administered within the boundaries set by the Constitution.

Conclusion

18. In all fairness, without disturbing the impugned judgment, ECP is directed to revisit its notification of returned candidates, keeping in view that a returned candidate, who declared himself to represent a political party and submitted the certificate of that political party, nominating the said candidate to be its official candidate for election for the respective constituency and has not withdrawn his declaration by any written intimation, has to be declared a returned candidate representing the said political party and not otherwise. The needful be done within seven days, if not earlier, after providing an opportunity of hearing to any affected party and, thus, the reserved seats for woman and non-Muslims are to be allotted to all deserving political parties, accordingly.

19. Consequently, civil appeals filed by SIC and its Chairman are dismissed in the above terms. As these appeals have been dismissed on merits, the connected civil petitions challenging the impugned judgment are also dismissed.

20. The above are the reasons for the short order dated 12th July, 2024 which read:

"For reasons to be recorded later, Civil Appeals Nos. 333 and 334 of 2024, C.M.A. No. 2920 of 2024 in Civil Appeal No. 333 of 2024, Civil Petitions Nos. 1612, 1613, 1614, 1615, 1616 and 1617 of 2024 and C.M.A. No. 3554 of 2024 in C.P. Nil of 2024 are dismissed in terms that:

1. Sunni Ittehad Council does not fulfil the conditions prescribed for a political party under the enabling provisions of the Constitution of Islamic Republic of Pakistan ("Constitution") and the law to be allowed/allocated reserved seats for women and non-Muslims in the National Assembly or the Provincial Assemblies.

2. Pakistan Tehreek-e-Insaf ("PTI") fulfils the conditions prescribed for a political party under the enabling provisions of the Constitution and the law to be allowed/allocated reserved seats for women and non-Muslims, in terms that:

i. A candidate for a seat in the National Assembly or the Provincial Assembly, who in his/her nomination paper has declared on oath to belong to PTI and duly submitted a certificate of the same political party confirming that he/she is the nominated candidate of PTI for the respective constituency, shall remain so, and cannot be declared independent, unless he/ she submitted a written declaration to the Election Commission of Pakistan or Returning Officer to be treated as the candidate of another political party or as an independent candidate;

ii. A returned candidate to the National Assembly or the Provincial Assembly, who in his/her nomination paper has declared on oath to belong to PTI and duly submitted a certificate of the same political party confirming that he/she is the nominated candidate of PTI for the respective constituency, shall remain so, and this consistent position maintained by a returned candidate throughout the electoral process should be legally recognized by the Election Commission of Pakistan and such returned candidate cannot be treated as the returned candidate of another political party or as an independent returned candidate, and thus, the reserved seats for women and nonMuslims are to be allowed/allocated to PTI, accordingly;

iii. A candidate nominated by PTI for a constituency of the National Assembly or the Provincial Assembly who, after being declared returned, joined another political party or sought to be treated as independent, raises serious

concerns about disregarding the trust reposed in him/her by the voters, thus undermining the will of the people; and

iv. The legal implications, effects and consequences of the determinations made above in paragraphs 2(ii) and 2(iii), as well as the actions or inactions of the Election Commission of Pakistan thereon, although deeply concerning, have not been challenged in the present appeals and petitions; and the persons who would be affected or aggrieved are not parties before this Court. Therefore, issuing definitive directions to the Election Commission of Pakistan qua the allocation of specific number of reserved seats for women and non-Muslims to a political party in the National Assembly and the Provincial Assemblies would not be legally appropriate.

3. Accordingly, the Election Commission of Pakistan is directed to decide the allocation of reserved seats for women and non-Muslims to political parties in the National Assembly and the Provincial Assemblies in the light of the determinations made hereinabove after providing an opportunity of hearing to the parties concerned, and if required revisit its earlier decisions on the matter. The needful be done within seven days of the receipt of this order."

Sd/-

Judge

Islamabad.

Dated: 13th August, 2024.


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**JAMAL KHAN MANDOKHAIL, J.---**We respectfully do not agree with the findings of the majority judgment with regard to providing an option to members of National and Provincial Assemblies to join Pakistan Tehreek-e-Insaf ("PTI") within a period of fifteen days. These are the reasons for our short order dated 12.07.2024.

Conduct of Election:

2. Under Article 218 of the Constitution of the Islamic Republic of Pakistan, 1973 ('Constitution'), it shall be the duty of the Election Commission of Pakistan ('ECP') to organize and conduct the elections honestly, justly, fairly and in accordance with law. Under section 66 of the Elections Act, 2017 ('the Act'), any person contesting elections from the platform of a particular political party, shall file a declaration in writing before the concerned Returning Officer ('RO') about his affiliation with a particular political party, if any, along with a certificate (commonly known as party ticket) from the political party showing

that he is that party's candidate from the constituency. According to section 67(3) of the Act, a candidate not nominated by any political party, shall be called as "independent candidate". Thus, to be a nominated candidate

of a particular political party, a declaration of affiliation from a candidate and a certificate from that party, showing his nomination is a condition precedent.

Role of ROs:

3. The role of ROs is the most significant. The Act assigns them the duty of receiving nomination papers, scrutinizing and deciding fate of them. The ROs have to allot symbols to contesting candidates, and thereafter, shall publish their names as provided by section 68(1) of the Act. The list shall contain name of the candidates, symbols allotted to them, their party affiliation, if any, according to their declarations. The ROs shall supply a copy of the list to each candidate and to exhibit it at a prominent place at each polling station on the day of the poll and to send a copy thereof to the ECP, which shall upload it for display on its website enabling each candidate and the general public to know about the detail mentioned in the list. According to rule 56(1) of the Election Rules, 2017 ('the Rules'), the list of contesting candidates shall be drawn up in Form 33, that has a set template. The ROs have no other option, but to fill-in the form on the basis of information given by a candidate in his nomination papers and declaration, in the following format:

Under section 90(10) of the Act, after close of poll, every Presiding Officer shall prepare a Result of the Count of votes in Form 45, as provided by rule 81 of the Rules. The ROs shall forthwith prepare and announce the provisional Consolidated Statement of Result of the Count in accordance with section 92 of the Act. The ROs shall prepare a final consolidated result in terms of section 95 of the Act, on the basis whereof, the ECP shall notify results of returned candidates of every constituency.

Election to Seats Reserved for Women and non-Muslims:

4. In order to ensure full participation of women and non-Muslims in all spheres of national life, Articles 51(3) and 4 and Article 106(3) of the Constitution has determined their due representation in National and Provincial Assemblies, respectively. Article 51(6)(d) of the Constitution provides a procedure and a formula for election to the seats reserved for women in National Assembly as under:

(6) For the purpose of election to the National Assembly,-

(a) .....

(b) .....

(c) .....

(d) members to the seats reserved for women which are allocated to a Province under clause (3) shall be elected in accordance with law through proportional representation system of political parties' lists of candidates on the basis of total number of general seats secured by each political party from the Province concerned in the National Assembly:

Article 51(6) (e) of the Constitution provides a procedure and a formula for election to the seats reserved for non-Muslims in National Assembly as under:

(e) members to the seats reserved for non-Muslims shall be elected in accordance with law through proportional representation system of political parties' lists of candidates on the basis of total number of general seats won by each political party in the National Assembly:

Article 106(3)(c) of the Constitution provides with the procedure and a formula for election to the seats reserved for women and non-Muslims in Provincial Assemblies as under:

"106. (1)

(2) .....

(3) For the purpose of election to a Provincial Assembly,--

(a) .....

(b) .....

(c) the members to fill seats reserved for women and non-Muslims allocated to a Province under clause (1) shall be elected in accordance with law through proportional representation system of political parties' list of candidates on the basis of the total number of general seats secured by each political party in the Provincial Assembly."

Procedure to Contest Election to the Reserved Seats:

5. According to the above provisions of the Constitution, members to the seats reserved for women and non-Muslims shall be elected in accordance with law, through proportional representation system of political parties' lists of candidates. All matters relating to the conduct of election and matters connected therewith or ancillary thereto are enshrined in the Act. Section 104 thereof provides a complete procedure for the conduct of election to the reserved seats as under:

104. Party lists for reserved seats.---(1) For the purpose of election to seats reserved for women and non-Muslims in an Assembly, the political parties contesting election for such seats shall, within the period fixed by the Commission for submission of nomination papers, file separate lists of their candidates in order of priority for seats reserved for women and non-Muslims with the Commission or, as it may direct, with the Provincial Election Commissioner or other authorized officer of the Commission, who shall forthwith cause such lists to be published for information of the public:

Provided that the list submitted by a political party shall not be subject to change or alteration either in the order of priority or through addition of new names in the list or omission of any name after expiry of the date of submission of nomination papers.

(2) The parties' lists referred to in subsection (1) may contain as many names of additional candidates as a political party may deem necessary for contesting seats reserved for women and non-Muslims, to provide for any disqualification of candidates during scrutiny of nomination papers or for filling of any vacant seats during the term of an Assembly.

(3) A candidate to a seat reserved for women or non-Muslims shall file the nomination papers on the Form on or before the last date fixed for filing of nomination papers for the election and the nomination papers shall, as nearly as possible, be scrutinized in the same manner as nomination papers of candidates on general seats are scrutinized under section 62.

(4) ---

(5) ---

(6) ---

(7) ---"

Since Article 51(6)(d)&(e) and Article 106(3)(b)&(c) of the Constitution provide that members to the seats reserved for women and non-Muslims shall be elected in accordance with law, therefore, the procedure and method provided by the above provision of the Act must be acted upon in its letter and spirit, as it is a command of the Constitution. If a law requires an act has to be done in a particular manner, that is how it should be done. Thus, no party is entitled to file list of its candidates to the reserved seats contrary to the provisions of section 104 of the Act, after the period fixed by the ECP for submission of nomination papers.

Determination of Reserved Seats:

6. In the context of Article 51(6)(d)&(e) of the Constitution, a political party means a party that has won/secured at least a general seat in the National Assembly, and in the context of Article 106(3)(c) of the Constitution, a political party means a party that has won/ secured at least a general seat in a Provincial Assembly. The provisos to these Articles fixes three days' time for the independent returned candidates to join any political party, which won general seats in the election. After expiry of three days, the ECP shall publish a list of total number of general seats won by each political party, including the independent returned candidates, who joined that party. The seats reserved for women and non-Muslims shall be allocated through proportional representation system of political parties' lists of candidates on the basis of the total number of general seats secured by each political party.

7. A proportion is an equation in which two ratios are set equal to each other. There is no fixed number or ratio of general seats in the said provisions of the Constitution for the purpose of allocation of reserved seats. The only basis for allocation of reserved seats depends upon the total number of general seats secured by a political party, after induction of independent returned candidates, if any. In general elections, the number of the general seats won by political parties' nominated candidates and independents vary. It is for this reason, the ECP in every election sums up total general seats secured by all the political parties including the independents joining

political party(ies) and thereafter divides them in the case of women by sixty seats reserved for women in order to determine the ratio on the basis whereof the reserved seats are to be allocated. This procedure has further been elaborated by rule 94 of the Rules. In this way, the share of each political party out of the seats reserved for women is determined. The same procedure is to be followed for the allocation of seats reserved for non-Muslims in the National Assembly. This formula also applies for the allocation of reserved seats in the Provincial Assemblies, keeping in view total number of general seats fixed by the Constitution for each Provincial Assembly.

Whether Reserved Seats can be left Vacant:

8. In the general elections of 2024, a large number of independent candidates won. As a result, the number of general seats won by political parties in the recent election is less than it was in previous elections. It was alternatively argued that after allocation of share of each political party on the basis of general seats won by each political party, rest of the reserved seats may be left vacant. A question arises whether seats reserved for women and non-Muslims in National and Provincial Assemblies can be left vacant? According to Article 34 of the Constitution steps shall be taken to ensure full participation of women in all spheres of national life. The Constitution allocated a specific number of seats for women and non-Muslims in Parliament and each Provincial Assembly. However, they can also contest on general seats, thereby enabling them to contribute in the process of legislation and policy making. It is the constitutional responsibility of every organ and authority of the State and each person performing functions on behalf of an authority of the State, every political party and every citizen to act in accordance with the provisions of the Constitution and the law. The seats reserved for women and non-Muslims is their constitutional right, as such, they cannot be deprived from their such fundamental right by leaving any reserved seat vacant. Similarly, no formula other than provided by the above provisions of the Constitution can be applied for allocation of reserved seats to political parties.

Facts of the Case:

9. The ECP had notified the Election Program for the election of National Assembly and all Provincial Assemblies through a Schedule ('Schedule') on 15 December 2023, which prescribed a specific period for submission, scrutiny and withdrawal of nomination papers for general seats and for seats reserved for women and non-Muslims. A number of candidates contested election to National and Provincial Assemblies independently, out of whom, eighty (80) returned candidates joined Sunni Ittehad Council ('SIC'), within three days of their notifications, as prescribed by the Constitution. SIC is an enlisted political party and Sahibzada Hamid Raza being its Chairman, requested the ECP for submission of his party's list of candidates and allocation of seats reserved for women and non-Muslims to SIC on the basis of total number of independent candidates, who joined it. The request of the appellant was declined by the ECP vide order dated 01.03.2024, which was assailed before the Peshawar High Court, but failed[p1], hence these appeals.

10. The learned counsel for the appellant stated that after the independent candidates joined SIC, in a way, it secured general seats, therefore, SIC was entitled for its share in the seats reserved for women and non-Muslims in National and Provincial Assemblies, respectively. The learned counsel stated that though SIC did not win general seats in National or any Provincial Assembly, but because of joining independent candidates, SIC has secured general seats. He suggested that after securing general seats, a purposive and progressive interpretation of Article 51(6) (d)&(e) and Article 106(3) (c) of the Constitution is required in order to consider SIC as a political party for the purpose of allocation of reserved seats. He made a reference to PLD 2024 SC 698[2].

Findings:

11. The Supreme Court ('SC') can interpret the Constitution, but it must ensure that words are not read into it nor should it ascribe artificial meaning to commonly understood words. Article 51(6) (d) & (e) and Article 106(3)(c) of the Constitution are clear enough to understand. The said provisions state that election to the seats reserved for women and non-Muslims shall be conducted in accordance with the law, which is the Act. Its section 104 provides that political parties shall within the period fixed by the ECP for submission of nomination papers, file separate lists of their candidates with the ECP to seats reserved for women and non-Muslims; and the listed candidates shall file nomination papers by or before the last date fixed for filing of nomination papers for general seats as prescribed by the Schedule. The nomination papers filed for reserved seats shall be

scrutinized in the same manner as nomination papers of candidates on general seats are scrutinized under section 62 of the Act.

12. Admittedly, the appellant (SIC) did not nominate any candidate for general seats nor filed its list of candidates and their nomination papers before the ECP within the stipulated period, which is a condition precedent to elect candidates to the seats reserved for women and non-Muslims. Although SIC is an enlisted political party and the independent elected members have a constitutional right to join it, but it does not mean that it fulfils the criteria necessary for allocation of seats reserved for women and non-Muslims. As SIC did not contest election, therefore, in the context of Article 51(6)(d)&(e) and Article 106(3)(b)&(c) of the Constitution, it cannot be termed as a political party. Merely because a large number of independent returned candidates joined SIC does not entitle it to file its list of candidates for reserved seats, and that too after the conduct of election. All the Hon'ble members of the Bench have unanimously held that the appellant is not entitled to file its list of candidates for the seats reserved for women and non-Muslims.

13. As far as the judgment relied upon by the learned counsel for the appellant (PLD 2024 SC 698) with regard to purposive and progressive interpretation of the Constitution is concerned, relevant portion whereof is reproduced as under:

In absence of express words or an enactment, preventing the Council from inquiring into the matter upon resignation or retirement of a judge, jurisdiction of the Council cannot be abolished, ousted or terminated. Since there is no express provision in the Constitution, nor is there any enactment, preventing the Council from continuing its proceedings of inquiry in a situation where a judge is retired or resigns before conclusion of the inquiry, it is the constitutional obligation of the Council to conclude the inquiry initiated against a judge and form an opinion regarding his conduct.

In the referred case, Article 209 of the Constitution was under discussion, which assigns power to the Supreme Judicial Council ('SJC') to initiate an inquiry against a judge of Supreme Court, Federal Shariat Court or a High Court. The Constitution does not provide for automatic termination of an inquiry already initiated against a sitting judge, upon his resignation or retirement. It was for this reason that this Court held that once the SJC initiates the inquiry against a sitting Judge, it shall be taken to its logical conclusion. Had the provision of Article 209 of the Constitution been interpreted progressively or purposively, in a manner that upon retirement or resignation of a judge, the inquiry initiated by a constitutional body shall stand terminated, it would have amounted to adding these words into the Constitution, which is beyond the domain of this Court. The referred judgment in the circumstances is of no assistance to the appellant, rather it strengthens the view that the Constitution has to be interpreted rigidly and to be implemented in its letter and spirit. As has been discussed above that the appellant does not qualify for reserved seats, therefore, we cannot mould the Constitution in a manner to facilitate SIC. The appeals to such extent failed.

Status of Returned Candidates who joined SIC:

14. In order to ascertain the status of 80 returned candidates, who joined SIC, the learned counsel for the ECP on our directions, produced their nomination papers. Perusal whereof would reveal that out of the 80 returned candidates, 39 returned candidates had filed declarations about their affiliation with PTI. Despite such fact, the ROs while publishing list of the contesting candidates in Form 33, showed them as independents, on the basis whereof, they contested election and were subsequently notified as independent returned candidates by the ECP. The ROs did not fill Forms 33 of these 39 candidates in consonance with their declarations. The learned counsel for the ECP admitted the fact that those 39 candidates filed declarations about their affiliation with PTI, but because of refusal of symbol by the ECP, endorsed by this Court on 13 January 2024 in the case of Election Commission of Pakistan[3], PTI was not considered as a political party for the purpose of election. He relied upon the Explanation to rule 94 of the Rules, which is reproduced as under:

'Explanation. For the purpose of this rule, the expression "political party" means a political party to which a symbol has been allocated by the Commission."

The learned counsel for the ECP stated that on account of non-allocation of symbol to PTI, the declarations of the candidates and their nomination by PTI were not accepted. According to him, all of them were independent

returned candidates, who contested election on different election symbols. They had exercised their constitutional right by joining SIC out of their free will and consent.

Political Party:

15. Under Article 17(2) of the Constitution "Every citizen, not being in the service of Pakistan, shall have the right to form or be a member of a political party, subject to any reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan, public order or morality." A political party means a group of persons organized to acquire and exercise political power. Section 2(xxviii) of the Act defines a political party as under:

"political party" means an association of citizens or a combination or group of such associations formed with a view to propagating or influencing political opinion and participating in elections for any elective public office or for membership of a legislative body, including an Assembly, the Senate, or local government;

The definition in the Act is so clear that the Parliamentarians did not consider the need of further explanation. To the contrary, rule 94 of the Rules provides an explanation to the definition of a political party. It is a settled proposition of law that rules framed under a Statute must remain within its domain and cannot transgress the limits and parameters of the statute[4]. The explanation to rule 94 of the Rules is, therefore, beyond the scope of the definition of a political party, hence, amounts to transgressing the limits and parameters provided by section 2(xxviii) of the Act. The Constitution has recognized the right of formation of a political party, subject to any reasonable restrictions imposed by law in the interest of sovereignty and integrity of Pakistan, public order and morality. After complying with the provisions of sections 200 and 201 of the Act, a political party shall be enlisted with the ECP in a manner as provided by section 202 of the Act. Under section 215 of the Act, a political party enlisted under the Act shall be eligible to obtain an election symbol for contesting election for National and Provincial Assemblies as well as local governments. However, under section 215(5) of the Act, if a political party fails to comply with the provisions

of section 209 or 210 of the Act, and fails to conduct its intraparty election, the ECP shall not allocate an election symbol to such political party or combination of political parties in subsequent election. This is the reasonable restriction imposed upon a political party in the circumstances.

16. Primarily, the purpose of allocation of a symbol to political parties is to facilitate their voters in identifying, recognizing and remembering the party's nominated candidates. If an election symbol of a political party is revoked for any reason, there is no penal consequence in the Act, except losing the right of having a common election symbol. Thus, refusing symbol to any political party does not affect its existence nor does it lose the rest of its rights available to it under the Constitution and the Act. Non-allocation of symbol to a political party, in no way prevents a candidate from filing a declaration about his affiliation with that political party, nor does it prevent such political party from nominating a candidate to contest an election. Once a political party is enlisted, it has a right under section 206 of the Act to nominate candidates for election to the National and Provincial Assemblies. If a candidate is nominated by a political party having no common symbol, under section 67(1) of the Act, he shall be allotted one of the prescribed symbols not allocated to any political party. Such political party can still propagate and influence political opinion and agenda in order to promote its nominated candidates. The primary role of a political party is to place a political agenda and policies to persuade people. To achieve its goal, a political party contests election by putting up candidates, and voters choose the party's nominated candidates on the basis of its manifesto, policies and programs. The party which wins majority seats in the election, forms a government and the parties which win less number of seats in the election, form an opposition. In any case, an enlisted political party shall exist and has a right to exercise its political power by participating in election, unless the Supreme Court upholds the declaration made against a political party by the Federal Government under section 212 of the Act, that such political party shall stand dissolved forthwith.

Status of PTI:

17. It is important to mention here that on account of not-conducting of intra-party election, the ECP had declined to allot symbol to PTI, because this is what section 215(5) of the Act stipulates. However, this did not mean that affiliation of the candidates with PTI stopped or that PTI stopped being a political party to contest election. Candidates from different constituencies from National and Provincial Assemblies filed nomination

papers and declarations showing their affiliation with PTI, but the ROs while issuing list of contesting candidates drawn up in Form 33, declared them as independents. The decision of the ROs was solely based upon the explanation to rule 94 of the Rules and on account of the decision of the ECP, revoking symbol of PTI. The election authorities did not properly apply the relevant provisions of the Constitution and the Act. The PTI's affiliated candidates had submitted their declarations by 24 December 2023, much earlier than the judgment passed by this Court on 13 January 2024. The contention of the learned counsel for the ECP that the decision of declaring PTI's affiliated candidates as independents, were pursuant to the judgment of this Court, is unfounded. There was no restraining order either from the ECP or in the judgment of this Court, preventing PTI from nominating candidates and participating in election, but, the ROs and the ECP misinterpreted the said judgment, which created an anomaly.

18. Admittedly, a large number of renowned lawyers are members of PTI and many of them contested election of the year 2024 for the general seats in National and Provincial Assemblies, filing declarations about their affiliation with PTI. Surprisingly, none of them had challenged the order of the ROs, declaring them as independent candidates and their notifications being independent returned candidates issued by the ECP. It is not known as to what had prevented them to do so? The learned counsel for the appellant and the PTI were unable to assign any reason in this behalf. Though, a PTI candidate, Mr. Salman Akram Raja, challenged the order of the RO but did so only to the extent of declaring him as an independent candidate, but surprisingly he did not take the matter to its logical conclusion. His petition was objected to by the Registrar, against which, a chamber appeal was provided by the Supreme Court Rules, 1980 but he did not avail such remedy, for the reason best known to him. We must say that the administration of PTI and its nominated candidates for National and Provincial Assemblies, were equally responsible for misinterpreting the judgment of this Court by presuming the PTI's nominated candidates as independents. They were negligent in failing to challenge the orders of the ROs and the ECP.

Entitlement of PTI for the Reserved Seats:

19. In the case in hand, the matter pending before this Court pertains to administrative responsibility of the ROs and the ECP with regard to allocation of seats reserved for women and non-Muslims, as provided by the Constitution and the Act. They have committed an illegality by declaring PTI's affiliated candidates as independents. These appeals pending before us is a continuation of the original matter of publishing list of contesting candidates drawn up in Form 33 by the ROs and notifications of returned candidates issued by the ECP in their administrative capacities. Since right of the electorate and of candidates for the seats reserved for women and non-Muslims is involved, they cannot be penalized because of the act of the ROs, the ECP, the PTI's administration and of those 39 candidates, who did not agitate their grievances. To protect and preserve their constitutional right, we can take notice of the matter.

20. Choosing a candidate for general seats and the seats reserved for women and non-Muslims is one of the fundamental rights of an electorate, guaranteed by the Constitution and the law. It is therefore, not a matter solely of the PTI, rather it involves a constitutional right of an electorate and legitimate interests of women and non-Muslims, which has to be provided to them on the basis of general seats secured/won by PTI. Protecting their constitutional rights and interests should have been the prime consideration of the ROs and the ECP, but the needful was not done and they acted contrary to the command of the Constitution and the law. We do not agree with the reasons which prevailed upon the ROs and the ECP, declaring PTI's 39 affiliated returned candidates as independents. The electorate voted for them in their such capacity. The act of the ROs and the ECP, declaring them as independent returned candidates amounts to depriving them from their constitutional right of forming a Parliamentary Party of PTI in National and Provincial Assemblies. Similarly, it has also deprived the PTI's women and non-Muslims candidates from their legitimate fundamental right to participate in national life, and to promote agenda and policies of the political party, to which they were affiliated. Consequently, the members to the seats reserved for women and non-Muslims shall be elected in accordance with law on the basis of general seats won/secured, including the said 39 returned candidates.

Independents:

21. We have perused the nomination papers of 80 candidates, who joined SIC, out of whom, 41 candidates in clear terms declared themselves as independents, while filing their declarations without there being a certificate (ticket) from any party, including PTI. The date for submission of nomination papers as per the Schedule was with effect from 20 December 2023 till 24 December 2023. Admittedly, none of the candidates or the leadership of PTI came forward to claim that the candidates who declared themselves as independents, were actually the party's nominated candidates. There is nothing on the record to suggest that these 41 candidates were compelled, coerced, pressurized, misinterpreted the law or judgment of this Court or was there any other peculiar circumstance beyond their control, to declare their status as independents. In the given circumstances, there is no reason, why they should be considered as PTI's nominated candidates. Judges decide cases in accordance with the Constitution and law, based upon the material available before them. Any such contention must be supported by the record, which is lacking in this case, therefore, these 41 candidates were independents. In this behalf, observations made by the Hon'ble eight Members of the Bench in Paragraph 108 of the majority judgment as under:

108. ...The assertion of SIC and PTI that they were also PTI candidates and the electorate voted for them for their being PTI candidates though appears satisfactory but is not supported by the record presently before us. Therefore, it is the most challenging matter involved in the case where the scales of the requirements of law and of justice are to be justly, fairly and reasonably balanced.

22. According to section 67(3) of the Act, 'A candidate not nominated by any political party (hereinafter called as 'independent candidate')'. In Paragraph 110 of the judgment, authored by our learned brother Syed Mansoor Ali Shah, J., it is stated that, according to section 66 of the Election Act, two elements make a person the candidate of a political party: (i) the candidate's own declaration that he belongs to that party, and (ii) the party's certificate (party ticket) nominating him as its candidate'. We agree with these findings and in the light thereof, there is no dispute that these 41 candidates did not file declarations about their affiliation with PTI, nor is there party's certificate (party ticket) nominating them as its candidates. This establishes the fact that at the time of submission of nomination papers, none of them had filed declarations about their affiliation with PTI, nor had a certificate (ticket) from the said party. All these candidates after being notified as independently elected candidates had an option to join PTI, instead they by exercising their constitutional right, joined SIC with free will and consent, and stated so in the affidavits filed by them. It is important to mention here that Mr. Salman Akram Raja, Advocate Supreme Court, appearing on behalf of PTI, surprisingly supported the stance of all those who joined SIC. The declarations in the nomination papers of 41 candidates were stated as independents, which were also accepted by this Court unanimously. It is for this reason, the Hon'ble
majority Members gave the 41 independent candidates an option that they may join PTI by submitting declarations about their affiliation with PTI and to obtain certificates of their nomination by PTI, within a period of fifteen days. With great respect, we do not agree with the decision of majority members with regard to providing opportunity to 41 independently returned candidates, who have already joined SIC, by exercising their constitutional right. They are now members
of SIC. Neither the Constitution nor the Act permits us to issue direction or provide an opportunity or additional avenue to them to join another political party and that too, within a period of fifteen days.

23. These are the reasons for our short order dated 12 July 2024, which is reproduced here under:

For reasons to be recorded later, we dispose of these appeals, petitions and miscellaneous applications through a short order as under:

1. These matters involve a controversy regarding the allocation of seats reserved for women and non-Muslims. The Sunni Itehad Council ("SIC") did not contest the General Elections of the year 2024. SIC, which demands allocation of reserved seats on account of inclusion of independent parliamentarians in it, did not secure a single seat in the National Assembly
or any of the Provincial Assemblies nor submitted a list
of its candidates for seats reserved for women and non-Muslims. Thus, it is not entitled to any of the reserved seats in the National Assembly and in the Provincial Assemblies. The impugned judgment and the order dated 1 March 2024 of the Election Commission of Pakistan ("ECP") to such extent is upheld.

2. Under Article 51(3) of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution"), the total number of seats in the National Assembly shall be 326, out of which 60 seats are reserved for women and 10 seats for non-Muslims. Such right of women and non-Muslims has been guaranteed by the Constitution. They shall be elected in accordance with
the law through proportional representation system of political parties' list of candidates on the basis of total number of general seats secured by each political party from the Province concerned in the National Assembly and the Provincial Assemblies, as provided by Article 51(6) (d) and (e) of the Constitution. Therefore, they cannot be deprived of this right of theirs by leaving these seats vacant, and all reserved seats must be filled in, as provided by Article 224(6) of the Constitution.

3. The impugned judgment of the High Court and the said order of the ECP to the extent of the proportional representation distribution of seats amongst the political parties which won and secured seats is also maintained, however, since the ECP calculated and allocated the seats to the parties by the exclusion of the Pakistan Tehreek-e-Insaf ("PTI") candidates, therefore, to such extent, the impugned judgment of the High Court and the order of the ECP are set aside.

4. During the hearing, it transpired that a number of candidates had submitted their nomination papers declaring on Oath that they belonged to PTI supported by an affiliation certificate of the said party, though some did not submit affiliation certificates of PTI, however, since they stated on Oath that they belonged to PTI, and did not contradict themselves, they should be considered to be members of PTI in the National and the Provincial Assemblies. The ECP by misinterpreting the judgment of this Court dated 13 January 2024, which was regarding non-holding intra-party elections in PTI, wrongly mentioned the said candidates of the PTI as independents in Form 33 of the Election Rules. The ECP had no authority to declare validly nominated candidates of a political party to be independent candidates. Similarly, a candidate once declared himself/herself as a candidate of a political party, could not subsequently resile from his/her candidature of a particular party, after the last date of withdrawal of the nomination papers.

5. It is important to mention here that neither the PTI nor any candidate affiliated with PTI approached either this Court before or during the hearing of these proceedings, or the High Court to challenge the decision of the ECP, declaring them as independents. However, in view of the fact that the appeal and the petition are a continuation of election proceedings before the ECP, we can look into the vires of the decision of the ECP in the light of the provisions of Article 51(1)(d) and (e) of the Constitution read with sections 66, 67 and 104 of the Elections Act, 2017 to safeguard the interest of women and non-Muslims. As a consequence whereof, the candidates who had submitted their nomination papers declaring that they belonged to PTI and had not filed a document showing affiliation with another political party before the last date of withdrawal of the nomi-nation papers, should have been treated as the Parliamentary Party of PTI, but the needful was not done by the ECP. Consequently, the PTI as a Parliamentary Party is entitled
to the reserved seats. The ECP should recalculate and reallocate the reserved seats amongst the political parties, including
the PTI, as provided by Article 51(6)(d) and (e) of the Constitution.

6. The candidates who had submitted their nomination papers by 24 December 2023, which was the last date of submission of nomination papers, and had declared themselves either as independent candidates or had left blank the relevant column in the nomination papers/declaration and were elected shall be considered to be independents. SIC is a registered political party and every independent member of the National Assembly and of the Provincial Assemblies has a right to join it. All those who joined the SIC are presumed to have done so out of their own free will. None of them claimed to have joined SIC because of any misunderstanding of any judgment, the law, compulsion, coercion or undue influence and it is not for this Court to presume otherwise. We must ensure that words are not read into the Constitution nor to ascribe artificial meaning to commonly understood words. We must also abide by validly enacted laws and must not do anything either to hinder or facilitate a political party by ignoring the laws mandate.

Sd/-
(Qazi Faez Isa)

CJ

Sd/-

(Jamal Khan Mandokhail)

**Judge**

**Qazi Faez Isa, CJ.** I agreed with the short order dated 12 July 2024 authored by Justice Jamal Khan Mandokhail and agree with his detailed reasons thereof which have been issued today.

2. However, I consider it my duty to point out the constitutional violations and illegalities in the majority's short order of 12 July 2024, and the majority's detailed judgment of 23 September 2024, the order/ clarification of 14 September 2024 and the Clarification of 18 October 2024 (respectively 'the majority's short order', 'the majority's judgment', 'the majority's order/clarification' and 'the majority's Clarification'). I do hope and expect that my distinguished colleagues in the majority[1] will reflect and correct their mistakes and ensure that Pakistan is governed in accordance with the Constitution of the Islamic Republic of Pakistan ('the Constitution'). Unfortunately, the review petitions against the majority short order could not be heard because my Hon'ble colleagues (Justice Syed Mansoor Ali Shah and Justice Munib Akhtar) outvoted me on the Committee constituted under the Supreme Court (Practice and Procedure) Act, 2023; attached is my separate note to the minutes of the meeting held on 18 July 2024.

3. These appeals were heard by a thirteen-member Bench of this Court, comprising of all judges of the Supreme Court.[2] The majority's short order concluded by permitting the Election Commission of Pakistan ('ECP') and Pakistan Tehreek-i-Insaf ('PTI') to, 'apply to the Court by making an appropriate application, which shall be put up before the Judges constituting the majority in chambers for such orders and directions as may be deemed appropriate'. This deviated from how courts have always functioned, was novel and unprecedented.

4. The majority of eight judges decided to part ways with the Court, comprising of thirteen judges, which had heard the appeals. The majority set up its own virtual court, permitted the making of 'an appropriate application' by the ECP and PTI, and directed that such appropriate application would only be heard by them whilst cloistered in Chambers. In doing this the majority of the Hon'ble Judges effectively legislated, because neither the Constitution nor any law permits what they did. Incidentally no party or counsel during the hearing ever suggested the course of action which the majority adopted, and neither the majority's short order nor the majority's judgment offers an explanation to justify it. In effectively legislating the Hon'ble Judges in the majority also contradicted themselves. They stated that the ECP and the PTI may 'apply to the Court' but then proceeded to state that only the 'judges constituting the majority' would hear the 'appropriate application'. This was not the only contradiction. It has been settled by the Supreme Court that a hearing of a case after it has been decided (which would be a review petition) should be by the same Bench and by the same number of Judges as had earlier heard the case:[3]

'Needless to mention that the dissenting Judges on the Bench that heard the case, subject to their availability, are necessary members of the Bench constituted to hear review petition filed against the majority judgment, i.e., judgment of the Court,... .'

'10. As the judgment of the Court is considered to be the judgment of all the members of that Bench, irrespective of its being majority judgment or unanimous judgment, there can be no difference in judicial powers of the members ... . Hence, there can be no fetters on the exercise of his judicial power as that would offend the fundamental constitutional value of independence of the judiciary.'

5. The majority disregarded the precedents of this Court, including the above. They not only carved out a separate eight-member 'court' from the thirteen-member Court, but also innovated further by not finally concluding the hearing of the appeals, because they permitted appropriate application to be filed, introduced timelines and changed what the Constitution provided.

6. The timelines that were introduced were as under:

(i) 41 returned candidates to file a statement within 15 days;

(ii) Upon receipt of the above statements the ECP to give notice to the political party concerned;

(iii) Then within 15 days the political party to submit its 'confirmation that the candidates contesting the General Elections as its candidates'; and

(iv) The ECP within 7 days to issue and post on its website 'the list of candidates now MNAs'.

7. Judges may decide or dispose of a case as per their understanding of the Constitution and the law but it is critical that the case must be decided or disposed of. Permitting appropriate application to be filed by the ECP or the PTI meant that the case was not decided or disposed of. This coupled with the stated timelines effectively kept the appeals pending. In civil cases after a judgment is pronounced the decree follows. In constitutional cases too a judgment can be executed, provided it is finally and conclusively decided. The majority's short order and the majority's judgment did not conclude the appeals. The well trodden legal path was abandoned by the majority which created unnecessary and avoidable problems. Since the appeals were not finally decided there was no decision which could be stated to be binding, in terms of Article 189 of the Constitution. Similarly, contempt of court proceedings for any non-compliance of the 'order of the Court', under Article 204 of the Constitution, cannot be initiated. The right of review, which Article 188 of the Constitution grants, was also effectively negated.

8. The majority's short order was announced on 12 July 2024, following which the Hon'ble Judges had to issue their detailed reasons for the same. Instead something inexplicable happened. A purported 'order' was uploaded on the Supreme Court's website on 14 September 2024, and this was done without informing the Chief Justice, the other Judges (in the minority), and bypassing the Registrar and the office of the Supreme Court. And, this was done on a Saturday, after the Registrar had left. The Deputy Registrar who was still in the premises of the Supreme Court submitted the following note to (me) the Chief Justice, after 8 pm on Saturday, 14 September 2024:

'I bring it to your kind notice that a news is floating on the media that Supreme Court of Pakistan has issued clarification of order dated 12.07.2024 passed in C.A. No. 333/2024 (Election - National Assembly / Reserved Seats). However, neither cause list was issued, nor notices were issued to the parties by the office and the order has still not been received in office till 8.00pm and was uploaded on the website.

Submitted for information, please.'

9. In view of the unusual happenings (mentioned above) I sought the following information from the Registrar; my questions and the answers from the Registrar are mentioned below:

| Questions by the Chief Justice | Answers by the Registrar |
|---|---|
| 1) When were the said applications filed? | The application of the ECP was received in the office of the Registrar on 26 August 2024. |
| 2) Why were the said applications not fixed before the Committee constituted under the Supreme Court (Practice and Procedure) Act, 2023? | These applications were not placed before the Committee in view of the majority's short order as directed by them to hear it in Chambers. |
| 3) How were the said applications fixed for hearing and how was this done without issuance of cause list disclosing their fixation? | These applications were not fixed for hearing rather were placed before the majority Judges in Chambers. As such no cause list was issued. |
| 4) Did the office issue notices to the parties and to the Attorney-General for Pakistan? | Notices were not issued to the parties nor to the Attorney-General for Pakistan. |
| 5) In which courtroom/ chamber were the applications heard, and by whom? | No hearing took place on these applications as the applications were placed before the majority Judges in Chambers. |
| 6) Why was a cause list not issued for announcement of the said order? | As the matter was placed before the majority Judges in Chambers and no hearing took place on the applications,therefore, the cause list for announcement of the said order was not issued. |

| | |
|---|---|
| 7) Why was the said order not fixed for announcement? | Neither any hearing took place on the applications nor the judgment/order was reserved, rather the same was decided by the majority Judges in Chambers. |
| 8) Without first depositing the original file and the said order in the Supreme Court's office how was the said order uploaded on the website? | Webmaster of IT Directorate uploads orders on the official website of this Court and did so on the directions of the Hon'ble Judges. |
| 9) Who directed the uploading of the said order on the Supreme Court's website? | As reported, the Webmaster of IT Directorate uploaded the said order on the official website of this court on 14 September 2024 on the direction of Mr. Sadaqat Hussain, Sr. PS to Justice Syed Mansoor Ali Shah (HJ-1). As also reported, he received the said order via Whatsapp from Mr. Sadaqat Hussain at 4:32 pm on 14 September 2024 along with the Tagline. |

10. The majority's order/clarification was admittedly passed without first listing the cases, without issuing notices to the parties and without issuance of the requisite notice to the Attorney-General for Pakistan. The title of the 'order' stated - 'In Chambers'. However, not all of the said eight Hon'ble Judges were in the Supreme Court premises and some were not even in Islamabad. By not issuing notices, not granting an opportunity of hearing, and not conducting the hearing in open
Court, the well established rules of natural justice were transgressed, and Article 10A of the Constitution, which gives protection to procedural fairness and has elevated due process and fair trial to the status of a Fundamental Right, was contravened. A nine-member Bench of this Court had recently rendered the following unanimous opinion:

'The proceedings of the trial by the Lahore High Court and of the appeal by the Supreme Court of Pakistan do not meet the requirements of the Fundamental Right to a fair trial and due process enshrined in Articles 4 and 9 of the Constitution and later guaranteed as a separate and independent Fundamental Right under Article 10A of the Constitution.'[4]

11. The majority's order/ clarification was incorporated into the majority's judgment (in its paragraph 58), however, the title of the 'order' was changed to 'clarification'. The Hon'ble Judges may have realized their non-compliance with Article 10A of the Constitution, therefore, in the majority's judgment they stated that, 'there was no legal requirement nor did we find it necessary to hear the parties before clarifying our own order'. However, it was acknowledged that the same was done 'without issuing notice to or hearing the parties'. With respect, to say that there was no legal requirement to hear the parties disregarded innumerable judgments of this Court. 'It has been laid down as principle of law by the superior courts that in every statute, principle of natural justice of hearing a person... shall be deemed to have been embodied.'[5] It is a '...principle of natural justice that an order affecting the rights of a party cannot be passed without an opportunity of hearing.'[6] '...the appellant shall have the right of being heard.'[7] By not hearing the parties to the appeals the Hon'ble Judges also effaced several millennia of jurisprudence.[8] No provision of the Constitution, law or precedent was cited to support that there was 'no legal requirement' to hear the parties. The mandatory requirement of openness and transparency were also transgressed. Secrecy and one-sided determinations are the harbingers of suspicion and mistrust, and undermine the trustworthiness and standing of courts.

12. The majority's order/ clarification was followed by yet another; the majority's Clarification which, like the earlier one of 14 September 2024, was uploaded on the website of the Supreme Court in similar manner. This was done on Friday, 18 October 2024 at 3.59 pm. This time too the cause list was not issued, parties were not

informed, and an opportunity of hearing was not provided. Where and when the Hon'ble Judges had met also remains a mystery. The title of the majority's Clarification is baffling, it stated, 'In Chambers at Islamabad and Karachi', that is, simultaneously in two cities. The majority's judgment (in paragraph 120) had stated that they were 'parting with the judgment', but almost a month later (on 18 October 2024) in the majority's Clarification they invalidated their own parting.

13. In my 46 years association with the law, I have not come across such novel methodology (as mentioned above), nor learnt of such practice being in vogue in any other country governed by the rule of law. In Chittaranjan Cotton Mills Ltd. v. Staff Union[9] this Court had (over four decades ago) stated the consequences of an improperly constituted court:

'Where the Court is not properly constituted at all the proceedings must be held to be coram non judice and, therefore, non-existent in the eye of law. There can also be no doubt that in such circumstances "it would never be too late to admit and give effect to the plea that the order was a nullity", as was observed by the Privy Council in the case of Chief Kwame Asante, Tredahone v. Chief Kwame Tawia (9 DLR 686 (PC)).'

The majority's order/clarification and the majority's Clarification cannot be stated to have been issued by a 'Court'; the forum which issued them was coram non judice. Moreover, such forum did not comply with the rudimentary principles of natural justice, of due process and of fair trial. Therefore, with great respect, the same do not constitute legal orders, and are of no legal effect. They also cannot be categorized as a 'decision' of the Supreme Court (in terms of Article 189 of the Constitution), resultantly, they need not be followed or acted upon.

14. Another significant departure from the Constitution by the majority's short order was to repeatedly refer to minorities therein. Minorities are neither mentioned in Article 51 nor in Article 106, and instead both provisions state 'non-Muslims'. Muslims and non-Muslims denote religious status; without reducing either's citizenship rights. To designate non-Muslims as minorities is suggestive of a reduced citizenship status. Minorities in the context of the Constitution could be any number of groups, such as, those with disabilities, the illiterate, racial or ethnic minorities, and may also include religious minorities (a sect within the same religion or of another religion). Substituting non-Muslims with minorities and disregarding the placement of these two words in the Constitution is neither linguistically nor textually correct.

15. The word minorities is used in the Constitution three times; in its Preamble and in the Principles of Policy.[10] Non-Muslims is used fifteen times in the Constitution.[11] Everyone who considers the Constitution, particularly Judges, must adhere to its language and not lift anything from one place and superimpose it on another provision. An eleven-member Bench of this Court in Benazir Bhutto v. Federation of Pakistan[12] held that:

'In construing constitutional provisions the expression used in one provision cannot be lifted and superimposed on the other provision which is not only against the canons of interpretation but also makes the reading of the provisions as a whole discordant.'

16. Articles 51 and 106 of the Constitution were under consideration in the appeals, however, the majority's short order and the majority's judgment not only disregarded their texts but effectively amended the Constitution. The Constitution can only be amended in the manner as stipulated therein (Articles 238 and 239), and judges have no role in amending it. In Hamza Rasheed Khan v. Election Commission of Pakistan[13] six judges of this Court categorically stated the obvious, which was that no court, including the Supreme Court, could confer jurisdiction upon itself:[14]

'12. Any court, including this Court, cannot by a judicial
order confer jurisdiction on itself or any other court, tribunal
or authority. The power to confer jurisdiction is legislative
in character; only the legislature possesses it. No court can create or enlarge its own jurisdiction or any other court's jurisdiction. Nor any court has any inherent or plenary jurisdiction.

Because of the constitutional command in Article 175(2) of the Constitution, the courts in Pakistan do not possess any inherent jurisdiction on the basis of some principles of common law, equity or good conscience and only have that jurisdiction which is conferred on them by the Constitution or by or under any law.'

'26. ...conferring the jurisdiction, vesting the right of action, specifying the acts and providing the procedure would clearly amount to legislating rather than interpreting law.'

17. The majority's short order did not state that an implementation Bench had been constituted. However, even if it is assumed (for the sake of argument alone) that this is what the majority had done, even then the majority's order/ clarification and the majority's Clarification could not be issued by such a purported implementation Bench. In Adnan A. Khawaja v. State[15] a five-member Bench of this Court held, that:

'It goes without saying that an implementation Bench cannot go behind a concluded and final judgment or revisit the same.'

18. This Court is empowered to call others to account, therefore, it must all the more be self-accountable, as was expressed by a nine-member Bench of this Court in Liaquat Hussain v. Federation of Pakistan:[16]

'It may be seen that independence of Judiciary and its
separation from Executive as mandated by the Constitution does not make its authority absolute but require its regulation within the four corners of laws, rules and procedure. Its normal functioning should be transparent and inspire confidence amongst general public. It is bound to exercise jurisdiction and authority within the prescribed domain so that it remains self-accountable.'

'...so long as the Parliament acts within the parameters of the Constitution, there is no restriction or prohibition to legislate on any subjects ... .'

19. Justice Syed Mansoor Ali Shah had disagreed with the then Chief Justice Umar Ata Bandial and Justice Ijaz ul Ahsan, and had dismissed the constitution petitions challenging the amendments made to the National Accountability Ordinance, 1999, stating that:

'...the majority judgment through a long winding conjectural path of far-fetched "in turn" effects has tried hard to "ultimately" reach an apprehended violation of the fundamental rights. The majority judgment has also fallen short to appreciate that what Parliament has done, Parliament can undo; the legislative power of the Parliament is never exhausted. If the Parliament can enact the NAB law, it can also repeal the entire law or amend the same.'

The five-member Bench of this Court in its decision (in the Intra Court Appeals[17] arising out of the above petitions), agreed with Justice Shah, and also agreed with him that the courts must not be influenced by politics and should preserve the future of democracy:

'Courts must rise above the 'hooting throng' and keep their eyes set on the future of democracy, undeterred by the changing politics of today. Courts unlike political parties don't have to win popular support. Courts are to decide according to the Constitution and the law even if the public sentiment is against them.'

20. Justice Syed Mansoor Ali Shah (in stating the above) had departed from his earlier decision in Jurist Foundation v. Federation and Pakistan[18] wherein a challenge to the appointment of General Qamar Javed Bajwa as the Chief of the Army Staff was made. The Government of the then Prime Minister Mr. Imran Khan, the then Law Minister Mr. Muhammad Farogh Naseem and the then Attorney-General Mr. Anwar Mansoor Khan wanted General Bajwa to continue as the Chief of the Army Staff. Mr. Muhammad Farogh Naseem even resigned from his position of Federal Law Minister to represent General Bajwa in Court. He was assisted by the learned Mr. Abid Shahid Zuberi. Within two days of the filing of the petition the petition was decided. The petition was neither allowed nor dismissed; instead what the respondents[19] wanted was given. The Court extended the tenure of General Bajwa by six months; which constituted legislating, and this is demonstrable from the judgment authored by Justice Syed Mansoor Ali Shah:

'Continuity of Incumbent COAS for Six Months

48. ...the tenure of a COAS and in the light of the assurance given by the Federal Government to address these issues through fresh legislation within six months, we ... find it appropriate to allow the current status of the COAS to continue for a period of six months, whereafter the new legislation (Act of the Parliament) shall determine his tenure and other terms of his service.' (p. 44)

The Constitution must never be made subservient to personal ambition, and those who do so, as well as their abettors and facilitators, should be made to face the consequences of their actions.

21. These appeals arise out of two civil petitions for leave to appeal[20] ('the said CPLAs') which had assailed the unanimous judgment dated 25 March 2024 of a five-member Bench of the Peshawar High Court by a political party, the Sunni Ittehad Council, which stated that the designated independent candidates in the National Assembly, who had joined it within the prescribed three days, as stipulated in the provisos to sub-clauses (d) and (e) of clause (1) of Article 51 of the Constitution, were their candidates, therefore, the Sunni Itthehad Council be given proportional representation from the seats reserved for women and non-Muslims, and the same be done in respect of the Provincial Assemblies, under sub-clause (c) of clause (1) of Article 106.

22. The said CPLAs came up for hearing before a three-member Bench[21] of this Court on 6 May 2024 when leave to appeal was granted, and on the very same day, the impugned judgment of the Peshawar High Court and ECP's order dated 1 March 2024 were suspended. The Court then stated that since the interpretation of the Constitution was required, therefore, the cases be placed before the Committee constituted under the Supreme Court (Practice and Procedure) Act, 2023 for the constitution of a larger Bench. The appeals (emanating from the said CPLAs), however, were ordered to be fixed on 3 June 2024, which was after almost a month.

23. I as Chief Justice, heading the Committee, proposed that these appeals should not be heard by those who may be considered to be the beneficiaries or affectees of the constitutional amendment which was then being discussed; to consider making the office of the Chief Justice a tenured three year post. The potential beneficiaries/affectees would have been the Chief Justice and five Judges,[22] and they would have been excluded from the Bench. However, the majority (Justice Syed Mansoor Ali Shah and Justice Munib Akhtar) did not agree. Therefore, I next proposed that the Full Court should hear these appeals.

24. The issue in these appeals was straightforward, which was to consider certain provisions of Articles 51 and 106 of the Constitution. However, these provisions were attended to in the majority's judgment cursorily. The first 58 paragraphs of the majority's judgment are devoted to a general discourse on elections, political parties, Articles 17 and 19 of the Constitution, certain provisions of the Elections Act of 2017, the rules made thereunder, the majority's short order and the majority's order/clarification. Reference was also made to an application (CMA No. 5913 of 2024, filed on 26 June 2024) on behalf of the PTI and Mr. Gohar Khan, but neither had signed it; the application was signed by an Advocateon-Record of this Court. The application states that the applicants 'may kindly be allowed to assist this August Court as interveners.' The majority's judgment also refers to eight articles, seven books mentioned fourteen times, fourteen foreign cases and two excerpts from speeches, but without stating their relevance to our Constitution, the Elections Act and the rules made thereunder.

25. Pakistan has a written constitution. The language used in the Constitution is easily understandable. Unlike the constitutions of some countries our Constitution is not centuries old nor does it use archaic words requiring extrapolating meaning therefrom. The majority's judgment, with respect, lost sight of the basics. The people of Pakistan are governed by the Constitution and by the laws enacted by their elected representatives, they do not want to be told how to govern themselves or made to encounter foreign doctrines, like the one expounded by the Austrian jurist and philosopher Hans Kelsen which was misapplied by the Supreme Court, and had caused untold misery to Pakistanis. In a rule based system like ours the applicable rules have to be applied, irrespective of one's own personal preferences. It is best not to interpolate one country's constitution with that of another. For instance, our Constitution requires that those wanting to contest elections must be a minimum twenty-five years of age, but in the United Kingdom the minimum age is eighteen years, and the minimum prescribed age for the President of Pakistan is forty years, but in the United States of America the age is thirty-five years. Just because in the United Kingdom or in the United State of America the stated age is different does not mean that it is correct or better, let alone that we should adopt it. We should do what our Constitution states.

26. The applicable provisions of our constitution are clear and self-evident, and it is best not to look for meaning which does not exist in the Constitution of the Islamic Republic of Pakistan.

Sd/-

(Qazi Faez Isa)

CJ

MWA/S-34/SC Order accordingly.

**P L D 2025 Supreme Court 247**

**Present: Syed Mansoor Ali Shah and Ayesha A. Malik, JJ**

**Malik MAHMOOD AHMAD KHAN---Petitioner**

**Versus**

**Malik MOAZAM MAHMOOD and others---Respondents**

C.P.L.A. No. 2250-L of 2016, decided on 19th December, 2024.

(Against the order dated 11.05.2016 passed by the Lahore High Court, Lahore in Writ Petition No. 33486 of 2015).

**Family Courts Act (XXXV of 1964)---**

----S. 5, Sched.---Maintenance allowance for minor---Child justice approach---Duty of Courts---Petitioner/father of minor son was aggrieved of fixing of maintenance allowance by the Courts below---Held, that Courts must approach cases involving children with a dedicated child justice approach, rooted in a legal and moral obligation to protect, nurture, and rehabilitate children, ensuring their rights and well-being within the justice system---Child justice encompasses both children in conflict with law, who require rehabilitative interventions rather than punitive measures---Children in contact with law must be safeguarded and supported throughout judicial processes---As custodians of justice, Courts must adopt a child justice approach that prioritizes the best interests of child, recognizing their vulnerabilities, developmental needs and potential---Such approach demands sensitivity to their circumstances, ensuring access to education, shielding them from exploitation, and fostering an environment conducive to their growth and reintegration into society---Supreme Court declined to interfere in the judgments passed by the Courts below as there was no jurisdictional error, illegality or procedural illegality---Petition for leave to appeal was dismissed and leave to appeal was refused.

Khalid Ikram Khatana, Advocate Supreme Court for Petitioner.

Respondents not represented.

Date of hearing: 19th December, 2024.

**ORDER**

**SYED MANSOOR ALI SHAH, J.---**A child (hereinafter referred to as "respondent No.1"), following the divorce of his parents in 2009 and the subsequent death of his mother, filed a suit for maintenance through his maternal grandmother against his father ("petitioner"). The trial court decreed the suit, fixing the maintenance allowance at Rs. 5,000/- per month, effective from November 2009 until respondent No.1 attained the age of majority, with a 10% annual increment, vide judgment dated 21.09.2015. Feeling aggrieved, the petitioner preferred an appeal before the learned Additional District Judge, Lahore, which was dismissed as non-maintainable vide order dated 17.10.2015. Subsequently, the petitioner challenged the judgment before the Lahore High Court, Lahore which was dismissed in limine vide order dated 11.05.2016 ("impugned order"). Hence, the present petition.

2. Courts must approach cases involving children with a dedicated child justice approach, rooted in a legal and moral obligation to protect, nurture, and rehabilitate children, ensuring their rights and well-being within the justice system. Child justice encompasses both children in conflict with the law, who require rehabilitative interventions rather than punitive measures, and children in contact with the law, who must be safeguarded and supported throughout judicial processes. As custodians of justice, courts must adopt a child justice approach that prioritizes the best interests of the child, recognizing their vulnerabilities, developmental needs, and potential. This approach demands sensitivity to their circumstances, ensuring access to education, shielding them from exploitation, and fostering an environment conducive to their growth and reintegration into society. As Nelson Mandela aptly said, "There can be no keener revelation of a society's soul than the way in which it treats its children."[1] By adhering to these principles, the judiciary not only fulfils its legal obligations but also demonstrates judicial sensitivity towards children, contributing to a just and compassionate society.

3. The Constitution of Pakistan, 1973, provides a robust framework for child justice. Article 25(3) empowers the State to enact special provisions for the protection of children, including measures that may favourably differentiate them from adults. Article 25A mandates free and compulsory education for children aged 5 to 16 years. Article 35 obliges the State to protect children, while Article 37(e) ensures just and humane working

conditions, explicitly prohibiting the employment of children in vocations unsuitable to their age or sex. This constitutional framework underscores child justice, prioritizing the well-being, rehabilitation, and reintegration of children into society, while addressing their unique rights and vulnerabilities within judicial processes.

4. As a signatory to the the United Nations Convention on the Rights of the Child ("UNCRC") in 1989, Pakistan is under an international obligation to take special measures to protect and rehabilitate children who come into conflict with the law.[2] The UNCRC provides a framework for child justice systems globally, emphasizing dignity, rehabilitation, and reintegration. Pakistan's constitutional mandate, combined with its international obligations, has catalyzed the establishment of a child justice system in the country. The adoption of UNCRC in 1989, almost universally ratified, marked a global paradigm shift in the international community's perspective, recognizing children as rights holders, not merely vulnerable dependents in need of special care.[3]

5. To fulfil the mandate of child justice, the UNCRC outlines guiding principles[4] affecting children. These principles, inter alia, include: (i) Ensuring that the best interests of the child is given primary consideration[5]; in all actions where children are directly, or indirectly involved or affected by the justice system, the best interests of the child should be a primary consideration, (ii) Guaranteeing fair and equal treatment of every child, free from all kinds of discrimination; a child in conflict with the law shall be treated without discrimination of any kind, (iii) Advancing the right of the child to express his or her views freely and to be heard; all children in conflict with the law have the right to participate in decisions affecting them, and in particular, to be given the opportunity to be heard in any judicial or administrative proceedings; (iv) Protecting every child from abuse, exploitation and violence[6]; children in contact with the law should be protected from any form of hardship while going through state and non-state justice processes and thereafter. (v) Treating every child with dignity and compassion[7]; children should be treated with care, sensitivity, fairness and respect throughout any procedure or case, with special attention for their personal situation, well-being and specific needs, and with full respect for their physical and psychological integrity, (vi) Respecting legal guarantees and safeguards in all processes; basic procedural safeguards as set forth in relevant national and international norms and standards shall be guaranteed at all stages of proceedings in state and non-state systems, as well as in international justice, (vii) Preventing conflict with the law as a crucial element of any juvenile justice policy; within juvenile justice policies, emphasis should be placed on prevention strategies facilitating the successful socialization and integration of all children, in particular through the family, the community, peer groups, schools, vocational training and the world of work, and (viii) Using deprivation of liberty of children only as a measure of last resort and for the shortest appropriate period of time; provisions should be made for restorative justice, diversion mechanisms and alternatives to deprivation of liberty. By adopting these principles and a child-centered approach, justice systems can provide fair, equitable, and effective solutions tailored to children's unique needs and circumstances. This also aligns with the the principle of restorative justice which is an approach to justice that focuses on repairing the harm caused by a crime or conflict, rather than solely punishing the offender. It involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance.[8]

6. A child-centered approach in the judiciary is essential because it acknowledges that children, unlike adults, are still in their formative years and are particularly vulnerable to the psychological and emotional impacts of legal proceedings. Scholars such as Karl Hanson and Olga Nieuwenhuys have emphasized that a child-centered approach recognizes that "children shape, interpret, and practice what their rights are," and emphasizes "living rights" --- rights as dynamically experienced and realized by children.[9] This approach advocates for judicial processes that are rehabilitative rather than punitive, protecting the child's dignity while fostering rehabilitation and reintegration into society. Such a framework aligns with both national and international legal standards, ensuring that children's voices are heard, their rights safeguarded, and their future prospects protected.

7. Courts, particularly at the district level, must adopt this approach to ensure that the justice system meets the unique needs, rights, and vulnerabilities of children. By prioritizing children's best interests in judicial decisions, the judiciary can promote long-term societal benefits, reduce recidivism, and support the development and well-

being of future generations. As the saying goes, "In serving the best interests of children, we serve the best interests of all humanity."[10]

8. We have examined the present case with a child justice lens, prioritizing the best interests of the child -- an approach that the courts must employ when dealing with cases involving children in contact or in conflict with the law. In this case, we see no jurisdictional error, illegality, or procedural irregularity in the impugned order. Therefore, we are of the view that the impugned order does not warrant any interference. Leave is, therefore, declined, and this petition is dismissed.

MH/M-60/SC Petition dismissed.

**P L D 2025 Supreme Court 274**

**Present: Syed Mansoor Ali Shah and Aqeel Ahmed Abbasi, JJ**

**In the matter regarding non fixation of the case, CPLA 836-K of 2020, etc.**

Crl. O. P. No.1 of 2025, decided on 22nd January, 2025.

**Supreme Court (Practice and Procedure) Act (XVII of 2023)---**

----S. 2---Constitution of Pakistan, Arts. 5, 190, 191A & 204---Contempt proceedings---Non-fixation of case---Executive and judicial order---Officer of Supreme Court fixed case in question before Constitutional Bench of Supreme Court on the basis of order passed by Committee of Supreme Court constituted under section 2 of Supreme Court (Practice and Procedure) Act, 2023, against the order passed by Bench of Supreme Court during Court proceedings---Validity---All Executive and Judicial authorities throughout Pakistan, including officers within the establishment of Supreme Court, are required under Article 190 of the Constitution to act in aid of Supreme Court, meaning in aid of its judicial orders, not administrative orders---Every citizen, including officers within the establishment of Supreme Court, are bound under Article 5 of the Constitution to obey the Constitution and law---Supreme Court issued notices to Attorney General to conduct contempt proceedings against officer of Supreme Court, as well as to assist Supreme Court on questions of law---Proceedings adjourned.

Malik Asad Ali v. Federation of Pakistan 1998 SCMR 15; 1998 SCMR 130; Human Rights Case No. 14959-K of 2018(PLD 2019 SC 183; Muhammad Sajid v. Imran Khan W.P. No. 3061 of 2022; Nusrat Bhutto v. Chief of the Army Staff PLD 1977 SC 657; Syed Zafar Ali Shah v. General Pervez Musharaf PLD 2000 SC 869; CJP Iftikhar Muhammad Chaudhry v. President of Pakistan PLD 2010 SC 61; Justice Qazi Faez Isa v. President of Pakistan 2019 SCMR 1875; and Malik Asad Ali v. Federation of Pakistan PLD 1998 SC 161 ref.

In attendance:

Muhammad Salim Khan, Registrar, SCP.

Zulifqar Ahmed, D.R. (Judl.), SCP.

Aamir Rehman, Addl. A.G.P.

Salahuddin Ahmed, Advocate Supreme Court.

Shahid Jamil Khan, Advocate Supreme Court.

Hamid Khan, Senior Advocate Supreme Court.

Date of hearing: 21st January, 2025.

**ORDER**

In response to the notice issued to the Additional Registrar (Judicial) of this Court, requiring an explanation as to why the cases (C.P.L.A. No. 836- K of 2020, etc.) were not fixed on 20.01.2025 in compliance with the court order dated 16.01.2025 and to show cause why contempt proceedings should not be initiated against him for such non-compliance of the court order, Mr. Muhammad Salim Khan, the Registrar of this Court, has appeared on behalf of the Additional Registrar (Judicial), Mr. Nazar Abbas, who is reported to be indisposed.

2. The Registrar has presented copies of two decisions made by two different Committees: first, the decision of the Committee constituted under Section 2 of the Supreme Court (Practice and Procedure) Act, 2023 ("Act"); and second, the decision of the Committee constituted under Article 191A of the Constitution of the Islamic Republic of Pakistan ("Constitution"). He stated that the Committee constituted under Section 2 of the Act convened its meeting on 17.01.2025 and, by a majority decision, decided to "withdraw" the said cases from the regular Bench and refer them to the Committee established under Article 191A of the Constitution. Subsequently, the latter Committee convened its meeting on the same date, i.e., 17.01.2025, and directed that all cases challenging the vires of the 26th Constitutional Amendment be fixed for hearing before the Constitutional Bench on 27.01.2025. He explained that, because of these decisions of the two Committees, the aforementioned cases were not be fixed by the office for hearing on 20.01.2025 before the regular Bench.

3. Mr. Salahuddin Ahmed, counsel for the respondents (C.P.L.A. 836-K/2022), has submitted that the vires of the 26th Constitutional Amendment were not challenged in the cases being heard by the regular Bench; rather, the issue under consideration was limited solely to the jurisdictional bar of regular Benches under Article 191A of the Constitution. Therefore, it appears that the said cases do not fall within the purview of the decision

rendered by the Committee established under Article 191A of the Constitution. Even otherwise, he submitted, the Committee established under Article 191A of the Constitution is required to pass a speaking order to determine whether the matter should be placed before the Constitutional Bench or a regular Bench as required under Section 2A of the Act. He has further submitted that there are two preliminary issues involved in the proceedings. First, the explanation advanced by the Registrar is that the case was not fixed before this Court due to the decisions of the Committees constituted under Section 2 of the Act and under Article 191A of the Constitution, both dated 17.01.2025. Therefore, the legal validity of the explanation of the Registrar must be examined and determined by the Court. Second, whether the decisions of the Committees taken on the administrative side cannot undo the effect of a judicial order. In support of this contention, learned counsel relied upon Malik Asad Ali v. Federation of Pakistan (1998 SCMR 15, 1998 SCMR 130, PLD 1998 SC 161) and Human Rights Case No. 14959-K of 2018 (PLD 2019 SC 183). Additionally, he cited the unreported order dated 21.05.2024 passed by the Islamabad High Court, Islamabad, in W.P. No. 3061/2022, titled Muhammad Sajid v. Imran Khan. He also placed reliance on Nusrat Bhutto v. Chief of the Army Staff (PLD 1977 SC 657), Syed Zafar Ali Shah v. General Pervez Musharaf (PLD 2000 SC 869), and CJP Iftikhar Muhammad Chaudhry v. President of Pakistan (PLD 2010 SC 61) to contend that the judicial powers of this Court cannot be taken away through administrative orders. Lastly, learned counsel submitted that the issue at hand affects the judicial powers of all judges of this Court. Therefore, propriety demands that this matter be placed before the Full Court. In support of this contention, learned counsel referred to Justice Qazi Faez Isa v. President of Pakistan (2019 SCMR 1875), CJP Iftikhar Muhammad Chaudhry v. President of Pakistan (PLD 2010 SC 61) and Malik Asad Ali v. Federation of Pakistan (PLD 1998 SC 161).

4. The above contentions of the learned counsel have given rise to the following substantial questions of law of public importance:

(i) whether the Committees constituted under Section 2 of the Act and Article 191A of the Constitution have the authority to withdraw a case in which cognisance has already been taken by a regular bench and serious questions of constitutional law relating to the jurisdiction of the regular Bench have been framed; and

(ii) whether the said Committees can, by an administrative order, undo the effect of a judicial order, whereby next date of hearing a specific case has been fixed before a regular Bench.

Under Article 190 of the Constitution, all executive and judicial authorities throughout Pakistan, including officers within the establishment of this Court, are required to act in aid of the Supreme Court, meaning in aid of its judicial orders, not administrative orders. Furthermore, in accordance with the constitutional mandate of Article 5 of the Constitution, every citizen, including officers within the establishment of this Court, is bound to obey the Constitution and the law. Accordingly, the legality of the explanation put forth by the Registrar, as well as the outcome of the present contempt proceedings, hinges upon the determination of the aforementioned questions.

5. In light of the significance of the questions involved, we hereby appoint Mr. Hamid Khan, Sr. ASC, and Mr. Muneer A. Malik, Sr. ASC, as amici curiae to assist the Court in addressing the aforementioned questions. Further, Mr. Shahid Jamil Khan, ASC, has also sought permission to assist the Court in the matter. As he represents one of the respondents in the main cases, his request is granted. Notice is also issued to learned Attorney General for Pakistan to conduct these proceedings as well as assist the Court on the above questions.

6. The hearing is adjourned to tomorrow, i.e., 22.01.2025, for arguments on the above questions.

IN THE SUPREME COURT OF PAKISTAN

(Original Jurisdiction)

PRESENT:

Mr. Justice Syed Mansoor Ali Shah

Mr. Justice Aqeel Ahmed Abbasi

Crl.O. P. No.1/2025

(In the matter regarding non fixation of the case, CPLA 836-K of 2020, etc.)

In attendance: Mr. Mansoor Usman Awan, A.G.P.

Mr. Hamid Khan, Sr. Advocate Supreme Court.

Mr. M. Waqar Rana, Advocate Supreme Court.
Mr. Salah ud Din, Advocate Supreme Court.
Mr. Shahid Jamil Khan, Advocate Supreme Court.
Mr. Nazar Abbas, Addl. Reg. (J), SCP.
Mr. Zulfiqar Ahmed, D.R.(J), SCP.
Mr. Munir A. Malik, Sr. Advocate Supreme Court
(via video link, Karachi)
Date of hearing: 22.01.2025.

**ORDER**

Mr. Nazar Abbas (accused person) has tendered appearance and seeks time to file his written statement. Let the needful be done by tomorrow i.e. 23.01.2025. It is clarified that on 21.01.2025 the Registrar of the Court had tendered appearance on behalf of Mr. Nazar Abbas and submitted on his behalf that the case was not fixed on 20.01.2025 because of the two decisions of the Committees
constituted under Section 2 of the Supreme Court (Practice and Procedure) Act, 2023 (the "2023 Act") and Article 191(A) (4) of the Constitution. Hence the defence presented by the Registrar on behalf of the Additional Registrar were the two Committees decisions dated 17.01.2025.

2. The learned Attorney General for Pakistan has pointed out that the amicus curiae appointed by this Court yesterday are already counsel in cases challenging the 26th Constitutional Amendment before the Constitutional Bench. Be that as it may, the question before us is the scope of Section 2 of the 2023 Act and does not directly relate to the 26th Constitutional Amendment. Even otherwise, we have asked the learned A.G.P. to suggest other names for appointing as amicus curiae, who are not associated with the challenge laid against the 26th Constitutional Amendment. He remained reluctant to suggest a name. We, therefore, appoint Mr. Ahsan Bhoon, learned ASC, and Khawaja Haris Ahmad, learned ASC as amici curiae in addition to the amici already appointed. Office is directed to intimate them so that can make it convenient to appear in person or through video link before the Court tomorrow.

3. Mr. Shahid Jamil Khan, learned ASC, representing respondents in the main case tendered appearance and requested to assist the Court on the question framed by the Court vide order dated 21.01.2025. He referred to Articles 204(c) and 175(2) of the Constitution to submit that the jurisdiction under Article 187 (Complete Justice) is also available to the Bench and hence the decisions of the Committee can be examined by the Bench. He submits that the administrative order cannot override a judicial order and to the extent of inconsistency the administrative order is void and non est. He has placed reliance on para-43 of case reported as Malik Asad Ali and others v. Federation of Pakistan through Secretary, Law, Justice and Parliament Affairs, Islamabad and others (PLD 1998 SC 161), Human Right case in the matter regarding disposal of infectious wastes in the Province of Khyber Pakhtunkhwa (PLD 2019 SC 183) and Muhammad Imtiyaz v. Ch. Muhammad Naeem and others (PLD 2023 SC 306). Walking us through the Supreme Court (Practice
and Procedure) Act, 2023, the learned counsel read Sections 2 and 2A and submitted that all the cases pending in the Supreme Court must first be taken-up by the original Committee under Section 2 of the 2023 Act and if the question arises before that Committee whether a case ought to be heard by the Constitutional Bench or the Regular Bench it ought to be referred to the Committee constituted under Article 191A of the Constitution under Section 2A. In the end he submits that the question as to how the Benches are to be regulated is a matter of some serious concern and therefore ought to be heard by a Full Court of this Court.

4. Mr. Munir A. Malik, learned counsel has tendered appearance as amicus curiae. He submits that two fundamental questions arise in this case: (i). that all the cases pending in the Supreme Court are to be first examined by the Committee constituted under Section 2 the 2023 Act and only if a question arises that the matter ought to be sent to the Committee constituted under Article 191A(4) of the Constitution (Section 2A of the Supreme Court (Practice and Procedure) Act, 2023), can the case be sent to the said Committee. (ii). that judicial order cannot be trumped by an administrative order because that directly affects the independence of the judiciary. He added that a case being heard by a Bench cannot be withdrawn through an administrative order. He submits that these questions are of fundamental importance and go to the root of the independence of

the judiciary and submits that it ought to be heard by a Full Court of this Court so that the matter is settled once and for all. When asked whether such an order can be passed in contempt proceedings, he submits it can be as in the present case the very defence presented by the accused person is that the case was not fixed before the Court because of the decisions of the two Committees dated 17.01.2025.

5. Mr. Hamid Khan, learned counsel has tendered appearance as amicus curiae and has referred to para-4 of the order passed by this Court on 21.01.2025. He read out the two questions of public importance framed in the said paragraph. Rephrasing the two questions he submits; i). whether a judicial order and its implementation can be undone or varied by a Committee exercising administrative and procedural powers of the Court; and ii). whether a constitutional question coming-up before a Bench of the Court could be decided by it or referred to a Full Court for its determination. He then referred to Articles 175 and 176 of the Constitution to submit that the Supreme Court has been constituted under Article 175 and its constitution has been described under Article 176 of the Constitution. Both these Articles read together do not envisage any divisibility within the Supreme Court regarding the exercise of judicial power. The learned amicus was on his legs when the Court had to rise for today. To come-up tomorrow i.e. 23.01.2025.

MH/I-1/SC Order accordingly.

**P L D 2025 Supreme Court 280**

**Present: Syed Mansoor Ali Shah and Aqeel Ahmed Abbasi, JJ**

**CRL. O. P.1/2025 IN CPLA 836-K OF 2020, ETC.**

(Matter regarding non-fixation of case as per court-order 16.01.2025)

**(a) Supreme Court (Practice and Procedure) Act (XVII of 2023)---**

----S. 2---Constitution of Pakistan, Art. 191A---Partly heard case, fixing of---Committee to constitute Benches---Jurisdiction---Dispute pertained to withdrawing a partly heard case from regular Bench of Supreme Court and fixing the same before Constitutional Bench of Supreme Court---Held, that once a case is assigned to a Bench and that Bench has taken seisin (assumed jurisdiction) of the matter and partly heard it, Chief Justice (of Supreme Court) cannot unilaterally withdraw it and reassign it to another Bench except under judicially recognized circumstances---This practice is firmly rooted in high Constitutional value of judicial independence whereby a Bench enjoys freedom and independence to adjudicate upon a lis it has taken cognizance of---When a Bench is seized of a case and has partly heard it, the matter becomes part of judicial proceedings and the Bench hearing the case assumes exclusive jurisdiction over it---Any interference, whether through withdrawal or reassignment, without judicial justification undermines the principle of judicial independence---Such practice imposes significant limitation on administrative powers of Chief Justice---While the Chief Justice has the authority to regulate formation of Benches and allocate cases as an administrative function, these powers do not extend to withdrawing or transferring part heard case from a Bench that has already assumed jurisdiction---Withdrawal or reassignment is not merely an administrative act but a judicial one---Any such action must either stem from a judicial order passed by the Bench seized of the matter or be supported by express statutory authority if carried out by another Court or authority---Committees constituted under section 2 of Supreme Court (Practice and Procedure) Act, 2023 and Article 191A of the Constitution lack authority to withdraw a case that has been partly heard, where cognizance has already been taken by a regular Bench, and transfer it to another Bench unless the Bench itself refers the case to the Committees for its assignment to another Bench for some justifiable reasons---Part heard cases may include those where serious questions of Constitutional law concerning jurisdiction of regular Bench have been framed, some arguments on those questions have been heard and hearing has been adjourned for further arguments---Supreme Court referred the matter to Chief Justice of Pakistan to convene Full Court to deliberate and decide on such serious issue warranting collective and institutional deliberation of all Judges of Supreme Court---Matter was disposed of.

Asad Ali v. Federation of Pakistan 1998 SCMR 15; Asad Ali v. Federation of Pakistan 1998 SCMR 130; Human Rights Case No. 14959-K of 2018 PLD 2019 SC 183; Pir Sabir Shah v. Shad Muhammad Khan PLD 1995 SC 66; Fazlul Quader Chowdhry v. Abdul Haque PLD 1963 SC 486; Marbury v. Madison 5 US 137 [1803]; Contempt proceedings against Syed Yousaf Raza Gillani PLD 2012 SC 553; M.Y. Shareef v. Hon'ble Judges of The High Court of Nagpur AIR 1955 SC 19; Zikar v. Government of State of M.P. AIR 1951 Nag 11; M. Ranka v. Hon'ble the Chief Justice (1991) 2 L.W. 225; Jawahar Ram Gupta v. Hon'ble Chief Justice 1996 (27) ALR 557; M. Ranka v. Hon'ble Chief Justice of Tamilnadu High Court, Madras (1994) 2 L.W. 135; Muhammad Imtiyaz v. Muhammad Naeem PLD 2023 SC 306; Raja Amer v. Federation of Pakistan PLJ 2024 SC 114 (2024 SCP 91); PLD 1998 SC 161 and Muhammad Sadiq Leghari, Registrar High Court of Sindh PLD 2002 SC 1033 rel.

**(b) Supreme Court (Practice and Procedure) Act (XVII of 2023)---**

----S. 2---Constitution of Pakistan, Art. 191A---Judicial and administrative orders---Scope---No administrative authority, including Committees constituted under section 2 of Supreme Court (Practice and Procedure) Act, 2023 and Article 191A of the Constitution, can by administrative order, undo the effect of a judicial order.

**(c) Supreme Court (Practice and Procedure) Act (XVII of 2023)---**

----S. 2---Constitution of Pakistan, Arts. 191A & 204---Contempt proceedings---Non-fixation of case---Executive and judicial order---Supreme Court initiated contempt proceedings against contemner/ officer of Supreme Court office who fixed case in question before Constitutional Bench of Supreme Court on the basis of order passed by Committee of Supreme Court constituted under section 2 of Supreme Court (Practice and Procedure) Act, 2023---Validity---Contemner/ officer of Supreme Court office did not deliberately avoid

fixation of cases before the Bench as directed in the Court order---There was no evidence to suggest that contemner/officer of Supreme Court office had any personal interest in the matter or had connived with any of the parties to the case nor did he act with intention of causing damage to any of the parties to the case---There was no indication of mala fide intent in the actions of contemner/officer of Supreme Court office---In absence of any such factors or elements of contumacy, conduct of contemner/officer of Supreme Court office could not be considered contumacious nor it suffered from mala fides requiring contempt proceedings against him---Supreme Court withdrew show cause notice issued against contemner/officer of Supreme Court office---Contempt proceedings were withdrawn.

In attendance:

Mansoor Usman Awan, AGP.

Hamid Khan, Sr. Advocate Supreme Court, Amicus curiae.

Munir A. Malik, Sr. Advocate Supreme Court, Amicus Curiae

(Through Video Link from Karachi)

Kh. Haris Ahmad, Advocate Supreme Court - Amicus curiae.

Muhammad Ahsan Bhoon, Advocate Supreme Court, Amicus curiae

Salahuddin Ahmed, Advocate Supreme Court, Shahid Jamil, Khan, Advocate Supreme Court, Counsel for Respondents (in CPLA 836-K of 2020, etc.)

Nazar Abbas, Addl. Reg. (J), SCP. (The respondent/accused in person)

Dates of hearing: 21st, 22nd and 23rd January, 2025.

**ORDER**

The underlying facts that have given rise to an unsavoury situation are that a three-member Bench of this Court (comprising Syed Mansoor Ali Shah, Ayesha A. Malik, and Irfan Saadat Khan, JJ.) heard certain cases (CPLA No. 836-K of 2020, etc.) on 13 January 2025. At the outset of the proceedings, an objection was raised regarding the Bench's jurisdiction to hear these cases, which involved a challenge to the constitutionality of a law, on the basis of Article 191A of the Constitution of the Islamic Republic of Pakistan ("Constitution"). After hearing arguments of the learned counsel on the jurisdictional objection, the Bench adjourned the hearing to 16 January 2025 by allowing time to the learned counsel for the parties to make preparation to further assist the Court on the points concerning the jurisdictional objection. The order dated 13 January 2025 is reproduced below:

At the very outset, the learned counsel for the petitioners submitted that the present regular bench of the Court cannot hear these cases, as they involve a challenge to the constitutionality of a law, namely, subsection (2) of Section 221-A of the Customs Act, 1969. When asked why this bench cannot hear these cases, the learned counsel referred to the provisions of Article 191A, which was added to the Constitution of the Islamic Republic of Pakistan through the 26th Constitutional Amendment. In response to the petitioners' objection regarding the lack of jurisdiction of the present bench of the Court, the learned counsel for the respondents contended that Article 191A, the basis of the objection regarding jurisdiction, is constitutionally invalid as it infringes upon the salient features of the Constitution, including the independence of the judiciary and the separation of powers among the three organs of the State. He further submitted that a constitutionally invalid amendment cannot oust the constitutionally valid conferment of jurisdiction on the regular benches of the Court.

2. When asked how the present bench of the Court can decide upon the constitutional validity of the newly added Article 191A, the learned counsel for the respondents took the position that since the objection raised and the basis thereof pertain to the jurisdiction of the present bench, it must be decided by it. In support of his stance, he referred to Sabir Shah v. Shad Muhammad Khan (PLD 1995 SC 66), Fazlul Quader Chowdhry v. Abdul Haque (PLD 1963 SC 486) and Marbury v. Madison (5 US 137 [1803]) and sought time to further assist the Court on this point.

3. Given the objection raised and the reply thereto, we find that it would be necessary to first decide upon the same before proceeding further in the matter at hand. Therefore, the learned counsel for the parties are granted time to prepare their arguments and assist the Court on the said points. The hearing for arguments on those points is adjourned to 16.01.2025.

On 16 January 2025, the three-member Bench stood reconstituted, with Aqeel Ahmed Abbasi, J., replacing Irfan Saadat Khan, J., and the said cases were posted before the reconstituted Bench. However, the reconstituted Bench could not proceed with the hearing, as Aqeel Ahmed Abbasi, J., was one of the two judges who had delivered the impugned judgment in these cases in the High Court of Sindh. Consequently, the reconstituted Bench (comprising Syed Mansoor Ali Shah, Ayesha A. Malik and Aqeel Ahmed Abbasi, JJ.) directed the office, by its order dated 16 January 2025, to fix these cases before the earlier Bench on Monday, 20 January 2025, at 1:00 pm. The order dated 16 January 2025 is reproduced below for ready reference:

These cases were heard on 13.01.2025 by a bench comprising Mr. Justice Syed Mansoor Ali Shah, Mrs. Justice Ayesha A. Malik and Mr. Justice Irfan Saadat Khan and were posted for 16.01.2025, however, the bench today cannot hear this matter, as the impugned judgment has been authored by one of us (Aqeel Ahmed Abbasi, J.). Considering that it was a part heard matter, let these cases be posted for 20.01.2025 at 01:00 p.m. before the same bench comprising Mr. Justice Syed Mansoor Ali Shah, Mrs. Justice Ayesha A. Malik and Mr. Justice Irfan Saadat Khan. Notice shall also be issued to the Attorney General for Pakistan under Order XXVII-A of the Code of Civil Procedure, 1908 ("C.P.C.").

On 20 January 2025, Mr. Salahuddin, ASC (counsel for one of the respondents in the said cases), appeared before the Bench (comprising Syed Mansoor Ali Shah, Ayesha A. Malik, and Aqeel Ahmed Abbasi, JJ.) that had passed the aforementioned order and pointed out that the cases had not been fixed for hearing as per the court order dated 16 January 2025. The Bench called for the Additional Registrar (Judicial); however, due to his unavailability, the Deputy Registrar (Judicial) appeared. The Deputy Registrar confirmed that the cases had not been fixed on that day, i.e., 20 January 2025 before any regular Bench but had instead been fixed for hearing before the Constitutional Bench on 27 January 2025, pursuant to the decision of the Committee constituted under the Supreme Court (Practice and Procedure) Act, 2023 ("Act"). He further submitted that the decision of the Committee had not yet been communicated to the office, in writing. Upon receiving information of these facts, the said Bench initiated suo motu contempt proceedings against the Additional Registrar (Judicial) for defiance of the court order and for obstructing the administration of justice. The Bench, while calling for his explanation, fixed the hearing of the contempt proceedings for 21 January 2025 by its order dated 20 January 2025. Relevant paragraphs 4 and 5 of the order dated 20 January 2025 are reproduced below:

4. It is a sad state of affairs that a judicial order of this Court has been ignored by the office and the cases put up before the Committee for a decision, despite the precedents of this Court to the contrary reported as Asad Ali v. Federation of Pakistan (1998 SCMR 15), Asad Ali v. Federation of Pakistan (1998 SCMR 130) and Human Rights Case No. 14959-K of 2018 (PLD 2019 SC 183). The defiance of the judicial order of this Court lowers the dignity and honour of this Court and hamper the administration of justice. In this background, let notice be issued to the Additional Registrar (Judicial) of this Court as to why contempt proceedings may not be initiated against him.

5. Office shall number this petition and fix it for hearing before us tomorrow i.e., 21.01.2025, when the additional Registrar (Judicial) shall appear in person with the explanation as to why the above-mentioned cases have not been fixed before the Bench today.

On 21 January 2025, the Bench that had passed the aforementioned order was reconstituted, excluding Ayesha A. Malik, J., from the Bench, and the suo motu contempt proceeding was listed before this reconstituted two-member Bench (comprising Syed Mansoor Ali Shah and Aqeel Ahmed Abbasi, JJ.).

2. On 21 January 2025, in response to the notice issued to the Additional Registrar (Judicial) of this Court, the Registrar of the Court appeared on behalf of the Additional Registrar (Judicial), who was reported to be indisposed. The Registrar presented copies of two decisions made by two different Committees: first, the decision of the Committee constituted under Section 2 of the Act; and second, the decision of the Committee constituted under Article 191A of the Constitution. He stated that the Committee constituted under Section 2 of the Act convened its meeting on 17 January 2025 and, by a majority decision, resolved to "withdraw" the said cases from the regular Bench and refer them to the Committee established under Article 191A of the Constitution. Subsequently, the latter Committee convened its meeting on the same date, i.e., 17 January 2025, and directed that all cases challenging the vires of the 26th Constitutional Amendment and vires of law be fixed

for hearing before the Constitutional Bench on 27 January 2025. He explained that, because of these decisions by the two Committees, the said cases were not fixed by the office for hearing on 20 January 2025 before the regular Bench. The explanation provided by the Registrar, coupled with the contention raised by Mr. Salahuddin, ASC (counsel for one of the respondents in the said cases), gave rise to the following substantial questions of law of public importance:

(i) Whether the Committees constituted under Section 2 of the Act and Article 191A of the Constitution have the authority to withdraw a case [from a Bench], in which cognisance has already been taken by a regular Bench and serious questions of constitutional law relating to the jurisdiction of the regular Bench have been framed; and

(ii) Whether the said Committees can, by an administrative order, undo the effect of a judicial order, whereby next date of hearing a specific case has been fixed before a regular Bench [to hear arguments on the jurisdiction of the regular Bench].

The Court observed that "[u]nder Article 190 of the Constitution, all executive and judicial authorities throughout Pakistan, including officers within the establishment of this Court, are required to act in aid of the Supreme Court, meaning in aid of its judicial orders, not administrative orders. Furthermore, in accordance with the constitutional mandate of Article 5 of the Constitution, every citizen, including officers within the establishment of this Court, is bound to obey the Constitution and the law. Accordingly, the legality of the explanation put forth by the Registrar, as well as the outcome of the present contempt proceedings, hinges upon the determination of the aforementioned questions."

3. In light of the significance of the questions involved, the Court appointed Mr. Hamid Khan, Sr. ASC, and Mr. Muneer A. Malik, Sr. ASC, as amici curiae to assist in addressing the aforementioned questions. Additionally, the Court granted permission to Mr. Shahid Jamil Khan, ASC (counsel for one of the respondents in the main cases), to assist in the matter. Notice was also issued to the learned Attorney-General for Pakistan to provide assistance on the above questions. The hearing was then adjourned to 22 January 2025 for arguments on these questions.

4. On 22 January 2025, the Court heard the arguments of Mr. Shahid Jamil Khan, ASC (counsel for one of the respondents in the main cases), as well as those of the learned amici curiae, Mr. Muneer A. Malik, Sr. ASC, and Mr. Hamid Khan, Sr. ASC. The Court also appointed two additional amici curiae, Mr. Ahsan Bhoon, ASC, and Khawaja Haris Ahmad, ASC, to assist in addressing the said questions, and adjourned the hearing to 23 January 2025.

5. On 23 January 2025, the Court heard further arguments of Mr. Hamid Khan, Sr. ASC, the learned amicus curiae, as well as from Mr. Salahuddin, ASC (counsel for one of the respondents in the main cases). The Court also heard the arguments of Mr. Ahsan Bhoon, ASC, and Khawaja Haris Ahmad, ASC, the learned amici curiae, as well as the learned Attorney-General for Pakistan.

6. On the same day, i.e., 23 January 2025, the respondent-accused, Mr. Nazar Abbas, the Additional Registrar (Judicial), filed his written reply (Crl.M.A. No. 134/2025) to the show cause notice. He explained his position mostly in the same terms as the explanation provided by the Registrar of the Court, on his behalf on 21 January 2025, as noted above. Some relevant portions of his reply are reproduced below:

1. That the answering respondent in reply to the subject Notice begs to submit that the undersigned has held this Hon'ble Court in the highest respect and esteem throughout his 36 long years of service with unblemished service record. Accordingly, the undersigned cannot even imagine wilful flouting or disregarding any order passed by this Hon'ble Court especially on the last leg of his service career which is going to end in a couple of weeks.

7. That as per the Court Roster, the requisite Bench for the purpose of hearing CPLA No.836-K/2020 etc. was not available on 20.01.2025, therefore, a note was initiated for constitution of Special Bench comprising Hon'ble Judges as mentioned in the order dated 16.01.2025, which partly heard the matter on 13.01.2025.

8. That upon perusal of the office note, the HCJ was pleased to place the matter before the Committee constituted under Section 2(1) of the Supreme Court (Practice and Procedure) Act, 2023 in the following terms: "May be placed before the Committee tomorrow at 12 noon."

9. That on 17.01.2025, the Committee constituted under Section 2(1) of the Supreme Court (Practice and Procedure) Act, 2023 decided through majority vote that the matter be placed before the Committee constituted under Article 191A(4) of the Constitution of Islamic Republic of Pakistan, 1973.

10. That the Committee constituted under Article 191A(4) of the Constitution of Islamic Republic of Pakistan 1973 held its meeting at 12:45 pm on 17.01.2025 and resolved that all cases challenging the 26th Constitution amendment and vires of Law be fixed before the 8 members Constitutional Bench on 27.01.2025, the Court Roster be issued accordingly.

12. That the constitution of Benches or approval of the Roster is beyond the capacity as well as jurisdiction of the answering respondent. The responsibility of the answering respondent at the most is to apprise the Competent Authority to the non-availability of any appropriate bench, which has been not only conveyed before time but also has been suggested to be met with by formation of special Bench so there is no lapse on the part of the answering respondent in the whole scenario.

13. That act of the office regarding non-fixation of the case before the Bench, was neither deliberate not wilful, it was in pursuance of the decisions taken by the two Committees. The answering respondent initiated an office note to comply with the order of the Court dated 16.01.2025 in letter and spirit by the constitution of the requisite Special bench and having no intention to withhold or disobey the order of the Hon'ble Court.

PRAYER

Inspite of the above facts, the answering respondent surrenders himself at the mercy of this Hon'ble Court with further prayer that the Show Cause Notice dated 20.01.2025 may kindly be withdrawn in the interest of justice.

7. We have considered the explanation provided by the respondent-accused in his reply to the show cause notice, as well as the arguments of the learned amici curiae, the learned Attorney-General and the learned counsel for some of the respondents in the main cases.

Preliminary points regarding the jurisdiction of the Benches that passed the orders dated 13 and 16 January 2025

8. First, we find it appropriate to address two preliminary points raised before us regarding the jurisdiction of the Benches that passed the orders dated 13 and 16 January 2025.

9. The first point raised was that the three-member Bench, which passed the order dated 13 January 2025, lacked jurisdiction to hear cases involving a challenge to the constitutionality of a law, as such matters fall within the exclusive domain of the Constitutional Bench under Article 191A of the Constitution. It was also argued that the said Bench could not examine the vires of the 26th Constitutional Amendment, whereby Article 191A was added to the Constitution, as this too falls within the exclusive domain of the Constitutional Bench under Article 191A.

10. The said point was also rebutted before us with the submissions that the Bench which passed the order dated 13 January 2025 had not commenced hearing the matter concerning the constitutionality of the law. Instead, it was hearing arguments on the objection raised to its jurisdiction to entertain such matters based on Article 191A. Furthermore, the Bench was also deliberating on whether it could examine the constitutionality of Article 191A itself, as the objection to its jurisdiction was rooted in that very Article. Thus, the Bench was addressing the jurisdictional question rather than the substantive matter of the constitutionality of the law involved in the cases before it. Since Khawaja Haris Ahmad, the learned amicus curiae, has provided his written articulation on this point, we find it expedient to reproduce the relevant portion here:

It is noteworthy that when, on 13.01.2025, the learned Bench took up the matter relating to its jurisdiction to entertain and decide the CPLAs (filed under Article 185(3) of the Constitution) fixed before it, this involved neither assuming jurisdiction over the merits of the CPLAs, nor decision of constitutionality of any law point involved in the CPLAs. Rather, in effect, it only took upon itself the task of ascertaining if Article 191A(3) could be so construed as to exclude the Bench's jurisdiction to hear the CPLAs. To do so, the learned Bench was dealing with the matter like any other case where question of jurisdiction is raised - i.e. (i) first looking at the wording of the provision itself to see if it per se excluded the Court's jurisdiction; and, (ii) if so, to see whether the provision of law relied upon for excluding the Court's jurisdiction constitutes valid law or not. Thus, in the instant case, the learned Bench would first examine the words of Article 191A(3) to ascertain if a

plain reading of it excludes the Court's jurisdiction in the matter; and, if such exclusion is a necessary consequence, then the Court would proceed to ascertain the constitutional validity of Article 191A(3). Prima facie it appears that the aforesaid exercise in not covered by exclusionary provisions of Article 191A(3) of the Constitution.

Similarly, Mr. Shahid Jamil Khan, ASC, adopted the same stance. In addition to the cases of Pir Sabir Shah,[1]1 Fazlul Quader Chowdhry[2] and Marbury[3] referred to by Barrister Salahuddin, he also cited extracts from Justice Fazal Karim's Judicial Review of Public Actions (2nd Edition, Volume 3, pages 1403-1406), where the learned author has discussed several cases from American, English and Pakistani jurisdictions on this point.

11. The second point raised was that the three-member Bench, which passed the order dated 16 January 2025 directing the office to fix certain cases before a particular Bench, acted without lawful authority, and that the said order was passed in contravention of the law governing the constitution of Benches and the assignment of cases. It was contended that the constitution of Benches falls within the domain of the Committee established under Section 2 of the Act, whereas the assignment of cases to Benches is the exclusive authority of the Chief Justice of Pakistan under the Supreme Court Rules, 1980. This point was also contested before us by referring to several precedents where Benches have issued directions for fixing cases even before the Full Court.

12. We are afraid we cannot address or adjudicate upon the above points in the present contempt proceedings, as the said points raised before us are misplaced. This Bench is not seized with a review petition against the orders of the three-member Benches dated 15 and 16 January 2025. Instead, we are only dealing with the contempt proceedings initiated for the alleged non-compliance with that order. A similar point was raised before this Court during the contempt proceedings against Syed Yousaf Raza Gilani, the then Prime Minister of Pakistan, regarding non-compliance with the directions issued in a judgment.[4] In that case, a seven-member Bench of this Court rejected the same in the following terms:

The Respondent's stand amounts to saying that the order of this Court is non-implementable, as he believes that the same is not in accord with the Constitution of Pakistan and the International law. This argument, if accepted, would set a dangerous precedent and anyone would then successfully flout the orders of the Courts by pleading that according to his interpretation they are not in accord with the law. A judgment debtor would then be allowed to plead before the executing Court that the decree against him was inconsistent with the established law. No finality would then be attached to the judgments and orders of the Courts, even those by the apex Court of the Country. ... The executive authority may question a Court's decision through the judicial process provided for in the Constitution and the law but is not entitled to flout it because it believes it to be inconsistent with the law or the Constitution. Interpretation of the law is the exclusive domain of the judiciary.

(Emphasis added)

Guided by the above reasoning of a larger Bench of this Court, we similarly dispose of the said points with the observation that if any of the parties to the cases in which the said orders were passed, or any other person, was aggrieved by the same, he could have availed of the legal remedy of seeking a review of the order through the judicial process provided under the Constitution and the law. But, no one is entitled to disobey or decline compliance with the court order merely because he believes it to be inconsistent with the Constitution and the law.

13. Next, we proceed to take up and address the aforementioned questions of law, for which the assistance of the learned amici curiae was sought.

(i) Whether the Committees constituted under Section 2 of the Act and Article 191A of the Constitution have the authority to withdraw a case from a Bench in which cognisance has already been taken by a regular Bench and serious questions of constitutional law relating to the jurisdiction of the regular Bench have been framed.

14. The practice of hearing part-heard cases by the same Bench is so well-established in our jurisdiction that neither the learned counsel assisting this Court on the above question nor our research assistants could find and cite any case from our jurisdiction in which a dispute arose and was adjudicated regarding the withdrawal of a part-heard case from one Bench and its reassignment to another, without a request being made by the original Bench hearing the case in its judicial order. However, such disputes have arisen and been adjudicated upon in the neighbouring jurisdiction, i.e., the Indian jurisdiction, in several cases. Since the bench constitution and

case-assignment legal framework in both our jurisdiction and the neighbouring jurisdiction are largely similar, the jurisprudence developed there would offer valuable insights for the determination of the question under consideration before this Court. The relevant portions of some of these cases are, therefore, cited below:

Zikar v. Govt. of State of M.P. AIR 1951 Nag 11 (DB)[5]

The point for consideration is whether the power to regulate the sittings of the High Court which the Chief Justice undoubtedly possesses can be invoked for withdrawing and transferring a case of which a Division Court is in seisin. The power to regulate the sittings of the Court which is an administrative power cannot afford any basis for regulating the mode of hearing of a case by a Court properly seized of it. The power to withdraw and transfer a case from such a Court without its concurrence is a power to prevent the exercise of jurisdiction by that Court which can only be done by virtue of a superior power of control or correction, for which authority must be found either in an express provision or by necessary implication. There is no express provision and in our view there is no warrant for any such implication.

The argument of the learned Counsel for the applicant that the application should have been placed before the Honourable the Acting Chief Justice or that the Acting Chief Justice has the power to withdraw or transfer a case before us without our concurrence is devoid of any basis in law and is in fact opposed to precedents.

(Emphasis added)

M. Ranka v. Hon'ble the Chief Justice (1991) 2 L.W. 225 (DB)[6]

With respect we disagree with the last observation of S. Ramalingam, J. that a party or a counsel may make a special mention before the Chief Justice so that the case pending before one Bench may be posted before another Bench. So far as other two observations are concerned, we think it right to say that if for some reasons, the learned Judges assigned with a case or cases, find that they should not hear the case or the cases, they may direct the papers to be placed before the Chief Justice for posting such case or cases before some other Bench and in some extraordinary circumstances, the counsel appearing in a case may make a special request that a particular case or cases may not be heard by a particular Bench for reasons none other than the reasons that are spelt out in the principles that no one shall be a judge in his own cause (Nemo debet esse judex propria causa). So far as the first rule is concerned, if the Judge himself or the Judges themselves say that a particular case or cases assigned to him/them say be taken out of his/their list, there should be no difficulty. So far as the second rule is concerned in which it is said that a counsel may bring to the notice of the court that a particular case or cases may not be heard by a particular Bench or a Judge of the court means to say only that the counsel would being a fact to the notice of the court and no more. He cannot be allowed to insist or ask this Court not to hear a case. It will be again for the Judge or the Judges hearing the case to decide whether they should say that the cases be listed before another Judge or Bench or not. Judges of the court including the Chief Justice are equals and exercise the same judicial power except such powers that are specifically assigned to the Chief Justice. There is no reason to concede a power in the Chief Justice to transfer a case from one Bench to another Bench of the Court or from one Judge to another Judge of the Court. Act of allocating business or portfolio or assigning case or cases is different from the act of recalling the case from the file of a particular Judge or a Bench of the court and from transferring a case from the file of a particular Judge or a Bench of the court and from transferring a case from the file of a particular Judge or a Bench of the court, to another Judge or a Bench of the court because any decision about it would partake the character of a judicial order.

(Emphasis added)

Jawahar Ram Gupta v. Hon'ble Chief Justice 1996 (27) ALR 557 The Chief Justice is free to assign a case where he will, but transferring an already assigned case from one Judge to another, we reiterate with emphasis, is not an authority which the Supreme Court observed for itself was with it. After April 13, 1996 when the Chief Justice had assigned this matter to this Court, the sanctity of the proceedings, as the Supreme Court has held, cannot be interfered with even by the legislature.

Activity outside the courtrooms in Court cases, and such Sunday residence orders of Chief Justices, could have disastrous consequences in the High Court's handling of matters, particularly those sensitive matters which many already try to avoid hearing.

This Court records with great humility, and concern, that what the Supreme Court could not do, the Hon'ble the Chief Justice was misled to do and at his residence, not in Court. Whatever be the degree of the in facie curiae contemptuous situation, it will be judged by the Division of the High Court concerned. The reservation also will be considered by that Division. Otherwise, what will be happen is that the record will remain within the portals of the court of Record in perpetuity as no Division will be able to enter judgment. On this the Supreme Court clearly reflected: "As for transfer from one Judge to another, there again is no original jurisdiction which we can exercise. It is not a fundamental right and so Article 32 has no application and there is no other law to which recourse can be had".

(Emphasis added)

The above extracts illustrate a well-established practice that once a case is assigned to a Bench and that Bench has taken seisin (assumed jurisdiction) of the matter and partly heard it, the Chief Justice cannot unilaterally withdraw it and reassign it to another Bench except under specific, judicially recognised circumstances. This practice is firmly rooted in the high constitutional value of judicial independence whereby a Bench enjoys the freedom and independence to adjudicate upon

a lis it has taken cognisance of. When a Bench is seized of a case and has partly heard it, the matter becomes part of judicial pro- ceedings, and the Bench hearing the case assumes exclusive jurisdiction over it. Any interference-whether through withdrawal or reassignment-without judicial justification undermines the principle of judicial independence.

15. The said practice imposes a significant limitation on the administrative powers of the Chief Justice. While the Chief Justice has the authority to regulate the formation of Benches and allocate cases as an administrative function, these powers do not extend to withdrawing or transferring a part-heard case from a Bench that has already assumed jurisdiction. Such withdrawal or reassignment is not merely an administrative act but a judicial one. Consequently, any such action must either stem from a judicial order passed by the Bench seized of the matter or be supported by express statutory authority if carried out by another court or authority.

16. The principles of judicial propriety and case continuity require that a Bench, once seized of a case, must see it through to its conclusion, barring exceptional circumstances. Arbitrary withdrawal or reassignment of a case after it has been partly heard sets a dangerous precedent, undermines the sanctity of judicial proceedings and erodes public confidence in the judiciary. Exceptional circumstances that may justify the reassignment of a case include instances where the Bench seized of the matter makes a judicial request for reassignment due to recusal, conflict of interest or other valid reasons. As the decision regarding the withdrawal or reassignment of a case partakes of the character of judicial process. Such decisions cannot rely solely on administrative discretion, as this would compromise the finality and integrity of judicial orders. These principles collectively affirm that the sanctity of judicial proceedings takes precedence over administrative powers, thereby safeguarding the impartiality and independence of the judiciary.

17. For almost similar reasons that create a bar on the power of assignment of cases concerning the withdrawal and reassignment of part-heard cases, this Court held in Human Rights Case No. 14959-K of 2018 (PLD 2019 SC 183) that a similar limitation also applies to the constitution of benches. It was held and observed in that case:

The above Rule [of Order XI of the Supreme Court Rules 1980] provides for administrative powers of the Chief Justice to constitute benches. However, once the bench is constituted, cause list is issued and the bench starts hearing the cases, the matter regarding constitution of the bench goes outside the pale of administrative powers of the Chief Justice and rest on the judicial side, with the bench. Any member of the bench may, however, recuse to hear a case for personal reasons or may not be available to sit on the bench due to prior commitments or due to illness. The bench may also be reconstituted if it is against the Rules and requires a three-member bench instead of two. In such eventualities the bench passes an order to place the matter before the Chief Justice to nominate a new bench. Therefore, once a bench has been constituted, cause list issued and the bench is assembled for hearing cases, the Chief Justice cannot reconstitute the bench, except in the manner discussed above.

7. In the absence of a recusal by a member of the Bench, any amount of disagreement amongst the members of the Bench, on an issue before them, cannot form a valid ground for reconstitution of the Bench. Any reconstitution of the Bench on this ground would impinge on the constitutional value of independence of judiciary. The construct of judicial system is pillared on the assumption that every judge besides being fair and impartial is fiercely independent and is free to uphold his judicial view. This judicial freedom is foundational to the concept of Rule of Law. Reconstitution of a bench while hearing a case, in the absence of any recusal from any member on the bench or due to any other reason described above, would amount to stifling the independent view of the judge. Any effort to muffle disagreement or to silence dissent or to dampen an alternative viewpoint of a member on the bench, would shake the foundations of a free and impartial justice system, thereby eroding the public confidence on which the entire edifice of judicature stands.

Public confidence is the most precious asset that this branch of the State has. It is also one of the most precious assets of the nation.

(Emphasis added)

While relying on the above observations in the case of Muhammad Imtiyaz,[7] this Court reiterated that the arbitrary reconstitution of Benches undermines the integrity of the judicial system and may have serious repercussions. If Benches are changed arbitrarily without justifiable reasons, it creates doubts and raises concerns about the fairness of the system. The public may question the impartiality of a judicial process that appears arbitrary. To uphold the rule of law, transparency and fairness in the matters of the constitution of Benches and the assignment of cases is imperative to maintain the independence, integrity and prestige of this Court.

18. We may mention here that it was argued before us that the cases concerning the powers of the Chief Justice, decided prior to the promulgation of the Act, have become irrelevant following the establishment of the Bench Constitution Committee under Section 2 of the Act, which has been endorsed by the Full Court of the Supreme Court on the judicial side in the case of Raja Amer.[8] We, however, are not persuaded by this argument for the simple reason that it was categorically held in Raja Amer that the powers of the Committee under Section 2 of the Act are the same as those previously exercised by the Chief Justice. The relevant observation is as follows:

Both the powers of suo motu invoking original jurisdiction and constituting benches were earlier being exercised by one person, the Chief Justice; it is these administrative powers that have now been conferred on the Committee comprising three persons, i.e., the Chief Justice and the two most senior Judges - nothing more nothing less.[9]

Therefore, whatever was stated in the referred cases regarding the powers of the Chief Justice to assign or withdraw cases from Benches fully applies to the Committees as well.

19. In view of the settled jurisprudence of the sub-continent on the constitution of Benches and the assignment of cases discussed above, we answer question (i) in the negative. We hold that the Committees constituted under Sections 2 of the Act and 191A of the Constitution lack the authority to withdraw a case that has been partly heard, where cognisance has already been taken by a regular Bench, and transfer it to another Bench, unless the Bench itself refers the case to the Committees for its assignment to another Bench for some justifiable reason. Such partly heard cases may include those where serious questions of constitutional law concerning the jurisdiction of the regular Bench have been framed, some arguments on those questions have been heard and the hearing has been adjourned for further arguments.

(ii) Whether the said Committees can, by an administrative order, undo the effect of a judicial order, whereby next date of hearing a specific case has been fixed before a regular Bench to hear arguments on the jurisdiction of the regular Bench.

20. This question need not detain us long, as a similar issue was addressed and decided by a Full Court of this Court in the case of Malik Asad Ali.[10] It was held in the said case that an administrative order passed by the Hon'ble Chief Justice (acting under restraint) passed in derogation of a judicial order would be without lawful authority and of no legal effect. In that case, the Chief Justice's administrative declaration, which sought to invalidate the convening of a Full Court under a judicial order of a Bench for hearing cases listed in Supplementary Cause List No. 405 of 1997, was declared illegal.

21. The above cited observations of a seven-member Bench of this Court in the contempt case against Syed Yousaf Raza Gillani are equally relevant. It was observed therein that "the executive authority may question a Court's decision through the judicial process provided for in the Constitution and the law but is not entitled to flout it because it believes it to be inconsistent with the law or the Constitution." This principle applies with equal force to the executive authority of the Chief Justice or the Committees, as the case may be.

22. Therefore, it can be held unequivocally that no administrative authority, including the Committees constituted under Section 2 of the Act and 191A of the Constitution, can, by an administrative order, undo the effect of a judicial order. Question (ii) is answered accordingly.

23. We may mention here that it was also argued before us that the Committees did not pass any administrative orders to undo the effect of the judicial orders. Instead, it was contended, the cases were transferred to the Constitutional Bench through the operation of law under Clause (4) of Article 191A, which states that all petitions, appeals or review applications against judgments rendered or orders passed, to which Clause (3) applies, pending or filed in the Supreme Court prior to the commencement of the Constitution (Twenty-sixth Amendment) Act 2024, stand transferred to the Constitutional Bench. However, we find this argument misconceived, and it is sufficiently answered by the formulation provided by Khawaja Haris Ahmad, the learned amicus curiae. For ease of reference, his formulation is again reproduced here:

It is noteworthy that when, on 13.01.2025, the learned Bench took up the matter relating to its jurisdiction to entertain and decide the CPLAs (filed under Article 185(3) of the Constitution) fixed before it, this involved neither assuming jurisdiction over the merits of the CPLAs, nor decision of constitutionality of any law point involved in the CPLAs. Rather, in effect, it only took upon itself the task of ascertaining if Article 191A(3) could be so construed as to exclude the Bench's jurisdiction to hear the CPLAs. To do so, the learned Bench was dealing with the matter like any other case where question of jurisdiction is raised - i.e. (i) first looking at the wording of the provision itself to see if it per se excluded the Court's jurisdiction; and, (ii) if so, to see whether the provision of law relied upon for excluding the Court's jurisdiction constitutes valid law or not. Thus, in the instant case, the learned Bench would first examine the words of Article 191A(3) to ascertain if a plain reading of it excludes the Court's jurisdiction in the matter; and, if such exclusion is a necessary consequence, then the Court would proceed to ascertain the constitutional validity of Article 191A(3). Prima facie it appears that the aforesaid exercise in not covered by exclusionary provisions of Article 191A(3) of the Constitution.

As evident from the above, the three-member Bench that passed the order dated 13 January 2025 was not deliberating on the constitutionality of the law challenged in those cases but was addressing the jurisdictional question, which every court inherently has the power to adjudicate. The Bench, which had previously referred such cases to the Constitutional Bench, was confronted with the principles governing a court's inherent power to decide jurisdictional questions. When the argument was prima facie supported by the referred precedents of the cases of Pir Sabir Shah, Fazlul Quader Chowdhry and Marbury, the Bench decided to adjudicate the jurisdictional matter after obtaining full assistance from the learned counsel for the parties, and the cases were adjourned to allow for further preparation and assistance on the jurisdictional issue.

24. In Pir Sabir Shah, the Court addressed the jurisdictional question of whether appeals filed before it under Section 8-B of the Political Parties Act, 1962, were competent and whether that provision was ultra vires the Constitution. Similarly, in Fazlul Quader Chowdhry, the Court dealt with the question of whether Clause (4) of Article 224 of the 1962 Constitution, which barred all courts from questioning the validity of constitutional amendments, was ultra vires the Constitution. The principle emerging from these cases is that if a dispute arises concerning a court's jurisdiction over a particular matter, the court has the power to hear and determine that dispute-even if its conclusion leads to the finding that it lacks jurisdiction. Moreover, in determining its jurisdiction, the court may examine the constitutionality of the law, including any constitutional provision, that confers or bars its jurisdiction. Based on this principle, the Bench that passed the order dated 13 January 2025 was acting within its jurisdiction. If, ultimately, it had determined that Article 191A validly excluded its jurisdiction, it would have transferred the cases to the Constitutional Bench in accordance with Clause (5) of

Article 191A of the Constitution, and would not have proceeded to address the matter of the constitutionality of the law challenged in those cases.

25. For these reasons, we find that it was the administrative decisions of the Committees that illegally nullified the judicial orders and unlawfully deprived the regular Bench of its judicial power to decide the jurisdictional question raised before it. Such jurisdictional questions, as contended by Khawaja Haris Ahmad, do not fall within the ambit of Clauses (3) and (5) of Article 191A of the Constitution.

26. As both the above questions have been answered in the negative. We are sanguine that the office shall fix the main case i.e. CPLA No. 836-K of 2020, etc before the original three-member bench comprising Syed Mansoor Ali Shah, Ayesha A. Malik, and Irfan Saadat Khan, JJ. in the first week of February 2025.

Decision on the Explanation of the Alleged Contemner

27. Having answered the questions of law, we now turn to the validity of the explanation furnished by the alleged contemner in response to the show-cause notice. Under Section 17(3) of the Contempt of Court Ordinance 2003, we must determine whether the interests of justice require further action and whether a charge for contempt of court should be framed against him. As required by law, the alleged contemner was given an opportunity for a preliminary hearing, and we have duly considered his written reply, along with the documents filed in support thereof.

28. It has become evident from the record that in compliance with the court order dated 16 January 2025, the alleged contemner initiated a note on the same day-16 January 2025-regarding the constitution of a Special Bench comprising the Judges mentioned in the said order. However, the Committee constituted under Section 2 of the Act, by a majority comprising the Hon'ble Chief Justice and Hon'ble Justice Amin-ud-Din Khan, passed an order on 17 January 2025, withdrawing the cases from the regular Bench and directing that they be placed before the Committee constituted under Article 191A of the Constitution for fixation before the Constitutional Bench.

29. We find that the alleged contemner did what he could to comply with the court order. As stated in his written reply, he had no authority to constitute the Bench of Judges as mentioned in the court order. At most, he could inform the Competent Authority, which was done by him not only in a timely manner but also with a proposal for the constitution of the Special Bench comprising the Judges specified in the court order, for the fixation of cases before it as directed. The alleged contemner's failure to fix the case before the Bench specified in the court order, therefore, does not constitute a contumacious act on his part.

30. In a contempt appeal by the Registrar of the High Court of Sindh,[11] a fourteen-member larger Bench of this Court drew a distinction between a case of contempt against a party to the case and a case of contempt against an officer of the Court, in the following words:

A distinction has to be made between a case of contempt of Court based on defiance or violation of a judicial order in the nature of temporary injunction by a party whereby such party was restrained from acting in a particular manner but in spite of service of notice or having come to know of the passing of such order, acts in a manner to alter the position to his advantage so as to frustrate the temporary injunction and an act of mere non-submission of a report called for by the Court by an Officer of the Court. In the former case, the Court would take strict view and mere act of defiance of the judicial order would by itself justify raising of presumption that the doer of the act was guilty of contempt of Court unless he proves otherwise whereas in the latter case, it has to be determined on application of judicial mind as to whether the accused deliberately did not submit the report on account of having personal interest in any of the parties to cause damage to the other party in the case in which the report was called or had any personal interest which, if proved or established, would make the act of non-submission of the report mala fide. In the absence of any of these factors and element of contumacy, his conduct could not be held to have suffered from mala fides or contempt of Court. Mere non-compliance of an order, in the absence of contumacy, would not amount to contempt of Court.

Per Rana Bhagwandas, J. (Additional note)

It may be pertinent to observe further that every failure to comply with an order may not amount to be criminal contempt warranting action therefor. There may be cases where there are justifiable reasons or causes for non adherence of an order of a Court which would depend on the facts of each case. There may also be cases where

non-compliance of the order was not wilful or deliberate. Likewise, there may be instances where compliance with an order of a Court may be beyond the scope of authority of a person to whom it is directed. Each-case, therefore, has to be examined in its proper perspective having regard to the facts and circumstances of a case. (Emphasis added)

Upon examining the case of the present alleged contemner, the Additional Registrar (Judicial) of this Court, we find that he did not deliberately avoid the fixation of the cases before the Bench as directed in the court order. There is no evidence to suggest that he had any personal interest in the matter or had connived with any of the parties to the case, nor did he act with the intention of causing damage to

any of the parties to the case. There is no indication of mala fide intent in his actions. In the absence of any such factors or elements of contumacy, his conduct cannot be considered contumacious, nor can it be said to have suffered from mala fides, requiring contempt proceedings against him. For these reasons, by accepting his explanation, the show-cause notice issued against him for contempt proceeding is discharged.

Contempt Proceedings Against the Members of the Committees

31. We have also deliberated on the question of whether, following the discharge of the show-cause notice against the alleged contemner, the Additional Registrar (Judicial), the matter should be considered concluded or whether it should proceed further against the members of the two Committees, where the first Committee unlawfully withdrew the part-heard cases from a Bench and transferred it for the consideration of the other Committee, through an administrative order by undoing the effect of a judicial order. While the second Committee, in total disregard of the judicial order passed by the regular Bench, simply in pursuance of the direction of the first Committee, went ahead and fixed the case before the Constitutional Bench on 27 January 2025. Both the Committees were not legally authorized to take administrative decisions dated 17 January 2025 in violation of the judicial order. In this background, it appears that the matter has to proceed further against the members of the two Committees. However, judicial propriety and decorum demand that the said question be considered and decided by the Full Court of the Supreme Court so that it is authoritatively decided once and for all. We note with advantage that the matter of contempt proceedings against the Registrar of a High Court[12] was treated with such gravity that a larger bench of 14 Judges was convened to adjudicate it. Therefore, in our view, this issue is even more serious, warranting the collective and institutional deliberation of all Judges of this Court. Consequently, we refer this matter to the Hon'ble Chief Justice for the convening of the Full Court to deliberate and decide on this important issue.

32. We may clarify here that we have not referred this matter to the Committee constituted under Section 2 of the Act, as its authority is limited to constituting benches of the Supreme Court. The Full Court of the Supreme Court, however, is constituted by the Constitution itself under Article 176. The distinction between the benches of a Court and the Full Court is well-established and constitutionally recognised in the provisions of Article 203J(2)(c) and (d) of the Constitution and the responsibility of convening the Full Court conventionally falls within the domain of the Chief Justice.

33. Before parting with this judgment, we find it necessary to acknowledge and express our appreciation for the invaluable assistance rendered to us by all the learned amici curiae, especially on such short notice.

MH/M-2/SC Order accordingly.

**P L D 2025 Supreme Court 319**

**Present: Syed Mansoor Ali Shah, Ayesha A. Malik and Aqeel Ahmed Abbasi, JJ**

**ADIL KHAN BAZAI---Appellant**

**Versus**

**ELECTION COMMISSION OF PAKISTAN and another---Respondents**

Civil Appeals Nos. 1507 and 1508 of 2024, decided on 12th December, 2024.

(Against the orders dated 21.11.2024 passed by Election Commission of Pakistan in Case No. F.6(28)/2024-Law-III and Case No.F.17(3)/2024-Coord.).

Per Syed Mansoor Ali Shah, J.; Ayesha A. Malik and Aqeel Abbasi, JJ. agreeing:

**(a) Constitution of Pakistan---**

----Art. 63A---Disqualification due to defection---Word "may"---Effect---Use of word "may" in granting power to Party Head indicates that its exercise is discretionary, not obligatory---Even if a member defaults undergrounds (a) or (b), the Party Head is not obligated to declare defection necessarily and he may choose not to exercise such power---Requirement of providing member concerned an opportunity to show cause as to why such a declaration should not be made against him, underscores that the Party Head must exercise such power justly, fairly and reasonably, rather than whimsically or arbitrarily.

**(b) Constitution of Pakistan---**

----Art. 63A(1)---Declaration of defection---Principle---Power to make a declaration of defection, under Article 63A(1) of the Constitution has been granted only to Party Head of a political party, not to any other office bearer of the party and that can be exercised only in relation to a member of Parliamentary Party of a political party in the House, not to any other member of the House---Existence of such two facts is a condition precedent for the exercise of power to make declaration of defection against a member of House and for the exercise of jurisdiction by Election Commission to confirm such a declaration.

**(c) Jurisdiction---**

----Scope---When a tribunal or authority is established by law to exercise jurisdiction over a particular matter, the Legislature defines scope of its power---It may either expressly or by necessary implications tabulate that jurisdiction can only be assumed and exercised if a particular state of facts exists or is shown to exist---In such case, though the Tribunal or authority are obligated to objectively ascertain in the event of a dispute, whether that state of facts exist before exercising jurisdiction over the matter, its decision on the existence of that state of fact i.e. the jurisdictional fact, is not conclusive---Instead, the decision is subject to challenge before and final determination of Civil Courts of plenary jurisdiction, or is subject to correction by Constitutional Courts through judicial review.

Queen v. Commissioner of Income Tax (1888) 21 QB 313 per Lord Esher; M.R.; Keramat Ali v. Muhammad Yunus PLD 1963 SC 191; Jamil Asghar v. The Improvement Trust PLD 1965 SC 698; Raunaq Ali v. Chief Settlement Commissioner PLD 1973 SC 236; Mehr Dad v. Settlement and Rehabilitation Commissioner PLD 1974 SC 193; Hamid Husain v. Govt. of West Pakistan 1974 SCMR 356; Hamida Begum v. Murad Begum PLD 1975 SC 624; Muhammad Hafeez v. Additional Commissioner 1981 SCMR 1171; Rehmatullah v. Ali Muhammad 1983 SCMR 1064; Ehsanul Haq Kiani v. Allied Bank 1984 SCMR 963; Aminullah v. Qalandar Khan 1993 SCMR 2307; Shah Muhammad v. Abdul Rauf 1998 SCMR 1363 and Umar Ikram-Ul-Haque v. Shahida Hasnain 2016 SCMR 2186; S.B.P. and Co. v. Patel Engineering Ltd. AIR 2006 SC 450; Jagdish Prasad v. Ganga Prasad AIR 1959 SC 492; Addanki Tiruvenkata v. State of Andhra Pradesh AIR 1964 SC 807 and Ehsanul Haq Kiani v. Allied Bank 1984 SCMR 963 rel.

**(d) Constitution of Pakistan---**

----Arts. 63A(3) & 63A(4)---Declaration of defection--- Election Commission---Exercise of jurisdiction---Principle---Election Commission has no power to conclusively determine jurisdictional facts but only has power to objectively ascertain existence of jurisdictional facts before exercising jurisdiction conferred upon it under Articles 63A(3) and (4) of the Constitution, for the purpose of determining alleged defection of a member from his political party---Findings of Election Commission on a jurisdictional fact, such as whether member

concerned belongs to parliamentary partly of a political party, is not conclusive---Rather, it is subject to correction by Supreme Court as its appellate forum, and ultimately to final determination by a Civil Court of plenary jurisdiction.

**(e) Constitution of Pakistan---**

----Arts. 63A(1), 63A(2), 63A(3) & 63A(5)---Declaration of defection---Disqualification--- Affidavit of consent---Genuineness--- Appellant/ Member of National Assembly contested election as an independent candidate and after winning the election submitted affidavit of consent to join respondent political party---Party Head of respondent political party invoked defection clause against appellant, and resultantly Election Commission disqualified him---Contention of appellant was that his affidavit of consent was a forged document and he did not give any such consent to join respondent political party---Validity---Appellant was not shown to have ever acted as member of respondent parliamentary party, but had consistently conducted himself as member of another political party---Election Commission should have proceeded on the assumption that appellant was not member of respondent political party---Election Commission's finding on genuineness and validity of consent affidavit were contrary to the weight of the material on record and was legally unsustainable---Appellant was not found to be member of respondent political party and declarations made by Party Head of respondent political party regarding appellant's defection from that party and confirmation thereof by the Commission through orders in question were without jurisdiction---Supreme Court set aside orders passed by Election Commission and declarations made by respondent political party regarding defection of appellant---Supreme Court restored membership of appellant as an independent member and not as member of respondent political party---Appeal was allowed.

Bahadur Khan Bangulzai v. Attaullah Khan Mengal 1999 SCMR 1921; Attaullah Khan Mengal v. Chief Election Commissioner 1999 CLC 1460; Giyan Chand v. Chief Election Commissioner 2000 MLD 709 and Ehsanul Haq Kiani v. Allied Bank 1984 SCMR 963 rel.

Ayesha A. Malik, J.; agreeing with Syed Mansoor Ali Shah, J.:

**(f) Constitution of Pakistan---**

----Arts. 17, 19 & 219---Election Commission of Pakistan---Duties and functions---Constitutional role of Election Commission is the duty to organize and conduct free and fair elections for benefit of citizens who enjoy fundamental right to not only contest elections but also right to vote for candidate of their choice under Article 17(2) of the Constitution---Such fundamental right is also an expression of choice of voters under Article 19 of the Constitution---In exercise of such fundamental rights, which culminate through electoral process and voting, voters are able to choose composition of their government by exercising their choice and ability to participate---Such rights are so integral that their violation results in denial of fundamental rights, such as the right to be protected and treated in accordance with law, the right to life and liberty and inviolability of dignity.

Worker's Party Pakistan v. Federation of Pakistan PLD 2012 SC 681; Muhammad Tahir-ul-Qadri v. Federation of Pakistan PLD 2013 SC 413; Zulfiqar Ali Bhatti v. Election Commission of Pakistan 2024 SCMR 997; Tahir Sadiq v. Faisal Ali 2024 SCMR 775 and Imran Ahmed Khan Niazi v. The State 2024 SCMR 1284 rel.

**(g) Constitution of Pakistan---**

----Art. 219---Election Commission of Pakistan---Powers---Constitutional duty of Election Commission cannot be considered as an overarching Constitutional power vis- -vis with other Constitutional provisions and institutions.

**(h) Constitution of Pakistan---**

----Art. 219---Election Commission of Pakistan---Role---Independence of Election Commission is a fundamental safeguard in democratic system which maintains integrity of elections and ensures that will of people translates into their consent to be governed by elected representatives---This is what gives legitimacy to the government, because it is based on choice of people---This builds public confidence, protects rule of law and protects people from political manipulation---Elections are lifeline to democracy and Election Commission is guarantor of electoral integrity---Independence of Election Commission is fundamental to election process without which very foundation of democracy is undermined---Election Commission should not become subservient to political influences or political engineering rather should remain an impartial custodian of

democracy as any leaning of Election Commission in favor of government would compromise legitimacy of political system---At the heart of protecting electoral integrity is the right to vote and exercise of such right by people---Supremacy of vote underscores the idea, that power and legitimacy in a democratic system derives its consent from the governed, which is why an independent Constitutional body is required to ensure that will of the people by way of election is actualized.

Muhammad Sibtain Khan v. Election Commission of Pakistan 2023 SCMR 2165; Imran Ahmed Khan Niazi v. The State 2024 SCMR 1284 and Sunni Ittehad Council v. Election Commission of Pakistan PLD 2024 SC 642 rel.

Taimoor Aslam Khan, Advocate Supreme Court for Appellant (in both cases).

Rana Asad Ullah, Addl. A.G.P., Muhammad Arshad, Spl. Secy. ECP, Khurram Shehzad, D.D. Law, ECP. Ms. Saima Tariq, D.D. Law, ECP and Falak Sher, A.D. Law, ECP. for Respondent No. 1 (ECP) (in both cases).

Barrister Haris Azmat, Advocate Supreme Court for Respondent No.2 (PML-N) (in both cases).

Date of hearing: 12th December 2024.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**These two appeals have been filed under clause (5) of Article 63A of the Constitution of the Islamic Republic of Pakistan ("Constitution") to challenge the orders dated 21 November 2024 ("impugned orders") passed by the Election Commission of Pakistan ("Commission") regarding the declarations made by the Party Head of the Pakistan Muslim League (N) ("PML-N"), which were referred to the Commission by the Speaker of the National Assembly under clause (3) of Article 63A of the Constitution. In the declarations, dated 21 and 31 October 2024, the Party Head of PML-N declared that the appellant had intentionally defected from the Parliamentary Party of PML-N, on the grounds of his sitting on the opposition benches in the National Assembly with the Parliamentary Party of the Sunni Ittehad Council ("SIC") and his abstaining from voting on the Finance Bill 2024 (Money Bill) and the Constitution (26th Amendment) Bill, in contravention of the directions issued by the Parliamentary Party of PML-N. By the impugned orders, the Commission confirmed these declarations under clause (4) of Article 63A of the Constitution. Consequently, the appellant was de-seated from his membership in the National Assembly, and his seat (NA-262) was declared vacant.

2. Briefly, the background facts of the case are that the appellant contested for a seat in the National Assembly from NA-262, Quetta-I, in the 2024 general elections held on 8 February 2024. In the poll, the appellant secured 20,278 votes as an independent candidate, while the runner-up candidate, belonging to the Jamiat Ulema-e-Islam Pakistan, secured 12,887 votes and the PML-N candidate received 2,510 votes. Having secured the highest number of votes, the Commission declared the appellant elected as a returned candidate to the said seat in the National Assembly as an independent candidate, through its notification dated 15 February 2024, issued under Section 98 of the Elections Act 2017 ("Elections Act"). Subsequently, on 18 February 2024, a letter was submitted to the Commission by Mr. Muhammad Shahbaz Sharif, the then President of PML-N, under Rule 92(6) of the Election Rules 2017, informing the Commission that the appellant had joined PML-N through a consent affidavit dated 16 February 2024; whereas, on 20 February 2024, a similar letter was submitted to the Commission by Sahibzada Muhammad Hamid Raza, the Chairman of the Sunni Ittehad Council ("SIC"), notifying the Commission that the appellant had joined SIC through a consent affidavit dated 20 February 2024. The Commission accepted the letter received of the President of PML-N but rejected the letter of the Chairman of SIC. However, during the sessions of the National Assembly, the appellant used to sit on the opposition benches with members of the Parliamentary Party of SIC, and also did not vote on the Finance Bill 2024 and the 26th Constitutional Amendment Bill, contrary to the directions issued by the Parliamentary Party of PML-N. Consequently, the President of PML-N declared the appellant's defection from the political party, PML-N, and the Commission, by the impugned orders, confirmed these declarations. Hence, these appeals have been filed by the appellant.

3. Before the Commission, as well as before this Court, the appellant took the stance that he never joined PML-N; therefore, the question of his defection from that political party does not arise. The consent affidavit dated 16 February 2024, purporting to show his joining of PML-N, is fake and fabricated. In this regard, he has

instituted a civil suit and filed a criminal complaint. In the civil suit, the said consent affidavit has been suspended, and in the preliminary inquiry conducted in the criminal complaint, it has been found to be fake and fabricated. The appellant elaborated that he belongs to Pakistan Tehreek-e-Insaf ("PTI") and initially filed his nomination paper to contest the seat of NA-262, Quetta-I, under the PTI party ticket. However, due to a dispute regarding PTI's intra-party elections and its election symbol, his nomination paper as a PTI candidate was rejected. Consequently, he filed another nomination paper as an independent candidate, and contested and won the election for the said seat as an independent candidate. Subsequently, he joined SIC through a consent affidavit dated 20 February 2024, in accordance with PTI's party decision. However, the joining of independent candidates to SIC has not been recognized as constitutionally valid by the Supreme Court in its judgment passed in Civil Appeal No. 333 of 2024 (Sunni Ittehad Council v. Election Commission of Pakistan); therefore, he remains an independent member of the National Assembly.

4. On the other hand, the stance of the Party Head of PML-N was that the appellant joined PML-N through his consent affidavit dated 16 February 2024 and did not challenge the said affidavit until he was declared to have defected from PML-N. The civil suit and criminal complaint filed by the appellant disputing the genuineness of the consent affidavit are an afterthought, intended solely to evade the consequences of defection. Once a consent affidavit for joining a political party is filed, it becomes irrevocable and cannot be substituted or withdrawn.

5. By the impugned orders, the Commission accepted the stance of the Party Head of PML-N and concluded that, after being elected as an independent candidate, the appellant joined PML-N on 16 February 2024. It further held that the appellant acted contrary to the directions issued by the Parliamentary Party of PML-N by abstaining from voting on the Finance Bill 2024 and the 26th Constitutional Amendment Bill. Consequently, the Commission confirmed the declarations made by the Party Head of PML-N and pronounced that the appellant had ceased to be a member of the National Assembly and that his seat had become vacant.

6. In addition to the above respective stances of the parties, the learned counsel for the appellant vehemently contended that the Commission does not possess jurisdiction under Article 63A of the Constitution to decide the disputed question of whether the consent affidavit dated 16 February 2024 is genuine or fake, and consequently, whether the appellant is a member of the Parliamentary Party of PML-N. He argued that only a Civil Court, not the Commission, is competent to adjudicate upon this disputed fact. Furthermore, he contended that the Commission's decision on this matter is not just, fair and reasonable. These contentions were refuted by both the learned counsel for the Party Head of PML-N and the Commission, who submitted that the Commission has the power to decide this question and has rightly determined the genuineness of the said consent affidavit.

7. We have considered the respective stances and contentions of the parties and, with the able assistance of their learned counsel, examined the material available on the record of the case.

8. Before examining the correctness of the Commission's decision regarding the genuineness of the appellant's consent affidavit dated 16 February 2024 and his alleged defection from PML-N, it would be expedient to first address the question of the Commission's jurisdiction: Does a Civil Court or the Commission have the jurisdiction to determine whether the member concerned is a member of the Parliamentary Party of a political party in proceedings under clauses (3) and (4) of Article 63A of the Constitution, for the purpose of determining his alleged defection from that political party?

9. A plain reading of Article 63A of the Constitution reveals that it grants power to the Party Head of a political party to declare that a member of the Parliamentary Party[1] of that political party has defected, if the member: (a) resigns from the membership of their political party or joins another Parliamentary Party; or (b) votes or abstains from voting in the House contrary to any direction issued by the Parliamentary Party to which he belongs, in relation to: (i) election of the Prime Minister or the Chief Minister, (ii) a vote of confidence or a vote of no-confidence, or (iii) a Money Bill or a Constitution (Amendment) Bill.[2] The use of the word "may" in granting this power to the Party Head indicates that its exercise is discretionary, not obligatory. Even if a member defaults under grounds (a) or (b), the Party Head is not obligated to declare defection necessarily and he may choose not to exercise this power. Furthermore, the requirement of providing the member concerned an

opportunity to show cause as to why such a declaration should not be made against him underscores that the Party Head must exercise this power justly, fairly and reasonably, rather than whimsically or arbitrarily. The original jurisdiction conferred upon the Commission, as well as the appellate jurisdiction of this Court, to confirm or otherwise the declaration made by the Party Head, therefore, extends to examining whether the Party Head has exercised this power justly, fairly and reasonably.[3]

10. A plain reading of clause (1) of Article 63A also makes it evident that the power to make a declaration of defection has been granted only to the Party Head of a political party, not to any other office-bearer of the party, and that it can be exercised only in relation to a member of the Parliamentary Party of that political party in the House, not to any other member of the House. The existence of these two facts is a condition precedent for the exercise of the power to make the declaration of defection against a member of the House and for the exercise of jurisdiction by the Commission to confirm such a declaration.

11. However, Article 63A has not expressly conferred power on the Commission to determine the existence of these facts before exercising its jurisdiction to confirm, or otherwise, the declaration. Therefore, the question as to the power of the Commission to decide these preliminary or collateral facts, also referred to as jurisdictional facts, arose in the cases of Bahadur Khan Bangulzai[4] and Giyan Chand.[5] In Bahadur Khan Bangulzai, the fact in dispute was whether the person who made the declaration of defection was the Party Head of the political party concerned; while in Giyan Chand, the dispute was whether the person (a member of the House) against whom the declaration of defection had been made was a member of the Parliamentary Party of the political party whose Party Head had made the declaration, as is the case in the present matter.

12. In Bahadur Khan Bangulzai, the Balochistan High Court, after referring to several academic and judicial expositions on the doctrine of jurisdictional fact, concluded that "the Chief Election Commissioner has the jurisdiction to determine as to who is the head of the political party, being a jurisdictional fact. However, no powers are available to the Chief Election Commissioner for resolving inbuilt organisational structural disputes which might have cropped up in the folds of a political party." On appeal, this Court endorsed this conclusion and elaborated it further by holding that "if a plea is raised before the Chief Election Commissioner that the person who made the reference on account of alleged defection is not the head of the political party involved, the Chief Election Commissioner is obliged to examine the bona fides of such a plea. If the person who has made the reference as the Head of the political party involved has been acting as such in the past, the Chief Election Commissioner is supposed to proceed on the assumption that he is the Head of the political party involved. However, if he finds no reliable material to conclude that the person who made the reference is factually the Head of the political party involved, and the question relates to inbuilt organisational structural disputes within the political party, he may direct the parties to resolve the question through civil proceedings [in a Civil Court]."

13. In Giyan Chand, the Peshawar High Court observed that "the Chief Election Commissioner did not determine whether or not the jurisdictional fact in terms of Article 63-A of the Constitution existed in order to disqualify the petitioner" and that "Article 63-A of the Constitution prescribes certain facts as sine qua non for its application but none of the facts either existed or were proved against the petitioner by ANP inasmuch as the petitioner did not contest the election as a candidate or a nominee of ANP nor was he a member of ANP in terms of the requirements prescribed by the Constitution of ANP nor did he join ANP after being elected Member of the Assembly."

14. Since the decisions in both the above cases were primarily based on the doctrine of jurisdictional fact, we find it appropriate to briefly outline this doctrine as expounded in various judicial pronouncements.

15. The doctrine of jurisdictional fact connotes that if a certain state of facts must exist before a tribunal or authority can exercise the jurisdiction vested in it, such tribunal or authority may inquire into those facts to determine whether it has jurisdiction but cannot confer jurisdiction upon itself by making an erroneous decision regarding them. As per this doctrine, when a tribunal or authority is vested with jurisdiction limited to decide on a particular matter, it generally has the ancillary power to inquire into and ascertain the existence of facts collateral to that matter when their existence is disputed before it. This power to ascertain collateral facts- referred to as jurisdictional facts- forms the foundation for the exercise of its jurisdiction. A jurisdictional fact

is, thus, one upon whose existence the assumption and exercise of jurisdiction by a tribunal or authority depend. It is a prerequisite fact whose existence must be ascertained before jurisdiction over a particular matter can be properly assumed and exercised. Its existence is a sine qua non or condition precedent to the assumption and exercise of jurisdiction. However, a tribunal or authority with jurisdiction limited to a particular matter cannot assume jurisdiction over a matter not conferred upon it by erroneously deciding the jurisdictional fact. An error in determining a jurisdictional fact constitutes a jurisdictional error, rendering the order passed without jurisdiction. Therefore, when a tribunal or authority is established by law to exercise jurisdiction over a particular matter, the legislature defines the scope of its powers. It may, either expressly or by necessary implication, stipulate that jurisdiction can only be assumed and exercised if a particular state of facts exists or is shown to exist. In such cases, though the tribunal or authority is obligated to objectively ascertain, in the event of a dispute, whether that state of facts exists before exercising jurisdiction over the matter, its decision on the existence of that state of facts-the jurisdictional fact-is not conclusive. Instead, the decision is subject to challenge before and final determination by the civil courts of plenary jurisdiction or is subject to correction by the constitutional courts through judicial review. However, where the legislature grants the power to determine not only the substantive matter but also the preliminary or collateral facts- referred to as jurisdictional facts- upon which further jurisdiction depends, the tribunal or authority has the power to conclusively determine whether the jurisdictional fact exists. In the latter case, its decision on jurisdictional facts stands on the same footing as a decision on the fact in issue or the adjudicatory fact regarding the substantive matter, and is likewise final, subject to any right of appeal to a higher forum; it cannot be challenged before a Civil Court of plenary jurisdiction.[6]

16. There is, therefore, a distinction in the legal effect of the ascertainment or determination of a jurisdictional fact by a tribunal or authority with limited jurisdiction, as expounded by Lord Esher, M.R.,[7] and subsequently adopted by this Court[8] and the Indian Supreme Court,[9] in two scenarios: (1) where the legislature entrusts a tribunal or authority with jurisdiction to adjudicate upon a matter, including the power to determine whether the preliminary state of facts on which its jurisdiction depends exists; and (2) where the legislature confers jurisdiction on such a tribunal or authority to proceed only if a certain state of facts exists or is shown to exist. In the former case, the tribunal or authority has the power to conclusively determine jurisdictional facts, whereas in the latter case, it only objectively ascertains the existence of the state of facts before exercising the jurisdiction conferred upon it. Such a finding must, of course, be based on the weight of the material placed before the tribunal or authority and not made arbitrarily or whimsically, as it remains subject to correction by an appellate forum, if any, or by constitutional courts through judicial review, in addition to final determination by civil courts of plenary jurisdiction.[10]

17. Article 63A of the Constitution does not explicitly entrust the Commission with the power to determine the preliminary state of facts- jurisdictional facts-on which its jurisdiction to confirm the declaration depends. Therefore, the present matter falls within the second of the two categories described above. The Commission has no power to conclusively determine jurisdictional facts but has only the power to objectively ascertain the existence of jurisdictional facts before exercising the jurisdiction conferred upon it under clauses (3) and (4) of Article 63A of the Constitution, for the purpose of determining the alleged defection of a member from his political party. Its finding on a jurisdictional fact, such as whether the member concerned belongs to the Parliamentary Party of a political party, is not conclusive; rather, it is subject to correction by this Court, as its appellate forum, and ultimately to final determination by a Civil Court of plenary jurisdiction. The question regarding the Commission's jurisdiction is answered accordingly.

18. Having thus answered the question of law, we now proceed to examine the correctness of the Commission's decision regarding the genuineness of the appellant's consent affidavit dated 16 February 2024 and consequently the ascertainment of the jurisdictional fact whether the appellant is a member of the Parliamentary Party of PML-N.

19. Clause (2) of Article 63A specifies two instances in which a member of a House becomes a member of a Parliamentary Party: (i) if the member is elected as a candidate or nominee of a political party, he automatically becomes a member of the Parliamentary Party constituted by that political party in the House, or (ii) if the

member, having been elected as an independent candidate (i.e., not as a candidate or nominee of any political party), subsequently joins a Parliamentary Party through a written declaration. In the first instance, where no act by any person or authority is required for a member of the House to become part (member) of a Parliamentary Party in the House, no dispute can arise regarding the status of such a member. However, in the second instance, where the member's action-namely, a written declaration of joining a Parliamentary Party-is required, a dispute may arise concerning the genuineness or validity of such a written declaration. It is in the latter case that the necessity arises for the Commission, before confirming the declaration made by the Party Head, to ascertain the genuineness or validity of the written declaration made by the member, showing his joining of a particular political party.

20. As observed above, the finding on a jurisdictional fact must be based on the weight of the material placed before the court, tribunal or authority and cannot be made arbitrarily or whimsically. Therefore, it is incumbent upon us to examine and evaluate the weight of the material submitted by the parties before the Commission, as well as before this Court, in support of their respective assertions.

21. The material supporting the stance of the Party Head of PML-N comprises the consent affidavit dated 16 February 2024, showing the appellant's joining of PML-N. In disputing the genuineness of this affidavit, the appellant produced a copy of his consent affidavit dated 20 February 2024, demonstrating his affiliation with SIC. This affidavit bears both his thumb impressions and signatures, and by its submission to the Commission, the appellant implicitly negated the existence of any prior consent affidavit. Furthermore, the appellant submitted a record of his tweet dated 23 February 2024, wherein he expressly denied joining any other party, stating: "I, returned candidate of NA-262 Qta-1, have joined Sunni Ittehad Council. The details of which are: I have voluntarily joined SIC, and all the required documents have been handed over to and received [by the] Election Commission on 20.2.24 at 9:35 PM. I strongly deny joining any other party."

22. The appellant also produced photographs taken during the first session of the National Assembly on 29 February 2024, showing him wearing a badge bearing the photograph of the founding chairman of PTI, Mr. Imran Khan, while taking the oath and signing the roll of members. Additionally, Bulletin No. 1 of the National Assembly (1st Session 2024), available on the official website of the National Assembly, mentions the appellant as an independent member of the Assembly at serial No. 254. Extracts from the official website of the National Assembly, dated 27 September 2024, which also shows that even till the said date the appellant was an independent member of the National Assembly. The appellant further presented a Civil Court order dated 2 November 2024, suspending the operation of the consent affidavit dated 16 February 2024, as well as an inquiry report dated 5 November 2024 prepared by the SHO, PS, Civil Lines, Quetta, which concluded that the said affidavit appeared to be false and fabricated. Moreover, the appellant produced copies of an affidavit and a statement by Saeed Ahmad, Oath Commissioner, whereby the said Oath Commissioner categorically denied having attested the disputed consent affidavit.

23. The weight of the material produced by the parties in support of their respective assertions is self-evident and requires no elaborate discussion. The Commission, as well as this Court acting as its appellate forum, is obligated to objectively assess the genuineness and validity of the consent affidavit dated 16 February 2024, based on the prima facie probative value of the material produced before it. Upon such assessment, the consent affidavit dated 16 February 2024 attributed to the appellant is found to be neither genuine nor valid.

24. Additionally, the Party Head of PML-N has failed to demonstrate a single instance where the appellant acted as a member of PML-N's Parliamentary Party in the National Assembly. On the contrary, the Party Head himself stated in his declarations that the appellant sits on the opposition benches with members of SIC. In Bahadur Khan Bangulzai, this Court observed: "If the person who has made the reference as the Head of the political party involved has been acting as such in the past, the Chief Election Commissioner is supposed to proceed on the assumption that he is the Head of the political party involved." Applying the principle underlying this observation to the present case, where the appellant is not shown to have ever acted as a member of PML-N's Parliamentary Party but has consistently conducted himself as a member of SIC and PTI, the Commission ought to have proceeded on the assumption that the appellant is not a member of PML-N's Parliamentary Party.

25. Therefore, in our considered view, the Commission's findings on the genuineness and validity of the consent affidavit dated 16 February 2024 are contrary to the weight of the material on record and are, therefore, legally unsustainable. Since the appellant is not found to be a member of PML-N's Parliamentary Party, the declarations made by the Party Head of PML-N regarding the appellant's defection from that party, and the confirmation thereof by the Commission through the impugned orders, were without jurisdiction. Consequently, these appeals are allowed. The impugned orders passed by the Commission are set aside, and the declarations made by the Party Head of PML-N that the appellant had defected from the said political party are not confirmed. Accordingly, the appellant's membership of the National Assembly from seat NA-262 stands restored as an independent member, not as a member of the Parliamentary Party of PML-N.

26. We may, however, clarify that the finding of this Court regarding the genuineness and validity of the consent affidavit dated 16 February 2024, as explained above, is subject to final determination by the Civil Court. Given the seriousness of the appellant's allegations regarding the fabrication and use of a false consent affidavit against Mr. Muhammad Shahbaz Sharif, the then President of PML-N and now the Prime Minister of Pakistan, we expect that the Civil Court, where the civil suit is sub judice, and the Magistrate, before whom the criminal complaint is pending adjudication, shall decide the same as early as possible.

27. These are the reasons for our short order dated 12 December 2024, which is reproduced hereunder for the completion of the record:

For reasons to be recorded later, these appeals are allowed. The impugned judgments passed by the Election Commission of Pakistan are set aside, and the declarations made by the Party Head of PML(N) that the appellant had defected from the said political party are not confirmed. Accordingly, the appellant's membership of the National Assembly from seat NA-262 stands restored as an independent member, not as a member of the Parliamentary Party of PML(N).

Sd/-

Judge

I agree with the judgment and have appended my separate judgment.

Sd/-

Judge

Sd/-

Judge

**AYESHA A. MALIK, J.---**I have read the judgment authored by my learned colleague Syed Mansoor Ali Shah, J. and agree with it, however, I have given additional reasons in a concurring judgment as it is essential to examine the constitutional role of the Election Commission of Pakistan (ECP) and its conduct while hearing the matter of defection under Article 63A of the Constitution of the Islamic Republic of Pakistan, 1973 (Constitution) as during the course of the arguments, a great amount of emphasis was placed on the fact that the ECP is a constitutional body with constitutional powers and that the decisions taken under Article 63A of the Constitution in the instant case are in accordance with its constitutional functions.

2. The subject of elections is dealt with in Part VIII Chapters 1 and 2 of the Constitution wherein the ECP is constituted[11] and the appointment of the Chief Election Commissioner,[12] the term of office of the Commissioner and Members[13] and the terms of their service[14] are provided for. Importantly, Article 218 (3) of the Constitution provides that it is the duty of the ECP to organize, conduct and make arrangements for honest, just and fair elections in accordance with law and free from corrupt practices. In furtherance of this constitutional duty, Article 219 of the Constitution confers specific duties on the ECP which include preparing the electoral rolls for the elections to the National Assembly, Provincial Assemblies and the local governments. It also places the duty of organizing and conducting elections to the Senate and the duty to fill casual vacancies in a House or a Provincial Assembly along with the duty to appoint Election Tribunals and hold the general elections to the National Assembly, Provincial Assemblies and the local governments. In this manner, the Constitution provides the duties and establishes constitutional standards that the ECP must uphold in matters related to the elections.

3. Article 218 (3) of the Constitution has been interpreted by this Court time and again holding that the primary duty of the ECP is to ensure free, fair and transparent elections[15]. This Court has also consistently reiterated

that the ECP is required to adhere to the constitutional standards of honesty, justice and fairness while making all necessary arrangements for holding elections, ensuring therein that all election related activities both individually and collectively adhere to the given constitutional standards.[16] This Court has also clarified that in execution of its duty of organizing and conducting elections, the ECP is not a law making body rather works within the legal framework provided by Parliament.[17] This is because legal competence for enacting electoral laws is found in Article 222 of the Constitution which gives Parliament legislative competence to enact electoral laws on specific subjects such as allocation of seats, delimitation, preparation of electoral rolls, matters relating to corrupt practices, etc. In the Zulfiqar Ali Bhatti case[18] while interpreting Article 222 of the Constitution, this Court has specifically stated that the competence to make electoral law is one which regulates the constitutional duty to conduct elections. The Court further stated that the use of the word power in Article 222 of the Constitution[19] actually confers and means the duties and functions entrusted to the ECP under the Constitution.

4. What is fundamental to the constitutional role of the ECP is the duty to organize and conduct free and fair elections for the benefit of the citizen who enjoys the fundamental right to not only contest elections but also the right to vote for the candidate of their choice under Article 17(2) of the Constitution. This fundamental right is also an expression of the choice of the voters under Article 19 of the Constitution. In the exercise of these fundamental rights which culminate through the electoral process and voting, voters are able to choose the composition of their government by exercising their choice and ability to participate.[20] These rights are so integral that their violation results in the denial of other fundamental rights such as the right to be protected and treated in accordance with the law, the right to life and liberty, and the inviolability of dignity.[21] This constitutional duty of the ECP was discussed in the Muhammad Sibtain Khan case[22] wherein this Court differentiated between the legal concept of power and duty and concluded that a constitutional duty is not the same as a constitutional power and that the ECP had failed to maintain the distinction between these two distinct legal concepts. The Court explained that Article 218 (3) of the Constitution imposed a constitutional duty on the ECP and that Articles 220 and 224 were in furtherance of that duty and cannot be read as a constitutional power which would make the ECP the master of all electoral matters. The reason given was simple, that on a constitutional plane, the ECP is not the master rather the forum or organ that must perform the task which lies at the heart of the constitutional democracy.

5. The facts of the instant case compel us to once again reiterate that the constitutional duty of the ECP cannot be considered as an overarching constitutional power vis- -vis other constitutional provisions and institutions. The ECP is, as per the constitutional mandate, an independent body, duty bound to conduct free and fair elections and duty bound to ensure that those elected by the people remain in government. The independence of the ECP is the fundamental safeguard in a democratic system which maintains the integrity of the elections, and ensures that the will of the people translates into their consent to be governed by the elected representatives. This is what gives legitimacy to the government because it is based on the choice of the people. This is what builds public confidence, protects the rule of law and protects people from political manipulation.

6. The Constitution expressly provides that the authority of government rests solely on the will of the people. This will manifests itself through the peoples exercise of their right to vote and participate in the electoral and political process. Elections are the primary manner in which registered voters elect representatives who will govern on their behalf and exercise the powers of the government. This is a fundamental right guaranteed by the Constitution.[23] The facts of this case show that the ECP failed to perform its constitutional duty to actualize the will of the people. The Appellant in these cases is an elected member of the National Assembly against whom a reference for defection was filed under Article 63A of the Constitution. The allegation against him is that he defected from his party being PML(N). The Appellant in his defence clearly and unequivocally stated that he was elected as an independent candidate for NA-262 (Quetta-I) and was accordingly notified on 15.02.2024.[24] He then joined Sunni Ittehad Council (SIC) on the basis of his affidavit dated 20.02.2024 along with a letter dated 20.02.2024 issued by the Chairman SIC to the ECP informing them of his joining SIC. However, on account of the judgment passed in the SIC case[25], he remained an independent member of the National Assembly. He also clearly stated that he never submitted the affidavit dated 16.02.2024 wherein it is alleged that he has joined PML(N), that this affidavit is a fake and fabricated document for which he has

instituted a civil suit as well as a criminal complaint. In the civil suit, the said affidavit was suspended by the Senior Civil Judge-I, Quetta on 02.11.2024 and in the criminal complaint, on the basis of a report filed by the SHO the said affidavit was stated to be fake and fabricated. Hence, the Appellant's entire case before the ECP was premised on the fact that he was never a candidate for or a member of the PML(N). When the issue of defection came up, the ECP did not consider any of the material evidence relied upon by the Appellant nor did they consider his stance with reference to the affidavit of 16.02.2024. Given that there were two affidavits before the ECP, it had to thoroughly examine the documents in order to determine whether it could proceed under Article 63A of the Constitution. Instead, the ECP accepted the version of the party head of PLM(N) without any scrutiny and proceeded on that basis. The ECP did not specifically considered the denial of the affidavit of 16.02.2024 and denial of the letter of the party head dated 17.02.2024, nor did they provide the Appellant with these documents until he sought a direction from the High Court of Balochistan on 31.10.2024 to provide him the required documentation. Instead, the ECP opted to act on the letter of the party head of PML(N) dated 17.02.2024 without following due process which not only violated the Appellant's right to due process and fair hearing but also violates the right to vote of the people who voted for the Appellant. In doing so, the ECP also disregarded the stay order dated 02.11.2024 issued by the Senior Civil Judge-III, Quetta and ignored the proceedings in the criminal complaint. These actions of the ECP demonstrate a leaning by the ECP in favour of a political party and the government which totally negates its constitutional duty and the Constitution's standards to act honestly, justly and fairly. Consequently, when political competitors are not afforded equal opportunities during the election period, it results in a violation of the citizens' fundamental rights. In terms of the judgment in this matter, authored by Justice Syed Mansoor Ali Shah, the ECP should have confirmed that the affidavit of 16.02.2024 was a genuine document and should have confirmed the genuineness of the declaration made by the party head of PML(N). Without tentative appraisal of these documents, the ECP's decision is not sustainable and violates the fundamental right to vote of the people who actually voted for the Appellant.

7. This Court has reminded the ECP that elections are the lifeline to democracy and the ECP is the guarantor of electoral integrity.[26] The independence of the ECP, therefore, is fundamental to the election process without which the very foundation of democracy is undermined. This Court has also recognized and declared that the ECP should not become subservient to political influences, or political engineering rather remain an impartial custodian of democracy as any leaning of the ECP in favour of the government would compromise the legitimacy of the political system.[27] At the heart of protecting electoral integrity is the right to vote and the exercise of this right, by the people. The supremacy of the vote underscores the idea, that power and legitimacy in a democratic system derives its consent from the governed which is why an independent constitutional body is required to ensure that the will of the people by way of election is actualized. It is unfortunate that despite clear pronouncements by this Court, the ECP conducts itself in a manner that is not in line with its constitutional duty rather aligned with the notion that they have the constitutional power to disregard other constitutional institutions and the basic right of the vote.

Sd/-

Judge

Ayesha A. Malik

I agree.

Sd/-

Judge

Sd/-

Judge

MH/A-6/SC Appeal allowed.

**P L D 2025 Supreme Court 354**

**Present: Syed Mansoor Ali Shah and Aqeel Ahmed Abbasi, JJ**

**MUHAMMAD DIN---Petitioner**

**Versus**

**PROVINCE OF PUNJAB through Secretary, Population Welfare, Lahore and others---Respondents**

C.P.L.A. No. 2541 of 2023, decided on 12th February, 2025.

(Against the judgment dated 30.03.2023 passed by the Lahore High Court, Lahore in W.P. No.39095/2020).

**Protection against Harassment of Women at the Workplace Act (IV of 2010)---**

----Ss. 2(h) & 4(4)(ii)---Harassment at workplace---Scope---Petitioner was proceeded departmentally for causing harassment at workplace and was compulsorily retired from service---Validity---Robust framework to combat harassment and promote safe, inclusive work environments has been provided under Protection against Harassment of Women at the Workplace Act, 2010---Effectiveness of such laws depends on strong judicial enforcement---As jurisprudence evolves, Courts must continue to interpret and apply such protections in a manner that upholds human dignity, gender justice and workplace equality---High Court had convincingly answered in its judgment, the contentions of the petitioner---There was no jurisdictional error, illegality or procedural irregularity in the judgment passed by High Court---Supreme Court declined to interfere in the judgment passed by High Court---Petition for leave to appeal was dismissed and leave to appeal was refused.

Catherine A. MacKinnon, Only Words (Harvard University Press, 1993); International Labour Organization, Experiences of Violence and Harassment at Work: A Global First Survey (2022) < https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40dgreports/%40dcomm/documents/publication/wcms_863095.pdf> accessed 12 February, 2025; World Economic Forum, Global Gender Gap Report (June 2024), < <https://www3.weforum.org/docs/WEF_GGGR_> 2024.pdf> accessed 12 February, 2025; Paula Nicolson, Gender, Power and Organization: A Psychological Perspective on Life at Work (Routledge, 1996); Deborah Rhode, Speaking of Sex: The Denial of Gender Equality (Harvard University Press, 1999); L. Fitzgerald and S. Shullman, 'Sexual Harassment: A Research Analysis and Agenda for the 1990s' Journal of Vocational Behavior, 42(1) (1993); Catherine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (Yale University Press, 1979); 'Enforcement Guidance on Harassment in the Workplace' U.S. Equal Employment Opportunity Commission < <https://www.eeoc.gov/laws/guidance/> enforcement-guidance-harassment-workplace>. It addresses how harassment based on race, color, religion, sex, national origin, age, disability, or genetic information is defined under EEOC-enforced statutes and the analysis for determining whether employer liability is established; Anne M. Kelly, Lynn Bowes-Sperry and Emily R. Lean, 'Sexual Harassment at Work: A Decade (Plus) of Progress' Journal of Management, 35(3) (2009); Sumi Cho, Kimberle Williams Crenshaw and Leslie McCall, 'Towards a Field of Intersectionality Studies: Theory, Applications, and Praxis' Signs Journal of Women in Culture and Society, 38:4 (2013); Heather McLaughlin, Christopher Uggen and Amy Blacktone, 'Sexual Harassment, Workplace Authority, and the Paradox of Power, American Sociological Review (Volume 77, Issue 4) (August 2012); Jennifer L. Berdahl, 'Harassment Based on Sex: Protecting Social Status in the Context of Gender Hierarchy' Academy of Management Review (April 2007); Vicki Schultz, 'The Sanitized Workplace' Yale Law Journal (Volume 112, 2003); Uzma Naveed Chaudhry v. Federation of Pakistan PLD 2022 SC 783; Article 1, ILO Violence and Harassment Convention (2019). The Convention entered into force on 25 June 2021 and has been ratified by 39 states; Articles 2 and 11, CEDAW (1979). Pakistan ratified the CEDAW in 1996; Articles 1 and 23, UDHR (1948). Pakistan ratified the UDHR in 1948; Article 7, ICCPR (1966). Pakistan ratified the ICCPR in 2010; Article 7, ICESCR (1966). Pakistan ratified the ICESCR in 2008; Meritor Savings Bank v. Vinson 477 U.S. 57 (1986); Harris v. Forklift System 510 U.S. 17 (1993); Vishaka v. State of Rajasthan AIR 1997 SC 3011; Janzen v. Platy Enterprises [1989] 1 S.C.R. 1252 and Carmichele v. Minister of Safety and Security 2001 (4) SA 938 (CC) rel.

Rashad ul Musawar, Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Petitioner.

Nemo for Respondents.

Assisted by Umer A. Ranjha, Judicial Law Clerk.

Date of hearing: 12th February, 2025.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---"**Sexual harassment is not about sex. It is about power."[1] Briefly stated, Dr. Sidra Zafar, a lady doctor ("respondent No. 5") filed a complaint against her driver, Muhammad Din ("petitioner"), alleging harassment and misconduct before the Ombudsperson, Punjab on 30.12.2019 under the Protection against Harassment of Women at the Workplace Act, 2010 ("2010 Act").The complaint detailed how respondent No. 5 was subjected to abuse, verbal assaults, and character assassination by the petitioner by engaging in inappropriate conduct, using indecent language and behaving unethically with female patients and by spreading malicious rumours about her alleged affairs with male colleagues, scandalizing her reputation, and making derogatory remarks in the presence of other staff members. Despite multiple warnings, his misconduct continued. On 26.10.2019, the petitioner unlawfully entered the ultrasound room while respondent No.5 was performing an ultrasound on a patient. He video-recorded the procedure without consent, later disseminating the video and making false and defamatory allegations against her, insinuating multiple affairs with men in an attempt to tarnish her dignity and professional standing.

2. It is important to underline that respondent No. 5 lacked the direct authority to remove the petitioner from his position, hence enjoying no control over him. Infact, she formally requested her department to transfer him and even after the transfer order was issued, the petitioner defiantly refused to comply with the order, withholding the vehicle's keys and logbook from the next appointed driver.

3. Taking cognizance of the complaint, the Ombudsperson issued a show-cause notice to the petitioner, who denied the allegations. However, after a thorough examination of the evidence, the Ombudsperson found that the allegations stood proved and ruled that the petitioner's actions constituted harassment under Section 2(h) of the 2010 Act, and imposed the major penalty of compulsory retirement from service under Section 4(4)(ii) of the 2010 Act, vide order dated 18.03.2020. Aggrieved by the same, the petitioner preferred a representation before the Governor of Punjab, which was dismissed, vide order dated 06.08.2020 ("impugned order"). Subsequently, the petitioner invoked the constitutional jurisdiction of the Lahore High Court, Lahore, by filing a writ petition against the impugned order, which was also dismissed, vide judgment dated 30.03.2023 ("impugned judgment"). Hence, the instant petition for leave to appeal.

4. We have heard the learned counsel for the petitioner at some length and have gone through the impugned judgment of the High Court and the record of the case.

5. At the outset, it is imperative to recognize that workplace harassment remains a pressing global issue, affecting millions of workers across various sectors. More than one in five workers (22.8% or 743 million people) worldwide have experienced some form of workplace violence or harassment.[2] Women are slightly more likely than men to have faced harassment over their careers.[3] Workplace harassment is not merely an individual grievance-it is a systemic problem that perpetuates gender inequality by restricting women's economic and professional growth. According to the Global Gender Gap Index (2024), (an index designed to measure gender equality globally) Pakistan ranks 145th out of 146 countries, making it the second lowest in the world.[4] In terms of economic participation, it ranks 142nd, reflecting a deteriorating situation for women in the workforce. These alarming statistics underscore the persistent challenges faced by women in professional settings, particularly in countries with significant gender disparities like Pakistan. The prevalence of workplace harassment not only affects individual wellbeing but also reinforces systemic gender inequality, limiting women's participation in the workforce and widening economic gaps.

6. Workplace harassment as a concept embodies a pattern of persistent mistreatment based on gender, power, or hierarchical disparities that creates a climate of fear and oppression in professional settings.[5] It is deeply intertwined with institutional culture and functions as a mechanism of exclusion, discouraging women from fully participating in professional and economic life.[6] Rooted in power imbalances, discrimination, and

systemic inequalities, workplace harassment not only undermines an individual's autonomy and dignity but also erodes broader principles of liberty, equality and social justice, particularly for women and transgender persons. Workplace harassment and sexual harassment are deeply interconnected, as both stem from power imbalances, systemic discrimination, and entrenched societal norms that reinforce gender hierarchies. Sexual harassment is indeed widely understood as a manifestation of power dynamics rather than merely a sexual act. This perspective is well-documented in standard literature, which emphasizes that harassment often stems from an individual's desire to assert dominance, control, or exploit power imbalances, particularly in hierarchical settings like workplaces, schools, or other social structures.[7] Pioneering feminist legal scholar Catherine MacKinnon reframed sexual harassment not as individual misconduct but as systemic sex-based discrimination that reinforces gender hierarchies in the workplace.[8] She identifies two primary forms of workplace harassment. The first, "quid pro quo" meaning (meaning "this for that"), involves explicit demands for sexual favours in exchange for job benefits or avoiding negative consequences. The second, "hostile work environment" harassment, occurs when unwanted sexual conduct - conduct rooted in gender - creates an intimidating, hostile, or offensive work environment affecting an employee's ability to work. Unlike "quid pro quo" harassment, which involves direct coercion, "hostile work environment" harassment is more pervasive and indirect, yet equally damaging. According to MacKinnon, both forms of harassment originate from gender-based discrimination, impeding women's equal opportunity for employment, performance, and professional advancement.[9] For her, sexual harassment is the mechanism through which women are kept in their place in the workplace.

7. MacKinnon's model reinforces that workplace power structures are viewed as hierarchical, with authority flowing from senior to junior employees. However, the present case demonstrates how gendered power dynamics[10]---even if an individual is lower in a formal power hierarchy, they may still wield informal power rooted in societal gender norms; social reinforcement[11]---harassment can be perpetuated by individuals at any level of a hierarchy if they are reinforced by social or cultural norms that condone or trivialize such behavior; and intersectionality[12]---literature on intersectionality highlights how multiple axes of power (gender, race, class, etc.,) intersect to shape experiences of harassment--can override organizational hierarchies. Despite being senior in hierarchy, respondent No. 5 was subjected to harassment by a driver, an employee significantly lower in the institutional hierarchy. This contradiction underscores the reality that harassment is about power, not formal position. The petitioner exerted informal power- through gendered privilege, power dynamics, and social reinforcement-to create a hostile work environment for a senior. This phenomenon reflects deeply ingrained patriarchal norms that resist women's leadership, particularly in male-dominated professions where authority remains subconsciously associated with masculinity. However, gender-based harassment is not solely about hierarchy-it is fundamentally about who is perceived as having the right to wield authority. Even a junior employee, through informal power structures, social reinforcement, and gendered privilege, can create a hostile work environment for a senior. When women's authority is perceived as illegitimate or easily undermined, colleagues, clients, and even subordinates may use harassment as an "equalizer" to reassert traditional power dynamics.[13] This reinforces the notion that workplace harassment is less about sexual desire and more about control and domination, serving as a tool to police and punish women who disrupt male-dominated spaces.[14] Thus, while sexual harassment is primarily understood as a power-based behavior, individuals at any level of a hierarchy can perpetrate harassment, particularly when supported by gendered or social reinforcements.

8. Pakistan has made legislative strides to combat workplace harassment, notably through the 2010 Act, which aims to create a safe working environment for all individuals, including women and transgender persons, free from harassment, abuse, and intimidation with a view towards fulfilment of their right to work with dignity.[15] The 2010 Act provides a definition[16] of harassment, encompassing unwelcome sexual advances. It applies to all workplaces, including public and private sector organizations, educational institutions, and businesses, and establishes mechanism such as inquiry committees within workplaces[17] and the office of the Ombudsperson to adjudicate complaints[18]. It is important to note that recently, the Parliament of Pakistan has expanded the scope of the 2010 Act to enhance its effectiveness through the Protection against Harassment of

Women at the Workplace (Amendment) Act, 2022 ("Amendment Act").[19] The Amendment Act broadens the application of the law by redefining key terms and extending its protections to a wider range of individuals and workplaces. The definition of "employee" now includes informal workers without contracts, freelancers, domestic workers, interns, trainees, among others.[20] Similarly, the definition of "workplace" has been expanded to encompass any location where professional services are rendered, including educational institutions, concerts, studios, performance venues, courts, highways, sporting facilities, and gymnasiums.[21] Additionally, the Amendment Act refines the definition of "harassment" by explicitly incorporating gender-based discrimination-whether sexual in nature or not-when it stems from a prejudicial mindset and results in discriminatory behavior.[22] The phrase "sexually demeaning attitude" has been clarified to mean any gesture or expression with a derogatory connotation that interferes with work performance or creates an intimidating, hostile, or offensive work environment. The Act now explicitly recognizes that harassment includes gender-based discrimination that fosters an abusive workplace, even when it is unrelated to sexual conduct. It is important to note that the petitioner's actions also fall within this expanded definition. Pervasive workplace harassment, such as the denial of equal opportunities or gender-based criticism of one's abilities, also falls within its ambit. Significantly, the Amendment Act replaces the phrase "a woman or man" with "any person" in the definition of "complainant," thereby extending the law's protection to transgender persons as well.[23] This inclusive approach ensures that the law safeguards all persons-male, female, and transgender persons-acknowledging the heightened vulnerability of female and transgender persons to workplace harassment.

9. In effect, the 2010 Act along with the recent amendments uphold gender equality and women's right to work without fear of exploitation under Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution"), safeguard human dignity under Article 14 of the Constitution, promote the right to a safe and working environment under Article 18 of the Constitution, and strengthen institutional accountability. Moreover, they give effect to Article 34 (Principles of Policy) of the Constitution which mandates steps to ensure the full participation of women in all spheres of national life and guarantees equal opportunity for women and transgender persons to earn their livelihood in a safe working environment. Viewing on a constitutional plane, the right to a safe, harassment-free workplace for all genders-including men, women, and transgender persons-is rooted in the constitutional guarantees of life, liberty, dignity, and equality.[24] A safe, harassment-free workplace is intrinsically linked to gender justice, which embodies the protection of human rights, ensuring equal access to opportunities and resources for all genders, and the elimination of discrimination, violence, and structural inequalities based on gender.

10. The 2010 Act along with the Amendment Act aligns with most international legal instruments, most notably the International Labour Organization Violence and Harassment Convention No. 190 ("ILO Violence and Harassment Convention"), which is the first-ever binding international treaty that explicitly provides for the elimination of workplace harassment and violence. It defines workplace harassment as, "A range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual, or economic harm, and includes gender-based violence and harassment."[25] Similarly, Articles 11 and 12 of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW")[26] protect women's right to work in safe and equitable conditions free from discrimination and mandates states to introduce laws and mechanisms to prevent gender-based violence, including workplace harassment. The United Nations Sustainable Development Goals, Goal 5 (Gender Equality) and Goal 8 (Decent Work and Economic Growth) call for eliminating all forms of violence against women and girls and ensuring safe working conditions, and protection from harassment. Other international instruments that support eliminating workplace harassment include the Universal Declaration of Human Rights ("UDHR")[27], the International Covenant on Civil and Political Rights ("ICCPR"),[28] and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR")[29].

11. Courts worldwide have played a crucial role in shaping workplace harassment jurisprudence by interpreting these principles within their national legal frameworks. In Meritor[30], the U.S. Supreme Court formally recognized sexual harassment as a form of sex discrimination under Title VII of the Civil Rights Act, 1964. It established that a hostile working environment constitutes unlawful workplace harassment, even if no economic

loss occurs. The U.S. Supreme Court, once again, in Harris[31] lowered the burden of proof for victims, and employed an objective criterion to establish that if the work environment was hostile or abusive from the perspective of a reasonable person, it qualified as harassment. The landmark ruling of the Supreme Court of India in Vishaka[32] recognized workplace harassment as a violation of fundamental rights, specifically the right to equality, life, and dignity under the Indian Constitution. It also introduced the Vishaka Guidelines, making it mandatory for organizations to establish mechanisms to address workplace harassment and paved way for the enactment of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 in India. In Janzen[33], the Supreme Court of Canada recognized sexual harassment as sex discrimination under the Canadian Human Rights Act and ruled that harassment is about power and control, not sexual attention. In Carmichele[34], the Constitutional Court of South Africa held that the state has a duty to prevent workplace harassment and gender-based violence, placing responsibility on the government to ensure that laws provide protection against sexual violence in employment settings.

12. The 2010 Act and the Amendment Act, along with constitutional and international legal principles, provide a robust framework to combat harassment and promote safe, inclusive work environments. However, the effectiveness of these laws depends on strong judicial enforcement. As jurisprudence evolves, courts must continue to interpret and apply these protections in a manner that upholds human dignity, gender justice, and workplace equality.

13. Viewing the instant case with the aforesaid lens, the contentions raised by the learned counsel for the petitioner have been convincingly answered in the impugned judgment. No jurisdictional error, illegality or procedural irregularity in the impugned judgment has been pointed out to us. In this background we are of the view that the impugned judgment does not warrant any interference. Leave is, therefore, declined and this petition is dismissed.

14. Before parting with this judgment, it is significant to note that Pakistan's commitment to eliminating workplace harassment requires stronger alignment with international legal frameworks. While the 2010 Act and the Amendment Act provide a foundation for safeguarding workers against harassment, the country has yet to ratify the ILO Violence and Harassment Convention which sets a comprehensive global standard for preventing and addressing workplace harassment, ensuring legal accountability, and promoting a culture of dignity and respect. Ratifying ILO Violence and Harassment Convention would reinforce Pakistan's constitutional guarantees of dignity, equality, and nondiscrimination, strengthen legal protections for workers- particularly women and marginalized groups-and signal a firm commitment to upholding international human rights standards.

15. Copy of this judgment be dispatched to the Attorney-General for Pakistan for considering the recommendation in this judgment regarding the ratification of the ILO Violence and Harassment Convention with the relevant quarters.

MH/M-11/SC Petition dismissed.

**P L D 2025 Supreme Court 461**

**Present: Syed Mansoor Ali Shah and Aqeel Ahmed Abbasi, JJ**

**MUHAMMAD SAJID---Petitioner**

**Versus**

**Mst. SHAMSA ASGHAR and others---Respondents**

C.P.L.A. No. 3284-L of 2022, decided on 15th April, 2025.

(Against the order dated 17.10.2022 passed by the Lahore High Court, Lahore in W.P. No. 63770 of 2022).

**Dowry and Bridal Gifts (Restriction) Act (XLII of 1976)---**

----Ss. 2(a), 2(e) & 5---Family Courts Act (XXXV of 1964), S.5---Gifts and presents---Recovery---Bride and groom, proprietary status of---Suit for recovery of dowery and maintenance---Appellant/groom was aggrieved of judgments and decrees passed by the Courts below without distinguishing dowry articles and presents---Validity---All property given to bride as dowry, bridal gifts, or presents vests absolutely in her---Use of the phrase "shall vest absolutely" confers exclusive and unqualified proprietary rights upon bride, thereby barring any adverse claim by husband or his relatives---Subsequent part "and her interest in property however derived shall hereafter not be restrictive, conditional or limited" acts as a safeguard to protect bride's proprietary autonomy from customary or familial encumbrances---Such absolute vesting of rights in the bride remains unaffected by any subsequent separation or divorce, thereby reinforcing her enduring and independent entitlement to such property---Legislative intent underpinning section 5 of Dowry and Bridal Gifts (Restriction) Act, 1976 is to secure independent proprietary status of bride and to shield her from dispossession, particularly in the event of marital breakdown--- Purposive interpretation of provision of section 5 of Dowry and Bridal Gifts (Restriction) Act, 1976 necessarily confines the scope of recoverable property to that which is demonstrably intended for the bride---Accordingly, items gifted to the groom or his relatives, unless clearly shown to be intended for the bridge's use or held in trust for her benefit, fall outside the protective ambit of Dowry and Bridal Gifts (Restriction) Act, 1976---Consequently, presents given to groom's family cannot be claimed by bride under Dowry and Bridal Gifts (Restriction) Act, 1976 unless it is clearly established that those were intended solely for her use or benefit---List provided by respondent/ bride showed that certain items, given to the family of appellant/groom, fell outside the scope of dowry and bridal gifts and were passed as "presents", as defined under Dowry and Bridal Gifts (Restriction) Act, 1976---Such items could not be decreed in favour of respondent/bride---Supreme Court modified the judgment passed by High Court to exclude such items, while the suit decreed in favour of respondent/bride to the extent of remaining items was maintained---Appeal was allowed.

Fawad Ishaq v. Mrs. Mahreen Mansoor PLD 2020 SC 269; Dawlance United Refrigeration v. Muhammad Asim PLD 2016 Lahore 425; Muhammad Arshad v. Additional District Judge 2015 CLC 463; Mussarat Iqbal Niazi v. Judge, Family Court 2013 CLC 276; Abdul Sattar v. Chairman Railways 2011 YLR 1033; Gul Sher v. Maryam Sultana 2011 YLR 1000; Najeeb Ullah v. Makhdoom Akhtar 2009 YLR 1823; Shahnaz Begum v. Muhammad Shafi PLD 2004 Lahore 290; Ghulam Rasool v. Judge, Family Court 1991 CLC 1696; Masud Sarwar v. Farah Deeba 1988 CLC 1546; Muhammad Khalid Karim v. Saadia Yaqoob PLD 2012 SC 66; Syed Mukhtar Hussain v. Saba Imtiaz PLD 2011 SC 260; Ejaz Naseem v. Fareeha Ahmad 2009 SCMR 484; Muhammad Akram v. Hajra Bibi PLD 2007 Lah. 515; Taimoor Aslam Satti v. Alia Bibi 2016 YLR 765; Shamim Akhtar v. District Judge 2016 MLD 242; Nomail Zia v. Adnan Riaz 2014 CLC 87; Article 23. Provision as to property. Every citizen shall have the right to acquire, hold and dispose of property in any part of Pakistan, subject to the Constitution and any reasonable restrictions imposed by law in the public interest. See Pakcom Limited v. Federation of Pakistan PLD 2011 SC 44; Article 24. Protection of property rights. (1) No person shall be deprived of his property save in accordance with law. (2) ... (3) ... (4) ...See Farhan Aslam v. Nuzba Shaheen 2021 SCMR 179; Article 25. Equality of citizens. (1) All citizens are equal before law and are entitled to equal protection of law; (2) There shall be no discrimination on the basis of sex; (3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children. See Government of Khyber Pakhtunkhwa v. Syed Sadiq Shah 2021 SCMR 747; Article 35. Protection of family.

The State shall protect the marriage, the family, the mother and the child. See Farhan Aslam v. Nuzba Shaheen 2021 SCMR 179 and Haseen Ullah v. Naheed Begum PLD 2022 SC 686 rel.

Ch. Zulfiqar Ali Dhudi, Advocate Supreme Court for Petitioner (through V.L. Lahore Registry).

Maqsood ul Haq, Advocate Supreme Court for Respondents.

Assisted by: Umer A. Ranjha, Judicial Law Clerk.

Date of hearing: 15th April, 2025.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**The marriage between Muhammad Sajid ("petitioner") and Shamsa Asghar ("respondent") was solemnized on 05.02.2018. Out of this wedlock, a daughter was born. However, the relationship between the parties became strained, ultimately culminating in a divorce. The respondent thereafter instituted a suit for recovery of maintenance allowance and dowry before the learned trial court. The suit was partially decreed to the extent of dowry and maintenance vide judgment dated 10.03.2022. Aggrieved by the quantum of the decree, both parties filed appeals before the learned Additional District Judge, Sialkot. As far as the petitioner is concerned, he filed an appeal for the reduction of the maintenance allowance while the respondent filed an appeal for the enhancement of the quantum of the decree regarding dowry. The said appeals were partially allowed[1], and more importantly, the valuation of dowry was enhanced while the claim for maintenance was dismissed vide judgment dated 19.09.2022 ("impugned judgment"). Subsequently, the petitioner preferred a civil revision before the Lahore High Court, Lahore, which was dismissed vide order dated 17.10.2022 ("impugned order"). Hence, the instant petition for leave to appeal before this Court.

2. We have heard the learned counsel for the parties at length and examined the impugned order of the High Court and the record of the case.

3. The primary legal question before us is whether the "dowry" claimed by the bride includes "presents" given to the groom or his family.

4. It is important to note that, at the time of the marriage, the respondent's parents had provided her with dowry as per the list appended to the plaint and exhibited as Exhibit P.2 before the learned trial court. The courts below have examined this list failing to appreciate the distinction between "dowry" and "presents". In order to address this issue, we turn to the governing legal framework, namely, the Dowry and Bridal Gifts (Restriction) Act, 1976 ("Act"). This legislation was enacted to regulate the practice of giving and receiving "dowry", "bridal gifts" and "presents" in the context of marriage, with the express purpose of limiting the value and extent of such exchanges. The Act defines the above terms in Sections 2(a), 2(b) and 2(e) in the following manner:

2. Definitions. In this Act, unless there is anything repugnant in the subject or context,

(a) "bridal gift" means any property given as a gift before, at or after the marriage, either directly or indirectly, by the bridegroom or his parents to the bride in connection with the marriage but does not include Mehr;

(b) "dowry" means any property given before, at or after the marriage, either directly or indirectly, to the bride by her parents in connection with the marriage but it does not include property which the bride may inherit under the laws of inheritance and succession applicable to her;

(c) ..

(d) ...

(e) "present" means a gift of any property not being a bridal gift or dowry, given before, at or after the marriage, either directly or indirectly, to either party to a marriage in connection with the marriage or to the relatives of the bride or bridegroom but does not include neundra and salami;

(f) .

(g) .

A perusal of these definitions reveals that the legislature has drawn a clear distinction between three categories of property exchanged in connection with marriage: "dowry[2]," "bridal gifts," and "presents". Dowry originates from the bride's parents to the bride; bridal gifts are conferred by the groom or his parents upon the bride; and presents constitute a residual category of gifts given to either party to a marriage (i.e., bride or groom) or their relatives in connection with the marriage.[3] Further, Section 5 of the Act provides:

5. Vesting of dowry etc., in the bride. All property given as dowry or bridal gifts and all property given to the bride as a present shall vest absolutely in the bride and her interest in property however derived shall hereafter not be restrictive, conditional or limited.

The above stipulates that all property given to the bride as dowry, bridal gifts, or presents shall vest absolutely in her.[4] The use of the phrase "shall vest absolutely" confers exclusive and unqualified proprietary rights upon the bride, thereby barring any adverse claim by the husband or his relatives. The subsequent part "and her interest in property however derived shall hereafter not be restrictive, conditional or limited" acts as a safeguard to protect the bride's proprietary autonomy from customary or familial encumbrances. This absolute vesting of rights in the bride remains unaffected by any subsequent separation or divorce, thereby reinforcing her enduring and independent entitlement to such property.

5. The legislative intent underpinning Section 5 is to secure the independent proprietary status of the bride and to shield her from dispossession, particularly in the event of marital breakdown. A purposive interpretation of this provision necessarily confines the scope of recoverable property to that which is demonstrably intended for the bride. Accordingly, items gifted to the groom or his relatives, unless clearly shown to be intended for the bride's use or held in trust for her benefit, fall outside the protective ambit of the Act.

6. In furtherance of this protective scheme, Section 7 of the Family Courts Act, 1964, read with the Schedule [Part I] appended thereto, vests the Family Court with jurisdiction to adjudicate claims relating to "dower", "maintenance", "dowry", and "personal property and belongings of a wife"[5]. This framework empowers a wife to initiate proceedings for the recovery of property, whether classified as dower, dowry, bridal gifts or presents (given to the bride). In such cases, these items vest absolutely in her as personal property and are recoverable under the Family Courts Act.[6] However, this entitlement does not extend to "presents" given to the groom or his relatives, as such items do not vest in the bride and therefore fall outside the scope of "personal property and belongings of a wife" as contemplated by the law.

7. The right of a bride to her property and belongings under Section 5 is further reinforced by the constitutional guarantees enshrined in Articles 23[7] and 24[8] of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution"), which recognize her right to hold, and dispose of her property irrespective of her marital status. It is further buttressed by Article 25 of the Constitution which guarantees equality before the law and equal protection of the law, obligating the State to eliminate all forms of discrimination against women.[9] Additionally, Article 35 of the Constitution obligates the State to protect the marriage, the family, the mother, and the child.[10] In construing Section 5, courts must therefore interpret the statutory language in harmony with these constitutional principles, ensuring that women's economic autonomy is upheld and not subordinated to any patriarchal or customary practices.

8. A parallel foundation for this interpretation exists in classical Islamic jurisprudence. As articulated in D. F Mulla's Principles of Mohammadan Law, any property, movable or immovable, given to the wife at the time of the marriage, whether by her own family, the husband, or his family, is presumed to be her exclusive property unless clear and cogent evidence is led to rebut this presumption.[11] Under Hanafi law, gifts (hiba)[12] made to the bride in connection with marriage are deemed irrevocable and confer absolute ownership in the bride.[13] This includes dowry, Mehr and any other wedding gifts. Although such gifts exchanged between spouses are considered irrevocable, neither party may subsequently seek their recovery or revocation.[14] The presumption of exclusive ownership reflects a deliberate policy of financial empowerment of women. Any interpretive approach that seeks to include property never delivered to or intended for the bride would distort both the legislative intent and well-settled Islamic principles.

9. Consequently, "presents" given to the groom's family cannot be claimed by the bride under the Act unless it is clearly established that they were intended solely for her use or benefit. The definitional framework provided in Sections 2(a), (b), and (e), read in conjunction with Section 5, establishes a clear threshold: only property that legally vests in the bride is afforded protection under the statute.[15] Accordingly, the term "present" under Section 2(e) must be interpreted restrictively to exclude items given to the groom's family or relatives, as such items do not vest in the bride and are therefore not recoverable by her.

10. We also find it necessary to clarify the reasoning adopted by the High Court in interpreting the term "dowry" under Section 2(b) of the Act.[16] The phrase "directly or indirectly" must be construed purposively to encompass the various modes through which dowry may be given, rather than focusing on its formal classification. This means that dowry need not be transferred in a direct or documented manner; it may be conveyed through intermediaries, informal channels, or third parties, so long as its origin lies with the bride's parents and the transfer is linked to the marriage, and the bride is the ultimate beneficiary.

11. While this judgment is confined to interpreting the statutory protections afforded to the bride, we find it necessary to acknowledge the broader social realities surrounding the practice of dowry. When socially imposed, dowry can exert severe pressure on families, especially those with limited financial resources.[17] In contrast, Islam designates Mehr as the sole obligatory provision, an unconditional gift from the groom to the bride, intending to secure her financial autonomy without burdening her family.[18] Dowry, unless given voluntarily and free from coercion, or social pressure, perpetuates inequality and exploitation, running contrary to the ideals of equitable marriage enshrined in both constitutional and Islamic frameworks. Thus, this ruling must not be misconstrued as an endorsement of dowry; rather, it serves as a firm reminder that any property received by the bride remains exclusively hers and is not subject to claim or appropriation by the groom or his family. No misplaced expectations or entitlements should arise in this regard. Society must strive to abandon regressive dowry practices, and instead promote a model of marriage rooted in simplicity, mutual dignity, and the groom's financial responsibility through Mehr. As a matter of public policy, any gifts or contributions made by the bride's family should be entirely voluntary, and given without societal pressure, thereby preserving familial dignity and reaffirming the constitutional commitment to equality and human dignity.

12. In view of the above, the list provided by the respondent shows that certain items, given to the family of the groom, fall outside the scope of dowry and bridal gifts and pass as "presents", as defined under the Act. These items are listed at Sr. Nos. 65 to 72 in Exhibit P.2 which cannot be decreed in favour of the bride. Therefore, the impugned judgment is modified to exclude these items, while the suit decreed in favour of the respondent to the extent of the remaining items is maintained.

13. This petition is hereby converted into an appeal and allowed in the terms set out above. Accordingly, the impugned order of the High Court stands set aside.

MH/M-44/SC Appeal allowed.

**P L D 2025 Supreme Court 529**

**Present: Syed Mansoor Ali Shah and Athar Minallah, JJ**

**ZAHIDA PARVEEN---Petitioner**

**Versus**

**GOVERNMENT OF KHYBER PAKHTUNKHWA through Secretary Elementary and Secondary Education, Civil Secretariat, Peshawar and others---Respondents**

C.P.L.A. No. 566-P/2024, decided on 17th March, 2025.

(Against the impugned judgment dated 03.06.2024 passed by the Khyber Pakhtunkhwa Service Tribunal, Peshawar in S.A. No. 1959 of 2023).

**(a) Khyber Pakhtunkhwa Civil Servants (Appointment, Promotion and Transfer) Rules, 1989---**

----R.10(4)---Constitution of Pakistan, Arts. 14, 25 & 27---Compassionate appointment---Married daughter of deceased civil servant---Discrimination---Principle of intelligible differentia---Appellant was daughter of deceased civil servant and was appointed under Rule 10(4) of Khyber Pakhtunkhwa Civil Servants (Appointment, Promotion and Transfer) Rules, 1989---Appointment of appellant was terminated after she contracted marriage---Validity---Reasonable classification must be founded on intelligible differentia and must bear rational nexus to the object sought to be achieved by law---Exclusion of married daughters, despite Rule 10(4) of Khyber Pakhtunkhwa Civil Servants (Appointment, Promotion and Transfer) Rules, 1989, itself is inclusive and silence on marital status lacks any rational basis---No intelligible differentia is discernible between a married son and a married daughter that would justify such exclusion in light of the underlying purpose of Rule 10(4) of Khyber Pakhtunkhwa Civil Servants (Appointment, Promotion and Transfer) Rules, 1989, which is to provide compassionate economic relief to bereaved family of a deceased or incapacitated civil servant---Such arbitrary classification is not only unreasonable but plainly unconstitutional, offending the guarantees of equality (Article 25), non-discrimination in public service (Article 27), and the right to dignity (Article 14)---Such act of authorities had undermined expectations of deceased civil servants whose families were assured of lawful security under the compassionate appointment framework---Supreme Court declared clarification of authorities and letter dated 28-04-2023, whereby married daughters were excluded from compassionate appointment under Rule 10(4) of Khyber Pakhtunkhwa Civil Servants (Appointment, Promotion and Transfer) Rules, 1989, to be discriminatory, ultra vires, issued without lawful authority, and incompatible with Constitutional guarantees and international legal obligations---Supreme Court directed respondent/authorities to restore appointment of appellant with all back-benefits and set aside judgment passed by Service Tribunal---Supreme Court reaffirmed that all judicial and administrative authorities bear a Constitutional responsibility to adopt gender-sensitive and gender-neutral language; that this was not a mere formality but reflected a substantive commitment to the values of dignity, equality, and autonomy guaranteed to all citizens under Articles 14, 25, and 27 of the Constitution---Supreme Court observed that the Judiciary must lead by example, ensuring that the words used to interpret and apply law did not themselves had become instruments of exclusion---Appeal was allowed.

S.G.G. Edgar, Craies on Statute Law (Universal Law Publishing Co, 7th Edition, 1971); Muhammad Nadeem Arif v. IG Police, Punjab 2011 SCMR 408; Federal Public Service Commission v. Altaf Hussain 2015 SCMR 581; Muhammad Bashir Limited v. Government of Pakistan 2015 SCMR 630; Province of Punjab v. Kanwal Rashid 2021 SCMR 730; Sant Ram Sharma v. State of Rajasthan AIR 1967 SC 1910; Union of India v. Majji Jangammayya AIR 1977 SC 757; B.N. Nagarajan v. State of Karnataka AIR 1979 SC 1676; P.D. Aggarwal v. State of U.P. AIR 1987 SC 1976; Union of India v. Arun Kumar Roy AIR 1986 SC 737; State of Madhya Pradesh v. GS Dall AIR 1991 SC 772; JAC of Airlines Pilots Association v. DG, Civil Aviation AIR 2011 SC 2220; N S Bindra, Interpretation of Statutes (LexisNexis, 13th Edition, 2022); Khawaja Ahmad Hassan v. Government of Punjab 2005 SCMR 186; Federation of Pakistan v. Shuja Sharif 2023 SCMR 129; Hadayat Ullah v. Federation of Pakistan 2022 SCMR 1691; Syed Azam Shah v. Federation of Pakistan 2022 SCMR 201; Dr. Mobashir Hassan v. Federation of Pakistan PLD 2010 SC 265; Meenakshi Dubey v. Madhya Pradesh AIR 2020 MP 60; Smt. Bhuvaneshwari V. Puranik v. State of Karnataka AIR 2020 Kar. 2303; Superintendent

of Police v. Ijaz Aslam 2024 SCMR 1831; Vice Chancellor Agriculture University v. Muhammad Shafiq 2024 SMCR 527; Pakistan Peoples Party Parliamentarians v. Federation of Pakistan PLD 2022 SC 574; Dr. Vijaya Manohar v. Kashi Rao AIR 1987 SC 1100; Sir William Blackstone in William Blackstone, Commentaries on the Laws of England, Book The First: Chapter the Fifteenth: Of Husband and Wife (Oxford Press) defines coverture as, "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection and cover, she performs everything; and is therefore called in our law-French a feme-covert; is said to be covert-baron, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities that either of them acquires by the marriage; E. H. Deering, 'Coverture and Lasting Effects of Gender Inequality: An Analysis through Equal Protection Jurisprudence' Washington University Jurisprudence Review (Volume 16, Issue 2, 2024); Reed v. Reed 404 U.S. 71 (1971); Frontiero v. Ricardson 411 U.S. 677 (1973); Kirchberg v. Feenstra 450 U.S. 455 (1981); Bombay Labour Union v. Messrs International Franchises AIR 1966 SC 942; C. B. Muthamma v. Union of India AIR 1979 SC 1868; Air India v. Nargesh Meerza AIR 1981 SC 1829; Joseph Shine v. Union of India AIR 2018 SC 4898; Murdoch v. Murdoch [1975] 1 SCR 423; Bhe v. Magistrate Khayelitsha 2005 (1) SA 580 (CC); International Covenant on Civil and Political Rights (1966); International Covenant on Economic, Social, and Cultural Rights (1966). Pakistan ratified ICCPR in 2010 and ICESCR in 2008 and Pakistan ratified the CEDAW on 3 December, 1996; CEDAW Committee, General Recommendation No. 33 on Women's Access to Justice, UN Doc. CEDAW/C/GC/33 (2015) <https://digitallibrary.un.org/record/807253/files/CEDAW_C_GC_33-EN.pdf?ln=en> accessed 23 March, 2025; Martha Albertson Fineman, The Autonomy of Myth: A Theory of Dependency (The New Press, 2005); bell hooks, Feminism is for Everybody: Passionate Politics (South End Press, 2000). She chose to write her name in lowercase to de-emphasize her personal identity and draw attention to her work and message, rather than herself; Simone de Beauvoir, The Second Sex (translated by H.M. Parshley) (Jonathan Cape, 1953); In existentialist terms (drawing on Jean-Paul Sartre, a French philosopher), the "other" means being objectified, excluded from subjectivity, and treated as something less than fully human, especially in social, cultural, and legal systems; Simone de Beauvoir, The Second Sex (translated by H.M. Parshley) (Jonathan Cape, 1953); General Post Office, Islamabad and others v. Muhammad Jalal PLD 2024

SC 1276; Paragraph 25 of the judgment provides that "it is clarified

that the instant judgment shall not affect the appointments already

made of the widow/widower, wife/husband or child of deceased or retired civil servants"; Zarai Taraqiati Bank v. Sarfraz Khan Jadoon 2021 SCMR 1305; Pakistan Medical and Dental Council v. Muhammad Fahad Malik 2018 SCMR 1956; According to the Merriam-Webster Dictionary, the term "liability" connotes "the quality or state of being liable" or "one that acts as a disadvantage"; Paragraph 7 of the impugned judgment rel.

**(b) Islamic law---**

----Women rights over their earnings---Scope---Under Islamic jurisprudence, a woman retains full ownership and control over her property, earnings, and financial affairs, irrespective of her marital status---Any presumption that a married woman becomes financially dependent on her husband is not only legally untenable but also religiously unfounded, and contrary to egalitarian spirit of Islamic law.

Surah An-Nisa (4:7): "For men is a share of what the

parents and close relatives leave, and for women is a share of what the parents and close relatives leave, be it little or much-a share ordained rel.

Rehman Ullah, Advocate Supreme Court for Petitioner (through V.L. Peshawar Registry).

Shah Faisal Ilyas, A.A.G. Khyber Pakhtunkhwa along with Ms. Sabra Parween, DEO (F) Karak for Respondents.

Assisted by: Umer A. Ranjha, Judicial Law Clerk.

Date of hearing: 17th March, 2025.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---"**A woman's legal rights, her personhood, and her autonomy are not erased by marriage, not should they be made contingent upon it."[1] Briefly stated, Zahida Parveen ("petitioner") was appointed as a Primary School Teacher (Basic Pay Scale-12) at Government Girls Primary School, District Karak, under the deceased son/daughter quota pursuant to Rule 10(4) of the Khyber Pakhtunkhwa Civil Servants (Appointment, Promotion, and Transfer) Rules, 1989 ("Rules"), vide order dated 17.03.2023. Subsequently, the District Education Officer (Female), District Karak withdrew the petitioner's appointment order without issuing a show-cause notice, vide order dated 15.05.2023 ("impugned order"). It is pertinent to note that the petitioner's services were terminated based on a clarification letter dated 21.02.2020[2] ("impugned clarification"), which stipulates that the benefit of appointment under the deceased son/daughter quota is not available to a female who has contracted marriage. A further guidance/ clarification was issued by the Provincial Government on 28.04.2023, providing that a married daughter may be considered eligible for appointment only if she has separated from her husband and dependent on her parents.[3] Aggrieved, the petitioner filed a departmental appeal against the impugned order before the Government of Khyber Pakhtunkhwa, which was not responded to within the statutory period. Consequently, the petitioner preferred an appeal before the Khyber Pakhtunkhwa Service Tribunal, Peshawar, ("Tribunal"), challenging the impugned order, which was dismissed vide judgment dated 03.06.2024 ("impugned judgment"). Hence, the instant petition for leave to appeal.

2. Learned counsel for the petitioner submitted that the impugned clarification, when read in conjunction with Rule 10(4) of the Rules constitutes a misinterpretation and misconstruction of the relevant statutory provisions. It was further contended that the petitioner was not afforded an opportunity of personal hearing, and that her services were terminated without the initiation or conclusion of any proper inquiry or fact-finding investigation. Accordingly, the impugned judgment is contrary to the fundamental principles of natural justice and is liable to be set aside. Conversely, learned counsel for the respondents supported the impugned judgment, arguing that the petitioner was not entitled to appointment under Rule 10(4), as she was residing with her husband at the relevant time.

3. We have heard the learned counsel for the parties at length and examined the impugned judgment of the Tribunal along with the record of the case.

4. The Khyber Pakhtunkhwa Civil Servants Act, 1973 ("Act") is the principal law governing the terms and conditions of service for civil servants in the province. Section 26 of the Act empowers the Governor, or any person authorized by the Governor, to make rules necessary for carrying out the purposes of the Act. The Rules formed under the Act provide the framework for appointment, promotion, and transfer of civil servants. Rule 10 relates to appointments under special categories, and Rule 10(4), relevant for the present matter, is reproduced below:

Rule 10. Appointment by Initial Recruitment.--

(1) ...

(2) ...

(3) ...

(4) Where a civil servant dies or is rendered incapacitated/ invalidated permanently during service then notwithstanding the procedure provided for in sub-rule (2), the appointing authority may appoint one of the children of such civil servant, or if the child has not attained the age prescribed

for appointment in Government Service, the widow/wife of such civil servant, to a post in any of the Basic Pay Scales 1-10:

Provided that the child or the widow/wife as the case may be, possesses the minimum qualification prescribed for appointment to the post:

(5) ...

(6) ...

(7) ...

(emphasis supplied)

A plain reading of Rule 10(4) makes it evident that it allows compassionate appointment in cases where a civil servant dies or is rendered permanently incapacitated during service. It allows the appointing authority to

appoint either one of the children of such a civil servant or, if the child is below the eligible age for government service, the widow/wife, to a post in Basic Pay Scales 1 to 10, subject to prescribed qualifications. The language of the rule is inclusive, indicating that the benefit is to be extended equally to all children, without distinction based on gender, marital status, disability or religion. Therefore, a plain reading of the provision indicates that a married daughter falls within the scope of "one of the children" and cannot be excluded solely on the basis of her marital status.

5. Now adverting to the impugned clarification issued by the Establishment Department, Government of Khyber Pakhtunkhwa, whereby Rule 10(4) of the Rules was interpreted so as to restrict its scope, the core question that arises is whether such an executive construction issued by a Section Officer can be regarded as legally competent to clarify, modify, or curtail the scope of the Rules. It is a settled principle of statutory interpretation that executive construction may assist in understanding administrative practice but holds no binding force where it seeks to override or contradict the express language of a statutory rule.[4] While executive authorities may issue instructions to supplement the implementation of rules, but it cannot, under the
pretext of a clarification, amend or distort the scope of duly framed
rules enacted under any statutory mandate.[5] Allowing subordinate executive authorities to restrict the lawful scope of such rules would amount to an impressible encroachment into the legislative domain and offend the doctrine of separation of powers.[6] Executive fiat cannot override legislative command, and any interpretation enabling such a proposition would be legally unsustainable and constitutionally repugnant.[7]

6. Applying this principle to the instant case, it is evident that the impugned clarification issued by the Establishment Department suffers from multiple constitutional and legal infirmities. First, the Establishment Department lacked the authority under Section 26 of the Act to issue any clarification that effectively amends Rule 10(4) --a power vested exclusively in the Governor. By purporting to interpret and restrict Rule 10(4), the impugned clarification amounts to an unauthorized executive act, effectively amending Rule 10(4) through an administrative fiat in clear excess of the executive's mandate. Second, and more critically, we have noticed that the impugned clarification introduces a discriminatory classification by excluding married daughters from eligibility, despite Rule 10(4) containing no such restriction, while allowing married sons to benefit under the same provision. Such a distinction does not meet the test of reasonable classification under Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution"). It is well settled that reasonable classification must be founded on an intelligible differentia and must bear a rational nexus to the object sought to be achieved by the law.[8] In the present case, the exclusion of married daughters, despite the rule itself being inclusive and silent on marital status lacks any rational basis. No intelligible differentia is discernible between a married son and a married daughter that would justify such exclusion in light of the underlying purpose of Rule 10(4), which is to provide compassionate economic relief to the bereaved family of a deceased or incapacitated civil servant. This arbitrary classification is thus not only unreasonable but plainly unconstitutional, offending the guarantees of equality (Article 25), non-discrimination in public service (Article 27), and the right to dignity (Article 14).[9] It also undermines the expectations of deceased civil servants whose families were assured of lawful security under the compassionate appointment framework. Consequently, the impugned clarification and the letter dated 28.04.2023 is liable to be struck down for being ultra vires, discriminatory, and constitutionally repugnant. It is well settled law that when the basic order is without lawful authority, then the entire superstructure raised thereon falls to the ground automatically.[10] Since the impugned clarification lacks lawful authority, the petitioner's termination pursuant to it is also void and declared unconstitutional.

7. The exclusion of married daughters from the ambit of Rule 10(4) is not merely a procedural irregularity--it reveals a deeper structural flaw grounded in patriarchal assumptions about a woman's identity and her role within the legal and economic order. It presumes that upon marriage, a woman relinquishes her independent legal identity and becomes economically dependent on her husband, thereby forfeiting entitlements available to similarly situated male counterparts. At its core, this exclusion constitutes a denial of a woman's right to financial and economic independence--rights that are not ancillary but essential to the exercise of constitutional personhood. The Constitution guarantees rights to individuals, not to marital units or prescribed social roles.

Women are autonomous, rights-bearing citizens in their own right, not by virtue of their relationship to a man, be it father, husband, or son. Financial independence is not a privilege but a necessary precondition for the full realization of citizenship, autonomy, and personhood. A married daughter remains equally a child of her deceased parent[11], and to deny her this entitlement on the basis of marriage is to deny her constitutional identity as an equal citizen. It bears mentioning that the principle of a woman's financial independence is not only grounded in the constitutional text but is also firmly embedded in the Islamic legal tradition. Under Islamic jurisprudence, a woman retains full ownership and control over her property, earnings, and financial affairs, irrespective of her marital status.[12] Therefore, any presumption that a married woman becomes financially dependent on her husband is not only legally untenable but also religiously unfounded, and contrary to the egalitarian spirit of Islamic law.

8. The rationale underpinning the impugned clarification represents a constitutionally impermissible revival of the discredited common law doctrine of coverture[13], under which a woman's legal existence was subsumed into that of her husband.[14] Contemporary constitutional jurisprudence[15] has firmly rejected such notions, affirming that marriage neither extinguishes a woman's legal personhood nor curtails her entitlements under the law. Any policy or executive clarification that seeks to reintroduce this logic under the pretext of marital dependency violates the core constitutional guarantees of dignity, equality, and non-discrimination. Excluding married daughters from compassionate appointment under Rule 10(4) not only violates Pakistan's constitutional framework but also breaches its international legal obligations under various instruments[16], most notably those under the United

Nations Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW")[17]. Article 1 of CEDAW defines "discrimination against women" as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of

men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." Similarly, Articles 2 and 11 of CEDAW explicitly prohibit discrimination in employment on the basis of sex and marital status. The CEDAW Committee has repeatedly underscored that laws and administrative practices rooted in cultural stereotypes or customary norms are incompatible with the State's duty to secure substantive gender equality.[18]

9. More broadly, the exclusion reflects a regressive and untenable conception of womanhood---one that conditions a woman's civic and economic identity on her relationship to a man. The Constitution neither recognises marriage as a status-diminishing event nor permits the State to presume dependency on that basis. This position is firmly grounded in feminist legal theory. Feminist legal scholars such as Martha Fineman, for instance, challenges the legal system's assumption that marriage guarantees economic support for women. She argues that this presumption has historically served to justify their exclusion from public entitlements, and advocates for reconceptualization of the State as a responsive institution--one that affirms women's economic and legal autonomy.[19] This vision aligns directly with Pakistan's constitutional commitment to equality and dignity. Similarly, bell hooks[20] underscores that true liberation requires economic independence and the dismantling of institutional norms that restrict women's access to public life based on the marital status or traditional roles. When the law denies married daughters equal access to employment opportunities, it reinforces the very patriarchal logic that the Constitution seeks to dismantle. This critique finds further resonance in Simone de Beauvoir's seminal work[21] where she interrogates how society has historically defined women not as autonomous beings but as the "Other,[22] " existing in relation to men rather than as individuals in their own right. De Beauvoir argues that a woman's personhood remains unrealised as long as her legal identity and legal entitlements are mediated through marital status or familial roles.[23] To exclude a woman from compassionate appointment merely because she is married is to reproduce precisely the patriarchal structure that denies women their full legal identity. It relegates them to a derivative status, reducing them to dependents rather than recognising them as independent, rights-bearing individuals. As Beauvoir aptly asserts, true liberation and by extension, constitutional equality requires that women be recognized and treated as full and equal participants in public life, with rights and responsibilities that are not contingent on their relationship to men. Anything less

perpetuates a system in which women's access to the justice remains precarious, conditional, and fundamentally subordinate.

10. In view of the foregoing, the exclusion of married daughters from compassionate appointment under Rule 10(4) of the Rules through the impugned clarification and the letter dated 28.04.2023, is declared to be discriminatory, ultra vires, issued without lawful authority, and incompatible with Pakistan's constitutional guarantees and international legal obligations. Consequently, the impugned judgment is set aside, and the respondent-department is directed to restore the petitioner's appointment with all back-benefits.

11. For completeness of record, it is clarified that the judgment of this Court reported as General Post Office, Islamabad and others v. Muhammad Jalal (PLD 2024 SC 1276) has struck down Rule 10(4) of the Rules as being ultra vires the Constitution but has no application on appointments that have been already made.[24] It is well settled that the judgments of this Court operate prospectively, unless declared otherwise.[25] Therefore, the present case remains unaffected by the said judgment.

12. We also find it necessary to express concern over the language used in the impugned judgment, particularly the phrase "a married daughter becomes a liability[26] of her husband."[27] Such language is not only factually and legally erroneous, but also deeply patriarchal, reinforcing outdated stereotypes that are fundamentally incompatible with constitutional values. It assumes that a woman's identity, legal capacity, personhood, and entitlement to support are subsumed into that of her husband upon marriage, treating her as a dependent rather than an autonomous, rights-bearing individual. The use of gender-biased language by judicial or administrative bodies does not merely reflect prevailing social prejudices, it perpetuates and legitimizes structural discrimination, and risks encoding bias into the law itself. Globally, it has been recognized that the language of judicial reasoning plays a critical role in shaping, affirming, or undermining substantive equality.[28] As constitutional subjects, women are entitled to equality not only in result but also in the form, tone, and respect with which the law addresses them. In this context, the Feminist Judgments Project undertaken in several jurisdictions[29] including Pakistan[30] has demonstrated how judicial reasoning can be reframed through a feminist lens, applying existing legal principles while eschewing gendered assumptions and incorporating inclusive, equality-affirming language. The core premise is clear: how law is written matters as much as what it decides.[31]

13. Thus, we deem it imperative to reaffirm that all judicial and administrative authorities bear a constitutional responsibility to adopt gender-sensitive and gender-neutral language. This is not a mere formality, but reflects a substantive commitment to the values of dignity, equality, and autonomy guaranteed to all citizens under Articles 14, 25, and 27 of the Constitution. The judiciary must lead by example, ensuring that the words used to interpret and apply the law do not themselves become instruments of exclusion.

14. This petition is converted into an appeal and allowed in the above terms.

MH/Z-3/SC Appeal allowed.

**P L D 2025 Supreme Court 560**

**Present: Syed Mansoor Ali Shah and Aqeel Ahmed Abbasi, JJ**

**SHAHBAZ LATIF---Petitioner**

**Versus**

**DIG, PAKISTAN RAILWAYS HEADQUARTERS OFFICE, LAHORE and others---Respondents**

C.P.L.A. No. 2646 of 2023, decided on 19th May, 2025.

(Against the judgment dated 11.04.2023 passed by the Federal Service Tribunal, Islamabad in Appeal No. 970(R)CS of 2019).

**(a) Civil service---**

----Considerable length of service---Appointment later found to have been procured through misrepresentation---Dismissal from service---Retrospective recovery of salary---Scope---Petitioner, after rendering services for fifteen years, was dismissed on account of defect in his initial appointment, and salaries received by him were also held recoverable---Validity---Though a public employment secured through misrepresentation or tampered credentials is void ab initio and confers no vested right upon the appointee, nonetheless, the issue of retrospective salary recovery for services rendered over a significant period engages broader principles of fairness, equity, and administrative accountability---In the present case, after fifteen years of continuous and uninterrupted service of petitioner, the Department initiated an inquiry into educational credentials of the petitioner---There is no material on record to show that the petitioner deliberately concealed or suppressed his academic record during this time or resisted verification---On the contrary, service of the petitioner was accepted, utilized, and remunerated without demur or objection---Petitioner had indeed discharged all assigned responsibilities without lapse---In such circumstances, the employer having accepted and benefited from fifteen years of unblemished service cannot now seek restitution of benefits already consumed---Principles of equity, good conscience, and public interest dictate that in the absence of fraud or dishonest conduct by the employee, retrospective recovery of wages is unjust---The recovery of salary for services lawfully and diligently performed is impermissible, notwithstanding defects in the initial appointment---Thus, the order for recovery in the present case is arbitrary, excessive, and in clear violation of equitable principles---Supreme Court set-aside the impugned judgment to the extent of recovery of salary from the petitioner, however, the petitioner's dismissal from service, on account of ineligibility at the time of appointment, would remain intact---Petition was converted into an appeal and was partially allowed accordingly.

Shams ur Rehman v. Military Accountant General, Rawalpindi 2020 SCMR 188 and Engineer in Chief v. Jalaluddin PLD 1992 SC 207 ref.

**(b) Contract Act (IX of 1872)---**

----S. 70---Employment---Considerable length of service---Appointment later found to have been procured through misrepresentation---Dismissal from service---Retrospective recovery of salary---Scope---Doctrine of quantum meruit---Petitioner, after rendering services for fifteen years, was dismissed on account of defect in his initial appointment, and salaries received by him were also held recoverable---Validity---In the present case, the doctrine of quantum meruit finds clear and compelling application---This equitable principle permits reasonable compensation for services rendered where one party has knowingly accepted and benefited from the work of another, even in the absence of a valid or enforceable contract---For over fifteen years, the petitioner continuously performed duties that fulfilled institutional needs and was compensated accordingly---To retrospectively invalidate such remuneration despite the employer's full knowledge and acceptance of the services rendered would be contrary to the fundamental tenet that no person should unjustly enrich themselves at the expense of another---In the present case, it was the employer/ Department that stood to benefit unjustly---Said principle finds statutory recognition under Section 70 of the Contract Act, 1872---Therefore, even where an employment / appointment is found to be irregular, if the employee has continuously and faithfully discharged official functions and the employer has enjoyed the resulting benefit over a significant period, the doctrine of quantum meruit furnishes both a moral and legal basis to preclude retrospective recovery of salary-

--Labors that is not donated but knowingly accepted must be compensated regardless of technical infirmities in the appointment process---The recovery of salary for services lawfully and diligently performed is impermissible, notwithstanding defects in the initial appointment---Thus, the order for recovery in the present case was arbitrary, excessive, and in clear violation of equitable principles---Supreme Court set-aside the impugned judgment to the extent of recovery of salary from the petitioner, however, the petitioner's dismissal from service, on account of ineligibility at the time of appointment, would remain intact---Petition was converted into an appeal and was partially allowed accordingly.

Craven-Ellis v. Cannons Ltd (1936) 2 KB 403 and Benedetti v. Sawiris [2013] UKSC 50 ref.

**(c) Employment---**

----Doctrine of quantum meruit---Scope---The doctrine of quantum meruit, literally meaning "as much as he has earned" or "as much as he deserves" and is a foundational principle of equity and restitution in both common law and civil law jurisdictions---Said principle enables a party to claim reasonable compensation for services rendered or work performed, even where a contract is void, unenforceable, or otherwise defective---The doctrine rests not merely on contractual notions, but on the broader equitable premise that a person who has received and retained a benefit should not be allowed to do so without paying reasonable compensation, particularly where the services were not intended to be gratuitous; which creates an implied obligation in law, akin to a quasi-contract, compelling restitution where unjust enrichment would otherwise result.

State of West Bengal v. Messrs B.K. Mondal and Sons AIR 1962 SC 779 ref.

**(d) Civil service---**

-----Doctrine of administrative acquiescence---Scope---Considerable length of service---Appointment later found to have been procured through misrepresentation---Dismissal from service---Retrospective recovery of salary---Scope---Petitioner, after rendering services for fifteen years, was dismissed on account of defect in his initial appointment, and salaries received by him were also held recoverable---Validity---The doctrine of administrative acquiescence rooted in principles of equity and fairness, which (doctrine) is based on the idea that if a person, observing another about to perform an act that might infringe upon their rights, remains silent in circumstances where an objection might have prevented the act, they may later be estopped from objecting---Transposed to public law, it implies that prolonged inaction or silence by a public authority, particularly where it had the duty and opportunity to act may amount to institutional acquiescence---In such cases, the authority's delay in enforcing its rights or correcting an irregularity can defeat retrospective punitive action, especially where the individual affected has acted in good faith and to the authority's benefit throughout---The prolonged inaction by the department, its failure to undertake any meaningful verification or scrutiny of the petitioner's appointment for fifteen years amounted to institutional negligence---Significantly, it was only after the passage of fifteen years that the department initiated an inquiry into the petitioner's appointment---Said belated action, without any intervening misconduct by the petitioner, underscored that the lapse lies entirely with the department---Administrative silence over such an extended period, particularly where it results in the receipt and acceptance of services, may amount to acquiescence and estop the department from seeking retrospective punitive measures---Petitioner could not be faulted for the department's own dereliction of its gatekeeping responsibilities---While the eventual termination of service due to irregular appointment may be legally sustainable, the direction for recovery of fifteen years' salary without any allegation or proof of fraud or mala fide intent on the part of the petitioner was manifestly disproportionate, inequitable, and legally untenable---The recovery of salary for services lawfully and diligently performed was impermissible, notwithstanding defects in the initial appointment---Thus, the order for recovery in the present case was arbitrary, excessive, and in clear violation of equitable principles---Supreme Court set-aside the impugned judgment to the extent of recovery of salary from the petitioner, however, the petitioner's dismissal from service, on account of ineligibility at the time of appointment, would remain intact---Petition was converted into an appeal and was partially allowed accordingly.

Ramsden v. Dyson (1866) LR 1 HL 129; Sardar Ali Khan v. State Bank of Pakistan 2022 SCMR 1454 and Market Committee, Multan v. Additional Commissioner (Consolidation) Multan 2023 SCMR 1683 ref.

Misbah Gulnar Sharif, Advocate Supreme Court for Petitioner.

Imran Masood, Advocate Supreme Court for Respondents. (Through V.L. Lahore Registry) Mian Ghulam Hussain, Advocate Supreme Court.

Assisted by: Umer A. Ranjha, Judicial Law Clerk, Supreme Court of Pakistan

Date of hearing: 19th May, 2025.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**The sole question arising for determination in the present case is whether the petitioner, despite having been wrongly appointed due to securing 377 marks in Matriculation against the required threshold of 399 marks, a discrepancy discovered only after he had rendered 15 years of continuous service is liable to refund the salary received during that period, as directed by the impugned judgment.

2. It is trite that public employment secured through mis-representation or tampered credentials is void ab initio and confers no vested right upon the appointee. Nonetheless, the issue of retrospective salary recovery for services rendered over a significant period engages broader principles of fairness, equity, and administrative accountability. In the present case, the petitioner entered public
service in 2003. It was not until 2018, after fifteen years of continuous and uninterrupted service that the department initiated an inquiry
into his educational credentials. There is no material on record to show that the petitioner deliberately concealed or suppressed his academic record during this time or resisted verification. On the contrary, his service was accepted, utilized, and remunerated without demur or objection.

3. In the present circumstances, the doctrine of quantum meruit finds clear and compelling application. This equitable principle permits reasonable compensation for services rendered where one party has knowingly accepted and benefited from the work of another, even in the absence of a valid or enforceable contract.[1] For over fifteen years, the petitioner continuously performed duties that fulfilled institutional needs and was compensated accordingly. To retrospectively invalidate such remuneration despite the employer's full knowledge and acceptance of the services rendered would be contrary to the fundamental tenet that no person should unjustly enrich themselves at the expense of another. In this case, it is the employer department that stands to benefit unjustly.

4. The doctrine of quantum meruit, literally meaning "as much as he has earned" or "as much as he deserves" is a foundational principle of equity and restitution in both common law and civil law jurisdictions. It enables a party to claim reasonable compensation for services rendered or work performed, even where a contract is void, unenforceable, or otherwise defective. The doctrine rests not merely on contractual notions, but on the broader equitable premise that a person who has received and retained a benefit should not be allowed to do so without paying reasonable compensation, particularly where the services were not intended to be gratuitous.[2] This creates an implied obligation in law, akin to a quasi-contract, compelling restitution where unjust enrichment would otherwise result.

5. In the context of Pakistani law, the principle finds statutory recognition in Section 70 of the Contract Act, 1872, which provides: "Where a person lawfully does anything for another person... not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered." Therefore, even where an employment appointment is found to be irregular, if the employee has continuously and faithfully discharged official functions and the employer has enjoyed the resulting benefit over a significant period, the doctrine of quantum meruit furnishes both a moral and legal basis to preclude retrospective recovery of salary. Labor that is not donated but knowingly accepted must be compensated regardless of technical infirmities in the appointment process.

6. Alongside, the doctrine of administrative acquiescence must also be considered. Rooted in principles of equity and fairness, this doctrine is based on the idea that if a person, observing another about to perform an act that might infringe upon their rights, remains silent in circumstances where an objection might have prevented the act, they may later be estopped from objecting.[3] Transposed to public law, it implies that prolonged inaction or silence by a public authority, particularly where it had the duty and opportunity to act may amount to institutional acquiescence.[4] In such cases, the authority's delay in enforcing its rights or correcting an

irregularity can defeat retrospective punitive action, especially where the individual affected has acted in good faith and to the authority's benefit throughout. The prolonged inaction by the department, its failure to undertake any meaningful verification or scrutiny of the petitioner's appointment for fifteen years amounts to institutional negligence. Significantly, it was only after the passage of fifteen years that the department initiated any inquiry into the petitioner's appointment. This belated action, without any intervening misconduct by the petitioner, underscores that the lapse lies entirely with the department. Administrative silence over such an extended period, particularly where it results in the receipt and acceptance of services, may amount to acquiescence and estop the department from seeking retrospective punitive measures. The petitioner cannot be faulted for the department's own dereliction of its gatekeeping responsibilities. While the eventual termination of service due to irregular appointment may be legally sustainable, the direction for recovery of fifteen years' salary without any allegation or proof of fraud or mala fide intent on the part of the petitioner is manifestly disproportionate, inequitable, and legally untenable.

7. We specifically queried learned counsel for the respondents as to whether the petitioner had in fact continuously and satisfactorily performed his duties throughout his tenure. The learned counsel candidly conceded that the petitioner had indeed discharged all assigned responsibilities without lapse. In such circumstances, the employer having accepted and benefited from fifteen years of unblemished service cannot now seek restitution of benefits already consumed. Principles of equity, good conscience, and public interest dictate that in the absence of fraud or dishonest conduct by the employee, retrospective recovery of wages is not only unjust, but contrary to settled legal precedent. See Shams ur Rehman[5] and Jalaluddin[6]. The recovery of salary for services lawfully and diligently performed is impermissible, notwithstanding defects in the initial appointment. We are, therefore, of the considered view that the order for recovery in the present case is arbitrary, excessive, and in clear violation of equitable principles and binding precedent.

8. Accordingly, the impugned judgment is set aside to the
extent it orders recovery of salary from the petitioner. However,
the petitioner's dismissal from service, on account of ineligibility
at the time of appointment, shall remain intact and unaffected by this decision.

9. This petition is hereby converted into an appeal and is partially allowed in the above terms.

**P L D 2025 Supreme Court 582**

**Present: Syed Mansoor Ali Shah and Aqeel Ahmed Abbasi, JJ**

**ISHFAQ AHMED ---Petitioner**

**Versus**

**MUSHTAQ AHMED and others---Respondents**

C.P.L.A. No. 1010-L of 2022, decided on 13th March, 2025.

(Against the impugned judgment dated 24.03.2022 passed by the Lahore High Court, Lahore in W.P. No. 75382 of 2021).

**(a) Punjab Rented Premises Act (VII of 2009)---**

----S. 19---Ejectment of tenant---Striking off defence---Petitioner/ landlord was aggrieved of judgment passed by High Court setting aside eviction order passed against respondent/tenant to vacate rented premises---Validity---Oral testimonies and documentary evidence produced by petitioner/landlord remained unchallenged, as right of respondent/tenant to cross-examine petitioner's/landlord's witnesses was struck off and that order attained finality, having remained unchallenged by respondent/tenant---In absence of any rebuttal or cross-examination, evidence led by petitioner/landlord stood uncontro-verted---Material on record conclusively established that petitioner/ landlord was lawful owner of the property---Rent proceedings, by their very nature, are summary in character and are intended to ensure swift and efficient resolution of landlord-tenant disputes, particularly in cases of default, so as to safeguard landlord's Constitutionally protected right to property---Petitioner/landlord remained embroiled in litigation for over seven years merely to recover possession of his property---Course of delay ran counter to the foundational objectives of rent legislation and summary adjudication---Such undue delays not only eroded Constitutional rights of property owners but had also given rise to broader economic and social justice concerns---For landlords, prolonged litigation entails financial strain, loss of rental income, and an inability to utilize their property for productive purposes, which can hinder economic growth---Conversely, tenants facing eviction proceedings often live in uncertainty, which can affect their social and economic stability---A just legal system must, therefore, ensure an equitable balance between rights of landlords and tenants, a balance that is fundamentally disrupted when cases are permitted to stagnate in judicial pipeline---Supreme Court set aside judgment passed by High Court and restored that of Lower Appellate Court, which had rightly upheld the claim of petitioner/landlord---Supreme Court directed respondent/tenant to vacate property in question within two months---Appeal was allowed.

**(b) Constitution of Pakistan---**

----Art. 10A---Right to fair trial and due process of law---Artificial Intelligence (AI), use of---Principle---Right to a fair trial before a competent, independent, and impartial judge is a fundamental principle of due process---AI must not overshadow the core guarantee of judicial autonomy--- While AI has potential to improve consistency and efficiency in legal processes, it also carries risk of introducing biases and limiting judicial discretion---Fairness and transparency must apply equally to AI-assisted rulings---Though AI may enhance efficiency and consistency, it cannot replicate normative judgment, ethical reflection, or contextual sensitivity essential to the act of judging---Dignity of judicial role lies not in mechanical generation of outcomes but in deliberative process of reasoning, listening, and responding a task that remains inherently and irreducibly human---Judicial reasoning involves not only logic but also humanity and it requires attentiveness, moral courage, and the ability to question unjust laws or outdated precedents---By contrast, AI operates within the constraints of existing data and lacks creative imagination and jurisprudential foresight necessary to develop new legal doctrines or safeguard emergent rights---Comparative jurisdictions have cautiously explored AI-assisted adjudication.

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**(c) Administration of justice---**

----Alternate Dispute Resolution---Mediation---Artificial Intelligence (AI), use of---Principle---AI lacks ability to feel emotional tenor, to de-escalate tension between parties, or to recognize the power of silence in a negotiation---AI also cannot build trust across the table through empathy, qualities essential to successful

mediation---This is where human mediators continue to hold the advantage---AI may be able to streamline many facets of legal practice, it cannot replicate deeply human process of mediation, where the emphasis is on understanding, negotiating, and resolving conflicts through human interaction---Mediation is emerging as the future power player in dispute resolution.

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Moeen Ahmed, Advocate High Court with special permission for Petitioner (through V.L. Lahore Registry).

Khalid Jamil, Advocate Supreme Court for Respondents (through V.L. Lahore Registry).

Date of hearing: 13th March, 2025.

**JUDGMENT**

**SYED MANSOOR ALI SHAH, J.---**

Application (C.M.A. No. 1402-L/2025). This is an application submitted by Mr. Moeen Ahmed, Advocate of the High Court, seeking permission to appear and argue the listed petition on behalf of the petitioner. It is stated therein that he had previously represented the petitioner before the High Court and is well conversant with the facts of the case. The matter pertains to a rent dispute, and the parties have been engaged in protracted litigation for the past seven years. In view of the foregoing, and in the interest of justice, the application is allowed. Mr. Moeen Ahmed, Advocate of the High Court, is permitted to appear and argue the case on behalf of the petitioner.

Main Case

2. The facts of the case, briefly stated, are that the petitioner is the lawful owner of a residential property, measuring five marlas, situated in Moza Rajghar, Tehsil and District Lahore ("property"). The said property was purchased by the petitioner through a registered sale deed dated 11.08.1999, executed in his favour by the previous owner, Muhammad Yaqoob. In the year 2016, the property was rented out to Mushtaq Ahmed ("respondent No. 1"), the real brother of the petitioner, under an oral tenancy agreement at a monthly rent of Rs. 35,000/-. Subsequently, respondent No. 1 committed default in the payment of the rent with effect from July 2016, compelling the petitioner to institute eviction proceedings against him on 06.07.2018. During the course of trial, the right of respondent No. 1 to cross-examine the petitioner's witnesses was struck off vide order dated 09.10.2019. The said order attained finality as it was not assailed before any forum. Consequently, respondent No.1 neither cross-examined the petitioner's witnesses

nor produced any evidence in support of his defence. Notwithstanding this, the learned Special Judge (Rent) dismissed the eviction petition vide order dated 01.03.2021, relying solely on the evidence led by the petitioner. The petitioner preferred an appeal before the learned appellate court, which was allowed vide judgment dated 11.11.2021. Aggrieved thereby, respondent No. 1 invoked the constitutional jurisdiction of the High Court which set aside the

judgment of the appellate court and dismissed the petitioner's eviction petition vide judgment dated 24.03.2022 ("impugned judgment"). Hence, the instant petition seeking leave to appeal against the impugned judgment.

3. Learned counsel for the petitioner contends that both the dismissal of the eviction petition and the impugned judgment of the High Court are vitiated by a manifest misreading and misappreciation of the record. It is submitted that the courts below erroneously relied upon purported inconsistencies between the pleadings and the testimonies of the petitioner's witnesses (AW-1 to AW-3), particularly misinterpreting the deposition of AW-1, the petitioner's mother. AW-1 deposed the property in question which had been given to her by the petitioner and that she rented it out and collected rent on his behalf. The courts[1] below erroneously construed this statement to imply that she was acting in the capacity of a "landlady," thereby undermining the petitioner's status as a landlord and negating the existence of a landlord-tenant relationship between the petitioner and the respondent No. 1. Learned counsel submitted that at no point, either in her affidavit or in her oral

testimony, did AW- 1 disclaim the petitioner's ownership or assert

any independent propriety interest in the property. Her role was
confined solely to that of an agent for the purpose of rent collection, a fact consistently corroborated by the testimonies of AW-2 and AW-3. It was further argued that the mere delegation of rent collection does not divest the petitioner of ownership, nor does it sever or extinguish the landlord-tenant relationship. When the pleadings and evidence are read in their entirety and in conjunction, they unequivocally establish the ownership of the property and respondent No. 1's status as a tenant in default.

4. Conversely, learned counsel for respondent No. 1 places reliance on the testimonies of AW- 1 to AW-3 particularly that of AW- 1 to contend that it was the petitioner's mother, and not the petitioner himself, who had rented out the property to respondent No. 1. It is argued that the deposition of AW- 1 undermines the existence of a landlord-tenant relationship between the petitioner and respondent No. 1. However, learned counsel for respondent No. 1 candidly conceded that none of the witnesses, including AW- 1, disputed the petitioner's ownership of the property or denied the obligation of respondent No. 1 to pay rent in terms of the oral tenancy agreement. Thus, notwithstanding the interpretive emphasis placed on AW- 1's testimony, the essential elements of the tenancy, including the petitioner's ownership and the respondent's liability, remain uncontroverted on the record.

5. We have heard the learned counsel for the parties and have carefully examined the testimonies of the three witnesses (AW-1 to
AW-3), as well as the documentary evidence brought on the record. The testimonies of the witnesses unequivocally establish that the petitioner is the admitted owner of the property. Not a single witness has refuted the title to the property of the petitioner. The evidence further reveals that the property was placed under the charge of the petitioner's mother (AW- 1), as the petitioner was residing abroad. Accordingly, the mother rented out the property and collected rent on behalf of the petitioner. The oral testimonies and the documentary evidence produced by the petitioner have remain unchallenged, as the right of respondent No. 1 to cross-examine the petitioner's witnesses was struck off vide order dated 09.10.2019, an order that attained finality, having remained unchallenged by respondent No. 1. In the absence of any rebuttal or cross-examination, the evidence led by the petitioner stands uncontroverted. The material on record conclusively establishes that the petitioner is the lawful owner of the property and that his mother merely acted as his agent for the limited purpose of renting out the property and collecting rent. Her role in managing the property or receiving rent does not, by any legal standard, confer ownership on upon her. While the law may recognize such agents as "landlords" for the procedural purpose of instituting eviction proceedings, such recognition is merely representative and does not derogate from the petitioner's legal title or his status as the actual landlord. The evidence, therefore, unequivocally confirms (i) the petitioner's ownership of the property, and (ii) respondent No. 1's persistent default in the payment of rent since July 2016. The core ingredients for the grant of eviction, namely, the existence of a landlord-tenant relationship under the oral tenancy agreement and continued default in rent payment stand fully established.

Nature and Purpose of Rent Proceedings

6. Rent proceedings, by their very nature, are summary in character and are intended to ensure swift and efficient resolution of landlord-tenant disputes, particularly in cases of default, so as to safeguard the landlord's constitutionally protected right to property. The very rationale of summary proceedings is defeated when such proceedings are allowed to linger for inordinate periods. The present case is a testament to this concern: the eviction petition was instituted before the learned Special Judge (Rent) in 2018, dismissed in 2021, and has only now come up for hearing before this Court in 2025. The petitioner-landlord has remained embroiled in litigation for over seven years merely to recover possession of his property, a course of delay that runs counter to the foundational objectives of rent legislation and summary adjudication. Such undue delays not only erode the constitutional rights of property owners but also give rise to broader economic and social justice concerns. For landlords, prolonged litigation entails financial strain, loss of rental income, and an inability to utilize their property for productive purposes, which can hinder economic growth. Conversely, tenants facing eviction proceedings

often live in uncertainty, which can affect their social and economic stability. A just legal system must, therefore, ensure an equitable balance between the rights of landlords and tenants, a balance that is fundamentally disrupted when cases are permitted to stagnate in the judicial pipeline.

Use of Artificial Intelligence ("AI") - An Innovative Road Ahead

7. There is an urgent need to examine the systemic causes of such delays and to devise innovative court and case management systems, particularly at the level of the District Judiciary, where the bulk of such disputes originate and where the pressure of case pendency is most acutely felt. While structural reforms are a must and require to continue with vigour, the present crisis compels immediate and pragmatic innovation. In Pakistan's overburdened courts, the integration of Artificial Intelligence ("AI") presents a promising path to operational reform, provided its adoption remains grounded in principled constitutional limits. Under Articles 10A[2] and 37(d)[3] of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution"), the right to fair and expeditious justice must not be rendered illusory. Within this constitutional framework, the thoughtful adoption of AI can serve as a viable instrument for access to timely justice and alleviating systemic backlogs.[4]

8. We notice that Commercial GenAI platforms like ChatGPT, Copilot, and DeepSeek have drawn increasing interest from judges around the world who seek new ways to conduct legal research, drafting, and decision support. In 2023, a Colombian judge expressly announced that ChatGPT was consulted when drafting a judicial ruling.[5] By 2025, appellate judges in Washington D.C. publicly cited ChatGPT in their official opinions.[6] More recently, a judge in Pakistan revealed using ChatGPT to adjudge a case both in a civil and a criminal matter, triggering a debate whether commercial AI is appropriate for official judgments.[7] The promise and potential of AI to enhance the efficiency and working of the justice system cannot be ignored any longer. We find this to be a fit case to explore the use of AI by the judiciary in order to actualize the constitutional mandate of Articles 10A and 37(d) of the Constitution.

Use of Artificial Intelligence ("AI")[8] to Enhance Judicial and Institutional Efficiency

Judicial Efficiency

9. AI, when deployed within principled boundaries, holds significant potential to enhance judicial and institutional productivity and efficiency. Its role is not to replace human adjudication but to supplement and support judicial functions, particularly in areas where judges themselves build expertise. Key applications can include: (i) Smart Legal Research: AI tools can rapidly process vast legal databases to extract relevant precedents, statutory provisions, and scholarly commentary, providing judges with timely, contextually rich legal material.[9] Smart Legal Research is an emerging discipline that applies AI technologies[10] to enhance the accuracy and efficiency of judicial research. Courts worldwide have adopted such platforms, recognizing that they uncover additional sources and insights complementing human research efforts. AI tools such as as Westlaw, LexisNexis AI tools, Casetext: CARA AI & CoCounsel, Bloomberg Law, vLex, SUPACE, Judge-GPT, and AI-assisted writing platforms like BriefCatch, WordRake, PerfectIt, Clearbrief and ChatGPT are increasingly integrated into judicial workflows, offering substantial support in legal research and drafting.[11] These tools streamline processes by enhancing efficiency, clarity, and precision, and can improve textual quality by detecting errors and refining structure. Federal Judicial Academy ("FJA"), Islamabad has taken a momentous stride in judicial innovation by introducing Judge-GPT, an LLM-based AI mechanism devised in collaboration with ETH Zurich.[12] Approximately 1500 judges within the District Judiciary currently utilize this technology, which is tailored to conform with Pakistan's legislative framework, procedural statutes, and domestic jurisprudence rather than mirroring any commercial prototype. Preliminary observations include that Judge-GPT expedites case law research and better drafting of court orders, enabling judges to devote enhanced attention to substantive legal analysis. Judges must, however, undertake careful verification of all references suggested by Judge-GPT while adhering to established ethical and procedural protocols.[13] Ongoing training in the system's evolving capabilities is likewise encouraged, ensuring that judges fully comprehend its scope and limitations. Should subsequent reviews affirm the reliability of Judge-GPT, a more extensive deployment may follow, marking a profound milestone in Pakistan's continued efforts to enhance judicial efficiency while preserving foundational principles of justice. (ii) Language Precision and Drafting: AI-powered platforms refine grammar, syntax, and structure, thereby enhancing the clarity, coherence, and

professionalism of judicial writing. Some of the AI-assisted writing platforms are: BriefCatch, WordRake, PerfectIt, Clearbrief and ChatGPT (iii) Comparative Jurisprudence: With increased access to international legal databases, judges can engage with foreign jurisprudence more efficiently, enabling domestic legal thought to evolve in dialogue with comparative and international law. (iv) Decision-Making Support: AI assists in organizing complex case files, identifying key legal questions, and summarizing voluminous records, thereby enabling more informed and timely decision-making. (v) Consistency and Coherence: By identifying conflicting precedents and promoting jurisprudential uniformity, AI promotes predictability and stability in legal outcomes, reinforcing public confidence in the judiciary. These functions establish AI as a valuable supplementary resource. However, AI tools remain subordinate to judicial reasoning and must never be mistaken as a substitute for the exercise of judicial conscience, discretion, or interpretive judgment. It is strongly underlined that the judicial role requires that AI tools be viewed as supplementary aids rather than substitutes for human reasoning. The responsibility for ensuring the accuracy, ethical integrity, and confidentiality of judicial determinations rests entirely with the judge.

Administrative Efficiency

10. Case allocation stands as a critical administrative function in any judiciary. The manner in which these allocations are executed can have a significant impact on both the neutrality and efficacy of adjudication, given that the judge presiding over a matter may influence its outcome. Traditionally, allocations are overseen by court administrators or senior judges, occasionally prompting concerns of partiality, judge shopping, or disproportionate caseloads.[14] In response, courts in a variety of jurisdictions have increasingly adopted AI-driven mechanisms designed to enhance objectivity. These range from straightforward random-assignment programs to advanced algorithms that categorize and assign cases based on their nature or complexity. A principal objective of this approach is the promotion of transparency, achieved by clarifying and standardizing the rules that govern allocation, thereby mitigating any suspicion of favouritism or manipulation. The allocation of cases within judicial systems is a foundational element of procedural fairness, and courts worldwide are increasingly adopting AI-driven frameworks to eliminate discretion, reinforce transparency, and prevent manipulation. Recognizing the risks of partiality, judge shopping, and imbalanced caseloads associated with manual allocations, jurisdictions such as China, Kazakhstan, and various European countries have institutionalized automated, random, or algorithm-based distribution systems often backed by constitutional or statutory mandates. (i) China's "Smart Courts": Historically, the assignment of cases in China was managed by court personnel or senior authorities, thereby introducing the risk of personal discretion.[15] To safeguard impartiality, the Supreme People's Court promulgated directives mandating computer-based random assignment, with narrow exceptions permitted for major or sensitive matters, related proceedings, and circumstances requiring direct leadership supervision.[16] Any departure from this protocol must be substantiated, and any alteration to the initially assigned judge must be transparently disclosed. (ii) Kazakhstan: Kazakhstan's AI-driven case distribution functions as a central component of the nation's judicial digitization efforts, with the Supreme Court offering clear guidance for judicial officers to adopt fully automated protocols that allocate new cases based on defined algorithmic factors such as jurisdiction, classification, and caseload.[17] By analysing whether cases fall into civil, criminal, administrative, or other categories, the system directs matters to judges with the appropriate specialization while continuously monitoring workloads to uphold equitable distribution and procedural efficiency. (iii) Europe: Multiple European judiciaries have adopted automated case allocation to enhance transparency and reduce corruption risks. Slovakia pioneered this approach in 2002 with a computerized random assignment system (colloquially called an "electronic filing room"), effectively transferring authority from court presidents to software-driven algorithms.[18] Under this framework, most Slovakian courts operate through a lottery principle that assigns incoming cases randomly, thereby preventing the selection of pliable judges for specific proceedings.[19] Between 2017 and 2018, Georgia introduced a similar randomized electronic method, that balances factors including case type and judges' existing workloads.[20] Comparable technological mechanisms are employed in Poland, the Czech Republic, and Romania, reflecting a broader commitment to mitigating judicial bias and preserving impartial adjudication. Empirical analyses across these jurisdictions suggest that random allocation strengthens judicial independence

and curtails undue influence. (iv) Argentina: Prometea an AI-based platform implemented in Argentina in 2017 fulfils an integral role in case allocation by classifying and triaging routine filings.[21] (v) Colombia: The Constitutional Court of Colombia adopted PretorIA, an AI system inspired by Argentina's Prometea, to address the large volume of tutela proceedings - petitions for constitutional protection.[22] It constructs a hierarchy of these cases based on urgency and fundamental rights considerations.[23] (vi) Brazil: The judiciary has adopted AI-driven systems that govern case allocation and clustering, thereby enhancing transparency and efficiency.[24]

Gaps in the AI Systems - A Warning

11. Although AI may yield significant advantages its adoption likewise generates pressing ethical considerations that necessitate rigorous examination.[25] Therefore, the responsible use of AI in judicial systems must be grounded in a robust framework of constitutional, ethical, and international legal principles.[26] These principles, inter alia, include: (i) Transparency and Explainability: Contemporary deep learning AI models often function as "black boxes" - a system where inputs and outputs are visible, but the internal decision-making process is unclear or too complex to interpret. This lack of transparency makes it difficult to understand how or why the model reaches its conclusions.[27] A lack of "explainability" mechanisms further undermines accountability: AI-generated outcomes may lack adequate justification, compromising transparency and public trust.[28] (ii) Hallucination: In AI, a hallucination is a fabricated or unfounded output that arises from a purely statistical pattern-matching process rather than an internal fact-checking mechanism.[29] LLMs like ChatGPT can confidently cite non-existent cases or procedural facts if their training data suggests it.[30] Many courts have already disciplined attorneys for filing briefs containing such ghost citations, which erodes trust in the legal process.[31] Therefore, hallucinations present both a technical and judicial challenge. Technically, models like GPT-4 have shown a significant incidence of fabricating legal references (58% in one study), underscoring their reliance on statistical predictions over fact verification.[32] These invented authorities can distort court proceedings, undermine evidentiary accuracy, and raise due process concerns if false information slips into the record. Some courts now require attorneys to certify that any AI-generated text has been thoroughly checked before filing.[33] Therefore, judges apply a trust-but verify approach to maintain factual accuracy and protect the rule of law. (iii) Accountability and Human oversight: Accountability is a central principle of judicial proceedings, especially when AI may inform or influence a ruling.[34] It requires that identifiable human authorities hold final responsibility and that mechanisms exist to question and correct any uncertain or objectionable outcomes arising from AI outputs.[35] Judges retain sole accountability for rulings, ensuring that AI acts only as supportive guidance rather than dictating final outcomes. Its function must remain strictly auxiliary, supporting judges while preserving their indispensable role in administering justice.[36] Therefore, many jurisdictions employ a human-in-the-loop or human-in-command approach.[37] Although AI tools might suggest risk scores or prepare draft decisions, a judge ultimately delivers and authenticates the final ruling and retains complete liability. We reiterate the necessity of human oversight, emphasizing that judges should examine and, when necessary, override AI-generated recommendations to preserve judicial integrity. This process also ensures that while developers or other associated parties may be held accountable for technical errors or biases, overarching responsibility rests with the judiciary. Courts must view algorithmic recommendations as advisory rather than conclusive, thereby protecting judicial authority over legal determinations. (iv) Fairness and non-discrimination: AI-driven tools for bail, sentencing, and comparable judicial decisions frequently replicate or exacerbate existing biases, especially when their underlying training data incorporate historical inequities.[38] AI systems must not influence judicial reasoning by embedding latent demographic or ideological biases. This Court warns against "automation bias", the undue deference to algorithmic recommendations and affirms that any AI adoption must maintain institutional independence and judicial impartiality. Accordingly, many legal frameworks now require more stringent oversight and emphasize that fairness must shape AI adoption in the judiciary, thereby honoring constitutional imperatives and reinforcing judicial integrity.

Artificial Intelligence ("AI"), Judging and Fair Trial

12. The right to a fair trial before a competent, independent, and impartial judge is a fundamental principle of due process. AI must not overshadow the core guarantee of judicial autonomy. While AI has the potential to

improve consistency and efficiency in legal processes, it also carries the risk of introducing biases and limiting judicial discretion. This Court emphasizes that fairness and transparency must apply equally to AI-assisted rulings, in alignment with Article 14 of the International Covenant of Civil and Political Rights[39] and General Comment No. 32[40] of the United Nations Human Rights Committee. UNESCO's 2021 Recommendation on the Ethics of Artificial Intelligence and its 2022 Global Toolkit on AI and the Rule of Law similarly call for accountability and oversight in AI deployment.[41] In Europe, the European Commission for the Efficiency of Justice Ethical Charter
and the Council of Europe Convention on Artificial Intelligence
and Human Rights, Democracy and the Rule of Law, 2024 emphasize transparency and accountability within judicial systems.[42] Moreover, Article 22 of the EU General Data Protection Regulation restricts fully automated decisions with significant legal consequences[43], while the EU AI Act, 2024 designates judicial AI as high-risk, requiring bias-free data, thorough documentation, explainability, and human oversight in accordance with the EU Charter of Fundamental
Rights. Similar initiatives by the OECD and G20 also stress a human-centric and transparent approach to justice.[44] While AI can assist in legal research and streamline tasks, it must not replace the critical human role of considering nuance, moral judgment, and equity.

Judging with AI - A Note of Caution

13. It must be unequivocally affirmed that AI is not, and must never become, a substitute for judicial decision-making. Adjudication is a constitutional function rooted in legal reasoning, institutional independence, and human empathy, qualities no automated system can replicate. The human part of justice lies in its moral and emotional core, the qualities that AI can never replicate (atleast today). While AI may process data and identify legal patterns, it lacks the capacity for compassion, ethical discernment, and the nuanced understanding of human suffering. Judges, juries, and lawyers bring empathy to their decisions, weighing not just the letter of the law but the spirit of fairness, the context of actions, and the possibility of redemption. Justice requires discretion, knowing when to show mercy, when to challenge unjust laws, and when to adapt to evolving societal values. It demands moral courage to uphold equity over rigid logic and the wisdom to balance punishment with rehabilitation. Most importantly, justice must be seen as legitimate by those it serves, and this legitimacy stems from the belief that a fellow human has truly listened, understood, and acted with conscience. Without these irreplaceable human elements, justice becomes a mechanical exercise, devoid of the very humanity it seeks to protect. Therefore, delegating core adjudicative functions to AI would constitute a dereliction of judicial duty constituting misconduct and compromise foundational principles such as impartiality and due process. The courtroom is not a site for algorithmic governance but a space for reasoned, principled deliberation, attentive to both legal nuance and the lived experiences of litigants. Judges must maintain vigilant oversight to ensure that AI remains an assistive tool, not a decision-maker. While such engagement demonstrates a progressive outlook, it also underscores the urgent need to delineate clear boundaries. The deployment of AI within judicial contexts especially those implicating rights, liberties, and access to justice must be approached with caution. Though AI may enhance efficiency and consistency, it cannot replicate the normative judgment, ethical reflection, or contextual sensitivity essential to the act of judging. The dignity of the judicial role lies not in the mechanical generation of outcomes, but in the deliberative process of reasoning, listening, and responding, a task that remains inherently and irreducibly human. Judicial reasoning involves not only logic but also humanity. It requires attentiveness, moral courage, and the ability to question unjust laws or outdated precedents. By contrast, AI operates within the constraints of existing data and lacks the creative imagination and jurisprudential foresight necessary to develop new legal doctrines or safeguard emergent rights. Comparative jurisdictions have cautiously explored AI-assisted adjudication. In China and Estonia, limited-function AI systems resolve low-stakes disputes under strict human oversight. While AI can support judicial functions, it cannot replace the human conscience that animates the judicial role.[45] AI remains merely an auxiliary resource, while indispensable human judgment and individualized discernment remain paramount in judicial decision-making.

14. Judiciaries in the USA, UK, Canada, Australia, and Singapore are methodically incorporating AI-driven tools into legal research.[46] In the US, Chief Justice John Roberts had acknowledged AI's potential while emphasizing that its use demands caution and humility.[47] Reflecting the same circumspection, the Illinois Supreme Court adopted a policy, effective January 1, 2025, that permits AI in court workflows but requires human oversight and accountability, thereby addressing concerns about algorithmic reliability.[48] In England and Wales, 2023 guidance authorizes AI for administrative tasks but excludes it from substantive legal analysis.[49] Similarly, the Canadian Judicial Council issued guidelines in 2023 encouraging AI exploration while reaffirming that judges alone retain responsibility for final rulings.[50] Courts in Australia and Singapore have introduced comparable measures, including Singapore's 2024 guide, which holds court users accountable for AI-generated content.[51] These developments embody a measured approach to AI integration, preserving judicial prudence and upholding the integrity of judicial processes.

The Future

15. While the integration of AI in the judicial process offers promising avenues for reform along with serious limitations, we must remain mindful that this assessment is being made today. The rapid advancement of AI technologies, their applications, and their potential consequences within the judicial system are still unfolding and may with time overcome the gaps identified above. We stand at the intersection of innovation and tradition. For any justice system to remain fair and just in the age of AI, certain core universal values must be preserved as non-negotiable ethical foundations. First and foremost, human dignity and compassion must remain central, ensuring that algorithms never override mercy or individualized consideration in judgments. Fairness and anti-discrimination principles must be hardwired into AI systems to prevent the replication of historical biases, guaranteeing equal treatment under the law. The rule of law must always prevail over the rule of data, with human judges retaining ultimate authority to interpret evolving legal and moral standards. Due process protections, including presumption of innocence and right to confront evidence cannot be compromised by automation. Finally, the system must preserve space for restorative justice and rehabilitation, recognizing that punishment should serve societal healing rather than mere efficiency. These principles form the essential guardrails ensuring that technological advancement enhances rather than diminishes justice, keeping the human element at the heart of legal systems even as AI capabilities grow more sophisticated. As we explore AI's role in the judicial system, we must continue to be vigilant in ensuring that these advancements do not undermine the core principles of justice, fairness, and impartiality. What the judicial landscape will look like in the coming years is uncertain, but the values that underlie our legal system must always remain the foundation upon which any innovative technological edifice is to be built.

The Enduring Role of Mediation and ADR in the AI Era

16. It is interesting to note that as AI continues to revolutionize the legal profession, especially with its ability to automate tasks such as legal research, case law summaries, contract review, drafting, and argument building, it raises an important question: what will be left for lawyers to do? While the more logical and fact-based aspects of legal work are increasingly replaceable by AI, the human qualities that underpin mediation and alternative dispute resolution ("ADR") remain irreplaceable.[52] AI lacks the ability to feel the emotional tenor, to de-escalate tension between parties, or to recognize the power of silence in a negotiation. It also cannot build trust across the table through empathy, qualities essential to successful mediation. This is where human mediators continue to hold the advantage. While AI may be able to streamline many facets of legal practice, it cannot replicate the deeply human process of mediation, where the emphasis is on understanding, negotiating, and resolving conflicts through human interaction. In fact, mediation is emerging as the future power player in dispute resolution. For lawyers in the Global South, there exists a unique opportunity to lead this shift in the legal profession. As AI continues to take over repetitive and fact-based legal tasks, lawyers can position themselves as experts in mediation and ADR, offering services that AI simply cannot replicate. The growing emphasis on mediation as a core skill set presents an exciting opportunity for the next generation of legal professionals to shape the future of dispute resolution in the brave new world of AI.

17. In sum, AI must be welcomed with careful optimism. It can streamline judicial functions, reduce delays, and expand access to legal knowledge. But it cannot replicate the moral, ethical, and empathic reasoning that

lies at the heart of judging.[53] Courts must thus pursue a calibrated integration harnessing AI's efficiencies without surrendering the conscience, independence, and humanity that justice demands.

18. We strongly recommend that the National Judicial (Policy Making) Committee in collaboration with the Law and Justice Commission of Pakistan considers developing comprehensive guidelines on the permissible uses of AI within the judiciary. These must delineate clear boundaries, ensuring that AI is used only as a facilitative tool and never in a manner that compromises human judicial autonomy, constitutional fidelity, or public trust in the justice system. Let a

copy of this judgment be dispatched to both the Law and Justice Commission of Pakistan and the National Judicial (Policy Making) Committee for preparing guidelines to regulate this emerging intersection of law and AI.

19. In light of the foregoing discussion, we affirm the judgment of the appellate court, which rightly upheld the petitioner's claim. Consequently, the impugned judgment of the High Court is set aside. This petition is converted into an appeal and allowed and respondent No. 1 is directed to vacate the property in question within two months from the date of this judgment.

20. Before parting with this judgment, we acknowledge with appreciation the invaluable assistance rendered to the Bench by Ms. Beenish Chaudhary[54], University of Buckingham (U.K.) and Mr. Umer A. Ranjha, Judicial Law Clerk, Supreme Court of Pakistan.

MH/I-7/SC Appeal allowed.

**P L D 2025 Supreme Court 720**

**Present: Syed Mansoor Ali Shah, A.C.J., Muhammad Ali Mazhar and Shahid Bilal Hassan, JJ**

**DISTRICT EDUCATION OFFICER (FEMALE), CHARSADDA and others---Petitioners**

**Versus**

**SONIA BEGUM and 5 others---Respondents**

C.R.P. No. 5/2023 in C.P.L.A. No. 448-P/2017 and C.R.P. No. 6/2023 in C.P.L.A. No. 651-P/2019 and C.R.P. No. 7/2023 in C.P.L.A. No. 655-P/2019 and C.R.P. No. 8/2023 in C.P.L.A. No. 658-P/2019 and C.R.P. No. 9/2023 in C.P.L.A. No. 666-P/2019 and C.P.L.A No. 402-P of 2023, decided on 25th April, 2025.

(Against the judgment dated 29.09.2022 passed by this Court).

C.P.L.A No. 402-P of 2023

(Against the judgment dated 17.03.2023 passed by the Peshawar High Court, Peshawar in W.P. No. 4180-P of 2022).

Per Syed Mansoor Ali Shah, J; Muhammad Ali Mazhar and Shahid Bilal Hassan, JJ. agreeing.

**(a) Khyber Pakhtunkhwa (Appointment, Deputation, Posting and Transfer of Teachers, Lecturers, Instructors and Doctors) Regulatory Act (XII of 2011)---**

----S. 3---Constitution of Pakistan, Art. 188---Supreme Court Rules, 1980, O.XXVI & O.XXVIII, R.3---Civil Procedure Code (V of 1908), S. 114---Review jurisdiction---Scope---Appointment, posting and transfer---Imposing of costs---Petitioner sought review of judgment passed by Supreme Court with regard to determination of place of residence for employment purposes---Validity---Power of review, as articulated in Article 188 of the Constitution and governed by Supreme Court Rules, 1980 ('Rules') and C.P.C. is not an open invitation to revisit judgments merely on the basis of dissatisfaction with the outcome---It is a limited jurisdiction, exercised with great caution and circumspection---Conditions for filing a review petition are specifically enumerated and they do not extend to re-arguing points of law or fact that have already been conclusively determined---Petitioner did not disclose any new or important evidence nor pointed any error that was apparent on the face of record---Issues raised by petitioner were mere reiteration of arguments that had already been considered and rejected by Supreme Court---Supreme Court declined to review its earlier judgment, as there was no ground made out for review and petitions were frivolous and vexatious---Supreme Court imposed cost under Order XXVIII, Rule 3 of Supreme Court Rules, 1980 upon petitioner for squandering valuable time of Supreme Court---Review petition was dismissed.

District Education Officer (Female) Charsadda and others v. Sonia Begum and others 2023 SCMR 217; Justice Qazi Faez Isa v. President of Pakistan PLD 2022 SC 119; Messrs Habib and Co. v. Muslim Commercial Bank PLD 2020 SC 227; Engineers Study Forum v. Federation of Pakistan 2016 SCMR 1961; Government of Pun jab v. Aamir Zahoor-ul-Haq PLD 2016 SC 421; Haji Muhammad Boota v. Member (Revenue) BOR 2010 SCMR 1049; Mehdi Hassan v. Province of Punjab 2007 SCMR 755; Anwar Husain v. Province of East Pakistan PLD 1961 Dacca 155; Ghulam Murtaza v. Abdul Salam Sheikh 2010 SCMR 1883; Haji Muhammad Boota v. Member (Revenue) BOR 2010 SCMR 1049; Abdul Rauf v. Qutab Khan 2006 SCMR 1574; Nawabzada Muhammad Amir Khan v. Controller of Estate Duty PLD 1962 SC 355; Pakistan International Airlines v. Inayat Rasool 2004 SCMR 1737; Noor Hassan Awan v. Muhammad Ashraf 2001 SCMR 367; Kalsoom Malik v. Assistant Commissioner 1996 SCMR 710; Abdul Majeed v. Chief Settlement Commissioner 1980 SCMR 504; Inter Quest Informatics Services v. Commissioner of Income Tax 2025 SCMR 257; Mukhtar Mai v. Abdul Khaliq 2019 SCMR 1302; Zakaria Ghani v. Muhammad Ikhlaq Memon PLD 2016 SC 229; Jamshoro Joint Venture v. Khawaja Muhammad Asif 2014 SCMR 1858; Suja A Thomas, 'Frivolous Cases' (2010) 59(2) DePaul Law Review 633; Cooter and Gell v. Hartmax Corp 496 U.S. 384 (1990); Wormer. 765 F.2d 86 (7th Cir. 1985); Cropper v. Smith (1884) 25 Ch D 700 (affirmed in Prince Abdulaziz v. Apex Global Management Ltd 120141 UKSC 64); De Cruz Lee v. Lee 2015 ONSC 2012; Irmya v. Mijovick 2016 ONSC 5276; British Columbia (Minister of Forests) v. Okanagan Indian Band, 2003 SCC 71; Sanford Levinson. 'Frivolous Cases: Do Lawyers Really Know Anything at All?' (1986) 24(2) Usgoode Hall LJ 353; Sanjeev Kumar Jain v. Raghubir Saran Charitable Trust 2012 (1) See 455; Bakht Biland Khan v. Zahid Khan PLD 2024 SC 1273; S.M. Sohail v. Sitara Kabir-ud-Din PLD 2009 SC 397; Lutfullah Virk v.

Muhammad Aslam Sheikh PLD 2024 SC 887; National Highway Authority. Islamabad v. Messrs Sambu Construction 2023 SCMR 1103; Capital Development Authority v. Ahmed Murtaza 2023 SCMR 61; Javed Hameed v. Aman Ullah 2024 SCMR 89;

Zakir Mehmood v. Secretary, Ministry of Defence 2023 SCMR 960; Pirbhai v. Singh 2011 ONSC 1366; Vinod Seth v. Devinder Bajaj (2010) 8 SCC 1; Pandurang Vithal Kevne v. Bharat Sanchar 2024 1NSC 1051 and Ashok Kumar Mittal v. Ram Kumar Gupta (2009) 2 SCC 656 rel.

**(b) Supreme Court Rules, 1980---**

----O.XXVIII, R.3---Civil Procedure Code (V of 1908), Ss. 35 & 35A---Costs, imposing of---Object, purpose and scope---Consistent imposition of meaningful and proportionate costs rooted in statutory authority, judicial discipline and Constitutional imperatives is essential to deter abuse of process and restore procedural integrity.

Per Muhammad Ali Mazhar, J. agreeing

**(c) Constitution of Pakistan---**

----Art. 188---Supreme Court Rules, 1980, O.XXVI---Civil Procedure Code (V of 1908), S. 114---Review jurisdiction---Scope---Every judgement rendered by Court of law is presumed to be a solemn and conclusive determination of all points arising out of the lis---Irregularities if any which have no significant effect or impact on outcome would not be sufficient to warrant review---If incongruity or ambiguity is of such a nature as to transmute the course of action from being one in aid of justice to a process of injustice then a review decision may be instituted for redressal to demonstrate error if it is found floating conspicuously on the surface of the record---Mere desire for rehearing of the matter cannot constitute sufficient ground for the grant of review which by its very nature cannot be equated with the right or remedy of appeal---Sanctity and finality of judicial determinations must not be compromised by mere persistence of litigants or mechanical issuance of advocate certificates---Review jurisdiction is not a fall back for unsuccessful litigants to reopen a lis but a narrowly confined judicial tool intended to correct palpable and consequential mistakes.

**(d) Constitution of Pakistan---**

----Art. 188---Supreme Court Rules, 1980, O.XXVI---Civil Procedure Code (V of 1908), S. 114---Review---Phrase "error apparent on the face of record"---Scope---Orders based on an erroneous assumption of material facts or those made without adverting to a provision of law or reflecting departure from undisputed construction of law and the Constitution may amount to an error apparent on the face of the record and can be rectified.

Commissioner Inland Revenue Z-III, Corporate Regional Tax Office, Tax House, Karachi v. Messrs MSC Switzerland Geneva and others 2023 SCMR 1011 = 2023 SCP 150 rel.

Shah Faisal Ilyas, Addl. AG, KPK for Petitioners.

Nemo for Respondents.

Umer A. Ranjha, Judicial Law Clerk and Ms. Uzma Zahoor, Research Officer, Supreme Court of Pakistan.

Date of hearing: 25th April, 2025.

**JUDGMENT**

C.R.Ps 5 to 9/2023

**SYED MANSOOR ALI SHAH, A.C.J.---**Through the present petitions, the petitioners seek review of the judgment of this Court dated 29.02.2022. This Court upheld the judgments of the Peshawar High Court, Peshawar in the impugned judgment under review (reported as District Education Officer (Female) Charsadda and others v. Sonia Begum and others (2023 SCMR 217) whereby challenges brought by candidates who had been denied appointments as Primary School Teachers ("PSTs") due to discrepancies between their domicile certificates and CNIC addresses were dismissed. The Court affirmed that under Section 3 of the Khyber Pakhtunkhwa (Appointment, Deputation, Posting and Transfer of Teachers, Lecturers, Instructors and Doctors) Regulatory Act, 2011, it is the domicile certificate, and not the CNIC address, that determines a candidate's permanent residence for employment purposes. It further cautioned that relying solely on CNIC addresses would undermine the value of domicile certificates and unfairly disadvantage otherwise qualified

applicants. Recognizing the distinction between "domicile" and "residence" and invoking the doctrine of legitimate expectation, the Court held that candidates who had successfully passed competitive examinations and possessed valid domicile certificates could not be denied appointments on technical grounds. Consequently, leave to appeal was refused. Hence, these instant review petitions.

2. At the very outset, we deem it necessary to express our concern regarding the growing trend of filing review petitions in a casual and mechanical manner, often as a veiled attempt to reargue matters already conclusively adjudicated. While the right of access to courts is a cornerstone of our constitutional framework, it is not an unqualified or limitless right. Such access must be exercised with due responsibility and in a manner that upholds the dignity and finality of judicial proceedings. When litigants such as the petitioners before us initiate repetitive and meritless petitions, or employ tactics aimed at delaying the conclusion of proceedings, they erode the integrity of the judicial process. In light of these concerns, it is necessary to restate the settled and narrow contours of the Court's review jurisdiction.

Scope of Review Jurisdiction

3. It must be noted that Article 188 of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution") empowers the Supreme Court to review any judgment pronounced or order made by it. Article 188 provides:

> Review of judgments or orders by the Supreme Court.---The Supreme Court shall have power, subject to the provisions of any Act of Majlis-e-Shoora (Parliament) and of any rules made by the Supreme Court, to review any judgment pronounced or any order made by it.

The aforesaid provision empowers the Supreme Court to review its judgment under Article 188 of the Constitution, subject to the provisions of any Act of Parliament, and of any rules made by this Court. The procedure governing the exercise of review jurisdiction is further elaborated in the Supreme Court Rules, 1980 ("Rules"). Order XXVI, Rule 1 of the Rules stipulates that a review petition may be filed on grounds similar to those mentioned in Order XLVII, Rule 1 of the Code of Civil Procedure, 1908 ("C.P.C."), which provides that a review may be sought where there is (1) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of, or could not be produced by, the third party seeking review at the time when the decree was passed or order made; (2) some mistake or error apparent on the face of the record, and (3) any other sufficient reason.[1]

4. The term "mistake or error apparent on the face of the record" cannot be defined with precision or exhaustiveness, and there would always remain an element of indefiniteness inherent in its very nature.[2] It is to be determined in each case on the basis of its own peculiar facts. Such an error may involve a question of law or fact; however, the critical condition is that it must be self-evident, immediately apparent, and not require extensive discussion or reasoning.[3] If an error is not self-evident and its detection demands prolonged debate or analysis, it cannot be classified as an error apparent on the face of the record. A decision, order, or judgment cannot be corrected simply because it is erroneous in law, or because a different view could have been taken by the court or tribunal on a point of law or fact.[4] It is important to note that a party filing a review petition cannot be allowed to repeat previously overruled arguments in an attempt to reopen the conclusions reached in the judgment.[5] It is well established law that the power of review should not be confused with the appellate power, which permits a superior court to correct errors made by a subordinate court.[6] Review proceedings are distinct from appeals and must be strictly confined to the scope and parameters outlined in Order XLVII, Rule 1 of the C.P.C.

5. In view of the aforesaid, the upshot of the discussion is that the power of review, as articulated in Article 188 of the Constitution and governed by the Rules and the C.P.C., is not an open invitation to revisit judgments merely on the basis of dissatisfaction with the outcome. It is a limited jurisdiction, exercised with great caution and circumspection. The conditions for filing a review petition are specifically enumerated, and they do not extend to re-arguing points of law or fact that have already been conclusively determined.

6. We have heard the learned Additional Advocate General, Khyber Pakhtunkhwa at some length, gone through the impugned judgment, record of the case and the law on the subject. It becomes evident that these petitions seek to rehear matters already settled in the judgment under review. These petitions do not disclose

any new or important evidence, nor do they point to any error that is apparent on the face of the record. In fact, the issues raised in the review petitions appear to be a mere reiteration of arguments that have already been considered and rejected by this Court. Therefore, we find that there is no ground made out for the review of the impugned judgment and are of the view that the present petitions are completely frivolous and vexatious.

Frivolity of the Petitions

7. Frivolous claims serve no purpose other than to waste the Court's time and resources. The repeated filing of such petitions, especially when the issues have already been conclusively settled, clutters the judicial process with baseless assertions. This compels the Court to divert its valuable time and attention to matters devoid of merit. Frivolous litigation is costly not only for the judicial system but also for litigants.[7] Such cases consume limited court resources and require parties to expend substantial time and financial resources defending unwarranted claims. This imposes an undue burden on both the judiciary and the litigants, leading to avoidable expenses and procedural delays. Moreover, frivolous litigation delays justice for deserving litigants by diverting the Court's focus from meritorious cases[8], thereby disrupting the efficient administration of justice and impeding the timely resolution of genuine disputes.

8. It is pertinent to highlight that over 2.2 million cases are currently pending before courts across Pakistan, including approximately 56,635 cases before this Court alone.[9] A proportion of these consist of review petition.[10] Frivolous, vexatious, and speculative litigation contributes substantially to this backlog, artificially inflating dockets and obstructing the expeditious adjudication of legitimate claims. The misuse of judicial processes not only squanders finite judicial resources but also undermines public confidence in the justice system. Frivolous and vexatious litigation has become a serious menace, choking and clogging the judicial machinery. Resources, both human and material that ought to be deployed toward resolving genuine disputes are instead wasted on these baseless claims.[11] This form of litigation must be unequivocally discouraged and systematically eliminated. As Justice Bowen famously remarked, "I have found in my experience that there is one panacea which heals every sore in litigation and that is costs."[12] The imposition of costs, as authorized under Order XXVIII, Rule 3 of the Rules[13], serves as a critical deterrent against the abuse of judicial process. It reinforces judicial discipline, promotes expeditious adjudication, and protects the integrity of the legal system. By ensuring that only bona fide claims occupy the Court's time, cost sanctions not only preserve judicial resources but also enhance broader access to justice.

Imposition of Costs

9. The imposition of costs functions as a crucial corrective mechanism within the justice system, simultaneously deterring meritless claims and preserving court access for genuine litigants.[14] As Professor Sanford Levinson has aptly observed, cost sanctions serve as an economic check on frivolous litigation, discouraging litigants from misusing judicial processes for vexatious purposes.[15] Any meaningful reform aimed at reducing case pendency, promoting alternative dispute resolution, or streamlining civil justice will be ineffective without robust and enforceable provisions on the imposition of costs.[16] This Court has consistently emphasized that frivolous litigation results in an unjustified waste of judicial time perpetuated in part by the absence of meaningful financial repercussions for filing baseless claims.[17] Such litigation not only delays the resolution of valid disputes but also misappropriates public resources, including funds, facilities, and manpower. These are financed by taxpayers and must be judiciously utilized.[18] Cost sanctions in frivolous and vexatious matters are thus essential to fulfilling the constitutional mandate of a fair trial under Article 10A of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution"). Failure to impose costs effectively denies genuine claimants access to justice under Article 9 and impairs the constitutional goal of expeditious justice outlined in Article 37(d) of the Constitution. In recognition of this, the Supreme Court has consistently directed all tiers of the judiciary to impose appropriate costs to check the abuse of process, prevent unwarranted adjournments, curb procedural delinquency, and preserve the judiciary's efficiency and integrity.[19]

10. The legal framework governing the imposition of costs in Pakistan is rooted in both statutory law and procedural rules. In addition to Order XXVIII, Rule 3 of the Rules, Section 35 of the C.P.C. empowers courts

to determine by whom and to what extent costs are to be paid. Section 35-A further authorizes compensatory costs against parties who raise false or vexatious claims or defences. More recently, the Costs of Litigation Act, 2017 enacted for the Islamabad Capital Territory has fortified the cost regime by mandating the imposition of compensatory, special, and adjournment costs. This transforms cost sanctions from a discretionary tool into a mandatory judicial duty. Although this statute currently applies only in the Islamabad Capital Territory, it offers a viable legislative model for adoption across provinces to standardize and strengthen deterrence against frivolous litigation nationwide.

11. One of the central challenges in curbing frivolous litigation is the absence of a universally accepted definition of a "frivolous suit." As Professor Suja A. Thomas has observed that there is considerable disagreement about what exactly qualifies as frivolous.[20] In this context, courts may consider a set of non-exhaustive factors to assess whether a case is frivolous. These inter alia include: (i) Conduct of the parties: Any behaviour that unnecessarily prolongs or delays the proceedings[21], (ii) Margin of success or failure: Whether the claim was reasonably arguable or plainly untenable from the outset[22], (iii) Falsehood or fraud: If a party or its witnesses lied under oath or submitted forged or fabricated document[23], (iv) Compliance with legal obligations: Whether the party has scrupulously complied with the Code of Civil Procedure, the Evidence Act, and other applicable substantive or procedural laws[24], (v) Unnecessary denials: If a party refused to admit facts or documents that ought reasonably to have been admitted[25], and (vi) Violation of court processes: Failure by a party or its legal representative to comply with court rules, practice directions, or lawful court orders.[26]

12. In various jurisdictions, including the United States[27], lawyers are ethically and procedurally obligated to certify, before filing a case, that the action is not initiated for improper purposes such as to harass, delay, or increase litigation costs unnecessarily. They must also certify that the claims, defences, and legal contentions are warranted by existing law and that factual contentions are supported by evidence. Courts have the discretion to penalize not only litigants but also legal representatives who violate these duties. This reinforces professional accountability and deters frivolous litigation. In Pakistan, a similar obligation exists specifically in the context of review petitions. Under the Rules, it is mandatory that the Advocate signing the review application briefly state the precise grounds on which the review is sought.[28] Furthermore, the Advocate must provide a reasoned certificate affirming that, in their professional opinion, the case warrants review. This safeguard ensures the limited jurisdiction of review is not misused, thereby conserving judicial time for matters of genuine substance.

13. Another significant obstacle in addressing frivolous litigation is the difficulty in determining what constitutes "reasonable" litigation costs. As emphasized by Sir Rupert Jackson and the Manitoba Law Reform Commission, cost regimes should be proportionate, comprehensible, and flexible enough to deliver justice in individual cases.[29] Token or nominal costs fail to deter luxury or baseless litigation. The Supreme Court of India has advocated for the imposition of punitive, rather than merely compensatory costs to effectively discourage frivolous claims.[30] Courts must therefore impose costs that are realistic and proportionate not only to disincentivize meritless litigation but also to encourage the use of alternative dispute resolution mechanisms, all while safeguarding access to justice for those with legitimate grievances.

14. The consistent imposition of meaningful and proportionate costs rooted in statutory authority, judicial discipline, and constitutional imperatives is essential to deter abuse of process and restore procedural integrity. It is imperative that courts across all tiers actively embrace cost sanctions as a necessary tool for judicial economy, procedural fairness, and the delivery of timely and effective justice. Only by weeding out vexatious and baseless claims can the judiciary ensure that its limited resources are directed toward those causes that truly deserve legal redress.

15. In view of the aforesaid, these civil review petitions are accordingly dismissed, with costs of Rs. 100,000/- (Rupees One Hundred Thousand only) imposed under Order XXVIII, Rule 3 of the Supreme Court Rules, 1980, for being frivolous and for having squandered the valuable time of the Court. The costs shall be deposited within fifteen (15) days with any charitable institution recognized under the Thirteenth Schedule to

the Income Tax Ordinance, 2001. Proof of such deposit must be placed on the record of this case. In the event of non-compliance, the office shall place the matter before the appropriate Bench for further orders.

C.P.L.A No. 402-P/2023

16. This petition is barred by limitation, having been filed with a delay of thirteen (13) days. The application for condonation of delay (C.M.A. No. 600-P/2023) fails to disclose any sufficient cause warranting condonation and is, therefore, dismissed. Even otherwise, the petition seeks to agitate the same issue which has already been conclusively adjudicated in District Education Officer (Female) Charsadda and others v. Sonia Begum and others (2023 SCMR 217). We see no justification to depart from the earlier view taken by this Court. Accordingly, this petition is dismissed both on the ground of limitation and on merits.

Sd/-

Acting Chief Justice

Sd/-

Judge

I have appended my Additional

Sd/-

Judge

**ADDITIONAL NOTE**

**MUHAMMAD ALI MAZHAR, J.---**The judgment authored by one of us, which has been sought to be reviewed [District Education Officer (Female) Charsadda and others v. Sonia Begum and others (2023 SCMR 217)] resonates that all the questions raised by the parties, both for and against, were properly discussed and answered in extenso. Since no plausible or reasonable ground, including any error apparent on the face of the record, was accentuated, therefore, all review petitions were dismissed with cost by means of the judgment authored by my learned brother, Justice Syed Mansoor Ali Shah. As the filing of review petitions has become an increasing trend, often resorted to as a matter of course rather than as a means to correct errors apparent on the face of the record as a legal necessity or propriety, I also feel it is my utmost responsibility to contribute an additional note on this crucial issue.

2. No doubt, this Court has been conferred the powers to review its judgment under Article 188 of the Constitution of the Islamic Republic of Pakistan ("Constitution"), but this is subject to the provisions of any Act of Parliament and of the rules made by this Court. In this background, Order XXVI of the Supreme Court Rules, 1980 ("Rules"), is also quite pertinent, wherein it is expounded that, subject to the law and practice, the Supreme Court may review its judgment or order on grounds similar to those mentioned in Order XLVII, Rule 1, of Code of Civil Procedure, 1908 ("C.P.C."), and in a criminal proceeding, on the ground of an error apparent on the face of the record. The precondition and yardstick for filing a review application is that the Advocate signing the application shall specify, in brief, the points upon which the prayer for review is based, and shall add a certificate in the form of a reasoned opinion that review would be justifiable in that particular case.

3. While recognizing the right to file a review petition within the framework and scope of review jurisdiction in the aforesaid rules, a penal clause is also embedded; that in case the Court concludes that the Review Application was vexatious or frivolous, the Advocate or the Advocate-On-Record drawing the application shall render himself liable to disciplinary action.

4. The survey of Order XLVII, Rule 1, C.P.C., divulges that an aggrieved person may file an application for review of the judgment or order on the ground of the discovery of new and important information or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. So, for all intents and purposes, the review of judgment or order may be entreated only in instances of errors in the judgment or order floating on the surface of the record with a substantial impact on the final outcome of the lis. However, it does not connote or entail a right of rehearing of a decided case, especially where there has been a mindful and thoughtful decision on the point of law as well as fact. In my view, every judgment rendered by a court of law is presumed to be a solemn and

conclusive determination of all points arising out of the lis. Irregularities, if any, which have no significant effect or impact on the outcome, would not be sufficient to warrant review. However, if the incongruity or ambiguity is of such a nature as to transmute the course of action from being one in aid of justice to a process of injustice, then, obviously, a review petition may be instituted for redressal, to demonstrate the error if it is found floating conspicuously on the surface of the record, but a mere desire for rehearing of the matter cannot constitute sufficient ground for the grant of review, which, by its very nature, cannot be equated with the right or remedy of appeal. The clemency afforded by review exists to nip in the bud an irreversible injustice, if any, done by a court, such as misconstruction of law, misreading of evidence, or non-consideration of pleas raised, which would amount to an error floating on the surface of the record. However, where the court has taken a conscious and deliberate decision on a point of fact or law, a review petition will not be competent. The review jurisdiction of the court is neither commensurate with a right of appeal nor an opportunity of rehearing, nor can a judgment or order be reviewed merely because a different view could have been taken.

5. At present, it has become a custom or routine practice to file review applications unwarily and injudiciously, based on certificates issued by advocates that merely imitate the grounds already urged and decided in the main petition or appeal, without specifying any genuine error in the judgment or order which merits its reversal. It is high time that this practice be denounced and condemned, as it constitutes nothing but a waste and depletion of the precious time of the Court and places an unnecessary burden on its docket. Reiteration of the same arguments in a review application is not sufficient to prompt a different view. A review of a judgment or order is a substantial step and such a departure should only be resorted to when a patent mistake, inadvertence, or oversight appears on the record which cause a serious miscarriage of justice.

6. While adverting to the provision or construction of any law and/or the Constitution, some errors may be apparent on the face of the record which cause substantial injury which require some remedial measures to advance the cause of justice. This may include the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of, or could not be produced by, the party seeking review at the time when the decree was passed or order made; some mistake or error apparent on the face of the record; or any other sufficient reason. The ground of error apparent on the face of the record, is common to review in both civil and criminal proceedings. For such review to be entertained, the specific ground must not only be mentioned in the certificate of the advocate, but also be conspicuously spotted in the review petition, rather than relying on sweeping or irrational grounds having no nexus with the case. Undoubtedly, it is the duty of the Judges of the apex Court to correct their errors, because the principles of law enunciated in their judgments are binding on all other courts in the country under Article 189 of the Constitution. Orders based on an erroneous assumption of material facts, or those made without adverting to a provision of law, or reflecting a departure from the undisputed construction of law and the Constitution, may amount to an error apparent on the face of the record and can be rectified. Earlier also, in my judgment in the case of Commissioner Inland Revenue Z-III, Corporate Regional Tax Office, Tax House, Karachi v. Messrs MSC Switzerland Geneva and others (2023 SCMR 1011 = 2023 SCP 150), the review jurisdiction was discussed in extenso. With reference to the aforesaid judgment, the rationes decidendi deducible from a plethora of local and foreign dicta rendered time and again on the exercise of review jurisdiction are as under:

"1. Mistakes or errors which are self-evident and found floating on the face of the record, or the production of new and important evidence which was not in the knowledge of the applicant after the exercise of due diligence and which could not be produced at the time the order under review was made, which, if noticed earlier, would have material bearing on the final result of the case and, if not corrected, may perpetuate illegality and injustice

2. Orders based on an erroneous assumption of material facts, or without adverting to a provision of law, or a departure from undisputed construction of law and Constitution may amount to an error apparent on the face of the record. However, where there is a material irregularity but there is no substantial injury consequent thereon, the exercise of power to review to alter the judgment would not necessarily be required as the irregularity must be of such a nature as to convert the process from being one in the aid of justice to a process of gross injustice

3. Misconstruction of law, misreading of the evidence on record and non-consideration of pleas raised before a Court would amount to an error floating on the surface of record.

4. Where the Court has taken a conscious and deliberate decision on a point of fact or law, a review petition will not be competent.

5. Where two conclusions drawn simultaneously appear to be the outcome of banking upon a hyper technicality, with the consequence that both the views became destructive of each other, this by itself is a sufficient ground for review of the judgment.

6. Where the judgment under review is found to have directed the doing of something which is in conflict with the Constitution or law, then it will be the duty of the Court to amend such error. However, it was observed on the scope of review that the incorrectness of a conclusion can never be a ground for review as it would amount to granting the Court a jurisdiction to hear appeals against its own judgments which is not permissible.

7. If the conclusion is wrong because something manifest has been ignored by the Court or the Court has not considered an important aspect of the matter, a review petition would lie.

8. A judgment cannot be reviewed merely because a different view could have been taken, rather a review petition would lie only when there is an alleged error in the judgment which is evident and can be established without elaborate arguments.

9. The review petition would also be competent if some relevant evidence or question of fact or law has been overlooked which, had it been considered by the Court, might materially have affected the judgment of the Court.

10. Review jurisdiction does not allow the re-hearing of a decided case, more so when the Court has given a conscious and deliberate decision on the point of law as well as of fact while disposing of the constitution petition before it. Moreover, the grounds not urged or raised at the time or hearing the constitution petition cannot be allowed to be raised in the review proceedings

11. If the error in the judgment/ order is so manifest and is floating on the surface, which is so material that had the same been noticed prior to the rendering of the judgment the conclusion would have been different, in such a case a review petition would lie. The Constitution does not place any restriction on the power of the Supreme Court to review its earlier decisions or even to depart from them nor the doctrine stare decisis will come in its way so long as review is warranted in view of the significant impact on the fundamental rights of citizens or in the interest of public good and the Court is competent to review its judgment/order suo motu without any formal application.

12. Mere desire of re-hearing of the matter cannot constitute sufficient ground for the grant of review. It is well settled by now that where petitioner took up all material grounds taken by him during the course of hearing of appeal and dealt with and decided in judgment under review and thus sought rehearing of arguments addressed by him at time of hearing and disposal of appeal and wished a different decision from one already given without satisfying jurisdictional requirement necessary for maintaining review petition.

13. Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of, or could not be produced by the party seeking review at the time when the decree was passed or order made; some mistake or error apparent on the face of the record; or any other sufficient reason and error apparent on the face of the record, are common grounds for review in both civil and criminal proceedings.

14. The expression, "error apparent on the face of the record" cannot be defined with precision or exhaustiveness, and there would always remain an element of indefiniteness inherent in its very nature. It is to be determined in each case on the basis of its own peculiar facts, whenever Judges of these courts are pointed out, in review jurisdiction conferred by the Constitution or law, something in their judgment or order that is in conflict with the Constitution or any law of the land, it becomes their duty to unhesitatingly correct that error. Duty of the Judges of the apex Court of the country is more thoughtful and profound in this regard, as there is no other court which can correct their error, and the principles of law enunciated in their judgments are, under Article 189 of the Constitution, binding on all other courts in the country.

15. An application to review a judgment is not to be lightly entertained and the Court could exercise its review jurisdiction only when grounds are made out as provided. A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition, through different counsel, of old and overruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient.

16. In a review petition, it is not open to the Court to reappreciate the evidence and reach a different conclusion, even if that is possible. Conclusion arrived at on appreciation of evidence cannot be assailed in a review petition unless it is shown that there is an error apparent on the face of the record or for some reason akin thereto. The power of review cannot be confused with appellate power which enables a superior court to correct all errors committed by a subordinate court.

17. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error.

18. A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. It is neither fairness to the Court which decided nor awareness of the precious public time lost what with a huge backlog of dockets waiting in the queue for disposal, for counsel to issue easy certificates for entertainment of review and fight over again the same battle which has been fought and lost. The Bench and the Bar, we are sure, are jointly concerned in the conservation of judicial time for maximum use.

19. The normal principle is that a judgment pronounced by the Court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so. The Court may also reopen its judgment if a manifest wrong has been done and it is necessary to pass an order to do full and effective justice.

20. Real distinction between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent', and that a 'review' is by no means an 'appeal' in disguise. It has become almost an everyday experience that review applications are filed mechanically as a matter of routine and the grounds for review are a mere reproduction of the grounds of special leave. If parties file review petitions indiscriminately, the time of the court is unnecessarily wasted. Greater care, seriousness and restraint is needed in filing review applications".

7. In light of the foregoing discussion, it is manifest that the review petitions under consideration were devoid of any merit, failed to disclose any error apparent on the face of the record, and did not meet the exacting standards prescribed under the Constitution, the Rules of this Court, or the settled jurisprudence. They represented, at best, a misguided attempt at re-agitating decided issues under the garb of review. The Court, therefore, has rightly dismissed the review petitions with costs. It is imperative to underscore that the sanctity and finality of judicial determinations must not be compromised by the mere persistence of litigants or mechanical issuance of advocate certificates. The review jurisdiction is not a fallback for unsuccessful litigants to reopen a lis, but a narrowly confined judicial tool intended to correct palpable and consequential mistakes.

MH/D-1/SC Review Petitions dismissed.

**P L D 2025 Supreme Court 737**

**Present: Qazi Faez Isa, C.J., Sardar Tariq Masood, Syed Mansoor Ali Shah, Yahya Afridi, Amin-ud-Din Khan, Jamal Khan Mandokhail, Muhammad Ali Mazhar, Syed Hasan Azhar Rizvi, and Musarrat Hilali, JJ**

Reference No. 1 of 2011, decided on 5th July, 2024.

(Reference by the President of Islamic Republic of Pakistan under Article 186 of the Constitution).

Per Qazi Faez Isa, CJ.; Sardar Tariq Masood, Amin-ud-Din Khan, Jamal Khan Mandokhail, Musarrat Hilali and Muhammad Ali Mazhar, JJ. agreeing; Syed Mansoor Ali Shah, Yahya Afridi and Syed Hasan Azhar Rizvi, JJ. partially agreeing with the majority opinion with their own reasons.

**(a) Constitution of Pakistan---**

----Art.186---Reference by the President under Article 186 of the Constitution---Judge of Supreme Court, who was part of the Bench which heard the Reference, signing the short opinion/order but retiring before the detailed reasons released and signed---Held: Judges who retire before signing the detailed reasons could do so after their retirement---It is commonsensical that, if a Judge has already signed a written opinion/short order, but then retires, he can sign/give the detailed reasons post-retirement---This also prevents the unnecessary wastage of public resources and Court time, which would happen if the Bench was to be reconstituted (after the retirement of a Judge) and the entire matter heard again.

Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v President of Pakistan PLD 2016 SC 61 ref.

**(b) Constitution of Pakistan---**

----Art. 186---Reference by the President under Article 186 of the Constitution to revisit the cases of Zulfiqar Ali Bhutto (former Prime Minister of Pakistan) reported as Zulfikar Ali Bhutto and 3 others v. The State (PLD 1979 Supreme Court 38) and Zulfikar Ali Bhutto v. The State (PLD 1979 Supreme Court 53)---Conviction and execution of death sentence awarded to Zulfiqar Ali Bhutto---Advisory jurisdiction of the Supreme Court under Article 186 of the Constitution---Scope---Supreme Court clarified that it was not hearing a petition, an appeal or a review petition---Neither the Constitution nor the law provides a mechanism whereby Mr. Bhutto's conviction could be set aside---Mr. Bhutto's conviction attained finality after the dismissal of his review petition by the Supreme Court---In its advisory jurisdiction under Article 186 of the Constitution, the Supreme Court cannot undo the decision (of Mr. Bhutto's conviction).

**(c) Criminal Procedure Code (V of 1898)---**

----Ss. 411-A & 526---Penal Code (XLV of 1860), S. 302(b)---Constitution of Pakistan, Art. 185(2)(b)---Trial by the High Court---Scope---Article 185(2)(b) of the Constitution and sections 411-A and 526 of the Cr.P.C permittrials to be conducted by the High Court, but these provisions do not provide for a High Court to conduct a murder trial. [Majority view]

**(d) Penal Code (XLV of 1860)---**

----S. 302(b)---Qatl-i-amd---Motive---Scope---In criminal cases the prosecution need not set up a motive but if it elects to do so and then fails to establish it the prosecution suffers its consequences---Motive's absence, or failure to establish it is also consequential in a murder case in which the guilt of the offender is established but the asserted motive is not---In such cases the accused invariably is not given capital punishment, but instead imprisonment for life.

Hakim Ali v. State 1971 SCMR 432 and Habibullah v. State PLD 1969 SC 127 ref.

**(e) Constitution of Pakistan---**

----Arts. 4,9, 10A, 66(1) & 186---Penal Code (XLV of 1860), Ss. 302, 307, 120B & 109---Criminal Procedure Code (V of 1898), S. 376---Reference by the President under Article 186 of the Constitution to revisit the cases of Zulfiqar Ali Bhutto (former Prime Minister of Pakistan) reported as Zulfikar Ali Bhutto and 3 others v. The State (PLD 1979 Supreme Court 38) and Zulfikar Ali Bhutto v. The State (PLD 1979 Supreme Court 53)---Murder trial of Zulfiqar Ali Bhutto ("Mr. Bhutto") by the Trial Court (the Lahore High Court) and the appellate court (the Supreme Court)---Requirements of due process and fair trial not met---Legal heirs of deceaseddid not object to or challenge closure of (initial) investigation by the Magistrate---Investigation was

reopened andtransferred to Federal Investgation Agency (FIA) immediately after General Zia-ul-Haq's coup d'etat overthrowing Mr. Bhutto's government---Significantly, no judicial order was issued directing that the investigation be reopened or the crime reinvestigated by the FIA---In the post coup investigation interim investigation report (challan) was submitted, and in addition to section 302 (murder) of the Pakistan Penal Code, 1860 ('P.P.C.') and section 307 (attempt to murder) mentioned in the FIR, sections 120B (criminal conspiracy to commit an offence) and 109 (abetment of an offence) were added---Acting Chief Justice ('ACJ') of the Lahore High Court transferred the case to the Lahore High Court for trial despite the fact that the Sessions Judge, Lahore had already taken cognizance of the case---This was done by the 'ACJ' without issuing notices to Mr. Bhutto and to the other accused, without providing them an opportunity of a hearing and without enabling them to acquire legal representation---Mr. Bhutto had appointed General Zia-ul-Haq as the Army Chief who by his actions of 5 July 1977 (i.e. coup d'état) had clearly violated Article 6 of the Constitution and committed the offence of high treason, the prescribed punishment for which is imprisonment for life or death---General Zia, therefore had a motive to proceed against Mr. Bhutto, because had he not done so, Mr. Bhutto may have proceeded against him for committing high treason---By conducting the murder trial itself, the High Court made redundant a number of provisions of the Constitution and Chapter XXVII of the Code of Criminal Procedure, 1898 ("the Code")---Section 376 of the Code requiring the confirmation of death sentences was violated and this inalienable right was contravened---Since the trial was conducted by the High Court itself, Mr. Bhutto and the other accused were deprived of one right of appeal, which Articles 4(1) and 9 of the Constitution guaranteed---Foremost basis for the conviction of Mr. Bhutto was the testimony of an accused, who turned approver, namely, the then Director-General of the Federal Security Force ('FSF')---After the coup d'etat of 5 July 1977 approver was arrested, nominated as an accused and pleaded that he would make disclosure of the crime, provided he was pardoned---His plea was accepted and he was made an approver---Crime was committed three years earlier and approver's conscience remained dormant and only awoke when he was arrested---Approver's credibility was accepted and he was believed without demur by the Trial and Appellate Courts---However, there were a number of factors which prudence should have alerted and shown that he was self-serving, self-preserving, morally bankrupt, and a false witness---Furthermore, confessions must be voluntary and must not have been obtained by fear of prejudice or hope or advantage---If the confession directly or indirectly is the result of inducement, threat or promise from a person in authority, it would be treated as not voluntary---With regard to the three offences attracting death sentences, section 302, P.P.C. (murder), section 307 PPC (attempted murder) and section 111, P.P.C. (abetment), there was no direct or circumstantial evidence against Mr. Bhutto---Spent bullet casings, ejected from the firearm(s) that were used in the attack, didnot match any of the weapons in use of the FSF---Trial Court proceeded on an incorrect assumption that the motive stood established, even though the facts did not suggest this---Proceedings of the National Assembly were also relied upon by the Courts for establishing motive, which was not permissible [Article 66(1) of the Constitution]---Mr. Bhutto's enmity with the complainant was cited by the complainant as the motive, however, it was not even considered that such enmity could equally be a reason to falsely implicate Mr. Bhutto---First reporting of the crime to the police was by complainant's brother, however, the FIR was not registered when he reported the crime, nor was he cited as the informant/complainant in the FIR when it was registered---Surprisingly, complainant's brother was also not produced as a witness---All the six co-accused were arrested after General Zia's coup d'etat and the imposition of Martial Law, and all of them had confessed to the crime---This remarkable coincidence was not considered by the Trial Court or the Appellate Court to be unusual nor was it ever considered whether these confessions could have been induced---Two of the accused were pardoned and made approvers---Acting Chief Justice, who headed the Bench of the Lahore High Court which had convicted Mr. Bhutto, and the Chief Justice of the Supreme Court who headed the Bench which had upheld the conviction, both assumed their offices in somewhat unusual circumstances giving rise to justifiable misgivings---Bias was on display in a number of paragraphs of the Trial Court's (High Court's) judgment---Gratis observations were made which had absolutely nothing to do with the case before the Court---Manner in which the trial was conducted was antithetical to a fair trial and due process---Trial Court (High Court), which had tried and convicted Mr. Bhutto, and the Appellate Court

(Supreme Court), which had dismissed his appeal, were operating when there was no constitutional rule in the country and one man's (General Zia-ul-Haq's) will and whim became legislation and his person had replaced the entire democratic order----Major constitutional and legal lapses that had occurred during the trial, appeal and review stage with respect to requirements of fair trial and due process stated.

Abul A'la Moudoodi v. Government of West Pakistan PLD 1964 SC 673; Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416; Government of Balochistan v. Azizullah Memon PLD 1993 SC 341; Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324; Government of Sindh v. Sharaf Faridi PLD 1994 SC 105; Ibrahim v King, (1975) 3 All ER 175; Muhammad Amjad v. State PLD 2003 SC 704; Dhani Bakhsh v. State PLD 1975 SC 187; Hakim Ali v. State 1971 SCMR 432 and Habibullah v. State PLD 1969 SC 127 ref.

Per Syed Mansoor Ali Shah, J.; partially agreeing with Qazi Faez Isa, CJ.with his own reasons

**(f) Constitution of Pakistan---**

----Art. 186---Advisory jurisdiction of the Supreme Court under Article 186 of the Constitution---Scope---In its advisory jurisdiction, the Supreme Court cannot undertake a fact-finding inquiry, adjudicate a lis between parties or review its judgment rendered in its adjudicatory jurisdiction.

Reference No. 1 of 2012 PLD 2013 SC 279; Cauvery Water Disputes Tribunal's case AIR 1992 SC 522; Al-Jehad Trust v. Federation of Pakistan PLD 1997 SC 84; Reference No. 1 of 1988 PLD 1989 SC 75 and Special Reference No.1 of 1955 PLD 1955 FC 435 ref.

**(g) Criminal trial---**

----Political trials---Scope and purpose---Around the world, authoritarian regimes use "political trials" to legitimize their seizures of power, delegitimize opponents and consolidate authority---A political trial is one whose disposition—the determination of guilt or innocence, followed by punishment—depends primarily on the accused's professed attitudes and activities in relation to the ruling regime---In such trials, the legal process is not employed to ensure justice or minimize errors but rather to discredit and punish political opponents---These trials often rely heavily on statements obtained during investigations from former allies or associates of the accused, who may be coerced or induced to turn against the accused---Such evidence, which would usually hold limited weight in a fair trial, becomes a convenient basis for conviction in a political trial, supporting the alleged criminality of the accused---Political trials thus serve as a potent and notorious "judicial tool" for authoritarian regimes, aimed at suppressing political resistance and eliminating opposition---These trials frequently violate due process and fair trial requirements to produce politically desirable outcomes.

Fiona Shen-Bayh, Undue Process: Persecution and Punishment in Autocratic Courts, (2022); Raymond Suttner, Political Trials and the Legal Process, (1985) and Anthony Pereira, Persecution and Farce: The Origins and Transformation of Brazil's Political Trials, 1964- 1979, (1998) ref.

**(h) Administration of justice---**

----"Transitional justice"---Scope and purpose---In post-authoritarian regimes, "transitional justice" forms a crucial part of the transition from repressive authoritarianism to constitutional democracy---It involves uncovering the crimes of former authoritarian rulers and holding them accountable for past human rights violations, including unlawful detentions, imprisonments and politically motivated trials---Transitional justice, however, is not about vengeance or retribution but about a principled approach to healing and justice---Courts globally have affirmed that they must address the demands of victims for truth and justice while laying the foundation for societal reconciliation and systemic transformation---This dual focus on accountability and restoration is what sets transitional justice apart from ordinary judicial processes---Transitional justice, therefore, encompasses a set of methods through which states that have experienced fundamental human rights violations seek to distance themselves from that past and move forward in a manner consistent with the need for justice for those who have suffered from these violations---These methods of transitional justice include truth and reconciliation commissions and the criminal prosecution of former authoritarian rulers---Furthermore, holding both executive and judicial institutions accountable for their actions during the period of authoritarian repression, as well as exonerating past victims of state repression and miscarriages of justice, is essential for facilitating the transition of these state institutions

toward greater respect for, and promotion of, the rule of law and fundamental human rights---Transitional justice encompasses broader mechanisms, including revisiting flawed judicial decisions made during authoritarian regimes through compromising due process and fair trial requirements---This process helps restore fairness and legitimacy in the legal system---By revisiting and rendering opinions on the fairness and legitimacy of such decisions, the Court delivers justice to affected individuals and sends a powerful message: judicial complicity with authoritarianism will not be shielded from scrutiny---This approach reinforces judicial independence, ensures accountability for regime-orchestrated injustices, and establishes a precedent for discrediting flawed judicial decisions rendered under oppressive regimes---Such actions underscore the judiciary's commitment to constitutional principles, reminding past and future judges of their duties and the need to resist authoritarian pressure---Ultimately, this helps safeguard democracy, the rule of law and human rights.

Juan Méndez, Constitutionalism and Transitional Justice, (2012); Vinjamuri and Snyder, Law and Politics in Transitional Justice, (2015); Hakeem Yusuf, Transitional Justice, Judicial Accountability and the Rule of Law, (2010); General (R) Pervez Musharraf v. Federation of Pakistan PLD 2024 SC 497; Taufiq Asif v. General (R) Pervez Musharraf PLD 2024 SC 610; Sindh High Court Bar Association v. Federation of Pakistan PLD 2009 SC 789 and Nawaz Sharif v. State PLD 2009 SC 814 ref.

**(i) Constitution of Pakistan---**

----Arts. 4, 9, 10A & 186---Reference by the President under Article 186 of the Constitution to revisit the cases of Zulfiqar Ali Bhutto (former Prime Minister of Pakistan) reported as Zulfikar Ali Bhutto and 3 others v. The State (PLD 1979 Supreme Court 38) and Zulfikar Ali Bhutto v. The State (PLD 1979 Supreme Court 53)---'Political trial'---Victim of 'judicial murder'---Murder trial of Zulfiqar Ali Bhutto ("Mr. Bhutto") by the Trial Court (the Lahore High Court) and the appellate court (the Supreme Court)---Requirements of due process and fair trial not met---Violations of procedural due process and fair trial requirements stated.

The murder trial of Mr. Zulfiqar Ali Bhutto, a former Prime Minister of Pakistan, serves as a classic example of a political trial, illustrating how such trials can be manipulated to advance authoritarian designs. Bhutto's trial effectively served as a potent and notorious "judicial tool" for strengthening General Zia's authoritarian regime, aimed at suppressing political resistance, eliminating opposition and ensuring the consolidation of power. It helped to entrench the repressive military authoritarian regime under which it was conducted. Instead of independent, substantive evidence, the prosecution relied heavily on confessional statements given by, or procured from, Bhutto's former associates—accomplices turned approvers.

Likewise, several violations of procedural due process and fair trial requirements were committed to achieve politically desirable outcomes. These included the unauthorized reinvestigation of the case, which had previously been closed by an order of the Magistrate concerned; the surreptitious and unlawful transfer of the investigation from the regular investigating agency (Provincial Police) to the Federal Investigation Agency; the transfer of the trial from the regular Trial Court (Sessions Court) to the High Court without adherence to legal requirements; the unjustified cancellation of bail previously granted to Bhutto by a Single Bench of the Lahore High Court; the determination of Bhutto's recusal application by judges other than the one whose recusal was sought, without addressing the instances cited to demonstrate the bias and prejudice of the judge (Justice Maulvi Mushtaq); the composition of the trial and appellate court benches, both of which were headed by judges (Justice Maulvi Mushtaq and Justice Anwar-ul-Haq) who harboured personal grievances against Bhutto due to being passed over for appointments as Chief Justice of their respective courts—the Lahore High Court (Trial Court) and the Supreme Court (appellate court); and the unwarranted reconstitution of the appellate court bench from nine judges to seven judges. It is an established principle that justice must not only be done but must also manifestly and undoubtedly be seen to be done. The infringement of this fundamental principle also constitutes a violation of due process and fair trial requirements. Because of these glaring violations, Bhutto is rightly regarded as the victim of "unfair judicial proceedings" and "legalized political murder"—also referred to as "judicial murder". Both the obvious procedural irregularities and illegalities in the reinvestigation and trial, as well as the biased composition of the trial and appellate court

benches, rendered the verdict illegitimate and undermined the independence and impartiality of the superior courts (High Courts and the Supreme Court) for years to come.

Rex v. Sussex Justices [1924] 1 KB 256; Ramsey Clark, Injustice against Bhutto in 2 Courts, (1979) and Ian Talbot, Pakistan: A Modern History, (1998) and Paula Newberg, Judging the State: Courts and Constitutional Politics in Pakistan, (1995) ref.

The Constitution and the law provide no mechanism to set aside the judgment by which Bhutto was convicted and sentenced, as that judgment attained finality following the dismissal of the review petition by the Supreme Court. Furthermore, in its advisory jurisdiction under Article 186 of the Constitution, the Supreme Court lacks the authority to reappraise the evidence or overturn a final decision. However, after carefully examining the record of the reinvestigation and trial proceedings, the Supreme Court concluded— and so stated— that the trial proceedings in the Lahore High Court and the appellate proceedings in the Supreme Court of Pakistan did not meet the requirements of the Fundamental Right to a fair trial and due process as enshrined in Articles 4 and 9 of the Constitution, which were later reinforced as a separate and independent Fundamental Right under Article 10A of the Constitution. Supreme Court's expression of this opinion reflects a commitment to confront past missteps and fallibilities during an authoritarian regime with humility, embodying a spirit of self-accountability and underscoring our dedication to ensuring that transitional justice shall be served with unwavering integrity and fidelity to the Constitution and the law.

Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416; Jubilee Insurance v. NBP PLD 1999 SC 1126; Nadeem Anwar v. NAB PLD 2008 SC 645 and Riaz-Ul-Haq v. Federation of Pakistan PLD 2013 SC 501 ref.

Per Yahya Afridi, J.; agreeing with Syed Hasan Azhar Rizvi, J. and partially agreeing with Qazi Faez Isa, CJ.

**(j) Criminal Procedure Code (V of 1898)---**

----Ss. 411-A & 526---Penal Code (XLV of 1860), S. 302(b)---Constitution of Pakistan, Art. 185(2)(b)---Trial by the High Court---Scope---Observation in the majority opinion authored by the Chief Justice (Qazi Faez Isa, J.), that Article 185(2)(b) of the Constitution and sections 411-A and 526 of the Code of Criminal Procedure, 1898 do not permit the High Court to conduct a murder trial – is untenable, as it is founded on a misconception of these provisions. [Minority view]

**(k) Criminal Procedure Code (V of 1898)---**

----S. 376 & Chapt. XXVII---Death sentence---Confirmation by the High Court---Scope---Chapter XXVII of the Code of Criminal Procedure, 1898 does not extend to death sentences passed by the High Court in the exercise of its original criminal jurisdiction---These provisions do not necessitate confirmation of such sentences or lead to the forfeiture of the right of appeal. [Minority view]

Per Syed Hasan Azhar Rizvi J.; partially agreeing with Qazi Faez Isa, CJ. with his own reasons

**(l) Judgment---**

----Additional/supplementary notes or opinions of Judges in a case---Significance---It is the hallmark of a robust judicial system to allow for the expression of supplementary views that may fortify the decision's legal foundation and contribute to the richness of our legal tradition.

**(m) Constitution of Pakistan---**

----Arts. 4, 9, 10A & 186---Penal Code (XLV of 1860), Ss. 302, 307, 120B & 109---Criminal Procedure Code (V of 1898), S. 526---Reference by the President under Article 186 of the Constitution to revisit the cases of Zulfiqar Ali Bhutto (former Prime Minister of Pakistan) reported as Zulfikar Ali Bhutto and 3 others v. The State (PLD 1979 Supreme Court 38) and Zulfikar Ali Bhutto v. The State (PLD 1979 Supreme Court 53)---Murder trial of Zulfiqar Ali Bhutto ("Mr. Bhutto") by the Trial Court (the Lahore High Court) and the appellate court (the Supreme Court)---Requirements of due process and fair trial not met---Biased and impartial conduct of the Acting Chief Justice of the High Court towards Mr. Bhutto---Non-observance of prescribed procedure under the Code of Criminal Procedure, 1898 ('Cr.P.C.') by the High Court---Proceedings of the trial held in-camera without any justification---Necessary material to prepare defence effectively not provided---Denial of right to defend---Discrepancies and irregularities in the testimony of the approver---Lack of corroboration of evidence provided by the approver---Evidence of material witnesses full of contradictions,

improvements and improbabilities---Motive remaining unproved---Negative report of ballistics experts---Major constitutional and legal lapses that undermined the proceedings of trial of Mr. Bhutto before the High Court as well as the appeal filed by him before the Supreme Court stated.

Syed Ali Nawaz Gardezi v. Lt.-Col. Muhammad Yusuf PLD 1963 SC 51 ref.

**(n) Qanun-e-Shahadat (10 of 1984)---**

----Art. 129, Illustration (b)---Approver, evidence of---Principles---Testimony of an approver is to be scrutinized with care and caution---Court should be doubly sure that his (approver's) evidence is corroborated in material particulars by reliable evidence---Principles for appreciating the evidence of an approver listed. Following are principles for appreciating the evidence of an approver:

(i) That if a statement of fact made by an accused in a confession is of the nature that if it is assumed to be true, it would negate the offence alleged to be confessed, it is called an exculpatory confession.

(ii) That a statement of an accused that contains self-exculpatory matter cannot amount to confession.

(iii) That a retracted confession is sufficient to sustain a conviction for a capital offence, if the Court is of the view that the same is voluntary and is true, but as a rule of prudence, it has been consistently held by the superior Courts that the same should not be acted upon unless corroborated by some other reliable evidence in material particulars.

(iv) That though the confession of a co-accused cannot be made the foundation of conviction but it may be used in support of other evidence.

(v) That the confession of a co-accused is evidence of a weak character.

(vi) That under Islamic jurisprudence, in order to make a confession reliable, it should be voluntarily made and not on account of any coercion, duress or violence.

(vii) That any delay in recording of a confession may, or may not, be fatal as to the evidentiary value of a retracted confession.

(viii) That any lapse on the administrative side on the part of a Magistrate recording a confession, may not be fatal as to the evidentiary value of such confession provided the Court is satisfied that the lapses on his part have not, in any way, adversely affected the voluntariness or truthfulness of the confession.

(ix) That if an accomplice's evidence is not corroborated in material respects, it cannot be acted upon and that the evidence of an accomplice cannot be used to corroborate evidence of another accomplice.

Ch. Muhammad Yaqoob and others v. The State 1992 SCMR 1983 ref.

**(o) Criminal Procedure Code (V of 1898)---**

----Ss. 411-A & 526---Penal Code (XLV of 1860), S. 302(b)---Constitution of Pakistan, Art. 185(2)(b)---Trial by the High Court---Scope---Observation in the majority opinion authored by the Chief Justice (Qazi Faez Isa, J.), that “Article 185(2)(b) of the Constitution and sections 411-A and 526 of the Code of Criminal Procedure, 1898 do permit trial to be conducted by the High Court, but these provisions do not provide for a High Court to conduct a murder trial”---His Lordship opined that such observation in the majority opinion was untenable under the law being based on a misconception and incorrect understanding of the true meaning and purpose of Article 185(2)(b) of the Constitution and sections 411-A and 526 of the Cr.P.C. [Minority view]

Raja Khurram Ali Khan and another v. Tayyaba Bibi and another 2019 YLR 98 and Raja Khurram Ali Khan and 2 others v. Tayyaba Bibi and another PLD 2020 SC 146 ref.

**(p) Criminal Procedure Code (V of 1898)---**

----Ss. 374, 375, 376, 377 & Chapt. XXVII---Death sentence---Confirmation by the High Court---Scope---On a reference for the confirmation of the sentence of death, the High Court is required to proceed in accordance with sections 375 and 376, Cr.P.C. and the provisions of these sections make it clear that the duty of the High Court, in dealing with the reference, is not only to see whether the order passed by the Trial Court is correct, but to examine the case for itself and even direct a further enquiry or the taking of additional evidence if the Court considers it desirable in order to ascertain the guilt or the innocence of the convicted person---When the High Court passes a sentence of death in its original criminal jurisdiction, Chapter XXVII of Cr.P.C. becomes redundant and inoperative---Chapter XXVII of the Cr.P.C does not extend to death sentences passed by the

High Court in the exercise of its original criminal jurisdiction---These provisions do not necessitate confirmation of such sentences or lead to the forfeiture of the right of appeal. [Minority view]

Per Muhammad Ali Mazhar J.; agreeing with Qazi Faez Isa, C.J. with his own reasons

**(q) Constitution of Pakistan---**

----Art. 186---Advisory jurisdiction of the Supreme Court under Article 186 of the Constitution---Scope---While the opinion rendered by the Supreme Court under its advisory jurisdiction may not be binding, it carries significant credence and persuasive value---It is rendered after much deliberation, thoughtfulness, and appreciation of the questions forwarded by the President consistent with the constitutional obligations and judicial propriety---Such opinions ought to be respected with due weight and esteem by all organs of the State---However, concomitantly, questions transmitted for opinion in the reference should not be ambiguous, indeterminate, or inexplicable to avoid the possibility of the Supreme Court returning the reference unanswered.

Reference No. 2 of 2005 PLD 2005 SC 873 ref.

**(r) Constitution of Pakistan---**

----Arts. 4, 9, 10A & 186---Penal Code (XLV of 1860), Ss. 302, 307, 120B & 109---Criminal Procedure Code (V of 1898), S. 526---Reference by the President under Article 186 of the Constitution to revisit the cases of Zulfiqar Ali Bhutto (former Prime Minister of Pakistan) reported as Zulfikar Ali Bhutto and 3 others v. The State (PLD 1979 Supreme Court 38) and Zulfikar Ali Bhutto v. The State (PLD 1979 Supreme Court 53)---Murder trial of Zulfiqar Ali Bhutto ("Mr. Bhutto") by the Trial Court (the Lahore High Court) and the appellate court (the Supreme Court)---Requirements of due process and fair trial not met---Violation of principles of natural justice---Reinvestigation in a closed case ordered mechanically without identifying lapses in the first investigation---Transfer of case from Sessions Court to the High Court by the then Acting Chief Justice of High Court with malice and without notice to accused persons---Personal bias and preconceived notions of Judges sitting on the Bench of the Trial Court (High Court)---Evidence of approver not corroborated by reliable evidence---One right of appeal lost/forfeited due to trial in the High Court---Appellate court (Supreme Court) failing to consider mitigating circumstances---Detailed reasons for failure to ensure a fair trial and due process stated.

Rex v. Sussex Justices (1924) 1 KB 256; Ms. Benazir Bhutto v. The President of Pakistan 1992 SCMR 140; Islamic Republic of Pakistan v. Abdul Wali Khan PLD 1976 SC 57; President v. Shaukat Ali PLD 1971 SC 585; Government of NWFP v. Dr. Hussain Ahmed Haroon 2003 SCMR 104; Asif Ali Zardari v. The State PLD 2001 SC 568; State of Puniab v. Davinder Pal Singh Bhullar AIR 2012 SC 364; Gullavalli Negeswararao etc. v. The State of Andhra Pradesh and others AIR 1959 SC 1376; Ranjit Thakur v. Union of India and others AIR 1987 SC 2386; Bhajan Lai, Chief Minister, Haryana v. Messrs Jindal Strips Ltd. and others (1994) 6 SCC 19; Justice P.D. Dinakaran v. Hon'ble Judges Inquiry Committee (2011) 8 SCC 380; A.K. Kraipak v. Union of India AIR 1970 SC 150; Davidson v. Scottish Ministers (2004) UKHL 34; Webb and Hay v. R (1993) HCA 30; R v. Sussex Justices, ex parte McCarthy (1923) All ER 233; R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2) (1999) 1 All ER 577; Taylor and another v. Lawrence and another (2002) EWCA Civ 90; Junaid Wazir v. Superintendent of Police 2024 SCMR 181; Federation of Pakistan v. Zahid Malik 2023 SCMR 603; Usman Ghani v. The Chief Post Master, GPO Karachi 2022 SCMR 745; Capital Development Authority v. Shabir Hussain 2022 SCMR 627; Raja Muhammad Shahid v. The Inspector General of Police 2023 SCMR 1135; Muhammad Yaseen v. Province of Sindh 2024 PLC (C.S.) 111; Government of Balochistan v. Ghulam Rasool 2024 SCMR 1155 and Inspector General of Police, Quetta v. Fida Muhammad 2022 SCMR 1583 ref.

**(s) Constitution of Pakistan---**

----Arts. 4, 9, 10A & 186---Reference by the President under Article 186 of the Constitution to revisit the cases of Zulfiqar Ali Bhutto (former Prime Minister of Pakistan) reported as Zulfikar Ali Bhutto and 3 others v. The State (PLD 1979 Supreme Court 38) and Zulfikar Ali Bhutto v. The State (PLD 1979 Supreme Court 53)---Murder trial of Zulfiqar Ali Bhutto by the Trial Court (the Lahore High Court) and the appellate court (the Supreme Court)---One of the questions framed by the Supreme Court in the Presidential Reference was

whether the decision in the case of murder trial against Zulfiqar Ali Bhutto fulfils the requirements of Islamic laws as codified in the Holy Quran and the Sunnah of the Holy Prophet (SAW)? ;if so, whether present case is covered by doctrine of repentance specifically mentioned in the following Suras of Holy Quran: (i) Sura Al-Nisa, verses 17 and 18; Sura Al-Baqara, verses 159, 160 and 222; Sura Al-Maida, verse 39; Sura Al-Aaraaf, verse 153; Sura Al-Nepal, verse 119; Sura Al-Taha, verse 82, as well as Sunan Ibn-e-Maaja, Chapter 171, Hadith No. 395; and,what are effects and consequences of doctrine – Re: Repentance---His Lordship observed that no opinion was rendered by the Supreme Court for this question, which was left unanswered for the valid reason that no assistance was provided---Since the question on the doctrine of repentance was framed with reference to various verses of the Holy Quran, forming substantial segment of the Presidential Reference, it should not remain untouched or unanswered---The unresolved question is why the question regarding the doctrine of repentance was framed by the Supreme Court?---Who had to or has to repent for the unfair and biased trial?---Was it the departed souls who tried the case in the High Court? ; or those who heard the appeal and review? ; or the bench that entertained and framed the question? ;or the bench members who rendered their opinion years after the Reference was instituted?---Supreme Court unanimously noted various lapses and biases in the High Court's murder trial, ultimately concluding that the proceedings of the trial by the Lahore High Court and the appeal by the Supreme Court failed to meet the constitutional requirements of a fair trial and due process enshrined in Articles 4, 9, and later guaranteed as a separate and independent fundamental right under Article 10A of the Constitution---Not only it demonstrates some sought of remorse though not explicitly articulated but it also implies a recognition of repentance for the failure to ensure a fair trial and due process, even as this question of the Presidential Reference remains unanswered or undecided.

[Minority view]

In Attendance:

On behalf of the President:

Mansoor Usman Awan,
Attorney-General for Pakistan assisted by
Ch. Aamir Rehman,
Additional Attorney-General,
Malik Javed Iqbal Wains,
Additional Attorney-General,
Raja M. Shafqat Abbasi,
Deputy Attorney-General and
Ms. Marium Ali Abbasi, Advocate.

On Court Notice:

Khalid Ishaq, Advocate-General, Punjab,
assisted by Sanaullah Zahid, Addl. AG.
Hassan Akbar, Advocate-General, Sindh
assisted by Qazi M. Bashir, Addl. AG.
Amir Javed, Advocate-General,
Khyber Pakhtunkhwa, assisted by
Sultan Mazhar Sher Khan, Addl. AG.
Asif Reki, Advocate-General, Balochistan
assisted by M. Ayaz Swati, Addl. AG.

On behalf of the LRs of the
late Zulfiqar Ali Bhutto:

Farooq H. Naek, Sr. Advocate Supreme Court, assisted by
Iftikhar Shah and Sheraz Shaukat Rajpar, Advocates.
(representing grandson Bilawal Bhutto Zardari)
Mian Raza Rabbani, Advocate Supreme Court, assisted by
Zeeshan Abdullah, Advocate.

(representing daughter Ms. Sanam Bhutto and grandchildren Ms. Bakhtawar Bhutto and Ms. Aseefa Bhutto)

Zahid F. Ibrahim, Advocate Supreme Court, assisted by

Altamash Arab, Advocate.

(representing grandchildren Ms. Fatima Bhutto and Zulfiqar Ali Bhutto)

Amici Curiae:

Manzoor Ahmad Malik,

Hon'ble former Judge,

assisted by Ansar Nawaz Mirza, Advocate Supreme Court,

Haider Rasul Mirza, Advocate Supreme Court and

Shahryar Riaz, Advocate High Court.

M. Makhdoom Ali Khan, Sr. Advocate Supreme Court,

assisted by Saad Mumtaz Hashmi, Advocate Supreme Court.

Khalid Jawed Khan, Advocate Supreme Court.

Ch. Aitzaz Ahsan, Sr. Advocate Supreme Court,

assisted by Ms. Zunaira Fayyaz Siwia, Advocate and

Qaiser Nawaz, Advocate.

Assadullah Khan Chamkani, Advocate Supreme Court,

assisted by M. Tariq Khan Hoti, Advocate Supreme Court.

Salahuddin Ahmed, Advocate Supreme Court,

assisted by Ehsan Malik and Aman Aftab, Advocates.

For Complainant:

Ahmed Raza Khan Kasuri, Advocate Supreme Court.

(in person)

For SCBA:

Ali Imran, Advocate Supreme Court.

Dates of hearing: 12th December, 2023, 8th January, 20th, 26th 27th, 28th February and 4th March, 2024.

Opinion

Qazi Faez Isa, CJ.

**Background**

1. The Federal Cabinet[1] headed by the Prime Minister decided to file a reference under Article 186 of the Constitution of the Islamic Republic of Pakistan ('the Constitution') 'in respect of the proceedings of the judicial process in the case of trial Shaheed Zulfiqar Ali Bhutto, former Prime Minister' ('Mr. Bhutto'), and the Prime Minister advised[2] the President of Pakistan ('the President') to file the reference. Resultantly, the President submitted a reference to the Supreme Court,[3] which was numbered as Reference No. 1 of 2011 ('the Reference').

Seeking the Opinion of the Supreme Court

2. Article 186 of the Constitution, pursuant to which the Reference was filed, states that:

'186. (1) If, at any time, the President considers that it is desirable to obtain the opinion of the Supreme Court on any question of law which he considers of public importance, he may refer the question to the Supreme Court for consideration.

(2) The Supreme Court shall consider a question so referred and report its opinion on the question to the President.'

**Questions Formulated for Opinion**

3. The following questions for the opinion of the Court were formulated:

'1. Whether the decision of the Lahore High Court as well as the Supreme Court of Pakistan in the murder trial against Shaheed Zulfiqar Ali Bhutto meets the requirements of fundamental rights as guaranteed under

Article 4, sub-Articles (1) and (2) (a), Article 8, Article 9, Article 10A/due process, Article 14, Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973? If it does not, its effect and consequences?

2. Whether the conviction leading to execution of Shaheed Zulfiqar Ali Bhutto could be termed as a decision of the Supreme Court binding on all other courts being based upon or enunciating the principle of law in terms of Article 189 of the Constitution of the Islamic Republic of Pakistan, 1973? If not, its effect and consequences?

3. Whether in the peculiar circumstances of this case awarding and maintaining of the death sentence was justified or it could amount to deliberate murder keeping in view the glaring bias against Shaheed Zulfiqar Ali Bhutto?

4. Whether the decision in the case of murder trial against Shaheed Zulfiqar Ali Bhutto fulfills the requirements of Islamic laws as codified in the Holy Quran and the Sunnah of the Holy Prophet (SAW)? If so, whether present case is covered by doctrine of repentance specifically mentioned in the following Suras of Holy Quran:

(a) Sura Al-Nisa: verses 17 & 18

Sura Al-Baqara: verses 159, 160 and 222 Sura Al-Maida: verse 39

Sura Al-Aaraaf: verse 153

Sura Al-Nehal verse 119

Sura Al-Taha: verse 82

as well as

(b) Sunan Ibn-e-Maaja, Chapter 171, Hadith No. 395

What are effects and consequences of doctrine Re: Repentance

5. Whether on the basis of conclusions arrived at and inferences drawn from the evidence/ material in the case an order for conviction and sentence against Shaheed Zulfiqar Ali Bhutto could have been recorded?'

Larger Bench

4. The Supreme Court[4] ordered that a larger Bench should be constituted to hear the Reference. Resultantly a larger Bench, comprising of the Chief Justice and eight Judges, was constituted, and it last heard the Reference on 12 November 2012; the Reference was not fixed in Court for eleven years. All the members of this Court who were hearing the Reference have retired.

Rehearing of the Reference

5. The Reference was again fixed in Court for hearing on 12 December 2023. This Court noted that, 'A number of other presidential references, filed later under Article 186, of the Constitution, were taken up for hearing and decided by this Court,[5] but this Presidential Reference remains pending, it merits determination as early as possible.' It would be appropriate to reproduce the following paragraphs from the order passed on 12 December 2023:

'2. Learned Mr. Farooq H. Naek referred to an application (C.M.A. No.8622/2018) filed on behalf of Mr. Bilawal Bhutto Zardari, the grandson of the late Mr. Bhutto and states he wants to be represented herein. We are informed that there is only one surviving daughter of the late Mr. Bhutto and he has eight grandchildren. The application is allowed and learned Mr. Naek may represent Mr. Bilawal Bhutto Zardari and assist this Court. If Mr. Bhutto's daughter and any of his grandchildren also want to be represented they may engage counsel. Mr. Naek states that he has also filed an application (CMA No. 10492/2023) seeking live telecast of these proceedings, however, the committee constituted in this regard had before filing of the application already made requisite arrangements and recommended that the Presidential Reference be broadcast, and proceedings are being broadcast,[6] therefore, this application has become infructuous and is disposed of.

3. Learned Mr. Naek refers to the report of Justice Shafi-ur-Rehman, who was then a Judge of the Lahore High Court, regarding the investigation into the murder of Mr. Mohammad Ahmed Khan, the father of the complainant, Mr. Ahmed Raza Khan Kasuri. He requested that he be provided its copy. A Tribunal of inquiry was constituted by the Government of Punjab in exercise of its powers conferred by section 3 of the West Pakistan Tribunals of Inquiry Ordinance, 1969.[7] The Report of the Tribunal is dated 22 February 1975 and

comprises of 30 pages, and is mentioned in the judgment of the Lahore High Court[8] and also in the appeal therefrom.[9]

4. The learned Attorney-General for Pakistan ('AG') was asked whether any of the successive Presidents or the Federal Government sought to withdraw the Presidential Reference or wants to do so now, and the learned AG stated that this was not done nor is this sought to be done now.

5. Learned AG was asked to read the Presidential Reference, which he did. He also read some of the orders of this Court, including order dated 21 April 2011[10] which formulated questions for the opinion of this Court. A number of amici curiae were appointed, some of whom have passed away and others we are told are indisposed. Learned Mr. Ali Ahmed Kurd, an amicus appointed by this Court, states that he will be rendering assistance. We are also informed that learned Mr. Makhdoom Ali Khan, another amicus appointed by this Court, will also be rendering assistance. Notice had also been issued to the Supreme Court Bar Association ('SCBA') and the late Ms. Asma Jahangir represented SCBA; if SCBA want to be represented before this Court they may nominate a counsel to assist us. We also appoint learned Messrs Khalid Javed Khan, Salahuddin Ahmed and Zahid F. Ebrahim as amici curiae. Mr. Yasser Kureshi, an academic working at Oxford University, United Kingdom, and Ms. Reema Omer of the International Commission of Jurists are also appointed as amici curiae. They are appointed to particularly attend to the constitutional and legal aspects of the matter.

6. The first and foremost constitutional and legal points, in addition to those recorded in order dated 21 April 2011, that require consideration are:

(1) Whether the Presidential Reference is maintainable under Article 186 of the Constitution;

(2) Whether the Presidential Reference requires a factual inquiry, and if so, whether under Article 186 of the Constitution an opinion can be given in this regard;

(3) The constitutional-legal position of the trial and appeal, and its credibility/ legitimacy when the person being tried was removed from power by a usurper who himself assumed power and then launched the prosecution of Mr. Bhutto in a criminal case which was filed as 'untraced'; and

(4) Were certain judge(s) removed from the trial and/or hearing the appeal to secure a particular result.

7. If the aforesaid aspect is successfully attended to then we will need to consider the trial and appeal which will require expertise in criminal law and procedure. Justice Manzoor Ahmed Malik, former Judge of the Supreme Court, and Justice Assadullah Khan Chamkani, a former Judge of the Peshawar High Court, have vast experience and we want to benefit from their knowledge in this regard, therefore, they are appointed as amici curiae, who may either submit a written brief and/or address us in person. We note that learned Mr. Khawaja Haris Ahmed was the Advocate-General, Punjab and was associated with the Presidential Reference when it was earlier heard and is also a criminal law expert, therefore, he is also appointed as amicus curiae to assist with the criminal law and procedure.

8. With regard to the criminal law aspects the learned amici curiae may assist on the following:

(1) If, and when, can a murder trial be conducted by the High Court, and to cite local and international precedents;

(2) Was the murder-trial being conducted by the High Court objected to, and if it was, how was the objection attended to;

(3) The consequences, if any, of departing from the usual mode of trial;

(4) The admissibility or otherwise of a confessional statement of an approver and to what extent can it be used against a co-accused;

(5) Was there any legal bias, and if so its effects; and

(6) What were the facts leading to reopening the investigation, and was it because fresh evidence had been discovered or was it on account of the usurper securing his position.

9. The Presidential Reference refers to an interview, which we are told was given to Mr. Iftikhar Ahmed of Geo television by Justice Nasim Hassan Shah, who was on the Bench of the Supreme Court which decided the appeal and review[11]. Mr. Ahmed Raza Kasuri also refers to his application (C.M.A. No. 5788/2011) and

states that he has filed extracts from a book written by the same learned Judge - Constitution, Law and Pakistan Affairs. Mr. Naek states that Justice Dorab Patel had also given an interview about the case.

10. Office is directed to send copies of the Presidential Reference, all orders and the Report of the Tribunal to the learned amici curiae who may attend to the questions noted above, in order dated 21 April 2011 and in the Presidential Reference. The learned amici may submit their respective written opinions on all or any of the said matters, and on any other aspect which they consider relevant, by Friday, 5 January 2024.'

6. We heard this Reference on 8 January, 20, 26, 27 and 28 February and 4 March 2024. On 6 March 2024 we announced our Opinion under Article 186 of the Constitution which read as follows:

'In the course of performing our core duty to administer justice 'in accordance with the Constitution of the Islamic Republic of Pakistan and the law', we (judges) are bound to 'do right to all manner of people, according to law, without fear or favour, affection or ill-will.'[12] There have been some cases in our judicial history that created a public perception that either fear or favour deterred the performance of our duty to administer justice in accordance with the law. We must, therefore, be willing to confront our past missteps and fallibilities with humility, in the spirit of self-accountability, and as a testament to our commitment to ensure that justice shall be served with unwavering integrity and fidelity to the law. We cannot correct ourselves and progress in the right direction until we acknowledge our past mistakes.

2. The advisory jurisdiction, under Article 186 of the Constitution, requires this Court to render an opinion on any question of law of public importance referred to by the President. To us, the question of law, in essence, is whether the requirements of due process and fair trial were complied with in the murder trial of Mr. Zulfiqar Ali Bhutto ("Mr. Bhutto"), the former Prime Minister of Pakistan, by the trial court (the Lahore High Court) and the appellate court (the Supreme Court). This question we approach and answer considering whether the trial court and the appellate court attended to and dealt with the requirements of due process and fair trial.

3. The reference filed by the President of Pakistan has provided us an opportunity to reflect upon the proceedings of the trial, conviction and death sentence of Mr. Bhutto, under the regime of the military dictator General Zia Ul Haq. The reference was filed during the government of the political party founded by Mr. Bhutto but the successive governments of other major political parties carried forward this inquiry and did not opt to withdraw the reference. This collective interest reflects the widespread desire of the people of Pakistan to seek the opinion of this Court on whether Mr. Bhutto was afforded a fair trial and due process for his trial for the murder of Mr. Muhammad Ahmed Khan Kasuri.

4. With the able assistance of the eminent legal minds of the country, we for the reasons to be recorded later and subject to amplifications and explanations made therein, render an opinion on the referred questions in the following terms:

Question (1)

Whether the decision of the Lahore High Court as well as the Supreme Court of Pakistan in the murder trial against Shaheed Zulfiqar Ali Bhutto meets the requirements of fundamental rights as guaranteed under Article 4, sub-Articles (1) and (2) (a), Article 8, Article 9, Article 10A/due process, Article 14, Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973? If it does not, its effect and consequences?

Opinion

(i) The proceedings of the trial by the Lahore High Court and of the appeal by the Supreme Court of Pakistan do not meet the requirements of the Fundamental Right to a fair trial and due process enshrined in Articles 4 and 9 of the Constitution and later guaranteed as a separate and independent Fundamental Right under Article 10A of the Constitution.

(ii) The Constitution and the law do not provide a mechanism to set aside the judgment whereby Mr. Bhutto was convicted and sentenced; the said judgment attained finality after the dismissal of the review petition by this Court.

Question (2)

Whether the conviction leading to execution of Shaheed Zulfiqar Ali Bhutto could be termed as a decision of the Supreme Court binding on all other courts being based upon or enunciating the principle of

law in terms of Article 189 of the Constitution of the Islamic Republic of Pakistan, 1973? If not, its effect and consequences?

Opinion

Referenced questions do not specify the principle of law enunciated by this Court in the Zulfiqar Ali Bhutto case regarding which our opinion is sought. Therefore, it cannot be answered whether any principle of law enunciated in the Zulfiqar Ali Bhutto case has already been dissented to or overruled.

Questions (3) and (5)

Whether in the peculiar circumstances of this case awarding and maintaining of the death sentence was justified or it could amount to deliberate murder keeping in view the glaring bias against Shaheed Zulfiqar Ali Bhutto?

Whether on the basis of conclusions arrived at and inferences drawn from the evidence/ material in the case an order for conviction and sentence against Shaheed Zulfiqar Ali Bhutto could have been recorded?

Opinion

In its advisory jurisdiction under Article 186 of the Constitution, this Court cannot reappraise the evidence and undo the decision of the case. However, in our detailed reasons, we shall identify the major constitutional and legal lapses that had occurred with respect to fair trial and due process.

Question (4)

Whether the decision in the case of murder trial against Shaheed Zulfiqar Ali Bhutto fulfils the requirements of Islamic laws as codified in the Holy Quran and the Sunnah of the Holy Prophet (SAW)? If so, whether present case is covered by doctrine of repentance specifically mentioned in the following Suras of Holy Quran:

(a) Sura Al-Nisa, verses 17 and 18; Sura Al-Baqara, verses 159, 160 and 222; Sura Al-Maida, verse 39; Sura Al-Aaraaf, verse 153; Sura Al-Nahl, verse 119; Sura Al-Taha, verse 82; as well as (b) Sunan Ibn-e-Maaja, Chapter 171, Hadith No. 395.

What are effects and consequences of doctrine - Re: Repentance

Opinion

We were not rendered any assistance on this question, therefore, it would be inappropriate to render an opinion.'

Retirement of Senior Puisne Judge Sardar Tariq Masood

7. Sardar Tariq Masood, J was the senior puisne judge when the Reference was heard and the above opinion was rendered, however, he retired on 10 March 2024. It is commonsensical that, if a Judge has already signed a written opinion/short order, but then retires, he can sign/give the detailed reasons post-retirement. This also prevents the unnecessary wastage of public resources and Court time, which would happen if the Bench was to be reconstituted (after the retirement of a Judge) and the entire matter heard again. A Supreme Court Bench comprising of thirteen Judges[13] held that Judges who had retired before signing the detailed reasons could do so after their retirement.

Facts of the case

8. On 11 November 1974 at 12.30 am Mr. Muhammad Ahmad Khan ('Mr. Khan'), his wife, his wife's sister and his son Mr. Ahmad Raza Kasuri ('Mr. Kasuri') were returning home after having attended a wedding in a car driven by Mr. Kasuri when it was fired upon and a bullet struck Mr. Khan in the head, which resulted in his death. The FIR[14] was registered on the written complaint of Mr. Kasuri ('the Complainant'), who stated that he suspected that he (and not his father) was the intended target because he was vociferously opposed to the government party (Pakistan Peoples Party) of Mr. Bhutto. Attributing motive to Mr. Bhutto, he stated that Mr. Bhutto had addressed him in the National Assembly (of which both were members - MNAs) saying that he (Mr. Kasuri) had exhausted his patience (' ') and that he (Mr. Bhutto) had said that he had had enough of Mr. Kasuri (' ').

Police Investigation of the Crime

9. The Police commenced its investigation[15] of the crime but the perpetrators could not be unearthed. Therefore, the Senior Superintendent of Police ('SSP') transferred the investigation to a specialized

investigation unit, that is, to the Crime Investigation Agency ('CIA').[16] However, the CIA also failed to trace the criminals, and after nine and a half months submitted its report recommending the closure of the investigation.[17]

Closing the Investigation

10. The Police could not make any progress in discovering those who had committed the crime which had killed Mr. Khan. The CIA too drew a blank. Therefore, a report was prepared by Inspector Abdul Hameed of CIA, Lahore which was also signed on 19 March 1976 by the Deputy Superintendent of Police ('DSP'), Ichhra Circle, Lahore within the limits of which the crime was committed, and on 24 April 1976 by the Superintendent of Police ('SP'), Cantonment, Lahore, recommending that the investigation be closed. The Magistrate ordered the closure of the investigation on 3 May 1976. Neither Mr. Kasuri, nor the other legal heirs of the late Mr. Khan, nor anyone else objected to the closure of the investigation. The Magistrate's order closing the investigation was never challenged.

Tribunal of Inquiry

11. The Government of Punjab appointed a Judge of the Lahore High Court as the Tribunal[18] to inquire into:

**'NOTIFICATION**

The 13th November 1974

No. SOG-III-6-309/74 - Whereas the Government of the Punjab is of the opinion that it is necessary to appoint a Tribunal for the purpose of making an inquiry into the incident which took place at Shadman-Shah Jamal Round-about, nearly four furlongs to the north of P. S. Ichhra, Lahore on the night between 10th and 11th November, 1974 at 12-30 a.m. (night):

Now, therefore, in exercise of the powers conferred on him by Section 3 of the West Pakistan Tribunals of Inquiry Ordinance, 1969 (Ordinance II of 1969), the Governor of the Punjab is pleased to appoint Mr. Justice Shafi-ur-Rehman, Judge, Lahore High Court as the Tribunal.

2. The terms of reference of the Tribunal shall be-

(i) To inquire into the incident which took place on the night between 10th and 11th November, 1974 at Shadman-Shah Jamal Round-about, nearly four furlongs to the north of P. S. Ichhra, Lahore leading to the death of Nawabzada Muhammad Ahmed Khan, resident of 130-J, Model Town, Lahore, father of Mr. Ahmed Raza Khan Qasuri, MNA, in which connection FIR No. 402/74 was recorded on 11th November 1974 at P. S. Ichhra, Lahore

(ii) To examine the investigations conducted by the Police in the case and give such directions as may be appropriate.

3. The Tribunal will finalize the inquiry and submit his report within one month.

F. K. BANDIAL

Chief Secretary.'

12. The Tribunal submitted Report of the Tribunal on 22 February 1975, which found that:

'15. The only motive mentioned in the FIR accounting for the occurrence is the affiliations and the political activities of the complainant, Mr. Ahmed Reza Khan Kasuri, and the extreme exasperation and dislike for him of the Prime Minister publicly expressed on the floor of the National Assembly. In explaining the mention of such a motive in the FIR the complainant made it clear that it does not necessarily mean that he was subjected to this and the precedent attacks directly at the bidding of the Prime Minister or that the attack was organized by someone in Government or Party. He said that on political differences, whatever their nature or extent, such a public condemnation by the Prime Minister, who happens to be, for the time being, the repository and source of all political and governmental powers, could prompt a die-hard, an over enthusiastic person, or a trigger happy individual, in the government or outside, of the party or not, to accomplish his extermination from the scene.'

The Tribunal issued the following directions:

'36. In short, the directions that I propose giving to the investigating agency are the following:-

(i) A more thorough and expert examination of the spot.

(ii) Preservation of property connected with the crime, already recovered or recoverable from the spot.

(iii) Expert examination of all the recovered articles together, with a view to narrow down the class of weapon used in the commission of the crime.

(iv) Natural witnesses to the occurrence i.e. residents of the area, invitees at the house of Bashir Shah, the Patrol Parties to be subjected to more purposive interrogation particularly for ascertaining the number of shots fired, number of weapons used and the suspects.

(v) The surviving occupants of the car should have been profitably interrogated on certain aspects of the investigation.

(vi) The material witnesses in the case and the suspects to be fully protected against physical harm.'

However, nothing was unearthed about the perpetrator(s) of the crime.

**5 July 1977**

13. The Chief of Army Staff, General Mohammad Zia-ul-Haq, overthrew the democratic order and imposed martial law on 5 July 1977. The investigation of the murder of Mr. Khan on 11 November 1974, which was closed on 3 May 1976, was reopened on the verbal orders of the Director of the Federal Investigation Agency ('FIA').[19] The prosecution never explained how and why an investigation into a thirty-two month old case, which was closed fourteen months earlier, was reopened. It was also not explained how and why the investigation was transferred to the FIA. Both of these actions (the reopening of the investigation and its transfer to FIA) were taken immediately after General Zia-ul-Haq's coup d'etat overthrowing Mr. Bhutto's government. The case was resurrected.[20]

Post Coup Investigation

14. The interim investigation report (challan) was submitted on 11 September 1977.[21] In addition to section 302 (murder) of the Pakistan Penal Code, 1860 ('P.P.C.') and section 307 (attempt to murder) mentioned in the FIR were added, sections 120B (criminal conspiracy to commit an offence) and 109 (abetment of an offence). The following seven persons were nominated in the interim investigation report to having conspired to murder Mr. Kasuri and for the murder of Mr. Khan:

Mr. Bhutto, Prime Minister

(Sheikh) Masood Mahmood, Director-General FSF

Mian Muhammad Abbas, Director FSF

Mr. Ghulam Hussain, Inspector FSF

Mr. Ghulam Mustafa, Inspector FSF

Mr. Arshad Iqbal, Sub-Inspector FSF

(Rana) Iftikhar Ahmad, Assistant Sub-Inspector FSF

However, in the final investigation report (challan) dated 18 September 1977 Masood Mahmood and Mian Muhammad Abbas were shown as approvers.

Transfer of case to the Lahore High Court

15. A murder case under section 302, P.P.C. can only be tried by a Court of Session. Therefore, the investigation report, which was submitted to the Magistrate, was forwarded to the Sessions Judge, Lahore on 12 September 1977. After receipt of the report the trial would have commenced. However, on the very next day (13 September 1977) the case (Criminal Original No.60/77, titled State v. Z. A. Bhutto) came up before Justice Mushtaq Hussain, the Acting Chief Justice ('ACJ'), who the very same day ordered that, 'In view of submissions made in the petition the case is transferred to this Court for trial.' This was done despite the fact that the Sessions Judge, Lahore had already on 12 September 1977 taken cognizance of the case. It is inexplicable how then the case was listed for hearing before the ACJ. Criminal Original No.60/77 is untraceable, therefore, it cannot be ascertained what was recorded therein, and what had necessitated its immediate fixation in the High Court, and before Justice Mushtaq Hussain. The record (which is available), however, shows that Justice Mushtaq Hussain immediately and on the same day 13 September 1977 granted the said petition, by passing the following order:

'In view of the submissions made in the petition the case is transferred to this Court for trial. It shall be heard by a Full Bench consisting of

1. Myself

2. Zakiuddin Pal
3. M.S.H. Qureshi
4. Sheikh Aftab Hussain and
5. Malik Gulbaz Khan, JJ.

To be heard on 24.9.1977.

Maulvi Mushtaq Hussain
ACTING CHIEF JUSTICE'

Commencement of the Trial

16. On 24 September 1977 the trial of Mr. Bhutto and of the other co-accused commenced. The High Court ordered that the evidence be summoned, however, even though the accused were present in Court, the charge was not framed against them. The charge was also not framed on the next date, that is, on 3 October 1977. Framing of charge is a mandatory requirement,[22] and only after it is framed can a trial commence. The charge was finally framed on 11 October 1977 when all the accused pleaded not guilty. From 11 October 1977 to 25 February 1978 the High Court (acting as the Trial Court) recorded the statements of forty-one prosecution witnesses (PWs) and of four defence witnesses (DWs). On 2 March 1978 judgment was reserved and it was announced on 18 March 1978. Mr. Bhutto was convicted for the following offences of the PPC: (a) section 120-B and sentenced to five years rigorous imprisonment, (b) section 302 read with sections 301 and 111 and sentenced to death and (c) under section 307 read with section 109 and sentenced to seven years rigorous imprisonment for each offence.

Appeal and Review

17. Mr. Bhutto appealed his conviction before the Supreme Court,[23] but his appeal was dismissed on 6 February 1979 by a majority of four to three.[24] A review petition[25] seeking review of the Judgment dismissing Mr. Bhutto's criminal appeal was filed, but it was unanimously dismissed on 24 March 1979.

Death Warrant and Execution

18. Mr. Bhutto's 'Warrant of Execution on Sentence of Death' ('the death warrant') was signed by Mushtaq Hussain, J, who by now had become the Chief Justice of the Lahore High Court. The death warrant concluded in the following words: 'Given under my hand and the seal of the Court this 25th day of March 1979', and it directed the Superintendent District Jail at Rawalpindi to execute the sentence on 'the Second day of April 1979'. The execution date was later changed to 'the Fourth day of April 1979'. Mr. Bhutto was executed and the Superintendent District Jail Rawalpindi issued a certificate stating that he was 'hanged by the neck till he was dead at Rawalpindi on Wednesday the 4th day of April, 1979; that the body remained suspended for a full hour and was not taken down until life was ascertained by a medical officer to be extinct...'.

The Constitutional scope of this matter

19. We want to clarify, and emphasize, that we are not hearing a petition, an appeal or a review petition. Neither the Constitution nor the law provides a mechanism whereby Mr. Bhutto's conviction could be set aside. Mr. Bhutto's conviction attained finality after the dismissal of the review petition by the Supreme Court. In our advisory jurisdiction, under Article 186 of the Constitution, the decision cannot be undone.

Detailed Reasons

20. With regard to the conviction and sentence of Mr. Bhutto, on 6 March 2024 we had recorded that, 'in our detailed reasons, we shall identify the major constitutional and legal lapses that had occurred with respect to fair trial and due process'. The following are the detailed reasons.

Reopening of the Investigation

21. The investigation of the murderous attack that took place on 11 November 1974 was undertaken by the Police, however, as no progress could be made it was transferred to the CIA, but still the perpetrator(s) could not be discovered. A Tribunal comprising of a High Court Judge was then constituted who issued certain directions but it did not help in unearthing the criminal(s). The recommendation to close the investigation was then made, which was accepted by the Magistrate and the investigation was officially closed on 3 May 1976. No one objected to the closure of the investigation. No application was submitted to reopen the investigation, and no Court ordered that the investigation be reopened. The complainant, who was a lawyer of some

standing, also did not object to the closure of the investigation nor did he take the objection that its closure was premature.

22. Within a few days of General Zia's take over those, who were made the accused, were arrested, the crime, which was declared to be untraced and the investigation of which had been closed, was reopened (without authorization) and FIA re-investigated it (without aurthorization). Everyone who was made a co-accused with Mr. Bhutto had surprisingly confessed to the crime. And, the High Court unilaterally and without hearing the accused elected to itself conduct a murder trial, which was wholly unprecedented. Mr. Bhutto had appointed General Zia-ul-Haq as the Army Chief[26] who by his actions of 5 July 1977 had clearly violated Article 6 of the Constitution and committed the offence of high treason, the prescribed punishment for which is imprisonment for life or death. General Zia, therefore had a motive to proceed against Mr. Bhutto, because had he not done so, Mr. Bhutto may have proceeded against him for committing high treason.

Reinvestigation by FIA

23. The Federal Investigation Agency Act, 1974 ('the FIA Act') constituted the FIA, and empowered the FIA to investigate the offences listed in the Schedule to the FIA Act, but it does not permit the reinvestigation of a crime which has already been investigated by the Police and the investigation whereof was ordered to be closed. Significantly, no judicial order was issued directing that the investigation be reopened or the crime reinvestigated by the FIA. The FIA had received the case file on 8 August 1977, but it had already commenced reinvestigation on 24 July 1977, as per case diary recorded by Abdul Khaliq, Deputy Director, FIA. This suggests that there was a preconceived objective. This transgression escaped the attention of the Trial Court Judges and also of the majority of the Appellate Court Judges.

Transfer of Case to the High Court

24. The reinvestigation report was submitted to the Sessions Judge, Lahore[27] on 12 September 1977 who sought a report from the Public Prosecutor. However, the very next day (on 13 September 1977) the case was placed before a single Judge of the Lahore High Court, namely, Justice Mushtaq Hussain, who did something most unusual. Without issuing notices to Mr. Bhutto and to the other accused, without providing them an opportunity of a hearing and without enabling them to acquire legal representation, he ordered that, 'In view of the submissions made in the petition the case is transferred to this Court for trial.'

25. Section 526 of the Code of Criminal Procedure, 1898 ('the Code') empowers the High Court to transfer a criminal case to itself if: (a) a fair trial is not possible, (b) the case involves some questions of law of unusual difficulty, (c) if the place in or near which any offence has been committed needs to be viewed, (d) it will be to the general convenience of the parties or witnesses or (e) to secure the ends of justice. However, Justice Mushtaq Hussain, ACJ did not cite any reason, let alone any of those mentioned in the law necessitating the transfer of case to the High Court and for it to conduct the trial itself.

Prejudice Caused to the Accused/Convict

26. A murder trial is conducted by a Court of Session.[28] Appeal against conviction lies before the High Court.[29] Article 185(2)(b) of the Constitution and sections 411-A and 526 of the Code permit trials to be conducted by the High Court, but these provisions do not provide for a High Court to conduct a murder trial. There was not a single precedent of a High Court conducting a murder trial. Mr. Bhutto's murder trial by the High Court made history; never before nor since has this happened. In other countries of the Indian subcontinent, where there are similar legal provisions, a High Court has never conducted a murder trial.

27. By conducting the murder trial itself, the High Court made redundant a number of provisions of the Constitution and Chapter XXVII of the Code. Section 374 requires that every sentence of death is required to be confirmed by the High Court; a vitally important safeguard against faulty convictions and hasty hangings. The sentence of death which is confirmed by the High Court must also be signed by two judges.[30] When a sentence of death is passed, the High Court to which the matter is sent for confirmation of the conviction and sentence is also empowered to pass any other sentence warranted by law or acquit the accused person.[31] In this case the trial was conducted by the High Court as the Trial Court, therefore, the death sentences passed by the Trial Court had to be confirmed by the Appellate Court. The mandatory requirement of section 376 of the Code, reproduced hereunder, was not complied with:

'Power of High Court to confirm sentences or annul conviction: In any case submitted under Section 374 the High Court:

(a) may confirm the sentence, or pass any other sentence warranted by law; or

(b) may annul the conviction and convict the accused of any offence of which the Sessions Court might have convicted him or order a new trial on the same or an amended charge; or

(c) may acquit the accused person;

Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.'

28. If for argument's sake it be accepted that the High Court could have conducted a murder trial, this it then did as a Trial Court, and as death sentences were passed these had to be confirmed by submitting the case to the High Court. Any two Judges of the High Court, who had not conducted the trial, could have done so in terms of section 376 of the Code. But, this was not done. Without confirming the sentences of death they could not have been executed. The Code, and its section 376, which provides essential protection to those sentenced to death, was enacted in 1898, but this provision has only once been disregarded, which was in this case.

Constitutional Safeguards were Disregarded

29. The Constitution mandates that, 'To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen.'[32] And, 'In particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.'[33] The law (section 376 of the Code) requiring the confirmation of death sentences was violated and this inalienable right was contravened. Article 9 of the Constitution stipulates that, 'No person shall be deprived of life or liberty save in accordance with law,' and this fundamental right too was violated, regrettably, by those mandated to ensure the laws compliance.

Right of appeal lost

30. An appeal against the conviction and sentence of a Court of Session lies to the High Court.[34] However, since the trial was conducted by the High Court itself, Mr. Bhutto and the other accused were deprived of one right of appeal. Article 4(1) of the Constitution which requires that all be treated in accordance with law, and Article 9 of the Constitution which prohibits anyone to be deprived of life save in accordance with law were vitiated. The convicts were deprived of one right of appeal, which Articles 4(1) and 9 guaranteed, and these rights can not be undone or disregarded, even during the proclamation of emergency.[35]

Right to Fair Trial and Due Process

31. The right to due process and a fair trial is part of the jurisprudence of Pakistan. These rights subsisted even before 'the right to fair trial and due process' were specifically incorporated in the Constitution, through Article 10A in the year 2010 as Fundamental Rights.[36] In the case of Abul A'la Moudoodi v. Government of West Pakistan[37] a five-Member Bench of the Supreme Court had stated (in 1964) that the necessity of due process 'is an element of justice which forms part of the British Common Law', that is inherited by Pakistan. In the case of Benazir Bhutto v. Federation of Pakistan[38] (1988) the Fundamental Right to life (Article 9 of the Constitution) was held, by an eleven-Member Bench of the Supreme Court, to include access to justice, which incorporates fair trial and due process:

'The right of "access to justice to all" is a well-recognised inviolable right enshrined in Article 9 of the Constitution. This right is equally found in the doctrine of "due process of law". The right of access to justice includes the right to be treated according to law, the right to have a fair and proper trial and a right to have an impartial Court or Tribunal. This conclusion finds support from the observation of Willoughby in Constitution of United States, Second Edition, Vol. II at page 1709 where the term "due process of law" has been summarised as follows:

"(1) He shall have due notice of proceedings which affect his rights.

(2) He shall be given reasonable opportunity to defend.

(3) That the Tribunal or Court before which his rights are adjudicated is so constituted as to give reasonable assurance of his honesty and impartiality, and

(4) That it is a Court of competent jurisdiction."

It therefore follows that in terms of Article 9 of the Constitution a person is entitled to have an impartial Court and tribunal. Unless an impartial and independent Court is established the right to have a fair trial according to law cannot be achieved.'

The above principle was reiterated (in 1993) in the case of Government of Balochistan v. Azizullah Memon:[39]

'The right of access to justice is internationally well-recognised human right and is now being implemented and executed by granting relief under the Constitutional provisions. Article 10 of Universal Declaration of Human Rights and Article 14 of the United Nations Convention on Criminal Political Rights[40] recognize the right of fair trial by an independent and impartial Tribunal established by law.'

'The right of access to justice does not only mean that the law may provide remedies for the violation of rights, but it also means that every citizen should have equal opportunity and right to approach the Courts without any discrimination. It also envisages that normally the Courts established by law shall be open for all citizens alike. Where the jurisdiction of the ordinary Courts established under the ordinary law is excluded or barred and certain class of cases or class of persons or inhabitants of an area are not allowed to approach such Courts and are to be tried or rights adjudicated by special Courts, then a fair, rational and reasonable classification must be made which have nexus with the object of the legislation.'

Al-Jehad Trust v. Federation of Pakistan[41] was decided by a five-Member Bench (in 1996) and it reiterated the earlier (1994) decision in the case of Government of Sindh v. Sharaf Faridi,[42] in which the due process of law requirement had been stressed.[43]

In the above mentioned cases, and in many others recording similar opinions, the jurisprudence of fair trial and due process stood established as a fundamental right well before the insertion of Article 10A[44] in the Constitution in 2010. The safeguards to ensure that an accused is fairly and justly treated and that essential requirements of a fair trial and due process are met were disregarded in the case of Mr. Bhutto.

Basis of Conviction

32. The foremost basis for the conviction of Mr. Bhutto was the testimony of an accused, who turned approver, namely, (Sheikh) Masood Mahmood, the then Director-General of the Federal Security Force ('FSF'). After the coup d'etat of 5 July 1977 Masood Mahmood was arrested, nominated as an accused and pleaded that he would make disclosure of the crime, provided he is pardoned. His plea was accepted and he was made an approver.[45]

Masood Mahmood the Approver

33. After Masood Mahmood's arrest he wrote to the District Magistrate, Lahore on 7 September 1977, stating he had, 'simply carried out orders of the former Prime Minister of Pakistan, Mr. Zulfiqar Ali Bhutto, to cause the death of Mr. Ahmad Raza Kasuri.' And, 'in case I am granted pardon... I would be able to disclose material facts regarding the conspiracy leading to the murder...'. He did so because, to use his own words, 'the commission of this heinous crime has haunted my conscience.' Incarceration had revived his flagging conscience. The crime was committed three years earlier and Masood Mahmood's conscience remained dormant and only awoke when he was arrested. A conscience which first wanted to secure a pardon for himself. A conscience which considered that to order an assassination was 'simply' a matter of 'carrying out orders', as was stated by this most senior police officer. The Additional District Magistrate accepted Masood Mahmood's plea on 14 September 1977, seven days after he had written to him offering 'to disclose material facts.'

Statement of Masood Mahmood

34. Masood Mahmood was made an approver on 14 September 1977, and his statement was recorded the same day. He waxed eloquent and most of what he said was irrelevant. The first four pages mention the various positions that he had held and how he reached grade 21. 'My selection to the Indian Police was made against a war reserved vacancy as I had served briefly in the Royal Indian Air Force.' And, 'I resumed duty on 18th September 1948 as Assistant Superintendent Police.' This was followed by saying that Prime Minister

Mr. Bhutto had sent for him on 12 April 1974, had praised him and noted the 'good work' he had done and acknowledged his 'established reputation for integrity, honesty and hard work.' It is questionable whether integrity and honesty would be the qualities to look for in a henchman. Masood Mahmood stated that after an hour of Mr. Bhutto persuading him he condescended to 'take-over as D.G. (FSF) to re-organise and train the force.' He then proceeded to reveal his vulnerability, stating that his ex-colleague Saeed Ahmad Khan, Chief Security Officer of the Prime Minister, and his Assistant, Abdul Hamid Bajwa, told him that if he did not do as Mr. Bhutto asked, 'your wife and children may see no more of you.' Saeed Ahmed Khan was not produced as a witness and Abdul Hamid Bajwa had died, therefore, anything allegedly said by them constituted hearsay. Masood Mahmood then disclosed his cowardice, stating that Mr. Bhutto had told him, 'You do not want Waqar chasing you ... ?' Waqar was also not produced as a witness. Another name which Masood Mahmood dropped was of M. R. Welch, Director FSF in Quetta, who he 'instructed to take care of him [Mr. Kasuri] if possible in Quetta'. Masood Mahmood stated 'that Mian Abbas had previously been asked under his orders through Mr. Haq Nawaz Tiwana do away with Ahmad Raza Kasuri. He directed me to tell Mian Abbas to get on with the job and tell Mian Abbas to produce either Ahmad Raza Kasuri's dead-body or his body totally bandaged all over.' Mian Muhammad Abbas, however, retracted his statement before the Trial Court and Haq Nawaz Tiwana, the previous Director-General of FSF, was not produced to testify. Masood Mahmood stated that Mr. Bhutto had wanted Mr. Kasuri to be killed for quite some time and had already directed Mian Abbas to do so, but to no effect. However, only when Masood Mahmood directed him to do so was Mr. Kasuri fired upon, which instead killed Mr. Khan.

Masood Mahmood Defiance of the Prohibition to Kill

35. Masood Mahmood put himself forward as a man having faith ( ) in God and knew that ordering someone's murder was 'against the dictates of God', but since he was given 'specific orders' from Mr. Bhutto he became 'instrumental in defying God Almighty (May He forgive me) for taking a valuable human life.' The reason cited by Masood Mahmood for defying God was his marital status - 'I would have chucked the job and walked down on the street, had I been a bachelor.'

Masood Mahmood's Credibility

36. Masood Mahmood's credibility was accepted and he was believed without demur by the Trial and Appellate Courts. However, there were a number of factors which prudence should have alerted and shown that he was self-serving, self-preserving, morally bankrupt, and a false witness:

(1) Masood Mahmood testified that Mr. Bhutto had appointed him as the Director General of FSF because of his integrity and honesty, but would those be the qualities that would be sought in one appointed to fulfill a criminal agenda and carry out nefarious activities.

(2) Masood Mahmood stated that 'his father and the deceased were great friends' yet he had no qualms to order the assassination of the son of his father's great friend.

(3) Mr. Bhutto had already instructed Mian Muhammad Abbas to assassinate Mr. Kasuri, according to Masood Mahmood, therefore, it is inexplicable why he would then also tell Masood Mahmood to do so.

(4) Masood Mahmood stated that Mian Muhammad Abbas did not follow Mr. Bhutto's directions to kill Mr. Kasuri, but offered no explanation why he disobeyed and suffered no consequences for such disobedience.

(5) However, Masood Mahmood's orders were followed by Mian Muhammad Abbas, who had earlier disobeyed the Prime Minister.

(6) As stated by Masood Mahmood it was acceptable to Mr. Bhutto if Mr. Kasuri was given a thorough beating yet he directed that Mr. Kasuri be killed.

(7) In ordering an assassination, and not a beating, Masood Mahmood alone would be responsible for it.

(8) Masood Mahmood stated that the following were complicit and were informed about the conspiracy to kill Mr. Kasuri: (1) Haq Nawaz Tiwana, the first Director-General of FSF, (2) Mian Muhammad Abbas, Director FSF, (3) M. R. Welch, Director FSF, Quetta, (4) Saeed Ahmed Khan, Prime Minister's Chief Security Officer, (5) Abdul Hamid Bajwa, Assistant Chief Security Officer and (6) himself. This number of persons knowing about a heinous conspiracy showed complete recklessness and disregard of detection, which any reasonable person would find hard to accept.

(9) The conspiracy theory put forward by Masood Mahmood was believed without a shred of supporting evidence.

(10) After Mr. Khan's murder Masood Mahmood continued to hold the position of DG of FSF, however, he was never again asked by Mr. Bhutto to do anything nefarious, let alone to kill. Did this mean that Mr. Bhutto had only one enemy, and the FSF comprising of thousands of personnel, was established for this sole purpose.

(11) Masood Mahmood secured his freedom and a passage out of the country by sacrificing Mr. Bhutto. A prudent person would be alerted to the conduct of such a person, yet Masood Mahmood's credibility was not questioned by those whose judicial duty it was to satisfy themselves of it.

Conscience and Convenience

37. Masood Mahmood repeatedly referred to his conscience. 'My conscience haunted me' and 'that this action [murder] would be against my conscience.' However, his conscience, lay dormant throughout his tenure as the Director-General of the FSF; it surfaced when he had spent only a few days in custody, and, his resurgent conscience was premised on first extricating himself and securing for himself a pardon. His convenience and safety trumped his conscience, which begs the question, was he truthful or an opportunist? Confessions must be voluntary and must not have 'been obtained from him by fear of prejudice or hope or advantage'.[46] And, 'If the confession directly or indirectly is the result of inducement, threat or promise from a person in authority, it would be treated as not voluntary'.[47] It must be 'ensure[d] that the confessional statement should be absolutely free from the slightest tinge or taint of extraneous influence such as threat, promise or inducement and the Courts are placed under an obligation to affirmatively satisfy themselves that it is free and voluntary'.[48] Masood Mahmood obtained for himself freedom from captivity by his self-serving statement. Masood Mahmood melodramatically put forward his faith by overlooking Islam's most fundamental teaching, and prohibition: to kill a human, and that killing one person was like the killing of all of humanity and saving one person was like the saving of all of humanity.[49] This type of person the Federal Court had perceptively categorized as 'a moral wretch'.[50]

Lack of Evidence

38. With regard to the three offences attracting death sentences, section 302 (murder), section 307 (attempted murder) and section 111 (abetment), there was no direct evidence against Mr. Bhutto, there wasn't even circumstantial evidence, which would exclude any reasonable hypothesis of innocence. The entire prosecution case was built on the statements of Masood Mahmood and Mian Muhammad Abbas, however, Mian Muhammad Abbas retracted his confession and testified to the contrary. Haq Nawaz Tiwana and Abdul Hamid Bajwa had died. M. R. Welch and Saeed Ahmed Khan, without being made approvers, were produced as prosecution witnesses.

Negative Forensic Report

39. The spent bullet casings, ejected from the firearm(s) that were used in the attack, did not match any of the weapons in use of the FSF. The prosecution contended that they were substituted, but without producing any positive evidence to substantiate this. Nonetheless, this contention of the prosecution was accepted, and it was further presumed that the purported substitution was done at the behest of Mr. Bhutto.

Unsubstantiated Inferences

40. Certain notings in some file/document, statedly made by Abdul Ahad, DSP, and Abdul Hamid Bajwa (exhibits 3/2-A and 3/2-A/ 1), were brought on record. And, Mr. Bhutto was sought to be implicated by relying on them purely on the basis of assumptions and his 'subsequent conduct', without stating what this was and how it incriminated him. The Trial Court held that, 'These documents corroborate the evidence of these witnesses on this point,' but without stating the said point. The judgment follows this with another vague sentence - 'These documents further show that the principal accused as well as P. W. 3 agreed to this suggestion', without expounding on what was this suggestion and to what had they agreed. Neither Abdul Ahad nor Abdul Hamid Bajwa were produced as witnesses (Abdul Hamid Bajwa had died), therefore, they could not be subjected to cross-examination. Extraordinary effort was made to draw arbitrary connections, derive meanings therefrom

and then use them against the accused. This eroded the fundamental principle of establishing guilt beyond reasonable doubt. The manner in which the trial was conducted was antithetical to a fair trial and due process.

Motive - Corroboration

41. Section 114 of the Evidence Act, 1872[51] in its illustration (b) states, 'that an accomplice is unworthy of credit, unless he is corroborated in material particulars.' In criminal jurisprudence it is well settled that motive cannot corroborate an approver's testimony.[52] However, the Trial Court was of the opinion that motive could be used as corroboration as expressed in paragraph 584 of its judgment, comprising of 627 paragraphs. Respectfully, it was also incorrect to say that, 'The principle laid down is not so wide', which was in complete negation of the said statutory provision. Only in paragraph 584 of the judgment was there a fleeting reference to motive yet the Trial Court proceeded on an incorrect assumption that the motive stood established, even though the facts did not suggest this.

42. The Appellate Court's majority judgment,[53] which comprised of 963 paragraphs, probably the longest judgment in any criminal case, upheld the High Court's judgment. The majority of the Judges of the Appellate Court took an even more novel approach, by first holding that the four co-accused and two approvers were not accomplices but witnesses, and then holding (on this entirely incorrect assumption) that they did not require corroboration. Corroboration of accomplices was categorized as an artificial requirement. 'Without introducing an artificial requirement of corroboration of his evidence by applying the rule contained in illustration (b) to section 114 of the Evidence Act.' Disregarding a statutory provision and declaring it to be an artificial requirement did not behove judges, and all the more so when the object of the law is to prevent wrong convictions.

The Asserted Motive - Constitutional Protection

43. The motive cited by Mr. Kasuri for targeting him was his political differences with Mr. Bhutto. Mr. Kasuri cited Mr. Bhutto's speech of 3 June 1974 in the National Assembly and the exchange of words between them as the motive for the crime. Other speeches in the National Assembly were also referred to, and relied upon, to support motive. The proceedings of the National Assembly were also relied upon by the Courts. This was not permissible. The Constitution stipulates that, 'no member shall be liable to any proceedings in any court in respect of anything said'[54] in Parliament. This constitutional provision, and protection accorded to the Members of Parliament, was not even considered.

44. Mr. Kasuri stated that he was an opponent of Mr. Bhutto yet whatever he said was believed. The possibility of others having a motive, which were mentioned in Report of the Tribunal was not explored. Mr. Khan was shot at and died; the investigators also did not consider the possibility that Mr. Khan may have been the intended target. There were also two ladies in the ill-fated car but, surprisingly, neither of them, nor any of the other children of Mr. Khan were examined to consider whether someone else may have had a motive. Mr. Bhutto's enmity with Mr. Kasuri was cited by Mr. Kasuri as the motive, however, it was not even considered that such enmity could equally be a reason to falsely implicate Mr. Bhutto.

Did Mr. Bhutto or Mr. Kasuri have Motive?

45. The entire prosecution case was premised on the motive which Mr. Kasuri asserted. However, this at best was an expression of suspicion; he could not say that he had personal knowledge of any specific conspiracy on Mr. Bhutto's part. When Mr. Kasuri testified in Court he undermined his own credibility, and consequently the suspicion he harboured that Mr. Bhutto was behind the attack. Mr. Kasuri had successfully contested on the Pakistan Peoples Party ('PPP') ticket from Kasur (NA 63) in the general elections held in 1970. He stated that Mr. Bhutto had 'suspended my primary membership of PPP' on 2 May 1971. And the very next day, 'On 3.5.1971, in a Press Conference I floated my own group in the PPP, which was known all over the country as PPP (Raza Progressive Group).' Mr. Kasuri stated that he then 'made a temporary peace with Mr. Bhutto as a matter of political strategy... in the year 1972.' But, 'Immediately after the lifting of the Martial Law on 21st April, 1972, I showed my teeth against Mr. Bhutto and revived my old role of criticising him both outside and inside the National Assembly of Pakistan.' He continued, 'Mr. Bhutto formally expelled me from the PPP in October, 1972. In June, 1973 I joined Tehrik-I-Istiqlal and I rejoined PPP on 6th April 1976. I joined the PPP

because of instinct of self-preservation, because I knew I was a marked man.' The inconsistencies in Mr. Kasuri's testimony abound.

46. Mr. Kasuri attributed the killing of his father to Mr. Bhutto but had no qualms applying to him for a PPP ticket to contest the 1977 general elections - 'I did apply for a PPP ticket for election to the National Assembly this year, ... The ticket was not awarded.' Surely, self-preservation could not be a reason for applying for a PPP ticket in the coming elections. Mr. Kasuri was confronted in cross-examination with his letter (P.W. 1/19) through which he had requested for an interview with Mr. Bhutto, and he stated, 'This request for seeking an interview pertains to the period from 8th of January to 30th of January, 1977, because in this period the tickets had to be decided and I was seeking an interview in relation to that.'

Motive Vitiated by Mr. Kasuri

47. Mr. Kasuri undermined his own narrative and credibility. He rejoined the PPP, headed by Mr. Bhutto, who he had earlier accused for the murderous attack on him, but which had killed his father. Mr. Kasuri tried to resolve this contradiction by saying that he did so for self-preservation. This explanation is difficult to accept, because it would mean that when his father was killed in 1974 he had acted bravely and nominated the Prime Minister for conspiracy and murder but later cowardice awashed over him. It is inexplicable why he would solicit the PPP ticket from the nominated accused after the murder of his father. The justification he offered was irreconcilable and unbelievable. It was imperative for the Trial Court to have scrutinized Mr. Kasuri's vacillating explanations and for the Appellate Court to have analyzed his recorded testimony in this regard, but unfortunately this was not done. The entire prosecution case was premised on Mr. Bhutto having the motive to have Mr. Kasuri killed. A motive which Mr. Kasuri himself vitiated.

48. The Trial Court and the Appellate Court gave credence to the motive theory, however, Mr. Kasuri's testimony could be equally treated to be that of a person wanting to settle personal scores. His testimony had created more than reasonable doubt about the alleged motive and it was equally suggestive of his animus towards Mr. Bhutto and to falsely implicate him. The prosecution is required to establish the guilt of an accused beyond reasonable doubt, which in the case of Mr. Bhutto with regard to motive, the attendant conspiracy and resultant killing it had not done.

Failure to Establish Motive

49. The matter of motive in this case, unlike other criminal cases, was very significant also because of the charge of conspiracy. It is also well established that in criminal cases the prosecution need not set up a motive but if it elects to do so and then fails to establish it the prosecution suffers its consequences.[55] The motive's absence, or failure to establish it is also consequential in a murder case in which the guilt of the offender is established but the asserted motive is not. In such cases the accused invariably is not given capital punishment, but instead imprisonment for life.[56]

Either Kill or Beat Mr. Kasuri

50. Masood Mahmood had confessed, and testified in Court, that Mr. Bhutto wanted one of two outcomes; either that Mr. Kasuri is killed or that he be severely beaten up. In his confessional statement[57] Masood Mahmood said, 'He [Mr. Bhutto] then ordered me to tell Mian Abbas to get on with it and produce either Ahmed Raza Kasuri dead body or his body totally bandaged all over...'. And, that, 'After giving orders to Mian Abbas I carried on normal work....' In his testimony (recorded before the five-Member Trial Court) he said, 'The Prime Minister went on to instruct me that I should ask Mian Muhammad Abbas to get on with the job and to produce the dead body of Mr. Ahmed Raza Kasuri or his body bandaged all over.' And, 'I repeated to [Mian Muhammad Abbas] him the orders of the then Prime Minister verbatim.' He did not disclose the orders that he gave to Mian Abbas. Masood Mahmood (in following Mr. Bhutto's stated orders) could have elected to direct that Mr. Kasuri be given a severe beating, however, he presumably elected to order that he be killed. This aspect neither the Trial Court nor the Appellate Court considered. Therefore, Masood Mahmood, and not Mr. Bhutto, would be liable for the killing.

First Information Report - FIR

51. The crime was first reported to the police, not by Mr. Kasuri, but by his brother, as Mr. Kasuri himself stated. 'My brother, Maj. Ali Raza rang up S. S.P. [Senior Superintendent of Police] Lahore and told him

about this incident on the telephone. S. S.P., Lahore at that time was Mr. Asghar Khan, who after, receiving this message on the telephone arrived in the hospital ... along with others. A large contingent of Police also arrived on various kinds of vehicles.' S.S.P. Lahore (PW 12) also confirmed that the crime was first reported by 'Major Ali Raza son of Nawab Muhammad Khan Kasuri, after midnight.' Major Ali Raza, who first informed the police, was also in the hospital when the police reached it. However, the FIR did not mention Major Ali Raza as the informant and the FIR's complainant.

52. Mr. Kasuri submitted a written complaint after almost three hours had elapsed since the crime, in which he mentioned Mr. Bhutto. The FIR was registered at 3.45 am on 11 November 1974 which showed Mr. Kasuri (and not his brother) as the informant/ complainant.

53. Section 154 of the Code requires that when information of a cognizable offence is given to the police it is required to be recorded by the officer in charge of the concerned police station. The categorization of reporting of a crime and reducing it into writing as the first information report (FIR), as its name suggests, is the very first information of a cognizable crime received by the police. An important object of the FIR, which courts consider, is that the crime was promptly reported to the police without retrospection and embellishment.

54. The first reporting of the crime to the police was by Major Ali Raza, however, the FIR was not registered when he reported the crime, nor was he cited as the informant/complainant in the FIR when it was registered. Surprisingly, Major Ali Raza was also not produced as a witness. This glaring anomaly went unnoticed by the Trial Court as well as by the majority of the Appellate Court. On its own this may be inconsequential but since the courts had categorized Mr. Kasuri as the informant, had assumed that the FIR was promptly recorded, without Mr. Kasuri having had time to embellish it and to falsely implicate Mr. Bhutto, and the prosecution had alleged that there was a conspiracy by basing it on the contents of the FIR, all of which the courts had unquestioningly accepted, it became most significant. This was yet another aspect showing that the law and the constitutional safeguards to ensure a fair trial had been disregarded.

The Co-accused

55. All the six co-accused were arrested after General Zia's takeover and the imposition of Martial Law, and all of them had confessed to the crime. This remarkable coincidence neither the Trial Court nor the Appellate Court considered to be unusual nor was it ever considered whether these confessions could have been induced. Two of the accused were pardoned and made approvers. One retracted his confession before the Trial Court but reiterated it before the Appellate Court. The remaining three co-accused did not even engage a counsel and the Trial Court appointed a counsel (at State expense) to represent all three of them, however, their counsel[58] at every juncture wanted to implicate, rather than extricate, his clients and was at pains to reinforce the prosecution case to prove Mr. Bhutto's guilt and thus of his own clients. It was the duty of the counsel, and of the Trial Court, to explain to these three co-accused that to abide by the command of a superior is not a defence to the charge of murder, but this was not done.

Supreme Court Bench Reconstituted

56. Nine Judges commenced hearing the appeal filed by Mr. Bhutto,[59] and heard it till 30 July 1978, where-after seven Judges heard it on 21 August 1978 and they announced their judgment on 6 February 1979. One of the nine Judges was Qaiser Khan, J who had retired on 30 July 1978, on his sixty-fifth birthday.[60] The Constitution envisages that an ad hoc Judge may be appointed within three years of his retirement,[61] but he was not appointed, despite having heard the appeal; the appellant's request in this regard was not heeded. Another Judge, Waheeduddin Ahmed, J, fell ill when the appeal was in its final stages of hearing and required about six weeks to recuperate, but rather than adjourning the case and awaiting for him to resume work the appeal was heard and was concluded in his absence. Considering that the appellant had been convicted and was incarcerated it is not understandable why Qaiser Khan, J was not appointed as an adhoc Judge after his retirement nor why the Appellate Court could not wait for Waheeduddin Ahmed, J to rejoin the Bench. This may have been inconsequential if the Appellate Court's decision was unanimous, but when four Judges had upheld the conviction and three had acquitted Mr. Bhutto it was a matter of great concern.

President's Power to Grant Pardon

57. Fazal Ellahi Chaudhry was elected as the first President of Pakistan under the new Constitution.[62] General Zia-ul-Haq took over the office of President on 16 September 1978, without being elected to it. The Constitution grants to the President the power to pardon, remit, suspend or commute any sentence passed by any court.[63] President Fazal Ellahi Chaudhry had (on his own volition) written to General Zia-ul-Haq 'spelling out extrajudicial considerations which would weigh with the Executive in taking a decision in this matter.'[64] However, the High Court took inexplicable umbrage with Mr. Bhutto's counsel referring to this letter. 'In these circumstances, the introduction of this letter in the present proceedings is nothing but an attempt to politicise the matter... We deprecate such an attempt.'[65] What, however, is of significance is that Mr. Bhutto was not dealt with in accordance with Article 45 of the Constitution, despite the reasons mentioned by President Fazal Ellahi Chaudhry in his letter. This was yet another transgression of due process, and to enjoy the protection of law and to be treated in accordance with law.[66]

Judges who Headed the Benches

58. Justice Mushtaq Hussain, in his capacity as the Acting Chief Justice, headed the Bench of the Lahore High Court which had convicted Mr. Bhutto, and Justice Anwarul Haq was the Chief Justice of the Supreme Court and headed the Bench which had upheld the conviction. The assumption of offices by both these Judges was somewhat unusual.

(a) Lahore High Court: Justice Mushtaq Hussain was appointed as the Acting Chief Justice of the Lahore High Court on 13 July 1977, when Justice Aslam Riaz Hussain was holding the position of the Chief Justice of the Lahore High Court. However, Chief Justice Aslam Riaz Hussain was appointed as the Acting Governor of Punjab, and had relinquished the position of the Chief Justice of the Lahore High Court on 16 July 1977, and on the same day administered oath to Justice Mushtaq Hussain as the Acting Chief Justice of the Lahore High Court. The Chief Justice of the Lahore High Court became the Acting Governor of Punjab, who gave oath to an Acting Chief Justice who continued in his acting position for six months; he was given oath as Chief Justice on 16 January 1978. The Constitution does not permit the constitutional office of the Chief Justice to be kept vacant for such a long duration. A High Court consists of a Chief Justice and Judges[67] and an Acting Chief Justice is appointed temporarily and only under certain circumstances.[68] An Acting Chief Justice, who later was made the Chief Justice, had transferred a murder case to the High Court and had himself presided over the trial, which under the aforesaid circumstances gave rise to justifiable misgivings.

(b) Supreme Court: Justice Muhammad Yaqub Ali was the Chief Justice of Pakistan who, 'relinquished charge of the office of Chief Justice of Pakistan' on 22 September 1977. A Judge retires or may resign.[69] Relinquishment of charge is alien to the Constitution. General Zia-ul-Haq, promulgated Martial Law Order 6 of 1977[70] which compelled Justice Muhammad Yaqub Ali to relinquish the office of Chief Justice of Pakistan and enabled the appointment of another. Consequently, Justice Anwarul Haq was appointed as the Chief Justice of Pakistan on 23 September 1977, 'In pursuance of the Proclamation of the fifth day of July, 1977, read with the Laws (Continuance in Force) Order, 1977 (C.M.L.A Order No. 1 of 1977), and in exercise of all powers enabling him in that behalf ... .' The General who had overthrown the democratic order, cast aside the Constitution, pushed aside the Chief Justice of Pakistan and appointed another in his place, one who presided over the Bench which had heard Mr. Bhutto's appeal. And, crucially, Prime Minister Mr. Bhutto was deposed by General Zia-ul-Haq, who had appointed himself as the President of Pakistan by issuing President's Succession Order 1978.[71] These are the facts, historical irony notwith-standing.

Bias of Justice Mushtaq Hussain

59. Mr. Bhutto had repeatedly claimed that Justice Mushtaq Hussain, who was the Acting Chief Justice (later Chief Justice) of the Lahore High Court, was prejudiced against him and was motivated by bias, and that he should not conduct the trial, let alone head the Bench conducting the trial, but this objection was cast aside by the Court.

60. The mere allegation or apprehension of prejudice or bias is not sufficient to sustain it. There must be something tangible and credible which exhibits bias. However, where there is bias it corrodes impartiality, and impartiality is necessary for correct decision-making and also to engender the acceptance of decisions. 'It

is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'[72]

61. Martial law was imposed on 5 July 1977 and Mr. Bhutto was arrested on 3 September 1977, in a three year old criminal case which had been closed as untraced. Despite having been granted bail by the High Court Mr. Bhutto was arrested on 16 September 1977 under Martial Law Order No. 12.[73] Mr. Bhutto had obtained bail on 13 September 1977 on the very same day (13 September 1977) Justice Mushtaq Hussain constituted a Bench headed by himself to try Mr. Bhutto and also himself heard the petition seeking cancellation of his bail.

62. The five-Member Bench constituted by Justice Mushtaq Hussain issued a show cause notice on 21 September 1977 to Mr. Bhutto, and gave him all of two days to state why the bail granted to him by the High Court should not be cancelled. The show cause notice also paradoxically directed him to appear before the five-Member Bench on 24 September 1977 despite the fact that Mr. Bhutto was incarcerated. On 21 September 1977 Mr. Bhutto challenged the transfer of the case to the High Court by Justice Mushtaq Hussain and placing it before a Bench which he headed.

63. Mr. Bhutto submitted a petition before the Supreme Court stating that Justice Mushtaq Hussain was prejudicial towards him and also had a bias against him. On 24 September 1977 the Supreme Court dismissed the application stating that the same should first be filed before the Trial Court.

64. Mr. Bhutto, pursuant to the Supreme Court order, filed applications seeking Justice Mushtaq Hussain's recusal on a number of grounds, including that: (1) Justice Mushtaq Hussain 'was prejudiced and partial against the Pakistan Peoples Party' and in this regard his statements (published in newspapers) were referred to. (2) The application seeking cancellation of bail, which was granted on 13 September 1977 by K.M.A. Samdani, J of the High Court, was placed before a five-Member Trial Court, constituted by Justice Mushtaq Hussain, and bail was cancelled on 8 October 1977, which could not be done by the Trial Court (because bail had been granted by the High Court), and that too without giving sufficient notice. (3) Upon acceptance of the office of Chief Election Commissioner Justice Mushtaq Hussain ceased to be Acting Chief Justice/Chief Justice because the Constitution stipulated that the Chief Election Commissioner could not hold another office.[74] (4) Specific instances of prejudicial conduct and bias during the conduct of the case were also mentioned. (5) The transfer of the trial from the Court of Session to the High Court, without notice to the accused, further confirmed the prejudice and the bias of Justice Mushtaq Hussain. (6) Private complaint case, on the same facts, was fixed for hearing before a Bench of the High Court,[75] however, Justice Mushtaq Hussain got it placed before the Bench he constituted and headed. (7) And, that Justice Mushtaq Hussain had not taken the oath prescribed under the Constitution but one crafted by the Chief Martial Law Administrator, therefore, he could not be considered to be the Acting Chief Justice or the Chief Justice of the Lahore High Court under the Constitution.

Bias of Trial Court

65. The five-Member Trial Court Bench unanimously dismissed the applications[76] filed by Mr. Bhutto. Request for recusal of a Judge is to be attended by the Judge whose recusal is sought. However, the Bench gave detailed findings on the objections which had been raised by Mr. Bhutto with regard to Justice Mushtaq Hussain. Justice Aftab Hussain[77] wrote the order through which Mr. Bhutto's applications (seeking recusal) were dismissed. Justice Mushtaq Hussain simply wrote two words - 'I agree' - on the order. The Hon'ble Judges signing this order justified taking oath under Martial Law[78] (and not under the Constitution) because if they did not do so 'it will lead to the result that there is no superior Court in Pakistan.' The expression of such nihilism was wholly unjustified, and unnecessary when attending to a request for the recusal of a Judge. The Judges forgot that 'Obedience to the Constitution' was their 'basic obligation', like it is of every person in Pakistan.[79] And, that they had also taken the oath to 'preserve, protect and defend the Constitution.'[80] Such anomie expressed by the Judges undermined the Constitution, and the necessity to abide by it. The order had a devastating effect on citizens and the body politic. Inculcating acceptance of autocratic rule and making it difficult to shake off the yolk of servitude.

66. The order dated 9 October 1977 also gave a definite finding with regard to Justice Mushtaq Hussain simultaneously holding the offices of Acting Chief Justice and of the Chief Election Commissioner by

staggeringly extraordinary reasoning - 'The Acting Chief Justice cannot be said to have been appointed as Chief Election Commissioner under the Constitution. His appointment is regulated by Election Commission of Order, 1977 (President's Post Proclamation Order 4 of 1977).' The applicable constitutional provisions with regard to the Chief Election Commissioner[81] were disregarded in preference to the proclamation of one man, who had assumed power unconstitutionally. Incongruity mocked when the Chief Election Commissioner could not even ensure that the stated 'forthcoming General Elections' were held, for which he was chosen and given the office of the Chief Election Commissioner. Scorching irony replaced unconvincing reasoning.

67. With regard to Justice Mushtaq Hussain's transfer of the trial from the Court of Session to the High Court, without issuing notice to Mr. Bhutto, the order disregarded the age old wisdom that a party is entitled to an opportunity of a hearing.[82] It held that, 'No such notice was required in the present case.' This flagrantly disregarded the due process principle which is firmly embedded in our jurisprudence.

68. Mr. Bhutto's objection to the assumption of jurisdiction by the five-Member Bench and also that of the complaint case (filed by Mr. Kasuri) after it was listed for hearing before 'a Division Bench consisting of K.M.A. Samdani, J and Mazharul Haq, J' was brushed aside by expressing surprise. 'It looks rather strange that the accused petitioner should prefer to be tried by a Bench of two Judges and not a larger Bench of five Judges bound by their oath of office to impart justice without fear or favour.' The learned Judges of the Trial Court referred to their oath, but forgot that they had also taken one under General Zia-ul-Haq's dispensation. In any event the two Judges of the Division Bench were as bound by their oath of office to impart justice as were the five. Stressing that they were bound by their oath and to state that the 'constitution of such a Bench [of five Judges] should inspire more confidence rather than create any apprehension in the mind of any party' was quite unnecessary.[83] In any event, and with hindsight, the apprehension of Mr. Bhutto proved to be correct.

69. In Justice Mushtaq Hussain transferring the trial to the High Court, taking away the pending complaint case from the Division Bench of the High Court and fixing it before the Trial Court, which he himself headed, was extraordinary. The law was not followed and settled methodology departed from.

70. Bias was on display in a number of paragraphs of the Trial Court judgment. Gratis observations were made which had absolutely nothing to do with the case before the Court, which was, whether Mr. Bhutto had conspired to order the assassination of Mr. Kasuri. Extraneous paragraphs were written to dishonour and disgrace Mr. Bhutto by five Hon'ble Judges who deemed it necessary to state that, before Mr. Bhutto sought 'election to the office of the Chief Executive of the Federation he would order his own life in accordance with the injunctions and teachings of Holy Qur'an and Sunnah.' The priggish sanctimony, with respect, did not stop here. The moralizing continued:

> 'Before undertaking to observe the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam he should inculcate these qualities in himself. Before a person embarks upon swearing to strive to preserve the Islamic ideology he would bring himself to believe in that ideology and test his firmness in that belief. Before presuming his ability to guarantee to the citizens the enjoyment of the protection of law and their treatment in accordance with law he would be a believer and a true adherent of law. He would consider himself to be as much subject to law as he would wish others to be. A person who considers the Constitution and the law as the handmaid of his polity is neither qualified to be elected to the high office of the Prime Minister nor can ever be true to his Oath.'

71. Mr. Bhutto was neither on trial for corruption nor for violating the Constitution, however, the Hon'ble Judges made gratuitous remarks about these matters too. And, he 'treat[ed] the Constitution and the law as a source of unlimited power for himself which may satisfy his own inane craving for self-aggrandisement and perpetuation of his rule. Such a person, in all probabilities, would destroy the very basis of the Constitution and the law which he is sworn to uphold.' Such pontification, however, overlooked the overthrow of the constitutional order and democratic rule on 5 July 1977, and of the unabated and continuous savagery of the Constitution.

72. Another discordant note in the order of the Hon'ble Judges of the Trial Court was expounding the virtues of equality:

'Islam does not believe in the creation of privileged classes. It believes in the equality before law of all - ruler and governed alike. It is opposed to all types of class distinction. Even the Caliph, the King, the Prime Minister or the President, by whatever name the ruler may be called, is as much subject to the law of the land as any ordinary citizen.'

But no attention was paid to the exceptionalism, and untouchability of General Zia-ul-Haq, the Chief Martial Law Administrator, who had gathered, in himself, all the powers of an absolute monarch.

73. The Appellate Court could not stomach the aforesaid 'gratuitous observations in paragraphs 610 to 611 of its judgment regarding the personal beliefs of the appellant, delivering a sermon as to the mode of conduct prescribed by Islam for a Muslim ruler.' The Appellate Court, however, considered that justice would be served if these paragraphs were expunged from the judgment of the Trial Court.[84] It overlooked what was glaringly obvious - the self-expressed prejudice and bias of the Trial Court.

Adulation and Praise for a Dictator

74. The Trial Court, which had tried and convicted Mr. Bhutto, and the Appellate Court, which had dismissed his appeal, were operating when there was no constitutional rule in the country and one man's will (and whim) became legislation and his person had replaced the entire democratic order. Unfortunately, the Chief Martial Law Administrator was adulated in another case.[85] He was stated to have 'stepped in to save the country.'[86] The expression of such incredulous admiration undermined the credibility of the Appellate Court. Was it not obvious that General Zia-ul-Haq would be the direct beneficiary of a guilty verdict. If Mr. Bhutto was acquitted he may have proceeded to prosecute General Zia-ul-Haq for the crime of high treason. General Zia-ul-Haq's personal survival depended on Mr. Bhutto being found guilty. The continuation of usurped power required Mr. Bhutto to be convicted.

People's Mandate

75. General Zia-ul-Haq's unconstitutional act was 'construed in the nature of a mandate from the people of Pakistan.'[87] It was not at all necessary, nor desirable, to state how popular he was. It was not for the Supreme Court to measure populism, nor what it entailed.

Absence of Fair Trial and Due Process

76. The Supreme Court, including the three Hon'ble Judges of the Supreme Court who acquitted Mr. Bhutto,[88] had also declared, 'that the Fundamental Rights stand validly suspended since 5th of July 1977.'[89] Therefore, and admittedly, the trial was conducted and the appeal heard without Mr. Bhutto having the constitutional protection of the Fundamental Rights and other rights guaranteed in the Constitution. Any single one of the aforesaid noted transgressions may have vitiated the trial and the conviction, however, cumulatively they destroyed any semblance of due process and fair trial, and revealed that innocent men were rushed to the gallows.

The Courts

77. The Trial and Appellate Courts, which conducted the trial and heard the appeal, were not true courts under the Constitution. The country was captive to Martial Law and so too were its courts. When Judges take oath of allegiance to dictators, the courts are no longer of the people.

78. In conclusion we want to acknowledge the assistance provided by all the learned counsel and by the learned amici. However, the painstaking work undertaken by our retired colleague, Justice Manzoor Ahmad Malik, and by his team deserves special mention. The expertise, the depth of knowledge and insightfulness of criminal jurisprudence provided by Justice Manzoor Ahmad Malik was most valuable and helpful.

Sd/-

Justice Qazi Faez Isa, CJ.

Sd/-

Justice Sardar Tariq Masood, J.

Sd/-

Justice Syed Mansoor Ali Shah, J.

I will be attaching my additional note.

Sd/-

Justice Yahya Afridi, J.

I will be attaching my additional note.

Sd/-

Justice Amin-ud-Din Khan, J.

Sd/-

Justice Jamal Khan Mandokhail, J.

Sd/-

Justice Muhammad Ali Mazhar, J.

I will contribute my opinion also in support of opinion dated 6.3.2024.

Sd/-

Justice Syed Hasan Azhar Rizvi, J.

I will attach my separate additional note in support of our opinion dated 6.3.2024.

Sd/-

Justice Musarrat Hilali, J.

**SYED MANSOOR ALI SHAH, J.---**In the short opinion dated 6 March 2024, we unanimously opined that '[i]n its advisory jurisdiction under Article 186 of the Constitution, this Court cannot reappraise the evidence and undo the decision of the case'. Furthermore, it was observed that '[t]he advisory jurisdiction under Article 186 of the Constitution requires this Court to render an opinion on any question of law of public importance referred by the President', and that in the present Reference, 'the question of law, in essence, is whether the requirements of due process and fair trial were complied with in the urder trial of Mr. Zulfiqar Ali Bhutto ("Mr. Bhutto"), the former Prime Minister of Pakistan, by the trial court (the Lahore High Court) and the appellate court (the Supreme Court)'. The reason for so restricting the scope of inquiry in the present Reference was grounded in the settled jurisprudence on the advisory jurisdiction of this Court, which holds that in its advisory jurisdiction, this Court cannot undertake a fact-finding inquiry, adjudicate a lis between parties or review its judgment rendered in its adjudicatory jurisdiction.[1]

2. I have gone through the detailed opinion authored by the Chief Justice and find that certain discussions and observations made therein, in my view, verge on reappraisal of the evidence in a case that has already been finally decided by this Court in its adjudicatory jurisdiction, thus going beyond the scope of inquiry set in the short opinion. With respect, I find myself unable to associate with such discussions and observations. Therefore, I add this note to briefly underscore the violations of the fundamental right to procedural due process and fair trial that occurred in the murder trial of Mr. Bhutto, as per the question of law taken up and answered in the short opinion. The facts forming the background of the present Presidential Reference and the questions of law referred to this Court for its advisory opinion have been comprehensively mentioned and discussed in the detailed opinion authored by the Chief Justice, and therefore, need no reiteration. While addressing the said violations of procedural due process and fair trial, I have drawn support from the theoretical framework of "transitional justice", which is employed to remedy the injustice caused by "political trials."

3. Around the world, authoritarian regimes use "political trials", writes Shen-Bayh,[2] to legitimize their seizures of power, delegitimize opponents and consolidate authority. A political trial is one whose disposition-the determination of guilt or innocence, followed by punishment---depends primarily on the accused's professed attitudes and activities in relation to the ruling regime.[3] In such trials, the legal process is not employed to ensure justice or minimize errors but rather to discredit and punish political opponents. These trials often rely heavily on statements obtained during investigations from former allies or associates of the accused, who may be coerced or induced to turn against the accused. Such evidence, which would usually hold limited weight in a fair trial, becomes a convenient basis for conviction in a political trial, supporting the alleged criminality of the accused. Political trials thus serve as a potent and notorious "judicial tool" for authoritarian regimes, aimed at suppressing political resistance and eliminating opposition.[4] These trials frequently violate due process and fair trial requirements to produce politically desirable outcomes.

4. In post-authoritarian regimes, "transitional justice" forms a crucial part of the transition from repressive authoritarianism to constitutional democracy. It involves uncovering the crimes of former authoritarian rulers and holding them accountable for past human rights violations, including unlawful detentions, imprisonments and politically motivated trials. Transitional justice, however, is not about vengeance or retribution but about a principled approach to healing and justice. Courts globally have affirmed that they must address the demands of victims for truth and justice while laying the foundation for societal reconciliation and systemic transformation. This dual focus on accountability and restoration is what sets transitional justice apart from ordinary judicial processes. Transitional justice, therefore, encompasses a set of methods through which states that have experienced fundamental human rights violations seek to distance themselves from that past and move forward in a manner consistent with the need for justice for those who have suffered from these violations.[5] These methods of transitional justice include truth and reconciliation commissions and the criminal prosecution of former authoritarian rulers.[6] Furthermore, holding both executive and judicial institutions accountable for their actions during the period of authoritarian repression, as well as exonerating past victims of state repression and miscarriages of justice, is essential for facilitating the transition of these state institutions toward greater respect for, and promotion of, the rule of law and fundamental human rights.[7]

5. Transitional justice serves as a vital tool for addressing injustices perpetrated under authoritarian regimes. It encompasses broader mechanisms, including revisiting flawed judicial decisions made during such regimes through compromising due process and fair trial requirements. This process helps restore fairness and legitimacy in the legal system. By revisiting and rendering opinions on the fairness and legitimacy of such decisions, the Court delivers justice to affected individuals and sends a powerful message: judicial complicity with authoritarianism will not be shielded from scrutiny. This approach reinforces judicial independence, ensures accountability for regime-orchestrated injustices, and establishes a precedent for discrediting flawed judicial decisions rendered under oppressive regimes. Such actions underscore the judiciary's commitment to constitutional principles, reminding past and future judges of their duties and the need to resist authoritarian pressure. Ultimately, this helps safeguard democracy, the rule of law and human rights.[8]

6. The silent application of transitional justice in Pakistan, aside from the present Reference, can also be found in several notable cases. These include the case upholding the conviction and sentence of General Pervez Musharraf,[9] the case of the Sindh High Court Bar Association,[10] which declared the proclamation of emergency and promulgation of PCO by General Pervez Musharraf unconstitutional, and the case of Nawaz Sharif,[11] another former Prime Minister of Pakistan, which reversed his conviction in the Army Chief's Aircraft Hijacking case. These cases demonstrate the importance of ensuring accountability for both executive and judicial officeholders for their actions during periods of authoritarian rule. They also serve as a reminder that transitional justice will remain a vital tool in addressing any future instances of authoritarianism and political trials.

7. The murder trial of Mr. Zulfiqar Ali Bhutto, a former Prime Minister of Pakistan, serves as a classic example of a political trial, illustrating how such trials can be manipulated to advance authoritarian designs. Bhutto's trial effectively served as a potent and notorious "judicial tool" for strengthening General Zia's authoritarian regime, aimed at suppressing political resistance, eliminating opposition and ensuring the consolidation of power. It helped to entrench the repressive military authoritarian regime under which it was conducted. Instead of independent, substantive evidence, the prosecution relied heavily on confessional statements given by, or procured from, Bhutto's former associates-accomplices turned approvers.

8. Likewise, several violations of procedural due process and fair trial requirements were committed to achieve politically desirable outcomes. These included the unauthorized reinvestigation of the case, which had previously been closed by an order of the Magistrate concerned; the surreptitious and unlawful transfer of the investigation from the regular investigating agency (Provincial Police) to the Federal Investigation Agency; the transfer of the trial from the regular trial court (Sessions Court) to the High Court without adherence to legal requirements; the unjustified cancellation of bail previously granted to Bhutto by a Single Bench of the Lahore High Court; the determination of Bhutto's recusal application by judges other than the one whose recusal was sought, without addressing the instances cited to demonstrate the bias and prejudice of the judge

(Justice Maulvi Mushtaq); the composition of the trial and appellate court benches, both of which were headed by judges (Justice Maulvi Mushtaq and Justice Anwar-ul-Haq) who harboured personal grievances against Bhutto due to being passed over for appointments as Chief Justice of their respective courts-the Lahore High Court (trial court) and the Supreme Court (appellate court); and the unwarranted reconstitution of the appellate court bench from nine judges to seven judges. It is an established principle that justice must not only be done but must also manifestly and undoubtedly be seen to be done.[12] The infringement of this fundamental principle also constitutes a violation of due process and fair trial requirements. Because of these glaring violations, Bhutto is rightly regarded as the victim of "unfair judicial proceedings" and "legalized political murder"---also referred to as "judicial murder".[13] Both the obvious procedural irregularities and illegalities in the reinvestigation and trial, as well as the biased composition of the trial and appellate court benches, rendered the verdict illegitimate and undermined the independence and impartiality of the superior courts (High Courts and the Supreme Court) for years to come.[14]

9. In fulfilment of our duty under the principle of transitional justice, and with the aim of distancing ourselves from past violations of fundamental human rights while moving forward in a manner consistent with justice for those who suffered from these violations, we explored all possible options within the existing constitutional and legal framework. The Constitution and the law provide no mechanism to set aside the judgment by which Bhutto was convicted and sentenced, as that judgment attained finality following the dismissal of the review petition by this Court. Furthermore, in its advisory jurisdiction under Article 186 of the Constitution, this Court lacks the authority to reappraise the evidence or overturn a final decision. However, after carefully examining the record of the reinvestigation and trial proceedings, we concluded-and so stated- that the trial proceedings in the Lahore High Court and the appellate proceedings in the Supreme Court of Pakistan did not meet the requirements of the Fundamental Right to a fair trial and due process as enshrined in Articles 4 and 9 of the Constitution,[15] which were later reinforced as a separate and independent Fundamental Right under Article 10A of the Constitution. Our expression of this opinion reflects a commitment to confront past missteps and fallibilities during an authoritarian regime with humility, embodying a spirit of self-accountability and underscoring our dedication to ensuring that transitional justice shall be served with unwavering integrity and fidelity to the Constitution and the law.

10. In the end it needs to be said that the judiciary is a resilient institution, endowed with the remarkable ability to recover and rise above the shadows of authoritarianism. This resilience is not accidental but is deeply rooted in the courage and integrity of those judges who refuse to compromise and have the courage to speak truth to power. In the annals of judicial history, there are turning points when the judiciary is bold enough to confront its past mistakes and chart a course for a better future. Today marks one such moment-a testament to the judiciary's unwavering commitment to justice and the rule of law.

11. The independence of the judiciary is the cornerstone of justice, and its true test lies in a judge's ability to stand firm under authoritarian regimes. The essence of judicial independence is not found in passivity or retrospective correction but in resisting authoritarian overreach at the time it occurs. Transitional justice, while important, should serve as a sobering reminder to judges: justice delayed by decades is justice diminished. Judges must act as the first and last line of defence for the rule of law, refusing to compromise even under duress, so that societies do not have to rely on transitional processes to correct the damage inflicted by judicial capitulation. Let the lesson of transitional justice be clearjudges must uphold their oaths with courage in the face of oppression, for only then can the judiciary truly safeguard democracy and the rights of the people. Transitional justice, however, often becomes necessary because, during oppressive rule, some judges fail to uphold their constitutional duty, succumbing to the pressure of illegitimate authority. This failure not only enables violations of due process and fair trial rights but also erodes public trust in the judiciary.

12. Judges serving under authoritarian regimes must remember that their true strength lies not in holding office but in steadfastly upholding their independence and principles. Justice Dorab Patel exemplified this ideal when he courageously dissented in the Bhutto case, acquitting Mr. Bhutto of the charges, and later refused to take the oath under the Provisional Constitutional Order (PCO) promulgated by General Zia,

thereby relinquishing his impending eight-year tenure as Chief Justice of Pakistan. His actions remind us that losing a position is a small sacrifice compared to compromising one's integrity or leaving behind a legacy of submission or compromise. Judges must always bear in mind that a judge's valour is measured by his courage to resist external pressures, stand firm against interference and safeguard the independence of the judiciary without fear or favour. Delay in confronting authoritarian inroads can prove fatal to the rule of law-such incursions must be resisted and rectified immediately, for the judiciary's role is to defend justice, not enable its erosion. I find no more suitable words to close this note than those of Bhutto himself, reflecting both a powerful critique of authoritarianism and a firm belief in the judiciary's essential role as a guardian of democracy. He wrote:

An independent Judiciary is the antithesis of Martial Law Anindependent Judiciary can only function under the umbrella of the Constitution and not under the shadow of the gun….. An independent Judiciary exists side by side with an executive chosen by the people and a legislature elected by them. But the people's Executive is in jail. The assemblies ... have become as silent as the graveyards. Can one flower flourish in a garden turned into a desert?[16]

Sd/-

Syed Mansoor Ali Shah

Judge

**YAHYA AFRIDI, J.---**I have had the privilege of going through the detailed opinion of Justice Qazi Faez Isa, the Chief Justice, as well as the additional notes of Justice Syed Mansoor Ali Shah and Justice Syed Hasan Azhar Rizvi, in furtherance to the unanimous short opinion of this Court dated 06.03.2024 ("Short Opinion").

2. I find myself in agreement with the observation of Justice Syed Mansoor Ali Shah that certain portions of the detailed opinion of the Chief Justice verge on reappraisal of evidence in a case that has already been finally decided by this Court in its adjudicatory jurisdiction, and thus, the same exceed the scope of the inquiry delineated in the Short Opinion that '[i]n its advisory jurisdiction under Article 186 of the Constitution, this Court cannot reappraise the evidence and undo the decision of the case'.

3. As to the question of law, whether the requirements of due process and fair trial were complied with in the murder trial of Mr. Zulfiqar Ali Bhutto, the former Prime Minister of Pakistan, by the trial court (the Lahore High Court) and the appellate court (the Supreme Court), I fully concur with the observations given in paragraphs No. 23 to 25, 31, 58 to 64 and 67 to 76 of the detailed opinion rendered by the Chief Justice, as well as paragraph No. 8 of the note authored by Justice Syed Mansoor Ali Shah, which highlight the violations of procedural due process and fair trial requirements.

4. I also record my concurrence, for the reasons given therein, with the view of Justice Syed Hasan Azhar Rizvi that the observation of the Chief Justice - that Article 185(2)(b) of the Constitution and sections 411-A and 526 of the Code of Criminal Procedure, 1898 do not permit the High Court to conduct a murder trial - is untenable, as it is founded on a misconception of these provisions. I further agree with the opinion of Justice Syed Hasan Azhar Rizvi that Chapter XXVII of the Code of Criminal Procedure, 1898 does not extend to death sentences passed by the High Court in the exercise of its original criminal jurisdiction. Consequently, I respectfully differ from the view of the Chief Justice that these provisions necessitate confirmation of such sentences or lead to the forfeiture of the right of appeal, as such an interpretation is contrary to the established legal framework.

5. It is, however, very pertinent to note that the present reference was avowedly filed against the backdrop of the restoration of the judiciary and the proactive role of the restored judiciary in addressing the matters of public importance. In this context, the reference drew attention, inter alia, to the 'admission' of former Chief Justice of Pakistan, late Justice Nasim Hasan Shah, regarding external pressures in the decision of the appeal of Mr. Zulfiqar Ali Bhutto, which the reference described as a regrettable chapter in judicial history of our nation.

6. In consideration of the above, I am of the view that this reference might never have come before us but for the events recounted and the facts disclosed in the interview and autobiography of Justice Nasim Hasan

Shah. Accordingly, it is both relevant and necessary to address certain aspects of that interview and autobiography, which raise significant concerns regarding the due process and fairness of the trial of Mr. Zulfiqar Ali Bhutto, as discussed in the following paragraphs.

7. In the Supreme Court judgement, Justice Nasim Hasan Shah rejected the contention that the trial of Mr. Zulfiqar Ali Bhutto was vitiated by bias on the part of Justice Maulvi Mushtaq Hussain, who presided over the Lahore High Court Bench that conducted the trial. However, this stance stands in direct contradiction to his later remarks in an interview with Iftikhar Ahmad for the program Jawab Deyh. In the aforesaid interview, Justice Nasim Hasan Shah described Justice Maulvi Mushtaq Hussain as an overt enemy of Mr. Zulfiqar Ali Bhutto, expressing that he should not have been part of the Lahore High Court Bench. In fact, the presence of Justice Maulvi Mushtaq Hussain on the Lahore High Court Bench was referred to as "Ziadati", a term that, within the context of the trial, could only be interpreted as bias. This clear contradiction in the views of Justice Nasim Hasan Shah raises concerns about the evaluation, in the appeal, of the question of bias on the part of Justice Maulvi Mushtaq Hussain.

8. Justice Nasim Hasan Shah revealed certain facts in his autobiography Memoirs and Reflections, which suggest that his inclusion in the Bench for the purpose of hearing the appeal of Mr. Bhutto was orchestrated by the Attorney General Sharifuddin Pirzada and Justice Maulvi Mushtaq Hussain. Such manipulation of the Bench composition undermines judicial impartiality and raises serious concerns about the fairness of the proceedings. It also shows that Justice Maulvi Mushtaq Hussain pursued the matter zealously even after the High Court had decided the case and the appeal was pending before the Supreme Court, despite his role having concluded with the decision of the High Court. This unwarranted involvement after conviction blurred the boundaries of judicial propriety and further eroded confidence in the impartiality of the appellate process.

9. The above account of events effectively undermines the duly expected impartiality of judicial decision-making in the trial of Mr. Zulfiqar Ali Bhutto. Such events, if left unaddressed, risk eroding public confidence in the fairness of the judicial process.

10. The extraordinary political climate of the time and the pressures inherent in such an environment appear to have influenced the course of justice in a manner inconsistent with the ideals of judicial independence. It is a sobering reminder of how deviations from constitutional governance can exert undue influence on judicial proceedings in politically charged cases, undermining the ideals of impartiality and due process in such exceptional circumstances. This also accentuates the importance of recognizing the courageous dissents of Justice Dorab Patel, Justice Muhammad Haleem and Justice G. Safdar Shah who stood their ground despite the prevailing atmosphere. Their dissents, even if unsuccessful in altering the outcome, remain a testament to the enduring principles of judicial integrity and impartiality, underscoring the value of an independent judiciary committed to the rule of law.

**Opinion**

11. In light of the foregoing discussion, I am of the considered opinion that the requirements of due process and fair trial were not complied with in the murder trial of Mr. Zulfiqar Ali Bhutto by the trial court and the appellate court.

Sd/-
Yahya Afridi
Judge

**SYED HASAN AZHAR RIZVI, J.---**Before I express my concurrence with the detailed opinion authored by Mr. Justice Qazi Faez Isa, Hon'ble Chief Justice of Pakistan, I find it imperative to pen down a few additional observations that resonate with the conclusions reached therein. While I fully agree with the reasoning except those mentioned in para 26 to 30 and the outcome of the detailed opinion, the significance of the issues presented before this Court compels me to elaborate on certain aspects that reinforce our collective judicial philosophy. The case at hand touches upon the intricate application of legal principles and reflects the broader constitutional ethos that guides our jurisprudence. It is with a deep sense of responsibility and a commitment to the rule of law that I concur with the conclusion of the detailed opinion. However, I believe that certain nuances warrant further emphasis to underscore the contours of our legal landscape and to provide

clarity for future jurisprudence. In aligning with the detailed opinion, I am mindful of the weighty considerations that have been accurately analyzed by the Chief Justice. The legal discourse presented therein is both thorough and compelling, leaving little room for dissent. Yet, it is the hallmark of a robust judicial system to allow for the expression of supplementary views that may fortify the decision's legal foundation and contribute to the richness of our legal tradition. Therefore, in the spirit of judicial comity and to enhance the legal reasoning that forms the crux of opinion by this Court, I offer the following observations.

2. Before delving into the intricate details of the case, let us first provide a concise overview of the key facts and events that set the stage for this reference. Briefly, Mr. Ahmad Raza Kasuri got registered an FIR No.402/74 dated 11.11.1974 for the offences under section 302/307 (now 324) of the Pakistan Penal Code, 1860 ('P.P.C.'), registered at Police Station ('P.S.') Ichhra, District Lahore against some unknown accused persons for the murder of his father Mr. Muhammad Ahmad Khan ('the deceased'). Later on, seven persons (Mr. Zulfiqar Ali Bhutto ('Mr. Bhutto'), Masood Mahmood, Director General Federal Security Force ('FSF'), Mian Muhammad Abbas, Director FSF, Ghulam Hussain, Inspector FSF, Ghulam Mustafa, Inspector FSF, Arshad Iqbal, Sub-Inspector FSF and Iftikhar Ahmad, Assistant Sub-Inspector (FSF) were nominated and the offences under sections 120-B/109 were also added in this case. A Full Court comprising five judges of the High Court was constituted for the trial of this case. After the trial, all the accused persons (except Masood Mahmood and Ghulam Hussain) were convicted and sentenced to death, along with other punishments, as per the judgment dated 18.03.1978, reported as PLD 1978 Lah. 523, pp. 618-622. A criminal appeal filed against the decision of the High Court was dismissed by this Court vide judgment dated 06.02.1979, reported as PLD 1979 SC 53. The review petition filed by Mr. Bhutto was also dismissed by this Court vide judgment dated 24.03.1979, reported as PLD 1979 SC 741. Finally, Mr. Bhutto was executed on 04.04.1979.

3. Since Mr. Bhutto's execution, one of Pakistan's major political parties, the Pakistan People's Party (PPP), has consistently questioned the fairness of the judicial process, alleging that it was influenced by the then-military dictatorship as well as political factors and as such lacked impartiality. The party views the trial of Mr. Bhutto and his subsequent execution as a miscarriage of justice, which remains a sensitive issue in Pakistani politics. In 2011, this longstanding grievance prompted the then-President of Pakistan, Asif Ali Zardari ('the President'), who was also Bhutto's son-in-law, to file a presidential reference under Article 186 of the Constitution of the Islamic Republic of Pakistan ('the Constitution') to seek the opinion of the Court on the legality and fairness of the original proceedings that led to Bhutto's death sentence. The reference aimed to address and rectify any historical injustices and to restore public confidence in the judiciary's impartiality. The President sought the opinion of the Court on the following questions of law:

1. Whether the decision of the Lahore High Court as well as the Supreme Court of Pakistan in the murder trial against Shaheed Zulfiqar Ali Bhutto meets the requirements of fundamental rights as guaranteed under Article 4, sub-Articles (1) and (2)(a), Article 8, Article 9, Article 10A/due process, Article 14, Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973? If it does not, its effect and consequences?

2. Whether the conviction leading to execution of Shaheed Zulfiqar Ali Bhutto could be termed as a decision of the Supreme Court binding on all other courts being based upon or enunciating the principle of law in terms of Article 189 of the Constitution of the Islamic Republic of Pakistan, 1973? If not, its effects and consequences?

3. Whether in the peculiar circumstances of this case awarding and maintaining of the death sentence was justified or it could amount to deliberate murder keeping in view the glaring bias against Shaheed Zulfiqar Ali Bhutto?

4. Whether the decision in the case of the murder trial against Shaheed Zulfiqar Ali Bhutto fulfills the requirements of Islamic laws as codified in the Holy Quran and the Sunnah of the Holy Prophet (SAW)? If so, whether present case is covered by doctrine of repentance specifically mentioned in the following Suras of Holy Quran:

(a) Sura Al-Nisa, verses 17 and 18; Sura Al-Baqara, verses 159, 160 and 222; Sura Al-Maida, verse 39; Sura Al-Aaraaf, verse 153; Sura Al-Nahl, verse 119; Sura Al-Taha, verse 82; as well as

(b) Sunan Ibn-e-Maaja, Chapter 171, Hadith No. 395.

5. Whether on the basis of conclusions arrived at and inferences drawn from the evidence/ material in the case an order for conviction and sentence against Shaheed Zulfiqar Ali Bhutto could have been recorded?

4. On 06.03.2024, we unanimously rendered our short opinion (with reasons to be recorded later) on the aforementioned questions, whereby we refused to provide any assistance/ opinion on questions Nos. 2 and 4. However, as regards questions Nos. 1, 3, and 5, we opined as follows:

Opinion on Question No.1

"(i) The proceedings of the trial by the Lahore High Court and of the appeal by the Supreme Court of Pakistan do not meet the requirements of the Fundamental Right to a fair trial and due process enshrined in Articles 4 and 9 of the Constitution and later guaranteed as a separate and independent Fundamental Right under Article 10A of the Constitution.

(ii) The Constitution and the law do not provide a mechanism to set aside the judgment whereby Mr. Bhutto was convicted and sentenced; the said judgment attained finality after the dismissal of the review petition by this Court."

Opinion on Questions Nos.3 and 5

"In its advisory jurisdiction under Article 186 of the Constitution, this Court cannot reappraise the evidence and undo the decision of the case. However, in our detailed reasons, we shall identify the major constitutional and legal lapses that had occurred with respect to fair trial and due process."

5. At the beginning of my note, I mentioned that, in principle, I concur with the conclusion reached in the detailed opinion rendered by the Chief Justice. However, certain areas related to constitutional and legal lapses in the case of Mr. Bhutto require further consideration and explanation keeping in view the scope and extent of authority of this Court in the advisory jurisdiction. Moreover, I disagree with specific observations made by the Chief Justice, as outlined in paragraphs 26 to 30 of the detailed opinion. Therefore, I will first highlight and explain the major constitutional and legal lapses that undermined the proceedings of trial of Mr. Bhutto before the High Court as well as the appeal filed by him before the Supreme Court of Pakistan, causing them to fail to meet the requirements of a fair trial and due process, as enshrined in Articles 4 and 9 of the Constitution. Secondly, I, with respect, outline the reasons for my disagreement with certain observations made by the Chief Justice in the detailed opinion. To avoid repetition, I will refer to the arguments presented by the legal representatives and counsel as outlined in the detailed opinion, except for those necessary for my analysis.

Right to due process and fair trial

6. At the time of the trial of Mr. Bhutto, the right to due process and a fair trial was not explicitly enshrined as a fundamental right in the Constitution. However, these rights have now been provided under Article 10-A, introduced by the Constitution (Eighteenth Amendment) Act, 2010. Even before the addition of this article to the Constitution, the right to a fair trial and due process was well-entrenched in our jurisprudence and considered as a part of the right of access to justice enshrined in the Constitution under Articles 4 and 9. Article 4 of the Constitution states that every individual has the right to be dealt with in accordance with the law, highlighting the necessity of legal processes that are fair and just. Article 9 further reinforces this by asserting that no person shall be deprived of life or liberty except in accordance with the law. These provisions collectively emphasized the importance of lawful procedures and the protection of individual rights, even before the explicit recognition of due process and fair trial in the Constitution. Thus, from the very beginning, this Court has stressed the importance of fair criminal trials to protect the rights and interests of both the victim and the accused. A fair trial ensures that the accused has the opportunity to present a defence and challenge the evidence, while the victim's rights to be heard and to seek justice are upheld. By maintaining impartiality and balancing the interests of both parties, this Court strives to deliver justice and maintain public confidence in the judicial system. For instance, this Court, in the case of Noor Ahmad v. The State (PLD 1964 SC 120), while shedding light on the conduct of criminal trials, observed that it is a fundamental principle that the trial of an accused person should be conducted with the utmost fairness and that anything likely to cause serious embarrassment to the accused in the conduct of their defence should be avoided. The relevant paragraph is quoted below for ease of reference:"

'We are also of the same view. Even though sections 235 and 239 of the Criminal Procedure Code give a discretion to the Court to try certain persons and or offences jointly yet there are certain considerations which are more fundamental than merely the convenience of the proceeding or trial which must be kept in view when deciding as to whether the discretion should in given in case be exercised or not. In a criminal trial, as we have already observed, it is a fundamental principle that the trial of an accused person should be conducted with the utmost fairness and anything which is likely to cause nay serous embarrassment to him in the conduct of his defence should be avoided. Thus, in the present case, it seems to us that whether a collision in such circumstances constituted one transaction or not there should not have been a joint trail of the appellants before us for more than one reason Firstly because the accusations made against them did not allege any kind of joint or concerted action nor disclosed any causal connection between the respective acts of the appellants....'

7. Later, in the case of Ch. Manzoor Elahi v. Federation of Pakistan etc. (PLD 1975 SC 66), this Court delved into the concept of 'due process' and on pages 109, 119, and 120 of the judgment provided a detailed explanation of what 'due process' entails. The Court emphasized the importance of legal procedures that ensure fairness, justice, and the protection of individual rights. The relevant paras of the judgment are reproduced hereunder for ease of reference:

'Article 4 may be compared 'with the due process of law in the American Constitution. The case of Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri PLD 1969 SC 14, supports this view. In the case under report Article 2 of the 1962 Constitution which is corresponding to Article 4 of the Constitution was considered and the Court observed as follows:-

"The words 'in an unlawful manner' in sub-clause (b) of Article 98(2) have been used deliberately to give meaning and content to the solemn declaration under Article 2 of the Constitution itself that it is inalienable right of every citizen to be treated in accordance with law and only in accordance with law. Therefore, in determining as to how and in what circumstances a detention would be in an unlawful manner one would inevitably have first to see whether the action is in accordance with law, if not, then it is action in an unlawful manner. Law is here not confined to statute law alone but is used in its generic sense as connoting all that is treated as law in this country including even the judicial principles laid down from time to time by the superior Courts. It means according to the accepted forms of legal process and postulates a strict performance of all the functions and duties laid down by law. It may well be as has been suggested in some quarters, that in this sense it is as comprehensive as the American 'due process' clause in a new garb. It is in this sense that an action which is mala fide or colourable is not regarded as action in accordance with law. Similarly, action taken upon extraneous or irrelevant considerations is also not action in accordance with law. Action taken upon no ground at all or without proper application of the mind of the detaining authority would also not qualify as action in accordance with law and would, therefore, have to be struck down as being action taken in an unlawful manner."

Frontier Crimes Regulation was an "existing law" under Article 225 of the 1962 Constitution and Article 280 of the Interim Constitution. It continues to be an "existing law" under Article 268 of the present Constitution. The regulation has, therefore, always been and still is an existing law operating subject to the Constitution of the day.

Since the continued operation of the Frontier Crimes Regulation is subject to the Constitution a question arises whether the Regulation is `law' within the meaning of Articles 4 and 9 of the Constitution. In the case reported in PLD 1969 SC 14, this Court has had occasion to observe that "law" in Article 2 of the 1962 Constitution (corresponding to Article 4 of the Constitution) is as comprehensive as the American "due process of law" clause in a new garb. A reference, therefore, to the views of the American jurists as contained in 16 American Jurisprudence will, be helpful to the discovery of the true meaning of the word "law" as contained in the said two Articles of the Constitution. The following are the extracts from that book:--

- Due process of law' must be understood to mean law in the regular course of administration through Courts of justice (Vide 16 American Jurisprudence 2d paragraph 546).

- It means law according to the settled course of judicial proceedings or in accordance with natural, inherent, and fundamental principles of justice, enforceable in the usual modes established in the administration of government with respect to kindred matters.
- A general law administered in its legal course according to the form of procedure suitable and proper to the nature of the case, conformable to, the fundamental rules of right and affecting all persons alike, is `due process of law'.
- Due process has to do with the denial of fundamental fairness shocking to the universal sense of justice; it deals neither with power nor with jurisdiction, but with their exercise.
- 'Law embraces all legal and equitable rules defining human rights and duties and providing for their enforcement, not only as between man and man, but also between the State and its citizens. (Vide 16 American Jurisprudence 2d paragraph 546).
- It is a general public law of the land (paragraph 547).
- It is the law that operates on all persons alike and do not subject the individual to the arbitrary exercise of the powers of Government.
- Under the 'due process of law' no change in procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action which relate to process of law, protect the citizen in his private right and guard him against the arbitrary action of Government (paragraph 549).
- Substantive due process has been roughly defined as the constitutional guarantee that no person shall be deprived of his life, liberty, or property for arbitrary reasons, such deprivation being constitutionally supportable only if the conduct from which the deprivation follows is prescribed by reasonable Legislation (i.e. the Legislation the enactment of which is within the scope of legislative authority) reasonably applied (that is, for a purpose consonant with the purpose of the Legislation itself). To the extent that arbitrary action involves procedural arbitrariness, such action is, of course, barred by the principles of due process. In general terms it has been stated that the requirement of due process of law may be satisfied if there is no unauthorised and merely arbitrary exercise of the powers of Government to the detriment of the people or of some of them.
- It has been authoritatively stated that the right of a citizen to due process of law must rest upon a basis more substantial than favour or discretion, and in many instances statutes have been held unconstitutional on the ground that they operated to vest in the Courts or in other officials an arbitrary power over matters protected by the Constitution (paragraph 550)."

Applying the concept of `law' as contained in the extracts just quoted, section 11 of the Frontier Crimes Regulation (hereinafter called the F. C. R. which empowers the Deputy Commissioner to refer the determination of the guilt or otherwise of a person to the "Council of Elders," does not seem to me to be "law" as contemplated in Articles 4 and 9 of the Constitution. The section gives unfettered powers to the Deputy Commissioner to refer the said question for decision to a Council of Elders, if he thinks it inexpedient that the matter should be determined by any Court of the classes prescribed in section 6 of the Code of Criminal Procedure. No guidance, at all, has been laid down in what circumstances the reference to the Council of Elders should be made. No rule of procedure or evidence has been prescribed for a proceeding before such Council. The Council is not prevented from adopting methods which are arbitrary and inconsistent with reason and the civilised decencies. The section has nothing to do with the regular course of administration through Courts of justice, and does not exclude arbitrary action involving procedural arbitrariness. It constitutes a denial of fundamental fairness shocking to universal sense of justice.'

8. In "Constitution of the Islamic Republic of Pakistan: A Commentary on the Constitution of Pakistan, 1962," by Muhammad Munir, former Chief Justice of Pakistan, it is mentioned on page 197 that in a criminal trial, an accused person has the following important rights under the general law:

'1. The right to know before the trial the charge and the evidence against him;
2. The right to cross-examine the prosecution witnesses;
3. The right to produce evidence in defence;
4. The right to appeal or to apply for revision;
5. The right to be represented by counsel;

6. The right to have the case decided by the Judge who heard the evidence;
7. The right to trial by jury or with the aid of assessors;
8. The right to certain presumptions and defences; and
9. The right to apply for transfer of the case to another Court.'

The above rights were approvingly referred to and endorsed by a five-member bench of this Court in the case of Brig. (Retd.) F.B. Ali and another v. The State (PLD 1975 SC 506). In this case, the Court, with respect to the above list of rights, observed that the rights (except the right mentioned at serial No.7 which is no longer available in Pakistan) enumerated by Mr. Munir are clearly available in a trial even by a Court Martial.

**HIGH COURT AS A COURT OF ORIGINAL CRIMINAL JURISDICTION**

9. In our country, the Code of Criminal Procedure, 1898 ('Cr.P.C.'), as the general law of the land, governs the procedure for conducting criminal trials in all criminal courts. Even where special criminal laws are silent on certain matters, the courts take guidance from and follow the principles laid down in the Cr.P.C. Undoubtedly, under the scheme of the Cr.P.C., the High Courts fall within the category of Criminal Courts and can try any offence under the P.P.C. A detailed procedure for trial before the High Court has been outlined in Chapter XXII-A of the Cr.P.C. For a better understanding of the above legal position, the relevant provisions of the Cr.P.C. (as existed at the time of the trial of Mr. Bhutto) are discussed below:

Section 6, Cr.P.C. provides the different classes of Criminal Court and Magistrates as follows:

"6. Classes of Criminal Courts and Magistrates: (1) Besides the High Courts and the Courts constituted under any law other than this Code for the time being in force, there shall be five classes of Criminal Courts in Pakistan, namely: -

(I) Courts of Session;

(II) ***[1]

(III) Magistrate of the first class:

(IV) Magistrate of the second class;

(V) Magistrate of the third class."

Emphasis supplied.

Section 28, Cr.P.C. states about the courts, competent to try offences under the P.P.C in the following words:

"28. Offences under Penal Code: Subject to the other provisions of this Code any offence under the Pakistan Penal Code may be tried-

(a) by the High Court, or

(b) by the Court of Session, or

(c) by any other Court by which such offence is shown in the eighth column of the Second Schedule to be triable."

Emphasis supplied.

Section 190, Cr.P.C. prescribes a mode for taking cognizance of an offence under P.P.C. as follows:

'190. Cognizance of offences by Magistrates. (1) Except as hereinafter provided, any District Magistrate or Sub-Divisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a report in writing of such facts made by any police officer;

(c) upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been committed.

(2) The Provincial Government, or the District Magistrate subject to the general or special orders of the Provincial Government, may empower any Magistrate to take cognizance under subsection (1), clause (a) or clause (b), of offences for which he may try or send to the Court of Sessions for trial.

(3) A Magistrate taking cognizance of an offence under subsection (1) of an offence triable exclusively by a Court of Session shall, without recording any evidence, send the case to the Court of Session for trial.'

Emphasis supplied.

Section 193, Cr.P.C. mandates that the Court of Sessions is not authorized to take cognizance of any offence as a court of original jurisdiction unless the case has been sent to it under section 190(3) supra. This provision of law is also reproduced hereunder for ease of reference:

'193. Cognizance of offence by Courts of Sessions.

(1) Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Sessions shall take cognizance of any offence as a Court of original jurisdiction unless the case has been sent to it under section 190, subsection (3).

(2) Additional Sessions Judges and Assistant Sessions Judges shall tray such cases only as the Provincial Government by general or special order may direct them to try, or as the Sessions Judge of the Division, by general or special order, may make over to them for trial.'

Emphasis supplied.

Section 194, Cr.P.C. provides for the taking of cognizance of offences by the High Court as follows-

'194. Cognizance of offences by High Court: (1) The High Court may take cognizance of any offence in manner hereinafter provided.

Nothing herein contained shall be deemed to affect the provisions of any Letters Patent or Order by which a High Court is constituted or continued, or any other provision of this Code.

(2) (a) Notwithstanding anything in this Code contained the Provincial Government, exhibit to the High Court, against persons subject to the jurisdiction of the High Court, information for all purposes for which Her Majesty's Attorney-General may exhibit informations on behalf of the Crown in the High Court of Justice in England.

(b) Such proceedings may be taken upon every such information as may lawfully be taken in the case of similar informations filed by Her Majesty\s Attorney-General so far as the circumstances of the case and the practice and procedure of the said High Court will admit.

(c) All fines, penalties, forfeitures, debts and sums of money recorded or levied under or by virtue of any such information shall form part of the revenues of the Province.'

Emphasis supplied.

10. As per the mandate of section 28, Cr.P.C., the High Court and the Court of Session have concurrent jurisdiction along with subordinate courts to try offences under the P.P.C. The Court of Session, unlike the High Court, is not a court of original criminal jurisdiction. As section 193 of the Cr.P.C. places a complete and clear bar on taking cognizance of any offence by the Court of Session in its original jurisdiction unless the case is sent to it by a Magistrate under section 190(3), Cr.P.C. Section 190(3), Cr.P.C., prescribes a mode of transmitting criminal cases (exclusively triable by the Court of Session) by a Magistrate after taking its cognizance under section 190(1) of the Cr.P.C. to the Court of Session, without recording evidence, for trial. It may be noted that the Magistrate taking cognizance of the offence will decide the forum competent to try the offence keeping in view the provision of section 30 as well as Schedule II to the Cr.P.C. No departure from this procedure ordinarily is possible. A perusal of Column 8 of Schedule II, Cr.P.C., indicates that the High Court is not mentioned as one of the courts competent to try offences under the P.P.C. Under this column, either the offences are triable by the Court of Session or by a Magistrate. However, Section 194 of the Cr.P.C. authorizes the High Court to directly take cognizance of any offence under the P.P.C., even though the High Court is not mentioned in Column 8 of Schedule II of the Cr.P.C. as a Court competent to try any offence. The above-stated position was quite different before the promulgation of the Law Reforms Ordinance, 1972 whereby the words appearing in section 194(1) "upon a commitment made to it" were omitted. Before the said Ordinance, the provision of section 194(1) was as under:

'194. Cognizance of offences by High Court: (1) The High Court may take cognizance of any offence, upon a commitment made to it, in manner hereinafter provided.'

11. Thus, prior to the amendment of subsection (1) of section 194, Cr.P.C. as it has been indicated hereinabove the High Court had no jurisdiction to directly take cognizance of the offence except upon a commitment made to it in the manner provided thereafter but after the amendment of subsection (1) of section

194, Cr.P.C. jurisdiction has been conferred upon the High Court to take cognizance of any offence directly. So far as the term 'in manner hereinafter provided' is concerned it has been noticed that the said term has already been explained by a two-member bench of this court in the case of Dr. Muhammad Afzal and others v. The State (2001 SCMR 1615). The Hon'ble bench, after a thorough examination of the legal provisions on the subject, concluded that, '...High Court can take cognizance of offence of Pakistan Penal Code under section 194, Cr.P. C. in the same manner as cognizance is taken under section 190(1)(c), Cr.P.C. by a Magistrate namely upon an information received from any person other than a police officer or upon his own knowledge or suspicion that such offence has been committed.' In addition, the High Court may withdraw for trial any case pending before any subordinate court while exercising its powers under Section 526, Cr.P.C. However, whether the High Court takes direct cognizance of a case or withdraws it from a subordinate court, it must follow the procedure for trial as provided under Chapter XXII-A of the Cr.P.C.

**MAJOR CONSTITUTIONAL AND LEGAL LAPSES IN THE CASE OF MR. BHUTTO**

12. Keeping in mind the above-settled principles and procedures to be adhered to while conducting a criminal trial, and after a thorough scrutiny of the entire record of Mr. Bhutto's case from the trial court/High Court up to this Court, I have found the following major constitutional and legal lapses that caused the proceedings of the trial of Mr. Bhutto to fail to meet the requirements of a fair trial and due process:

**I) Biased Conduct of the Acting Chief Justice**

In this case, the incomplete report/Challan under section 173, Cr.P.C. ('Challan') was submitted before the concerned area Magistrate on 11.09.1977. As the said Magistrate was not competent to try an offence punishable under section 302 P.P.C. (the main offence in the case), he, therefore, forwarded the same under section 190(3), Cr.P.C. to the Court of Session for trial. The record shows that on 13.11.1977, the State, through the Special Prosecutor, filed a petition, i.e., Criminal Misc. Application No. 127- T of 1977, for transfer of the criminal cases pending before a Court of Session at Lahore. The petition was fixed before the Acting Chief Justice, Mushtaq Hussain, who, on the same day, withdrew the case from the Court of Session and transferred it to the High Court and constituted a Full Court comprising five judges of the High Court for the trial of the case, and also adjourned the case to 24.09.1977 for hearing, vide the same judicial order dated 13.09.1977 (as reproduced in para 15 of the detailed opinion).

It would not be out of place to mention here that Chapter 1 of Volume-V of the High Court Rules and Orders deals with the Judicial Business of the High Court. Its Part A(b) prescribes a procedure for the disposal of petitions for the transfer of criminal cases. Rule 5 provides, 'the petitions for transfer of cases shall ipso facto be treated and dealt with as urgent petitions'. Rule 6 provides, 'Notice of the hearing of urgent petitions shall not be given individually to the petitioner or his counsel but a list of such petitions shall be hung up for the purpose on the notice board outside the Deputy Registrar's room and/or displayed in electronic media on the day proceeding the date fixed for the hearing of these petitions giving the name of the Judge by whom the petition will be heard.' Rule 7 provides, 'In petitions for transfer of cases under section 526, Criminal Procedure Code, filed in the High Court, the Sessions Judge shall, without fail, return all notices received by him from the High Court, whether for himself or for parties, after service, within one week from the date of their receipt.' Rule 8, Part A(b) further provides that 'The Sessions Judge shall, without fail, also submit, within one week from the date of receipt of the High Court letter, all reports or explanations called for by the High Court from himself or the Magistrate concerned with regard to allegations contained in the petitions for transfer or affidavit, copy whereof will accompany the said letter.' However, the then Acting Chief Justice sidestepped the above-noted prescribed procedure and, without giving/issuing any notice to the Court of Session/trial court for service to the parties, displaying the same in electronic media, or seeking any report or explanation from the Court of Secession/trial court with regard to allegation contained in the petition, passed the order dated 13.09.199 in a hasty manner.

Furthermore, he (the Acting Chief Justice) did not satisfy any of the conditions/grounds mentioned in section 526(1) (a-e) for exercising his jurisdiction under the said provision of law. The said order is also silent on the fact of what urgency or exigency necessitated the Acting Chief Justice to constitute a Full Bench for trial through a judicial order instead of a special order as required under Part-B of Chapter 3 of the High Court

Rules and Orders. Without having any lawful authority, he, vide the said order, fixed the next date of hearing in the main case, even though the case file was not before him. Under the law, after the constitution of the Full Court/trial court, it is the exclusive power of the Full Court/trial court to fix the next hearing date at its convenience. All the aforementioned facts indicate his undue favor to someone against Mr. Bhutto. Even otherwise, the language of the order dated 13.09.1977 'In view of the submissions made in the petition the case is transferred to this Court for trial' ex -facie speaks volumes about his apparent bias or impartiality against Mr. Bhutto.

**II) Non-observance of Prescribed Procedure by the Full Court**

On September 24, 1977, the Full Court took up Mr. Bhutto's case for the first time and delivered the requisite copies to the accused persons (Mr. Bhutto, Mian Muhammad Abbas, Arshad Iqbal, Rana Iftikhar, and Ghulam Mustafa) under section 265-C, Cr.P.C. The Court also summoned the evidence for October 2, 1977. As previously mentioned, the Full Court was bound to follow the procedure for trial as provided under Chapter XXII-A of the Cr.P.C. Under this chapter, section 265-D stipulates that if, after perusing the police report or the complaint and all other documents and statements filed by the prosecution, the Court is of the opinion that there is ground for proceeding with the trial of the accused, it shall frame in writing a charge against the accused. However, the Full Court did not frame any charges against the accused persons, thereby ignoring the above mandatory provision of law and directly summoned the evidence. This implies that the Full Court had already formed its opinion to proceed with the trial even without perusing the record. However, the charges were formally framed against the accused person on October 11, 1977.

On November 5, 1977, Mr. Bhutto filed an application before the Full Bench, expressing his apprehension that a fair and impartial trial would not be conducted in his case. The Full Court, instead of disposing of the application, observed, 'This application be placed on record, which shall be disposed of in accordance with law, after the trial.' I find this course of action adopted by the Full Court difficult to understand. The application should have been disposed of promptly, considering that the accused was expressing distrust in the Court. However, the Court seemed adamant about concluding the trial without addressing the concerns raised by Mr. Bhutto.

**III) In-Camera Trial Without Any Justification**

On January 24, 1978, Mr. Bhutto informed the Full Bench that he had boycotted the trial after the cross-examination of Ghulam Hussain (PW.34) and, therefore, he was not prepared to answer any questions under section 342 of the Cr.P.C., which were directly related to his defence. Upon this, the Full Court made a general observation that the accused (Mr. Bhutto) had made several scurrilous, scandalous, and baseless attacks on the impartiality of the Bench. Consequently, the Court, solely based on the above reason, directed that the proceedings of the case be held in camera. It further ordered that no part of the in-camera proceedings would be published in any form whatsoever. Section 352, Cr.P.C. provides that the place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them. This provision of law, however, provides an exception to the above general rule that the Presiding Judge may, if he thinks fit, order at any stage of any inquiry into or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

I would feel no hesitation to observe here that this was a trial of a prominent politician who was also the head of a major political party and had served as the Prime Minister of the country. Against whom allegations of criminal conspiracy levelled by another politician in connection with the murder of his father. This situation created a compelling need for an open trial to ensure that justice was not only done but also perceived to be done transparently. An almost similar observation has been made by a five-member bench of this Court in Syed Ali Nawaz Gardezi v. Lt.-Col. Muhammad Yusuf (PLD 1963 SC 51) wherein the said Hon'ble Bench upheld the findings of the trial court, which ordered an open trial for the accused because the accused was a high-ranking government official. This decision highlights the importance of transparency and public scrutiny in cases involving individuals in significant positions of authority. In light of these considerations, it appears that the Full Bench did not exercise its discretion appropriately by ordering an in-

camera trial and caused serious prejudice to the accused, Mr. Bhutto in contumacious disregard of the law previously declared by this Court in the Nawaz Gardezi case supra.

**IV) Denial of the Right to Defend**

Similarly, On January 28, 1978, the request of Mr. Bhutto for the supply of a copy of his statement recorded under section 342, Cr.P.C. on January 25, 1978, was declined (with the permission only to see that statement) for the reason that the proceedings were held in camera. In the case of Mr. Bhutto, the legal requirements for a fair trial, such as due notice and the opportunity to defend oneself, appear to have been compromised, as he was not provided with the materials necessary to prepare his defence effectively. This could possibly undermine the fairness and integrity of the trial proceedings. A fair trial for a criminal offence involves not only the technical observance of the framework and formalities of the law but also the recognition and just application of its substantive principles to ascertain the truth and prevent miscarriage of justice.

**V) Erroneous Appreciation of Evidence of Approver**

There is no denying the fact that there was no direct evidence in this case, which was solely based on the evidence of the approvers Masood Mahmood and Mian Muhammad Abbas. Under section 133 of the Evidence Act, 1872 (now Article 16 of the Qanun-e-Shahadat Order, 1984), an accomplice is a competent witness against an accused person. Thus, the evidence of an accomplice holds significant importance in the criminal justice system, particularly in cases where direct evidence is scarce. An approver is a participant or accomplice in a crime who agrees to testify against their fellow accused in exchange for leniency or a pardon. However, the evidence of an approver is treated with caution due to the inherent risk of unreliability and the possibility of ulterior motives. Section 114, illustration (b) of the Evidence Act, 1872 (now Article 129, illustration (b) of the Qanun-e-Shahadat Order, 1984), reinforces this caution by requiring that the testimony of an approver be corroborated in material particulars by independent and reliable evidence. This corroboration is necessary to ensure that the testimony of the approver is truthful and not fabricated to secure their own benefit. This Court in the case of Ghulam Qadir and another v. The State (PLD 1959 SC (Pak.) 377) had a chance to examine the evidentiary value of an approver. After a thorough analysis of the material available on record and the law on the subject, a 3-member bench of this Court laid a normal standard of corroboration for the acceptance of the evidence of an approver in a criminal case. S. A. Rahman, J.- (as he then was) speaking for the bench observed as under:

'As a matter of strict law, the uncorroborated testimony of an accomplice could, if accepted, form the basis of a conviction in a criminal case. However in the course of judicial precedents, a rule of prudence has been evolved under which it is always insisted that there ought to be independent corroboration of an approver's statement on material points suggesting a link between accused persons and the crime before such a statement could be accepted as a safe foundation for their conviction. The reason for the rule is obvious. There is always danger of substitution of the guilty by the innocent in such cases and it is realised that it would be extremely risky to act upon the statement of a self-confessed criminal who while trying to save hip own skin, might be unscrupulous enough to accept suggestions of others to inculpate a person unconnected with the crime in place of his real accomplice for whom he may have a soft corner. But the corroboration required would depend on the facts and circumstances of each particular case and no hard and fast rule can be laid down in this behalf. Surely, one of the factors calling for consideration may be the circumstance that the approver had no ostensible motive to involve any of the accused persons falsely in the case. That does not imply any relaxation of normal standards of corroboration in such cases and indeed, in my humble judgment, the High Court, in the present case, does nor appear to have been guilty of any such lapse.'

The above normal standard of corroboration was followed by a subsequent equal bench of this Court in the case of Abdul Khaliq v. The State (1970 SCMR 307). The bench observed, "The extent and nature of corroboration of the testimony of an accomplice may vary from case to case. The rule of practice requiring corroboration of the evidence of the accomplice is that the corroboration must be in respect of some material particulars implicating the accused, and it is not necessary that evidence of the accomplice should be corroborated in every detail of the crime.' Later, a 5-member bench of this Court in the case of Abdul Majid

and another v. The State (PLD 1973 SC 595) approvingly referred to the above observations of the earlier 3-member bench regarding the requirement of the normal standard of corroboration of the statement of an approver and decided the case accordingly.

Later a matter involving the encounter/murder of six persons by the police came for consideration before this Court in the case of Ch. Muhammad Yaqoob and others v. The State (1992 SCMR 1983). This Court after analyzing the case law from 1949 to 1991 observed that the testimony of an approver is to be scrutinized with care and caution and the Court should be doubly sure that his (approver's) evidence is corroborated in material particulars by reliable evidence. Further, this Court laid down the following principles for appreciating the evidence of an approver:

(i) That if a statement of fact made by an accused in a confession is of the nature that if it is assumed to be true, it would negate the offence alleged to be confessed, it is called an exculpatory confession.

(ii) That a statement of an accused that contains self-exculpatory matter cannot amount to confession.

(iii) That a retracted confession is sufficient to sustain a conviction for a capital offence, if the Court is of the view that the same is voluntary and is true, but as a rule of prudence, it has been consistently held by the superior Courts that the same should not be acted upon unless corroborated by some other reliable evidence in material particulars.

(iv) That though the confession of a co-accused cannot be made the foundation of conviction but it may be used in support of other evidence.

(v) That the confession of a co-accused is an evidence of a weak character.

(vi) That under Islamic Jurisprudence, in order to make a confession reliable, it should be voluntarily made and not on account of any coercion, duress or violence.

(vii) That any delay in recording of a confession may, or may not, be fatal as to the evidentiary value of a retracted confession as in the case of Syed Sharifuddin Pirzada v. Sohbat Khan and 3 others (supra), this Court has held that the factum that the accused were in the police custody for 11 to 15 days, was not fatal as to the credibility of the retracted confessions for the reason that the Court was satisfied that the retracted confessions were not tutored and were, in fact, made voluntarily.

(viii) That any lapse on the administrative side on the part of a Magistrate recording a confession, may not be fatal as to the evidentiary value of such confession provided the Court is satisfied that the lapses on his part have not, in any way, adversely affected the voluntariness or truthfulness of the confession.

(ix) That if an accomplice's evidence is not corroborated in material respects, it cannot be acted upon and that the evidence of an accomplice cannot be used to corroborate evidence of another accomplice.

It is relevant to mention here that the provisions of sections 337 to 339, Cr.P.C., lay down the procedure for tendering a pardon to an accomplice. The combined effect of these provisions is that a pardon may be tendered with the objective of 'obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, the offence.' A pardon can be offered to such a person on the condition that he makes a full and true disclosure of all circumstances within his knowledge related to the offence and to every other person involved, whether as a principal or abettor, in its commission. It is evident that, without attempting to provide a formal definition of the term 'accomplice', the above provisions outline the criteria necessary for treating a person as an accomplice to tender a pardon. An accomplice, therefore, means a guilty associate or partner in crime, someone who is consciously connected with the offence in some way, whether before, during, or after its commission, or who makes admissions of facts showing that he had a conscious hand in the offence. If a witness
is not concerned with the commission of the crime for which the
accused is charged, he cannot be said to be an accomplice in the
crime. In other words, an accomplice is a particeps criminis, who is consciously so connected with the criminal act done by his confederate that he, due to the presence of the necessary mens rea and his participation in the crime in some way, can be tried alongside that confederate who actually perpetrated the crime. A witness who could not be so indicted due to the absence of mens rea cannot be considered an accomplice.

**VI) Masood Mahmood does not qualify to be an Approver**

As the case rests mainly on the evidence of the approver his evidence requires a careful scrutiny, and can only be accepted if it is supported in material particulars by other reliable evidence. Upon examining the testimony of the approver (PW-2), numerous discrepancies and irregularities have been observed. Nonetheless,
the following significant excerpts from his evidence are reproduced below for a thorough understanding and proper appreciation of his evidence:

'In June 1974 when Mr. Ahmad Raza Kasuri was speaking
in the National Assembly, Mr. Zulfiqar Ali Bhutto addressed
him directly and not through the Speaker as follows: He
asked him to keep quiet, that he had enough of him and
that he would not tolerate his nuisance anymore. This is
more or less, what the Prime Minister said. A day or two later I was sent for by the prime Minister. He, inter alia, said to me that he was fed up with the obnoxious behavior of Mr. Ahmad Raza Kasuri and that Mian Muhammad Abbas, an Officer of the FSF, knew all about his activities. This officer is an accused in this Case. The then Prime Minister further told me that this officer had already been given directions through my predecessor to get rid of Mr. Ahmad Raza Kasuri. The Prime Minister went on to instruct me that I should ask Mian Muhammad Abbas to get on with the job and produce the dead body or Mr. Ahmad Raza Kasuri or his body bandaged all over.'

'On the 11th of November, 1974, I was at Multan so was Mr. Zulfiqar Ali Bhutto. Very early in the morning he rang me up. He said to me, "Your Mian Abbas has made complete balls
of the situation. Instead of Mr. Ahmad Raza Kasuri, he has got his father killed". I was taken by surprise. The Prime Minister hung up after telling me that he would summon me later…. Soon after that, when I returned to the Headquarters, Mian Abbas informed me and reported to me that his operation had been successful, but instead of the intended victim his father Nawab Muhammad Ahmad Khan had been murdered at Lahore'.

'As far as I remember, I left Multan in the same afternoon. I was summoned by Mr. Bhutto on our return to Rawalpindi. He was peeved and agitated. He said that the actual task had yet to be accomplished. I said to him, "at your behest, an idea conceived by you was carried out and communicated by me to Mian Abbas who already your directions through my predecessor and the fact remains that both you and I and my subordinates will be taken to task by God Almighty, but I will not carry out any such orders any more'.

In answer to a question during cross-examination, the approver (PW-2) stated that:

'I did not give any plan of mine to Mian Muhammad Abbas for committing the murder of Mr. Ahmad Raza Kasuri.
Since Mr. Abbas had assured me about the execution
of the orders ive to him by the then Prime Minister, therefore,
I did not give any person to him for the execution of those orders'.

A careful examination of the above-quoted excerpts from the evidence of Masood Mahmood, the approver (PW-2), reveals that he implicitly distanced himself from the alleged conspiracy involving Mr. Bhutto. He portrayed himself as an innocent and God-fearing man who merely conveyed a message from the then Prime Minister to another officer, treating it as part of his official duties. Moreover, the alleged incident took place on November 11, 1974, and he was taken into custody on July 5, 1977, with his confessional statement recorded on August 24, 1977. To substantiate his bona fides and the voluntariness of his actions, he claimed that on August 14, 1977, he wrote a letter to the Chief Martial Law Administrator, explicitly disclosing the misdeeds of the Federal Security Force, as well as his own actions wrongly carried out under the orders of Mr. Bhutto. Surprisingly, the letter was written after more than two and half years of the occurrence while he was in custody. If he had truly repented for his previous actions, he should have written that letter before his arrest. However, this stance has no value, as the letter or a copy thereof was not produced by him as evidence. He also failed to explain why he remained silent for approximately two and half years after the alleged incident and why he did not report it to the concerned authorities. Even otherwise, if his

entire statement is considered in its totality, it does not constitute any offence. His statement is free from any mens rea and is therefore exculpatory; thus, he does not fall within the category of an accomplice. However, the High Court/Trial Court did not take note of this important aspect
of the matter and, relying upon the evidence of the approver, erroneously convicted Mr. Bhutto. Although, this Court, in paragraph 413 of the majority judgment, made an important observation to the effect, '...If a witness is not an accomplice in the sense
indicated above, namely, on account of the absence of mens rea
then the real question is not of requiring corroboration of his evidence, but of the degree of credit to be attached to his testimony, depending
on all the facts and circumstances of the particular case. In other
words, he has then to be judged as any other witness, without introducing an artificial' requirement of corroboration of his evidence by applying the rule contained in illustration (b) to section 114 of the Evidence Act.'

Later, the majority judgment (para 456) concluded that Masood Mahmood, the approver was a truthful and reliable witness and dismissed the appeal of Mr. Bhutto while hypothetically observing, 'that Masood Mahmood enjoyed a special position under Zulfiqar Ali Bhutto, that he was in close and constant touch with him throughout his tenure as Director-General of the Federal Security Force from 1974 to 1977, that he was shown all kinds of favours and considerations by being sent abroad for official visits and medical treatment, that he was not the only civilian official taken into custody on the proclamation of Martial Law, and that during his long career in the Police service of Pakistan, he had held important positions involving the assumption of responsibility and exercise of authority, and it was, therefore difficult to hold that Masood Mahmood had become an instrument in the hands of the Martial Law authorities to deliberately and falsely concoct the story he had narrated at such length at the trial. A further significant fact strengthening this conclusion was that even if he was pressurised to falsely implicate the former Prime Minister, there was no reason for the Martial Law authorities, or for Masood Mahmood himself to falsely assign an important operational role in the conspiracy to the appellant
Mian Muhammad Abbas, who was then functioning as one of the Directors of the Federal Security Force, incharge of Operations and Intelligence...'.

**VII) Lack of Corroboration of Evidence of the Approver**

If, for the sake of argument, it is accepted that Masood Mahmood fulfills all the requirements of being an approver, the next important legal question is whether the prosecution has succeeded in providing the necessary corroboration to support his testimony. To find the answer, I thoroughly examined the available records and was highly disappointed to find any convincing evidence to corroborate the sequence of events as alleged by Masood Mahmood, the approver. As far as the motive is concerned, it has been found from the excerpt of evidence of Masood Mahmood, as quoted above, that the motive mainly set out by the prosecution was Mr. Bhutto's speech in June 1974 in the National Assembly, where he directly addressed Mr. Ahmad Raza Kasuri and said he had enough of him and would not tolerate his nuisance anymore. In addition to this, Mr. Ahmad Raza Kasuri, while appearing as PW-1 before the High Court/Trial Court, gave a detailed account of his differences with Mr. Bhutto. Notably, he stated that he was a founding member of the Pakistan People's Party ('PPP'), formed on December 1, 1967, and was elected to the National Assembly in 1971 on that party's ticket. As he considered Mr. Bhutto a power-hungry, their relations cooled and eventually became strained. The above are the two main reasons for the involvement of Mr. Bhutto in this case, as per the prosecution evidence available on record. It is worth discussing a shocking fact: Mr. Ahmad Raza Kasuri, while appearing as PW-1, disclosed that Mr. Bhutto formally expelled him from the PPP in October 1972. In June 1973, he joined Tehrik-I-Istiqlal and then rejoined the PPP on April 6, 1976, due to an instinct for self-preservation. I am unable to understand, and even a person of ordinary prudence could not fathom, why he would rejoin a party led by someone accused of conspiring in his father's death. His rejoining is not justified in any manner, regardless of his reasoning. Based on these facts, it could be surmised that Mr. Ahmad Raza Kasuri might have been subjected to some external pressure possibly motivated by the then Martial law regime to implicate

Mr. Bhutto in the murder of his father, even though he might not have personally wished to do so or might have been convinced of Mr. Bhutto's innocence subsequently.

**VIII) Motive Remained Unproved**

Even otherwise, when there are open hostilities between two groups, the motive factor may propel one side to commit a crime, and the same factor may possibly induce the other group to implicate their rivals. Further, the motive is a double-edged weapon, which can be used either way and by either side i.e. for real or false involvement. Reference in this regard may be made to the cases of Noor Elahi v. Zafarul Haque (PLD 1976 SC 557); and Allah Bakhsh v. The State (PLD 1978 SC 171). Therefore, to my understanding the prosecution failed to establish the motive part of the case; but the High Court/Trial Court (in para 464 of the judgment) had erroneously held, 'the motive to kill Ahmad Raza Kasuri is proved to be on the part of the principal accused [Mr. Bhutto]'. Similarly, this Court in para 497 of the majority judgment subscribed to the finding of the High Court/Trial Court while ignoring the above apparent fundamental inconsistencies in the case of the prosecution and held that Mr. Bhutto had a strong motive to do away with Ahmad Raza Kasuri owing to their violent political differences, and the manner and the language in which Ahmad Raza Kasuri gave vent to his views against the former Prime Minister and his polices.

**IX) The Retracted Confession of Mian Abbas carries no Evidentiary Value**

A careful examination of the confessional statement made by Mian Abbas under section 164, Cr.P.C. shows that he also attempted to exculpate himself by laying the blame on approvers Masood Mahmood and Ghulam Hussain and incidentally implicating Mr. Bhutto in this crime. Under these circumstances, his statement cannot be treated as a confession for the purposes of section 30 of the Evidence Act, 1872 (now Article 43 of the Qanun-e-Shahadat Order, 1984). Moreover, he had initially admitted his guilt and recorded his judicial confession. However, he later retracted that confession, yet the High Court/ Trial Court convicted him and sentenced him to death. During the appeal proceedings before this Court, he again changed his mind, retracted the retraction of his judicial confession, and pleaded guilty. Although a conviction can be based on a retracted judicial confession provided it is corroborated, the conduct of Mian Abbas as described above makes him a highly unreliable witness in case involving a capital sentence.

**X) Impact of Negative Report of Ballistics Experts**

Additionally, the negative report of the Ballistics Expert dated September 8, 1977, regarding the use of any of the 25 guns of the third Battalion of the FSF, then stationed in Walton Lahore, in the present crime undermines the entire prosecution case, not only in regard to the use of weapons belonging to this Battalion but also regarding the use of FSF ammunition. Particularly, this report is fatal to the evidence of the approver Ghulam Hussain and of the other witnesses who claimed to have supplied Short Machine Guns (SMGs) and ammunition to Ghulam Hussain for the purpose of carrying out an attack on Mr. Ahmad Raza Kasuri.

**DISAGREEMENT WITH CERTAIN REASONS IN THE DETAILED OPINION**

13. No doubt, the High Court, as earlier discussed, is fully competent to take direct cognizance under section 194, Cr.P.C. of a criminal case for the commission of any offence under the P.P.C. or transfer the same to itself for trial under section 526, Cr.P.C., as both provisions have existed in the Cr.P.C. since its inception in 1898. If these provisions were found to be inappropriate, the Parliament could amend or delete them in any of the subsequent amendments made after its adoption. Given the above legal position, I do not agree with the observation made in para 26 of the detailed opinion authored by the Chief Justice whereby it has been observed, 'Article 185(2)(b) of the Constitution and sections 411 -A and 526, of the Code permit trial to be conducted by the High Court, but these provisions do not provide for a High Court to conduct a murder trial.' I would feel no hesitation to state here that Section 411-A, Cr.P.C. only provides a remedy of appeal to an accused who has been convicted in a trial held by the High Court in the exercise of its original criminal jurisdiction. An exception is attached to this provision, under which no appeal lies in cases where an appeal lies to the Supreme Court under Article 185 of the Constitution. Article 185(2)(b) of the Constitution stipulates that an appeal shall lie to the Supreme Court from any judgment, decree, final order, or sentence of a High Court if the High Court has withdrawn any case for trial before itself from any court subordinate to it

and has in such trial convicted the accused person and sentenced him. As the High Court withdrew the case of Mr. Bhutto from the Court of Session/Trial Court and convicted him, his case was not covered under section 411-A, Cr.P.C. being subject to its exception clause. Therefore, Mr. Bhutto filed a direct criminal appeal before this Court under Article 185(2)(b).

14. The Chief Justice, with due respect, erred in understanding the true meaning and purpose of Article 185(2)(b) of the Constitution and sections 411-A and 526 of the Cr.P.C. Consequently, his observation that the aforementioned provisions of law permit the trial to be conducted by the High Court, but do not allow the High Court to conduct a murder trial, is untenable under the law being based on a misconception of these provisions. It is, however, true that the trial of Mr. Bhutto, for the first time, was conducted by the High Court in its original criminal jurisdiction; but now one more example can also be quoted from the recent past. Where a single bench of the Islamabad High Court tried the case of an on-duty Additional Sessions Judge, Raja Khurram Ali Khan, and his wife, Maheen Zafar, for torturing their domestic worker, Tayyaba Bibi. They were both convicted and sentenced and their criminal appeal under section 411-A, Cr.P.C., was dismissed by the Division Bench of the same High Court. See Raja Khurram Ali Khan and another v. Tayyaba Bibi and another (2019 YLR 98). A Criminal Appeal filed against the judgment of the Division Bench was also dismissed by this Court. See Raja Khurram Ali Khan and 2 others v. Tayyaba Bibi and another (PLD 2020 SC 146).

15. As far as the observation of the Chief Justice in para 27-28 of the detailed opinion regarding confirmation of the death sentence by the High Court is concerned, my understanding of the legal framework as provided under Chapter XXVII titled 'OF THE SUBMISSION OF SENTENCES FOR CONFIRMATION' is quite different. Under this chapter, the Legislature has provided valuable safeguards for the life and liberty of convicts in cases involving capital sentences. The provisions contained therein seek to ensure that in capital sentence cases, where the life of the convicted person is at stake, the entire evidentiary material bearing on the innocence or guilt of the accused and the question of the sentence must be scrutinised with utmost caution and care by a superior Court. This Chapter only deals with the sentence of death passed by a Court of Session and it has nothing to do with the sentence of death passed by a High Court while trying a case in its original criminal jurisdiction. The provision of section 374 is more than clear in this regard which states as under:

'374. Sentence of death to be submitted by Court of Session: When the Court of Session passes sentence of death, the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court'.

Emphasis Supplied.

Further, section 377 states as under:

'377. Confirmation of new sentence to be signed by two Judges: In every case so submitted, the confirmation of the sentences, or any new sentence or order passed by the High Court, shall, when such Court consists of two or more Judges, be made, passed and signed by at least two of them.'

Emphasis Supplied.

16. The above provisions are clear and require no further interpretation regarding whether a death sentence passed by a Full Bench comprising five judges of the High Court still requires confirmation by another two judges of the same Court. On a reference for the confirmation of the sentence of death, the High Court is required to proceed in accordance with sections 375 and 376, Cr.P.C. and the provisions of these sections make it clear that the duty of the High Court, in dealing with the reference, is not only to see whether the order passed by the trial court is correct, but to examine the case for itself and even direct a further enquiry or the taking of additional evidence if the Court considers it desirable in order to ascertain the guilt or the innocence of the convicted person. If, for the sake of argument, it is accepted that the said death sentence passed by a Full Bench still requires confirmation by another two judges of the same High Court, it would be

against the spirit of the above Chapter as well as the settled law whereby a smaller bench cannot sit as an appellate authority against the decision of a larger bench even it would disturb the internal hierarchy of the High Court. For instance, Section 3(1) of the Law Reforms Ordinance, 1972, provides for an appeal to a bench of two or more judges of a High Court from a decree passed or final order made by a single judge of that Court in the exercise of its original civil jurisdiction. But no such appeal would lie if the decree or final order is made by a bench comprising more than one judge, thus rendering the said provision of law redundant. Similarly, we, for the purposes of Section 374, Cr.P.C., cannot use the terms 'Court of Session' and 'High Court' interchangeably, as both are
distinct and separate judicial forums. Consequently, when the High Court passes a sentence of death in its original criminal jurisdiction, the above Chapter XXVII of Cr.P.C. becomes redundant and inoperative. However, the convict may seek the remedy of appeal under Article 185(2)(b) of the Constitution or Section 411-A, Cr.P.C., as the case may be, as discussed in the preceding paragraphs. Therefore, with such an interpretation and understanding of Chapter XXVII of Cr.P.C., I am unable to agree with the view expressed by the Chief Justice in paragraphs 27 to 30 of the detailed opinion regarding the application of Chapter XXVII, as well as the loss of the right of appeal in the case of a criminal trial conducted by the High Court in its original criminal jurisdiction, as being misconceived.

17. In conclusion, while exercising the restraint expected of me in an advisory jurisdiction, I have no hesitation in stating that no evidence whatsoever was available on record to sustain the conviction of Mr. Bhutto as recorded by the High Court/Trial Court and upheld by this Court. The evidence of the material witnesses, namely Ahmad Raza Kasuri (PW-1), Masood Mahmood (PW-2), Saeed Ahmad (PW-3), Mr. Welch (PW-4), and Ghulam Hussain (PW31) is full of contradictions, improvements, and improbabilities and was not sufficient for awarding the capital punishment to Mr. Bhutto. Even the majority of this Court erroneously subscribed to the findings of the High Court/Trial Court without carrying out any independent analysis or review of the material available on record. In short, the case of Mr. Bhutto is a bitter example of unfairness, wherein both substantive and procedural laws were misapplied to please the then-Martial Law authorities. As a result, we lost a great political leader. This case stands as a stark reminder of how legal systems can be manipulated for political gain, leading to grave injustices. The misapplication of laws in this case not only undermined the integrity of the judicial process but also eroded public trust in the legal system. It highlights the importance of judicial independence and the need for courts to be free from political influence. The loss of Mr. Bhutto, a visionary leader, was not just a blow to his supporters but to the nation as a whole, depriving it of his leadership and contributions.

18. The above are the reasons in support of the unanimous short opinion rendered by this Court on 06.03.2024.

Sd/-

Syed Hasan Azhar Rizvi

Judge

Opinion on Reference No.01/2011, filed under Article 186 of
the Constitution of the Islamic Republic of Pakistan, 1973

**MUHAMMAD ALI MAZHAR, J.---**

Pursuant to the decision of the Federal Cabinet, the President of Pakistan, in the year 2011, filed a reference under Article 186 of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution") seeking an opinion in respect of the proceedings of the judicial process in the case of the trial of Shaheed Zulfiqar Ali Bhutto, former Prime Minister of Pakistan (Mr. Bhutto).

For the ease of reference, the following index provides an outline of the key topics discussed in the opinion:


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**I. Quintessence of Advisory Jurisdiction**

2. To begin, it is expedient to reproduce, for the ease of reference, Article 186 of the Constitution as under:

Advisory Jurisdiction

186, (1) If, at any time, the President considers that it is desirable to obtain the opinion of the Supreme Court on any question of law which he considers of public importance, he may refer the question to the Supreme Court for consideration.

(2) The Supreme Court shall consider a question so referred and report its opinion on the question to the President. [emphasis applied]

3. The spirit and fundamental nature of the advisory jurisdiction under Article 186 accentuates that the President may refer any question of law which is considered to be a matter of public importance to the Supreme Court for its consideration and opinion. This function plays a momentous role in advisory jurisdiction. The foremost wisdom of this jurisdiction lies in enabling the President to seek aid and assistance in the form of an opinion from the Supreme Court on any issue of law concerning public importance, which is the dominant feature of the "Presidential Reference" encapsulated in the Constitution. In my view, while the opinion rendered under advisory jurisdiction may not be binding, it carries significant credence and persuasive value. It is rendered after much deliberation, thoughtfulness, and appreciation of the questions forwarded by the President consistent with the constitutional obligations and judicial propriety. Such opinions ought to be respected with due weight and esteem by all organs of the State. However, concomitantly, questions transmitted for opinion in the reference should not be ambiguous, indeterminate, or inexplicable to avoid the possibility of the Supreme Court returning the reference unanswered.

4. In essence, the scope and existence of advisory jurisdiction represent is a fundamental correlation and relationship between the government and the judiciary. It is the sole pathway for seeking Supreme Court's opinion in certain instances. The Court must remain confined to the proposed questions without making any departure and must keep a tight rein on the reference itself. The Supreme Court may decline to articulate an opinion if the questions framed lack any constitutional significance or public importance. In Reference No. 2 of 2005 (PLD 2005 SC 873), a nine-member bench of this Court rendered an opinion on the draft Bill titled "HISBA BILL". The opinion referenced various local and foreign judicial precedents and the insights of eminent jurists on constitutional provisions, and concluded that the opinion on a Presidential Reference is not a decision between parties but entails an extensive judicial exercise, including evaluation and appreciation of arguments advanced by advocates appearing for summoned parties, and the Court then forms an opinion. It was further expounded that keeping in mind the language used in Articles 189 and 190 of the Constitution, the opinion expressed by the Supreme Court on a Presidential Reference under Article 186 is required to be esteemed by all organs of the State. Thus, it would not be fair to say that the opinion expressed by the Supreme Court on a Presidential Reference under Article 186 of the Constitution has no binding effect.

**II. Opinion of Larger Bench**

5. On 06.03.2024, the larger bench of this Court delivered its opinion on five questions raised in the Reference filed by the President of Pakistan. The larger bench, by and large, opined that the proceedings of the trial by the Lahore High Court and the appellate judgment rendered by the Supreme Court did not meet the requirements of the fundamental right to a fair trial and due process, enshrined in Articles 4 and 9 of the Constitution, and later guaranteed as a separate and independent fundamental right under Article 10A of the Constitution. It was further opined that the Constitution and the law do not provide a mechanism to set aside the judgment whereby Mr. Bhutto was convicted and sentenced. The said judgment had attained finality after the dismissal of the review petition by this Court, and thus, this Court cannot reappraise the evidence to undo the decision.

6. No doubt, the conviction attained finality after the dismissal of the review petition by this Court. However, in my unfeigned empathy and astuteness, I reckon it my utmost duty to draw attention to the quintessential blemishes and glitches in the murder trial, which blatantly suppressed, devastated, and compromised the doctrine of due process of law and the right to a fair trial.

**III. Overview of Murder Trial**

7. To articulate my opinion, a selection of indispensable facts about the "Murder Trial" is sine qua non to be jotted down for augmentation. To avoid veibosity, I aim to recapitulate the short and snappy minutiae of the murder trial, which forms the nucleus of my opinion. Considering the acute topographies, FIR No.402/74 was registered on 11.11.1974 at Police Station Ichara, Lahore, on the complaint of Mr. Kasuri. After lodging the FIR regarding the assassination of his father, the police carried out the investigation but traced no culprits. Consequently, the investigation was transferred by the Senior Superintendent of Police to the Crime Investigation Agency. Despite the transfer, no suspects of the alleged crime were identified or implicated, and recommendations were made for closure. The report was submitted
to the concerned Magistrate and approved vide administrative order
dated 03.05.1976. Neither the complainant nor any other legal heirs of the deceased challenged the closure of the investigation in the High Court or applied to the prosecution agency for the revival of the case or changes to the investigation officer or agency. Here, the matter could have ended without any further proceedings or investigation, effectively setting it to rest for all practical purposes. However, on one fine morning, the Government of Punjab, of its own accord, appointed a Tribunal to inquire into the incident mentioned in the same FIR without any lawful justification or application from any aggrieved person.

**IV. Reinvestigation in a Closed Case.**

8. The erstwhile Tribunal, in its report dated 22.02.1975, issued certain directions for further investigation without any logical justification. After the imposition of martial law in the country, the Director of the Federal Investigation Agency ("FIA") resurrected the case on 03.05.1976, which had been closed much earlier. Again, this was done without any lawful justification and appeared to be an attempt to revive the closed case by any means with mala fide intentions. The Director of the FIA, more loyal than the king, implicated seven persons, including Mr. Bhutto. A final report under Section 173 of the Code of Criminal Procedure Code, 1898 ("Cr.P.C.") was submitted, wherein two accused persons were cited as approvers. The concerned Magistrate sent the matter to the Sessions Judge for trial on 12.09.1977. All of a sudden, a transfer application was moved by the State to the Acting Chief Justice of the Lahore High Court, who instantaneously transferred the case to the High Court for trial by 'a five-member bench headed by him. To conclude, the aforesaid bench, vide judgment dated 18.03.1978, awarded the death penalty to Mr. Bhutto. His appeal was dismissed by this Court on 06.02.1979, and though a review petition was filed, it was also dismissed on 24.03.1979. To end the story everlastingly, the death sentence was executed on 04.04.1979.

9. In the safe administration of the criminal justice system in our country, relevant provisions are provided under Cr.P.C. for making arrests, conducting investigations, holding trials, issuing convictions, and executing sentences. Whenever, an Officer In-Charge of a Police Station receives information about an offence, he is required to determine whether the offence is cognizable or non-cognizable. The Investigating Officer plays a crucial role in the administration of the criminal justice system and the constituent of the investigation report and its worth holds plenteous value and has repercussions on the outcome of any criminal case. The

Investigating Officer is obligated to investigate the matter from all possible angles, as required by Rule 25.2(3) of the Police Rules, 1934, to ascertain the truth and aim to arrest the real offender, not the innocents. The investigation typically begins with inspecting the crime scene, reconnoitering the circumstances connected to the offence, identifying and arresting the suspect, gathering of relevant evidence (including witness statements), making applications to the Court for recording confessions if any, conducting searches and seizures, carrying out recoveries and identification parades if required, and finally submitting the final report under Section 173, Cr.P.C., after fulfilling all legal requirements. The Investigating Officer must ensure that the provisions of the law are conscientiously followed without any breaches and the investigation is conducted impartially, with the sole aim of uncovering the truth rather than implicating innocents. This impartiality forms the foundational pathway for the prosecution's case. The mere registration of an FIR does not insinuate conviction or proof of guilt. Section 169, Cr.P.C., clearly provides that if, upon investigation, it appears to the Officer In-Charge of the police station, or to the Police Officer conducting the investigation that there is insufficient evidence or reasonable grounds for suspicion to justify forwarding the accused to a Magistrate, such officer shall, if such person is in custody, release the individual upon executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report and to try the accused or send him for trial. The case of Norwest Holst Ltd. v. Department of Trade and others [(1978) 3 All ER 280 at 290] held that "in every investigation, there are by and large three different phases. First of all, the administrative phase; next, the judicial phase; and, finally, the executive phase when the orders of the Court or the Tribunal are, if necessary, executed, or promulgated. Quite plainly fairness to the suspect demands that he should be given a chance of stating his case. Equally fairness demands that the suspect shall be given a chance of putting his side of the case before the judicial inquiry is over. Fairness to the inquirer demands that during the administrative period he should be able to investigate without having at every stage to inquire from the suspect what his side of the matter may be. Of course, it may be difficult to find out the particular point at which the administrative phase ends and the judicial phase begins". The judgment also quoted a passage from Lord Reid's speech in Wiseman v. Borneman [(1971) AC 297, at 308)], that every public officer deciding whether to prosecute or raise proceedings ought to first decide whether a prima facie case is made out or not.

10. Neither does it appear from the record that anyone, including the legal heirs of the deceased, was dissatisfied with the first investigation into the alleged crime, nor is there any indication that they approached the police, the FIA, or the High Court to request a fresh investigation. Additionally, nothing in the record justifies the decision to reinvestigate a closed case. No independent reasoning appears to have been applied to explain why reinvestigation was necessary. Moreover, there is no mention of significant errors or blunders made by the original Investigating Officer, nor any suggestion that evidence was intentionally omitted or manipulated to favour the accused. Similarly, there is no indication that overwhelming evidence was ignored or that reinvestigation was necessary to unearth the truth because the earlier investigation was so defective or contained such visible and seeming lapses on part of the Investigating Officer that it was rendered inadequate. Even the directions in the Tribunal's order to the investigating agency do not reflect any concrete or strong justification for reinvestigation. Instead, reinvestigation was ordered mechanically without identifying lapses on the part of the Investigating Officer. Neither was it asserted that the earlier investigation was botched, nor was any departmental action proposed against the Investigating Officer if the Tribunal believed that he failed to discharge his statutory duty of conducting a fair and impartial investigation.

11. The 'purpose of reinvestigation is not to appease influential individuals or to implicate the innocent. Its underlying principle is to unearth the truth where fairness, rectitude, and impartiality demand it. However, this does not mean that reinvestigation should routinely or customarily be ordered de novo, after submission of challan/report of closure, without any rational or well-articulated justification. Such orders must not cater to grudges or nefarious designs aimed at dragging the irreproachable or innocent individuals into .dire consequences. Reinvestigation cannot be wielded as a tool to favour any influential persons or punish the innocent so casually, callously, or arbitrarily, at the whims of influential and powerful individuals.

Manipulated or misused, the garb of reinvestigation is truly a dangerous idea that undermines the integrity of the criminal justice system and poses a serious danger to its administration.

**V. Transfer of Case from Sessions Court to High Court**

12. According to Section 28 of the Cr.P.C., an offence under the Pakistan Penal Code, 1860 (P.P.C.) may be tried by the High Court, or by the Court of Session or by any other Court by which such offence is shown in the eighth column of the Second Schedule to be triable. Section 31, P.P.C., however, is noteworthy, according to which the High Court may pass any sentences authorised by law. Similarly, a Sessions Judge or Additional Sessions Judge may pass any sentence authorised by law, with the rider that any sentence of death passed by any such Judge shall be subject to confirmation by the High Court. While Section 302 offences are triable by Sessions Court, as also mentioned in the Schedule-II (Explanatory Note) of the Cr.P.C., as the procedural framework outlined in Section 190, Cr.P.C., states that the Magistrate may take cognizance of any offence upon receiving a complaint of facts which constitute such offence; upon a report in writing of such facts made by any police officer; upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been committed which he may try or send to the Court of Session for trial. A Magistrate taking cognizance of an offence triable exclusively by a Court of Session shall, without recording any evidence, send the case to the Court of Session for trial under Section 193, Cr.P.C., wherein it is clearly provided that except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction, unless the case has been sent to it under Section 190.

13. The factual matrix in the case decrypts that the case was sent for trial to the Sessions Judge, Lahore, on 12.09.1977. However, on the very next day, a transfer application was filed by the State, which was allowed on the same day by the Acting Chief Justice of the Lahore High Court, the late Justice Maulvi Mushtaq Hussain, who constituted the bench, and the charge was framed on 11.10.1977. Without a doubt, under Section 526 Cr.P.C., the High Court has jurisdiction to transfer a case or itself try it, but with certain conditionalities, for instance: (a) that a fair and impartial inquiry or trial cannot be had in any criminal court subordinate thereto; (b) that a question of law of unusual difficulty is likely to arise; (c) that a view of the place in or near which any offence has been committed may be required for a satisfactory inquiry into a trial of the same; (d) that an order under this section will tend to the general convenience of the parties or witnesses; or, (e) that such an order is expedient for the ends of justice, or is required by any provision of this Code. While exercising this jurisdiction,, the High Court may act either on the report of the lower court, or on the application of a party interested, or on its own initiative.

14. It appears beyond any doubt that J. Maulvi Mushtaq Hussain allowed the transfer application in a slipshod manner, even without notice to the accused persons. Neither did the Court consider the parameters and constituents of Section 526, Cr.P.C., which require consideration before passing an order of transfer of a case, nor did it record in the order how Mr. Bhutto, who was incarcerated and no longer in power, was in a position to influence or manipulate the outcome, or hinder a fair inquiry or trial. Moreover, it was not mentioned what serious question of law of unusual difficulty was likely to arise in the prosecution case, or how the transfer was required for the general convenience of the parties or witnesses, or expedient for the ends of justice. On the contrary, in my view, the order was tainted with malice, seemingly intended 'to gain control of the prosecution case to stifle or curb the ends of justice and the right to a fair trial which is an inherent and fundamental right of every accused. The Court should not have rubberstamped the State's request for a case transfer without notice to the accused or without judiciously, cautiously, and diligently addressing the grounds raised in the transfer application to determine whether it genuinely made out a case for transfer or if the purpose of the transfer was to cause serious prejudice to the defence. It is evident from the record that Mr. Bhutto not only challenged the transfer order but also objected to the five-member bench trying the case, particularly alleging bias against J. Maulvi Mushtaq Hussain, who was heading the bench. However, all such objections were in vain. Neither the

bench members of the High Court ever acknowledged these concerns, nor did this Court give any importance

or paid any heed to them. Despite serious objections, J. Maulvi Mushtaq Hussain did not recuse himself from the bench, but continued enthusiastically completing the murder trial.

**VI. Allegations of Bias**

15. Now, I would like to address the allegations of bias. Various instances are reflected in the record, including altercations and sarcastic remarks from the bench during the trial, which led Mr. Bhutto to believe he could not expect a fair trial or justice. Time and again, he raised allegations of bias and expressed lack of confidence, but the bench, seemingly overenthusiastic, overzealous, or under external pressure, continued the trial. They awarded the maximum sentence based solely on the testimony of an approver, without any other concrete incriminating or corroborative testament or circumstantial evidence. The bench's approach was unique and, even without considering any mitigating circumstances, appeared predetermined or prejudiced to impose the maximum punishment in a highly dubious case. In my considered view, the personal bias or preconceived notions of the judges unambiguously rendered them incapable of serving independently and fair-mindedly, which undermines the basic limb of the administration of justice and the sacred trust of the masses. When there is an actual probability of bias, the judge ought to recuse themselves, not because they are necessarily biased or incapable of dispensing justice impartially, but because the circumstances might engender a certain restlesness or fear of bias influencing the outcome of a case in the mind of others. In fact, reposing public confidence in the judiciary is the yardstick by which the justice delivery system and its integrity are appraised, including adherence to the doctrine of ex debito justitiae. A biased decision inevitably undermines credibility. However, mere apprehension or allegations of bias without any substantial whys and wherefores cannot alone justify recusal. Each judge, guided by his own conscience and sense of right and wrong, must decide whether to sit in a particular case or not. Lord Hewart's aphorism in Rex v. Sussex Justices ([1924] 1 KB 256) aptly applies here: "Justice must not only be done, but must also be seen to be done". Relevant local and foreign judicial precedents which are essentially concentrated on the question of alleging bias are as follows:-

1. Ms. Benazir Bhutto v. The President of Pakistan (1992 SCMR 140). Bias in a Judge is the paralysis, complete or partial, of judicial faculties and therefore the allegation of bias against a Judge would be wholly unfounded unless it be shown that the proceedings held by him were irregular and one-sided or the conclusions reached by him were wrong and reasons given in support thereof erroneous. Bias in judicial matters may be caused by the judgment, order or observations of a Superior Court or it may spring from personal, political, religious, communal, racial, commercial or economic considerations. Ref: Dimes v. The Grand Junction Canal (No.1) and others (1852) H.L.C. 759-794) and Rex v. Sussex Justices (1924) 1 K B 256) and Muhammad Ismail Chowdhury v. Abdul Khaleque Dowdagar and another (PLD 1960 SC (Pak.) 301.

2. Islamic Republic of Pakistan v. Abdul Wali Khan (PLD 1976 SC 57). Mere suspicion of bias, even if it is not unreasonable, is not sufficient to disqualify a Judge. The basis of the disqualification, therefore, is "personal bias or prejudice" of such a nature as would necessarily render a Judge unable to exercise his functions impartially in a particular case and this must be shown as a matter of fact and not merely as a matter of opinion.

3. President v. Shaukat Ali (PLD 1971 SC 585), The mere assertion of bias can never be sufficient to disqualify a Judge in hearing a cause or matter. In the absence of any pecuniary or proprietary interest in the subject-matter of the proceeding, it is essential that a real likelihood of bias must be shown.

4. Government of NWFP v. Dr. Hussain Ahmed Haroon (2003 SCMR 104). It is an age-old fundamental principle of law that justice should not only be done but manifestly and undoubtedly it should seen to have been done. To achieve this objective/ goal it is of prime importance that a Judge/person equipped with the authority of decision should not be having any sort of personal interest in the outcome of the matter under issue before him. The conduct of the proceedings should not

generate any reasonable apprehension in the mind of a person that the deciding officer has harboured any grudge or bias against him.

5. Asif Ali Zardari v. The State (PLD 2001 SC 568). The foremost question is what is 'bias' has been described in Corpus Juris Secundum, Volume X pp. 354 and 355. BIAS. Primarily, a diagonal or slant, especially of a seam, cut, or line across a fabric; and so derivatively, a leaning of the mind; a mental predilection or prejudice; anything which turns a man to a particular course; a particular influential power which sways the judgment; a preconceived opinion; a sort of emotion constituting untrustworthy partiality; bent, inclination, prepossession, propension, or tendency, which sways the? mind toward one opinion rather than another; propensity toward an object, not leaving the mind? indifferent. "Bias" has been held synonymous with "partiality," and strictly to be distinguished from "prejudice". Garner on Administrative Law, 4th Edition at page 122 has also attempted to define bias as a disqualification and in such context observed as follows: "Not only is a person affected by an administrative decision entitled to have his case heard by the agency seized with its determination, but he may also insist on his case being heard by a fair Judge, one free from bias. Bias in this context has usually meant that the adjudicator must have no financial interest in the matter under dispute, but it is not necessarily so limited, and allegations of bias have been upheld in circumstances where there was no question of any financial interest."

6. State of Punjab v. Davinder Pal Singh Bhullar (AIR 2012 SC 364). In respect of judicial bias, the statement made by Frank J. of the United States is worth quoting: "If, however, bias' and partiality' be defined to mean the total absence of preconceptions in the mind of the Judge, then no one has ever had a fair trial and no one will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions…… Much harm is done by the myth that, merely by….. taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine." The principle in these cases is derived from the legal maxim nemo debet esse judex in causa propria sua. It applies only when the interest attributed is such as to render the case his own cause. This principle is required to be observed by all judicial and quasi-judicial authorities as non-observance thereof, is treated as a violation of the principles of natural justice. (Vide: Rameshwar Bhartia v. The State of Assam, AIR 1952 SC 405; Mineral Development Ltd. v. The State of Bihar and another AIR 1960 SC 468; Meenglas Tea Estate v. The Workmen, AIR 1963 SC 1719; and The Secretary to the Government, Transport Department, Madras v. Munuswamy Mudaliar and others AIR 1988 SC 2232).

7. Gullavalli Negeswararao etc. v. The State of Andhra Pradesh and others (AIR 1959 SC 1376). It is one of the fundamental principles of judicial procedure that the person or persons who are entrusted with the duty of hearing a case judicially should be those who have no personal bias in the matter. In Ranger v. Great Western Ry. Co.(1) Lord Cranworth, L.C., says: 'A judge ought to be, and is supposed to be, indifferent between
the parties. He has, or is supposed to have, no bias inducing
him to lean to the one side rather than to the other In ordinary cases it is just ground of exception to a judge that he is not indifferent, and the fact that he is himself a party, or interested as a party, affords the strongest proof that he cannot be indifferent."

8. Ranjit Thakur v. Union of India and others (AIR 1987 SC 2386). The test of real likelihood of bias is whether a reasonable person, in possession of relevant information, would have thought that bias was likely and is whether respondent was likely to be disposed to decide the matter only in a particular way. It is the essence of a judgment that it is made after due observance of the judicial process; that the Court or Tribunal passing it observes, at least the minimal requirements of natural justice, is composed of impartial persons acting fairly and without bias and in good faith. A judgment which is the result of bias or want of impartiality is a nullity and the trial "coram non-judice.

9. Bhajan Lal, Chief Minister, Haryana v. Messrs Jindal Strips Ltd. and others (1994) 6 SCC 19. Bias is the second limb of natural justice. Prima facie no one should be a judge in what is to be regarded as 'sua causa', whether or not he is named as a party. The decision-maker should have no interest by way of gain or detriment in the outcome of a proceeding. Interest may take many forms. It may be direct, it may be indirect,

it may arise from a personal relationship or from a relationship with the subject-matter, from a close relationship or from a tenuous one.

10. Justice P.D. Dinakaran v. Hon'ble Judges Inquiry Committee (2011) 8 SCC 380. Nemo debet esse judex in propria causa. This principle consists of the rule against bias or interest and is based on three maxims: (i) No man shall be a judge in his own cause; (ii) Justice should not only be done, but manifestly and undoubtedly be seen to be done; and (iii) Judges, like Caesar's wife should be above suspicion. The first requirement of natural justice is that the Judge should be impartial and neutral and must be free from bias... He must be in a position to act judicially and to decide the matter objectively. A Judge must be of sterner stuff. His mental equipoise must always remain firm and undetected. He should not allow his personal prejudice to go into the decision-making.

11. A.K. Kraipak v. Union of India (AIR 1970 SC 150). The real question is not whether he was biased. It is difficult to prove the state of mind of a person. Therefore what we have to see is whether there is reasonable ground for believing that he was likely to have been biased. We agree with the learned Attorney General that a mere suspicion of bias is not sufficient. There must be a reasonable likelihood of bias. In deciding the question of bias we have to take into consideration human probabilities and ordinary course of human conduct.

12. Davidson v. Scottish Ministers [2004] UKHL 34 [House of Lords]. In Porter v Magill [2001] UKHL 67, [2002] 2 AC 357, 494, paragraph 103, my noble and learned friend Lord Hope of Craighead expressed the test in terms accepted by the Second Division and by both parties to this appeal- "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

13. Webb & Hay v. R [1993] HCA 30 [High Court of Australia]. When it is alleged that a judge has been or might be actuated by bias, this Court has held that the proper test is whether the fair-minded people might reasonably apprehend or suspect that the judge has prejudged or might prejudge the case. In considering the merits of the test to be applied in a case where a juror is alleged to be biased, it is important to keep in mind that the appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice. Both the parties to the case and the general public must be satisfied that justice has not only been done but that it has been seen to be done.

14. R v. Sussex Justices, ex parte McCarthy [1923] All ER 233 [House of Lords]. It was of fundamental importance that justice should not only be done, but that it should also be manifestly seen to be done; the question was not whether the acting clerk, when with the justices, made any observation or offered any criticism which he could not properly make or offer, but whether he was so related to the case by reason of the civil action as to be unfit to act for the justices in the criminal proceedings, and the answer to that question depended, not on what was actually done, but on what might appear to be done; what be did might have created a suspicion that there had been an improper interference with the course of justice; and, therefore, the conviction of the applicant must be quashed.

15. R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2) [1999] 1 All ER 577 [House of Lords]. The contention is that there was a real danger or reasonable apprehension or suspicion that Lord Hoffmann might have been biased, that is to say it is alleged that there is an appearance of bias not actual bias. The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.

16. Taylor and another v. Lawrence and another [2002] EWCA Civ 90 [Court of Appeal, Civil Division]. For the purpose of applying the test for apparent bias, namely whether in the all the circumstances a fair-minded and informed observer would be led to conclude that there was a real possibility that the tribunal was biased, the informed observer could be expected to be aware of the legal traditions and culture of the English jurisdiction, and accordingly he would be aware that in the ordinary way contacts between the judiciary and the legal profession should not be regarded as giving rise to a possibility of bias.

**VII. Doctrine of Natural Justice and Due Process of Law**

16. In our history, it was not rare but rather the first murder trial conducted by the High Court, which was unique in that it was decided by a bench of five likeminded judges, including the then Acting Chief Justice, who unanimously agreed to award the death penalty. I am also mindful of the turn of phrase, "the accused is the favourite child of law". The substratum of this concept is based on the farsightedness and prudence that it is better to let a hundred guilty persons be acquitted than to convict one innocent or that it is better to run the risk of sparing the guilty than to condemn the innocent. Reliance is placed on the principles elucidated in my judgment, Muhammad Riaz v. Khurram Shehzad (2024 SCMR 51). The raison detre is to assess and scrutinize whether the police and prosecution have performed their tasks accurately and diligently in apprehending and exposing the actual culprits or whether they dragged innocent persons into the crime due to a defective or botched-up investigation, depriving the victim of justice. The philosophy of this phrase, though, does not imply that the Court should grant any unwarranted favours, indulgences, or preferential treatment to the accused. Rather, it ensures a fair-minded and unbiased sense of justice in all circumstances, as a safety gauge to maintain an evenhanded right of defence and a fair trial, thereby complying with the due process of law and reinforcing the renowned doctrine, "innocent until proven guilty". However, if the prosecution case's background or chronicle is analyzed, it strongly suggests that Mr. Bhutto was not treated as the "favorite child of law" but rather as an "unfavourite child of law".

17. The personal bias, prejudice mind or jaundiced eye of the judges tarnished and contaminated the framework of entire trial and the judgment, which tantamount to grave violation of the principle of natural justice and it also enfeebles the elementary foundation of the administration of justice which is sacrosanct for the faith and conviction of the masses. To enjoy the protection of law and to be treated in accordance with the law is the inalienable right of every citizen. The purpose of Article 4 of the Constitution, is to ascribe and integrate the doctrine of equality before the law or equal protection of the law. No action detrimental to the life and liberty of any person can be taken without due process of law. The principles of natural justice require that the delinquent be afforded a fair opportunity to converge, explain, and contest before being found guilty or condemned without any bias or prejudice of the Courts and judges. The principles of natural justice and the doctrine of due process are not new phenomena but have long been encapsulated as a sacred obligation of every court and tribunal to follow religiously in all matters, whether civil or criminal, to ensure a fair trial. The right to a fair trial has now been explicitly enshrined in our Constitution by virtue of the 18th Constitutional Amendment in the shape of Article 10-A and in case of apparent bias as done in this case, the accused could not expect right to fair trial. [Reference can be made to some judgments authored by me, such as Junaid Wazir v. Superintendent of Police (2024 SCMR 181), Federation of Pakistan v. Zahid Malik (2023 SCMR 603), Usman Ghani v. The Chief Post Master, GPO Karachi (2022 SCMR 745), Capital Development Authority v. Shabir Hussain (2022 SCMR 627), Raja Muhammad Shahid v. The Inspector General of Police (2023 SCMR 1135), Muhammad Yaseen v. Province of Sindh (2024 PLC(C.S.) 111), Government of Balochistan v. Ghulam Rasool (2024 SCMR 1155) and Inspector General of Police, Quetta v. Fida Muhammad (2022 SCMR 1583).

**VIII. Evidence of the Approver**

18. I cannot ignore another crucial aspect, which is an acid test for considering and appreciating the evidence of an approver: whether their testimony is trustworthy or not. To ensure the safe, effective, and efficient administration of the criminal justice system, certain norms and yardstick are to be followed. The Court must first be satisfied that the testimony of the approver has been adequately corroborated to avoid a conviction based on weak or tainted evidence. Each case has its own facts. No doubt, an approver may be a competent

witness, but their evidence requires substantial corroboration regarding the crime, the identity of each accused, and corroboration through independent and reliable evidence. The settled rule of practice is not to convict any accused on the basis of any vicious or venomous investigation. Therefore, the evidence of an approver must be appreciated with great care and caution and not treated as gospel truth. It would not be incongruous to emphasize here that under Section 114 of the Evidence Act, 1872, which is analogous to Article 129 of the Qanun-e-Shahadat Order, 1984, the Court may presume the existence of any fact it considers likely to have happened, having regard to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case. However, the illustration provided in clause (b) distinctly conveys "that an accomplice is unworthy of credit, unless he is corroborated in material particulars", an important factor that was also not considered when giving credence to the evidence of the approver.

**IX. Confirmation of Death Sentence**

19. If the death sentence is awarded to an accused by the Court of Session, the proceedings must be submitted to the High Court under Section 374, Cr.P.C., and the sentence cannot be executed unless confirmed by the High Court. Under Section 376, Cr.P.C., when a murder reference is submitted by the Court of Session under Section 374, the High Court may confirm the sentence, or pass any other sentence warranted by law, or may annul the conviction, and convict the accused of any offence of which the Sessions Court might have convicted him, or order a new trial on the same or an amended charge, or may acquit the accused person, provided that no order of confirmation shall be made until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of. For all intent and purposes, one thing is clear beyond any shadow of doubt: confirmation of a death sentence by the High Court is only required if the punishment is awarded by the Court of Session and a murder reference is submitted to comply with the letter of law. However, in this case, the death penalty was awarded by a five-member bench of the High Court, so there was no need for confirmation by any lower, or similar, or even larger bench of the same High Court. According to the exactitudes of Section 374, Cr.P.C., a murder reference may be sent by the Court of Session for confirmation, and the role of the High Court as provided under Section 376 Cr.P.C. cannot be read in isolation. It is contingent upon the murder reference sent by the Court of Session for confirmation under Section 374, Cr.P.C. Since the murder trial was conducted by the High Court itself, which was undoubtedly a rare example, no further confirmation was required upon conviction by the High Court, in accordance with the provisions of Section 376, Cr.P.C.

**X. Right of Appeal**

20. Had the murder trial been conducted by the Court of Session and the death penalty awarded, Mr. Bhutto could have appealed before a divisional bench of the Lahore High Court. However, since the trial was conducted by the High Court itself, his right to appeal in the High Court was forfeited. To address such situations, the framers of the Constitution wisely provided for a direct appeal to the Supreme Court under sub-article (2) (b) of Article 185 of the Constitution in cases where the High Court withdraws a case for trial before itself from a subordinate court and convicts the accused. Likewise, the prerequisites of the appellate jurisdiction of the Supreme Court are further delineated in the sub-article (3) of Article 185, which states that an appeal to the. Supreme Court from a judgment decree, order, or sentence of a High Court in a case to which clause (2) does not apply shall lie only if the Supreme Court grants leave to appeal. What normally happens? When the death penalty awarded by the Court of Session is confirmed by the High Court in a murder reference and the appeal of the convict is dismissed by the High Court while maintaining the judgment awarding the death penalty, the Supreme Court, in order to ensure the safe administration of justice, typically grants leave to appeal and provides ample opportunity for hearing in order to reevaluate and revisit whether the death penalty is rightly awarded or not. However, in the case of Mr. Bhutto, due to the direct appeal being preferred in the Supreme Court, at least one sure-shot expected right of appeal with the leave of this Court was lost, and the solitary remedy or opportunity that remained in the playing field was to move a review petition alone after dismissal of Appeal by this Court.

**XI. Interviews in Print and Electronic Media**

21. Last but not least, the reference sent by the President of Pakistan is also structured and unfolded in paragraph 9, where the late Justice Nasim Hasan Shah, former Chief Justice of Pakistan, in his interviews on print and electronic media, admitted that the decision regarding Mr. Bhutto's appeal was made under coercion. This admission leaves no doubt in the mind of a sane and prudent person that it was a judicial murder and such admission constitutes a violation of his oath. According to the chronicles, J. Nasim Hasan Shah was appointed as an Ad Hoc Judge of the Supreme Court on 18.05.1977. The Lahore High Court delivered its judgment against Mr. Bhutto on 18.03.1978; the Supreme Court decided his appeal on 06.02.1979; the review petition was dismissed on 24.03.1979; and to close the chapter, the death penalty was executed on 04.04.1979. J. Nasim Hasan Shah retired on 14.04.1994, but was first interviewed by journalist Mr. Suhail Warraich in 1996, which interview was published in Jang Magazine. Another journalist/ host, Mr. Iftikhar Ahmed, interviewed him on 03.12.2003 for his TV show, aired on Geo TV Network. After laying down the robes of his office, his conscience awakened and forced him to make disclosures through print and electronic media. In both interviews, J. Nasim Hasan Shah revealed his own views and some other relevant facts. Though he retired in April 1994, he made certain revelations years later that added fuel to the fire and were also incorporated in the Presidential Reference as eye-openers. The remorse, confession, or admission of wrongness in the decision came much after the die was cast. It is quite a common phenomenon that poetry or its verses have multiple meanings, interpretations, or even double entendres, but quite fitting for the belated disclosures made in the interview under discussion, I wish to dedicate the following rhymes of the famous poet Dagh Dehlvi, which seems to match the situation:

22. According to the manuscript and DVD produced in Court during the hearing of this Reference, J. Nasim Hasan Shah expressed regret over the decision and admitted that Mr. Bhutto's punishment could have been reduced. He also revealed that some of the judges were under external pressure. J. Nasim Hasan Shah confessed in an interview with Iftikhar Ahmed, televised on Geo TV's programme "Jawab De". According to the gist of the interview, J. Nasim Hasan Shah stated that it was J. Maulvi Mushtaq Hussain's unjustness (zyaadati), as he was a very strong person and an enemy of Mr. Bhutto. He said that it would have been better if he had not been on the case. When the host asked if he still could have written a dissenting note, J. Nasim Hasan Shah replied in the affirmative, but explained that there was some weakness on his part as well as on the part of Mr. Bhutto's chief defense attorney, Mr. Yahya Bakhtiar, as the latter had somewhat annoyed the judges. The host further pointed out that while Mr. Yahya Bakhtiar might have annoyed the judges, J. Nasim Hasan Shah himself admitted that Mr. Bhutto should have received the benefit of doubt. J. Nasim Hasan Shah again responded in the affirmative. The host then asked if Pakistan's history would have been different today had he written a dissenting note, to which J. Nasim Hasan Shah responded that he does not know if it would have been different, but at least Mr. Bhutto's life might have been spared. He expressed regret about the situation, noting that Mr. Yahya Bakhtiar seemed unwilling to argue against the sentence or mitigating circumstances. Mr. Nasim Hasan Shah said that, as a human, a certain level of detachment occurs, but the role of the lawyer is to win the judge's favor, and in this case, the counsel had annoyed the judges. The disclosures made in the interview, though belated, not only blew the whistle on the biases involved but also pierced the veil of the entire trial and conviction, exposing blatant violations of fair trial principles with the complicity of the judges conducting the trial.

**XII. Mitigating Circumstances**

23. A judge is not supposed to be influenced by appeasement or flattery, nor should they harbor malice or venom against any party while discharging their sacred duty of imparting o justice in accordance with the law. The conversion of a death penalty into life imprisonment does not equate to a clean chit for the convict; the punishment remains intact, albeit with a modified quantum. It is astonishing that, according to aforementioned interview excerpt, the judges of this Court, while hearing the appeal of Mr. Bhutto, were anxiously waiting for arguments on the quantum of sentence but felt annoyed by the counsel for the appellant. The tolerance and forbearance of judges must not be so fragile or touchy as to make them easily annoyed during the hearing of a case, which is a sacred duty and trust. If a judge becomes annoyed with a litigant or their advocate in an unruly manner and loses their patience, control, or peace of mind, it becomes difficult for them to impart justice in accordance with the law. Therefore, judges should remain calm, be good listeners, and instead of arguing themselves, which is the core function of lawyers, they must allow lawyers the opportunity to present their cases and arguments. According to the details of the interview, the judges hearing the appeal were annoyed, and if this was so, then of course, the possibility of an independent application of mind was remote. Decisions made in haste or anger are not only contrary to the basic norms of justice under the law of the land, but also violate the standards set forth in the injunctions of Islam for the administration of justice. Normally, in appeals filed before the Supreme Court in cases where the High Court has confirmed the death penalty, this Court, in order to ensure the safe administration of justice, not only grants leave but, at times, considers mitigating 'circumstances, altering the punishment without specific arguments. Sometimes, the Court even hints at this line of argument.

24. In the judgment of the Review Petition Zulfikar Ali Bhutto v. The State (PLD 1979 Supreme Court 741), this Court recorded submissions by Mr. Yahya Bakhtiar that, even if the petitioner's conviction were maintained, it was a fit case for the lesser penalty under Section 302 of the P.P.C., read with Sections 109 and 111, as the petitioner was guilty only of abetment and was not present at the scene of the murder. However, these arguments were conveniently set aside on the ground that they had not been raised during the hearing of the appeal. It was further articulated in the judgment of the review petition that during the hearing of the appeal the question of sentence was very much present before the Court, and it was the duty of the learned counsel for the petitioner to raise such points during that time, but the counsel was more focused on seeking acquittal than pleading for mitigation of the sentence.

25. In my opinion, almost in all cases where appeals are filed against confirmation of the death penalty, no advocate directly requests a conversion of the sentence to life imprisonment. Instead, they strive for a fair acquittal for their client, which is the professional duty of every lawyer. Simultaneously, the appellate Court, with its sense of right and wrong, always has inherent jurisdiction to affirm, set aside, or modify sentences. Even when dismissing an appeal and maintaining a conviction, the Court may alter or convert the sentence from death to life, or to a lesser punishment, to do complete justice, particularly when the punishment does not seem commensurate with the gravity of the charge, the role attributed to the convict, or in cases of doubt that a maximum punishment may not be justified. Despite the established bias and grave violations of natural justice and due process in the trial and conviction, the punishment in this case was maintained. The matter did not end here, but the Court also missed the train and failed to consider mitigating circumstances, despite overwhelming material on record which could have justified an acquittal or, at the very least, a conversion of the death penalty to life imprisonment. This omission was quite tragic, atrocious, and reprehensible.

26. Though this Court rendered its opinion on 06.03.2024, almost after 13 years, it may be said, better late than never. In my view, there was no plausible justification to delay the opinion on the Presidential Reference. I am at a loss as to why it was preserved in cold storage, left hanging, and why the hearing was not commenced immediately when the questions were framed by the respected bench of this Court. Anyhow, . It is an essential limb of civil and criminal administration of justice that "justice delayed is justice denied," which virtually means that cases, whatever they may be, should not be delayed or protracted indefinitely. Courts should decide matters within a reasonable period of time, as unjustified delays can emasculate fairness and render justice inconsequential or of little worth to the parties involved. On the other hand, another maxim, "justice hurried is justice buried," also has far-reaching implications, accentuating that undue haste or a

compromise on natural justice and .due process may also prejudice the rights of the parties. In such situations, the possibility of injustice cannot be ruled out. The best course to avoid the adverse consequences of both the aforesaid legal aphorisms is to maintain a proper balance in the court docket, with a measured pace. More importantly, cases should not be delayed purposefully due to their profile or significance, as happened with this Reference, which awaited its long-pending turn for an opinion.

**XIII. Doctrine of repentance**

27. Another important factor that cannot be overlooked is that Question No. 4 of the Presidential Reference framed by this Court had a direct nexus with the doctrine of repentance. For ease of reference, it is reproduced as under: -

"Whether the decision in the case of murder trial against Shaheed Zulfiqar Ali Bhutto fulfills the requirements of Islamic laws as codified in the Holy Quran and the Sunnah of the Holy Prophet (SAW)? If so, whether present case is covered by doctrine of repentance specifically mentioned in the following Suras of Holy Quran:

(a) Sura Al-Nisa: verses 17 and 18 Sura Al-Baqara: verses 159, 160 and 222 Sura Al-Maida: verse 39 Sura Al-Aaraaf: verse 153 Sura Al-Nehal verse 119 Sura Al-Taha: verse 82 as well as (b) Sunan Ibn-e-Maaja, Chapter 171, Hadith No. 395.

What are effects and consequences of doctrine Re: Repentance"

28. No opinion was rendered by this Court on Question No. 4, which was left unanswered for the valid reason that no assistance was provided on this question. Since this question on the doctrine of repentance was framed with reference to various verses of. the Holy Quran, forming a substantial segment of the Presidential Reference, I feel it should not remain untouched or unanswered. Repentance is expressed in Arabic as "taubah," which is a fundamental precept of the teachings of Islam. It involves the confession of sins, remorse for past wrongdoings, and a pledge to refrain from them in the future. Islam prescribes that repentance entails giving up the sin immediately, regretting what happened in the past, resolving not to go back to sinning, restoring others' rights or property, and fepenting before the agony of death [Ref: https://islamaa.infoien/answers/14289/how-to-repent-in-islam#:]. One of the wisdoms of repentance is that the believer experiences real regret and turns to Allah without wasting any time and strives not to repeat that mistake. Therefore, he repents in a true and sincere manner. He repents and keeps his word that he will remain on the right path until the end of his life [Ref: https://www.arabnews.pk/islam-perspectiveinews/841561]. Allama Ibn al-Shami, a renowned jurist, stated that Muslims should emulate the Prophet's example by following his teachings, and should not try hard to find wrongdoings. We must also strive to protect the excellent reputation of the Last Messenger of Almighty Allah and abide by what he did, accepting the repentance of one who repents. As he emphasized, "it is not for us to impose punishments and other means of deterrence on the basis of our personal inclinations. Rather, we are bound to act on what appears to be the law of our Prophet (peace and blessings of Allah be upon him)" [Ref: Zubair Saeed Sabri v. The State (PLD 2024 SC 681)].

29. The unresolved question in my introspection is why the question regarding the doctrine of repentance was framed by this Court? Who had to or has to repent for the unfair and biased trial? Was it the departed souls who tried the case in the High Court? Those who heard the appeal and review? The bench that entertained and framed the question? Or the bench members who rendered their opinion years after the Reference was instituted? This Court unanimously noted various lapses and biases in the High Court's murder trial, ultimately concluding that the proceedings of the trial by the Lahore High Court and the appeal by the Supreme Court failed to meet the constitutional requirements of a fair trial and due process enshrined in Articles 4, 9, and later guaranteed as a separate and independent fundamental right under Article 10A of the Constitution. In my view, not only it demonstrates some sought of remorse though not explicitly articulated but it also implies a recognition of repentance for the failure to ensure a fair trial and due process, even as Question No. 4 of the Presidential Reference remains unanswered or undecided.

30. I wrap up this opinion with the poignant verses of Mirza Ghalib (Mirza Asadullah Baig khan):

31. The office is directed to report this opinion through proper channel to the worthy President of Pakistan in terms of Article 186 of the Constitution of the Islamic Republic of Pakistan.

MWA/R-8/SC Reference answered.

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[1] In its meeting held on 28 March 2011.

[2] On 1 April 2011, pursuant to entry 54 of Schedule V-B, Rule 15-A(1) of the Rules of Business, 1973 (enacted under Articles 90 and 99 of the Constitution of the Islamic Republic of Pakistan.

[3] On 2 April 2011.

[4] Before a three-Member Bench, comprising of Iftikhar Muhammad Chaudhry, CJ, Muhammad Sair Ali, J and Ghulam Rabbani, J.

[5] (1) Reference No. 1 of 2012 filed on 7 December 2012, (2) Reference No. 1 of 2020 filed on 23 December 2020, (3) Reference No. 1 of 2022 filed on 21 March 2022 and (4) Reference No. 2 of 2022 filed on 18 October 2022.

[6] https://www.youtube.com/live/fnsKtf1yM78?si=Wnye57Er IJ39zB0.

[7] Notification No.SOG-III-6-309/74, dated 13 November 1974, published in the Punjab Gazette on 11 December 1974.

[8] State v. Zulfiqar Ali Bhutto PLD 1978 Lahore 523.

[9] Zulfiqar Ali Bhutto v. State, PLD 1979 Supreme Court 53, p. 61, para 9.

[10] In re: Reference No. 1 of 2011, 2011 SCMR 962.

[11] Zulfikar Ali Bhutto v. State PLD 1979 Supreme Court 741.

[12] Oath of Office for Judges of the Supreme Court and the High Courts, prescribed under Articles 178 and 194 in the Third Schedule to the Constitution of the Islamic Republic of Pakistan.

[13] *Chief Justice of Pakistan Iftikhar Muhammad Chaudhry v. President of Pakistan* PLD 2016 Supreme Court 61, para 206, pp. 203-4.

[14] First Information Report No. 402/74 was registered at Police Station Ichhra, Lahore on 11 November 1974 at 3.45 am under section 302 (murder, now gatl-i-amd) and under section 307 (now section 324) - attempt to kill - of the Pakistan Penal Code, 1860.

[15] The investigation commenced on 11 November 1974 by Sub-Inspector Abdul Hayee, who was the Station House Officer (SHO) of Police Station Ichhra, and continued till 14 December 1974.

[16] CIA's Inspector Abdul Hameed took over the investigation on 15 December 1974.

[17] The closure report dated 1 October 1975 was prepared and submitted under rule 25.57 of the Police Rules, 1937, read with section 173 of the Code of Criminal Procedure, 1898.

[18] Inquiry Tribunal comprising of Justice Shafi-ur-Rehman was constituted under the West Pakistan Tribunals of Inquiry Ordinance, 1969 vide Notification No.SOG-III-6-309/74, dated 13 November 1974, published in the Punjab Gazette on 11 December 1974.

[19] As per the testimony of Abdul Khaliq, Deputy Director FIA (PW 41).

[20] The first entry in the case diary (zimni) by FIA is recorded by Abdul Khaliq, Deputy Director FIA, on 24 July 1977, though the file of the case was received by Inspector FIA Muhammad Boota on 8 August 1977.

[21] Section 173 of the Code of Criminal Procedure, 1898.

[22] Section 265-D of the Code of Criminal Procedure, 1898.

[23] Criminal Appeal No. 11 of 1978.

[24] S. Anwarul Haq, CJ, Muhammad Akram, Karam Elahi Chauhan and Nasim Hassan Shah, JJ, dismissing the appeal, while Dorab Patel, Muhammad Haleem and G. Safdar Shah, JJ, allowing it.

[25] Review Petition No. 5/R of 1979.

[26] On 1 March 1976.

[27] Code of Criminal Procedure, 1898, section 190(2) read with section 346(2).

[28] Ibid., sections 190(2) and 265-A.

[29] Ibid., section 410.

[30] Ibid., section 377.

[31] Ibid., section 376.

[32] Constitution of the Islamic Republic of Pakistan, Article 4(1).

[33] Ibid, Article 4(2) (a).

[34] Code of Criminal Procedure, 1898, section 410.

[35] Constitution of the Islamic Republic of Pakistan, Part X.

[36] Article 10A was inserted by the Constitution (Eighteenth Amendment) Act, 2010.

[37] PLD 1964 Supreme Court 673, p. 710.

[38] PLD 1988 Supreme Court 416.

[39] PLD 1993 Supreme Court 341.

[40] Incorrectly mentioned, as it is the International Covenant on Civil and Political Rights.

[41] PLD 1996 Supreme Court 324.

[42] PLD 1994 Supreme Court 105.

[43] PLD 1996 Supreme Court 324, p. 423YY.

[44] Article 10A was inserted by the Constitution (Eighteenth Amendment) Act, 2010.

[45] Under section 337 of the Code of Criminal Procedure, 1898.

[46] Ibrahim v. King, (1975) 3 AllER 175.

[47] Muhammad Amjad v. State PLD 2003 Supreme Court 704, 717.

[48] Dhani Bakhsh v. State PLD 1975 Supreme Court 187, 191B.

[49] Al-Qur'an, surat Al-Maidah (5) verse 32.

[50] Ishaq v. Crown PLD 1954 Federal Court 335, 343.

[51] Illustration (b) of Article 129 of the Qanun-e- Shahadat, 1984.

[52] Qabil Shah v. State, PLD 1960 Karachi 697.

[53] The majority judgment was authored by Anwarul Haq, CJ, and was agreed by Mohammad Akram, Karam Elahee Chauhan and Nasim Hassan Shah, JJ.

[54] Constitution of Islamic Republic of Pakistan, Article 66(1).

[55] Hakim Ali v. State 1971 SCMR 432, 445C, Habibullah v. State PLD 1969 Supreme Court 127, 130A.

[56] Hakim Ali v. State 1971 SCMR 432.

[57] Code of Criminal Procedure, 1898, section 164.

[58] Mr. Irshad Ahmed Qureshi, Advocate.

[59] Criminal Appeal No. 11 of 1978.

[60] Constitution of the Islamic Republic of Pakistan, Article 179.

[61] Ibid., Article 182.

[62] Constitution of the Islamic Republic of Pakistan, 1973.

[63] Ibid., Article 45.

[64] Order dated 24 February 1978 in Cr. Misc. Petition No. 16-R/79 in Criminal Review Petition No. 5-R/79.

[65] Ibid., authored by S. Anwarul Haq, CJ.

[66] Constitution of the Islamic Republic of Pakistan, Article 4.

[67] Ibid., Article 192(1).

[68] Ibid., mentioned in Article 196.

[69] Ibid., Article 179.

[70] Laws (Continuance in Force) (Fifth Amendment) Order, 1977, Gazette of Pakistan, Extraordinary, Part I, 22 September 1977, PLD 1977 Federal Statutes 441.

[71] Gazette of Pakistan, Extraordinary, Part I, 16 September 1978, PLD 1978 Federal Statutes 156.

[72] Rex v. Sussex, [ 1924] 1 KB 256, per Lord Hewart, Chief Justice of England. The aphorism - justice is not only done, but is also seen to be done' - is a part of the *Code of Conduct to be observed by Judges of the Supreme Court and of the High Courts of Pakistan*.

[73] PLJ 1977 Federal Statutes 276.

[74] Constitution of the Islamic Republic of Pakistan, Article 216.

[75] K.M.A. Samdani and Mazharul Haq, JJ.

[76] Order dated 9 October 1977 authored by Aftab Hussain, J.

[77] Ibid.

[78] High Court Judges (Oath of Office) Order, 1977, President's Order (Post Proclamation) No. 1 of 1977, High Court (Appointment of Acting Chief Justices). Order, 1977 and Supreme Court Judges (Oath of Office) Order, 1977.

[79] Constitution of the Islamic Republic of Pakistan, Article 5. This Article originally used the word 'basic'. It was replaced with the word 'inviolable' through President's Order No. 14 of 1985.

[80] Ibid., Third Schedule.

[81] Articles 213, 214, 215 and 216.

[82] In Latin - audi alteram partem.

[83] Reverberating the famous line from William Shakespeare's play Hamlet - 'The lady doth protest too much, methinks.'

[84] Zulfiqar Ali Bhutto v. State PLD 1979 Supreme Court 53, paragraph 935.

[85] Begum Nusrat Bhutto v. Chief of Army Staff PLD 1977 Supreme Court 657.

[86] Ibid., 723AA.

[87] Ibid.

[88] Dorab Patel, Muhammad Haleem and G. Safdar Shah, JJ.

[89] Begum Nusrat Bhutto v. Chief of Army Staff, PLD 1977 Supreme Court 657, pp. 721, 763.

[1] Reference No. 1 of 2012 PLD 2013 SC 279 (5MB), Cauvery Water Disputes Tribunal case AIR 1992 SC 522 relied upon; Al-Jehad Trust v. Federation of Pakistan PLD 1997 SC 84 (5MB); Reference No. 1 of 1988 PLD 1989 SC 75 (11MB) and Special Reference No.1 of 1955 PLD 1955 FC 435 (5MB).

[2] Fiona Shen-Bayh, Undue Process: Persecution and Punishment in Autocratic Courts, (2022).

[3] Raymond Suttner, Political Trials and the Legal Process, (1985).

[4] Anthony Pereira, Persecution and Farce: The Origins and Transformation of Brazil's Political Trials, 1964- 1979, (1998).

[5] Juan Méndez, Constitutionalism and Transitional Justice, (2012).

[6] Vinjamuri and Snyder, Law and Politics in Transitional Justice, (2015).

[7] Hakeem Yusuf, Transitional Justice, Judicial Accountability and the Rule of Law, (2010).

[8] I acknowledge and appreciate Mr. Yasser Kureshi's valuable contribution as amicus curiae in shedding light on the crucial concepts of transitional justice and political trials. His amicus brief has been instrumental in navigating these complex topics. Mr. Yasser Kureshi is a departmental lecturer at University of Oxford, UK.

[9] General ® Pervez Musharraf v. Federation of Pakistan PLD 2024 SC 497 and Taufiq Asif v. General ® Pervez Musharraf PLD 2024 SC 610.

[10] Sindh High Court Bar Association v. Federation of Pakistan PLD 2009 SC 789 (short order) and PLD 2009 SC 879 (detailed judgment).

[11] Nawaz Sharif v. State PLD 2009 SC 814

[12] Rex v. Sussex Justices [1924] 1 KB 256 per Lord Hewart.

[13] Ramsey Clark, Injustice against Bhutto in 2 Courts, (1979) and Ian Talbot, Pakistan: A Modern History, (1998).

[14] Paula Newberg, Judging the State: Courts and Constitutional Politics in Pakistan, (1995).

[15] Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416; Jubilee Insurance v. NBP PLD 1999 SC 1126; Nadeem Anwar v. NAB PLD 2008 SC 645 and Riaz-Ul-Haq v. Federation of Pakistan PLD 2013 SC 501.

[16] Stanley Wolpert, Zulfi Bhutto of Pakistan: His life and Time, (1993) p. 405.

[1] Item "(II) Presidency Magistrate" omitted by Criminal Law Amending Ordinance, 1949, Sch.

**2025 SCP 170**

**IN THE SUPREME COURT OF PAKISTAN**

**(Review Jurisdiction)**

**PRESENT:**

**Mr. Justice Syed Mansoor Ali Shah Mr. Justice Aqeel Ahmed Abbasi**

C.R.P No. 292/2024 in C.P.L.A. No. 4449/2021

*(For review of order dated 14.09.2023 passed by this Court in C.P.L.A. No. 4449/2021)*

Federal Public Service Commission through its Secretary, Islamabad

... Petitioner

***Versus***

Kashif Mustafa and others

… Respondent(s)

For the Petitioner: Mr. Rana AsadUllah Khan, Addl. AGP For

the Respondent(s): Mr. Shehryar Kasuri

Assisted by: Umer A. Ranjha, Judicial Law Clerk, Supreme Court of Pakistan

Date of Hearing: 08.05.2025

# ORDER

**Syed Mansoor Ali Shah, J.–** We note that the instant petition is barred by a delay of 204 days. The accompanying application for condonation of delay fails to disclose any sufficient cause that justifies condoning such an inordinate delay.

2. Moreover, we observe that the judgment of the Lahore High Court, Lahore dated 27.05.2021 challenged in the earlier round before this Court merely held that the intra-court appeal ("ICA") filed by the petitioner institution before the High Court was not maintainable in terms of Section 3(2) of the Law Reforms Ordinance, 1972, as an appeal was provided under the Federal Public Service Commission Ordinance, 1977 against the original order. In simple terms, if the law dealing with the original proceedings offers a remedy of appeal, revision, or review, then the right to file an ICA before the High Court is barred. It is immaterial whether the aggrieved person actually availed that remedy or not; what matters is the legal availability of such remedy under the law.[1] This conclusion was upheld by this Court through the impugned order, now under review, dated 19.09.2023.

3. In the above facts, we are of the considered view that the instant petition is not only hopelessly time barred but also frivolous and vexatious.

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[1] Syed Asif Raza v. Pakistan International Airlines PLD 2001 SC 182.

> This Court has recently affirmed that, while the right of access to courts is a cornerstone of our constitutional framework, it is not an unqualified or limitless right.[2] Such access must be exercised with responsibility and in a manner that upholds the dignity and finality of judicial proceedings. When litigants, such as the petitioner institution before us, initiate repetitive and meritless petitions, they erode the integrity of the judicial process. Frivolous litigation not only clogs judicial dockets but also drains public resources and delays justice for genuine litigants. This becomes more concerning when such frivolous claims are filed by government or public statutory functionaries like the petitioner institution, who are expected to act with higher responsibility and to protect, rather than squander, public resources and judicial time.

4. When public bodies initiate litigation, they do so not as private litigants pursuing personal interests, but as custodians of the law and fiduciaries of the public interest. They are under an onerous obligation to act fairly, responsibly, and in accordance with the Constitution. The petitioner institution ought to have exercised greater legal discipline and internal scrutiny before invoking the jurisdiction of this Court. This case exemplifies a gross misuse of the judicial forum, initiated not to seek legitimate relief, but rather to harass and exhaust the opposing party through abuse of process. In these circumstances, not only is the petition dismissed, but costs are imposed to mark the Court's disapproval of such conduct and to deter the recurrence of similar misuse by public authorities.[3] The Court further directs that the concerned institution shall undertake an internal inquiry to identify and hold accountable the officials responsible for authorizing the filing of this petition. Only through such institutional self-correction can public bodies restore public confidence, reduce the burden of unnecessary litigation, conserve precious state resources, and fulfil their constitutional mandate with integrity.

5. This Court notes with grave concern that the present petition, filed by a statutory public institution, is not only legally untenable and devoid of merit, but also reflective of a deeper, disturbing culture of risk-averse governance. Increasingly, public officers, driven by a misplaced fear of personal liability, resort to filing petitions before the highest court of the land not on the strength of legal grounds but to insulate themselves from accountability. Such conduct reduces the judicial forum from a platform for genuine legal address to a tool of bureaucratic self-preservation and

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[2] District Education Officer (Female) Charsadda v. Miss Sonia Begum 2025 SCP 160 (SCP citation).

[3] Javed Hameed v. Aman Ullah 2024 SCMR 89 and Lutfullah Virk v. Muhammad Aslam Sheikh PLD 2024 Supreme Court 887 and Zakir Mehmood v. Secretary, Ministry of Defence 2023 SCMR 960.

indecision. This mindset must be deprecated in the strongest terms. Litigation is not a substitute for responsible administrative decision-making. Public institutions must be strong and confident enough to make lawful decisions and stand by them. A culture built on fear and undue accountability only weakens the institutional spine of governance. It is imperative that public bodies cultivate the legal courage and internal discipline to act decisively. In institutional strength lies the strength of the nation. The present petition exemplifies not only a gross abuse of judicial process but also a troubling abdication of institutional responsibility. Courts are not to be approached mechanically or defensively, especially by those entrusted with public functions and legal stewardship. In these circumstances, the petition is dismissed with exemplary costs, to mark this Court's disapproval and to deter the continuation of such irresponsible and obstructive practices by public bodies.

6. Accordingly, the instant petition is dismissed with costs of Rs.100,000/- (Rupees One Hundred Thousand only), imposed under Order XXVIII, Rule 3 of the Supreme Court Rules, 1980, for not only being frivolous, vexatious and having squandered the valuable time of the Court but also reflective of institutional abdication and poor governance. The costs shall be deposited within fifteen (15) days with any charitable institution recognized under the Thirteenth Schedule to the Income Tax Ordinance, 2001. Proof of such deposit must be placed on the record of this case. In the event of non-compliance, the office shall place the matter before the appropriate Bench for further orders.

7. Let a copy of this order be sent to the Secretary, Ministry of Law and Justice as well as the Office of the Attorney-General for Pakistan who shall ensure its immediate circulation to all Ministries and their attached departments. The legal wings of these public bodies must take serious stock of the concerns expressed herein and initiate concrete measures to stem the tide of wasteful and meritless litigation. It is imperative that institutional litigation be guided by legal merit, not fear or self-preservation. This practice must be decisively brought to an end.

Judge

Judge

Islamabad,
08th May, 2025. **Approved for reporting** *Iqbal*

**2025 SCP 187**

**IN THE SUPREME COURT OF PAKISTAN**

**(Appellate Jurisdiction)**

**Bench-II:**
**Mr. Justice Syed Mansoor Ali Shah Mr. Justice**
**Aqeel Ahmed Abbasi**

C.P.L.A. No. 2987-L/2019

*(Against the order dated 09.07.2019 passed by the Punjab Service Tribunal, Lahore in Appeal No.872/2019)*

District & Sessions Judge (Authority), Jhang, etc.

Versus

Ghulam Shabbir

For the petitioner(s): Mr. Khalid Masood Ghani, ASC. For the respondent(s): Mr. Sher Aman, ASC.
Assisted by: Mr. Umer A. Ranjha, Judicial Law Clerk, Supreme Court of Pakistan.

Date of hearing: 07.05.2025.

JUDGMENT

**Syed Mansoor Ali Shah, J.–** The current constitutional era has been termed as the age of *proportionality*.[1] Briefly stated, on allegations of misconduct and corruption, disciplinary proceedings were initiated against the respondent while he was serving as an *Ahlmad* (court record keeper) in the District Courts, Jhang under the Punjab Civil Servants (Efficiency and Discipline) Rules, 1999 ("Rules"). The Senior Civil Judge was appointed as an Inquiry Officer who served a charge-sheet upon the respondent alleging as follows:

> "That on 4.6.2018 you accused/respondent received Rs: 100.000/- (one lac) Bank Al-Barka Cheque No.20437925 dated 7.7.2018 and Rs. 150,000/- (one lac fifty thousand) vide cheque No.20437926 which were deposited in your account and withdrawn by you as bribe for getting recruited the relatives of the complainant and on 16.7.2018 you also received an amount Rs. 130,000/- as such bribe in front of Mr. Ahmad Ali Shahzad Bhatti and Rana Dilbar Hussain Khan advocates"

2. The Inquiry Officer in his report dated 06.10.2018 found the respondent guilty of the charges and recommended the imposition

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1 See Vicki C Jackson, 'Constitutional Law in the Age of Proportionality' (2015) 124 Yale LJ 3094.

of a major penalty of dismissal from service. The competent authority, i.e., District & Sessions Judge, concurred with the findings of the Inquiry Officer and imposed the major penalty of dismissal from service upon the respondent *vide* order dated 17.10.2018. Aggrieved, the respondent filed a departmental appeal before the Lahore High Court, Lahore, on the administrative side, which was not decided within the statutory period and remained pending. Thereafter the respondent filed an appeal before the Punjab Service Tribunal, Lahore, ("Tribunal"), which was partially allowed *vide* order dated 09.07.2019 ("impugned order"). The Tribunal observed as follows:

> "After going through the record, it has been noticed that the appellant was afforded opportunity of personal hearing by the inquiry officer and the Authority in a fair manner but the fact remains that the appellant failed to dislodge the charges leveled against him. It has also come on record that after receiving two cheques in the presence of Ahmad Ali Shahzad & Rana Dilbar Hussain, Advocates, appellant could not succeed in getting recruited his relatives and refused to return the bribe amount. Furthermore, during personal hearing before the Authority/D&SJ, Jhang appellant did not deny the allegations leveled against him and took the plea that he has not received the disputed amount as bribe rather he has borrowed the same from complainant and sought for a lenient view."
>
> (emphasis supplied)

The Tribunal, after holding that the charges stood proved against the respondent, further observed that the punishment of dismissal from service did not appear to be proportionate to the gravity of the misconduct. Without assigning any reasons, it proceeded to convert the major penalty of dismissal from service into the lesser penalty of forfeiture of two years of service. It is pertinent to note that the respondent has not assailed the said order before this Court.

3. We have heard the learned counsel for the parties at length and have carefully examined the impugned order, the applicable law, and the record of the case.

4. The question that arises for determination is whether the Tribunal was justified in converting the major penalty of dismissal from service of the respondent into a lesser penalty of forfeiture of two years of service, in the circumstances of the case, and after having found that the charges of misconduct and corruption against the respondent stood proved.

5. The Tribunal without explicitly mentioning it, has relied upon the *principle of proportionality* to reduce the penalty imposed on the respondent. At its core, the *principle of proportionality* requires that when an administrative authority exercises discretionary power, it must strike a fair balance between the adverse effects of its decision on the rights, liberties, or interests of individuals and the legitimate aim or purpose the decision seeks to achieve.[2] A more refined version of the *principle of proportionality* analysis adopts a structured[3], four-stage test[4], requiring courts to address the following questions to determine whether an impugned measure is constitutionally or legally justifiable. It includes: (i) *Legitimacy*: Does the action pursue a legitimate objective recognized by law? (ii) *Suitability* (Rational Connection): Is the measure capable of achieving that objective, i.e., is there a rational nexus between the means employed and the aim pursued? (iii) *Necessity*: Could the same objective have been achieved through a less restrictive or less onerous alternative? and (iv) *Proportionality stricto sensu* (Balancing): Does the measure maintain a fair balance between the severity of its impact on the individual and the importance of the public interest it serves?

6. The *principle of proportionality* also finds firm footing within our constitutional framework, particularly in Article 4 of the Constitution of the Islamic Republic of Pakistan, 1973, which guarantees that to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen; Article 14, which affirms the inviolable dignity of person; and Article 25 which safeguards against discrimination. These provisions collectively impose a duty upon the courts to ensure that executive or disciplinary measures not only pursue lawful objectives but do so in a manner that is just, fair, and proportionate.

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2 HP Wade, CR Forsyth and the Rt Hon Lord Woolf, De Smith's Judicial Review (8th edn, Sweet & Maxwell 2018). See Muhammad Nasir Ismail v. Government of Punjab 2025 SCP 67 (SCP citation); Shahida Siddiqa v. Allied Bank Limited 2024 SCMR 92; Pervaiz Hussain Shah v. Government of Punjab 2024 SCMR 309; Ijaz Badshah v. Government of Pakistan 2023 SCMR 407; Divisional Superintendent, Postal Services v. Nadeem Raza 2023 SCMR 803; Muhammad Sharif v. Inspector General of Police, Lahore 2021 PLC (C.S.) 762; Muhammad Iqbal Khan Noori v. NAB PLD 2021 SC 916 and Sabir Iqbal v. Cantonment Board PLD 2019 SC 189.

3 De Freitas v. Permanent Secretary of Ministry of Agriculture [1999] AC 69; R(Daly) v. Secretary of State for
the Home Department [2001] 2 AC 532; R v. Shayler [2003] 1 AC 247; Huang v. Secretary of State for the Home Department [2007] 2 AC 167.

4 Bank Mellat v. HM Treasury (No.2) [2013] UKSC 39 (per Lord Sumption). This test has been dealt with in
D.G. Cement v. Federation of Pakistan PLD 2013 Lahore 693.

7. In disciplinary jurisprudence, *proportionality* maintains a delicate balance between public and private rights. While civil servants are entitled to procedural fairness and protection from arbitrary sanctions, these rights must be balanced against the compelling public interest in maintaining the integrity and accountability of public institutions.[5] In our view, the *principle of proportionality* at its most functional level ultimately hinges on a singular, decisive question: *whether the interference with private rights is justified by a corresponding and weighty public interest*. This balancing offers a structured framework for assessing the sustainability of disciplinary penalties. The penalty imposed must be evaluated not in isolation, but in relation to the degree of harm caused to the public interest and the severity of intrusion upon the private rights of the officer. A constitutionally and administratively sustainable penalty is one that serves a legitimate public objective without inflicting excessive or unnecessary harm upon individual rights. The test is not merely whether discipline is warranted, but whether the measure adopted strikes a fair and reasonable equilibrium between the legitimate aims of the institution and the human dignity of the individual. Accordingly, the *principle of proportionality*, in its clearest form may be said to rest on the following standard: *The action taken achieves a necessary public goal without causing disproportionate harm to private interest.*

8. The *principle of proportionality*, now widely recognized across constitutional systems, offers significant benefits by promoting structured, transparent, and reasoned decision-making in rights adjudication. This structured approach disciplines judicial discretion, enhances accountability, and fosters a culture of justification, where power must be exercised with reasons. However, the principle is not without risks. When applied without rigor or adequate explanation, it can become a mask for judicial subjectivity, enabling courts to substitute their personal preferences under the guise of balancing. If detached from clear normative anchors or applied inconsistently, *proportionality* may erode legal certainty and allow disguised arbitrariness. Thus, while *proportionality* strengthens constitutional adjudication when properly employed, its

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[5] Council of Europe, The Administration and You: Principles of Administrative Law Concerning the Relations Between Administrative Authorities and Private Persons: A Handbook (Council of Europe Publishing 1996) and Rajan Khanal, Anil Kumar Gupta and Prakash C Bhattarai, 'Civil Servants' Integrity in Public Sector: The Case of Nepal' (2022) 8(12) Heliyon.

misuse can undermine the very values it seeks to uphold. A disproportionate decision may also violate the rule of law.[6]

9. In the present case, the charge of corruption against the respondent, serving as an *Ahlmad* (court record keeper), a role central to preserving the integrity and fairness of the judicial process, has been unequivocally proven. Significantly, the respondent has not challenged the findings of the Tribunal before this Court. The importance of an *Ahlmad* to the functioning of a fair and just judicial system cannot be overstated. When court officials engage in misconduct, whether by accepting bribes or abusing their position, they do not merely tarnish individual cases; they strike at the very foundation of public confidence in the administration of justice. Judicial service is not merely a profession, it is a public trust. [7] An *Ahlmad* proven to be involved in corruption can irreparably damage the administration of justice, undermining public confidence in the justice system and tainting the credibility of the decisions it delivers. In such a context, the imposition of the penalty of dismissal from service is not only legitimate but necessary to protect public trust and uphold the rule of law. However, the Tribunal has reduced the penalty of the respondent to forfeiture of two years of service describing the original penalty as "grave and harsh" without offering any cogent reasons or legal justification.

10. We note that the impugned order states:

> The charges leveled against the appellant stand proved but at the same time, I have come to the conclusion that awarding punishment of dismissal from service does not seem to be palatable to the gravity of guilt he deserves a second chance."[8]

While this conclusion may reflect a compassionate approach, the application of the *principle of proportionality* cannot rest on bare assertions or subjective impressions. Rather, it is a structured principle that demands cogent reasoning and a transparent, systematic evaluation of the nature, gravity, and context of the established misconduct, assessed against the penalty imposed.[9] In the absence of a clear, structured, and transparent justification, the Tribunal cannot simply conclude that a penalty is excessive based

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6 G Huscroft, B Miller and G Webber (eds), Proportionality and the Rule of Law (Cambridge University Press 2014).

7 Anne Wallace and Jane Goodman-Delahunty, 'Measuring Trust and Confidence in Courts' (2021) 12(3) International Journal for Court Administration.

8 Impugned order, paragraph 3.

9 Sakhib Zar v. Messrs K Electric Limited 2024 SCMR 1722.

on personal belief or an undefined sense of fairness. Instead, the Tribunal was duty-bound to evaluate how the penalty served the public interest in safeguarding judicial integrity, and whether it maintained a proportionate balance with the individual's rights. In this case, where the respondent's misconduct involved accepting substantial sums through multiple cheques in exchange for illegal favours, a fact support by credible evidence and unconvincingly rebutted by the respondent, the public interest in accountability is overriding. The respondent's defense that the payments were merely loans is unsupported by evidence and contradicted by his own admissions during the personal hearing. When assessed through the lens of the structured *proportionality* framework, the Tribunal's order does not withstand scrutiny. We, therefore, find that the Tribunal's decision to substitute the major penalty of dismissal with forfeiture of two years of service fails the *proportionality* test.

11. Accordingly, we set aside the impugned order passed by the Tribunal. The major penalty of dismissal from service, imposed by the competent authority *vide* order dated 17.10.2018, is hereby restored. Resultantly, this petition is converted into an appeal and allowed.

Judge

**2025 SCP 192**

**IN THE SUPREME COURT OF PAKISTAN**

(Review Jurisdiction)

**Bench-I:**

Mr. Justice Syed Mansoor Ali Shah Mr. Justice Aqeel Ahmed Abbasi

**C.R.P. No. 458/2024 IN C.P.L.A. No. 2514/2024**

*(Against the order dated 18.07.2024 passed by this Court in Civil Petition No.2514/2024)*

Dr. Muhammad Asif

Versus

Dr. Sana Sattar and others

For the petitioner(s): Mr. Niaz Ullah Khan Niazi, ASC.
a/w Dr. Muhammad Asif-petitioner.

For the respondent(s): Barrister Haris Azmat, ASC.
a/w Dr. Sana Sattar-respondent No.1.

Assisted by: Mr. Umer A. Ranjha, Judicial Law Clerk,
Supreme Court of Pakistan.

Date of hearing: 16.05.2025.

**JUDGMENT**

**Syed Mansoor Ali Shah, J.-** *"Children are not the people of tomorrow; they are people today. They have a right to be taken seriously."*[1]

*Brief facts*

The present review petition arises out of a custody dispute concerning two children, A and B[2], aged eight and seven years, respectively. The proceedings were initially instituted by respondent No. 1 (mother), who filed an application for custody before the Senior Civil Judge (Family Division), Layyah. The said application was dismissed *vide* order dated 14.07.2023; however, a visitation schedule was framed to facilitate meetings between respondent No. 1 and her children. Aggrieved, both parties[3] filed separate appeals

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1 Janusz Korczak (1878-1942) was Polish doctor, educator, author, and advocate for children's rights, known for his dedication to orphaned children. He established and directed an orphanage in Warsaw and was a prominent figure in Polish education and

children's literature. Tragically, he perished in the Treblinka extermination camp during the Holocaust, along with the children under his care.

2 For the sake of confidentiality, the names of the children have been kept anonymous.

3 The petitioner challenged the visitation rights given to respondent No.1, while respondent No.1 assailed the order passed by the Senior Civil Judge.

before the learned Additional District Judge, Layyah. *Vide* judgment dated 25.04.2024, the appellate court allowed the appeal filed by respondent No.1 (mother) and granted her custody of the children, and maintained a visitation arrangement for the petitioner (father), while dismissing his appeal. The petitioner then filed a constitutional petition before the Lahore High Court, Multan, which was dismissed *vide* judgment dated 24.05.2024. A civil petition for leave to appeal under Article 185(3) of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution"), was preferred before this Court, which was dismissed *vide* order dated 18.07.2024 ("impugned order"). The present petition seeks review of the impugned order.

*Review and Child Justice*

2. While fully mindful of the limited scope of our review jurisdiction[4], we deemed it necessary to revisit the matter in light of two foundational principles enshrined in the UN Convention on the Rights of the Child[5] ("CRC"): Article 3, which mandates that the best interests of the child shall be a primary consideration in all actions concerning them; and Article 12, which guarantees every child the right to express their views freely in all matters affecting them, with due weight given in accordance with their age and maturity. The earlier proceedings regrettably failed to provide the children an opportunity to be heard, an omission that undermines both domestic constitutional protections and our international commitments. Given the central importance of a child's voice in

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4 Federal Public Service Commission v. Kashif Mustafa 2025 SCP 170 (SCP citation); Justice Qazi Faez Isa v. President of Pakistan PLD 2022 SC 119; M/s Habib and Co. v. Muslim Commercial Bank PLD 2020 SC 227; Engineers Study Forum v. Federation of Pakistan 2016 SCMR 1961; Government of Punjab v. Aamir Zahoor- ul-Haq PLD 2016 SC 421; Haji Muhammad Boota v. Member (Revenue) BOR 2010 SCMR 1049 and Mehdi Hassan v. Province of Punjab 2007 SCMR 755.

5 The United Nations Convention on the Rights of the Child ("CRC") was adopted on 20 November 1989. In interpreting the Articles of CRC and in particular Articles 3 and 12 of the United Nations Convention on the Rights of the Child (CRC) constitute foundational pillars of child-centered justice, requiring that in all actions concerning children, their best interests shall be a primary consideration and that children capable of forming their own views shall be heard and those views given due weight in accordance with age and maturity. These principles are not to be applied in isolation but are to be interpreted in the light of the broader international legal framework that operationalizes and reinforces them. General Comment No. 14 (2013) provides authoritative guidance on the application of Article 3, offering a structured approach to determining and balancing best interests in judicial proceedings, while General Comment No. 12 (2009) elaborates the procedural and substantive dimensions of Article 12, affirming that the right to be heard is not merely formal but must be meaningful, safe, and age-appropriate. These general comments are complemented by

instruments such as the UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (2005), the Guidelines for the Alternative Care of Children (2009), and regional conventions including the European Convention on the Exercise of Children's Rights (1996) and the African Charter on the Rights and Welfare of the Child (1990), all of which underscore the legal and moral imperative to integrate the child's voice and best interests in every decision affecting them. Courts, therefore, are under a binding obligation, both moral and legal to embed these interpretive tools in their reasoning, thereby transforming child justice from a paternalistic paradigm to one that upholds the agency, dignity, and evolving capacities of the child.

custody determinations, we found it imperative to re-examine the case to ensure that these rights are not only acknowledged but meaningfully upheld. To rectify this oversight and to ensure that the children's welfare and perspectives were given due consideration, this Court deemed it necessary to interact directly with both children involved. The interaction enabled the Bench to make an independent assessment of their emotional well-being, level of comfort, and expressed preferences.

*The journey from the Guardian and Wards Act, 1890 to the United Nations Convention on the Rights of the Child, 1989*

3. As a contextual background, we emphasize that Section 17[6] of the Guardians and Wards Act, 1890 ("Act") provides that, in appointing a guardian, the court shall be guided by what "appears in the circumstances to be for the welfare of the minor". While this provision rightly places "welfare" at the center of the determination[7], it operates within a framework that is broadly discretionary, adult- centric, and lacking in normative clarity. Rooted in colonial legislative thought, the concept of "welfare" under this Act has often been applied in an arbitrary and paternalistic manner, devoid of structured criteria or meaningful inclusion of the child's own perspective. The journey from the Act to the CRC represents a profound philosophical transformation in the domain of child justice, from a paternalistic, adult-driven notion of "welfare" to a rights-based, participatory understanding of the "best interests of the child." Under the colonial-era framework, the child was largely viewed as an object of adult protection, with minimal recognition of their evolving capacities, autonomy, or voice. While the child's welfare was nominally a guiding principle, it remained vague and was frequently interpreted through the subjective lens of what adults, typically courts or guardians assumed to be appropriate, without affording the child an opportunity to be heard. In stark

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6 **17. Matters to be considered by the Court in appointing guardian.** – (1) …

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

7 Shaista Habib v. Muhammad Arif Habib PLD 2024 SC 629; Rashid Hussain v. Additional District Judge, Islamabad PLD 2022 SC 32; Raja Muhamamd Owais v. Nazia Jabeen 2022 SCMR 2123; Mst. Hameed Mai v. Irshad Hussain PLD 2002 SC 267; Mst. Talat Nasira v. Mst. Munawara Sultana 1985 SCMR 1367; Feroze Begum v. Lt. Col. Muhammad Hussain 1983 SCMR 606; Rahimullah Choudhury v. Helali Begum 1974 SCMR 305 and Khizar Hayat Khan Tiwana v. Zanib Begum PLD 1967 SC 402.

contrast, the CRC revolutionized this paradigm by anchoring child justice in the principles of dignity, autonomy, and participation. Articles 3 and 12 of the CRC collectively reinforce the child's right to life, equality, protection, and most crucially participation. Article 3 requires that the best interests of the child be a primary consideration in all actions concerning them.[8] This is not a vague or aspirational goal; it is a structured legal standard demanding a comprehensive, child-centered assessment that incorporates the child's emotional, psychological, developmental, and relational needs, alongside considerations of safety and long-term well-being. Complementing this, Article 12 mandates that every child capable of forming their own views has the right to express those views freely in all matters affecting them, and that those views must be given due weight in accordance with their age and maturity.[9] This shift from "welfare" to "best interests" and from silence to participation marks a fundamental transformation in the philosophy of child justice, it reframes the child not as a passive recipient of adult decisions, but as an active rights-holder whose voice must be heard and respected. While the terms "welfare" and "best interests" may occasionally overlap in practice, they are not synonymous. The former often reflects subjective adult assumptions, whereas the latter is grounded in objective legal principles that prioritize the rights, agency, and holistic well-being of the child. The CRC thus replaces a discretionary and protective approach with a rights-based and participatory one mandating not only the protection of the child but also their meaningful inclusion in decisions that shape their lives.

*Reading Section 17 of the Act with CRC through the lens of the Doctrine of Updating Construction of Statutes*

4. In this light, Section 17 of the Act, must be interpreted through the lens of the CRC and the doctrine of updating construction of statutes. This interpretive approach empowers courts to move beyond archaic conceptions of "welfare" and adopt a rights-based framework that gives full effect to the dignity, agency,

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[8] Gaurav Nagpal v. Sumedha Nagpal (2009) 1 SCC 42; S v. M [2007] ZACC 18; Re G (Children) [2006] UKHL
43; Troxel v. Granville 530 U.S. 57 (2000); Minister for Welfare v. Fitzpatrick [2000] ZACC 6; Gordon v.
Gordon [1996] 2 SCR 27; Young v. Young [1993] 4 SCR 3; 18; J v. C [1970] AC 688 and Santosky v. Kramer
455 U.S. 745 (1892).

[9] M and M v. Croatia [2015] ECHR 759; Re D (A Child) [2010] UKSC 12 and S v. M [2007] ZACC 18.

and voice of the child. To harmonize Section 17 with the CRC, the term "welfare" must not be understood in isolation. Instead, it must be interpreted within the CRC's normative framework, thereby transforming the concept into one that is inclusive, participatory, and rights-affirming. While "welfare" is a broader, more traditional term, and "best interests" it's more structured and contemporary legal counterpart, the two are not irreconcilable. Through a dynamic interpretation of "welfare" using the doctrine of updating construction, courts can incorporate the core elements of the best interest's standard, most notably, the child's right to participation. Such an interpretation not only aligns domestic law with Pakistan's international obligations but also with its constitutional values, notably the rights to life, dignity, equality, and the protection of childhood, as guaranteed under Articles 9, 14, 25, and 34 of the Constitution. Though Section 17 was enacted in a different era, it must now be read as a "living" provision. The principle that statutes extends to new circumstances has evolved into the modern doctrine of updating construction.[10] Given that continuous statutory revision is rarely feasible and societies often function under inherited laws, courts operate on the presumption that legislation is "always speaking", meant to apply in evolving social and legal contexts.[11] This interpretive approach ensures that statutes remain effective and aligned with contemporary values, including shifting constitutional and human rights norms. The phrase "welfare of the minor" can no longer be confined to its colonial-era meaning. Instead, it must be enriched by the modern, internationally recognized concept of the best interests of the child, as codified in Article 3 of the CRC, to which Pakistan is a State Party.[12] The "welfare" standard is thus not static, it is a living standard that encompasses a child's emotional, psychological, cultural, and developmental needs, extending far beyond material well-being or parental preference. Moreover, the right of the child to be heard, as guaranteed by Article 12 of the CRC, must also be read into the application of Section 17. Any genuine assessment of the child's welfare or best interests is incomplete without ensuring the child's meaningful participation in the proceedings, appropriate to their age

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[10] See P St J Langan (ed), Maxwell on the Interpretation of Statutes (10th edn, Sweet & Maxwell 1953) and Fakir Muhammad v. Federation of Pakistan PLD 1958 SC 118.

[11] Meera Shafi (Meeshah Shafi) v. Ali Zafar PLD 2023 SC 211.

[12] Pakistan ratified the United Nations Convention on the Rights of the Child on 12 November 1990 which provided broader guidelines for the promotion and protection of child rights.

and maturity.[13] By interpreting Section 17 in this harmonized manner, consistent with both international obligations and constitutional values, courts affirm that the provision requires not only an objective inquiry into what serves the child's welfare but also a procedural obligation to hear the child and give due consideration to their voice. This interpretive approach ensures that even a law as old as the Act remains a relevant and effective tool for delivering justice that is sensitive to the rights and realities of children today. To interpret it otherwise would be to render the statute obsolete, unfit for the constitutional and child-rights-informed present.

*Voice of the Child*

5. We underline that a child must be heard so that her best interests can be properly understood and protected. The participation of a child in legal prcoeedings is not a formality; it is fundamental to a justice system that respects the dignity and agency of the child. Listening to the voice of a child gives them a sense of worth, inclusion, and trust in the judicial process. As clarified in the UN General Comment No. 12, the views of the child must be seriously considered, not merely acknowledged.[14] Listening to a child does not mean obeying them, but rather understanding their perspective deeply enough to act in their best interests.[15]

*Child Justice – Integrating CRC Principles and the Constitution*

6. The principles enshrined in Articles 3 and 12 of the CRC, the primacy of the child's best interests and the right to be heard find clear constitutional resonance in Articles 9, 14, 25 and 34 of the Constitution. Article 9 guarantees the right to life, which includes the right to a *healthy, secure, and meaningful life*. Article
14 protects the *inherent dignity* of every person, including children. Article 25 enshrines *equality before the law and non- discrimination*, and Article 34 obligates the State to ensure the *protection of motherhood and childhood*. Collectively, these

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[13] See Laura Lundy, John Tobin and Aisling Parkes, 'The Right to Respect for the Views of the Child' in John Tobin (ed), The UN Convention on the Rights of the Child: A Commentary (OUP 2019).

[14] See UN Committee on the Rights of the Child, 'General Comment No. 12: The Right of the Child to be Heard' (CRC/C/GC/12, 20 July 2009). The UN General Comments are authoritative interpretations and clarifications issued by the United Nations treaty bodies, especially the Human Rights Committee and the Committee on the Rights of the Child (CRC Committee), among others. These General Comments elaborate on the meaning, scope, and application of specific articles in international human rights treaties.

15 Albie Sachs, The Strange Alchemy of Life and Law 69 (Oxford Univ. Press 2009).

provisions establish a strong constitutional foundation for child justice and child-centered adjudication, aligning Pakistan's constitutional values with its international obligations under the CRC and other international instruments it has ratified[16]. The Constitution further reinforces these obligations. Article 25(3) empowers the State to enact special provisions for the protection of children, including measures that may favorably differentiate them from adults. Article 25A mandates free and compulsory education for children aged 5 to 16 years. Article 35 specifically ensures the protection of marriage, the family, the mother, and the child. Article 37(e) guarantees just and humane working conditions, explicitly prohibiting child labour in vocations unsuitable to their age or sex. These provisions collectively prioritize the well-being, rehabilitation, and integration of children into society, and provide a solid legal basis for rights-based adjudication in matters affecting them.

*Judicial Obligation to apply a Child-Centered Framework*

7. It must be underscored that courts are bound to approach all matters involving children through the lens of a dedicated child- centered and child justice framework, a judicial philosophy grounded in both legal and moral obligations to safeguard, nurture, and empower children within the justice system.[17] The concept of child justice is broad and inclusive. It encompasses not only children in *conflict* with the law, who require rehabilitative and restorative processes rather than punitive sanctions, but also children in *contact* with the law, including those involved in custody and guardianship disputes and other civil proceedings who must be treated with dignity, heard, protected, and empowered throughout judicial proceedings. As custodians of justice, courts bear a heightened responsibility to prioritize the best interests of the child in all decisions affecting them. This principle, central to international child rights jurisprudence, demands that the judiciary transcend procedural formalism and engage substantively with each child's unique vulnerabilities, developmental needs, and future

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16 Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights and Universal Declaration of Human Rights, UN Convention on the Elimination of All Forms of Discrimination against Women, UN Convention on the Rights of Persons with Disabilities, UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. UN Framework Convention on Climate Change and UN Genocide Convention.

17 UNICEF, Introduction to the Five Advocacy Briefs on Child Justice and Child Friendly Justice (November 2022).

potential.[18] Such an approach requires judicial sensitivity, active participation of children in proceedings (where appropriate), and the creation of child-sensitive courtroom environments that respect their dignity and ensure their voices are not only heard but meaningfully considered.

*Hearing the Children: A Participatory Approach*

8. Guided by this constitutional and international framework, the Court adopted a child-friendly, participatory approach in the present case. Both children were invited to approach the Bench, not from the rostrum, but in a relaxed and informal manner, reducing the psychological distance between them and the Court. The interaction was designed to be warm and non-intimidating: we greeted them, shook hands, and engaged in a gentle conversation to elicit their views and preferences. The elder child conveyed a heartfelt desire to be with both parents, reflecting a deep emotional need for unity. The younger child, facing developmental delays, was unable to express his views meaningfully. The Court gave due weight to their expressed preferences and developmental contexts, ensuring emotional and psychological well-being remained central to adjudication. Only after internalizing their perspectives did the Court proceed to hear submissions from counsel.

*Examining "Best Interests" of the Children*

9. Learned counsel for the petitioner (father) submitted that the petitioner has since remarried and has a one-year-old child from his second marriage. He is a qualified child specialist and operates a private hospital in District Layyah. It was emphasized that the petitioner had personally overseen various therapies for child B during the period the child was in his custody as he has significant developmental delays. He further submitted that his parents (the children's paternal grandparents) reside with him and maintain a close and affectionate bond with the children. On this basis, it was argued that the best interests of the children would be served by placing them in his custody.

10. Conversely, learned counsel for respondent No. 1 (mother) submitted that she is also a medical doctor employed in government

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[18] Ursula Kilkelly and Stefaan Pleysier, 'Rights of the Child in the Justice System' (2023) 23(2) Sage Journal.

service and has likewise remarried. However, she clarified that her husband's children are adults and do not reside with them. The children live with her and her husband alone. The elder child is currently enrolled in a renowned private school, where he is performing well, while the younger child is undergoing therapy at a recognized institution in Lahore. She asserted that she is the primary caregiver and has been diligently attending to both the educational and therapeutic needs of the children. Unlike the professional commiment of the petitioner-father, her government job allows her to attend to her children. In any case the mere fact that the mother, is a working mother, cannot be held against her in custodial determinations as her professional commitments do not diminish her role as a mother and the primary caregiver, unless established otherwise. Article 11 of the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") recognizes the right of women to work and to be protected from discrimination in matters relating to marriage and family responsibilities[19], while Article 16 ensures equality in matters of marriage and family life, including the rights and responsibilities of parents, irrespective of marital or employment status.[20] General Recommendation No. 21 on equality in marriage and family relations under Article 16 specifically calls for states to ensure that custody and guardianship laws do not discriminate against women on the basis of their employment status and uphold shared responsibility of parents for child-rearing.[21] To penalize a mother for exercising her right to work would run afoul of these guarantees.

11. We have paid particular attention to the condition of child B, aged seven, who has signficant development delays and requires sustained therapeutic care. The petitioner-father, being a child specialist, emphasized his familiarity with the child's needs and past efforts to ensure regular therapy. Respondent No.1-mother, however, also demonstrated serious attentiveness to the child's condition and B is undergoing special intervention/theraphy in Lahore. Both parents appear committed to the children's welfare and capable of providing stable, loving environments. However, we note

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19 Pakistan ratified the CEDAW on 3 December 1996. See CEDAW, Article 11.

20 Ibid, Article 16.

21 Committee on the Elimination of Discrimination against Women (CEDAW), 'General recommendation No 21: Equality in marriage and family relations' (1994) UN Doc A/49/38/Rev.1 at 112 (CEDAW General Recommendation 21).

that the father has remarried, has a one-year-old child from his second marriage, and is employed full-time during the day while also maintaining a private practice in the evenings, leaving him largely unavailable at home. After considering the age, educational continuity, psychological health, children's emotional, medical, and educational continuity in light of their evolving needs, the stability of home environment, and the city of residence of the children and after assessing the current circumstances and capacities of the parents we conclude that the best interests of the children, particularly the child with special needs, are best served by remaining in the custody of their mother. No alternative caregiver can fully replicate the intuitive care, emotional constancy, and protective environment a mother is uniquely positioned to offer. The fact that she is a working professional does not detract from her suitability as a custodial parent. On the contrary, it reflects her resilience and her commitment to providing a secure, nurturing, and dignified upbringing for her children.

*ADR and Child Justice: An Important Intersection*

12. In matters involving children, such as custody, guardianship, and family disputes, the courts must recognize that a strictly adversarial approach often exacerbates conflict, delays resolution, and undermines the child's sense of stability and security. In contrast, Alternative Dispute Resolution ("ADR"), particularly mediation, offers a more collaborative, efficient, and child-sensitive mechanism for resolving such dispute. While the CRC does not explicitly reference the term ADR, its spirit and structure clearly support its use. Article 3 of the CRC demands that the best interests of the child be a primary consideration in all actions concerning children, while Article 12 guarantees the child's right to express views freely and to have those views given due weight. In General Comment No. 12 (2009), the UN Committee on the CRC explicitly encourages States to develop mechanisms that ensure meaningful child participation in family law proceedings, including through non-judicial and informal processes such as mediation.[22] Such processes must be voluntary, child-friendly, and facilitated by professionals trained to respect the evolving capacities of the child

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[22] UN Committee on the Rights of the Child, 'General Comment No. 12: The Right of the Child to be Heard' (CRC/C/GC/12, 20 July 2009), p. 68-70.

and prioritize their best interests. Properly designed ADR mechanisms reduce the psychological burden on children, promote parental cooperation, and lead to faster, more sustainable outcomes that support the child's long-term welfare. Accordingly, Family Courts and Guardianship Tribunals must prioritize mediation as a first recourse, particularly where parties demonstrate a willingness to engage in good faith. Adjudication should be pursued only when mediation fails or is deemed unsuitable due to concerns of safety, coercion, or imbalance of power. This approach not only aligns with Pakistan's international obligations under the CRC but also reinforces the constitutional commitment to protect the dignity, welfare, and future of every child.

*Directive to Courts: Hear the Voice of the Child*

13. Before parting with this judgment, we find it necessary to underscore that this decision must serve as a directive to all courts, particularly Family Courts and judges of the District Judiciary: *the voice of the child must be heard and respected in every custody and guardianship matter*. This is not an aspirational goal but a binding obligation under the CRC. We conclude this judgment with the words of James Baldwin, who said: "*The children are always ours, every single one of them, all over the globe; I am beginning to suspect that whoever is incapable of recognizing this may be incapable of morality*."[23] These words are a solemn reminder that courts, especially Family Courts have a moral and legal responsibility to see, hear, and protect every child not as a passive subject of proceedings, but as a rights-bearing individual whose dignity must be safeguarded at every stage of the judicial process.

14. In view of the foregoing, and as custody already stands vested with the mother, we are of the considered view that no case for review of the impugned order is made out. Accordingly, this petition is dismissed. The parties are directed to strictly adhere to the visitation schedule determined by the lower appellate court. Custody of the children shall continue with the mother unless and until the petitioner-father moves a fresh application for custody and the same

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[23] James Baldwin (1924–1987) was an American writer, essayist, novelist, and civil rights activist whose work profoundly shaped discussions on race, identity, and justice in the 20th century. He is best known for his incisive explorations of the Black experience in America, particularly the intersection of race, sexuality, and class.

is adjudicated by the competent forum in light of any material change in circumstances.

15. Copy of this judgment be dispatched to the Registrars of all High Courts for further circulation to judges of the District Judiciary, for their information and future guidance.

**2025 SCP 198**

**IN THE SUPREME COURT OF PAKISTAN**

**(Appellate Jurisdiction)**

**Bench-II:**

**Mr. Justice Syed Mansoor Ali Shah Mr. Justice Aqeel Ahmed Abbasi**

**C.P.L.A. No. 2283-L/2016**

***(Against the judgment dated 02.02.2016 passed by the Punjab Service Tribunal, Lahore in Appeal No. 2308/2015)***

Muhammad Niaz Khan

... Petitioner

Versus

R.P.O. Sheikhupura Region at Lahore, etc.

… Respondent(s)

For the Petitioner: Mr. Javed Imran Ranjha, ASC. (Through Video Link, Lahore)

For the Respondents: Mr. Khalid Masood Ghani, AAG, Pn. a/w Mr. Nasir Abbas, DSP Legal, Mr. Shoaib Inspector, Legal.

Assisted by: Mr. Umer A. Ranjha, Judicial Law Clerk, Supreme Court of Pakistan.

Date of Hearing: 12.05.2025.

JUDGMENT

**Syed Mansoor Ali Shah, J.–**

"*Proportionality as principle or doctrine is a way to bring the demands of justice into greater harmony with the law of constitutional rights*."[1]

Disciplinary proceedings were initiated against the petitioner, then serving as a Sub-Inspector at Police Station Mandi Usman Wala, Sheikhupura, through a show cause notice dated 07.06.2014, issued by the Regional Police Officer ("RPO"), Sheikhupura, under the provisions of the Punjab Police (Efficiency and Discipline) Rules, 1975. The allegations raised pertained to faulty investigation by the petitioner. In response, the petitioner submitted a written reply denying the charges, but his explanation was deemed unsatisfactory. Consequently, he was awarded the major penalty of dismissal from service via order dated 04.08.2014, issued by the RPO. On departmental appeal, the penalty was

reduced to a two-stage reduction in pay, and the petitioner was reinstated into service by order dated 27.03.2015. Dissatisfied with this outcome, the petitioner

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1 Mattias Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice' (2004) 2 International Journal of Constitutional Law 574.

approached the Punjab Service Tribunal, Lahore ("Tribunal"), seeking reinstatement with effect from the date of his original dismissal, along with all consequential benefits. The Tribunal partially allowed the appeal and modified the penalty from a two-stage to a one-stage reduction in pay through the impugned order dated 02.02.2016 ("impugned order"). Hence, the present petition for leave to appeal.

2. We have heard the learned counsel for the parties and carefully examined the impugned order, the applicable law, and the record of the case.

3. The Tribunal found that although an investigation had been conducted, the prosecution failed to produce even a shred of evidence to substantiate the allegations. It observed:

> "3. From the record it is evident that neither the punishing authority took into consideration this version of the appellant nor he gave any weight to his stance before imposing major penalty upon the appellant which was sheer violation of principle, of natural justice. There was no direct and confidence inspiring evidence available on record which could link the appellant with the alleged charges of receiving illegal gratification. The prosecution has badly failed to produce even an iota of evidence in order to substantiate the allegations leveled against the appellant. Neither tangible and cogent evidence (documentary or oral) has been brought on record in order to prove the veracity of the allegations which gives credence to the fact that the appellant's version was plausible and credible. Even regular inquiry was not conducted before imposition of major penalty…" (emphasis supplied)

Despite these categorical findings, the Tribunal opted merely to reduce the penalty, rather than exonerate the petitioner. It appears that the Tribunal relied, albeit implicitly, on the principle of proportionality, finding the original penalty disproportionate to the alleged misconduct. However, this application was both legally flawed and logically inconsistent with its own conclusion when no misconduct was established. The Tribunal failed to properly exercise its discretion under Section 5 of the Punjab Service Tribunals Act, 1974, which empowers it to confirm, set aside, vary, or modify impugned orders. While the Tribunal has authority to vary the punishment in appropriate cases, such discretion must be exercised judiciously grounded in the record, legal standards, and principles of fairness.[2] It is well established that judicial interference with disciplinary penalties is only justified where the penalty is arbitrary, perverse, or based on irrelevant considerations.[3] Once the Tribunal found that the allegations

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[2] Deputy Postmaster General v. Habib Ahmed 2021 PLC (C.S.) 531 and Secretary, Government of Punjab v. Khalid Hussain Hamdani 2013 SCMR 817.

[3] Divisional Superintendent, Postal Services, D.G. Khan v. Nadeem Raza 2023 SCMR 803; Government of Khyber Pakhtunkhwa v. Nargis Jamal 2022 SCMR 2114 and Postmaster General Sindh, Karachi v. Syed Farhan 2022 SCMR 1154.

were wholly unsubstantiated, the only lawful outcome was to exonerate the petitioner.

4. The principle of proportionality provides a structured framework for judicial review of administrative actions.[4] Developed across various constitutional jurisdictions[5], it involves a four-step[6] test: (i) the measure must pursue a legitimate aim; (ii) be suitable to achieve that aim; (iii) be necessary, in that no less restrictive alternative exists; and (iv) strike a fair balance between the measure's impact on individual rights and the public interest. This Court has recently introduced and adopted this four-stage test to assess the legality and fairness of administrative and disciplinary decisions.[7] Such framework ensures that any interference with rights is justified, necessary, and lawful.

5. Proportionality promotes a stable and systematic method of constitutional adjudication.[8] Courts employing this approach are expected to articulate clearly the reasoning behind their decisions at each stage of the analysis thereby enhancing transparency, accountability, and legitimacy in judicial reasoning. Proportionality must, therefore, be applied with discipline, care, and sensitivity to context, particularly where fundamental rights and human dignity are at stake.

6. In the present case, the Tribunal's own findings confirm that there was no credible evidence, documentary or oral, linking the petitioner to the alleged misconduct. No regular inquiry was held, and the principles of natural justice were violated.[9] In such circumstances, the very first limb of the proportionality test i.e., legitimacy fails. Without proven misconduct, there can be no legitimate objective warranting disciplinary action. Any penalty, however minor, is thus disproportionate by default. The absence of evidence removes the legal basis for any sanction. Furthermore, Articles 4, 14, and 25 of the Constitution of the Islamic Republic of Pakistan, 1973, which guarantee the right to be treated in accordance with law, human dignity, and equality before the law, require all forums, including

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4 HP Wade, CR Forsyth and the Rt Hon Lord Woolf, De Smith's Judicial Review (8th edn, Sweet & Maxwell 2018). See Muhammad Nasir Ismail v. Government of Punjab 2025 SCP 67 (SCP citation); Shahida Siddiqa v. Allied Bank Limited 2024 SCMR 92; Pervaiz Hussain Shah v. Government of Punjab 2024 SCMR 309; Ijaz Badshah v. Government of Pakistan 2023 SCMR 407; Divisional Superintendent, Postal Services v. Nadeem Raza 2023 SCMR 803; Muhammad Sharif v. Inspector General of Police, Lahore 2021 PLC (C.S.) 762; Muhammad Iqbal Khan Noori v. NAB PLD 2021 SC 916 and Sabir Iqbal v. Cantonment Board PLD 2019 SC 189.

5 De Freitas v. Permanent Secretary of Ministry of Agriculture [1999] 1 AC 69; R(Daly) v. Secretary of State for the Home Department [2001] 2 AC 532; R v. Shayler [2003] 1 AC 247; Huang v. Secretary of State for the Home Department [2007] 2 AC

167.

6 Bank Mellat v. HM Treasury (No.2) [2013] UKSC 39 (per Lord Sumption).

7 District and Sessions Judge (Authority), Jhang v. Ghulam Shabbir (C.P.L.A. No. 2987-L/2019).

8 T Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 Yale LJ 943.

9 Aamir Akbar v. Additional Superintendent of Police, Bahawalpur 2025 SCMR 632; Sakhib Zar v. K-Electric Limited 2024 SCMR 1722 and Raja Muhammad Shahid v. Inspector General of Police 2023 SCMR 1135.

tribunals, to ensure that disciplinary measures are not only lawful but also fair and just.

7. Once the Tribunal concluded that the disciplinary process was procedurally flawed and unsupported by evidence, it was legally and constitutionally bound to reinstate the petitioner with all consequential benefits. Its failure to do so reflects a fundamental error of law, a misapplication of the principle of proportionality, and a disregard for the constitutional principles of fairness and due process. Endeavouring to "balance" unproven misconduct with the imposition of a continuing penalty is both illogical and legally untenable. Given the manifestly unjust disciplinary proceedings, the petitioner is entitled to complete exoneration and full restitution. It is not the role of the Tribunal to engage in an exercise of mercy or compromise where the foundational basis of penal action is wholly unsubstantiated. Fairness demands rectification, not calibration, in the face of injustice.

8. For these reasons, we find that the impugned order is untenable in both law and fact. Once the Tribunal determined that the charges were unsubstantiated, the only legally viable course was to exonerate the petitioner. The imposition of any penalty, absent proven misconduct, constitutes a violation of natural justice and results in a manifest miscarriage of justice. The Tribunal's decision, being internally inconsistent and contrary to constitutional norms, is accordingly set aside. The petitioner stands exonerated and is directed to be reinstated in service from the date of his original dismissal, with all consequential benefits.

9. Accordingly, this petition is converted into an appeal and is hereby allowed.

Islamabad, Judge
12th May, 2025.
Approved for reporting

*Sadaqat* Judge

**2025 SCP 203**

**IN THE SUPREME COURT OF PAKISTAN**

**(Appellate Jurisdiction)**

**Bench-I:**

**Mr. Justice Syed Mansoor Ali Shah Mr. Justice Aqeel Ahmed Abbasi**

**Civil Petitions No. 1982 & 1983 of 2025** *(Against the order of Islamabad High Court, Islamabad dated 19.5.2025, passed in Diary No.9715/2025)*

Frontier Holdings Limited through its Chief Executive, Islamabad and another *(in both cases)*

… Petitioners

***Versus***

Petroleum Exploration Pvt. Limited through its Chief Executive Officer, Islamabad
*(in both cases)*

… Respondent

For the Petitioners: Ms. Zainab Janjua, Advocate High Court. For the

Respondent: N.R.

Date of Hearing: 29.05.2025.

ORDER

**Syed Mansoor Ali Shah, J**.- At the very outset, learned counsel for the petitioners submitted that she is not an Advocate of this Court and has filed a separate application in each case (C.M.As. No. 4089 & 4090 of 2025) seeking special permission to appear in matter. She stated that she has previously handled the case before the Islamabad High Court and, owing to the urgency of the matter, the petitioner companies have not yet been able to engage an Advocate of the Supreme Court. In view of the reasons stated, limited special permission is granted to the learned counsel to appear before this Court at this stage only. The petitioners are directed to engage an Advocate of the Supreme Court to argue the cases in the next stage. The present counsel shall be at liberty to assist any such counsel subsequently engaged in the matter. The applications stand disposed of accordingly.

Main Case

2. Learned counsel for the petitioners submits that the dispute between the parties was referred for arbitration under the auspices of the International Chamber of Commerce (ICC), London. Upon conclusion of the proceedings, a partial foreign arbitral award was rendered on 12.12.2024, and subsequently, a separate award on costs was issued on

31.03.2025. The awards were filed before the Islamabad High Court for enforcement under the Recognition and Enforcement (Arbitration, Agreements and Foreign Arbitral Awards) Act, 2011 ("Act").

3. Learned counsel submits that while admitting the enforcement petition, the learned Single Judge of the High Court issued interim relief *vide* order dated 24.04.2025, restraining the respondents from assigning, transferring, or alienating their working interest in Badin Fields and from creating any charge, lien, or encumbrance thereon. This interim order was subsequently challenged before a Division Bench in an intra-court appeal ("ICA"), which *vide* impugned order dated 19.05.2025, suspended the interim relief granted by the learned Single Judge.

4. It is contended that the interim relief was granted in aid of enforcement under the Act and did not amount to final relief. Courts are empowered to pass interim measures to protect the integrity and efficacy of the enforcement process. Denial of such protection would defeat the very purpose of the Act and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("Convention"). Reliance is placed on *Taisei Corporation & another v. A.M. Construction Company (Pvt.) Ltd*. (2024 SCMR 640), *Orient Power Company (Pvt.) Ltd, Lahore v. Sui Northern Gas Pipelines Ltd*. (2021 SCMR 1728), *Government of India v. Vedanta Limited and Ors* (AIR 2020 SC 4550), and *Zeiler v. Deitsch* (500 F.3d 157 (2007)) which affirm that courts must maintain a pro-enforcement bias while dealing with foreign arbitral awards. It was further argued that the Division Bench interfered at the interim stage without recording or satisfying any of the limited grounds of non- enforcement under Article V of the Convention, as incorporated into the Act. Such premature judicial interference sends an adverse signal to the international community, undermines arbitral sanctity, erodes investor confidence, and undermines Pakistan's international obligations. A stable and enforcement-friendly legal environment is vital for encouraging foreign direct investment.

5. It is further submitted with respect that the impugned order passed by the Division Bench, whereby the interim relief granted to the petitioners was suspended, has effectively obstructed the enforcement of the foreign arbitral award and is therefore inconsistent with the pro- enforcement mandate of the Act, the Convention, and the settled jurisprudence of this Court. Foreign arbitral awards are not to be treated as ordinary civil decrees; rather, they possess a binding character under international law, to which Pakistan has expressly committed itself.

6. It is also contended that the ICA before the Division Bench was not maintainable. Orders passed therein are not amenable to an ICA appeal under Section 3(2) of the Law Reforms Ordinance, 1972. It is well settled that ICAs do not lie from orders passed under special laws that contain a self-contained appellate mechanism and do not expressly provide for such appeals. See *Karim Bibi and others v. Hussain Bakhsh and another* (PLD 1984 SC 344), *Muhammad Abdullah v. Deputy Settlement Commissioner Lahore* (PLD 1985 SC 107) and *International Islamic University, Islamabad v. Syed Naveed Altaf* (2024 SCMR 472).

7. In view of the above, leave is granted to consider the questions raised. The appeals arising out of these petitions shall be heard on the basis of available record, however, parties are at liberty to file additional documents, if any. The said appeals shall be listed before a three-member bench after a fortnight.

C.M.As. No. 3673 & 3674/2025 (Stay Matter):

8. Notice to the respondents. Meanwhile, the operation of the impugned order dated 19.05.2025 passed by the Division Bench of the Islamabad High Court shall remain suspended until the next date of hearing in order to be consistent with the pro-enforcement bias maintained by this Court as well as the mandate of the Act, the Convention, and the settled jurisprudence of this Court. The interim restraining order passed by the learned Single Judge shall remain in field and continue to operate.

9. For completeness, it is clarified that a collective reading of Orders XI, XX, and XXXIII of the Supreme Court Rules, 1980 establishes that this Court, while entertaining a petition arising out of an order of a Division Bench of a High Court, is competent to grant leave and suspend the impugned order. Reference is made to *Sheri-CBE & others v. Lahore Development Authority* (2006 SCMR 1202), *Municipal Committee v. Province of Punjab* (2001 SCMR 745), and *ICI Pakistan Ltd. v. Federation of Pakistan* (2007 PTD 2306).

Islamabad, 29th May 2025.

**Approved for reporting.**

*Umer A. Ranjha, LC**

**2025 SCP 226**

**IN THE SUPREME COURT OF PAKISTAN**

**(Appellate Jurisdiction)**

**Bench-II:**

**Mr. Justice Syed Mansoor Ali Shah Mr.**

**Justice Aqeel Ahmed Abbasi**

Civil Petition No. 651 of 2025

*(Against the judgment dated 28.01.2025 passed by the Islamabad High Court, Islamabad in C.M.A. No. 409/2024)*

Federal Public Service Commission, through its Chairman, Islamabad

***Versus***

Dr. Shumaila Naeem and Others

For the Petitioner: Mr. Rashideen Nawaz Kasuri, Addl. A.G.P.
a/w Mr. Haroon Rasheed, Director FPSC
Mr. Sana Ullah Islam, J.S, Establishment Division, Government of Pakistan.
Mr. Masroor Hussain, D.S, Establishment Division, Government of Pakistan.

For the Respondents: Barrister M. Saad Umer Buttar, ASC.
a/w Mr. Moiz Gul and Ms. Maheen Junaid, Advocates.

Amicus Curiae: Assisted by:

Date of Hearing:

Ms. Asma Hamid, ASC.

Mr. Umer A. Ranjha, Judicial Law Clerk and Ms. Uzma Zahoor Civil Judge/Research Officer, Supreme Court of Pakistan.

22.05.2025.

JUDGMENT

**Syed Mansoor Ali Shah, J.**– Briefly, Dr. Shumaila Naeem (the "respondent") then unmarried, joined government service as a Medical Officer on 07.09.2007[1], based on her domicile of origin in Khyber Pakhtunkhwa ("KPK"). Following her marriage on 31.05.2008 to a civil servant domiciled in Balochistan, she was transferred on deputation to the Pakistan Institute of Medical Sciences ("PIMS") under the Ministry of National Health Services Regulations and Coordination ("MNHS"), in accordance with the wedlock policy, *vide* order dated 08.09.2009. She was subsequently absorbed at PIMS through a notification dated 17.12.2013, and was later promoted to the post of Senior Registrar (BS- 18) on 14.12.2021 and also performed duties as Assistant Professor (BS- 19). It is prudent to note that the respondent did not change or alter her

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[1] Letter No. F.1-260/2012-H-I dated 29.04.2025 issued by the Ministry of National Health Services Regulations and Coordination (C.M.A. No. 3555/2025).

domicile throughout this time on the basis of her husband's domicile which is of Balochistan. Subsequently, during service, the respondent changed her domicile to that of her husband i.e, Province of Balochistan on 20.10.2018 and formally relinquished her Province of KPK domicile on 25.10.2018. On the basis of her new domicile, she applied for an advertised post of Associate Professor (Obstetrics & Gynaecology) (BS-19) at PIMS against the Balochistan seat. Controversy arose when the respondent, having obtained the requisite departmental no objection certificates ("NOCs") for applying to the post of Assistant Professor (Obstetrics & Gynaecology) (BS-19) on the basis of her Balochistan domicile, got rejected by Federal Public Service Commission ("FPSC"). Although the respondent successfully passed the written examination, her candidature was rejected by the FPSC *vide* memorandum dated 10.07.2024, on two grounds: first, that a change of domicile after entry into government service is impermissible; and second, that she lacked the requisite experience for the post. Dissatisfied with the FPSC's decision, the respondent preferred a departmental representation, which, along with her subsequent review petition, was dismissed through orders dated 12.09.2024 and 02.10.2024, respectively. However, her appeal under Section 7(3)(d) of the FPSC Ordinance, 1977 ("Ordinance") before the Islamabad High Court was allowed *vide* judgment dated 28.01.2025 ("impugned judgment"), whereby the impugned decisions rejecting her candidature were set aside. Aggrieved by the impugned judgment, the present petition

for leave to appeal has been filed before this Court by the FPSC.

2. The learned Additional Attorney General, assisted by representatives of the FPSC and MNHS, contended that under the Establishment Division's Office Manual No. F.8/5/75-WC dated 12.08.1975 ("O.M. 1975")[2], a married female candidate may adopt her husband's domicile if applying for a post through "direct recruitment". However, it was argued that "direct recruitment" refers solely to first-time entry into service, after which the domicile declared at initial induction under Establishment Division Office Manual No. 1/14/71-TRV dated 20.09.1971 ("O.M. 1971") becomes final and binding for the duration of service. The High Court, it was submitted, erred in holding that O.M. 1975 overrides O.M. 1971; instead, both operate in distinct spheres: O.M. 1975 governs initial appointments, while O.M. 1971 applies post-entry. Permitting a change of domicile mid-service, it was argued, could lead to

[2] An Office Manual in Pakistan's service law framework is a departmental guide for internal procedures. It does not override statutory service rules but can be used to interpret or implement them unless it contradicts a statute or constitutional provision. This is issued under Section 25 of the Civil Servants Act, 1973.

arbitrary advantage and disruption of seniority. On the respondent's experience, it was submitted that the certificates were issued by unauthorized officials and reflected service on an internal arrangement, not a substantive appointment or promotion to BS-18. Hence, her experience was non-countable. Additionally, the NOC was challenged as legally infirm, allegedly obtained through misrepresentation of domicile. Accordingly, the FPSC's rejection of both her Balochistan domicile and experience was defended as lawful.

3. Conversely, learned counsel for the respondent raised several objections to the FPSC's actions. As a preliminary matter, he contended that the FPSC lacks locus standi to file the petition and cannot be represented by the State, relying on this Court's settled jurisprudence. On merits, it was argued that the respondent, having secured the highest marks in the written examination, acquired a vested right to be fairly considered for appointment, one that could not be arbitrarily denied. He further submitted that the respondent does not fall within the definition of a "civil servant" under the Occupational Groups and Services (Probation, Training and Seniority) Rules, 1990, making O.M. 1971 inapplicable. Since the post was to be filled through "direct recruitment", her husband's domicile recognized under O.M. 1975 ought to be considered. "Direct recruitment", it was emphasized, entails fresh appointments distinct from existing service, seniority, or promotion structures, involving independent pay scales and selection procedures. The respondent was said to have met all experiential requirements, supported by a valid experience certificate issued under the Pakistan Medical and Dental Council Regulations, 2018 ("PMDC Regulations"). As this certificate had not been challenged through any legal forum,

it had attained finality. Reference was also made to Rule 14 of the Civil Servants (Appointment, Promotion and Transfer) Rules, 1973, which allocates only six percent of seats for Balochistan. It was argued that had the respondent retained her KPK domicile, her selection prospects would have been stronger, undermining allegations of strategic domicile change. Accordingly, the FPSC's rejection of her domicile and experience was characterized as arbitrary, erroneous, and without legal basis.

4. The learned amicus curiae opined that Sections 15 and 16 of the Succession Act, 1925 ("1925 Act") are inapplicable to the present matter, as their provisions do not extend to Muslims. She further submitted that the respondent may avail the benefit of O.M. 1975 only if this Court concludes on the factual plane that the advertised post constitutes a new post and falls within the scope of "direct recruitment".

5. We have heard the learned counsel for the parties and amicus curiae at length and have carefully examined the impugned judgment, the applicable law, and the record of the case.

*Preliminary Objections: Locus Standi, Representation and Status of the Respondent*

6. Before addressing the substantive issues, we must first dispose of the preliminary objections raised by the respondent. Firstly, he contended that the FPSC lacks locus standi to file the petition relying on *Rahim Foods*[3]. We have examined the said judgement whereby this Court categorically held that the Competition Commission of Pakistan ("CCP"), under the Competition Act, 2010 ("2010 Act"), functions primarily as a regulatory body and also as a quasi-judicial forum. However, when CCP decides a matter between rival parties in exercise of its quasi-judicial powers, CCP cannot claim to be an aggrieved person for the purposes of challenging a decision before a superior forum.[4] No such quasi- adjudicatory framework exists under the Ordinance in question[5], which merely provides for an administrative review of the FPSC's own decisions. Therefore, the instant case is distinguishable. The impugned rejection of the respondent's candidature is not a determination made in a quasi- judicial capacity of FPSC between contesting parties but rather exercising an administrative power of review of its earlier order. Therefore, the precedent cited by the respondent is inapposite, as it pertains to quasi- judicial bodies seeking to defend their adjudicatory decisions, which is not the situation here. The objection to the locus standi of the FPSC to file the present appeal is misconceived.

7. The second objection challenging the competence of the learned Additional Attorney General to represent the FPSC is equally untenable. As an attached department of the Establishment Division[6], the FPSC is a Federal Government entity and, as a matter of settled law, must be represented by government counsel, not private advocates.[7] The respondent's claim of a vested right to appointment on the basis of her performance in the written test is similarly flawed. The FPSC retains the authority to determine eligibility, and mere success in the examination or a conditional recommendation does not confer a vested right to

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3 A. Rahim Foods (Pvt.) v. K & N's Foods (Pvt.) PLD 2023 SC 516.

4 Wafaqi Mohtasib v. SNGPL PLD 2020 SC 586.

5 Section 7 of the Ordinance.

6 Rule 4(4) read with Schedule III of The Rules of Business 1973 and Dr. Riffat Kamal v. Federation of Pakistan 2015 SCMR 847.

7 Officer InCharge Army Housing v. Federation of Pakistan PLD 2024 SC 576 and Rasheed Ahmad v. Federation of Pakistan PLD 2017 SC 121.

appointment.[8] Further, the argument that the respondent is not a civil servant lacks merit. It is settled by this Court that a civil servant is someone who holds a civil post in connection with the affairs of the Federation and who has been employed by the competent authority i.e., either by the FPSC or the Provincial Public Service Commission

in the prescribed manner after following the due process of law and having gone through the process of competition.[9] Applying this to the instant case, the respondent was appointed through the KPK Public Service Commission i.e., competent authority through an open competition, Moreover, this Court has already held that doctors employed in PIMS and other federal institutions hold civil posts and are civil servants within the meaning of Section 2(1)(b) of the Civil Servants Act, 1973.[10] Accordingly, the respondent's reliance on the inapplicability of O.M. 1971 is misplaced and does not withstand scrutiny.

*The Legal Doctrine of Domicile: Origins, Elements, and Contemporary Relevance*

8. Before turning to the core controversy surrounding domicile and its bearing on "direct recruitment", it is instructive to examine the legal doctrine of domicile itself. Modern scholarship traces its origins to Roman law, with English Canon Law serving as the vehicle for its transmission into the common law tradition.[11] The term "domicile" is derived from the Latin *domicilium* (from *domum colere* - to inhabit or cultivate a home), and its Dutch counterpart *woonplaats*, both evoking the notion of a permanent legal home "this is where you are, because this is where you belong."[12] Across jurisdictions, legal dictionaries and judicial pronouncements consistently define domicile as a person's legal home to which they intend to return whenever absent.[13] Lord Chelmsford aptly

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[8] Paragraph 14(b) of General Instructions of Federal Public Service Commission states that 'Eligibility of the candidates in terms of Recruitment Rules and the advertised conditions shall be determined after the conduct of screening/professional test/descriptive examination. On detailed scrutiny of the applications if they are found ineligible, their candidatures will be cancelled irrespective of the fact whether they have appeared in the examination/test or even qualified therein.'

[9] Sindh Irrigation and Drainage Authority v. Government of Sindh 2022 SCMR 595 and Muhammad Mubeen us Salam
v. Federation of Pakistan PLD 2006 SC 602.

[10] Dr. Rashid Anwar v. Federation of Pakistan 1996 PLC (C.S.) 1073. See Article 240 of the Constitution and Section 2(1)(b), Civil Servants Act, 1973 which defines civil servants as "means a person who is a member of an All-Pakistan Service or of a civil service of the Federation, or who holds a civil post in connection with the affairs of the Federation, including any such post connected with defence, but does not include—

(i) a person who is on deputation to the Federation from any Province or other authority;

(ii) a person who is employed on contract, or on work-charged basis or who is paid from contingencies; or

(iii) a person who is a "worker" or "workman" as defined in the Factories Act, 1934 (XXV of 1934), or the Workmen's Compensation Act, 1923."

[11] Nikolaos A Davrados, 'Nationality, Domicile, and Private International Law Revisited' in Essays in Honour of Nestor Courakis (2017).

[12] Ellison Kahn, 'The South African Law of Domicile of Natural Persons' (1971) 1971 Acta Juridica 1; Albert Levitt, 'The Domicile of a Married Woman - I - The Older View' (1920) 91 Cent LJ 4.

[13] Black's Law Dictionary (9th edn, West 2009) 558; Words and Phrases (Permanent edn, vol 13, West 1952) 425–26; Corpus Juris Secundum (vol 25, West 1956) 2–3; District Education Officer (Female), Charsadda v. Sonia Begum 2023 SCMR 217; Muhammad Yar Khan v. Deputy Commissioner 1980 SCMR 456; Joan Mary Carter v. Albert William Carter PLD 1960 SC 616; Mark v Mark [2005] UKHL 42; Cragnish v. Craignish [1892] 3 Ch. 180; Pradeep Jain v. Union of India (1984) 3 SCC 654 and Mohammad Raza v. State of Bombay, AIR 1966 SC 1436.

described it as the "intention of a permanent home."[14] Thus, domicile has two essential components: *(i) factum* - the physical fact of residence; and *(ii) animus manendi* - the intention of remaining there permanently.[15] Importantly, domicile is not synonymous with residence. While one may have multiple residences, a person can have only one domicile at a time. Indeed, even a person with no physical home cannot be without a domicile in law. Domicile may be categorized as: (i) *Domicile of origin*: acquired by operation of law at birth; (ii) *Domicile of choice*: adopted voluntarily by a legally competent person intending to make a place their permanent home; and (iii) *Domicile of dependence*: determined by the domicile of another, such as a spouse, parent, or legal guardian.[16] It is a settled principle that any person, subject to legal capacity and in accordance with applicable law, may lawfully change their domicile.

9. Domicile, though often perceived as administrative, is a foundational legal concept that shapes an individual's access to rights, opportunities, and entitlements. It is not merely a declaration of permanent residence, but a legal construct that governs access to public services, education, employment, political participation, and regional entitlements. Domicile can influence taxation, voting rights, and eligibility for regional quotas in civil service recruitment.[17] In Lord Westbury's words, domicile is "a relation which the law creates between an individual and a particular locality or country."[18] Theories of domicile span several disciplines — law, human geography, and residential mobility, each highlighting how one's place of habitual residence affects jurisdiction, migration patterns, and settlement dynamics. Accordingly, domicile must always be interpreted in light of the underlying purpose it is meant to serve.

10. In Pakistan, the concept of domicile is recognized in Part II of the 1925 Act, Section 17 of the Citizenship Act, 1951 ("1951 Act"), and the Schedule to Rule 310-A of the Civil Service Regulations ("CSR") Volume I. These provisions acknowledge changes of domicile through dependence, voluntary relocation, choice, or marriage. The procedural framework for obtaining, modifying, renewing, or cancelling domicile is outlined in the Citizenship Rules, 1952.[19] This legal understanding of

[14] Waicker v Hume (1858) 10 HLC 124.

15 Peter Stone, Conflict of Laws (Longman Law Series 1995) and District Education Officer (Female), Charsadda v. Sonia Begum 2023 SCMR 217.

16 Paul Torremans, 'Domicile, Nationality and Residence' in Paul Torremans (ed), Cheshire, North & Fawcett: Private International Law (15th edn, OUP 2017).

17 Anggi Fitratama Rianto Putra and Rifqi Ridlo Phahlevy, 'The Concept of Domicile in Filling Government Positions in the Regions' (2024) 1(4) Journal of Geography, Regional Planning and Development.

18 JG Castel, 'Domicile' (1958) McGill LJ 179.

19 Rules 23, 28-B and 30, Citizenship Rules, 1952.

domicile is central to the present controversy, as the respondent claims eligibility for appointment under the province of Balochistan quota on the basis of a changed domicile acquired through marriage. Whether such a change is legally sustainable, for a civil servant, for the purpose of "direct recruitment", particularly after entry into civil service, lies at the heart of the dispute now before this Court.

*Applicability of Sections 15 and 16 of the Succession Act, 1925 on Muslims*

11. The respondent argued that, by virtue of Sections 15 and 16 of the 1925 Act that a wife's domicile automatically shifts to that of her husband upon marriage. However, this contention is legally untenable. These provisions fall under Part II of the 1925 Act, which, by virtue of Section 4, expressly excludes their application to Muslims, Hindus, Buddhists, Sikhs, and Jainas. The historical context reinforces this exclusion. Prior to the Succession Act, 1865, Muslims and Hindus were governed by their respective personal laws, while other communities were subject to a patchwork of colonial legal principles. The 1925 Act was a consolidating statute aimed at non-Muslim and non-Hindu communities, deliberately preserving the autonomy of personal laws in succession matters for the latter.[20] Accordingly, Sections 15 and 16 have no applicability to Muslims, and the respondent's reliance on them is misplaced.

12. For civil servants, the applicable domicile regime is set out in the Schedule to Rule 310-A of the CSR, Volume I. This Schedule explicitly recognizes the change of domicile through marriage and other modes, and affirms that the domicile of a married woman ordinarily follows that of her husband. As the respondent is a civil servant, it is this framework not the 1925 Act or 1951 Act that governs the determination and change of her domicile.

*Domicile and Marriage: Autonomy, Dependency, and the Rights of Women in Civil Service*

13. While CSR recognizes that a married woman may adopt her husband's domicile by virtue of Item No. 7 of the Schedule to Rule 310-A of the CSR. Having established that the respondent's status as a civil servant brings her within the ambit of Rule 310-A, the critical question that arises is whether such adoption is automatic or mandatory; or a matter of personal choice under the Item No. 7 of the Schedule and;

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[20] Law Commission of India, Report No 247 on Indian Succession Act (Government of India 2014). whether the domicile of civil servant freezes upon entry into the civil service and cannot be altered during service.

*(i) Acquisition of the domicile of the husband is optional*

14. To address the first question, it is necessary to examine whether the mere fact of marriage results in a compulsory shift of domicile. There exist interpretational inconsistencies among courts regarding whether a wife's acquisition of her husband's domicile is a matter of law or choice.[21] The traditional common law rule under which a wife's domicile followed that of her husband is rooted in the doctrine of

dependency and aimed at preserving legal unity within the marital relationship. However, this dependency rule has come under strong criticism for subordinating a woman's agency. Lord Denning famously described it as "the last barbarous relic of a wife's servitude," calling for its abandonment in light of modern principles of equality and autonomy. This rule, born from the doctrine of coverture[22] which rendered a married woman "civilly dead" by merging her legal identity into that of her husband has been widely rejected across common law jurisdictions.[23] Legal reforms in the United Kingdom, New Zealand, Australia, and Singapore have abolished the automatic domicile rule, affirming a woman's right to independently determine her legal affiliation.[24] Even in jurisdictions like Malaysia, where no statute has been enacted, courts have recognized a woman's right to abandon her husband's domicile and assert her own.[25] From a constitutional standpoint, tethering a woman's legal identity and civic entitlements to her husband's domicile infringes upon her autonomy, dignity, and equality. The Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), to which Pakistan is a signatory[26], affirms a woman's right to be free from such marital subordination and to choose her domicile irrespective of her marital status.[27] Accordingly, the proposition that a woman's domicile automatically changes upon marriage is neither supported by contemporary constitutional values nor binding in the absence of express

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21 Dr. Muather Gul v. Government of Khyber Pakhtunkhwa 2025 MLD 36; Najm-un-Nisa v. Government of Khyber Pakhtunkhwa 2021 PLC (C.S.) 434; Dr. Shama Hidayat v. Chairman Public Service Commission 2018 PLC (C.S.) Note 93; Shabnam v. Government of Khyber Pakhtunkhwa 2015 PLC (C.S.) 1111 and Fareeda Noor v. Mehar Muhammad Nawaz 2005 CLC 669.

22 E. H. Deering, 'Coverture and Lasting Effects of Gender Inequality: An Analysis through Equal Protection Jurisprudence' Washington University Jurisprudence Review (Volume 16, Issue 2, 2024).

23 Reed v. Reed 404 U.S. 71 (1971); Frontiero v. Ricardson 411 U.S. 677 (1973); Kirchberg v. Feenstra 450 U.S. 455 (1981); Bombay Labour Union v. Messrs International Franchises AIR 1966 SC 942; C. B. Muthamma v. Union of India AIR 1979 SC 1868; Air India v. Nargesh Meerza AIR 1981 SC 1829; Joseph Shine v. Union of India AIR 2018 SC 4898, Murdoch v. Murdoch [1975] 1 SCR 423 and Bhe v. Magistrate Khayelitsha 2005 (1) SA 580 (CC).

24 Domicile and Matrimonial Proceedings Act 1973 (U.K.); Domicile Act, 1976 (New Zealand); Domicile Act, 1982 (Australia) and Section 52, Women's Charter 1961 (Singapore).

25 Teo Ka Fook v Loo Chiat Hui [2010] MLJU 636.

26 Pakistan ratified the CEDAW on April 12, 1996.

27 Articles 2, 5, 15 and 16, CEDAW.

legal compulsion. It is therefore held that a married woman retains the legal

discretion, choice or agency to either adopt her husband's domicile or retain her own. In the present case, the respondent, by her own volition, opted to adopt her husband's domicile, which is legally permissible.

*(ii) The domicile freezes on joining the civil service and cannot be changed during service in light of O.M. 1971*

15. Unlike general domicile concepts rooted in personal identity and legal affiliation, the interpretation of domicile for government servants must be aligned with the objectives and practical necessities of recruitment policies and service conditions. Domicile must be understood in light of the purpose and object of the relevant legal context. In service law, it is interpreted with reference to recruitment policies and service terms.[28] The Establishment Division's O.M. 1971 addresses the issue of domicile change after entry into government service:

> **Change of Domicile after entry into Government Service:** A question has arisen whether a government servant who entered service based on the domicile of a particular province/region may subsequently change domicile during service. While a government servant, as a Pakistani citizen, may change domicile under law, it has been decided that the domicile declared and accepted at entry shall be final for the duration of service and no later change shall be recognized for service terms, including postings and transfers. *(emphasis supplied)*

The O.M. 1971 permits civil servants irrespective of gender to change their domicile for purposes related to citizenship rights and obligations. However, the domicile declared and accepted at entry into civil service shall be final for the duration of service and no later change shall be recognized for service terms, including postings and transfers.[29] This principle equally applies to female civil servants. The rationale behind this is that Pakistan, as a constitutional Federation, comprises several Provinces with distinct socio-economic profiles and varying levels of development. To ensure equitable representation and fair opportunities across the Federation, the civil service recruitment process allocates vacancies based on provincial quotas determined by the domicile of the candidates. Domicile, in this context, serves as a constitutional tool to promote inclusivity and national integration by safeguarding the interests of less-developed regions and underrepresented populations. Once a candidate enters the civil service against a post allocated to a particular province or region, their domicile is considered "frozen" to maintain the

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[28] Mauzam Hanif v. Settlement Officer 2006 SCMR 642.

[29] Qaisar Khan v. Government of Khyber Pakhtunkhwa 2021 SCMR 67 and Muhammad Shakoor and Rehan Safdar v. Federal Public Service Commission PLD 2007 SC 381.

integrity of this federal balancing mechanism. It is also important to note that permitting the change of domicile may affect the mechanism of transfer and seniority as well. Disregarding seniority undermines bureaucratic impartiality, violates constitutional guarantees of due process and equality (Article 4 and 25 of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution"))[30] and breeds cynicism within the service. The erosion of seniority norms weakens administrative

stability.[31] Allowing post-induction changes in domicile would not only undermine the quota system but also open avenues for manipulation, enabling individuals to shift provincial affiliation for personal advantage, thereby diluting the constitutional promise of provincial parity. The freezing of domicile thus serves the larger constitutional purpose of federal harmony and administrative fairness within the civil service structure of Pakistan.

16. In this context, an unmarried female civil servant such as the respondent while legally entitled to adopt the domicile of her husband upon marriage, but for all service-related entitlements and obligations, her original domicile (in this case, KPK) continues to be the determining document. The question that now arises is whether the O.M. 1975 creates a specific exception that permits a female civil servant to change her domicile (or use her husband's domicile under the aforesaid O.M.) during service, only in limited cases where appointment to a higher post is through "direct recruitment"?

*Direct Recruitment of in-service female candidates is an exception to general rule*

17. Learned counsel for the respondent relied on O.M. 1975, arguing that because the advertised post was to be filled by "direct recruitment", the respondent's matrimonial domicile cannot be disregarded. O.M. 1975 states:

> **Married Female Candidates – Determination of Domicile**: According to Estt. Division's O.M. No. 2/2/67 dated August 26, 1968, a candidate's domicile is determined by their parents' domicile or, if the parents of a migrant candidate have not migrated to Pakistan, by the candidate's own residence and education in the province of domicile. The question whether a married female candidate can be deemed to share her husband's domicile has been considered, and it was decided that for direct recruitment, a married female candidate's domicile may be accepted as that of her husband. *(emphasis supplied)*

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[30] Hadayat Ullah v. Federation of Pakistan 2022 SCMR 1691 and Ajit Singh v. State of Punjab (1999) 7 SCC 209.

[31] Barbara Geddes, Politician's Dilemma: Building State Capacity in Latin America (University of California Press 1994) and Paul P Craig and Adam Tomkins (eds), The Executive and Public Law: Power and Accountability in Comparative Perspective (Oxford University Press 2006).

The above shows that a married candidate not yet in service may opt for either her own or her husband's domicile, and once chosen, that domicile is final for service terms. However, to assess O.M. 1975's applicability to a civil servant already in service, three objections raised by the learned Additional Attorney General must be addressed: (i) the advertised post was for initial recruitment not direct recruitment; (ii) direct recruitment implies first entry into service; and (iii) allowing an in-service female civil servant to

change domicile risks disrupting seniority and service structure.

*Direct Recruitment and Initial Recruitment are interchangeable terms*

18. Having clarified the distinct applicability of O.M. 1975 to female civil servants, it is essential to address the terminology surrounding recruitment, particularly the distinction or lack thereof between "direct recruitment" and "initial recruitment," which forms a critical basis for the arguments advanced. Service rules in Pakistan recognize three modes of appointment[32]: (i) initial recruitment, (ii) promotion, and (iii) transfer. Initial recruitment is defined as an appointment made otherwise than by promotion or transfer, typically through examination, test, or interview conducted by the Commission.[33] Notably, the term "direct recruitment" is absent from any Pakistani law or regulation. However, Indian service jurisprudence[34] employs a parallel classification comprising (i) direct recruitment, (ii) promotion, and (iii) transfer, with direct recruitment statutorily defined identically to Pakistan's initial recruitment. This semantic and functional equivalence is reinforced by frequent interchangeable use of "direct recruitment" and "initial recruitment" in various Pakistani departmental manuals and service documents.[35] Hence, it is legally unsound to treat these terms as distinct; they are interchangeable in both meaning and application.

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[32] Rule 3, Punjab Civil Servants' (Appointment and Conditions of Service) Rules, 1974; Rule 3, Khyber Pakhtunkhwa Civil Servants (Appointment, Promotion and Transfer) Rules, 1989 and Rule 3, Sindh Civil Servants (Appointment, Promotion and Transfer) Rules, 1974 and Rule 3, Balochistan Civil Servants (Appointment, Promotion and Transfer) Rules, 1979.

[33] Wahiduddin v. Province of Sindh 1980 PLC (C.S.) 390; Section 2(1)(d), Punjab Civil Servants Act 1974 provides that "initial recruitment" means appointment made otherwise than by promotion or transfer"; Section 2(1)(d), Sindh Civil Servants Act, 1973 provides "initial appointment" means appointment made otherwise than by promotion or transfer; Section 2(1)(d), Khyber Pakhtunkhwa Civil Servant Act 1973 provides "initial appointment" means appointment made otherwise than by promotion or transfer; Section 2(1)(c), Balochistan Civil Servants Act 1974 provides "initial appointment" means appointment made otherwise than by promotion or transfer; Section 2(1)(c), Civil Servants Act 1973 provides "initial appointment" means appointment made otherwise than by promotion or transfer; Section 2(j), Punjab Enforcement and Regulatory Authority (Appointment and Conditions of Service) Regulations, 2024 provides "Initial recruitment" means the appointment made other than by promotion or transfer of the employees; from any other service/ department.

[34] The Mysore State Civil Services Rules, 1957; I.P.S. (Regulation of Seniority Rules, 1954) and R. N. Nanjundappa v.
T. Thimmiah AIR 1972 SC 1767.

[35] Part II of O.M. No. 3/69/2000-CP-7, dated 27-03-2001; Part F of Extract from para 6 of Estt. Secretary's D.O letter No.1/9/73-F. IV dated 22-10-1973; Estt. Div. O.M.No.15/38/52-SE II, dated 29-1-1954; Estt. Div. O.M.No.1/9/74- ARC dated 12-9-1974; Estt. Div. O.M No. 3/59/2003-R.2, dated 24-10-2003; Estt. Div. O.M.No.56/2/48-Estts. (ME), dated 19-10-1948; Estt. Div. O.M.No.2/5/77/WC/R-IX, dated 11-1-1978; Estt. Div. O.M. No.11/1/81-R.5, dated 20-

8- 1981; Part F Estt. Div. O.M. No. 9/1/73-R.5, dated 22-8-1984; Estt. Div. O.M. No. 5(1)11/67-D.V., dated 21-3-1968;

*Scope of Direct Recruitment: Fresh Entrants vs In-Service Applicants*

19. Initially, the Court was inclined to accept the learned Additional Attorney General's interpretation that "direct recruitment" signifies only first entry into service. However, a deeper review of government service structures reveals that in-service civil servants, with a NOC from their parent department, may apply for vacancies designated for "direct recruitment". Thus, "direct recruitment" encompasses two categories: (i) fresh entrants from outside the service, and (ii) in-service candidates seeking appointment to new posts. Hence, the terms "initial recruitment"/"direct recruitment" cannot be strictly confined to a fresh candidate entering service for the first time as the same could equally involve an in-service candidate through an open competition.[36] Therefore, "direct recruitment"/"initial recruitment" does not exclusively mean first entry into service.

*One-Time Domicile Choice for Female Candidates: Purposive and Gender-Sensitive Interpretation of Domicile in Direct Recruitment*

20. An exception to the general principle under O.M. 1971 whereby the domicile of a civil servat stands frozen upon entering the civil service, has been carved out in the case of female officers who marry during service. Recognizing the constitutional values of equality, dignity, and the realities of social mobility that accompany marital life, a limited concession is provided whereby a woman officer may, only once, adopt the domicile of her husband if she seeks appointment to a post through direct recruitment. This exception acknowledges that marriage often entails a change in residence and social identity, and aims to accommodate such transitions without violating the broader principle of domicile integrity. However, this option is strictly a one-time concession in the entire service tenure of the female officer. Once exercised, the new domicile (based on husband's domicile) stands frozen and remains immutable regardless of whether the officer is subsequently divorced, widowed, or remarries a person from another province. This safeguard ensures that the exception does not evolve into an instrument of circumvention or manipulation, and preserves the constitutional scheme of fair and equitable representation across the Federation.

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Estt. Div. O.M. No. D. 210/84. R.5, dated 3-6-1986; Estt. Div. O.M.No.54/12/57-ME, dated 14-7-1951; Estt. Div O.M No. 4/6/2004-R.2, dated 4-05-2005; Estt. Div. D.O letter No.4/4/80-R.2, dated 31-10-1985; Estt. Secretary's D. O letter No.4/3/78-R. II, dated 7-8-1978; Estt. Secretary's D.O Letter No.5-PD.VI/85, dated 17-9-1987; Estt. Div. O.M. No.9/7/80-A.III, dated 23-9-1980; Estt. Div. O.M. No.4/3/80-R. II dated 8-5-1986; Estt. Div. O.M No.4/8/90-R.2, dated 2-9-1990; Estt. Div OM No. 4/10/2006-R-2, dated 01-08-2007; Estt. Div. OM No. 4/15/2006-R-2, dated 22-5-2007;

Estt. Div. OM No. 3/17/2005-R-2, dated 26-09-2006; Estt. Div O.M.No.1/22/66-D. V dated 17-10-1966; Estt. Div. O.M.No.2/51/78.D.III, dated 11-7-1979 and Estt. Secretary's D.O., letter No.4/20/74-A IV, dated 11-12-1974.

[36] Dr. P. Dananjayan v. The Principal (Writ Appeal No. 1423 of 2019).

21. The learned Additional Attorney General's contention that permitting the respondent's change of domicile would destabilize the civil service structure would have been correct if the respondent remained in the same service structure, however, the "direct recruitment" of in-service candidates involves new pay scales, distinct terms, and a separate seniority list. Such recruitment neither alters existing service conditions nor infringes on vested rights. We are conscious of the fact that the respondent would be accorded a benefit due to the change of her domicile as the advertised post was not for the KPK domicile holders, therefore her batchmates holding the KPK domicile were deprived to take part in the "direct recruitment" process but as the respondent has changed the domicile legally on the basis of her marriage and O.M. 1975 allows the domicile of the husband to be considered for "direct recruitment", no such discrimination exists as her case is distinguishable from that of her colleagues in the same cadre. It is well settled law that statutory provisions must be harmoniously interpreted, avoiding redundancy.[37] Where two interpretations exist, one favouring the rights of civil servants and the other favouring the State, the one beneficial to the civil servants prevails.[38] In interpreting the O.M. at hand, this Court has adopted a women-centric approach, consistent with Article 25(3) of the Constitution of Pakistan, which explicitly permits affirmative measures in favour of women. Such an interpretation advances substantive equality by recognizing historical and structural disadvantages faced by women, and ensures that the law is applied in a manner that promotes gender justice and inclusion. A purposive, gender-sensitive reading under Article 25(3),
34 and 35 of the Constitution supports allowing female candidates, whether fresh or in-service, a one-time, informed choice of domicile for "direct recruitment" under O.M. 1975. Once this choice is exercised the domicile is once again frozen for the purposes of the civil service. Any subsequent change in the marital status of a female civil servant (if any), would have no bearing on the domicile and her domicile of choice is frozen for the purpose of remaining service and for any posts arising out of "direct recruitment" in the future. Consequently, rejecting the respondent's matrimonial domicile was legally unsustainable. Applying this to the instant case, given that the respondent has exercised the option to choose her domicile, this would be treated as a one-time choice only in matters of direct rectuiment to a higher post during serivce.

[37] Waqar Zafar v. Haji Mazhar Hussain Shah PLD 2018 SC 81 and Aftab Shahban Mirani v. Muhammad Ibrahim PLD 2008 SC 779.

[38] Mohsin Ali Hasani v. Government of Pakistan 1990 SCMR 1685.

*Validity of Experience Certificate, NOC, and Domicile Documentation*

22. The learned Additional Attorney General's objection to the respondent's experience certificate on the ground that it was issued without a substantive appointment or promotion is without merit. While earlier certificates were issued by the Executive Director, PIMS, and the Additional Secretary, MNHS, the competent authority under Section V(5), (6), and (9) of the PMDC Regulations is the Pakistan Medical and Dental Council ("PMDC").[39] The PMDC issued a certificate on 31.10.2023, confirming that the respondent possesses 6 years, 4 months, and 29 days of teaching experience.[40] This certification was issued after duly considering her performance of duties as a designated Assistant Professor under an "internal arrangement". It was argued that the term "internal arrangement" does not connote that the respondent was posted as an Assistant Professor, hence her experience as such is not countable. However, in light of the certificates issued by PIMS, MNHS, and PMDC, the term "internal arrangement" is at best an indoor policy of PIMS and has no bearing on the rights of the respondent. No justifiable explanation has been given by PIMS or MHNS regarding the term "internal arrangement". In this background, the PMDC certificate remains valid and unchallenged, and has achieved finality.[41] Hence, the FPSC cannot override or disregard the jurisdiction and findings of the duly designated certifying authority.

23. In view of the above reasons, and not for the reasons given in the impugned judgment, this petition is hereby dismissed. Consequently, the orders of the FPSC dated 02.10.2014 and 10.07.2024, whereby the respondent's candidature was rejected, are set aside. It is pointed out that a seat of Associate Professor is still vacant. The petitioner is, therefore, directed to consider the case of the respondent for appointment for the post of Associate Professor on her Balochistan domicile strictly in accordance with law and after complying with all codal formalities within a fortnight of the receipt of this judgment.

*Real role of the Supreme Court and its Judges.*

24. The Supreme Court is not merely a forum for resolving disputes; it is the constitutional conscience of the nation, tasked with producing progressive and principled jurisprudence that breathes life

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39 Section V(5), (6) and (9), Pakistan Regulations for the Appointment of Faculty/Teachers/Examiners/Principals/ Deans/Vice Chancellors in Undergraduate and Postgraduate Medical and Dental Institutions and Medical Universities, 2018.

40 Yaqub Ali Khan v. Federal Public Service Commission 2019 SCMR 413.

41 Section V(9)(iv), Pakistan Regulations for the Appointment of Faculty/Teachers/Examiners/Principals/Deans/Vice Chancellors in Undergraduate and Postgraduate Medical and Dental Institutions and Medical Universities, 2018.

into the Constitution and bridges the distance between law and the lived realities of the people. It is the ultimate guardian of fundamental rights and the final sentinel against executive or legislative overreach. Judges of this Court are not passive interpreters of text, they are the custodians of liberty, equality, and institutional independence. The Court must remain alive to the evolving aspirations of society and innovate new remedies to advance justice.

25. Judges are to act with integrity and courage, to resist all encroachments, external or internal that threaten to erode the autonomy of the judiciary or subvert the rule of law. Judges must not fall prey to the lure of small, short-term benefits, whether of elevation, power, or personal comfort that may accrue if they speak the language of authority rather than that of the Constitution. Such benefits are illusory and transient. The true reward of a judge lies in preserving the dignity of the institution and the trust of the people. It is also the solemn duty of judges of this Court to call out, with moral clarity and institutional courage, those among their ranks who surrender to the power of the day at the cost of constitutional principles. Critique from within, when rooted in fidelity to the Constitution, is not disloyalty, it is the highest form of service to the judicial institution. History is a vigilant witness. It does not remember those who

accommodated power, but those who stood resolute in defense of principle. The jurisprudential legacy of a judge is not built on appeasement but on principled defiance when the soul of justice is imperiled. Courts must never become tools of expediency. Rather, they must be lighthouses of constitutional morality and guardians of democratic integrity. History will not absolve judges who abandon their constitutional duty; it will remember them not as dispensers of justice, but as collaborators in injustice.

26. A copy of this judgment be dispatched to the petitioner for immediate compliance of the judgment.

**Announced.**
Islamabad,
17th June 2025.

**2025 SCP 237**

**IN THE SUPREME COURT OF PAKISTAN**

**(Appellate Jurisdiction)**

**Bench-II:**
**Mr. Justice Syed Mansoor Ali Shah Mr.**
**Justice Aqeel Ahmed Abbasi**

Civil Petitions No. 3453-L/2019 and 23-L/2022.

*(Against the order dated 24.11.2021 and 13.09.2019 passed by the Punjab Service Tribunal, Lahore in Appeals No. 5717/2015 and 863/2019)*

Tahir Kazmi (in C.P.L.A. No. 3453-L/2019) Ali Asghar (in C.P.L.A. No. 23-L/2022)
Versus
Inspector General of Police, Punjab, Lahore (in CPLA No. 3453-L/2019)
Director General Statistics Department, Lahore, etc. (in CPLA 23-L/2022)

| | |
|---|---|
| For the petitioner(s): | Mr. Muhammad Usman Arif, ASC.<br>a/w Mr. Rana Iqbal, AHC.<br>(In C.P.L.A. No. 3453-L/2019)<br>Malik Saleem Iqbal Awan, ASC. (In<br>C.P.L.A. No. 23-L/2022) |
| For the respondent(s): | Mr. Khalid Masood Ghani, AAG, Pn.<br>Mr. Kashif Murtaza, Inspector (Legal). |
| Assisted by: | Mr. Umer A. Ranjha, Judicial Law Clerk,<br>Supreme Court of Pakistan. |
| Date of hearing: | 14.05.2025. |

JUDGMENT

**Syed Mansoor Ali Shah, J.–** These petitions raise a recurring question in service jurisprudence: whether a civil servant is entitled to back benefits upon reinstatement following the setting aside of a penalty of dismissal, removal, or compulsory retirement. We are also called upon to determine how the intervening period between removal and reinstatement ought to be treated.

C.P.L.A. No. 3453-L/2019 (Tahir Kazmi)

2. The petitioner, a Head Constable in the Punjab Police, was compulsorily retired from service by the SP, Madina Town, Faisalabad, on 29.04.2011, following a

show-cause notice issued on 01.04.2011. His departmental appeal was rejected by the Capital Police Officer, Faisalabad,

on 15.12.2017. A subsequent review before the Inspector General of Police led to a partial modification of the penalty as it was reduced to forfeiture of two years of approved service, and the intervening period was ordered to be treated as leave without pay. Aggrieved by this, the petitioner filed an appeal before the Punjab Service Tribunal, Lahore which, *vide* its judgment dated 03.09.2019 ("impugned judgment"), reinstated the petitioner but treated the intervening period as special casual leave without pay. Through this petition for leave to appeal, the petitioner challenges the denial of back benefits for the intervening period and the imposition of the modified penalty.

C.P.L.A. No. 23-L/2022 (Ali Asghar)

3. The petitioner in this case was removed from service on 25.06.2014 following departmental proceedings under the Punjab Employees Efficiency, Discipline and Accountability Act 2006, for 46 days of unauthorized absence. His departmental appeal was dismissed on 09.06.2015. He then approached the Punjab Service Tribunal, Lahore which partially allowed the appeal by modifying the penalty to forfeiture of three years of approved service and ordered reinstatement. However, the Tribunal, in its judgment dated 24.11.2021 ("impugned judgment"), directed that the intervening period be treated as leave without pay. The petitioner now seeks to challenge both the denial of back benefits and the imposition of the modified penalty.

*Concept of Back Benefits*

4. The core issue is the entitlement to back benefits. Grant of back benefits while not expressly defined in the service laws of Pakistan is a well-established remedy in Pakistan as well as other jurisdictions. As defined in Black's Law Dictionary, "back pay" refers to the salary an employee should have received but was denied due to unlawful employer action.[1] A "back pay award" restores the economic status quo ante, compensating for the loss incurred.[2] In our jurisdiction, the term "back benefits" typically includes arrears of salary and related service entitlements.[3] Although broader meanings may exist, this discussion

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1 Bryan A Garner (ed), Black's Law Dictionary (10th edn, Thomson Reuters 2014) 166.

2 Ibid and Aguinaga v. United Food & Commercial Workers Int'l Union 993 F.2d 1463, 1473.

3 Muhammad Sharif v. Inspector General of Police, Punjab 2021 SCMR 962 and Smith v. West, 1999 US App Vet Claims LEXIS 475, 6.

confines "back benefits" to arrears of pay and other emoluments denied due to wrongful dismissal or removal.

5. This legal understanding of back benefits is closely tied to the effect of reinstatement, which in our jurisprudence, nullifies the dismissal or removal order, restoring the employee to their previous position as if the dismissal or removal had never occurred.[4] Reinstatement thus presumes the restoration of all financial entitlements, unless specific exceptions apply. The logical corollary is that the reinstated civil servant is entitled to all benefits lost during the period of wrongful removal, unless it is shown that the civil servant was gainfully employed elsewhere or that reinstatement was conditional.[5]

*Doctrine of Constructive Continuity*

6. This presumption of full legal restoration finds resonance in the common law doctrine of *vanishing dismissal*, recognized particularly in the United Kingdom, where a successful appeal against dismissal causes the dismissal to "vanish" as though it never existed.[6] Under this doctrine, when a civil servant's removal or dismissal is declared unlawful, either on procedural grounds, violation of due process, or on the merits of the disciplinary action, the law sets aside that punitive action. The restorative power of *vanishing dismissal*, therefore, is not merely a remedial choice but flows from a deeper legal commitment to the rule of law that acts done without lawful authority cannot be allowed to produce lawful effects. The doctrine reaffirms that state power must be exercised within legal limits, and when those limits are transgressed, the consequence must be a full return to the pre-violation status. What follows, however, has remained a matter of practical adjustment: the civil servant is reinstated, the period of absence is regularized, and in many cases, salary and other emoluments are awarded. This sequence of reliefs rests on a juridical fiction: that the civil servant is deemed never to have been lawfully removed in the first place.

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[4] Muhammad Sharif v. Inspector General of Police, Punjab 2021 SCMR 962, Chairman State Life v. Siddiq Akbar 2013 SCMR 752 and Umer Said v. District Education Officer (Female) 2007 SCMR 296.

[5] Inspector General of Police, Punjab v. Tariq Mahmood 2015 SCMR 77; Muhammad Bashir v. Government of the Punjab 1994 SCMR 1801 and Pakistan v. Mrs. A.V. Issacs PLD 1970 SC 415.

[6] Marangakis v. Icelands Food Limited [2022] EAT 161; Folkestone Nursing Home v. Patel [2018] EWCA Civ 1843 and Roberts v. West Coast Trains Ltd [2004] IRLR 789.

7. What we now seek to formally recognize is that this fiction amounts to more than a technical adjustment, it is a constructive legal state that reconstructs the continuity of service and restores the civil servant to the position he or she would have occupied had the illegal order not been passed. We propose to refer to this idea as the doctrine of *constructive continuity*. Although no such doctrine under this name exists in the jurisprudence of Pakistan or comparative jurisdictions, its elements are implicit in the way courts grant relief after declaring a termination unlawful. *Constructive continuity*, as we conceive it, offers a principled and doctrinal framework for such relief. It rests on the notion that an unlawful act cannot be permitted to cause enduring disadvantage, and that the law must, to the extent possible, restore the person to the status quo ante. In this sense, the doctrine draws conceptual strength from the broader legal principle of restitution, which seeks to undo the unjust consequences of an unlawful act and re-establish the rightful position of the aggrieved party.

8. The doctrine of *constructive continuity*, therefore, proposes that once a dismissal or removal is declared unlawful, the civil servant shall be deemed to have remained in continuous service during the period of absence and shall be entitled, subject to lawful deductions or limitations, to all the salary, allowances, increments, and service-related benefits that would have accrued had the unlawful act not occurred. The purpose of this doctrine is not merely to provide compensation but to restore the legal and institutional integrity of the employment relationship.

9. We are conscious that this is the first time such a doctrine is being formally articulated in our jurisprudence. It is our considered view that adopting the language and structure of *constructive continuity* provides coherence, consistency, and clarity to future cases where civil servants are reinstated following wrongful termination. In the absence of a codified rule or settled precedent using this terminology, we believe this formulation will serve as a valuable guidepost for courts, tribunals, and administrative authorities, and will enhance the transparency and reasoning behind reliefs granted in reinstatement cases. It is a settled principle that when the foundational order is without lawful authority, the

superstructure built upon it collapses.[7] The civil servant must be placed in the position they would have occupied had the unlawful action not occurred. The concept of *constructive continuity*, as articulated here, reinforces this consequence and gives expression to the broader principles of legal restoration and administrative fairness that underpin service jurisprudence.

10. This doctrine, while coined for the first time, is rooted in the constitutional promise of fairness, restitution, and institutional integrity. It ensures that a wrongfully removed public servant is treated, for all legal and financial purposes, as having continued in service, thereby entitling them to the salary, benefits, and emoluments that would have accrued but for the wrongful termination. *Constructive continuity* is, therefore, not only an administrative doctrine; it draws strength from constitutional protections. Article 9 of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution") enshrines the right to life, which includes the right to livelihood[8], a right that is fundamentally impaired when a civil servant is deprived of his employment through an unlawful act. Article 10A secures the right to fair trial and due process[9], which would be hollow if reinstatement does not lead to full restitution. Article 14 protects the dignity of man[10], and Article 25 ensures equality before the law[11]. Denying back benefits to a reinstated civil servant who has suffered procedural or substantive injustice infringes upon these constitutional guarantees. It amounts to continued punishment despite legal vindication. We, therefore, hold that such imaginative reconstruction, grounded in equity and justice, constitutes a legitimate and necessary doctrinal development in service jurisprudence.

11. This constitutional foundation finds affirmation in judicial precedent, most notably in *Tariq Mahmood*[12] *and* *Muhammad Sharif*[13] where this Court reaffirmed that the grant of back benefits is the norm

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[7] Superintendent of Police v. Ijaz Aslam 2024 SCMR 1831; Vice Chancellor Agriculture University v. Muhammad Shafiq 2024 SMCR 527 and Pakistan Peoples Party Parliamentarians v. Federation of Pakistan PLD 2022 SC 574.

[8] Aatika Hina Mushtaq v. Secretary Special Education, Government of Punjab 2025 SCP 158 (SC citation); Divisional Superintendent v. Umar Daraz 2023 SCMR 761; Province of Punjab v. Kanwal Rashid 2021 SCMR 730; Pir Imran Sajid Versus Managing Director 2015 SCMR 1257; Abdul Wahab v. HBL 2013 SCMR 1383 and Olga Tellis v. Bombay Municipal Corporation AIR 1986 SC 180.

[9] Naveed Asghar v. The State PLD 2021 SC 600 and Altaf Ibrahim Qureshi v. Aam Logue Ittehad PLD 2019 SC 745.

[10] Mubarik Ali Babar v. Punjab Public Service Commission 2023 SCMR 518; Uzma Naveed Chaudhary v. Federation of Pakistan PLD 2022 SC 783 and Malik Ubaidullah v. Government of Punjab 2021 PLC (C.S.) 65.

11 Muhammad Yasin v. D.G. Pakistan Post Office 2023 SCMR 394 and National Commission on Status of Women v. Government of Punjab PLD 2019 SC 218.

12 Inspector General of Police, Punjab v. Tariq Mahmood 2015 SCMR 77.

13 Muhammad Sharif v. Inspector General of Police, Punjab 2021 SCMR 962.

and denial of service benefits to such reinstated employee is an exception.[14] Any deviation from this must be justified by clear evidence that the employee was gainfully employed elsewhere during the intervening period. The logic is straightforward - when a court declares an official action unlawful, it must undo not only the decision but the resulting harm. Restitution is therefore integral to corrective justice, not an exercise of discretion.

12. The legal obligation to restore service benefits upon reinstatement also finds expression in the statutory framework, where the second proviso to Section 16 of the Punjab Civil Servants Act, 1974 empowers the competent authority to determine arrears of pay when a dismissal, removal, or reduction in rank is set aside.[15] However, this discretion is not absolute. It must be exercised in accordance with constitutional guarantees and judicial principles.[16] In particular, if the foundational order is declared without lawful authority, then its consequences, including the denial of salary, must also be set aside.

13. That said, the basis for reinstatement influences the grant of back benefits. When reinstatement is granted on merits, for instance, where charges are disproved or found legally unsustainable, then full back benefits must follow as a matter of right.[17] The civil servant, having been wrongfully excluded from service, is entitled to be made whole. However, where reinstatement is based on procedural infirmities such as denial of a hearing or non-compliance with mandatory inquiry procedures, the award of back benefits may be deferred, pending the outcome of a fresh disciplinary inquiry. The principle here is to balance legal restoration with procedural fairness to the employer. Where a dismissal is found disproportionate and a lesser penalty is substituted such as forfeiture of increments or censure, the substitution must be deemed to operate

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[14] Muhammad Sharif v. Inspector General of Police, Punjab 2021 SCMR 962; Inspector General of Police, Punjab v Tariq Mahmood 2015 SCMR 77; Sohail Ahmed Usmani v DG CAA 2014 SCMR 1843; Chairman State Life v Siddiq Akbar 2013 SCMR 752; Muhammad Hussain v E.D.O. (Education) 2007 SCMR 855; Umer Said v District Education Officer (Female) 2007 SCMR 296 and General Manager v Mehmood Ahmed Butt 2002 SCMR 1064.

[15] **Section 16. Pay.** –A civil servant appointed to a post shall be entitled, in accordance with the rules, to the pay sanctioned for such post.

Provided that, when the appointment is made on a [current charge or acting charge basis in the manner prescribed] or by way of additional charge, his pay shall be fixed in the prescribed manner:s Provided further that where a civil servant has been dismissed or removed from service or reduced in rank, he shall, in the event of the order of dismissal, removal from service or reduction in rank being set aside, be entitled to such arrears of pay as the authority setting aside the order may determine.

16 Secretary, Government of Punjab v. Khalid Hussain Hamdani 2013 SCMR 817 and Brean v. Amalgamated Engineering Union (1971) 2 QB 175).

17 Muhammad Sharif v. Inspector General of Police, Punjab 2021 SCMR 962.

retrospectively, as if the lesser penalty had been imposed ab initio. The civil servant, in such cases, is entitled to the full range of service-related benefits (salary, allowances, increments, seniority, and pension rights) for the intervening period, subject only to such deductions or limitations as are consistent with the nature of the modified or substituted penalty. If the substituted or modified penalty has any bearing on the quantum of back benefits, then the financial entitlements shall be calibrated accordingly, in a manner that reflects the revised disciplinary outcome without undermining the continuity of service. To deny such back benefits, despite acknowledging that the original penalty was excessive, would perpetuate the very disproportionality the Court seeks to remedy. This would offend the principles of fairness, non-discrimination, and proportionality embedded in Articles 4 and 25 of the Constitution. The Court, therefore, holds that in all such cases, the doctrine of *constructive continuity* shall apply: the civil servant shall be deemed to have remained in service subject to the modified or substituted penalty, and shall accordingly be entitled to all back benefits that would have accrued under the corrected disciplinary outcome.

14. Regardless of the extent of financial benefits granted, the intervening period between a civil servant's removal and subsequent reinstatement must be regularized to maintain the continuity of service. This is, however, a separate theme from back benefits. The reason for grant of extraordinary leave without pay or "leave of the kind due" is to ensure that the service record of the civil servant remains unbroken[18], thereby safeguarding eligibility for pension, promotion, seniority, and other ancillary service benefits. As held by this Court, any failure to recognize such intervening periods results in an unlawful forfeiture of rights already earned.[19] It constitutes a constructive discontinuity in service and violates both constitutional guarantees and statutory protections.

15. In this respect, *constructive continuity* functions as a constitutional bridge. It ensures that reinstatement is not an empty gesture but a restorative act, fully aligned with Articles 9, 10A, 14, and 25 of the Constitution. It prevents wrongful state action from leaving lasting

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[18] Muhammad Sharif v. Inspector General of Police, Punjab 2021 SCMR 962; National Bank of Pakistan v Zahoor Ahmed Mengal 2021 SCMR 144; NAB v Muhammad Shafique 2020 SCMR 425; Federation of Pakistan v Mamoon Ahmed Malik 2020 SCMR 1154.

[19] Muhammad Sharif v. Inspector General of Police, Punjab 2021 SCMR 962.

scars on an individual's career and livelihood. To reinstate a civil servant without restoring their status, entitlements, and dignity is to offer a remedy that fails to remedy and justice that falls short of being just.

16. Applying these principles to **C.P.L.A. No. 3453-L/2019 (Tahir Kazmi)**, the petitioner, a Head Constable in the Punjab Police, was compulsorily retired on account of an omission in the discharge of official duties. In departmental review, fault was indeed established, though not of a degree warranting compulsory retirement. Accordingly, the penalty was modified to forfeiture of two years of approved service. The Tribunal reinstated the petitioner but directed that the intervening period be treated as special casual leave without pay, thereby depriving him of all back benefits. No material was placed on record to suggest that the petitioner was gainfully employed during this period, nor was his reinstatement made conditional on any pending inquiry. In such circumstances, the denial of back benefits is both legally and constitutionally unsustainable. Once reinstated, the petitioner was entitled to be treated as if he had never left service. The impugned judgment fails to give effect to the doctrine of *constructive continuity* and ignores the petitioner's entitlement to full restitution. Denial of back benefits violate Articles 4, 9, 14, and 25 of the Constitution. As to the reduction of penalty from compulsory retirement to forfeiture of two years of approved service, we see no ground to interfere, and the petition is dismissed to that extent. Accordingly, the impugned judgment is modified to the extent that the petitioner is granted full back benefits, including arrears of pay, increments, and pensionary entitlements, subject to the effect of the modified penalty, with effect from 29.04.2011, the date on which the original penalty of compulsory retirement was imposed.

17. In **C.P.L.A. No. 23-L/2022 (Ali Asghar)**, the petitioner was removed from service on account of being absent without authorization for 46 days. The Tribunal, while acknowledging the disproportionality of the penalty, modified it to forfeiture of three years of approved service and reinstated the petitioner. However, it simultaneously directed that the intervening period be treated as leave without pay, thereby denying all back benefits. While the petitioner was not fully exonerated, and some fault was duly attributed, he remains entitled to back benefits calibrated in accordance with the modified penalty. Once reinstated with a lesser

punishment, the petitioner is to be treated as having remained in service, subject only to the consequences that lawfully flow from the substituted penalty. Denying all back benefits, despite setting aside the original penalty as excessive, amounts to a disproportionate outcome that undermines the principles of fairness and *constructive continuity*. As to the reduction of penalty from removal from service to forfeiture of three years of approved service, we see no ground to interfere, and the petition is dismissed to that extent. Accordingly, the petition is partially allowed. The impugned judgment is modified to the extent that the petitioner is granted back benefits, including arrears of pay, increments, and pensionary entitlements subject to the effect of the substituted penalty, with effect from 25.06.2014, the date on which the original penalty of removal from service was imposed.

18. These petitions are converted into appeals and partially allowed in the above terms.

**2025 SCP 285**

**IN THE SUPREME COURT OF PAKISTAN**

**(Appellate Jurisdiction)**

**PRESENT:**

**Mr. Justice Syed Mansoor Ali Shah Mrs.**

**Justice Ayesha A. Malik**

**C.P.L.A. No. 88-P of 2022**

*(Against judgment dated 03.11.2021 passed by the Peshawar High Court, Peshawar in FAB No.37-P of 2011)*

Abdul Salam Khan ***…Petitioner***

Versus

M/s Bank Al-Habib Ltd, etc. ***…Respondent(s)***

For the Petitioner(s) :
Nemo.

For the Respondent(s) :
N.R.

Date of Hearing : 18.07.2025.

ORDER

**Syed Mansoor Ali Shah, J**.- The present petition arises out of a challenge to the auction of an immovable property conducted by a bank in execution of a money decree dated 26.04.2010. The auction took place in 2011. The petitioner promptly raised objections the same year, which were dismissed. An appeal was preferred before the High Court and remained pending for an extraordinary period of ten (10) years, culminating in a decision in 2021. The matter then reached this Court in 2022 and is being taken up now, three years later, in 2025.

2. The question that engages the attention of this Court is not limited to the validity of the auction; rather it extends to whether any meaningful relief can now be granted after the passage of fourteen years. Even if

the petitioner's claim had merit, the sands of time have all but eroded its potency. Justice delayed is not merely justice denied; it is often justice extinguished. In this case, the petitioner's claim stands virtually interred under the weight of protracted judicial indifference.

3. It is telling that, after fourteen years since the auction and due notice, neither the petitioner nor any authorized representative has appeared before this Court to pursue the petition. In these circumstances, granting any further adjournment is both unwarranted and inconceivable. We have, nevertheless, undertaken a careful examination of the petitioner's objections and the record of the case. The objections to the auction proceedings do not appear to be tenable, and we find no reason to deviate from the concurrent findings of the courts below. Accordingly, the petition stands dismissed on merits as well as for non-prosecution. Office shall dispatch a copy of this order to the parties for information and record.

4. Having examined the case, the Court cannot remain indifferent to the systemic malaise of delay in the adjudication of cases. In this case the appeal of the petitioner kept pending before the High Court for ten (10) years. It is beyond cavil that delay in adjudicating cases by the courts at any tier of the justice system corrodes public confidence in the judiciary, undermines the rule of law, and disproportionately harms the weak and vulnerable who cannot afford the cost of prolonged litigation. Delay in adjudication carries severe macroeconomic and societal consequences: it deters investment, renders contracts illusory, and weakens the institutional legitimacy of the judiciary. A justice system's credibility rests not only in the fairness of its decisions but also in the timeliness with which those decisions are rendered.

5. The issue is not merely administrative, it is constitutional. The right to access to justice is guaranteed by Articles 4, 9 and 10A of the Constitution of the Islamic Republic of Pakistan, 1973.[1] It encompasses within it the right to a fair and timely trial. Delay that renders a remedy ineffective or a right illusory amount to a denial of due process. Justice, to be real, must be both just and timely.

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[1] Baz Muhammad Kakar v. Federation of Pakistan PLD 2012 SC 923; Khan Asfandyar Wali v. Federation of Pakistan PLD 2001 SC 607; Liaqat Hussain v. Federation of Pakistan PLD 1999 SC 504; Mehram Ali v. Federation of Pakistan PLD 1998 SC 1445; Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324; Government of Balochistan v. Azizullah Memon PLD 1993 SC 341 and Benazir Bhutto v. Federation of Pakistan PLD 1988 SC 416.

6. The statistics speak for themselves. It is pertinent to highlight that over 2.2 million cases are currently pending before courts across Pakistan, including approximately 55,941 cases before this Court alone,[2] inspite of enhancing the number of judges at the Court. These figures are not abstract; they represent disputes suspended in time.

7. Delay in adjudication is not merely a by-product of docket congestion or branch-level inefficiencies; it is a deeper, structural challenge of judicial governance. The Court, as a matter of institutional policy and constitutional responsibility, must urgently transition toward a modern, responsive, and intelligent case management framework. Such a system must, at a minimum, ensure: the early fixation of cases on a non-discriminatory basis; the elimination of "queue-jumping" and preferential scheduling; the prioritization of matters involving constitutional, economic, or national importance without compromising the timely resolution of individual claims; the implementation of age-tracking protocols to automatically identify dormant cases; and the judicious use of Artificial Intelligence ("AI") tools to assist in scheduling and triage while preserving the sanctity of judicial discretion.

8. Judicial systems across the world have recognized that delay is not an intractable inevitability but a solvable institutional challenge. Countries such as Singapore, the United Kingdom, Brazil, Estonia, Canada, China, Denmark, and Australia have undertaken comprehensive reforms combining technology, structural innovation, and procedural discipline to reduce backlog and enhance judicial efficiency. Through tools such as e-filing, real-time dashboards, automated scheduling, and transparent digital oversight, these jurisdictions have moved from being passive custodians of dockets to active managers of justice delivery. These international experiences underscore a basic truth: delays in justice are not inevitable; they are a product of institutional design, and can be remedied with vision, planning, and resolve. The judiciary of Pakistan must draw upon these

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[2] Summary Statement of Case Institution, Disposal and Pendency (July 15, 2025), Supreme Court of Pakistan <https://www.supremecourt.gov.pk/downloads_judgements/all_downloads/Fortnightly_Disposal_Report.pdf> accessed; Judicial Statistics, 3rd Bi-Annual Report (January-June 2024) Law and Justice Commission < http://www.ljcp.gov.pk/reports/3bar.pdf> accessed 22 July 2025.

global lessons and commit to transformative reform that integrates technological innovation, administrative restructuring, and disciplined case management. Courts must evolve into engines of timely, transparent, and citizen-focused justice.

**JUDGE**

Islamabad.
18 July, 2025.

Approved for Reporting.
Umer A. Ranjha, JLC*

**2025 SCP 308**

**IN THE SUPREME COURT OF PAKISTAN**

**(Appellate Jurisdiction)**

**Bench-II:**

**Mr. Justice Syed Mansoor Ali Shah Mr.**

**Justice Aqeel Ahmed Abbasi**

**Civil Petition No. 1107-L of 2015 and Civil Appeal No. 247-L of 2017** *(Against the judgment dated 28.04.2015 passed by the Lahore High Court, Lahore in W.P. No. 29864/2014)*

Ambreen Akram

***… Petitioner***

***Versus***

Asad Ullah Khan etc.

***… Respondents***

For the Petitioner: Mr. Rana Rashid Akram Khan, ASC.

For the Respondents: Mr. Umer Ijaz Gilani, ASC, a/w respondent No. 1 in person.

Amici Curiae:

Assisted by:

Date of Hearing:

Professor Khaled Abou El Fadl, Distinguished Professor of law, UCLA School of Law, Dr. Muhammad Zubair Abbasi, Lecturer in Law, School of Law and Social Sciences, University of London and Ms. Fatima Yasmin Bokhari, CEO Musawi, Advocate High Court, assisted by Barrister Khadija Yasmin Bokhari, Advocate High Court.

Mr. Umer A. Ranjha, Judicial Law Clerk and Ms. Uzma Zahoor, Civil Judge/Research Officer, Supreme Court of Pakistan.

08.07.2025.

JUDGMENT

**Syed Mansoor Ali Shah, J.**– This case raises two foundational questions at the intersection of Islamic law, constitutional rights, and lived social realities: *When does a Muslim woman become entitled to maintenance within a marriage?* And, under *what circumstances, if any, may a husband be excused from his marital obligation to pay maintenance to his wife?* At stake is not merely the contemporary interpretation of Islamic law, but the very meaning of marriage (*nikah*) and marital relationship, the scope of financial independence of a woman within marriage and our Constitution's[1]

[1] Constitution of the Islamic Republic of Pakistan (1973).

promise to uphold the dignity, privacy and equality of an individual, the protection of the family and participation of women in all spheres of life.

2. Brief facts giving rise to these questions are that marriage between the petitioner (wife) and the respondent (husband) was solemnized through the contract of marriage ("nikahnama") dated 02.11.2012. Though *rukhsati*[2] was mutually scheduled for February 2013, the respondent delayed it for over a year. In October 2013, the petitioner claimed maintenance for the period since marriage by approaching the Family Court, Faisalabad[3]. Despite submitting a written statement, the respondent remained absent during reconciliation proceedings, prompting the court to proceed *ex-parte* awarding maintenance at Rs. 3,000/- per month from the date of the marriage till the subsistence of the marriage through judgment and decree dated 12.03.2014. Aggrieved, both parties filed appeals before the learned District Judge, Faisalabad. Meanwhile the respondent divorced the petitioner on 02.05.2014. The District Court partly allowed the petitioner's appeal on 27.10.2014, dismissed that of the respondent, and enhanced the maintenance allowance from Rs. 3,000/- to Rs. 5,000/- per month till the subsistence of marriage.[4] Subsequently, both parties approached the Lahore High Court, Lahore and *vide* judgment dated 28.04.2015 ("impugned judgment"), the High Court allowed the respondent's petition on the ground that as the marriage was never "consummated," the petitioner was not entitled to maintenance and dismissed the petition of the petitioner and set aside the judgments and decrees of the courts below. Hence, the instant petition for leave to appeal and connected civil appeal[5] by the petitioner before this Court.

3. Learned counsel for the petitioner argued that the impugned judgment is legally unsustainable and contrary to settled principles of family law. He submitted that the petitioner was lawfully entitled to maintenance from the date of marriage until the date of divorce, particularly in view of the respondent's persistent failure to perform *rukhsati* and take the petitioner to her marital home. Conversely, learned counsel for the respondent-husband, Mr. Umer Ijaz Gilani, ASC appointed by the Court in view of the respondent's plea that

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2 The English word for "rukhsati" is "to depart" or "to take leave". It refers to the ceremony where the bride leaves her family home to join her husband's household after the wedding. It can also be translated as "farewell" or "seeing- off".

3 The petitioner claimed monthly maintenance of Rs. 25,000, along with arrears for the period from November 2012 to October 2013.

4 It is noted that the appellate court failed to consider that, during the pendency of the appeal, the respondent had
already divorced the petitioner.

5 The connected civil appeal was filed against the petition dismissed that of the petitioner by the Lahore High Court.

he was unable to engage counsel submitted that the respondent contracted marriage under family pressure and never promised for *rukhsati*. Being dissatisfied with the marriage from the outset, he subsequently divorced the petitioner. Referring to The Hidayah[6], learned counsel argued that a wife's entitlement to maintenance arises only once she shifts to the husband's residence, which, according to him, did not occur in the present case. Therefore, according to the learned counsel, the judgments and decrees of the courts below were based on a misapplication of the law and facts, and the High Court rightly set them aside through the impugned judgment.

*Submissions of the Amici Curiae*

4. Professor Khaled Abou El Fadl, in his amicus brief submitted via email from the University of California Los Angeles (UCLA), United States, addressed the classical juristic foundations of maintenance (*nafaqa*) under Islamic law. He noted that the concept of maintenance is traditionally rooted in iḥtibās, commonly understood as the wife's availability for the marital relationship. He outlined two principal juristic approaches. The majority Ḥanafī and early *Shāfiʿī* position holds that maintenance becomes obligatory upon the conclusion of a valid marriage contract, irrespective of consummation, unless the wife is at fault. In contrast, the *Mālikī*, *Ḥanbalī*, and later *Shāfiʿī* view links iḥtibās more narrowly to consummation. Even under the latter view, Professor El Fadl explained, if the wife offers herself for cohabitation and the husband fails to consummate the marriage through no fault of hers, her entitlement to maintenance may still arise. Ultimately, he endorsed the Ḥanafī position, firmly rejecting the notion that maintenance is a *quid pro quo* for conjugal access. He described such a framing as "clearly patriarchal and disrespectful towards women," arguing instead that maintenance becomes due upon the formation of a valid marriage contract. Professor El Fadl emphasized that once a valid contract is concluded, the wife "relies to her detriment" on the marital bond and becomes unavailable to other suitors, thereby acquiring a legitimate right to maintenance, even in the absence of consummation, particularly where the husband has failed to provide a marital home. He concluded his submissions by stating: "...that at a minimum, the position that would entirely be consistent with *Sharīʿah* is that if there is a valid contract, and a woman does not unreasonably

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6 Burhan al-Din al-Farghani al-Marghinani, Al-Hidayah: The Guidance, vol 2, tr Imran Ahsan Khan Nyazee (Federal Law House 2015).

refuse to consummate the marriage before seeking a divorce, then she should be entitled to *nafaqa*."

5. Dr. Muhammad Zubair Abbasi, similarly, contended that under both Islamic and Pakistani law, a husband's duty to maintain his wife arises immediately upon a valid marriage, regardless of *rukhsati* or consummation. He critiqued colonial-era interpretations[7] for embedding patriarchal assumptions that wrongly condition a wife's entitlement to maintenance on physical obedience or cohabitation. Contrasting this with the classical Islamic view of marriage as a solemn civil contract (*'aqd*) not a transactional exchange, Dr. Abbasi underscored that maintenance flows directly from the contract. Relying on Islamic principles, classical jurisprudence, and statutory developments such as Section 9 of the Muslim Family Laws Ordinance, 1961 ("MFLO") and Section 17A of the Family Courts Act, 1964 ("Act"), he argued that courts have rightly affirmed that consummation is not a precondition to maintenance. He submitted that unjustly tying maintenance to consummation undermines women's constitutional rights to dignity and equality under Articles 14, 25, and 35 of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution"). In conclusion, Dr. Abbasi urged the Court to reaffirm that maintenance is a legal and constitutional duty activated by the marriage itself.

6. Ms. Fatima Yasmin Bokhari, argued that a wife's right to maintenance flows directly from the solemnization of a valid marriage, and is neither conditioned on consummation nor on the socio-cultural practice of *rukhsati*. Citing constitutional provisions, Islamic principles, and case law, she contended that making maintenance contingent on consummation undermines women's constitutional rights, enables bad- faith avoidance by husbands, and imposes an unfair evidentiary burden on wives. Ms. Bokhari called on the Court to move beyond patriarchal constructs historically embedded in classical jurisprudence. She critiqued the "maintenance–obedience complex" that links a wife's right to financial support to her physical submission, arguing that such a notion is neither Qur'anic nor consistent with contemporary Islamic values. She emphasized that Islam envisions marriage as a contract of

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[7] Legal historians have noted how the flexible and context-sensitive nature of classical *fiqh* was transformed into a rigid, codified system known as Anglo-Muhammadan Law, later termed Muslim Personal Law during the colonial period in British India. See Scott Kugle, 'Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia' (2001) 35 Modern Asian Studies 257-313; Elisa Giunchi, 'The Reinvention of Sharī'a under the British Raj: In Search of Authenticity and Certainty' (2010) 69 The Journal of Asian Studies 1119-1142.

mutual respect, compassion, and reciprocity not subordination.[8] Maintenance, she submitted, is not a reward for obedience but a legal entitlement grounded in dignity and mutual care inherent in the marital bond. Referencing reforms in countries like Tunisia, Morocco, and Turkey, where obedience is no longer tied to maintenance, and marriage is redefined based on equality,[9] she called on the Court to affirm maintenance as an unconditional right consistent with both Islamic teachings and Pakistan's constitutional promise of gender justice and equality.

7. We have heard the learned counsel for the parties and have hugely benefited from the wisdom of the amici curiae. We have carefully examined the impugned judgment, the applicable law, and the record of the case. We now proceed to address the questions framed above.

A. *When does a Muslim woman become entitled to maintenance within a marriage?*

8. Marriage under Islamic law is regarded both as an act of devotion (*ibadat*) and a social transaction (*muamalat*).[10] According to Baillie, marriage, like other contracts requires declaration and acceptance for its constitution and both, must be expressed in such a manner as to demonstrate the intention, without any sort of ambiguity.[11] According to Dr. Tanzil-ur-Rahman, marriage or nikah is a religious legal contract that regularizes the physical relationship between man and woman, establishes the lineage of their progeny and creates civil rights and obligations between them.[12] The essential requirements of a valid marriage include offer (*ijab*) and acceptance (*qabul*),[13] exchanged either directly or through representatives or guardians,[14] along with free and informed consent.[15] These elements

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[8] Amina Wadud, Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective (2nd edn, Oxford University Press 1999) and Asma Barlas, Believing Women in Islam: Unreading Patriarchal Interpretations of the Qur'ān (rev edn, University of Texas Press 2019).

[9] Ashraf Booley, 'Progressive Realisation of Muslim Family Law: The Case of Tunisia' (2019) 22 Potchefstroom Electronic Law Journal; World Bank, Morocco's Family Code (Moudawana) at Ten: Legal Accomplishments and Social Realities (World Bank 2015) https://openknowledge.worldbank.org/server/api/core/bitstreams/a4915bd1- bddd-52ec-9d88-97399b5f6d8d/content accessed 15 July 2025; Laura A Weingartner, 'Family Law and Reform in Morocco – The Mudawana: Modernist Islam and Women's Rights in the Code of Personal Status' (2005) 82(4) University of Detroit Mercy Law Review 687–714; D Engelcke, 'Family Law Reform in Algeria: National Politics, Key Actors, and Transnational Factors' in DH Gray and N Sonneveld (eds), Women and Social Change in North Africa: What Counts as Revolutionary? (CUP 2018) 308.

[10] Anshul Parashara, 'Nikah under Muslim Law' (2022) Jus Corpus Law Journal https://www.juscorpus.com/nikah- under-muslim-law/ accessed 16 July 2025.

[11] Neil B.E. Baillie, A Digest of Moohummudan Law (Smith Elder 1865) ch 1.

[12] Tanzil-ur-Rahman, A Code of Muslim Personal Law, vol 1 (Hamdard Academy 1978).

13 Muhammad Yousaf v. Huma Saeed 2024 SCMR 1078; Mohammed Salim v. Shamsudeen (2019) 4 SCC 130; Shayara Bano v. Union of India AIR 2017 SC 4609 and Imran Ahsan Khan Nyazee (tr), Al-Hidayah: The Guidance, vol 1 (Federal Law House 2015) ch 54, 723.

14 Muhammad Hori and Eliva Sukma Cipta, 'The Purpose of Marriage in Islamic Philosophical Perspective' (2019) 2(1) Journal of Islamicate Studies 18.

15 Muhammad Yousaf v. Huma Saeed 2024 SCMR 1078.

align with the statutory requirements for a valid civil contract and marriage is now established under our jurisprudence to be a solemn civil contract (*'aqd* ).[16] In Pakistan, every marriage solemnized under Muslim law must be registered under the MFLO,[17] and the *nikahnama* serves as the principal documentary proof.

9. While marriage under Islamic law is indeed a civil contract, it is far more than a mere legal arrangement; it is the foundation of a deeply personal and moral relationship rooted in mutual respect, compassion, and shared responsibility. The Qur'an describes the marital relationship as one of love (*mawaddah*) and mercy (*rahmah*)[18], and enjoins equitable treatment, protection, and financial support as essential obligations within this framework underscoring the spiritual and emotional dimensions that animate the marital union. Upon entering marriage, the wife commits not simply to a legal contract but to a marital relationship, a bond of care, dignity, and cohabitation. This relational commitment, rather than any notion of physical submission or patriarchal obedience, is what gives rise to the right of maintenance.

10. Maintenance flows not from dominance, but from the mutual obligations and moral fabric that underpin the marital bond. Any interpretation that reduces this right to the wife's subordination negates the ethical core of the relationship as envisioned by both the Qur'an and constitutional values such as dignity, equality, and non- discrimination. The entitlement to maintenance thus must be understood as a recognition of the wife's role in nurturing the marital relationship, not as a reward for submission, but as a legal and moral consequence of her commitment to that relationship.

11. All major Islamic schools of thought recognize maintenance as a legal right of the wife, grounded in the husband's financial responsibility and the imperative to uphold her dignity.[19] According to The Hidayah, "when a woman surrenders into the custody of her husband, it is incumbent upon him thence to supply her with food,

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16 Muhammad Yousaf v. Huma Saeed 2024 SCMR 1078; Saleem Ahmed v. Government of Pakistan PLD 2014 FSC 43 (holding that a Muslim marriage is a civil contract creating mutual rights and obligations) and Mst. Khurshid Bibi
v. Baboo Muhammad Amin PLD 1967 SC 97. See Musawi and Sindh Judicial Academy, Muslim Family Laws Bench Book for Judges in Pakistan (2023). Muhammad Munir, 'Marriage in Islam: A Civil Contract or a Sacrosanct?' (2008) 31(1) Hamdard Islamicus 1.

17 Section 5, Muslim Family Law Ordinance, 1961.

18 Qur'an 30:21 (Surah Ar-Rum).

19 Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (3rd edn, Ilmiah Publishers 2003) ch 12.

clothing, and lodging."[20] This notion of "surrender" lies at the heart of what jurists have historically termed the "maintenance-obedience complex".[21] This is the idea that a wife's entitlement to maintenance is conditional upon her obedience, most often defined in terms of physical availability for conjugal relations. In classical jurisprudence, particularly within the *Ḥanafī* and *Ḥanbalī* schools, this was expressed through the doctrine of *iḥtibās*, which refers to the wife's seclusion or retention in the marital home for the husband's access. However, this reductive formulation, which treats marriage as a transactional exchange of physical obedience for material support, is incompatible with the Qur'anic vision of marriage as a solemn covenant based on affection and compassion. Modern Islamic legal thought, especially as shaped by the doctrine of *Maqāṣid al-Sharīʿah* (objectives of Islamic law), compels a broader and more egalitarian interpretation. As al-Ghazālī outlines in *al-Mustaṣfā*, the Sharīʿah seeks to protect five essentials: religion, life, intellect, family, and property.[22] Later scholars such as al- Shāṭibī (in *al-Muwāfaqāt*), Ibn ʿĀshūr, and Jasser Auda have extended these to include dignity, justice, and social well-being.[23] Applying this purposive framework, the institution of marriage is not premised on the wife's "surrender" but on mutual commitment, emotional and physical companionship, cooperation, and shared responsibility. A commitment that actualizes dignity, justice and social well-being. It aims to establish a moral and familial order rooted in justice and compassion[24] and entails mutual moral control, and not one-sided authority.[25]

12. Prominent contemporary scholars have sharply criticized the maintenance-obedience framework as both patriarchal and doctrinally unsound. Professor Khaled Abou El Fadl, after a thorough examination of classical sources, contends that treating maintenance as "compensation for sexual enjoyment" degrades women and violates the ethical foundations of the *Sharīʿah*. Dr. Abbasi has similarly challenged the colonial legacy embedded in South Asian jurisprudence, arguing that British judges selectively invoked Islamic principles to

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20 Sheikh Burhanuddin Abi Al Hassan Ali Marghinani, The Hidaya: Commentary on Islamic Laws, vol 1 (Charles Hamilton tr, Darul-Ishaat 2005) 241.

21 Amina Wadud, Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective (2nd edn, Oxford University Press 1999) and Asma Barlas, Believing Women in Islam: Unreading Patriarchal Interpretations of the Qur'ān (rev edn, University of Texas Press 2019).

22 Abū Ḥāmid al-Ghazālī, al-Mustaṣfā min ʿIlm al-Uṣūl (vol 1, Dār al-Kutub al-ʿIlmiyyah 1993, Beirut).

23 Jasser Auda, Maqāsid al-Sharī'ah as Philosophy of Islamic Law: A Systems Approach (International Institute of Islamic Thought 2008) and Abū Isḥāq al-Shāṭibī, al-Muwāfaqāt fī Usūl al-Sharīʿah (Dār al-Kutub al-ʿIlmiyyah 1997, Beirut).

24 Muhammad Hori and Eliva Sukma Cipta, 'The Purpose of Marriage in Islamic Philosophical Perspective' (2019) 2(1) Journal of Islamicate Studies 18.

25 Mehvish Kazmi v. Parvaiz Hussain PLD 2022 SC (AJ&K) 1.

reinforce Victorian norms of male authority, thereby curtailing women's rights under the guise of Muslim personal law.[26] Fatima Bokhari has drawn attention to reforms in several Muslim-majority jurisdictions that have moved away from traditional notions of *qiwāmah*, *wilāyah*, and the "obedience-maintenance complex", opting instead for legal models premised on mutual respect and support rather than female subordination.[27] Accordingly, maintenance should not be viewed as a *quid pro quo* for physical obedience, but as an inherent legal and ethical obligation arising from the marital contract. It is intended to protect the wife's dignity, autonomy, and financial security. Interpretations that condition this entitlement on physical submission not only distort Islamic legal principles but also enable coercive control. A just and contemporary approach guided by *Maqāṣid al-Sharīʿah*, constitutional norms, and feminist jurisprudence must displace obedience-based reasoning in favor of frameworks that center equality, welfare, and mutual respect.

13. Maintenance as an obligation arising directly from the marital contract has also been affirmed by the statutory framework of Pakistan, which treats maintenance as an absolute and enforceable right, rather than a conditional or discretionary entitlement. Section 9[28] of the MFLO empowers a wife to initiate proceedings before the Family Court for the recovery of maintenance upon the husband's failure or neglect to provide for her, without requiring proof of consummation, cohabitation, or obedience. The provision reflects a rights-based orientation, enabling women to assert financial claims independently of social customs or physical residence with the husband. Similarly, Section 17A[29] of the Act enhances the enforceability of such claims by

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26 Julia Stephens, Governing Islam: Law, Empire, and Secularism in Modern South Asia (Cambridge University Press, 2018) 99-74 and 87-93.

27 Musawah, "Rethinking Qiwamah and Wilayah" (November 14, 2024), https://www.musawah.org/knowledge-building/rethinking-qiwamah-and-wilayah/ accessed 25 July 2025.

28 **9. Maintenance.**—(1) If any husband fails to maintain his wife adequately, or where there are more wives than one, fails to maintain them equitably, the wife, or all or any of the wives, may in addition to seeking, any other legal remedy available apply to the Chairman who shall constitute an Arbitration Council to determine the matter, and the Arbitration Council may issue a certificate specifying the amount which shall be paid as maintenance by the husband.

(2) A husband or wife may, in the prescribed manner, within the prescribed period, and on payment of the prescribed fee, prefer an application for revision of the certificate to the Collector concerned and his decision shall be final and shall not be called in question in any Court.

(3) Any amount payable under sub-section (1) or (2), if not paid in due time, shall be recoverable as arrears of land revenue.

29 **17A. Suit for maintenance.**—(1) In a suit for maintenance, the Family Court shall, on the date of the first

appearance of the defendant, fix interim monthly maintenance for wife or a child and if the defendant fails to pay the maintenance by fourteen day of each month, the defence of the

defendant shall stand struck off and the Family Court shall decree the suit for maintenance on the basis of averments in the plaint and other supporting documents on record of the case.

(2) In a decree for maintenance, the Family Court may:

(a) fix an amount of maintenance higher than the amount prayed for in the plaint due to afflux of time or any other relevant circumstances; and

(b) prescribe the annual increase in the maintenance.

introducing an expeditious, summary procedure for the recovery of arrears of maintenance.[30] The introduction of this provision is a testament to the legislature's recognition of the structural barriers faced by women in asserting marital rights, and its attempt to provide a gender-sensitive and accessible remedial mechanism. Together, these statutes form a beneficial and pro-women legal framework[31] that affirms maintenance as a substantive, unqualified right flowing from the existence of a valid marriage not from performance, obedience, or physical availability. The courts in Pakistan have consistently interpreted these provisions in line with constitutional guarantees and Islamic legal principles, holding that a wife's entitlement to maintenance accrues immediately upon the solemnization of a valid marriage.[32]

*Consequences of Nikah: Cultural Practices and Patriarchal Notions*

14. *Rukhsati*, in our social fabric, is a customary practice marking the bride's departure from her parental home to join her husband. The term *rukhsati* literally means "to depart" or "to take leave,"[33] and while culturally significant, it holds no independent legal status under Islamic or statutory law.[34] While the solemnization of marriage marks the formal commencement of the marital relationship, it also carries immediate legal consequences under Islamic law, our jurisprudence and the statutory framework of Pakistan.[35] A valid marriage is not a mere ritual or symbolic act; it is the point from which the spouses assume legal status and corresponding rights and obligations.[36] The expression of acceptance at the time of marriage is the ultimate evidence of a woman's willingness to enter into the marital relationship and to discharge her matrimonial obligations.[37] A wife's right to maintenance becomes absolute when she demonstrates such willingness, which is reinforced from her waiting for *rukhsati* to be effected. To condition a wife's entitlement to maintenance on *rukhsati* or consumption undermines legal certainty and enables husbands to

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(3) If the Family Court does not prescribe the annual increase in the maintenance, the maintenance fixed by the Court shall automatically stand increased at the rate of ten percent each year.

(4) For purposes of fixing the maintenance, the Family Court may summon the relevant documentary evidence from any organization, body or authority to determine the estate and resources of the defendant.

30 Yasmeen Bibi v. Muhammad Ghazanfar Khan, PLD 2016 SC 613.

31 Saif-ur-Rehman v. ADJ Toba Tek Singh 2018 SCMR 1885.

32 Zeeshan Iftikhar Butt v. Maria Asif 2019 CLC 777; Muhammad Nawaz v Khurshid Begum, PLD 1972 SC 302; Rashid Ahmad Khan v. Nasim Ara PLD 1968 Lahore 93 and Sardar Muhammad v. Nasima Bibi PLD 1966 Lahore 703.

33 Rekhta Dictionary, 'Rukhsati' https://www.rekhtadictionary.com/meaning-of-rukhsatii accessed 16 July 2025.

34 Najam-ur-Rehman v. Masooma Hassan 2023 CLC 991; Muhammad Sharif v. ADJ 2007 SCMR 49 and Shamim Akhtar v. ADJ, Sialkot 1991 CLC 1142.

35 Section 5, Muslim Family Laws Ordinance, 1961.

36 Muhammad Munir, 'Maintenance of Wives under Muslim Law: An Analytical Study' (2008) 31(2) Hamdard Islamicus 33, 35.

37 Haseen Ullah v. Mst. Naheed Begum PLD 2022 SC 686.

evade their financial responsibilities by invoking social customs or delaying performance. Such an approach imposes an unconstitutional burden on women and reinforces patriarchal norms that make a woman's financial rights contingent upon her physical availability or subservience. This is incompatible with the dignity and equality promised under the Constitution.

*Answer to Question No. 1*

15. A holistic reading of the aforesaid contemporary Islamic principles, constitutional and statutory protections, and judicial precedents affirms that the right to maintenance flows unconditionally from the solemnization of a valid marriage and constitutes a binding legal duty.

B. *Under what circumstances, if any, may a husband be excused from his marital obligation to pay maintenance to his wife?*

16. While the general rule is that maintenance becomes payable upon the solemnization of a valid marriage, classical Islamic jurisprudence does recognize narrowly defined exceptions where the wife's conduct may temporarily affect her entitlement to maintenance. Such as, according to *Hidayah*, if a wife is disobedient or refractory and departs from the matrimonial home without her husband's consent, she forfeits her right to maintenance until she returns and submits, as the breach of matrimonial restraint is attributed to her.[38] Baillie, similarly, observes that if the wife's conduct amounts to *nushūz* (rebellion), the husband would be justified in suspending maintenance.[39] Dr. Tanzil- ur-Rahman identifies the 'control' of husband over his wife as a condition precedent for his duty of maintenance. However, he acknowledges that where the husband, due to his own fault such as impotence or unwillingness to cohabit is unable to keep his wife with him, her entitlement to maintenance remains unaffected.[40] Historically, all the above referred interpretations and that of the classical doctrine of *nushūz*, particularly in the Ḥanafī and *Ḥanbalī* schools, that calls for submissiveness, obedience or surrender of wife, while placing the husband in control or ownership of wife, were interpreted through a patriarchal lens. These have reduced marital obligations to the wife's physical availability (*iḥtibās*) for conjugal access. Such formulation

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38 Sheikh Burhanuddin Abi Al Hassan Ali Marghinani, The Hidaya: Commentary on Islamic Laws, vol 1 (Charles Hamilton tr, Darul-Ishaat 2005) 242.

39 Neil B.E. Baillie, A Digest of Moohummudan Law (Smith Elder 1865) 97.

40 Tanzil-ur-Rahman, A Code of Muslim Personal Law, vol 1 (Hamdard Academy 1978), 259.

construes marriage as a transactional contract rather than a covenant based on mutual respect, emotional companionship, and shared responsibilities. Such a reductive view is incompatible with the higher objectives (*Maqāṣid al-Sharīʿah*),[41] which prioritize dignity, justice and human welfare. Contemporary jurists like Mohammad Hashim Kamali and Jasser Auda urge a shift from rule-based formalism to purpose-driven reasoning, where *Sharīʿah* is read as a living, ethical system aligned with fundamental rights and evolving social realities.[42] Accordingly, the husband may be excused from paying maintenance only in very limited circumstances where he can prove, through clear and cogent evidence, that the wife has wholly and unjustifiably repudiated the marital relationship, including emotional, residential, and relational aspects. The burden of proof lies squarely on the husband. A refusal to cohabit arising from abuse, neglect, coercive control, behaviour or absence of appropriate living arrangements does not amount to *nushūz or* unjustifiable repudiation of the marital relationship by the wife. Where the husband fails to effect *rukhsati*, does not provide a residence, withholds the agreed dower,[43] or fails to facilitate travel documentation (e.g., a visa), the wife's non-cohabitation cannot be construed as voluntary withdrawal from marital relationship. In such cases, her entitlement to maintenance remains intact.

17. More troublingly, conditioning a wife's entitlement to maintenance on proof of consummation creates an untenable and constitutionally suspect standard. It forces women to disclose intimate and deeply private aspects of their married life in public judicial proceedings, contrary to their constitutional right to dignity and privacy under Article 14 of the Constitution. The burden to prove or disprove consummation, a fact often unverifiable and inherently private, places women in an impossible position and risks compounding their vulnerability within the justice system. To interpret *nushūz* in such contexts is not only doctrinally flawed but also facilitates coercive control and economic subjugation. Denying maintenance under these circumstances weaponizes patriarchal customs and undermines the ethical foundations of Islamic law. This exception, therefore, must be narrowly

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41 Jasser Auda, Maqāsid al-Sharī'ah as Philosophy of Islamic Law: A Systems Approach (International Institute of Islamic Thought 2008.

42 Mohammad Hashim Kamali, Principles of Islamic Jurisprudence (3rd edn, Islamic Texts Society 2003); Jasser Auda, Maqāṣid al-Sharī'ah as Philosophy of Islamic Law: A Systems Approach (International Institute of Islamic Thought 2008); Jasser Auda, Reclaiming the Higher Objectives of Islamic Law: Towards a New Maqasid Methodology (International Institute of Islamic Thought 2010); Taha Jabir al-'Alwani, The Ethics of Disagreement in Islam (International Institute of Islamic Thought 2004) and Abū Isḥāq al-Shāṭibī, al-Muwāfaqāt fī Uṣūl al-Sharīʿah (Dār al-Kutub al-ʿIlmiyyah 1997, Beirut).

43 Haseen Ullah v. Mst. Naheed Begum PLD 2022 SC 686; Tariq Mehmood v. Farah Shaheen 2010 YLR 349; Najam- ur-Rehman v. Masooma Hassan, 2023 CLC 991; Muhammad Sharif v. ADJ 2007 SCMR 49 and Abdul Fahim v. Mst. Shahnaz Begum 2003 CLC 1450.

construed and reformulated through the lens of *Maqāṣid al-Sharīʿah*, constitutional guarantees of equality, dignity, and social justice under Articles 14, 25 and 35 of the Constitution, and progressive jurisprudence. The above lens provides that unreasonable and unjustified denial or withdrawal of the wife from a marital relationship is the only exception to grant of maintenance.

*Answer to Question No. 2*

18. A husband may only be excused from paying maintenance where he proves through clear, cogent, and compelling evidence that the wife has wholly and unjustifiably withdrawn from the marital relationship including its emotional, residential, and relational aspects. The burden of proof lies squarely on the husband. This exception in favour of the husband must be narrowly construed to support structural gender inequalities which demand a cautious and rights- oriented approach to interpreting such exceptions, ensuring that maintenance remains a shield against economic vulnerability, not a tool of coercion.

*Conclusion*

19. A holistic reading of contemporary Islamic jurisprudence, statutory enactments, constitutional protections, and judicial precedents affirm that a wife's right to maintenance is neither contingent upon consummation or *rukhsati*, nor subject to the discretion of the husband. It flows unconditionally from the solemnization of a valid marriage and constitutes a binding legal duty. In essence, the only legitimate ground for suspending this obligation arises where the husband discharges a high burden of proof to establish that the wife has wholly and without justification withdrawn from the marital relationship understood not merely as physical access but encompassing the full spectrum of emotional, residential, and relational life. Absent such proof, the obligation to provide maintenance persists. This understanding not only gives effect to the egalitarian spirit of Islamic law but also reinforces the constitutional commitment to dignity (Article 14), equality (Article 25), and protection of the family unit (Article 35). In a patriarchal society, where economic dependence often fuels systemic injustice, the right to maintenance must be safeguarded as an essential constitutional, legal, and ethical entitlement. Any attempt to curtail it must therefore be subjected to the strictest constitutional and jurisprudential scrutiny.

*The present case*

20. In the present case, there is no dispute that the parties entered into a valid marriage. Nor is there any allegation, much less evidence, that the petitioner refused consummation or cohabitation without reasonable cause. On the contrary, the record reveals that the respondent failed to provide a marital abode, made no arrangements for *rukhsati*, and did not take steps to fulfill his basic obligations under the marital contract. There is similarly no factual or legal basis in the record to invoke the narrow exception to the respondent's obligation of maintenance. No credible evidence has been led to suggest that the petitioner willfully withdrew from the marital relationship or refused cohabitation without valid cause. The wife's inability to cohabit due to the husband's own failure to facilitate *rukhsati* does not defeat her claim to maintenance.[44] She cannot be penalized for non-consummation that resulted from the respondent's own inaction. To suggest otherwise would allow men to weaponize the absence of consummation often caused by their own neglect as a mean to escape financial responsibility, thereby trapping women in marriages devoid of both rights and dignity. In view of these settled principles, the Court finds that the petitioner's right to maintenance accrued upon the solemnization of marriage and continued throughout the subsistence of the marital bond. Considering that the divorce took place during the pendency of the said litigation, the maintenance period will continue till the period of *iddat*. The denial of maintenance in the present case, in light of the respondent's default and the absence of any fault on part of the wife, was contrary to law and is accordingly set aside.

21. In view of the foregoing discussion, the impugned judgment is set aside. The wife's entitlement to maintenance from the date of valid marriage is affirmed in the sum for Rs 5000/- per month adjudicated upon by the District Court and shall also include maintenance for the period of *iddat*. The petition is accepted, converted into an appeal, and allowed. The connected civil appeal is also allowed.

22. The Court deems it important to acknowledge the valuable role of amici curiae in assisting on complex questions of constitutional law, Islamic jurisprudence, and gender justice. The Court records its appreciation for the invaluable assistance rendered by Professor Khaled Abou El Fadl, Dr. Muhammad Zubair Abbasi, and Ms. Fatima Yasmin

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44 Najam-ur-Rehman v. Masooma Hassan 2023 CLC 991.

Bokhari for their insightful submissions, which greatly aided the Court's deliberations. Their interventions anchored in international human rights, Islamic law and constitutional law brought comparative depth, sharpened normative clarity, and helped contextualize the matter within broader global frameworks.

23. The institution of the amicus is essential to ensuring that adjudication remains informed, inclusive, and principled. It is imperative that constitutional courts in Pakistan continue to institutionalize this practice, especially in matters of significant public consequence or global relevance. The amicus curiae serve as a vital bridge between law and justice, local realities and global perspectives, the bench and the academy. Embracing this inclusive model of judicial deliberation enhances not only the legitimacy and quality of judgments, but also affirms the judiciary's commitment to learning, openness, and constitutional dialogue.

24. Before parting, we find it imperative to offer guidance on a foundational aspect of judicial responsibility: *the role of judicial language*. In family law adjudication, the impact of a judge's words extends far beyond the courtroom. It is therefore essential to consider how judicial language can either uphold or undermine the values our Constitution enshrines.

*Gender sensitive judicial language*

25. We note with concern the language used in the impugned judgment, which states that "…*maintenance allowance is the right of wife after consummation of marriage and after crossing the barrier, it becomes the responsibility of the husband to maintain his wife*."[45] This formulation is deeply patriarchal. The language employed by courts in family law cases does more than resolve individual disputes; it actively shapes public understanding of rights and obligations within marriage and the broader family structure. Judicial language carries normative force. It influences how justice is perceived, internalized, and practiced. Terms such as "surrender," or "submit" are rooted in patriarchal frameworks and reinforce outdated notions of gender hierarchy and female subordination. These expressions cast women as passive recipients in marriage rather than equal partners, undermining their legal and constitutional status. It is therefore imperative that judicial reasoning and expression be firmly anchored in the constitutional

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[45] Impugned judgment, paragraph 5.

values of dignity, equality, and non-discrimination, while also reflecting the lived realities of litigants and the prevailing social context. Judges, particularly in family law matters, are not merely arbiters of individual disputes; they are reformers and thought leaders capable of guiding society toward progressive and inclusive thinking. They bear a constitutional and ethical duty to adopt gender-sensitive, rights-based language that affirms the equal legal status of women as full and autonomous persons. Judicial decisions must avoid stereotypes, promote tolerance, and embody the principles of substantive justice.[46] In fulfilling this transformative role under the Constitution, the judiciary does more than interpret law; it reshapes societal attitudes and advances equality through every word it speaks. Language is never neutral. It either reinforces the status quo or propels society toward a more just and equal future.

**Announced.**
Islamabad,
11th September, 2025.

**2025 SCP 353**

**IN THE SUPREME COURT OF PAKISTAN**

**(Appellate Jurisdiction)**

**PRESENT:**

**Mr. Justice Syed Mansoor Ali Shah**

**Mr. Justice Aqeel Ahmed Abbasi**

Civil Petition No.1174 of 2022

*(Against the judgment dated 02.02.2022 of the Islamabad High Court, Islamabad in Writ Petition No.4096 of 2021)*

*Shakeel Ahmed Kayani*

*Versus*

*... Petitioner*

*The Managing Director/Chief Executive Office, Islamabad and another*

*... Respondents*

For the Petitioner: Mr. Muhammad Bashir Khan, ASC

For the Respondents: Mr. Sultan Mazhar Sher Khan, ASC

Date of Hearing: 17.09.2025

JUDGMENT

**Syed Mansoor Ali Shah, J.-** Brief facts of the case are that the petitioner joined the erstwhile Oil and Gas Development Corporation ("**Corporation**") established under the Oil and Gas Development Corporation Ordinance, 1961 ("**Ordinance, 1961**") as Accounts Assistant (BPS-14) 02.02.1995, after having earlier served with the Pakistan Military Accounts Department Office, Wah Cantt. During his service, the Oil and Gas Development Corporation (Reorganization) Ordinance, 2001 ("**Ordinance, 2001**") was promulgated, and the Corporation was converted into the Oil and Gas Development Company Limited ("**Company"**). The petitioner, by operation of law, became the employee of the Company and finally retired from service on attaining the age of superannuation as Senior Accountant (E-04) on 17.06.2021, after rendering a total service of 40 years and 10 months.[1]

[1] Counting his previous service with Pakistan Military Accounts Department Office of the Controller of Factories Accounts, Wah Cantt of 14 years 05 months and 15 days from 17.08.1980 to 01.02.1995. Reference is made to Office Memorandum of the Company, dated 23.06.2021.

2. The claim of the petitioner is that as per Regulation 15(1A) of the Oil and Gas Development Corporation Pension and Gratuity Regulations, 1985 ("**Pension Regulations**") framed by the erstwhile Corporation, with the prior approval of the Federal Government, he is entitled to 2% of the gross pension for each extra year of service rendered by him beyond 30 years of qualifying service subject to a maximum of 10% of his gross pension. This pension has been referred to in the documents, perhaps for convenience, as *Additional Pension*.

3. The claim of the petitioner was denied vide Office Memorandum dated 20.08.2021 by the Company. The petitioner challenged the said decision before the Islamabad High Court through a constitutional petition which was dismissed vide judgment dated 02.02.2022, hence, the instant petition.

4. Learned counsel for the petitioner argued that the petitioner is entitled to *Additional Pension* under Regulation 15 (1A) of the Pension Regulations and being a former employee of the Corporation, his terms and conditions of service are protected under Section 5 of the Ordinance, 2001. He added that Regulation 265 of the Oil and Gas Development Corporation Employees (Service) Regulations, 1994 (**"Service Regulations**"), which provides that the directives or instructions issued by the Federal Government shall be complied with and carried out by the Company, cannot override the statutory protection extended under Ordinance, 2001. Hence, the Office Memorandum dated 04.09.2001 (**"OM"**) issued by the Finance Division, Government of Pakistan, discontinuing *Additional Pension* has no bearing on the petitioner, who is an erstwhile employee of the Corporation. He also referred to letters dated 01.02.2005 and 23.05.2010 issued by the Company declaring that employees of the Company are not civil servants but are employees of an autonomous body governed by its own Regulations.

5. Learned counsel for the respondent Company, while supporting the impugned judgment, submits that under Regulation 265 of the Service Regulations, the Board of Directors of the Company

are bound by the directives and instructions issued by the Federal Government. He referred to the OM dated 04.09.2001 as the directive/instruction of the Federal Government and underlined Clause C of Part-III (Pension and Commutation) of the said OM to point out that *Additional Pension* has since been discontinued - this being binding on the Company - it could not grant *Additional Pension* to the petitioner. Alternatively, he submits that as per the decision of the Board of Directors taken in the 145th meeting of the Board on 17.01.2013, it has been resolved that the maximum scale of gross pension shall continue to be equal to 70% of the pensionable salary upon completion of 30 years or more service at the time of retirement. Hence even for this reason the petitioner cannot be given pension for extra years of service.

6. We have heard the learned counsel for the parties, examined the record of the case and have gone through the law on the subject. The legislative framework, forming the background of this case, provides that Ordinance, 1961 established the Corporation for the purpose of exploration and development of oil and gas resources. It further provided for the Board of Directors of the Corporation, the powers and functions of the Corporation, and the power of the Federal Government and the Corporation to make Rules and Regulations, respectively. It is an admitted position between the parties that no Rules were formulated by the Corporation. However, under Section 30 of the Ordinance, 1961, with the previous approval of the Central Government,[2] the Corporation made the Pension & the Service Regulations, referred to above. Subsequently, need was felt to convert the Corporation into the Company and therefore Ordinance, 2001 was promulgated on 5 July 2001 (w.e.f. 23 October 1997) whereby the Corporation was converted into a public limited company incorporated under the Companies Ordinance, 1984. Sections 4 and 5 of Ordinance, 2001 provide that the Company shall own all the assets, properties, etc of the Corporation, be entitled to the benefit of all the notifications (including the notified Regulations mentioned above) issued for the working of the Corporation, be liable to pay all liabilities

[2] Now, Federal Government

and obligations of the Corporation and that the employees of the Corporation shall be deemed to be the employees of the Company on the same remuneration and other conditions of service, rights and privileges including pension, etc. It is an admitted position between the parties that the Pension and Service Regulations made under the erstwhile Ordinance continue to regulate the affairs of the Company. Even otherwise, this Court has already affirmed the continuing enforceability of these Regulations even after promulgation of Ordinance, 2001.[3] Besides, under Section 24 of the General Clauses Act 1897, the Regulations are deemed to have been issued under Ordinance, 2001 unless inconsistent with the said Ordinance.

7. Section 5 of the Ordinance 2001 provides that all employees of the Corporation shall on the date of incorporation of the Company be deemed to be the employees of the Company on the same remuneration and other conditions of service, rights and privileges including the pension, provident fund and gratuity as were applicable to them before the conversion of the Corporation into the Company. This provision saves and protects the terms and conditions of the employees of the erstwhile Corporation. Under Regulation 15(1A) of the Pension Regulations, the benefit of *Additional Pension* was extended to the employees of the Corporation on 19.04.1987.[4] As per the respondents, the benefit of *Additional Pension* has been withdrawn under the OM dated 04.09.2001 which being a directive/instruction of the Federal Government is binding on the Company under Regulation 265 of the Service Regulation.

8. We would first like to examine the OM to see if it is a directive /instruction issued by the Federal Government to the Board of Directors of the Company. The OM is titled: REVISION OF BASIC PAY SCALES AND FRINGE BENEFITS OF CIVIL EMPLOYEES (BPS-1-22) OF THE FEDERAL GOVERNMENT (2001) and provides at the outset that the President has been pleased to sanction a scheme for the civil employees of the Federal Government. Under PART-III of the

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[3] Syed Tahir Abbas Shah v OGDCL through MD 2012 PLC (C.S.) 885; OGDCL v Nazar Hussain 2010 SCMR 1559

[4] By amending the Pension Regulations through SRO No. 292(I)/87

OM dealing with PENSION AND COMMUTATION, it provides that the Government has made the following reforms in respect of all pensioners of the Federal Government. In the end, the OM has been copied to all the Ministries, Divisions and Departments of the Federal Government. Nowhere from the reading of the OM can it be shown that it is a directive / instruction issued to the Board of Directors of the Company. There is also nothing on the record to show that the said OM was separately dispatched to the Board of Directors of the Company as a directive/instruction. No receipt of any such directive/instruction has been placed on the record by the Company. The OM was issued by the Finance Division of the Federal Government for the regulation of its own employees. It is an admitted position that the employees of the Company are not civil servants, hence for the OM to be a directive or instruction addressed to the Board of Directors of the Company, special reference had to be made in this regard. In its absence the OM does not purport to operate as a directive or instruction under the law. The assumption in this case that the OM is a directive or instruction issued to the Board of Directors of the Company is seriously misconceived. This aspect of the matter went unnoticed and unexamined by the High Court even in the earlier litigation (*Abdullah* case referred hereunder). Further, the submission of the learned counsel for the respondent Company that twelve years later on 17.01.2013 the Board of Directors of the Company in the 145th meeting of the Board resolved to discontinue *Additional Pension* confirms that no directive/instruction in this regard was ever issued to the Company earlier, otherwise, there was no need for the Board to pass such a resolution a decade later. Hence, the OM dated 04.09.2001 cannot be constructed as a directive or instruction issued to the Company by the Federal Government under Regulation 265.

9. As an alternative, the learned counsel for the Company referred to the decision of the Board of Directors passed in the year 2013 (12 years after the said OM) on 17.01.2013 (reflected in the letter dated 25.02.2013) which without reference to the said OM states that the Board of Directors have resolved that the maximum scale of gross pension shall continue to be equal to 70% of the pensionable salary

upon completion of 30 years or more service at the time of retirement. Any such Board decision is inconsequential as the same is in violation of Section 5 of Ordinance, 2001 read with Regulation 15 (1A) of the Pension Regulations. Other than the statutory protection enjoyed by the employees under Section 5 as discussed above, the said Regulations were framed in the year 1985 (and amended in 1987) after seeking prior approval of the Federal Government in terms of Section 30 of the erstwhile Ordinance, 1961. The said Regulations are still in the field and enjoy a higher statutory force than a Board Resolution of the Company and unless the said Regulations are amended by the Company with the prior approval of the Federal Government, the decision of the Board of Directors cannot override the said Regulations. Hence both the decision of the Board dated 17.1.2013 and its policy announcement through letter dated 25.02.2013 are not sustainable being in violation of Ordinance 2001 and the Pension Regulations.

10. As a last recourse, learned counsel for the petitioner has referred to a judgment passed by the Islamabad High Court dated 08.10.2020 in favour of the Company against which leave was declined by this Court vide order dated 07.04.2023 in *Abdullah v. Managing Director CEO OGDCL*[5] . *Abdullah* upholds the OM, assuming that the OM was a directive issued to the Board of Directors of the Company by the Federal Government – it does not examine the factual and legal status of the directive/instruction as done in this case. *Abdullah* is also silent regarding the scope of statutory protection extended to the employees under Section 5 of Ordinance, 2001 and under the Pension Regulations, hence it is distinguishable from the present case. Further, with respect, *Abdullah* does not decide any question of law or enunciate any principle of law and is a leave declining order, thus it does not pass as a binding precedent.[6]

[5] Passed in CPLA 2913 of 2020

[6] Allied Bank Limited v. Habib-Ur-Rehman and Others, 2023 P L C (C.S.) 1319; Syed Hammad Nabi and others v. Inspector General of Police Punjab, Lahore and others, 2023 SCMR 584; Muhammad Salman v. Naveed Anjum and others, 2021 SCMR 1675

11. We have also gone through the decision of the Company whereby claim of the petitioner was declined through an OM dated 20.08.2021. Perusal of this OM shows that the request of the petitioner was turned down on the ground that his claim was allegedly against the *Rules* and *Policy* of the Company. It is an admitted position between the parties that the Corporation or now the Company have not yet come up with any *Rules* and secondly, the *Policy* announcement dated 25.02.2013 by the Company has hereinabove been declared to be violative of Section 5 of the Ordinance, 2001 and the Pension Regulations. Hence, the OM dated 20.08.2021 was issued without keeping in view the statutory framework regulating the working of the Company and is therefore set aside.

12. Having decided that the OM dated 04.09.2001 does not constitute a directive or instruction under Regulation 265 of the Service Regulations and the decision of the Board of Directors dated 17.1.2013 does not hold, as discussed above, we now proceed to discuss the overall scheme of the law to underline that the Company enjoys autonomy in managing its internal governance.

13. The creation of the Corporation under the Ordinance, 1961 was not a mere bureaucratic arrangement but a deliberate legislative choice to insulate a vital sector of the economy from the day-to-day interference of ministerial control. The statute envisaged a Board of Directors empowered to conduct the affairs of the Corporation "*on commercial considerations having regard to public interest*" while federal directives were binding only insofar as they fell within the domain of policy. Significantly, it was the Board itself which was authorised to determine whether a matter constituted "*policy*"[7]. This governance architecture reflected the legislative intent: to endow the Corporation with institutional autonomy so that commercial decisions could be taken in the best interest of the enterprise and the country, free from fluctuating political currents.

[7] See Section 4 of the Ordinance, 1961

14. The transition of the Corporation into a public limited company in 2001 strengthened, rather than diluted, this autonomy. By registering it as a company limited by shares under the Companies Ordinance, 1984 subject to the fiduciary duties of its directors and the discipline of company law, the legislature shifted the governance model closer to that of the private sector, where independent Boards are entrusted with decision-making in the interests of the company and its stakeholders. This progression underscores a legislative trajectory toward greater independence, transparency, and accountability in the governance of state-owned enterprises. Accordingly, any statutory reference of adherence to government directives/instructions cannot be read as compelling the Board to mechanically implement instructions. Such a reading would negate both the original intent of the Ordinance, 1961 and the autonomy conferred under the Ordinance, 2001 corporate structure. Rather, it is incumbent upon the Board to assess whether a directive is commercially sound, consistent with the fiduciary duty of directors, in furtherance of the company's statutory purpose and in the general public interest. Only if these conditions are satisfied can a directive legitimately become part of the Company's internal governance. To hold otherwise would reduce the Board to a mere rubber stamp, defeating the very rationale for creating autonomous commercial entities under the law. Public corporations are designed not as extensions of government departments but as independent bodies entrusted with bringing efficiency, autonomy, and commercial discipline to vital sectors of economic activity.

15. Commercial autonomy is thus not only a legislative design but also a constitutional necessity for public sector companies engaged in strategic areas of the economy. Strong, independent public institutions are the bedrock of economic development, good governance, and the rule of law. When boards of statutory corporations or public companies are permitted to exercise independent judgment, they advance the twin objectives of commercial viability and public interest, thereby serving the larger purposes of the State. Conversely, when such bodies are reduced to administrative

subordinates of the executive, both economic growth and democratic accountability suffer. In a constitutional democracy committed to the separation of powers and the strengthening of institutions, autonomy of state-owned enterprises is therefore indispensable.

16. We also wish to reiterate that *pension* is not a matter of bounty, charity, or benevolence - it is a right protected under Articles 9 and 14 of the Constitution of the Islamic Republic of Pakistan, 1973 ("Constitution") and inseparably linked with the right to life, dignity and livelihood[8], for without sustenance in old age, these rights ring hollow. It should be taken more seriously for those public servants for whom it is a crystallized return on years of faithful service, a form of deferred wages earned through the sweat, labour, and loyalty of an employee. It embodies the principle that those who serve must not be cast aside in their twilight years. To deny or withhold pension is to strip a person of the security they have justly earned, leaving them exposed to indignity, vulnerability, and want. Therefore this right must be protected in the shape of the grant of pension that is not only adequate but also predictable.[9] Moreover, an element of respect and empathy is to be maintained while granting pension which would be in consonance with the values that our Constitution espouses with dignity as the highest constitutional value.[10] The law itself stands as a shield to protect the rights of such employees, ensuring that long- earned entitlements are not eroded by institutional caprice. Ordinance, 2001, therefore, not only recognizes but also protects pension by

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[8] Muhammad Yousaf v Province of Sindh, 2024 SCMR 1689; Qazi Khalid Ali v Federation of Pakistan, C.P.L.A.147-K/2023; Province of Sindh through Secretary Government of Sindh, Karachi and Others Vs. Mst. Sorath Fatima and Another, 2025 SCP 278; The Province of Punjab through Secretary, Finance Department, Government of the Punjab, Lahore and Others Vs. Kanwal Rashid and Others, 2021 SCMR 730.

[9] International Labour Organization, *Universal Social Protection for Human Dignity, Social Justice and Sustainable Development,* International Labour Conference, 108th Session, 2019 (General Survey on the implementation of the Social Protection Floors Recommendation, 2012, No. 202) <https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetin gdocument/wcms_673680.pdf>

[10] See Constitution of Pakistan, 1973, Article 38(b), (c), (d); Also affirmed by Pakistan's ratification of the Universal Declaration of Human Rights (UDHR), Article 1; For a detailed discussion on dignity as the highest value in a constitutional system see Ronald Dworkin, Is Democracy Possible Here?, Princeton University Press and Ronald Dworkin, Justice for Hedgehogs, USA Harvard University Press; Also see Al-Najjar, Sherzad & Saeed, Hemn. (2021), *Ronald Dworkin and Human Dignity as Highest Constitutional Value: Philosophical Theorization of Rights and Human Dignity in a Comparative Perspective*,

UKH Journal of Social Sciences, 5, 82-89,< https://pdfs.semanticscholar.org/b6a7/fe373c7746fcfabdaeaca6f3dc562cde869e.pdf>.

ensuring that the terms and conditions of service of the employees of the erstwhile Corporation, and now of the successor Company, cannot be altered to their disadvantage. To trifle with pension is, therefore, to trifle with constitutional justice itself.

17. For the above reasons, we set aside the impugned judgment and declare that the petitioner is entitled to *Additional Pension* under Section 5 of the Ordinance, 2001 read with Regulation 15(1A) of the Pension Regulations with the direction to the Company to pay the *Additional Pension* to the petitioner in accordance with the Pension Regulations within 30 days from the receipt of this Judgment and submit a compliance report to the Registrar of this Court. In case the compliance report is not received till the first week of November 2025, the case will be put up on the judicial side for necessary orders. This petition is converted into an appeal and allowed in the above terms.

Judge

Judge

Islamabad, 17.09.2025

Approved for Reporting

*(Muhammad Ahmad)*

**2025 SCP 358**

**IN THE SUPREME COURT OF PAKISTAN**

**(Appellate Jurisdiction)**

**PRESENT:**

**Mr. Justice Syed Mansoor Ali Shah Mr.**

**Justice Aqeel Ahmed Abbasi**

**Civil Petitions No. 954, 981 to 983 of 2022**

*(Against the judgment dated 26.01.2022 passed by the Federal Service Tribunal, Islamabad in Appeal Nos. 1563(R)CS to 1566(R)CS/2019)*

Naeem Khan Niazi *(in CPLA No. 954/2022)* Muhammad Noman *(in CPLA No. 981/2022)* Iftikhar Naseeb Khan *(in CPLA No. 982/2022)* Muhammad Shafiq *(in CPLA No. 983/2022)*

Versus

Federal of Pakistan through Secretary, Ministry of Interior, Govt. of Pakistan, Islamabad and another

*(in call cases)*

| | |
|---|---|
| Petitioners: | In Person |
| | *(in all cases)* |
| For the Respondents: | Munawwar Iqbal Duggal, Addl, AGP |
| | a/w Jair Nasrani, DD HR, FIA |
| | a/w Sajjad Hussain, Deputy Dir. (Law), FIA |
| | *(in call cases)* |
| Date of Hearing: | 30.09.2025 |

ORDER

**Syed Mansoor Ali Shah, J.-** The case of the petitioners, who were then Sub-Inspectors, was that the promotion of the petitioners to the post of Inspector (BPS-16) should have been considered from August, 2015 when 25 vacancies to the post of Inspector occurred. It is an admitted position between the parties that in August, 2015, there were 25 vacancies for the post of Inspectors. However, due to pending litigation where stay orders were granted by the High Court and subsequently by the Federal Service Tribunal, Departmental Promotion Committee (DPC) could not be held till 10.10.2017. The reason behind the grant of stay orders was that Federal Service Tribunal through its decision dated 08.04.2015, decided that the seniority list of the Sub-Inspectors including women and men officers ought to be combined, which was finally resolved through the Anomaly Committee and the consolidated seniority list was issued on 03.04.2017 and the stay orders were finally vacated on 24.07.2017. As a result, the DPC was held

immediately thereafter on 10.10.2017 and the petitioners were promoted to the post of Inspector.

2. The petitioners (in person) have argued that even if the DPC was to be held on 10.10.2017, which was delayed for almost two years, is for no fault of theirs and they should have been considered for promotion with effect from August, 2015 when admittedly 25 vacancies of inspectors were available. They relied on *Asad*[1], wherein this Court has held that seats have to be filled from the date of the vacancy. They have taken us through the minutes of the DPC held on 10.10.2017 and pointed out that 42 seats were to be filled in the said DPC. We have noticed that the 04 petitioners before us fell in the top 25 of the 42 seats to be filled in the DPC held on 10.10.2017 after disregarding the candidates deferred in the said meeting. Hence, it is argued that had the same DPC been held in 2015, the four petitioners would have been entitled to be considered for promotion against 25 posts. In this case, the vacancy admittedly occurred in August, 2015 and all of the petitioners qualified within the 25 slots available in August, 2015. Therefore, the petitioners should have been promoted with effect from August, 2015.

3. Learned Additional Attorney General has placed reliance on *Asad Hussain vs. The Controller General of Accounts, Federal Co-operative Building Sector G-5, Islamabad and another* (2025 SCMR 1515), *Naseem Khan vs. The Government of Khyber Pakhtunkhwa through Chief Secretary KPK Peshawar and others* (2024 SCMR 1341), *Muhammad Amjad vs. The Director General Quetta Development Authority and another* (2022 SCMR 797) and contends that in this particular case the delay in the DPC was for no fault of the Government, therefore, the benefit of granting promotion to the petitioners from the date when vacancies were available is not permissible.

4. We have heard the learned counsel for both the parties and have examined the record in detail.

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[1] *Asad Hussain vs. The Controller General of Accounts, Federal Co-operative Building Sector G-5, Islamabad and another* (2025 SCMR 1515)

5. It is a well-settled principle, recognized in our jurisprudence and consistently affirmed in comparative public law, that a civil servant's claim to promotion crystallises the moment a vacancy within their quota arises, provided they meet the prescribed eligibility criteria. At that stage, a corresponding duty is cast upon the competent authority to consider the officer's case fairly and in good time. Administrative indecision, internal disputes, or managerial laxity cannot be pleaded as excuses to defer the process once a substantive vacancy exists. The failure to act amounts to arbitrariness and undermines the doctrine of legitimate expectation, which demands that civil servants be treated in accordance with established norms of fairness and predictability.

6. The settled principle of public administration is that every sanctioned post exists to serve a functional need of the State, and must be filled within a reasonable time after falling vacant. Unless a post has been lawfully abolished, frozen pursuant to a demonstrable policy of fiscal constraint, or withheld due to overriding and transparent public exigencies, the administration is bound to proceed with filling it. Vacancies left unaddressed foster ad-hocism, informal delegation, and opacity, which in turn open the door to nepotism and favouritism. Such practices not only corrode the principles of merit and transparency but also offend the guarantees of equality before law and equal protection of law under Articles 4 and 25, as well as the constitutional injunction of Article 27 that no citizen shall be discriminated against in appointments to the service of Pakistan. Nepotism and favouritism strike at the heart of constitutional morality: they transform public office from a position of trust into a tool of patronage, thereby weakening institutional integrity and eroding public confidence in the fairness of the system.

7. Public institutions are not the private preserves of those who manage them, but repositories of public trust. Their strength lies in the timely and transparent deployment of sanctioned human resources. Failure to fill vacancies without lawful justification not only diminishes institutional performance but also undermines the confidence of civil servants and the public alike. A vacancy is not an empty formality: it represents the

people's need for service, which the State is constitutionally bound to meet. see *Asad*.

8. Petitioner has relied on the phrase "unjustified delays" in the afore-cited judgment to argue that the delay was due to the grant of stay orders by the Court, hence it was no fault of the department. It is a settled principle of service jurisprudence that when a vacancy arises it must be filled without *unjustified delay*, for timely consideration is an essential incident of service and an element of fair treatment under Articles 4 and 25 of the Constitution. The delay in the present case cannot be regarded as justified. It was occasioned by litigation arising out of irregularities in the seniority list prepared by the Department itself, which litigation was ultimately decided against the Department. The stay orders, therefore, were a direct consequence of the Department's own flawed exercise and not of any conduct attributable to the petitioners. To describe such delay as "justified" would, in effect, permit the administration to take advantage of its own wrong and visit innocent officers with the adverse consequences of disputes in which they had no role. This would be wholly inequitable and inconsistent with the doctrine of legitimate expectation, which entitles civil servants to be considered for promotion as soon as vacancies arise.

9. Delay must always be assessed through a civil servant-centric lens: Was the officer in any way responsible for the obstruction? If not, the protection of his rights cannot be made contingent upon protracted departmental disputes or collateral litigation. In this case, the petitioners were blameless, and the delay—spanning over two years—was excessive by any standard of reasonableness. To accept the Department's argument would mean that even if such litigation dragged on for a decade or more, eligible officers would be deprived of promotion until the very end of their careers, thereby reducing the constitutional guarantee of fair consideration to a mere formality. Such an outcome cannot be countenanced. The fair and lawful course, therefore, is to reckon the petitioners' promotion from the date the vacancies first arose in August 2015, notwithstanding the intervening delay.

10. For the above reasons, impugned judgment dated 26.01.2022 passed by the Tribunal is set aside and the instant petitions are converted into appeal and allowed.

Judge

Judge

*Islamabad 30.09.2025*

APPROVED FOR REPORTING

*Tanveer Ahmed*

**2025 SCP 391**

**IN THE SUPREME COURT OF PAKISTAN**

**(Appellate Jurisdiction)**

**PRESENT:**

**Mr. Justice Syed Mansoor Ali Shah**

**Mr. Justice Aqeel Ahmed Abbasi**

Civil Petition No.4430 of 2022

*(Against the judgment dated 02.11.2022 of the Federal Service Tribunal, Islamabad in Appeal No.813(R)CS of 2021)*

*Federation of Pakistan through Secretary, Ministry of Defence, Rawalpindi and others*

*Versus*

*Rooh ul Amin*

For the Petitioners: Barrister Umer Aslam Khan, AAG Pak.

For the Respondent: Mr. Zubair Hussain, ASC

Date of Hearing: 13.10.2025

ORDER

**Syed Mansoor Ali Shah, J.-** Brief facts of the case are that adverse remarks were recorded against the respondent in the year 2013. Subsequently, his case came before the Departmental Promotion Committee ("DPC") for promotion to the post of Sub-Engineer B&R Grade-I (BS-14) in 2015 but he was superseded on the ground of these adverse remarks. The respondent met the same fate in the DPCs held in 2016, 2017, 2018, and 2019. He separately challenged the adverse remarks, which were finally set aside by the Federal Service Tribunal on 26.09.2018, and that decision was upheld by this Court on 06.05.2019. Afterward, the DPC convened in March 2020 and promoted the respondent with effect from 22.07.2020.

2. The respondent contends that he ought to have been promoted from 27.07.2015 – the date when he first became entitled to promotion – but was wrongfully superseded on the basis of adverse remarks that no longer exist in the record. His departmental representation claiming ante-dated promotion was rejected on 09.12.2020. The subsequent representation also failed, leading him to file an appeal before the Tribunal, which through the impugned judgment dated 02.11.2022, allowed his claim and held that he was entitled to be promoted from 2015. The Government has assailed this judgment before us.

3. Learned Additional Attorney General for Pakistan submits that the respondent's departmental representation was barred by time, rendering the appeal before the Tribunal incompetent. On merits, he argues that the respondent never challenged the DPC decisions for 2015 to 2019, and as those orders of supersession still subsist, he cannot now claim ante-dated or pro-forma promotion. He relies upon *Abdul Ghani Chaudhry v. Secretary Establishment, Islamabad and others* (1998 SCMR 2544).

4. Conversely, learned counsel for the respondent refers to paragraph 7 of the impugned judgment, wherein the Tribunal found sufficient cause to condone the delay in filing the departmental representation. It held that the respondent received the relevant communication on 03.02.2021 and, given the security and access constraints of his posting, the delay was justified. He further submits that once the adverse remarks – the sole reason for all supersessions – were set aside by a competent forum and the decision attained finality up to this Court, the supersession orders automatically lost all legal efficacy.

5. We have heard learned counsel and examined the record. On limitation, we find no error in the Tribunal's reasoning. It duly considered the factual circumstances, recorded sufficient cause, and exercised its discretion judiciously in condoning the delay. No interference is warranted on that score.

6. On merits, the core issue is whether the respondent was required to challenge each supersession order separately when all such orders were founded exclusively on adverse remarks that were subsequently annulled. The answer must plainly be in the negative. Once the adverse remarks were expunged by the Tribunal and that finding was upheld by this Court, they ceased to exist in the service record ab initio. In the eye of law, they are deemed never to have been recorded. Consequently, any supersession resting entirely on those remarks collapses with them. It is a settled principle that when the foundation of an administrative order disappears, the superstructure built upon it cannot survive. The orders of supersession were derivative and consequential in nature; once their premise was extinguished, they stood denuded of all legal effect. Non-challenge to such supersession orders, therefore, carries no independent

significance. One cannot be compelled to challenge a shadow of a decision whose substratum has been judicially erased. The insistence that the respondent should have separately impugned those orders amounts to requiring a meaningless formality – an exercise in futility that the law does not demand. The dictum in *Abdul Ghani Chaudhry* is distinguishable, as the case does not discuss the effect of the setting aside of the adverse remarks, which are the basis of supersessions in this case.

7. For these reasons, we find no error in the Tribunal's conclusion that the respondent's promotion should relate back to 2015, when he first became eligible and would have been promoted but for the unlawful adverse remarks. We accordingly decline leave to appeal. The petition is dismissed.

Judge

Judge

Islamabad:
13.10.2025
*(Muhammad Ahmad)*
Approved for reporting.

**2025 SCP 410**

**IN THE SUPREME COURT OF PAKISTAN**

**(Appellate Jurisdiction)**

**PRESENT:**

**Mr. Justice Syed Mansoor Ali Shah Mr.**

**Justice Aqeel Ahmed Abbasi**

Civil Petition No.1392 of 2024

*(Against the judgment dated 14.02.2024 passed by the Khyber Pakhtunkhwa Service Tribunal, Peshawar in Service Appeal No.1772/2023)*

*Mst. Farakh Naz*

*Versus*

*The Secretary Elementary & Secondary Education Department, Govt of Khyber Pakhtunkhwa, Peshawar and others*

For the Petitioner: Mr. Shahid Qayyum, ASC

For the Respondents: Mr. Zahid Yousaf Qureshi, AAG KP Date of Hearing: 22.10.2025

JUDGMENT

**Syed Mansoor Ali Shah, J.-** *The question before us is whether marriage can disqualify a daughter from appointment under the quota reserved for the children of civil servants who die or become incapacitated while in service.*

The mother of Farakh Naz (petitioner) was an employee at the Education Department, Government of the KPK, who retired from service on medical grounds on 27 April 2022. As a consequence, the petitioner was appointed as a Primary School Teacher (Basic Pay Scale-12) at Government Girls Primary School, Tatar Khel No. 2, District Karak, Khyber Pakhtunkhwa, under the deceased or incapacitated employee's quota under Rule 10(4) of the Khyber Pakhtunkhwa Civil Servants (Appointment, Promotion, and Transfer) Rules, 1989 ("**Rules**"), vide order dated 8 January 2023. The petitioner was performing her duties, when the District Education Officer (Female), District Karak suddenly withdrew petitioner's appointment order without issuing a show-cause notice, vide order dated 12 May 2023, on the basis that the petitioner got married. This termination was based on a clarification letter dated 21 February 2022[1], which

[1] The clarification provides: The facility of employment to one of the children of the deceased/invalidated government servant is given in view of their dependence on their parents. The

stipulated that the benefit of appointment under the quota is not available to a female who has contracted marriage. Further, clarification dated 28 April 2023[2] provided that a married daughter may again be considered eligible for appointment if she has separated from her husband and is dependent on her parents. Aggrieved of her termination order, the petitioner filed a departmental appeal against the impugned order which was rejected vide order dated 29 August 2023. Consequently, the petitioner preferred an appeal before the Khyber Pakhtunkhwa Service Tribunal, Peshawar, ("**Tribunal**"), challenging the impugned order, which was dismissed vide judgment dated 14 February 2024 ("**impugned judgment**"). Hence, the instant petition for leave to appeal.

2. The learned counsel for the petitioner contended that in *Zahida*[3] a similar withdrawal order has already been set aside by this Court and prays for the same relief. He further argues that termination was affected without adhering to the due process of law, particularly in the absence of any show-cause notice or opportunity of hearing. Conversely, the learned counsel for the respondents supported the impugned judgment, asserting that the petitioner had suppressed her marital status, thereby disentitling her from any equitable relief. It was submitted that the Tribunal had rightly concluded that, in view of the clarifications dated 21 February 2020 and 28 April 2023, the petitioner's appointment was not sustainable, and hence no indulgence was warranted in her favour.

3. At the very outset, it is pertinent to observe that the facts of the present case are substantially on all fours with the earlier judgment of this Court in *Zahida,* wherein the services of the petitioner in that case had likewise been terminated based on the above clarifications. In the said judgment, while interpreting Rule 10(4) in a gender-neutral manner, this Court affirmed that a woman's legal identity, rights, and autonomy remain intact after marriage, and that any attempt by the executive to limit these rights through administrative instructions is devoid of lawful authority. It held that

facility is equally available to male and female children. However, in case the female has contracted a marriage, she loses this right. Hence, a married daughter is not eligible for this

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facility.

[2] The clarification provides: It is to further clarify that a married daughter after separation from her husband and dependent on her parents is also entitled to appointment under Rule 10(4) of the Rules subject to the conditions that: (i) In case the married daughter is separated judicially, she has to produce a divorce certificate duly issued by NADRA and (ii) In case she has separated customarily she has to produce a certificate from the Deputy Commissioner concerned to the effect that she is separated and is fully dependent on her parents after separation.

[3] *Zahida Parveen v. Government of Khyber Pakhtunkhwa* PLD 2025 SC 529.

the exclusion of married daughters from the purview of Rule 10(4) offends the constitutional guarantees enshrined in Articles 14, 25, and 27 of the Constitution of Pakistan, 1973 ("**Constitution**"), and contravenes Pakistan's international commitments under the Convention on the Elimination of All Forms of Discrimination Against Women ("**CEDAW**")[4]. Ultimately both clarification letters were unequivocally struck down by this Court as being discriminatory, ultra vires the Rules, and issued without lawful authority.

*Moving Beyond Zahida*

*Rule 10(4) Extends Continuity of Livelihood to The Family - Marital Status of The Child, Whether Male or Female, is Wholly Immaterial*

4. We take the opportunity of the instant matter and consider it necessary to further build upon *Zahida* by clarifying that the benefit under Rule 10(4) is not a personal reward for the child or other members of the family, but a posthumous or continuing premium on the service rendered by the parent - the deceased or incapacitated civil servant. The quota is therefore a recognition of the parent's dedication to public service, and the appointment under it is the State's means of extending continuity of livelihood to the family. The children or other dependents are merely the conduits through whom the State expresses its recognition and support. The said benefit - appointment to a post - is to be realized through the family members of the deceased or incapacitated civil servant, including the children, the wife or widow, and, where applicable, the husband or widower. Hence, apart from the prescribed educational qualifications and age, the only qualification relevant to such appointment is the applicant's status as a family member of the deceased or incapacitated employee. The marital status of the child, whether male or female, is wholly immaterial. The rationale of the rule is compensatory and benevolent - it aims to provide financial continuity to the affected family, not to assess or penalize the marital status of the child. To deny this benefit to a married daughter on the ground of her marriage is to misread the object of the Rule. The benefit is a recognition of the services rendered by the parent; it matters little whether the beneficiary child is married or unmarried.

[4] Pakistan ratified the CEDAW on 3 December, 1996.

5. The Rule contemplates appointment of a child of a deceased or incapacitated civil servant to provide financial relief to the affected family in recognition of the parent's service to the State. Its purpose is not to assess the dependency or economic condition of individual children but to ensure that the benefit of employment reaches the family of the civil servant who has died or become incapacitated during service. In this context, a son and a daughter stand on an equal footing. Both can transmit the intended economic relief to the family, and the choice of either fulfils the object of the Rule. The assumption that a daughter, by reason of her marriage, ceases to be connected with or concerned for her parental family is misconceived and rests on outdated social stereotypes. If a son's marriage does not disqualify him or interrupt the flow of financial benefit to the family, there is no rational basis to hold that a daughter's marriage should have that effect. The relief contemplated by the Rule flows to the family through the appointed child – whether son or daughter – and the daughter's marital status bears no nexus to the object of the Rule. Any interpretation that denies her this opportunity offends the guarantees of equality and non-discrimination under Articles 25 and 27 of the Constitution and perpetuates a stereotype the Constitution itself rejects.

*The Constitutional Framework*

6. The Constitution of Pakistan is gender-neutral in its recognition of fundamental rights and does not draw a distinction between a man and a woman, or a son and a daughter, in the enjoyment of their entitlements (Article 25). Indeed, it goes further and consciously discriminates in favour of women by directing the State to take special measures for their protection and advancement (Articles 25, 27, and 34). This constitutional framework acknowledges that women have historically faced systemic disadvantage and therefore deserve additional support to ensure substantive equality. Yet, despite this constitutional protection, the petitioner has been denied her rightful claim to the quota reserved for the children of a deceased or incapacitated parent on the ground of her marriage - a denial that stands in stark contradiction to both the text and spirit of the Constitution.

*Marriage does Not Strip a Woman of Her Personhood*

7. Being married is not a disqualification that strips a woman of her personhood or her constitutional entitlements; marriage merely alters her legal status, not her fundamental rights. A woman like a man is a "person" under the Constitution – and this constitutional status of her personhood remains undisturbed through marriage or divorce. The view that a daughter (and not the son) is always dependent upon her father and thereafter as a wife is always dependent upon her husband is constitutionally unsustainable. Such a notion undermines her individuality and erodes her identity as a person in her own right. As Martha C. Nussbaum aptly observes, *"A society that denies women equal opportunities for full human functioning denies itself justice."*[5]

*Woman's Choice – To Work or to Care – is Equally Dignified*

8. A woman is a full and independent person, enjoying all her fundamental rights in her own capacity as a citizen of Pakistan. Even if she is being looked after by her husband, it remains her personal choice to seek employment, to serve the State, and to enjoy financial autonomy. Conversely, if she chooses to remain at home and devote herself to caregiving and managing the household, that too is a dignified and valuable choice. The contribution of a homemaker to the stability of the family and, by extension, to the strength of the nation, is immeasurable. The labour of care - raising children, nurturing the family, maintaining the household - is an onerous and vital task, too lightly acknowledged in law and society. Strong families and strong nations are built on the strength of mothers who devote themselves to this unseen work. To describe such a woman as "dependent" on her husband is therefore extremely demeaning. She is independent in her personhood and her choice, and whether she stays at home or joins the workforce, her contribution to the family and to society is no less valuable than that of a man. Economic independence, in whatever form it manifests - through employment or through the exercise of meaningful choice - is a crucial component of a woman's dignity, enabling her to live as an equal and self-reliant member of society. The law cannot compel her to remain dependent, nor can it penalize her for exercising her choice to pursue public employment. Any interpretation

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[5] Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press 2001)

that does so perpetuates patriarchy and violates the constitutional guarantees of equality, liberty, and dignity.

*A Woman Is Not a Liability: Rejecting the Language of Patriarchy*

9. We must also strongly dispel, once again, the regressive notion reflected in the above referred clarifications issued by the Establishment Department of the Government of Khyber Pakhtunkhwa, which state that a married woman is no longer "a liability"[6] of her father. Such a statement is deeply insensitive, for it unpersons a woman. The very use of the term "liability" to describe a woman reflects a patriarchal rigidity of thought that has no place under our Constitution. We are astonished that such a term could find its way into official correspondence in the 21st century, more so in a republic that constitutionally guarantees equality, dignity, and respect to all its citizens irrespective of gender.

*Women's Inclusion Is a Constitutional Right, Not a Concession*

10. Looking at from another angle, the participation of women in the public sphere is not a benevolent concession - it is the realization of a right long denied. At the heart of the matter lies not only the individual dignity of women but also the collective progress of society. When women contribute across education, administration, policy, health, and justice, institutions draw upon a broader spectrum of experience, enhancing the quality, legitimacy, and responsiveness of governance.[7] Women's equal participation in public life is thus not simply a means to personal financial independence; it is a structural driver of socio-economic development, good governance, and constitutional democracy. This has been recognized internationally through the Sustainable Development Goals (SDGs)[8] and by comparative constitutional jurisprudence[9] that advocates affirmative measures to correct gender imbalance in public services.

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[6] According to the Merriam-Webster Dictionary, the term "liability" connotes "the quality or state of being liable" or "one that acts as a disadvantage."

[7] Khan, M. A., Imran, A., Khan, S. M., & Qureshi, H. K. J. 'Role of Women in the Economic Development of Pakistan: Theoretical Insight' (2022 IRASD Journal of Economics, 4(2)) 243–251; Radhika Kapur, 'Participation of Women in Social, Economic and Political Activities' (2021 Delhi University) <https://www.researchgate.net/publication/355733271_Participation_of_Women_in_Social_Economic_ and_Political_Activities>.

[8] SDG 5: 'Achieve gender equality and empower all women and girls'

[9] *Dattatraya Motiram More v. State of Bombay* AIR 1953 Bom 311; *Vinayak S/o Ramchandra Sudame*
*v. State of Maharashtra and Others* 1982 (2) BomCR 671; *Om Narain Agarwal v. Nagar Palika, Shahjahanpur* 1993 INSC 62; *Government of Andhra Pradesh v. P.B. Vijayakumar & Another* 1995 SCC (4) 520.

11. In addition to CEDAW, as discussed in *Zahida,* the exclusion of married women from public service also completely goes against the global agenda of equality for women as put forth in the Beijing Declaration and Platform for Action, 1995 ("**Beijing Declaration**")[10]. The Beijing Declaration is the world's most comprehensive, visionary plan ever created to achieve the equal rights of all women and girls.[11]. Although the declaration is not a legally binding treaty it creates a foundational global commitment towards achieving gender equality carrying significant moral and political weight.[12] It recognizes in Article 13 that women's empowerment and their equal participation in decision-making processes are indispensable to achieving equality, development, and peace; Article 16 underscores that sustainable economic growth, social justice and poverty eradication require women's full involvement in economic and social development; and Article 26 directs states to promote women's economic independence including employment by reforming structural inequalities, expanding access to productive resources, and addressing the feminization of poverty. The accompanying Platform for Action further operationalizes these commitments. It places a direct responsibility on governments to design and implement inclusive policies with the equal participation of women, ensuring that gender equality becomes an integral component of national development and governance frameworks.

*The Quranic Ethos of Equality: Women as Independent Moral and Civic Beings*

12. The moral imperative to uphold women's substantive freedom and equality - in the social, familial, spiritual, and public spheres - finds its deepest grounding in Islamic teachings. The Holy Quran, through its timeless ethical vision, lifted women from being treated as property of men or tribes to independent, autonomous moral beings, fully participating in family and social life.[13] By placing

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[10] 'Beijing Declaration (UN Women); adopted unanimously by **189 member states** at the Fourth World Conference on Women <https://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf>

[11] 'The Beijing Declaration and Platform for Action at 30, and why that matters for gender equality' (*UN Women,* 24 January 2025).

[12] It is important to note that Pakistan took steps to cement the commitments undertaken by the Beijing Declaration. The creation of the National Commission on the Status of Women in 2012 came out of the international commitments under the Beijing Declaration.

[13] Sulaimani, F. (1986) 'The Changing Position of Women in Arabia Under Islam During the Early Seventh Century.' University of Salford, International Studies Unit. http://usir.salford.ac.uk/14814/1/361089.pdf; Also see Brown, J. 'Islam is not the Cause of Honor Killings. It's Part of the Solution.' (Yaqeen Institute for Islamic Research) (2016).

women on an equal spiritual footing with men, Islam transformed pre- Islamic society and established a moral order where dignity and equality are indivisible. The Quran's divine message makes no distinction between men and women in their moral worth[14] or capacity for public service. There can, therefore, be no justification for treating women differently in matters of public employment, particularly on patriarchal interpretations of hardship or dependency that apply equally, if at all, to both men and women.

13. Within the framework of *usul-al-fiqh*, there is no textual or rational basis to exclude women from gainful employment - before, during, or after marriage. The foundational rule is one of permissibility unless expressly prohibited[15], and Islam contains no such prohibition. On the contrary, modern scholarship has rearticulated the Quran's gender-egalitarian ethos and reaffirmed the substantive equality embedded within Islamic tradition.[16] From an age that tolerated female infanticide, Islam advanced women to positions of moral and civic leadership.[17] Women in Islam were thus never confined to the domestic sphere alone. Performing valued public duties was recognized as a means of fulfilling their potential and serving the community. The Quran, the Sunnah, and the Hadith literature collectively affirm women's dignity, their right to public participation, and society's duty to honour their contributions in every sphere of life.

*Rejecting Patriarchal Constructs*

14. It is therefore imperative that legislators and policymakers recognize women as autonomous individuals and refrain from enacting or interpreting laws in a manner that subordinates their personhood

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https://yaqeeninstitute.org/en/jonathan-brown/islam-is-not-the-cause-of-honor-killings-its-part-of-the- solution/.

[14] The Quran at many places directly addresses both men and women and draws no distinction therein. See Quran (16:97); "*Whoever does good, whether male or female, and is a believer, We will surely bless them with a good life, and We will certainly reward them according to the best of their deed*s." (Tran. Dr. Mustafa Khattab, The Clear Quran)

[15] This Legal Maxim in the Shariah is *Al-Asl Fi Al-Ashya' Al-Ibahah* (the original rule for all things is permissibility). See Muhammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Texts Society 1991) 306-309.

[16] Recently building on a "hermeneutics of recovery", Amina Wadud and Asma Barlas have advocated for such a reading. See Amina Wadud, *Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective* (2nd edn, Oxford University Press 1999) and Asma Barlas, *Believing Women in Islam: Unreading Patriarchal Interpretations of the Qur'ān* (rev edn, University of Texas Press 2019).

[17] Exemplified by Samra bint Nuhayk and Shifa bint Abdullah, who were appointed as market supervisors to ensure fair trade in the reign of the Caliph Umar ibn al-Khattab. *See* Dr. Omar Suleman et al, '"We Used to Have No Regard for Women": Gender Equity & the Advent of Islam' (Yaqeen Institute for Islamic Research, 22 July 2024) https://yaqeeninstitute.org/read/paper/we-used-to-have-no- regard-for-women-gender-equity-

the-advent-of-islam#ftnt29; Cf. *Al-Mu'jam Al-Kabeer At-Tabarani* 785; *Al-Ahad* wal-*Mathani* 2860.

to patriarchal or marital constructs. The exclusion or "othering"[18] of women - particularly on the ground of matrimony - constitutes a direct assault on their dignity and equality and denies them the fundamental rights that attach to their independent selves. Terminations such as that of the petitioner, resting upon patriarchal readings of the Rule or policy, not only violate the identity and rights of women but also impoverish society and future generations, who are thereby deprived of the intellect, values, and perspectives that women uniquely bring to public life.

15. In *Zahida,* this court already clarified that although *Jalal*[19] struck down Rule 10(4) as unconstitutional, that judgment operates prospectively, and does not affect appointments already made, such as this one. It is also worth emphasizing that when this Court declares a notification, circular, or rule as *ultra vires*, such declaration is not person-specific - it operates *erga omnes* (i.e., against all) rather than inter partes (i.e., between the parties). *Zahida* is not a judgment in *personam* but a judgement in *rem*, as it decided the question of law.[20] So its direction equally applies to all appealing and non-appealing parties.[21] The underlying principle is equal treatment of all persons similarly situated to avoid impartial justice that breeds discontent, resentment, and frustration within the social fabric.[22] Thus, the Government should give full effect to the Court's decision by extending its benefit to all persons to prevent the multiplicity of litigation arising from identical causes.

16. Consequently, in view of the above, the impugned judgment is set aside, and the respondent-department is also directed to restore the petitioner's appointment with all back-benefits in light of

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[18] **"Othering"** is a sociological and philosophical term used to describe the process by which a group or individual is **marginalized, excluded, or treated as fundamentally different or inferior** to a dominant group

[19] *General Post Office, Islamabad v. Muhammad Jalal* PLD 2024 SC 1276.

[20] *Government Of Khyber Pakhtunkhwa through Chief Secretary, Peshawar and others v. Maqsad Hayat and others* 2023 SCMR 8.

[21] *Bashir Ahmed Badini v. Hon'ble Chairman and Member of Administration Committee and Promotion Committee of Hon'ble High Court of Balochistan* 2022 SCMR 448; *WAPDA v. Abdul Ghaffar* 2018 SCMR 380; *Kashif Zafar v. Postmaster-General* 2013 SCMR 726; *Hameed Akhtar Niazi v. Secretary, Establishment Division* 1996 SCMR 1185; *Abdul Hameed Nasir v. National Bank of Pakistan* 2003 SCMR 1030; *Hadayat Ullah and others v. Federation of Pakistan* 2022 SCMR 1691

[22] *Mehar Muhammad Nawaz Versus Managing Director, Small Business Finance Corporation* 2009 SCMR 187.

*Sharif*[23]. This petition is converted into an appeal and allowed in the above terms.

Judge

Judge

Islamabad:

22.10.2025

Approved for reporting

*(Muhammad Mohsin Masood, LC)*

**2025 SCMR 411**

**IN THE SUPREME COURT OF PAKISTAN**

**(Appellate Jurisdiction)**

**PRESENT:**

**Mr. Justice Syed Mansoor Ali Shah Mr.**

**Justice Aqeel Ahmed Abbasi**

Civil Petition No.4757 of 2024

*(Against the order dated 16.05.2024 passed by the Punjab Service Tribunal, Lahore in Appeal No.4144/2023)*

Ghulam Murtaza

***Versus***

District Police Officer, Gujrat and others

For the Petitioner: Ch. Munir Sadiq, ASC

For the Respondents: Mr. Sanaullah Zahid, AAG. Punjab Date of Hearing: 23.10.2025

ORDER

**Syed Mansoor Ali Shah, J.** The brief facts of the case are that the Petitioner, serving as a Police Constable (BPS-07), was implicated in a criminal case bearing FIR No. 722/2021 dated 08.01.2021, registered under Sections 302, 311, 147 and 148 of the Pakistan Penal Code, 1860, at Police Station Civil Lines, Gujrat. Subsequently, independent departmental proceedings were initiated against the Petitioner in addition to the pending criminal case under Punjab Police (Efficiency & Discipline) Rules, 1975 ("**Rules**"). The allegations levelled against the Petitioner in the disciplinary proceedings were that:

> "*He while posted at P.P Jatria Sadar Lalamusa, failed to perform his official duty in an appropriate manner. As per Special Report vide No. 1210-5A, dated 09.11.2021 submitted by SHO P.S Civil Lines, Gujrat, the delinquent official has been found involved in a case FIR No. 722/21, dated 08.11.2021 u/s 302/311/148/149 PPC P.S Civil lines, Gujrat. Being a public servant his involvement in a criminal case amounts to height of inefficiency and gross misconduct on his part and warrants strict departmental action against him under the provisions of the Punjab Police (E&D) Rules, 1975.*"

Without conducting a proper inquiry, the Inquiry Officer, through report dated 18.11.2021, merely referred to the Petitioner's involvement in the criminal case and recommended serious departmental action. Consequently, the Petitioner was dismissed from service vide order dated 13.12.2021. The Petitioner preferred an appeal

against his dismissal, wherein he was provisionally reinstated with a direction to the department to conduct a *de-novo* inquiry vide order dated 25.04.2022. Meanwhile, the Petitioner was acquitted in the criminal case on 26.04.2022.

2. In the *de novo* inquiry, identical allegations were served on the Petitioner on 19.05.2022. He appeared before the Inquiry Officer and informed him of his acquittal in the criminal case. Nonetheless, while acknowledging the acquittal, the Inquiry Officer concluded that the Petitioner's mere involvement in a criminal case warranted departmental action. The report remained silent on the separate allegation of failure to perform duty in an appropriate manner. Relying on this report, the competent authority dismissed the Petitioner from service on 16.06.2022. His departmental appeal and revision were subsequently dismissed on 06.04.2023 and 21.08.2023, respectively. The Service Tribunal also dismissed his appeal on 16.05.2024, leading to the present Civil Petition for Leave to Appeal.

3. Learned counsel for the Petitioner contended that the allegation of involvement in the criminal case stood disproved, while the charge of improper performance of duty was neither discussed by the Inquiry Officer nor supported by any evidence. Hence, the imposition of a major penalty solely on the basis of the Petitioner's nomination in an FIR was unwarranted and without lawful justification. Conversely, the learned Additional Advocate General ("**AAG**") argued that criminal and departmental proceedings are distinct and independent, and the Petitioner's dismissal—based on a duly conducted inquiry and upheld by the appellate fora—was lawful and sustainable.

4. The charge sheet levelled two allegations against the Petitioner:
(i) failure to perform duty in an appropriate manner, and (ii) involvement in a criminal case. Two inquiries were held, yet both reports - dated 18.11.2021 and 26.05.2022 - neither addressed nor examined the alleged dereliction of duty. Instead, they focused solely on the Petitioner's implication in the criminal case and, on that basis alone, recommended departmental action. Thus, in effect, the only charge pursued against the Petitioner was his involvement in the criminal case - of which he had already been acquitted prior to the initiation of the *de novo* inquiry.

5. We have heard the learned counsel and examined the record of the case. It is an admitted position that the Petitioner stood acquitted in the criminal case vide judgment dated 26.04.2022. The order of acquittal shows that the Petitioner was extended the benefit of doubt and acquitted on merits.

6. We consider it necessary to reiterate the settled principle that departmental disciplinary proceedings and criminal proceedings, though sometimes arising out of the same set of facts, operate in distinct legal domains[1] and are governed by different standards of proof. The disciplinary inquiry is founded on the preponderance of probability, aimed at preserving the integrity and efficiency of public service, whereas a criminal trial proceeds on the stricter standard of proof beyond reasonable doubt, intended to determine penal liability. Consequently, the pendency or outcome of one does not automatically affect the other, and both may lawfully proceed concurrently.[2]

7. However, this general rule admits of an important exception. Where the sole allegation in the departmental proceedings is that the civil servant has been involved in, or is facing, a criminal case - and no independent and probeable act of misconduct is alleged - the acquittal of the civil servant in the criminal case removes the very substratum of the departmental charge.[3] The disciplinary machinery cannot stand on its own in such circumstances because there exists no stand-alone allegation that the department can independently inquire into or establish through departmental evidence. The charge of "involvement in a criminal case" is, by its very nature, incapable of departmental proof - it belongs exclusively to the criminal forum. Once the criminal court has adjudged the civil servant not guilty on the

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[1] *Mumtaz Uddin Shaikh v. Chief Postmaster, GPO, Hyderabad and others* 2024 SCMR 1675; *Muhammad Iqbal v. Regional Police Officer, Sahiwal and another* 2023 PLC (C.S.) 267; *Muhammad Nawaz Khan v. Inspector General Of Police, Punjab, Lahore and others* 2023 PLC (C.S.) 884.

[2] *Secretary, Local Government And Rural Development, Government Of Punjab, Lahore and another v. Ahmad Yar Khan* 2010 S C M R 861; *The Director General, Intelligence Bureau Government Of Pakistan and others v. Babar Ali Solangi* 2025 SCMR 353; *Ghulam Murtaza Sheikh and another v. The Chief Minister, Sindh and others* 2024 SCMR 1757; *Faraz Naveed v. District Police Officer Gujrat and another* 2022 SCMR 1770; *Senior Superintendent Of Police (Operations) and others v. Shahid Nazir* 2022 SCMR 327; *Shahid Masood Malik v. Habib Bank Ltd. and another* 2007 PLC (C.S.) 125.

[3] *Muhammad Iqbal v. Regional Police Officer, Sahiwal and another* 2022 SCMR 1520

same accusation, the departmental authority is left with nothing to determine; the entire charge falls to the ground.

8. Any further attempt to proceed would not only be redundant but would also transgress the boundaries of fairness and legality. It would offend the broader constitutional guarantee of due process and fair trial under Article 10A, which requires that no one be condemned without credible evidence, impartial inquiry, and a meaningful opportunity of defence. A departmental action that, despite acquittal, persists in holding the civil servant liable for mere involvement in a criminal case is founded not on evidence but on conjecture and subjective notions of ideal conduct. Such proceedings violate the constitutional matrix of rights that shield every citizen from arbitrary and oppressive state action. The denial of due process under Article 10A necessarily infringes the right to dignity under Article 14 and the right to livelihood - an inseparable facet of the right to life under Article 9. These inter-locking guarantees collectively ensure that public employment, though subject to discipline, remains protected by constitutional fairness and human dignity. To sum up, the jurisprudence, therefore, draws a clear and categorical distinction:

(a) Where departmental proceedings rest on independent and probeable evidence of misconduct, an acquittal in the criminal case does not absolve the employee, and both proceedings may lawfully run concurrently.

(b) However, where the departmental action is founded solely on the registration or pendency of an FIR, without any distinct charge of misconduct, the employee's subsequent acquittal extinguishes that foundation, rendering any ensuing penalty legally untenable and constitutionally infirm.

9. Learned AAG has also submitted that the service appeal of Petitioner was barred by time, however, this aspect was never raised by the department before the Tribunal. Keeping in view the circumstances of the case, we are not inclined to take up this matter at this stage.

10. We, therefore, set aside the impugned judgment and the order of dismissal of the Petitioner and re-instate the Petitioner into service. This petition is converted into appeal and allowed.

Judge

Judge

Islamabad:

23.10.2025

*APPROVED FOR REPORTING*

*(Muhammad Mohsin Masood LC/Uzma Zahoor)*

**2025 SCP 414**

**IN THE SUPREME COURT OF PAKISTAN**

**(Appellate Jurisdiction)**

**PRESENT:**

**Mr. Justice Syed Mansoor Ali Shah Mr.**

**Justice Aqeel Ahmed Abbasi**

**Civil Petition No.1729-L of 2017**

*(Against the order dated 11.04.2017 passed by the Lahore High Court, Lahore in W.P No.21330/2010)*

Hafiz Abdul Rauf

Versus

PASSCO, Lahore, etc

For the Petitioner: Mr. Khalid Ismail, ASC
*(Via V.L. Lahore)*

For the Respondents: Ms. Saba Saeed, ASC
*(Via V.L. Lahore)*

Date of Hearing: 23.10.2025

ORDER

**Syed Mansoor Ali Shah, J.-** Brief facts of the case are that the Petitioner who was working as Project Incharge in Pakistan Agricultural Storage and Services Corporation Ltd (PASSCO), Lahore was departmentally proceeded on the charges mentioned in Show Cause Notice dated 18.04.2009. Without holding regular inquiry, major penalty of dismissal from service was imposed on the Petitioner, which was subsequently, set aside by the Lahore High Court and converted into compulsory retirement through the impugned order dated 11.04.2017. The question before us is: *whether a major penalty (or even minor penalty) can be imposed on a civil servant in the absence of a regular inquiry*?

2. We have heard the learned counsel for the parties at some length and gone through the impugned judgment of the High Court and the record of the case.

3. Before embarking upon the merits of the case, it is imperative to recall that the *inquiry* is not a mere procedural ritual; it is the constitutional heartbeat of fairness within the disciplinary framework of public service. The right to be heard, to confront evidence, and to defend oneself against allegations is not a privilege

granted by departmental grace but a facet of the fundamental rights guaranteed under Articles 9, 10A, and 14 of the Constitution — the right to life and livelihood, the right to a fair trial, and the right to dignity. To disregard an inquiry is, therefore, to erode these guarantees at their very core.

4. Regrettably, a recurring tendency has emerged within certain administrative hierarchies – a dismissive refrain that "let them go to the courts." Such indifference trivializes the hardship of those public servants who lack the means, resources, or social capital to pursue costly and protracted litigation. Many are left to endure unjust penalties in silence, their professional lives and personal dignity scarred by the absence of due process. When disciplinary power is exercised without the discipline of inquiry, it ceases to be lawful authority and degenerates into arbitrariness.

5. Bypassing or conducting a sham inquiry does not merely harm the individual; it corrodes institutional morale, breeds cynicism, and burdens the judicial system with avoidable litigation – diverting the energies of both the public servant and the State from constructive service. It is, therefore, incumbent upon this Court to restate, in clear terms, that an inquiry is the cornerstone of the rule of law in service discipline – a constitutional shield against administrative excess and a guarantee that justice within the bureaucracy is not reduced to the whim of authority.

6. The erstwhile Removal from Service (Special Powers) Ordinance, 2000 ("**2000 Ordinance**")[1], under which the petitioner was proceeded against, prescribes a comprehensive inquiry mechanism. It mandates the appointment of an Inquiry Officer or Inquiry Committee to conduct a regular inquiry, which entails framing and communicating specific charges and a statement of allegations to the accused, securing a written reply, and examining both oral and documentary evidence while ensuring the accused's right to cross- examine witnesses. For this purpose, the Inquiry Officer is vested with the powers of a civil court under the Civil Procedure Code, 1908 ("**CPC**"). Upon completion of the inquiry within the prescribed

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[1] The Removal from Service (special powers) Ordinance, 2000 has since been repealed vide the Removal from Service (special powers) (Repeal) Act, 2010.

timeframe, the Inquiry Officer or Committee submits a report with findings and recommendations to the competent authority. Based on this report, and after affording the accused a reasonable opportunity to show cause, the competent authority may impose an appropriate penalty where guilt is established. This procedural framework is similarly reflected in other efficiency and disciplinary rules governing civil servants.[2]

7. It is, however, recognized that a regular inquiry may be dispensed with, though only in exceptional circumstances. Section 5(4) of the erstwhile 2000 Ordinance expressly provides:

> "The *competent authority may dispense with the inquiry under sub-section (1) if it is in possession of sufficient documentary evidence against the accused, or for reasons to be recorded in writing, it is satisfied that there is no need of holding an inquiry."*

This statutory power is to be exercised sparingly and with circumspection. The courts have consistently interpreted it narrowly, emphasizing that dispensation of inquiry is an exception, not the rule. Only in rare and exceptional cases – where the available documentary evidence conclusively establishes misconduct, or where the facts are undisputed and borne out from the record or for any cogent and recorded reasons – can the department resort to a summary procedure.

8. The courts have time and again held that the power to dispense with a regular inquiry must be exercised with extreme caution and only in the rarest of cases. It cannot be invoked where the charge is of such a nature that it cannot be established without recording evidence or cross-examining witnesses.[3] The very object of an inquiry is to test the credibility of allegations through evidence, confrontation, and defence; dispensing with it in contested matters amounts to short-circuiting due process. Accordingly, the dispensation of a regular inquiry is justified only in *extraordinary circumstances*, particularly where facts are admitted, undisputed, or self-proving from the record. Where the facts are contested, or where credibility and evidentiary weight must be tested by cross-examination, a summary

[2] Civil Servants (Efficiency & Disciplinary) Rules, 2020 ("2020 Rules"), The Punjab Employees Efficiency, Discipline and Accountability Act, 2006 ("PEEDA 2006"), The Sindh Civil Servants (Efficiency And Discipline) Rules, 1973 ("Sindh Rules 1973"), The Balochistan Employees' Efficiency And Discipline Act, 2011 ("Balochistan Rules 2011"), Khyber Pakhtunkhwa Government Servants (Efficiency and Discipline) Rules, 2011 ("KPK Rules 2011").

[3] *Saad Salam Ansar v. Chief Justice of Sindh High Court, Karachi* 2007 SCMR 1726

procedure cannot be adopted. Even in cases where a summary route is permissible, it must be exercised "with extra care so that no prejudice is caused".[4] To proceed otherwise would offend the guarantee of fair trial and due process under Article 10A of the Constitution, which forbids condemning a person without proper proof and the opportunity to defend. The competent authority may therefore dispense with an inquiry only where the charge rests on incontrovertible documentary material – leaving no disputed question of fact – and only after recording detailed reasons reflecting independent application of mind. It is well settled that reliance on evidence which is not self- authenticating defeats the very rationale of dispensation. This Court has held, for instance, that unverified closed-circuit television (CCTV) footage cannot be treated as conclusive evidence unless subjected to forensic examination and authentication.[5] The same principle applies to disputed or untested documentary material, the veracity of which can only be established through cross-examination.[6]

9. Conversely, where the incriminating fact is admitted and self-proving – such as absence from duty duly reflected in official records – the competent authority may, for recorded reasons, proceed without a regular inquiry.[7] In every case, however, the safeguard remains that the authority must demonstrate, through cogent reasoning and written justification, that the evidence relied upon is unimpeachable, self-contained, and that no prejudice has been caused to the accused officer. A holistic view of the settled legal principles establishes that a civil servant must be clearly informed of the specific charges and allegations against them, afforded an opportunity to submit a written defence, granted the right to cross-examine witnesses, and provided a fair opportunity of personal hearing. The purpose is to determine whether the allegations of misconduct are substantiated and, if so, to confront the delinquent officer as to why disciplinary action should not be taken.[8]

10. The principles governing inquiry apply with equal force whether the penalty contemplated is major or minor. The distinction

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[4] Ibid

[5] *Member (Administration), FBR v. Mian Khan* 2022 PLC (C.S.) 474

[6] *Muhammad Abdul Moied v. Government of Pakistan* 2010 SCMR 1546; *Abdul Sattar v. Pakistan Water and Development Authority* 2007 PLC (C.S.) 354

[7] *National Bank of Pakistan v. Zahoor Ahmad Mengal* 2021 SCMR 144.

[8] *Government of Khyber Pakhtunkhwa vs. Aurangzeb* 2025 SCMR 40.

between the two relates only to the degree of severity, not to the existence of procedural safeguards. A minor penalty is still a penalty, carrying legal, professional, and reputational consequences for the civil servant. To treat it as exempt from the discipline of inquiry is to trivialize the constitutional guarantees of fairness and due process.

11. No penalty – howsoever described – may lawfully be imposed without confronting the accused with the allegations, affording a reasonable opportunity to explain, and adjudging that explanation through reasoned consideration.[9] These safeguards are not ornamental; they are the very instruments by which justice is administered within the civil service. The logic of distinguishing between major and minor penalties presupposes that the authority will first ascertain, through a fair inquiry, the true nature and gravity of the misconduct so that the proportionality of the punishment can be justly determined. Without such inquiry, there is no factual foundation on which discretion can rest.

12. A regular inquiry, therefore, cannot be dispensed with merely because the department intends to impose a so-called minor penalty. The absence of inquiry deprives the authority of an informed basis to calibrate punishment and exposes the order to arbitrariness. Procedural fairness is indivisible; it cannot be diluted by the label of "minor." Where any punitive action affects a civil servant's dignity, reputation, or prospects of advancement, it must pass through the crucible of inquiry – so that discipline does not become disguised injustice.

13. The centrality of due process and fair trial in disciplinary proceedings is not only a constitutional imperative but also a binding international obligation. Pakistan, as a signatory to core international

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[9] In the comparative context also see *Satyendra Singh v. State of Uttar Pradesh* 2024 SCC 3325; *Kulwant Singh Gill v. State of Punjab* 1990 INSC 278; *MP State Agro Industries Development Corporation v. Jahan Khan* 2007 INSC 895; In the United States the 5th Amendment of the U.S. Constitution prohibits the federal government from depriving a person of life, liberty, and property without providing adequate due process. As a result, federal employees can have a property right in their continued federal employment, which means that due process must be provided before an agency interferes with or terminates their employment or imposes any penalty including suspension. This was reinforced in the case of *Cleveland Bd. of Education v. Loudermill,* 470 U.S. 532, 546 (1985); Also see *Gilbert v. Homar*, 520 U.S. 924, 935-36 (1997) (regarding the due process clause in cases of suspension), *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1280 (Fed. Cir. 2011) and *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1375 (1999) (quoting and citing Loudermill extensively to explain a Federal employee's due process right to present his or her side of the case).

human rights instruments, has undertaken to uphold these guarantees. Article 10 of the Universal Declaration of Human Rights affirms that *"everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations."* This foundational guarantee presupposes a meaningful inquiry as the mechanism through which facts are established, and rights are adjudicated.

14. Article 14 of the International Covenant on Civil and Political Rights further crystallizes the fair-trial standard.[10] It guarantees equality before courts and tribunals and a fair and public hearing by a competent, independent, and impartial authority in all proceedings determining rights and obligations, whether civil, criminal, or disciplinary. The provision embraces all adjudicatory forums – ordinary or specialized – and requires that procedural safeguards be respected throughout the process.[11] A proper inquiry is the procedural instrument through which fairness is operationalized. It enables the accused to know the case against them, respond to evidence, and test the credibility of witnesses and documents. Penalties – whether classified as minor or major – imposed without adherence to this process amount to arbitrary deprivation of rights, contravene the guarantees of fair trial and due process, and fall foul of Pakistan's constitutional framework and its international commitments. International law does not countenance punitive outcomes founded on untested allegations; nor can the Constitution.

15. In the instant case, it is an admitted position that major penalty was imposed without any regular inquiry. When asked, learned counsel for the respondent could not refer to any document that justifies as to why the regular inquiry was dispensed with. The allegation against the petitioner is his involvement in a scam regarding the preparation and encashment of forged and fictitious bills. The Managing Director, PASSCO raised the allegations vide final show cause notice dated 18.04.2009 of abetment to fraud and also dispensed away with the inquiry on the basis of "sufficient

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[10] Section 1 of Article 14 of the ICCPR states "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law."

[11] General comment no. 32, Article 14, 'Right to equality before courts and tribunals and to fair trial' (UNHRC, 2007)

documentary evidence and incriminating record" without showing what evidence was actually on record. From the allegations, this is a case where the facts are necessarily in dispute; a position also borne out of the petitioner's reply denying the allegations. Furthermore, the handwriting expert also reported that the signatures on the purchase bill did not tally with the admitted signatures of the petitioner. As such, there was no reasonable ground to dispense with the inquiry and more so there was no ground to award a major penalty without any regular inquiry, which was imposed upon the petitioner vide office order dated 30.05.2009. The High Court though observed the handwriting expert report and noted the aforementioned discrepancy of signatures, yet the writ petition was partially accepted and the penalty of dismissal from service was converted into compulsory retirement in contravention of established principles of law and procedure discussed above.

16. In view of the above, since the guilt of the petitioner was never established by a regular inquiry, no penalty – minor or major (in this case major penalty) could have been imposed upon him. As such the impugned order of conversion of penalty into compulsory retirement is set-aside and the petitioner is re-instated into service. As to the back benefits, the same shall be determined by the department in the light of *Muhammad Sharif*[12] This petition is converted into appeal and allowed.

[12] *Muhammad Sharif v. Inspector General of Police, Punjab* 2021 SCMR 962.

**2025 SCP 418**

**IN THE SUPREME COURT OF PAKISTAN**

**(Appellate Jurisdiction)**

**PRESENT:**

**Mr. Justice Syed Mansoor Ali Shah**

**Mr. Justice Aqeel Ahmed Abbasi**

Civil Petitions No.3651-L and 4648 of 2022

*(Against the judgment dated 26.10.2022 of the Federal Service Tribunal, Lahore in Appeal No.300(L) of 2020)*

*The Secretary / Chairman Railways, Government of Pakistan, Ministry of Railways, Islamabad, etc.*
*(in CPLA No.3651-L of 2022)*
*Federation of Pakistan through Secretary Finance Division, Islamabad*
*(in CPLA No.4648 of 2022)*

*Versus* Tariq Mansoor and others

*(in both cases)*

For the Petitioners: Mr. Jawad Mahmood Pasha, ASC
*(via video link from Branch Registry Lahore)*
Barrister Umer Aslam, AAG Pak. a/w Mr. Shoaib Adil, Addl. Secretary, PR Mr. Muhammad Tayyab, Director PR
Ms. Huma Noureen, Legal Consultant, PR Mr. Najam Bashir, CFO, PR
Mr. Khalid Zia, SO (Litigation)

For the Respondents: Sheikh Muhammad Ali, ASC
Mr. Behzad Mund, AHC

Date of Hearing: 30.10.2025

ORDER

**Syed Mansoor Ali Shah, J.-** Brief facts of the case are that the respondent, serving as Accounts Officer in the Audit Department of Pakistan Railways, enhanced his qualification by obtaining an LLB degree in the year 1992. Consequently, he applied for two advance increments under two schemes: (i) *THE INCENTIVE SCHEME FOR RAILWAYS OFFICERS AND SUBORDINATES* dated 22.01.1966
("**Scheme, 1966**") issued by the Railway Department, Government of West Pakistan; and (ii) *GRANT OF ADVANCE INCREMENTS TO THE EMPLOYEES DRAWING PAY IN BPS-16*—Office Memorandum dated 08.07.1996 ("**General Scheme, 1996**"). The respondent approached the department through a representation, which was referred to the Finance Department and subsequently rejected vide order dated 26.09.2019 on the ground that the **Scheme, 1966** stood abolished on
01.12.2001. The respondent challenged the said decision before the Tribunal, which, vide impugned judgment dated 26.10.2022, granted him relief under the **Scheme, 1966**.

2. Learned Additional Attorney General for Pakistan, representing Pakistan Railways and the Federal Government, assisted by Mr. Jawad Mahmood Pasha, ASC, and Ms. Huma Noureen, Legal Consultant, Pakistan Railways, submits that the respondent, being an Accounts Officer in the Audit Department, was not entitled to any incentive under the **Scheme, 1966**. Learned Law Officer referred to the scheme to show that while it extends benefits to various departments of Pakistan Railways, the Audit Department is not one of them. With regard to the **General Scheme, 1996**, it was submitted that the said scheme requires a person to possess an M.A. or M.Sc. degree to qualify for two advance increments. As the respondent's qualification is LLB, he does not fall within its ambit.

3. Conversely, learned counsel for the respondent vehemently argued that

several judgments of the Tribunal, as well as letters issued by Pakistan Railways and the Finance Division, have extended similar benefits to officers who obtained an LLB degree. Some of these references, however, relate to departments already covered under the **Scheme, 1966**, and none pertains to an Accounts Officer of the Audit Department.

4. We have heard the learned counsel for the parties and examined the record. Upon careful perusal of both schemes, we find that no benefit under the **Scheme, 1966** has been extended to officers of the Audit Department, and that an LLB qualification is not recognized under the **General Scheme, 1996**. Therefore, the respondent's case does not fall within the scope of either scheme. The benefit extended by the Tribunal under the **Scheme, 1966** is thus unsustainable and stands set aside.

5. As to the respondent's alternate plea under the **General Scheme, 1996**, the Tribunal did not address it. We considered the option of remanding the matter to the Tribunal for this purpose. However, since the record before us is complete and enables us to finally determine the issue, there is no occasion to remand the case.

6. We wish to highlight that "Remand" is not an automatic judicial reflex. It is a judicial instrument to be employed only when justice so demands, not as a matter of routine. A case may properly be remanded to a lower forum where material facts remain undetermined, procedural fairness has been compromised, or essential evidence has not been duly examined—situations in which the appellate court cannot itself do complete justice. The purpose of remand is corrective, not dilatory; it serves to secure a just adjudication, not to prolong litigation.

7. Yet, the power to remand must be exercised with circumspection and restraint. Where the factual matrix is complete, the issues are purely legal, or the appellate record permits a final determination, the appellate court ought to decide the matter itself. To remand in such circumstances is to sacrifice substance at the altar of form and to delay justice in the name of process. The restraint against unnecessary remand finds its rationale in the *principle of judicial economy*—a foundational tenet of modern adjudication that obliges courts to avoid duplication of proceedings, promote finality, and conserve judicial time. It embodies the constitutional command for expeditious justice under Article 37(d) of the Constitution, ensuring that litigation does not get trapped in repetitive procedural rounds. Judicial economy thus demands that appellate courts decide, not defer, where the record enables them to do so, for justice delayed is justice denied.

8. It was next argued by learned counsel for the respondent that an LLB degree is equivalent to an M.A. degree, hence the respondent is entitled to benefit under the **General Scheme, 1996**. No such facility for treating equivalent degrees is

provided in the scheme, nor can such a condition be judicially read into it. Institutional autonomy is a vital facet of constitutional governance. It reflects the recognition that each organ or department of the State possesses its own sphere of competence, expertise, and discretion within which it must be permitted to function freely. Courts, while the ultimate interpreters of legality, must exercise judicial restraint in matters where the law vests policy discretion or administrative choice in an executive or institutional authority.

9. When a scheme or departmental policy—such as one framed by Pakistan Railways or the Finance Division—does not expressly provide for a particular benefit, it is not the function of the Court to read that benefit into the scheme. Doing so would amount to judicial legislation and would erode the institutional autonomy that underpins administrative efficacy. Courts are to interpret the scheme as framed, not to re-engineer it according to perceived notions of equity or convenience.

10. The judiciary must therefore respect the institutional boundaries drawn by law. Unless the omission complained of violates a constitutional or statutory command, the Court cannot compel an institution to adopt a policy or grant a concession not contemplated by its own governing framework. The principle of *institutional autonomy* thus guards against judicial overreach, ensuring that policy formation remains the prerogative of the executive, and that courts confine themselves to ensuring legality, rationality, and procedural fairness within the limits set by law.

11. Furthermore, this Court has already held that an LLB degree is not equivalent to a Master's degree. Reference may be made to order dated 17.02.2022 passed in *CPLA No. 262 of 2018* titled *Government through Secretary Finance, Finance Division (Regulation Wing), Islamabad v. Manzoor Qadir, Assistant Director (Mails) and others*, and order dated 13.03.2018 passed in *CPLA No. 65 of 2017* titled *The Secretary Finance Division, Government of Pakistan, Islamabad v. Hakim Ali Soomro and others*.

12. Accordingly, we see no reason to remand the matter to the Tribunal and hold that the respondent is not entitled to advance increments under either of the Schemes. We note that, following the impugned judgment of the Federal Service Tribunal, the respondent has already received advance increments amounting to Rs. 75,000/-. The Additional Secretary, Pakistan Railways, submits that, in the facts

and circumstances of this case, the Department does not intend to recover the said amount from the respondent. The Department has shown grace and magnanimity in foregoing this amount; however, this arrangement shall not be treated or cited as a precedent in any other case. The instant petitions are converted into appeals and allowed.

Judge

Judge

Islamabad: 30.10.2025

Approved for Reporting

*(Muhammad Ahmad)*

**2025 SCP 427**

**IN THE SUPREME COURT OF PAKISTAN**

**(Appellate Jurisdiction)**

**PRESENT:**

**Mr. Justice Syed Mansoor Ali Shah Mr. Justice Naeem Akhter Afghan Mr. Justice Aqeel Ahmed Abbasi**

**Civil Petitions No.41-Q and 42-Q of 2022**

*(Against the judgment dated 30.01.2018 of the Punjab Service Tribunal, Lahore in Appeal No.3989 of 2016)*

*Allah Diwaya*
*(in CPLA No.41-Q of 2022)*
*Waseem Ahmed and others*
*(in CPLA No.42-Q of 2022)*

*... Petitioners*

*versus*

*Director Education Quetta and another*
*(in CPLA No.41-Q of 2022)*
*Chief Secretary, Govt. of Balochistan & others*
*(in CPLA No.42-Q of 2022)*

*... Respondents*

For the Petitioners: Mr. Manzoor Ahmed Rahmani, ASC
*(in both cases / via video link from Branch Registry Quetta)*

For the Respondents: Mr. Muhammad Ayaz Swati, AAG Balochistan
*(in both cases)*

Date of Hearing: 24.10.2025

JUDGMENT

Syed Mansoor Ali Shah, J.-

*The question before us is whether the status of an absconder or fugitive in a criminal case, by itself, bars a person from pursuing civil or service remedies ?*

Brief facts are that the petitioners were initially appointed as Junior Venacular Teachers (JVTs) by the Education Officer, Dera Bugti, and continued to serve for nearly twenty-five years until their appointment, alongwith those of twenty-two other teachers, was declared fake/bogus by the Director Education (S) through letter dated 11-02-2015. This was reaffirmed through the subsequent letter dated 09-11-2015 alleging that the petitioners had entered the Education Department through forged appointment orders, leading to the stoppage of salaries. The petitioner's first appeal was disposed of with consent for initiation of proper inquiry. Till date no removal order has been passed; yet their respective salaries remain withheld. Their subsequent appeal seeking release of salaries was dismissed as non-maintainable solely on the ground that the petitioners are fugitives from law/absconder in a criminal case. Hence this petition for leave to appeal.

2. Learned counsel for the petitioners submits that the concept of being a fugitive from law or being an absconder is a concept under the criminal law and cannot be applied on the civil side. Therefore, service appeal of the petitioners ought to have been heard on merits and the case decided accordingly. While the learned AAG argued that in the absence of lawful induction, no vested right to pay or continuation in service arises, and that his fugitive/absconder status disentitles him to seek discretionary relief until he submits to the lawful process.

3. The principle that a fugitive or absconder cannot invoke the court's appellate jurisdiction in a criminal matter traces its origin to the *Fugitive Disentitlement Doctrine* developed in the United States. Evolving in the late nineteenth century as an equitable rule of criminal appellate procedure[1]. The doctrine rests on the premise that one who deliberately evades the authority of the court disentitles himself to its relief. It treats flight from justice as a constructive waiver of appellate rights, justified on three inter-locking rationales: first, that a court should not pronounce judgments it cannot enforce; second, that flight directly frustrates the appellate process by placing the appellant beyond judicial control; and third, that denial of hearing deters evasion of justice.

4. In the United Kingdom, the same consequence follows in criminal appeals not by way of doctrine but through procedural rule and practical necessity. Under the *Criminal Appeal Act 1968*, an appellant who has not surrendered to custody may have his appeal dismissed, since enforcement of any judgment—whether affirming or overturning conviction—would be impossible while he remains at large. Pakistan law has followed the

same procedural course: appellate courts have repeatedly declined to hear the criminal appeals of fugitives until they surrender or are apprehended, treating submission to jurisdiction as a precondition for hearing.

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[1] See Roberto Iraola, 'The Fugitive Disentitlement Doctrine' *WASH. L. REV* 427 (1950) 430 & *Smith v. United States*, 94 U.S. 97 (1876); *Molinaro v. New Jersey*, 396 U.S. 365 (1970)

5. The rationale, shared across these jurisdictions, is one of *enforceability and procedural discipline*, not punitive forfeiture of rights. This principle, however, is strictly confined to criminal proceedings. Its extension into civil, family, or service-law contexts finds no support in either doctrine or policy. Civil and service adjudications determine rights over property, employment, or entitlements that are enforceable irrespective of the claimant's physical custody, and the litigant's absence seldom frustrates the process or its execution[2]. In the United Kingdom and other common- law jurisdictions, blanket disentitlement of fugitives from civil justice is unknown, being incompatible with the right to a fair hearing under Article 6 of the *European Convention on Human Rights*. Within our own constitutional framework, founded upon Articles 4, 9, 10A and 25 of the Constitution of Pakistan, the right of access to justice cannot be curtailed merely because a person stands accused, or has absconded, in another domain of law. Unless a statute expressly provides otherwise or the fugitivity demonstrably obstructs adjudication, abscondence in a criminal matter cannot extinguish or suspend independent civil or service rights**.**

6. This Court has already affirmed that any disadvantage arising from the status of a proclaimed offender ordinarily attaches only to the very case in which the proclamation is issued and does not extend to other matters lacking nexus to that proceeding.[3] Accordingly, a proclaimed offender is not, merely by virtue of that status, barred from instituting or defending a civil suit or prosecuting an appeal concerning his civil rights and obligations.[4] Moreover, declaring a person proclaimed offender carries certain statutory consequences within that criminal sphere unless a specific statute governing civil employment expressly stipulates that such criminal status disables pursuit of civil remedies, the disqualification cannot be read into the service jurisprudence by implication. It would be impermissible to import a penal consequence into service jurisprudence in the absence of a clear legislative mandate.

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[2] Even in the United States, attempts to transplant the doctrine into civil contexts have been rejected as disproportionate and inconsistent with due process.

[3] *Tahir Sadiq v. Faisal Ali and others* 2024 SCMR 775.

[4] *Malik Ahmad Usman Nawaz v. The Appellate Tribunal (Elections Act, 2017)* 2024 SCMR 1202; *Umar Farooq v. Sajjad Ahmad Qamar and others* PLD 2024 Supreme Court 688*; Tahir Sadiq v. Faisal Ali and others* 2024 SCMR 775.

7. Application of the disentitlement doctrine within the domain of civil adjudication is fundamentally inconsistent with the constitutional architecture. Articles 4 and 10-A enshrine the right to fair treatment, due process, and equality before law, ensuring that every person is afforded a meaningful opportunity to vindicate civil, service, and proprietary rights. The continuation of criminal liability or the status of a proclaimed offender, howsoever serious, does not operate to forfeit these indispensable civil entitlements unless the legislature has expressly imposed such a disability. To read a bar by implication would undermine the integrity of the justice system and would, in effect, operate as a double-edged weapon. One edge to deprive a citizen of the right of appeal or statutory remedy in matters affecting livelihood, service tenure, pension, contractual obligations or financial liabilities amounts to a denial of access to justice, a core constitutional guarantee woven into Articles 4, 9, 10-A and 25. Such exclusion would not only subvert the principle that no person shall be dealt with except in accordance with law, but would also distort the court's function from an instrument of justice into a mechanism of oppression. It would erode the very safeguards that protect citizens against arbitrary action, weaken public confidence in judicial institutions, and compromise the constitutional promise that justice shall be administered fairly, transparently, and without discrimination. The second edge would invite deliberate exploitation by shrewd and unscrupulous litigants. Such persons could weaponized a separate criminal label as a tactical device to preclude judicial review, insulating their conduct from scrutiny and avoiding accountability for contested actions. The practical effect would be to vest opportunistic litigants with a license to oppress; by invoking disentitlement they could extinguish an aggrieved person's access to remedies affecting livelihood, service, property or contractual rights, and thereby deny them the procedural protections of notice, hearing and appeal. Misapplied in this manner, the doctrine would cease to serve equity or orderly procedure and instead become a cloak for bad-faith litigation tactics that subvert the rule of law and strip citizens of constitutionally guaranteed due process.

8. The present matter is a service dispute, raising factual and legal issues that fall squarely within the ambit of departmental

and administrative law. These include whether the appointments were in fact irregular or fabricated; whether the disciplinary proceedings conformed to mandatory procedural requirements; and whether salaries may lawfully be withheld while the employee's service has not yet been formally terminated. None of these questions bear any nexus to the criminal proceedings or the status of the petitioner in that separate sphere. Criminal liability carries its own evidentiary thresholds and procedural safeguards, which are neither applicable to nor are determinative of service matters. To dismiss the petitioners solely based on their alleged abscondence is, therefore, a clear misapplication of law, as it conflates two distinct jurisdictions and deprives the petitioners of adjudication on issues squarely within their civil and service rights.

9. In this view of the matter, the impugned judgment is set aside with the direction that the appeal of the petitioners would be deemed to be pending before the Tribunal who will decide the matter on merits in accordance with law. Considering that the matter is pending since 2015, we are sanguine that the Tribunal will decide the matter within three months from the receipt of this order. These petitions are converted into appeal and allowed.

Judge

Judge

Judge

Islamabad:

24.10.2025

APPROVED FOR REPORTING

*(Uzma Zahoor/MMM LC)*

[23] *Muhammad Sharif v. Inspector General of Police, Punjab* 2021 SCMR 962.

**2025 SCP 428**

**IN THE SUPREME COURT OF PAKISTAN**

**(Appellate Jurisdiction)**

**PRESENT:**

**Mr. Justice Syed Mansoor Ali Shah Mr.**

**Justice Aqeel Ahmed Abbasi**

Civil Petition No.1531 of 2025

*(Against the judgment dated 03.03.2025 of the Federal Service Tribunal, Islamabad in Appeal No.03(Q)CS/2024)*

Ain-ud-Din … Petitioner

*Versus*

The Acting Sector Commander NHMP, Shahi Bag Kalat Quetta and others … Respondents

For the Petitioner: Mr. Muhammad Umar Ijaz Gilani, ASC

Respondents: Raja Shafqat Khan Abbasi, DAG. Pak
a/w Mr. Muhammad Asad, DSP. NHMP

Date of Hearing: 23.10.2025

JUDGMENT

**Syed Mansoor Ali Shah, J.-** Brief facts of the case are that the Petitioner while working as Patrolling Officer (SI), was departmentally proceeded on the allegation that he ended up having a quarrel with the Senior Admin Officer. Consequently, regular inquiry was conducted in the matter under the National Highways and Motorway Police (Efficiency and Discipline) Rules, 2016 ("**Rules")** and the Petitioner was dismissed from service. Thereafter, the Petitioner preferred departmental appeal which was also dismissed and so was his service appeal through the impugned judgment dated 03.03.2025.

2. Learned Counsel for the Petitioner submits that the order of dismissal from service was passed by an Acting Sector Commander when the competent authority under the law was the Sector Commander and as the Acting Sector Commander being DSP could not have assumed the role of a Superintendent Police (SP). He further contends that the Petitioner was not granted an opportunity of cross- examining the four prosecution witnesses who deposed against the Petitioner. Thirdly, he submits that the four prosecution witnesses were subordinates of the complainant and therefore, cannot be independent witnesses. Fourthly, he submits that the imposition of major penalty of dismissal from service is disproportionate to the gravity of the offence. On the other hand, learned Additional Attorney General (**"AAG"**) along with Mr. Muhammad Asad, DSP (Legal) NH&MP submitted that NH&MP is a disciplined force and due process was fully

followed and the imposition of major penalty in the present facts and circumstances of the case is correct and further submits that the Acting Sector Commander was lawfully authorized to deal with such matter.

3. Admittedly, proceedings against the Petitioner were initiated under the relevant Rules. It is, therefore, essential to examine whether the prescribed procedural framework was duly observed. Rule 8(2) particularly provides for right of cross-examination.

> "The inquiry officer or inquiry committee shall inquire into the charge and may examine such oral or documentary evidence in support of the charge or in defence of the accused as may be considered necessary and the *accused shall be entitled to cross- examine the witnesses against him*."

We asked the learned AAG to refer to the inquiry report and show to the Court, whether an opportunity of cross-examination was granted to the Petitioner. No such reference could be made by the learned AAG. He, however, contends that as the Petitioner never raised this question in the reply to the Show Cause Notice, he cannot agitate this matter now. In response to which the learned counsel for the Petitioner submits that this ground was specifically taken in the service appeal filed before the Service Tribunal. We find it important to examine the ground regarding failure to allow the petitioner to cross examine the witnesses as it goes to the core of the case.

4. This Court has unequivocally recognised cross-examination as an essential safeguard in disciplinary proceedings. Any testimony that is not subjected to that scrutiny lacks comparable probative weight. This Court has further underscored that an Inquiry Officer or Committee is duty-bound to ensure a fair, comprehensive, and even- handed inquiry, grounded in the principles of natural justice. A departure from these safeguards imperils the integrity of the process and creates a real risk of injustice.[1] The court has evidently laid the burden upon the Inquiry Officer to ensure that the requirements of proper, free and fair trial are fulfilled. It cannot be the case that where

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[1] *Federation of Pakistan through Chairman FBR vs. Zahid Malik* 2023 SCMR 603.

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an accused does not specifically refer to his right to cross-examination in a reply to a show-cause notice, that right is somehow waived. The right remains and it is upon the Inquiry Officer to ensure that such right is told to the accused, properly afforded and if the accused does not wish to proceed with cross-examination, record the reasons and put that into writing. It is incumbent upon the inquiry officer to ensure that the right is not treated so casually and dispensed away with especially without any reasons recorded in writing. The right remains intact, guaranteed under Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973 (**"Constitution"**) even where the accused does not make a request to cross examine any witness at any point during the investigation process.[2]

5. Article 10-A of the Constitution enshrines the right to a fair trial as a fundamental right. Where the petitioner is denied the opportunity to cross-examine prosecution witnesses, the proceedings cannot meet the constitutional standard of fairness. The right to a fair trial is not a singular act but a composite guarantee — a bouquet of procedural safeguards that include the framing of a clear charge, adequate opportunity to defend, the right to lead evidence, and the right to cross-examine witnesses. Each of these components is indispensable. Their observance ensures adherence to the principles of natural justice and due process, which form the bedrock of any adjudicatory process
— particularly disciplinary proceedings where adverse consequences or penalties may follow.[3] It is well settled that the right to a proper defence—and, by necessary implication, the right to cross-examine—is a vested and inalienable right of the accused. Article 10-A of the Constitution casts a constitutional canopy over all proceedings, shielding the accused from being left exposed to the harsh glare of arbitrary or one-sided departmental action. It ensures that no person is condemned unheard and that fairness permeates every stage of the disciplinary process.

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[2]The right of fair trial encompassing the natural justice requirements of procedural fairness is recognized in jurisdictions across the world. This particularly controversy of whether the accused has to make a formal request for cross-examination came up in a matter before the Irish High Court in the case of *Lyons v. Longford and Westmeath Education and Training Board* [2017] IEHC 272. The High Court ruled that cross-examination and the requirements of free trial are to be fulfilled, no matter whether the accused makes a request of cross-examination.

[3] *Tariq Khan vs. Additional DG, FIA* 2025 PLC (C.S.) 467; *Ghulam Murtaza Shiekh vs. The Chief Minister, Sindh* 2024 SCMR 1757; *Raja Muhammad Shahid vs. Inspector General of Police* 2023 SCMR 1135*, Federation of Pakistan through Chairman FBR vs. Zahid Malik* 2023 SCMR 603; *Usman Ghani vs. Chief Post Master, GPO Karachi* 2022 SCMR 745.

5. Based on the foregoing discussion, and particularly on the ground that the petitioner was not afforded an opportunity to cross- examine the witnesses — a safeguard integral to the constitutional guarantee of a fair trial under Article 10-A — we set aside the impugned order of dismissal from service. The competent authority is directed to conduct a de novo inquiry strictly in accordance with the requirements of Article 10-A of the Constitution and to complete the same within a period of two months from today. Pending the conclusion of such inquiry, the petitioner shall stand reinstated into service. The question of back benefits shall also be determined in the course of the de novo proceedings. Consequently, the impugned judgment of the Tribunal is set aside. This petition is converted into an appeal and allowed in the above terms.

Judge